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COMMENT: *People v. Jackson: Rosario* Reductionism and Collateral Attacks

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COMMENT

PEOPLE v. JACKSON:* *ROSARIO* REDUCTIONISM AND COLLATERAL ATTACKS

INTRODUCTION

In August 1978, a fire swept through a supermarket in Brooklyn, New York, killing six firefighters and triggering a criminal prosecution that periodically dominated local headlines for sixteen years. Although the 1979 conviction of Erick Jackson seemingly closed the case, subsequent litigation revealed a startling series of evidentiary lapses and prosecutorial misconduct severe enough to warrant a new trial. When the dust settled, after spending nearly ten years in prison, Erick Jackson was a free man.[1]

Those who followed the case through the headlines might view the *Jackson* case as one involving tragic deaths, an incompetent trial defense and falsified and withheld evidence. *Jackson*'s true legal legacy, however, lies outside the more lurid details of the case. Late in 1991, a New York Court of Appeals ruling on a procedural aspect of a crucial criminal doctrine changed the standard of review for certain discovery violations and created a new, more restrictive rule for appealing prosecutorial non-compliance. With all of the public rancor surrounding *Jackson*, it is this exception that most deserves

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

[1] Soon after Jackson's recent acquittal, *New York Times* columnist Bob Herbert wrote, "Now it's time to investigate the investigators." *Brooklyn's Obsessive Pursuit*, N.Y. TIMES, Aug. 21, 1994, § 4, at 15. He had previously written, "Driven by ambition, misguided loyalties and intense political pressures, public officials resorted to astounding levels of misconduct in the aftermath of the tragic . . . fire in Brooklyn in 1978." Bob Herbert, *Disregard of the Truth*, N.Y. TIMES, Aug. 7, 1994, § 4, at 17.

the legal community's attention.

In 1961, the New York Court of Appeals decided *People v. Rosario*[2] and established a state discovery rule for criminal cases.[3] The *Rosario* rule, as first fashioned, required the prosecution to disclose all prior statements made by state witnesses to defense counsel before cross-examination.[4] Unlike the federal standard,[5] the applicable standard of review for a *Rosario* violation has evolved from a "harmless error" analysis to a per se rule mandating reversal.[6] The rule and its gradual expansion have engendered heated polemics between prosecutors, who dislike the rule, and defense attorneys, who depend on it.[7] Throughout its existence, the rule also has weathered acrimonious objections from members of the bench.[8]

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[2] 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448, *cert. denied*, 386 U.S. 866 (1961).

[3] The purpose of the rule was to require the prosecution to provide potential impeachment materials to the defense to guard against inconsistent or inaccurate testimony. This judge-made rule was later codified in New York Criminal Procedure Law ("CPL") § 240.20 (McKinney 1993). Unlike the common-law *Rosario* rule, however, the statute does not specify a remedy in the event of non-compliance; it simply delineates what constitutes *Rosario* materials and when they must be turned over.

[4] The pre-*Rosario* New York rule allowed the court to determine the prior statements' relevancy as impeachment materials before ordering them to be disclosed to the defense. *See* People v. Walsh, 262 N.Y. 140, 186 N.E. 422 (1933). The purpose of *Rosario* was to allow the defense, rather than the court, to determine use-value since defense counsel was in the best position to make such a decision. *Rosario*, 9 N.Y.2d at 289, 173 N.E.2d at 883, 213 N.Y.S.2d at 450. By requiring the prosecution to make all prior statements available to the defense, the burden of acquiring prior statements was shifted from the defense to the prosecution.

[5] *See* People v. Jencks, 353 U.S. 657 (1957).

[6] Under the original *Rosario* rule, if the prosecution failed to disclose all prior statements by government witnesses, the appellate court would apply a harmless error analysis in deciding whether or not to vacate the verdict. *Rosario*, 9 N.Y.2d 286, 173 N.E.2d at 884, 213 N.Y.S.2d 448. In subsequent decisions, however, the Court of Appeals redefined *Rosario* to require a per se, automatic reversal. *See infra* text accompanying notes 51-83.

[7] *See, e.g.*, Jay M. Cohen & Michael Gore, *An Appropriate Measure of Prejudice*, N.Y. L.J., Jan. 21, 1992, at 2; Jan Hoffman, *New Loophole for Appeals: Tape Cassette*, N.Y. TIMES, Oct. 17, 1993, § 1, at 29; William M. Kunstler, *Goodbye to* Rosario, N.Y. L.J., Jan. 10, 1992, at 2; James C. McKinley Jr., *Secret Memos by Police Are Sought*, N.Y. TIMES, July 25, 1990, at B3.

[8] *See, e.g.*, *Jackson*, 78 N.Y.2d at 650, 585 N.E.2d at 803, 578 N.Y.S.2d at 491 (Titone, J., dissenting); 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); People v. Novoa, 70 N.Y.2d 490, 500, 517 N.E.2d 219, 225, 522 N.Y.S.2d 504, 510 (1987) (Bellacosa, J., concurring); *Rosario*, 9 N.Y.2d at 292, 173 N.E.2d at 884, 213 N.Y.S.2d at 452 (Froessel,

As the *Rosario* rule developed from a limited, low-impact discovery requirement into a stringent, per se rule, the focus of the debate shifted from whether the prosecution should, as a matter of course, be compelled to produce certain prior statements to what the consequences for non-compliance ought to be.[9] The change in the standard of review is important because a per se standard often produces results that differ from a harmless error standard.[10] Proponents of the per se stan-

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J., concurring).

[9] In *Rosario*, three members of the bench concurred, but argued that:

> A defendant should of course be entitled to probe fully any contradictory matter, but ought not to be permitted to embark on a fishing expedition in the expectation of discovering subtle shades of meaning and immaterial variances in a prior statement of a witness . . . . Such a practice would undoubtedly prolong trials and produce confusion, without in any way promoting the ends of justice.

9 N.Y.2d at 292, 173 N.E.2d at 885, 213 N.Y.S.2d at 453 (Froessel, J., concurring). The above quote reflects the view that the discovery requirement itself, as instituted by the majority, was problematic. In a later decision, however, *Rosario* critics assailed the per se standard rather than the responsibility to produce: "[the per se rule] is a law enforcer's nightmare and a perpetrator's delight. Insofar as the rule is not constitutionally rooted, I believe it would be useful for the Legislature to consider . . . overcoming the *per se*-ness [sic] of this exalted court-made rule." *Jones*, 70 N.Y.2d at 557, 517 N.E.2d at 872, 523 N.Y.S.2d at 60 (Bellacosa, J., concurring). The above quote was cited approvingly by its author in a post-*Jackson* decision, which suggested that an alternative to the per se rule might be found in open-file discovery. People v. Banch, 80 N.Y.2d 610, 626-27, 608 N.E.2d 1069, 1079, 593 N.Y.S.2d 491, 501 (1992) (Bellacosa, J., dissenting). Clearly, production was no longer an issue. It was instead the per se standard that drew the dissenters' wrath.

[10] The differences are fairly manifest, regardless of the criminal case context. A harmless error analysis would force the defendant to prove not only the existence of the error but also particularized prejudice. The use of the per se standard makes proof of an error dispositive, irrespective of any signs of prejudice. A harmless error review increases the burden of proof for the defendant since he is the moving party. Proving the violation becomes a necessary but inconclusive step in the process. He then must demonstrate how the withheld statements could have been used to gain a more favorable outcome at trial. *Jackson*, 78 N.Y.2d at 648-49, 585 N.E.2d at 801-02, 578 N.Y.S.2d at 490; *see also* People v. Crimmins, 367 N.Y.2d 230, 326 N.E.2d 787, 367 N.Y.S.2d 213 (1975) (discussing the use of harmless error analysis in criminal appeals).

Depending on the trial judge, this burden may be fairly high. Even if the material has exculpatory value, other overwhelming proof of guilt may allow the court to find that there still was no reasonable possibility that this material would have affected the outcome of the trial. People v. Robles, 153 Misc. 2d 859, 583 N.Y.S.2d 138 (Sup. Ct. Kings County 1992) (overwhelming evidence of guilt rendered harmless failure to provide material not clearly exculpatory); People v. Jackson, 65 N.Y.2d 265, 480 N.E.2d 727, 491 N.Y.S.2d 138 (1985) (existence of conflicting testimony does not mean jury should not have convicted).

dard argue that the rule is essential for developing a fully informed defense.[11] The importance of this principle, supporters argue, coupled with the difficulty in determining the actual harm caused by the error, make the per se rule a necessity.[12] Opponents of the per se rule claim that, in many instances, the violations concern materials that are of de minimis value at best.[13] Thus, the opponents assert, the strict liability standard is draconian and leads to unjust results.[14]

A third argument, central to the adversarial process in criminal prosecutions, was not addressed by the Court of Appeals in its development of the *Rosario* doctrine. This position recognizes that the *Rosario* rule acts to enforce prosecutorial compliance with discovery. Whether one believes that *Rosario* deters prosecutorial negligence and misconduct depends upon one's view of prosecutorial ethics generally. This aspect of

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The per se rule is much more generous to the defendant. Providing it can be established that the error in question occurred, the defendant is entitled to the appropriate remedy—automatic reversal of conviction. Hence, the choice of operating standard of review is an important, if not key, component of *Rosario*.

[11] The reasoning behind this is simply that the prior statements might be used by the defense to impeach the government's witnesses. This would, of course, undermine the witnesses' credibility and bolster a defendant's case. Thus, pretrial access to the statements could directly influence trial strategy.

[12] Prior to *Jackson*, the Court of Appeals had held that a harmless error analysis was inapplicable to *Rosario* violations because such an analysis necessarily would be purely speculative. *Jones*, 70 N.Y.2d at 552 n.4, 517 N.E.2d at 868 n.4, 523 N.Y.S.2d at 56 n.4. The analysis was considered inherently impossible since it would have to be founded on what the defense counsel might have done with the material, how the witness or witnesses might have responded, and how this information and witness reaction would be viewed by the jury. The *Jones* court seemed to say that it was not possible for an appellate court to make such distinctions about witnesses, counsel or juries.

[13] This is a central point of disagreement. Opponents of the per se standard believe that there are clear cases of incidental violations that would not, or could not, have had any impact on a jury's verdict. Proponents are likely to counter that this view of any particular case is subjective and cannot be supported empirically. This latter view is essentially the same one presented by the *Jones* court, but is not universally shared by all members of the court. In what can only be called a "bitter concurrence," Judge Bellacosa argued that in more cases than not the actions of the prosecutors could in no way be "deemed to have contextually, potentially and prejudicially affected the outcome and the fairness of the procedures affecting [defendants'] rights," as such, he found the per se rule to be counterproductive. *Id.* at 557, 517 N.E.2d at 871, 523 N.Y.S.2d at 59 (Bellacosa, J., concurring).

[14] *See id.* at 553-57, 517 N.E.2d at 869-72, 523 N.Y.S.2d at 57-60 (Bellacosa, J., concurring); *Banch*, 80 N.Y.2d at 621-27, 608 N.E.2d at 1076-79, 593 N.Y.S.2d at 498-501 (Bellacosa, J., dissenting); *see also* Cohen & Gore, *supra* note 7, at 2.

criminal litigation—good and bad faith on the part of the interested parties—is highly inflammatory and subject to vastly apposite views. Despite the resentment caused by implications of unethical conduct, this issue must be addressed because discovery compliance is vital to the criminal justice system.

In 1991, *People v. Jackson*[15] offered the New York Court of Appeals an opportunity to restate its position on *Rosario*. The conviction of the defendant, Erick Jackson,[16] on six counts of murder and one count of arson had been affirmed on appeal.[17] After his appeal was exhausted, Jackson discovered that the prosecution had withheld assorted statements made by government witnesses as well as other exculpatory material.[18] Consequently, Jackson filed a collateral motion to vacate with the trial court, pursuant to the Criminal Procedure Law ("CPL") section 440.10.[19] The trial court found that there had been a *Rosario* violation and, pursuant to the per se rule, vacated the judgment.[20] The appellate court confirmed the vacatur and the state appealed to the Court of Appeals.[21]

In its appeal the government claimed that Jackson's motion should not have been decided under the per se standard because the statute governing motions to vacate required Jackson to prove prejudice.[22] Hence, the issue presented to the

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[15] 78 N.Y.2d 638, 585 N.E.2d 795, 578 N.Y.S.2d 483 (1991). The court also heard a companion case to *Jackson* that was decided under the same line of reasoning. *See* People v. Wahad, 79 N.Y.2d 787, 587 N.E.2d 274, 579 N.Y.S.2d 636 (1991).

[16] Erick Jackson, also used the names Eric Knight and Jackson-Knight. In the interests of clarity, this Comment will refer to the defendant as Erick Jackson.

[17] People v. Jackson, 103 A.D.2d 1047, 479 N.Y.S.2d 390 (2d Dep't 1984).

[18] People v. Jackson, 142 Misc. 2d 853, 853, 538 N.Y.S.2d 677, 677 (Sup. Ct. Kings County 1988).

[19] *Id.* New York CPL § 440.10(1) lists eight separate grounds for granting a motion to vacate judgment: (a) improper jurisdiction; (b) judgment was procured by duress, misrepresentation, or fraud; (c) material evidence adduced at trial resulting in judgment was false and known to be false by the prosection or court; (d) material evidence was procured in violation of defendant's constitutional rights; (e) defendant lacked capacity to understand criminal proceedings; (f) improper and prejudicial conduct not appearing in the record; (g) new evidence has been discovered; (h) judgment was in violation of defendant's constitutional rights. N.Y. CRIM. PROC. L. § 440.10 (McKinney 1994).

[20] *Jackson*, 142 Misc. 2d 853, 856, 538 N.Y.S.2d 677, 679.

[21] *Jackson*, 162 A.D.2d 470, 556 N.Y.S.2d 165 (2d Dep't 1990).

[22] People v. Jackson, 78 N.Y.2d 638, 585 N.E.2d 795, 578 N.Y.S.2d 483 (1991). The relevant part of CPL § 440.10 is subsection (1)(f), which provides for a reversal when "improper and prejudicial conduct not appearing in the record occurred

Court of Appeals was whether the per se reversal rule applied to *Rosario* violations when raised through a collateral motion, rather than direct appeal.[23] The Court did not address the particular misconduct; instead it focused on the appropriate standard of review.

Viewing *Jackson* as "novel," the court attempted to "harmonize" the per se reversal rule of *Rosario* and the statutory requirement of a case-specific finding of harm to the defendant.[24] The majority understood *Jackson* to present an issue reflecting competing policy considerations and thus attempted to integrate these concerns.[25] The court held that when a *Rosario* violation is presented in a CPL 440.10 motion, the per se rule does not apply, and the defendant must "make an actual showing that prejudice resulted from the prosecution's failure to turn over *Rosario* material."[26] The court reaffirmed its commitment to *Rosario*, however, ruling that the per se standard would still apply when a defendant's direct appeal was still pending.[27] Thus, if the violation was raised prior to the

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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." N.Y. CRIM. PROC. L. § 440.10(1)(f).

[23] *Jackson*, 78 N.Y.2d 638, 641, 585 N.E.2d 795, 797, 578 N.Y.S.2d 483, 485. This is an important distinction because it could affect a great number of cases. When a defendant learns after the judgment is entered that prior statements made by government witnesses had been withheld, the defendant's only means of relief is through a CPL § 440.10 motion. Because the *Rosario* violation was not part of the record, the defendant would be precluded from raising the matter on direct appeal.

[24] *Id.* at 641, 585 N.E.2d at 797, 578 N.Y.S.2d at 485; *see* N.Y. CRIM. PROC. L. § 440.10.

[25] The court explicitly sought to weigh the defendant's right to full discovery of state witnesses' prior statements against the societal interest in finality and the lack of time constraints in CPL § 440.10. *Id.* at 643, 585 N.E.2d at 798, 578 N.Y.S.2d at 486.

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

[27] *Id.* at 648, 585 N.E.2d at 801, 578 N.Y.S.2d at 489 ("This holding does not represent a de facto elimination of the per se error rule, as the dissent contends.") The majority's pronounced reaffirmation had been disputed by the dissent which claimed that the holding in *Jackson* eviscerated *Rosario*. *Id.* at 650-51, 585 N.E.2d at 803, 578 N.Y.S.2d at 491 (Titone, J. dissenting) (" [T]he practical effect of the Court's decision here will be to make relief for *Rosario* violations virtually unavailable in post-conviction proceedings"). Although in a post-*Jackson* case the court discussed the holding in *Jackson* as though it were simply an exception to the norm, *see* People v. Banch, 80 N.Y.S. 610, 616, 608 N.E.2d 1069, 1072, 593 N.Y.S.2d 491, 494 (1992) (listing *Jackson* as one of three narrow exceptions to *Rosario*), the dissent in *Jackson* clearly believed that the majority's opinion would

appellate court's ruling, it would require an automatic reversal.[28] Once direct appeal was exhausted, however, a defendant would have to demonstrate that the violation had a "reasonable possibility of contribut[ing] to the verdict."[29]

This Comment contends that the over-arching purpose of the *Jackson* decision was to place a de facto time limit on *Rosario*. By so doing, the majority has effectively rejected the rationale of *Rosario*'s per se reversal standard and, thus, has eliminated, albeit unpersuasively, the need for retaining *Rosario* in its current form. In creating this new exception, the majority opinion has fashioned a rule that is internally inconsistent and simply irrational. Furthermore, the holding both fails to advance the very societal interests the court claims justified the new rule and weakens the incentive for prosecutorial compliance with *Rosario*'s obligations.[30] Finally, by introducing judicial subjectivity in the application of previously settled case law, *Jackson* has created confusion among the lower courts resulting in disparate decisions and an uncertain legal standard.

Part I of this Comment explores the historical development of the *Rosario* doctrine through *Jackson* and the institution of the per se standard. Next, Part II discusses the factual and procedural history of *Jackson*, and examines the nature and scope of the *Rosario* materials withheld from the defense.

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substantially weaken *Rosario*'s application.

Because the court recognized that the ruling in *Jackson* would create a disparity between defendants who had their *Rosario* claims in the record for direct appeal and those who did not, the court also held that the shift from per se to harmless error would not take effect until the defendant's direct appeal had been exhausted. *Jackson*, 78 N.Y.2d at 649, 585 N.E.2d at 802, 578 N.Y.S.2d at 490.

[28] *Jackson*, 78 N.Y.2d at 641, 585 N.E.2d at 797, 578 N.Y.S.2d at 485.

[29] *Id.* at 649, 585 N.E.2d at 802, 578 N.Y.S.2d at 490.

[30] Whether the majority had another agenda or was truly motivated by the arguments posited in the opinion is a matter of speculation. As the analysis concludes, however, the apparent goal was to limit the reach of *Rosario*, effectively limiting defendants' collateral remedies and allowing the prosecution more leeway in complying with CPL § 240.20. *See supra* note 3. The long-term goal of some members of the court seems to be the complete abolition of the per se standard for *Rosario* violations. *See, e.g.*, *Banch*, 80 N.Y.2d at 622, 608 N.E.2d at 1076, 593 N.Y.S.2d at 498 (1992) (Bellacosa, J., dissenting); *Jackson*, 78 N.Y.2d at 660 n.6, 585 N.E.2d at 809 n.6, 578 N.Y.S.2d at 497 n.6 (Titone, J., dissenting) (expressing skepticism of majority's stated commitment to *Rosario*). *But see id.* at 650, 585 N.E.2d at 802, 578 N.Y.S.2d at 491 (majority opinion affirming court's commitment to *Rosario* doctrine).

Finally, Part III analyzes the significance of the *Jackson* court's decision in terms of its statutory construction, use of precedent, and the relationship between the doctrine of finality and *Jackson*. The Comment concludes by considering the effect of *Jackson* on prosecutorial compliance and the consequences of the holding on post-*Jackson* cases.

I. THE EVOLUTION OF THE *ROSARIO* DOCTRINE

In *People v. Rosario*,[31] the Court of Appeals instituted a new rule regarding the disclosure of statements by government witnesses to the defense. Prior to *Rosario*, New York procedure had required the trial court to determine which prior statements were relevant to the defendant and allowed only those materials to be seen by defense counsel.[32] In cases where the trial court improperly denied a discovery request, appellate courts applied a harmless error test.[33] The ruling in *Rosario* eliminated the old rule by requiring that all prior statements be turned over to the defense regardless of their impeachment value. *Rosario* did retain the harmless error analysis standard of review for the appellate level, but its mandate of automatic full disclosure of all prior statements by government witnesses represented a radical departure from the court's prior position.[34]

In *Rosario,* after three witnesses for the state had testified, defense counsel requested that their prior statements be turned over for use on cross examination.[35] The statements were given to the trial judge who found some "variances" between the prior statements and the trial testimony but deemed

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[31] 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448 (1961).

[32] People v. Walsh, 262 N.Y. 140, 186 N.E. 422, 265 N.Y.S. 140 (1933).

[33] *Id.* at 144, 186 N.E. at 423, 265 N.Y.S. at 144.

[34] At the time *Rosario* was decided, the issue before the court concerned who should make the initial decision on relevancy. The essence of *Rosario* was that a decision on the relevancy of prior statements should lie with defense counsel. *See infra* text accompanying note 43. Thus, the trial court's role shifted from one of determining relevancy to one of verifying prosecutorial compliance. In this context, it is easy to see why initial debate over *Rosario* turned on the issue of compelling the prosecution to produce the statements, not the consequential evaluation of a failure to comply with this requirement. *Rosario*, 9 N.Y.2d 286, 289-91, 173 N.E.2d 881, 883-84, 213 N.Y.S.2d 448, 450-51 (explicitly overruling *Walsh* and prohibiting trial judges from determining which documents defense counsel may view).

[35] *Id.* at 288, 173 N.E.2d at 882, 213 N.Y.S.2d at 449.

only certain portions relevant to the defense.[36] Rosario was convicted on all charges and sentenced accordingly. On appeal, Rosario argued that the trial court had erred in denying defense counsel access to specific prior statements.[37]

The Court of Appeals observed that, while New York's existing rule allowed the defense to see and use only purely inconsistent statements, the recently announced federal *Jencks* rule had no such restrictions.[38] Apparently persuaded by the Supreme Court, the *Rosario* court held that:

> a right sense of justice entitles the defense to examine a witness' prior statement, whether or not it varies from his testimony on the stand. As long as the statement relates to the subject matter of the witness' testimony and contains nothing that must be kept confidential, defense counsel should be allowed to determine for themselves the use to be made of it on cross examination.[39]

In addition to a "right sense of justice," two other related findings influenced the court's decision to adopt the *Jencks* standard. First, the court found that despite the state's prevailing view on the subject at that time, pretrial statements offered more than just a source of contradictions with which to confront and discredit a witness.[40] For instance, pretrial statements "seemingly in harmony" with trial testimony might still reveal bias, additional knowledge, shades of meaning, stress, or additions or omissions, all of which could help the defense place the direct testimony of the witnesses in an entirely dif-

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[36] *Id.* at 288, 173 N.E.2d at 882, 213 N.Y.S.2d at 450.

[37] *Id.*

[38] *Id.* at 288-89, 173 N.E.2d at 882-84, 213 N.Y.S.2d at 450-51. The U.S. Supreme Court had held that a defendant was entitled to inspect any statement made by government witnesses bearing on the subject matter of their testimony. Jencks v. United States, 353 U.S. 657 (1957).

[39] *Rosario*, 9 N.Y.2d at 289, 173 N.E.2d at 883, 213 N.Y.S.2d at 449. The court appeared to accept the Supreme Court's analysis of prior statements' use value:

> Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

Jencks, 353 U.S. at 667.

[40] *Rosario*, 9 N.Y.2d at 289, 173 N.E.2d at 883, 213 N.Y.S.2d at 449.

ferent perspective.[41] Since impeachment could be accomplished through a subtle use of prior statements, the court necessarily concluded that impeachable materials consisted of more than just blatantly conflicting statements.

The question of who was to decide the use-value of *Rosario* material also influenced the court's decision. Since prior statements could be employed in a myriad of ways, the court reasoned, the "single-minded defense counsel for the accused . . . is in a far better position to appraise the value of a witness' pretrial statements" than is the trial judge.[42] Moreover, the prior procedure—where defense lawyers argued about the relevance of statements before viewing their contents—was illogical and fairly useless.[43] The court concluded that as long as the government's information is not required to be kept confidential, providing the material to the defense would promote a more just end.[44] If the information is of little or no value, then disclosing it would cause no harm. Conversely, withholding the information could deprive defense counsel of a legitimate opportunity to impeach a prosecution witness.[45]

Despite its finding that trial judges were not the most suitable parties to evaluate pre-trial statements, the court

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[41] *Id.* at 290, 173 N.E.2d at 883, 213 N.Y.S.2d at 450.

[42] *Id.* at 290, 173 N.E.2d at 883, 213 N.Y.S.2d at 451.

[43] Observing this procedure, the court wondered how the defense could argue that prior statements contain something of value when they were not allowed to see them first. *Id.*

[44] The court explicitly limited the range of material to the subject matter of the witness' testimony. Because the use of the prior statements also was limited to cross examination, there was little chance that the materials would serve any purpose other than impeachment. *Id.* CPL § 240.20 has since expanded and specified the materials that fall under the *Rosario* umbrella. Some of the materials covered by CPL § 240.20(1) are:

> (a) Any written, recorded or oral statement of the defendant, and of a co-defendant to be tried jointly, made, other than in the course of the criminal transaction, to a public servant engaged in law enforcement activity [or his agent];
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> . . .
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> (c) Any written report or document, or portion thereof, concerning a physical or mental examination, or scientific test or experiment, 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 . . . .

N.Y. CRIM. PROC. L. § 240.20(a), (c).

[45] *Rosario*, 9 N.Y.2d at 290, 173 N.E.2d at 884, 213 N.Y.S.2d at 451.

retained the harmless error analysis.[46] Thus, even though the court found that trial judges could not properly determine the impeachment value of prior statements, it decided that appellate courts could. This apparent contradiction was commented upon by the concurring opinion, which argued that retaining the harmless error analysis invalidated the purpose and principle of the holding.[47]

Accordingly, the court could maintain logical consistency only through the continued application of the older rule. Seemingly recognizing the paradox, the Court of Appeals moved to create a more universal standard but opted, however, to remove judicial discretion from the appellate courts rather than reinstate it at the trial level.

In 1976, the court decided *People v. Consolazio*,[48] the first in a chain of cases that expanded and clarified *Rosario*. In *Consolazio*, the defendant appealed the trial court's decision not to compel the prosecution to turn over unsigned witness questionnaires, arguing the failure constituted a *Rosario* violation.[49] While creating a narrow exception to the rule,

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[46] *Id.* at 291, 173 N.E.2d at 884, 213 N.Y.S.2d at 451.

[47] *Id.* at 293, 173 N.E.2d at 885, 213 N.Y.S.2d at 453 (Froessel, J., concurring). The majority held that "appellate Judges may now examine the prior statements, and conclude that the variances they disclose are of such a trivial and inconsequential character that they may be disregarded. If we may, why may not the Trial Judge be given the same right in the first instance?" *Id.* Because the majority ultimately affirmed Rosario's conviction, Judges Froessel, Dye and Burke concurred in the result. They most certainly dissented, however, from the majority's acceptance of the federal standard articulated in *Jencks*.

[48] 40 N.Y.2d 446, 354 N.E.2d 801, 387 N.Y.S.2d 62 (1976).

[49] *Id.* The defense also argued that failure to compel the prosecution to turn over its evidence was a *Brady* violation. A *Brady* violation occurs when the prosecution fails to disclose exculpatory material in its possession. Brady v. Maryland, 373 U.S. 83 (1963). *Brady* and *Rosario* are similar in that both cover materials that are withheld by the prosecution. There are, however, two major distinctions. One is that *Brady* material does not have to relate to government witnesses. That is, the focus in a *Brady* investigation concerns exculpation, not impeachment. In contrast, *Rosario* material is directly associated with state witnesses and their testimony. The criteria is not whether the material is exculpatory, but whether it is merely a prior statement. The other distinction is that New York applies a harmless error analysis for *Brady* violations. For a discussion of New York's view on *Brady* violations, see People v. Vilardi, 76 N.Y.2d 67, 555 N.E.2d 915, 556 N.Y.S.2d 518 (1990). The reason for the second distinction flows from the first. The court finds that it is easier to determine the exculpatory value of something by contrasting it with the known facts at trial. Thus, its impact in terms of harm can be assessed contextually. *See Jackson*, 78 N.Y.2d 638, 653-54, 585 N.E.2d 795, 804-05, 578 N.Y.S.2d 483, 492-93 (Titone, J. dissenting). *Rosario* material is trick-

Consolazio greatly extended *Rosario* by assuming a per se standard for appellate review.[50]

The *Consolazio* court rejected the state's argument that the questionnaires were work product, finding instead that they were statements in narrative form. Therefore, the statements normally would be *Rosario* material.[51] In *Consolazio*, however, the court found the specific questionnaires to be exempted from *Rosario* because they were "duplicative equivalents" of the witnesses' grand jury testimony.[52] The court apparently found that since *Rosario* violations normally deprive defendants of materials that might alter the outcome of the trial, it followed that if for all practical purposes the materials already were in the defendant's possession, then the defense suffered no harm.[53]

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ier to evaluate because it is not possible to tell if the defense attorney would have successfully impeached a government witness with the prior statement. It also is not feasible to gauge if depriving the defendant of the opportunity for impeachment would probably, or possibly, have led to a different verdict. *See, e.g.*, People v. Jones, 70 N.Y.2d 547, 552 n.4, 517 N.E.2d 865, 868 n.4, 523 N.Y.S.2d 53, 56 n.4 ("the conclusion that the information was of no value must necessarily be founded on sheer speculation").

[50] Although the *Consolazio* court did not explicitly endorse the per se standard, it certainly established it constructively. The court specifically rejected the argument that a *Rosario* violation could be considered harmless because of its significance to the defense, and it eliminated harmless error as an appropriate standard of review. *Consolazio*, 40 N.Y.2d at 454, 354 N.E.2d at 805, 387 N.Y.S.2d at 66. Thus, the per se standard was instituted by default. *See also* People v. Banch, 80 N.Y.2d at 623, 608 N.E.2d 1069, 1077, 593 N.Y.S.2d 491, 499 (1992) (Bellacosa, J., dissenting) ("the new per se era dawned with *People v. Consolazio*").

[51] *Consolazio*, 40 N.Y.2d at 453, 354 N.E.2d at 805, 387 N.Y.S.2d at 65. To further illustrate the difference between *Rosario* and *Brady*, one can see that if the unsigned statements were considered prior statements by government witnesses they would then be *Rosario* material. The per se standard would require a reversal without any further exploration. But if the court was looking for a *Brady* violation, then the test would be different. The court would not be interested in whether or not the statements fell under the *Rosario* umbrella and were related to government witnesses who would testify at trial. The only question would be whether or not the materials exculpated the defendant, and if so, did withholding them cause the defendant a significant degree of harm.

[52] *Id.* at 454, 354 N.E.2d at 805, 387 N.Y.S.2d at 66.

[53] *Id.* at 454, 354 N.E.2d at 806, 387 N.Y.S.2d at 66. The court observed that the prosecution would be much better served by simply turning over any material it thinks might be *Rosario* material, instead of assuming that something was simply cumulative. *Id.* at 454-55, 354 N.E.2d at 806, 387 N.Y.S.2d at 66-67. There is no advantage in withholding the material as duplicative statements would already be constructively possessed by the defense. But, if the trial or appellate court decided that the materials were not actually duplicative, the conviction would be

Although the court did not reverse in *Consolazio*, it did hold "that a failure to turn over *Rosario* material may not be excused on the ground that such material would have been of limited or of no use to the defense."[54] Furthermore, the court stated, "[w]e thus reject arguments that consideration of the significance of the content or substance of a witness' prior statement can result in a finding of harmless error."[55] The language in *Consolazio* tacitly endorsed a per se standard of review by distinctly rejecting the possibility that a *Rosario* violation could be found to be harmless error.

Nine years later, the Court of Appeals decided another case that further entrenched per se reversals as the necessary response to a *Rosario* violation. In *People v. Perez*,[56] the court considered whether the withholding of statements made by a government witness to the defendant's family that had been taped by the prosecution was *Rosario* material. The state contended that since the statements were made to private parties, they were not *Rosario* material.[57] The court rejected that argument, finding the defense's request reasonable since the statements were in the prosecution's possession.[58] The court found that CPL section 240.20(1)(a)—the statute specifying which materials fall under *Rosario*—made no such distinction between public or private conversations.[59] The court also stated that CPL section 240.20(1)(a) required the material to be turned over early in the proceedings, prior to opening statements in jury trials, rather than before cross-examination as originally dictated by *Rosario*.[60] The court noted that although a delay in turning over *Rosario* materials may not harm every defendant, it could cause substantial harm to the defense in any particular case.[61] Because the degree of harm could not

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put in jeopardy.

[54] *Id.* at 454, 354 N.E.2d at 805, 387 N.Y.S.2d at 66.

[55] *Id.*

[56] 65 N.Y.2d 154, 480 N.E.2d 361, 490 N.Y.S.2d 747 (1985).

[57] *Id.* at 158, 480 N.E.2d at 363, 490 N.Y.S.2d at 749.

[58] *Id.* at 158-59, 480 N.E.2d at 363-64, 490 N.Y.S.2d at 749-50.

[59] *Id.* at 158, 480 N.E.2d at 363-64, 490 N.Y.S.2d at 750; *see also supra* note 44.

[60] *Id.* at 158, 480 N.E.2d at 363, 490 N.Y.S.2d at 749. This is because the prior statements not only might influence the cross examination process, they could have an impact on opening arguments and trial strategy as a whole. *Id.*

[61] *Perez*, 65 N.Y.2d at 159, 480 N.E.2d at 364, 490 N.Y.S.2d at 750. It is not

be determined in a post-hoc analysis, the potential for substantial harm compelled an automatic reversal.[62]

In *People v. Ranghelle*,[63] the court specified further that the cause of the *Rosario* violation was irrelevant; good faith efforts to comply with the rule would not excuse the prosecution's failure to comply.[64] In so doing, the court distinguished between a delay in compliance and total failure to comply. When the failure is a "mere delay" and not a total failure to comply, the defendant must show that he or she was prejudiced by the delay.[65] This exception for mere delay was grounded in the availability of immediate remedies such as revising jury instructions or recalling a witness to the stand for further questioning by the defense.[66] Again, the court affirmed the per se rule with attendant quotations from *Consolazio* and *Rosario*.[67]

The *Rosario* line of cases concluded with *People v. Novoa*[68] and *People v. Jones*.[69] These companion decisions emphasized that the *Rosario* doctrine precluded the use of harmless error analysis and seemingly provided for CPL section 440.10 motions to operate on a per se basis.

In *Novoa*, the defendant was tried for second degree murder. After the conviction had been entered, a CPL section

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clear if the court was referring to the harm that could result from a court's application of the harmless error test, or if it was indirectly addressing the issue of prosecutorial compliance.

[62] *Id.* at 159, 480 N.E.2d at 364, 490 N.Y.S.2d at 750.

[63] 69 N.Y.2d 56, 503 N.E.2d 1011, 511 N.Y.S.2d 580 (1986).

[64] *Id.* at 63, 503 N.E.2d at 1016, 511 N.Y.S.2d at 585. In *Ranghelle*, one of the issues concerned the memo pads of two police officers who testified at trial. The memo pads were not turned over to the defense and the officers read from them on the stand. On appeal, the court rejected the argument that the reading of the memo pads constituted production of the materials. *Id.* at 65, 503 N.E.2d at 1017, 511 N.Y.S.2d at 586.

[65] "Delay" refers to a violation that is corrected before the close of evidence. "Total failure" occurs when the withheld material is not disclosed until after the trial. *Id.* at 63, 503 N.E.2d at 1016, 511 N.Y.S.2d at 585.

[66] Because the defendant can recall the witness to the stand, the witness can still be confronted with the prior statements. There also is the possibility of obtaining jury instructions to mitigate any possible prejudice resulting from what may appear to be confusion on the part of the defense. Of course, the latter is within the court's discretion. But, as long as the defense has not rested it is not necessarily too late to employ the previously withheld materials.

[67] *Ranghelle*, 69 N.Y.2d at 63, 503 N.E.2d at 1016, 511 N.Y.S.2d at 585.

[68] 70 N.Y.2d 490, 517 N.E.2d 219, 522 N.Y.S.2d 504 (1987).

[69] 70 N.Y.2d 547, 517 N.E.2d 865, 523 N.Y.S.2d 53 (1987).

440.10 motion was filed, in part, based on *Rosario* violations. During the investigation, one prosecution witness made statements to a police detective, who recorded the statements and gave them to the trial assistant for the prosecution. The state acknowledged that it had not turned over the statements to the defense but argued that the error was inadvertent and that the statements were insubstantial.[70] The trial judge held that since the error was unintentional, the strict liability rule did not apply.[71] The court also found that the defendant had suffered no prejudice and denied the motion to vacate. The Court of Appeals reversed, holding that inadvertence did not excuse the error.[72] Specifically, the court noted that "in the eleven years since *Consolazio*, this court has not deviated from the principle that harmless error analysis is inappropriate with respect to *Rosario* violations."[73]

By contrast, in *Jones*, the defendant's conviction for selling and possessing narcotics was affirmed by the Court of Appeals,[74] which then granted defendant's motion for reargument and vacated its prior order. Using the per se rule, the court remanded the case for a new trial on *Rosario* grounds.[75] The Court of Appeals found that "[t]he sole issue is whether the prosecution's total failure to deliver *Rosario* material to defense counsel as required by the rule is subject to harmless error analysis."[76] The *Jones* court omitted all discussion of the procedural mechanisms involved in bringing the appeal. The only material issue, therefore, was whether the violation had occurred.

As in *Novoa*, the court again relied on *Consolazio* and, in discussing the harmless error standard, unequivocally stated:

> [T]he significant fact is that the conclusion that the information was of no value must necessarily be founded on sheer speculation as to what might have occurred and matters not in the record: i.e., the questions counsel might have asked or avoided asking, how the witness might have answered, and how such differences in the testi-

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[70] *Novoa*, 70 N.Y.2d at 495, 517 N.E.2d at 222, 522 N.Y.S.2d at 507.
[71] *Id.*
[72] *Id.*
[73] *Id.* at 499, 517 N.E.2d at 224, 522 N.Y.S.2d at 509.
[74] 70 N.Y.2d 547, 517 N.E.2d 865, 523 N.Y.S.2d 53 (1987).
[75] *Id.* at 548, 517 N.E.2d at 866, 523 N.Y.S.2d at 54.
[76] *Id.*

mony might have affected the decision of the jury.[77]

The court found that this rejection of the harmless error approach was not a departure from the existing rule.[78] It argued that the decision in *Ranghelle*, which held that good faith was immaterial, was a logical application of the rule originally framed in *Rosario* and "carried forward" in *Consolazio* and other cases.[79]

This chain of cases formed the *Rosario* rule as it existed before *Jackson* reached the Court of Appeals in 1991. The rule required a per se reversal of a conviction if the prosecution withheld prior statements by government witnesses, regardless of their content or the state's good faith. In each of these cases, the court declined to discuss the procedures through which the claims were raised. Furthermore, in no instance did the court consider the status of any defendant's direct appeal material to its decision.[80] The court was consistent in its application of a per se standard of review; prejudice was assumed.

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[77] *Id.* at 552 n.4, 517 N.E.2d at 868 n.4, 523 N.Y.S.2d at 56 n.4.

[78] *Id.* at 553, 517 N.E.2d at 869, 523 N.Y.S.2d at 57.

[79] *Id.*; *see also* People v. Perez 65 N.Y.2d 154, 480 N.E.2d 361, 490 N.Y.S.2d 747 (1985); People v. Poole, 48 N.Y.2d 144, 397 N.E.2d 697, 422 N.Y.S.2d 5 (1979) (disclosure of prior statements mandatory but defense may not have unfettered access to prosecution's files).

[80] In general, by the time a case reached the Court of Appeals, the existence of the material had already been determined. The court's decision turned on either the definition of *Rosario* material or possible exceptions to the rule. *See supra* notes 49-53. The fact that the prosecution regarded the mechanism for raising the claim as immaterial can be inferred by its acquiescence in stipulating to the violation in order to expand the record and have the matter addressed directly by an appellate court. By doing so, the prosecution avoided the CPL § 440.10 hearing by the trial court. *See* People v. Young, 79 N.Y.2d 365, 591 N.E.2d 1163, 582 N.Y.S.2d 977 (1992). This stipulation saved the courts and prosecution time and resources by eliminating the hearing stage from the process. It also indicates that the prosecution did not consider the means by which the claim was raised as relevant to *Rosario* or its per se standard.

II. *PEOPLE v. JACKSON*[81]

A. *The First Trial and Appeal*

On August 2, 1978, six firefighters perished while battling a fire at a Waldbaum's supermarket in Brooklyn, New York. The firefighters were on the store's roof when it collapsed, sending them to their deaths.[82] The fire was characterized as the worst tragedy in the history of the New York Fire Department.[83] Initial reports from the fire department suggested that the fire had been set deliberately.[84] This conclusion was drawn from signs that there were multiple points of the fire's origin, a fact that indicated arson. In addition, the fire department's report stated that the fires began downstairs and burned upwards.[85] This view, however, was not universally held. A Police Department Arson Division Detective, Harold Dugan, was of the opinion that the fires began just below the

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[81] Despite this Comment's focus on the procedural aspects of *Jackson*, an extensive discussion of the facts is necessary for an understanding of the possible scope of *Rosario* violations and the impact that they can have on trial strategies and verdicts. While most *Rosario* violations are not as egregious as *Jackson*, the fact that even the most outrageous instances of misconduct may easily go undetected raises the specter of other, improperly convicted defendants unnecessarily serving sentences. Thus, the extent of the *Rosario* violations in *Jackson* is relevant to the larger question of the importance of the per se rule in ensuring prosecutorial compliance with the discovery requirements delineated by CPL § 240.20 and the *Rosario* doctrine.

[82] People v. Jackson, 65 N.Y.2d 265, 267, 480 N.E.2d 727, 729, 491 N.Y.S.2d 138, 140 (1985).

[83] Appellant's Brief at 2, People v. Jackson, 78 N.Y.2d 638, 585 N.E.2d 795, 578 N.Y.S.2d 483 (1991) (No. 135). It should be noted that the People were the appellants in this case but mistakenly titled their brief "Respondent's Brief." The prosecution's brief will hereinafter be referred to as "Appellant's Brief."

[84] *Id.* Note, however, that when *Jackson* was remanded to the trial court for a determination of prejudice, the trial court observed that the police believed that the Fire Department had planted evidence of arson and that this was known by the prosecution. People v. Jackson, 154 Misc. 2d 718, 593 N.Y.S.2d 410 (Sup. Ct. Kings County 1992). Police Arson Detective Harold Dugan said later in an out-of-court interview,

> We had information back in our office that there was an attempt to be made to acquire for the widows [of the deceased firemen], the $50,000 federal crime victims' money. It was a belief held, perhaps by the fire marshals, that a crime had to have been committed in order for that to be possible.

60 Minutes: The Case Against Eric Jackson (CBS television broadcast, Apr. 30, 1989) (transcript on file with the *Brooklyn Law Review*) [hereinafter *60 Minutes*].

[85] *Jackson*, 154 Misc. 2d at 721, 593 N.Y.S.2d at 412.

roof and burned downwards through the cockloft.[86] Because of the unresolved contradictions between the two departments' reports, the police kept the criminal investigation open.[87]

In March 1979, nine months after the fire, Julio Cruz, a jail-house informant, told one of the Police Detectives investigating the fire that Erick Jackson had admitted that he had been paid to set the Waldbaum's fire.[88] Cruz, an inmate at Rikers Island House of Detention, claimed that he had overheard Jackson making this statement in October 1978 when they both had been incarcerated at Rikers Island.[89] As a result of this information, the police brought Jackson to the Brooklyn District Attorney's office for questioning. Over a two-day period, Jackson made three statements to the police and Assistant District Attorney Michael Gary,[90] in which he admitted setting the fire at the supermarket by punching holes in the roof, stuffing paper in the holes, and pouring the accelerant down through the holes into the store.[91] Jackson also discussed setting a similar fire at a Royal Farms Dairy store, also located in Brooklyn.[92] According to Jackson's statements,

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[86] The term "cockloft" refers to a space above the ceiling of the store but below the roof. *Id.* Dugan was not entirely consistent on this point in his prior statements. In his grand jury testimony Dugan said he did not know the cause of the fire. However, Dugan later provided memoranda to the effect that he believed that the Fire Department fabricated the arson evidence for insurance purposes and later stated that he believed the fire had been caused by an electrical short. *Id.*

[87] Although there were at least two different government agencies investigating the fire, there apparently was very little teamwork involved. There were reports of acrimony between the police investigators and the fire marshals. Brooklyn District Attorney Gold was quoted as saying the marshals had "'hindered' the investigation," and "were otherwise 'uncooperative.'" Josh Barbanel, *Brooklyn Man Convicted in Blaze in Which 6 Firefighters Died in '78*, N.Y. TIMES, Dec. 2, 1980, at D23. This may have been the normal state of relations between the police and fire departments, but there may have been other factors as well. *See supra* note 84.

[88] People v. Jackson, 65 N.Y.2d at 267, 480 N.E.2d at 729, 491 N.Y.S.2d at 140.

[89] *Id.*

[90] The fact that Gary handled the interrogation of Jackson is relevant since he later testified regarding Jackson's confession. In addition, Gary was the author of an internal memorandum that was later found to be *Brady* material, and he testified at the CPL § 440.10 hearing in 1988. *See Jackson*, 142 Misc. 2d 853, 538 N.Y.S.2d 677 (1988). Finally, Gary's handling of the investigation and confession was the centerpiece of Erick Jackson's 1994 retrial. *See* Jan Hoffman, *Two Trials Later, Mystery Lingers in Arson Case*, N.Y. TIMES, Aug. 21, 1994, at 45; Daniel Wise, *Judge Recounts Prosecutor Role at Previous Arson-Murder Trial*, N.Y. L.J., Aug. 11, 1994, at 1.

[91] *Jackson*, 154 Misc. 2d at 720, 593 N.Y.S.2d at 412.

[92] *Id.* The Royal Farms store Jackson had discussed was in Coney Island,

neither he nor his two accomplices were ever inside the store.[93] Following an unsuccessful suppression hearing, the case moved to trial.[94]

1. Jackson's First Trial

At trial the prosecution presented two arson experts who, at times, gave conflicting testimony.[95] Former Fire Marshall Charles King testified that the fire had been intentionally started at four different points within the store. According to King, one fire began in the men's bathroom and three others started in unconnected points beneath the stairs leading to the store's mezzanine.[96] King testified that the critical fire—the one started in the men's room—burned upward through a beam in the bathroom.[97] King also stated that it was not possible for the fire to have been started by someone throwing accelerant onto the beam from outside the building.[98]

Although King's testimony indicated that the fire was arson, his version of how the fire started did not correspond to Jackson's confession. In King's opinion, the evidence showed that an accelerant had been used, a claim the People bolstered by introducing an empty turpentine canister that had been found under the mezzanine stairs.[99] King's version of the events suggested that the arsonist had entered the building, set the fires on the lower floors with an accelerant and then left.[100] Even if King's testimony did not corroborate Jackson's

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Brooklyn, a considerable distance from the Waldbaum's located in Sheepshead Bay, Brooklyn.

[93] *Id.*

[94] At his pretrial suppression hearing, Jackson raised the issue of whether he consented to being questioned on one of the dates where no "Damiani" order had been produced. (A "Damiani order" is a procedure by which the district attorney takes custody of an inmate at Rikers Island, with the inmate's consent, so the district attorney's office can interview the inmate and return him to Rikers Island on the same day). The trial court found that there was probable cause to question Jackson and that he had consented to being questioned. *Id.*

[95] Appellant's Brief, *supra* note 83, at 4-6.

[96] Appellant's Brief, *supra* note 83, at 4-6.

[97] Appellant's Brief, *supra* note 83, at 4-6.

[98] Appellant's Brief, *supra* note 83, at 4-6.

[99] Brief for Defendant-Respondent at 2-3, People v. Jackson, 78 N.Y.2d 638, 585 N.E.2d 795, 578 N.Y.S.2d 483 (1991) (No. 135).

[100] This is an interpretation shared by both parties. *See* Appellant's Brief, *supra* note 83, at 4-6; Brief for Defendant-Respondent, *supra* note 99, at 2-3.

confession, it conclusively posited arson as the cause of the fire.

The government's second expert witness, Detective Dugan, presented a very different analysis of the fire. Dugan testified that he did not believe that any of the fire's points of origin were located beneath the stairs.[101] Rather, Dugan identified the point of origin as being just below the roof, above the beam in the cockloft.[102] Further contradicting King, Dugan testified that the fire had burned down from that point of origin to the beam in the men's room.[103] Although Dugan did not testify to the cause of the fire, his testimony corresponded more with Jackson's confession than had King's analysis, since Dugan placed the origin just under the roof and attributed the blaze in the store to a "drop fire."[104]

While the two experts' testimony was incongruous at times, each could corroborate parts of Jackson's confession. The prosecution relied on Fire Marshal King to bolster Jackson's admission that he had started the fire. Yet, because King's theory about the fire's path conflicted with Jackson's confession, the prosecution urged the jury to utilize Dugan's theory about the point of origin for the fire and discount King's contrary hypothesis.[105] Thus, King's testimony showed the fire

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[101] Appellant's Brief, *supra* note 83, at 4.

[102] Appellant's Brief, *supra* note 83, at 4.

[103] Appellant's Brief, *supra* note 83, at 4.

[104] Appellant's Brief, *supra* note 83, at 4. It is understandable that Dugan would not testify as to the cause of the fire. The prosecution knew that Dugan did not think the fire was arson and they certainly would not want to have him discuss his doubts. The defense, unaware of Dugan's previously stated opinion, probably assumed that he would say that the fire was caused by arson. It also should be noted that Jackson's trial attorney may not have provided adequate assistance of counsel, possibly resulting in an ineffective cross-examination. *See infra* note 110.

At the CPL § 440.10 hearing Dugan testified that at least one of the fires had been set after the main fire was extinguished. He testified that the can of turpentine which Fire Marshal King claimed was used in setting the original fire, was in "pristine condition." Yet, had the can been subject to any heat, it would have burst. He further testified that had the can been present during the primary fire, the firefighters would "definitely" have removed it. *Jackson,* 154 Misc. 2d at 720-22, 593 N.Y.S.2d at 412-13; Brief for Defendant-Respondent, *supra* note 99, at 19 (citing Hearing Minutes at 499-505, *Jackson* (No. 93-031)).

[105] This conclusion is not explicitly posited by the court but is easily deduced from the court's presentation of the trial. 154 Misc. 2d at 720-22, 593 N.Y.S.2d at 412-13; *see also* Appellant's Brief, *supra* note 83, at 4-5.

was arson and Dugan's confirmed that the fire had begun on or near the roof and burned downwards.

The government called other witnesses, including Michael Gary who, as the transcriber of Jackson's confession, introduced it into evidence.[106] The prosecution also called Julio Cruz, who testified to Jackson's jailhouse admissions.[107]

Finally, after a motion to dismiss the charges was denied,[108] the defense rested without introducing any evidence or calling any witnesses.[109] Jackson's attorney relied strictly on cross examination and summation to defend Jackson on the six murder counts.[110]

In closing, defense counsel argued that when he confessed, Jackson was referring not to the fire at Waldbaum's but to another fire entirely.[111] The defense did not dispute that the Walbaum's fire was arson. Instead, counsel argued that Jackson was not the person who had set the fire. The defense tried to persuade the jury that first, Cruz's testimony was a fabrication that he had concocted to reduce his own sentence,[112] and second, that Dugan's testimony should be given little weight since he had not visited the crime scene.[113] Finally, the de-

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[106] *Jackson*, 154 Misc. 2d at 718-20, 593 N.Y.S.2d at 412; *see also supra* note 90.

[107] Appellant's Brief, *supra* note 83, at 3.

[108] The motion was based on the conflicting testimony of two arson experts. The court denied the motion, finding that the inconsistency was a question for the jury and was reconcilable. People v. Jackson, 65 N.Y.2d 265, 274, 480 N.E.2d 727, 732-33, 491 N.Y.S.2d 138, 144 (1985).

[109] Appellant's Brief, *supra* note 83, at 5.

[110] Appellant's Brief, *supra* note 83, at 5. Although the strategic decisions were formed, in part, by the materials available to defense counsel at the time, there was some question concerning the quality of Jackson's defense. Robert Sullivan, who represented Jackson during his motion to appeal, said that "John Corbett (Jackson's original lawyer at trial) billed the system for three hours of investigation on this case." *60 Minutes, supra* note 84, This seems wholly inadequate in a murder trial involving a complicated fire and six counts of murder in the indictment. At the time of the CPL § 440.10 hearing, the trial court indicated its displeasure with defense counsel's performance at trial, but declined to consider the issue since the matter was settled on *Rosario* and *Brady* grounds. *Jackson*, 154 Misc. 2d at 735, 593 N.Y.S.2d 422 ("The Court is extremely troubled by what it has learned of counsel's performance in this case. However, in light of the *Brady* and *Rosario* issues, the Court will not decide this issue.").

[111] Appellant's Brief, *supra* note 83, at 5.

[112] Appellant's Brief, *supra* note 83, at 5; *see also Jackson*, 154 Misc. 2d at 727-28, 593 N.Y.S.2d at 416-17.

[113] Appellant's Brief, *supra* note 83, at 5.

fense insisted that King's testimony was more reliable than Dugan's.[114] The strategy was to convince the jurors that while the fire might have been arson it could not have happened the way the prosecution had claimed. On December 1, 1980 the jury convicted Jackson of six counts of felony murder and one count of second degree arson.[115] He was sentenced to 150 years in jail.[116]

Jackson moved to set aside the verdict claiming insufficiency of evidence and newly discovered evidence.[117] The new evidence revealed that Cruz was a minor at the time of Jackson's alleged statement to him and, as such, could not have been in the section of Rikers Island that housed Jackson. Thus, it would have been physically impossible for Cruz and Jackson to have been together at any one time.[118] Judge Slavin denied the motion, ruling that there was enough evidence for the jury to convict and that Cruz's age was known and available during trial and therefore was not newly discovered evidence.[119] The Appellate Division affirmed without opinion.[120]

2. The Court of Appeals Considers *Jackson*

Jackson appealed his conviction to the Court of Appeals on three grounds: 1) the trial court's denial of the newly discovered evidence claim was an abuse of discretion; 2) his statements were a product of an illegal seizure and so were inadmissible; and 3) his guilt had not been established beyond a

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[114] Appellant's Brief, *supra* note 83, at 5-6.

[115] *Jackson*, 154 Misc. 2d at 718, 593 N.Y.S.2d at 410.

[116] Brief for Defendant-Respondent, *supra* note 99, at 11; *see also Jackson*, 103 A.D.2d 1047, 479 N.Y.S.2d 390 (2d Dep't 1984).

[117] People v. Jackson, 65 N.Y.2d at 269, 480 N.E.2d at 727, 491 N.Y.S.2d at 141.

[118] It seems there is no doubt that Cruz and Jackson could not have been incarcerated in the same section of Rikers Island. Under Correction Law §§ 485 and 500-c, minors and adults can neither be lodged together in the same building nor eat together in the same facility. *Jackson*, 65 N.Y.2d 265, 480 N.E.2d at 730, 491 N.Y.S.2d 138. Daniel O'Neill, general office captain at Rikers Island, while discussing the separation policies for adults and minors, stated: "I personally don't believe [the conversation] could have taken place." *60 Minutes*, *supra* note 84.

[119] *Jackson*, 65 N.Y.2d at 269, 480 N.E.2d at 730, 491 N.Y.S.2d at 141.

[120] *Jackson*, 103 A.D.2d 1047, 479 N.Y.S.2d 390 (2d Dep't 1981).

reasonable doubt.[121] The court concluded that since the first claim was without merit and the second not reviewable,[122] it would discuss only the third ground for appeal.[123]

The court affirmed Jackson's conviction, finding that a question of conflicting testimony could be resolved by a jury.[124] Hence, the jury could find Jackson guilty beyond a reasonable doubt.[125] The court examined the evidence presented at trial and found that the "[d]efendant's three statements to the authorities place him on the roof, making holes in it which were stuffed with paper and upon which an accelerant was then poured and lighted, and his admission to Cruz confirms his participation in setting the fire."[126] Corroboration of the confession, the court held, "need only be of circumstances 'calculated to suggest the commission of crime, and for the explanation of which the confession furnishes the key.'"[127] Thus, the court held that there was sufficient evidence before the jury to corroborate Jackson's confessions which, in turn, could enable the jury to find guilt beyond a reasonable doubt. With this decision, Jackson had exhausted his direct appeal.

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[121] *Jackson*, 65 N.Y.2d at 269, 480 N.E.2d at 730, 491 N.Y.S.2d at 141.

[122] The court found that the facts surrounding Cruz's age and location were readily available prior to trial. The court also determined that the issue of admissibility of Jackson's statements was not one of probable cause but consent. Since the trial court had found consent and this finding was affirmed by the intermediate appellate court, the Court of Appeals ruled that the issue was beyond their scope of authority for review. *Id.* at 269-70 nn.3-4, 480 N.E.2d at 730 nn.3-4, 491 N.Y.S.2d at 141 nn.3-4.

[123] *Id.* at 269-70, 480 N.E.2d at 730, 491 N.Y.S.2d at 141.

[124] The court found that although convictions could not be sustained if they were based on "the testimony of a single witness which is involved in hopeless contradiction," this case presented conflicting testimony which went to reasonable doubt, not insufficient evidence. *Id.* at 270, 480 N.E.2d at 730-31, 491 N.Y.S.2d at 141.

[125] The court concluded that "if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted." *Id.* at 272, 480 N.E.2d at 732, 491 N.Y.S.2d at 143.

[126] *Id.*

[127] *Id.* at 273, 480 N.E.2d at 732, 491 N.Y.S.2d at 143 (quoting People v. Murray, 40 N.Y.2d 327, 332, 353 N.E.2d 605, 386 N.Y.S.2d 691, 695 (1976)).

B. Rosario *and CPL Section 440.10: The Court of Appeals Revisited*

1. The Motion to Vacate

While Erick Jackson appealed his conviction, a separate civil action was underway. The suit was brought by the widows of the deceased firefighters against the City of New York and Waldbaum's.[128] The plaintiffs were represented by Robert Sullivan, a well-known personal injury lawyer.[129] During discovery, Sullivan came across memoranda that had not been given to Jackson's defense counsel, leading Sullivan to believe that Jackson had been wrongly convicted.[130] Based on that information, and his own opinions as to the fairness and accuracy of the conviction, Sullivan, who had never tried a criminal case, decided to help Jackson pursue a reversal.[131]

In 1988, three years after the appellate court's ruling against him, Jackson moved to vacate his conviction on the grounds that exculpatory, or *Brady*, material[132] had been withheld from the defense and that he had received ineffective assistance of counsel.[133] The trial court informed both parties that consideration also would be given to any *Rosario* violations. The court then examined the prosecution's files to determine if they had complied with *Rosario* prior to Jackson's trial and found that there was at least one violation.[134] The court's decision did not discuss the violation in detail, noting only that during the hearing the prosecution conceded that a memorandum dated March 26, 1979, had not been provided to defense

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[128] The case was settled out of court five weeks into trial for $13.5 million. The city's portion of the settlement was about $300,000. Mary A. Giordano, *PI Expert Makes Bid to Clear Arsonist*, MANHATTAN LAW., Aug. 2, 1988, at 1.

[129] *Id.*

[130] Sullivan has told interviewers that he found 18 statements, taken by the police from eyewitnesses to the fire, contradicting the prosecution's case. The grand jury testimony of an F.B.I. arson specialist concluded that the fire was not arson. In addition, there were memoranda from former assistant district attorneys who declined to prosecute because they believed that the evidence did not warrant a conviction. *Id.*; *see also 60 Minutes*, *supra* note 84.

[131] *60 Minutes*, *supra* note 84.

[132] *See supra* note 49.

[133] People v. Jackson, 142 Misc. 2d 853, 538 N.Y.S.2d 677 (Sup. Ct. Kings County 1988).

[134] *Id.*

counsel.[135] The memorandum contained a synopsis of an interview between Fire Marshal King and then-Assistant District Attorney Gary. Since King had testified at Jackson's initial trial, the document was considered *Rosario* material.[136] The court did not discuss the contents of the memorandum, or the existence of any other undisclosed materials. Instead it turned to a consideration of the appropriate standard of review for a *Rosario* violation raised in a collateral motion. The court concluded that the violation carried a per se standard and therefore necessitated an automatic reversal.[137]

In explaining its reasoning the trial court observed that while *Rosario* violations received per se reversals on direct appeals, two courts had determined that post-judgment appeals required only a harmless error analysis.[138] In examining these cases, however, the court found that one of the cases, *People v. Howard*,[139] had since been rendered moot by subsequent Court of Appeals cases, and the other case, *People v. Mancuso*,[140] had been wrongly decided.[141] The trial court understood the Court of Appeals' position to be that *Rosario*-based CPL section 440.10 motions to vacate maintained per se reversal status, despite the absence of a direct appeal.[142] Since the People conceded that a *Rosario* violation had occurred, Jackson's conviction required vacatur.[143] On June 4, 1990, the Appellate Division affirmed the reversal.[144] The District Attorney's office then appealed to the Court of Appeals.

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[135] *Id.*

[136] *Id.*

[137] *Id.* at 856, 538 N.Y.S.2d at 679. The court addressed the contents of this memorandum, and other *Rosario* materials, when the case was returned to the trial court on remand. *Jackson*, 154 Misc. 2d at 724, 593 N.Y.S.2d at 414-15.

[138] *Jackson*, 142 Misc. 2d at 854, 538 N.Y.S.2d at 677.

[139] 127 A.D.2d 109, 513 N.Y.S.2d 973 (1st Dep't 1987).

[140] 141 Misc. 2d 382, 532 N.Y.S.2d 643 (Sup. Ct. Kings County 1988).

[141] *Jackson*, 142 Misc. 2d at 854-55, 538 N.Y.S.2d at 678.

[142] *Id.* at 854, 538 N.Y.S.2d at 677.

[143] *Id.* at 856, 538 N.Y.S.2d at 679.

[144] People v. Jackson, 162 A.D.2d 470, 556 N.Y.S.2d 165 (2d Dep't 1990).

2. The Court of Appeals Reconsiders *Rosario*

a. *The Majority Opinion*

On December 19, 1991, the Court of Appeals reversed the lower courts' decision and remanded the case to the trial court for a hearing on the prejudicial impact of the *Rosario* violation.[145] The basis for the holding was that the lower courts had incorrectly applied a per se standard for reversal to a post-appeal motion to vacate. The court found that, when the defendant's direct appeal had been exhausted, the language of CPL section 440.10 required that particular prejudice had to be established to merit a vacatur of the verdict.[146]

The court stated that its previous decisions touching on *Rosario* had never determined the standard of review for violations under CPL section 440.10 motions to vacate, noting that its decisions were always based on claims brought on direct appeal.[147] Although the trial court had read the Court of Appeals decision in *People v. Novoa*[148] as requiring a per se reversal even when the claim was raised in a collateral motion, the Court of Appeals asserted that for procedural purposes the claim in *Novoa* had been considered heard on direct appeal.[149] Starting with this historical construction, the court determined that *Jackson* should be treated as a case of first impression.[150]

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[145] People v. Jackson, 78 N.Y.2d 638, 585 N.E.2d 795, 578 N.Y.S.2d 483 (1991).

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

[147] *Id.*

[148] 70 N.Y.2d 490, 517 N.E.2d 219, 522 N.Y.S.2d 504 (1987).

[149] *Jackson*, 78 N.Y.2d at 641, 585 N.E.2d at 797, 578 N.Y.S.2d at 485. In *Novoa*, the *Rosario* claim was raised while the direct appeal was pending. The trial court denied the defendant's CPL § 440.10 motion. The intermediate appellate court affirmed both the conviction and the denial of the CPL § 440.10 motion. People v. Novoa, 124 A.D.2d 1078, 508 N.Y.S.2d 132 (1st Dep't 1986). When the Court of Appeals heard the case on appeal, both the verdict and the collateral motion were considered as though the issues had been consolidated and so the CPL § 440.10 motion was treated as though it was raised on direct appeal. *Novoa*, 70 N.Y.2d 490, 517 N.E.2d 219, 522 N.Y.S.2d 504. The court's contention that this consolidation was for procedural purposes is misleading. The procedural process required the court to hear them together because they had been heard jointly by the intermediate appellate court. But the court did not opt to create a procedural exception in *Novoa*. In fact, the court did not enter into any form of discussion concerning the fact that the *Rosario* claim was brought more than a year after the verdict and was initially raised as a collateral motion. *Id.*

[150] "Thus, the question before the court today is indeed a novel one." *Jackson*,

The court's reasoning began with the finding that since Jackson's claim was made in the context of CPL section 440.10, it was subject to the limitations of the statute.[151] The court also determined that the legislature's inclusion of the word "prejudice" in the statute indicated that the legislature had been concerned with the need for finality, and so required a determination that the error had harmed the defendant.[152] According to the court, the statutory necessity for a showing of prejudice created a conflict between the harmless error analysis implicit in CPL section 440.10(1)(f) and the common-law per se standard for *Rosario* claims raised on direct appeal. Recognizing that the disparate standards of review could lead to discordant treatment of otherwise similarly situated defendants,[153] the court sought to integrate the two standards in a

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78 N.Y.2d at 641, 585 N.E.2d at 797, 578 N.Y.S.2d at 485.

[151] *Id.* at 645, 585 N.E.2d at 799, 578 N.Y.S.2d at 487. The court discussed various subsections in which a *Rosario* violation could be grounded, and concluded that subsection (1)(f) was the most appropriate. *Id.* New York's CPL provides for a reversal when "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." N.Y. CRIM. PROC. L. § 440.10.

[152] *Jackson,* 78 N.Y.2d at 641, 585 N.E.2d at 797, 578 N.Y.S.2d at 485. The court appeared to assume that the prejudice requirement was included in the statute to prevent judgments from being overturned on the basis of an inconsequential, non-constitutional error. Thus, when a defendant cannot show that the error in question had an impact on the verdict, the need for finality of judgments requires that the judgment stand. The key ingredient in this logical chain is the existence of prejudice or harm to the defendant. Inherent in the majority's holding is the opinion that the statute demands a case-specific showing by the defendant of individualized prejudice resulting from the particular error. Reading this particular necessity into the statute allowed the *Jackson* majority to create the harmless error analysis standard for post-appeal CPL § 440.10 motions based on *Rosario* violations. The *Jackson* holding implicitly states that the court's prior holdings, which precluded the harmless error approach, were purely policy decisions. The problem with this reasoning is that the prior holdings appeared to say that the harmless error analysis approach was simply inapplicable given the nature of a *Rosario* violation. Thus, the majority's belief that the prejudice requirement of CPL § 440.10 can be satisfied on a case-by-case basis is at odds with the *Rosario* chain of cases. *See, e.g., Novoa,* 70 N.Y.2d at 499, 517 N.E.2d at 224, 522 N.Y.S.2d at 509 ("this court has not deviated from the principle that harmless error analysis is inappropriate with respect to *Rosario* violations"); *see also supra* text accompanying notes 54-80.

[153] The disparity exists when two defendants suffer *Rosario* violations, but one defendant's violation is in the record and the other's is not. The first defendant is entitled to a per se reversal if he can establish the violation on appeal. The second defendant would have to meet the additional burden of proving prejudice at

decision it claimed was driven by policy considerations.[154]

The court determined that the policy of finality outweighed the discovery rights protected by *Rosario* and that CPL section 440.10(1)(f) compelled a particularized demonstration of prejudice by defendants asserting *Rosario* claims.[155] To eliminate the disparate standards of review for cases that were still in the pre-appeal stage, the court held that the harmless error standard of review would become applicable only after the defendant's appeal had been decided.[156] The courts, therefore, would use the per se standard when a CPL section 440.10 motion was decided prior to the determination of the defendant's appeal. After the appeal was decided, the CPL section 440.10 motion was to be subjected to a harmless error analysis. Accordingly, the court reversed and remanded the case to the trial court for a hearing to determine the extent of the prejudice resulting from the violations.[157]

b. *The Dissent's Critique*

In a bitterly, or at least sharply, divergent opinion, the three-member dissent contended that settled case law required the per se standard for *Rosario* claims to be applied for all *Rosario* violations, regardless of the mechanism used to bring the issue before a court.[158] In the dissent's view, the post-*Rosario* chain of cases established that *Rosario* violations are prejudicial per se, and as a result, the statutory requirement of prejudice is satisfied once a defendant can prove that the violation occurred.[159]

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his CPL § 440.10 hearing. This latter scenario is similar to that in People v. Novoa, 70 N.Y.2d 490, 517 N.E.2d 219, 522 N.Y.S.2d 504 (1987).

[154] *Jackson*, 78 N.Y.2d at 641, 585 N.E.2d at 797, 578 N.Y.S.2d at 485.

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

[156] *Id.* at 649, 585 N.E.2d at 802, 578 N.Y.S.2d at 490.

[157] The trial court had not previously addressed the potential *Brady* violation or ineffective assistance of counsel charge at the prior CPL § 440.10 hearing because the *Rosario* violation had preempted further judicial review. The Court of Appeals instructed the trial court to re-examine these claims, in addition to determining the degree of harm caused by the *Rosario* violation. *Id.* at 650, 585 N.E.2d at 803, 578 N.Y.S.2d at 491.

[158] *Id.* at 660, 585 N.E.2d at 809, 578 N.Y.S.2d at 497 (Titone, J., dissenting).

[159] The *Rosario* chain quoted by both the majority and dissent included People v. Jones, 70 N.Y.2d 547, 517 N.E.2d 865, 523 N.Y.S.2d 53, (1987); People v. Novoa, 70 N.Y.2d 490, 517 N.E.2d 219, 522 N.Y.S.2d 504, (1987); People v.

According to the dissent, the majority's reasoning was based not on a reading of the language in CPL section 440.10, but rather on an arbitrary statutory reconstruction reflecting the majority's personal views.[160] Furthermore, the dissent argued, since the court previously had determined that the harmless error analysis was inapplicable to *Rosario* violations as a matter of policy, there was no reason to believe that this standard of review should become applicable in post-conviction or post-appeal settings.[161] Thus, the dissent claimed, the majority had supplanted the policy of fairness in the adjudicative process with its preference for protecting convictions from per se reversals.[162]

In the dissent's view, the majority had mistakenly construed the policy question as one of whether the *Rosario* doctrine should be available for CPL section 440.10 motions. The actual policy issue before the court, however, was whether the per se standard should be available for *Rosario* violations. This question, the dissent concluded, had already been decided in the post-*Rosario* chain of cases.[163]

Finally, the dissent opined that if societal policies are the touchstone of *Jackson*, the majority ought to have considered the impact of its holding. The dissent asserted that the majority's ruling would deter prosecutorial compliance and substantially narrow the general applicability of the *Rosario* doc-

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Ranghelle, 69 N.Y.2d 56, 503 N.E.2d 1011, 511 N.Y.S.2d 580 (1986); and People v. Consolazio, 40 N.Y.2d 446, 354 N.E.2d 801, 387 N.Y.S.2d 62 (1976). See *supra* notes 48-80 and accompanying text for a discussion of those cases. The majority and dissent agreed that the above cases required a per se reversal for violations addressed through direct appeal. The dissent, however, disagreed with the majority's reasoning that the logic behind the per se ruling was inoperative in cases involving collateral attacks.

[160] "[The holding] must be premised solely on what the majority terms a choice of 'policy'—the majority's current code word for its four members' unwillingness to apply a well-settled rule of law in such a way as to produce vacaturs of previously settled convictions." *Jackson*, 78 N.Y.2d at 655, 585 N.E.2d at 805, 578 N.Y.S.2d at 494 (Titone, J., dissenting). The dissent further criticized the majority's approach, saying "the present majority's rationale is nothing more than an exercise in result-directed statutory construction that simply does not withstand scrutiny." *Id.* at 652, 585 N.E.2d at 804, 578 N.Y.S.2d at 492. See *infra* note 221 for a further discussion of the dissent's criticism.

[161] *Jackson* at 653-55, 585 N.E.2d at 804-06, 578 N.Y.S.2d at 492-94 (Titone, J., dissenting).

[162] *Id.* at 654, 585 N.E.2d at 805, 578 N.Y.S.2d at 493.

[163] *Id.* at 652 n.1, 585 N.E.2d at 804 n.1, 578 N.Y.S.2d at 492 n.1.

trine.[164] In its conclusion, the dissent voiced its opposition to the majority's approach to judicial decisionmaking. The dissent understood the majority's approach to be one that preferred policy considerations to logic and precedent, and feared that this method raised the possibility of sudden departure from precedent based on "nothing more than a change in prevailing judicial sentiment."[165]

3. *Jackson* on Remand: A Harmful-Error Analysis

On remand, the trial court found that both the *Rosario* and *Brady* violations had caused Jackson harm and, again, set aside the verdict.[166] The court chose not to examine the ineffective assistance of counsel issue.[167] The court's opinion delineated the withheld materials—many of which were both *Brady* and *Rosario* material—and discussed how they might have affected the defense's strategy at trial. Based on its review of the case, the court concluded that Erick Jackson had suffered more than just an error-fraught trial.[168]

Specifically, the court found that the prosecution had withheld a wide array of evidence and statements from defense counsel. Some of the materials that the prosecution had been directly aware of included: Detective Dugan's opinion that the fire was electrical in nature and that the fire department had set the three minor fires;[169] the March 26, 1979, memorandum, which had been the basis for the court's initial granting

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[164] *Id.* at 658-60, 585 N.E.2d at 808-09, 578 N.Y.S.2d at 496-97.

[165] *Id.* at 659, 585 N.E.2d at 808, 578 N.Y.S.2d at 496-97.

[166] *Jackson*, 154 Misc. 2d 718, 735-36, 593 N.Y.S.2d 410, 422 (Sup. Ct. Kings County 1992).

[167] *Id.* Although the court's stated reason for by-passing the charge of ineffective assistance of counsel was that it was not necessary, this decision probably was related to the fact that the original trial lawyer, John Corbett, had died. *60 Minutes*, *supra* note 84; *see also supra* note 110.

[168] *Jackson*, 154 Misc. 2d at 735-36, 593 N.Y.S.2d at 422.

[169] *Id.* at 723-24, 593 N.Y.S.2d at 413-14. What is most interesting is that an assistant district attorney ("ADA") took notes of Dugan's interviews and then destroyed them. *Id.* In fact, the (former) ADA testified that he always destroyed his notes after talking with either police officers or fire investigators. *Id.* This raises the possibility of untold convictions tainted by the intentional destruction of *Rosario* material. Destroying notes of interviews with potential state witnesses is an act in direct contravention to the due diligence required by *Rosario*.

of Jackson's CPL section 440.10 motion;[170] and a memorandum dated February 25, 1980, from Assistant District Attorney Weininger to then-Assistant District Attorney Aiello regarding Cruz's confession.[171] The documents constituting *Brady* material involved a memorandum from Assistant District Attorney Besunder to Assistant District Attorney Lasky disclosing that just prior to the fire a construction worker on the roof of the store had not seen flame, smoke, or holes in the roof.[172] The memorandum also stated that none of the prosecution's experts believed that the fire could have lain dormant prior to being discovered.[173]

The court then examined different strategies the defense could have used if it had been aware that not only had one expert believed the fire was not arson, but also had known that the other expert's opinion was based upon fabricated evidence. The court also discussed the possibility of a different verdict had the court known that one of the prosecutors had destroyed notes that constituted *Rosario* material.[174] The court believed that the defense clearly would have altered its trial strategy if it had known this information.[175] Thus, based upon the combination of the destroyed notes regarding Dugan's expert opinion and the memorandum concerning the fire marshal's report, the court concluded that a reasonable possi-

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[170] *Id.* at 724, 593 N.Y.S.2d at 414.

[171] The Weininger memorandum discusses Cruz's belief that Jackson may have been speaking about the other fire he claimed to have set, not the Waldbaum's fire. *Id.* at 724-25, 593 N.Y.S. 2d at 414. In an interesting aside, Aiello later became a judge on the New York Supreme Court and was the trial judge for a post-*Jackson* case, People v. Robles 153 Misc. 2d 859, 583 N.Y.S.2d 138 (Sup. Ct. Kings County 1992). *See infra* notes 302-05 and accompanying text.

[172] To help illustrate the distinction between *Brady* and *Rosario* material, this memorandum was *Brady* material because it tended to exculpate. It was not *Rosario* material because the construction worker did not testify at trial. *See supra* notes 49-51 for a more detailed discussion of *Brady*.

[173] *Jackson*, 154 Misc. 2d at 725, 593 N.Y.S.2d at 415. If the fire had in fact been started by Jackson punching holes in the roof and pouring accelerant through the holes, then the worker should have seen the holes themselves and smoke from the fire coming up through the holes. Since the fire could not have lain dormant, the worker's statements contradicted Jackson's confession and Fire Marshall King's testimony. *See supra* text accompanying notes 99-103.

[174] The trial court was clearly upset by the destruction of the notes. The court noted that had if it been aware of the destruction at the time of the original trial it would have sanctioned the lawyer. *Jackson*, 154 Misc. 2d at 734, 593 N.Y.S.2d at 421.

[175] *Id.* at 732, 593 N.Y.S.2d at 420.

bility existed that the *Rosario* violations had affected the result of the trial.[176] On June 12, 1992, Jackson's conviction was vacated.[177] Five months later the appellate court affirmed this decision.[178]

4. Epilogue: Retrial and Acquittal

In August of 1994, Erick Jackson was tried again. He was acquitted of all charges.[179] Given the lengthy public history of Erick Jackson's case, it was not surprising that the case received a great deal of local publicity.[180] The second trial, differed dramatically from the first. In contrast to John Corbett, Robert Sullivan presented an aggressive defense. For example, he called former assistant district attorney, now judge, Michael Gary, to the stand to question him about a falsified statement which had been shown to another witness.[181] Fire Marshall King also testified, stating that he had told prosecutors sixteen years ago that "they had the wrong man."[182] In the end, the jury simply could not find any evidence to corroborate Jackson's confessions and acquitted him altogether.[183] For the first time since his arrest, more than fifteen years earlier, Erick Jackson was a free man.

III. ANALYSIS

The Court of Appeal's decision in *Jackson* is problematic both in its legal reasoning and its result. Viewed in its histori-

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[176] *Id.* at 734, 593 N.Y.S.2d at 421.

[177] *Id.* at 736, 593 N.Y.S.2d at 422.

[178] People v. Jackson, 198 A.D.2d 301, 603 N.Y.S.2d 558 (2d Dep't 1993).

[179] As the case resulted in an acquittal, there is no slip opinion and the records are sealed. The case was tried in Kings County before Acting Supreme Court Justice Gerald Beblock under the indictment number 1850/79.

[180] *See, e.g.*, Joseph P. Fried, *Judge Is Assailed in Waldbaum Fire Case*, N.Y. TIMES, Aug. 11, 1994, at B3; Joseph P. Fried, *An Old Case of Arson Set for Retrial*, N.Y. TIMES, July 31, 1994, at 35; Ellis Henican, *A Case Goes Up in Flames*, NEWSDAY, July 31, 1994, at 8.

[181] *Judge Recounts Prosecutor Role at Previous Arson-Murder Trial*, N.Y. L.J., Aug. 11, 1994, at 2.

[182] *Simple Phrase Frees Defendant: You've Got the Wrong Man*, BERGEN RECORD, Aug. 19, 1994, at A8; Hoffman, *supra* note 90, at 45.

[183] Joseph P. Fried, *On Retrial, Suspect Is Acquitted in Fire that Killed 6 in '78*, N.Y. TIMES, Aug. 18, 1994, at A1.

cal context, the *Rosario* doctrine is based on the inapplicability of the harmless error standard of review for *Rosario* violations.[184] The *Jackson* decision should have addressed the issue of standard of review in terms of its relationship to *Rosario*, without focusing on the differing types of appeals. Such an approach would have led the court to extend the per se standard of reversal to all *Rosario* cases, not just to those heard on direct appeal. Instead, the court arrived at a decision that is internally inconsistent and logically unpersuasive. Moreover, the decision fails to advance the policy interests it is purportedly based upon. Ultimately, *Jackson* can only lead to results that the court has long-sought to prevent.

The final result of *Jackson* creates a new exception to *Rosario* which undercuts the compliance features inherent in the per se standard used in earlier cases. Since *Rosario* violations are caused by prosecutors' failures to meet their discovery obligations, reducing the punitive aspect of the rule discourages due care in compliance. Furthermore, reinstalling the harmless error standard without definitive guidelines for its application will necessarily generate dissimilar results for similarly situated defendants. Thus, stripped of compelling policy argument or legal basis, *Jackson* represents nothing more than the court's preference not to reverse affirmed convictions, even at the expense of well-settled law.

A. Rosario, *Assumed Prejudice, and Illogical Reasoning*

The majority's fundamental error in *Jackson* is its reliance on a procedural device to determine which standard of review should be applied. The issue that the court should have addressed was whether the harmless error standard could ever be applied to *Rosario* violations.[185] Instead, the majority con-

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[184] *See, e.g.*, People v. Consolazio, 40 N.Y.2d 446, 454, 354 N.E.2d 801, 805, 387 N.Y.S.2d 62, 66 (1976) ("we thus reject arguments that consideration of the [undisclosed statement] can result in a finding of harmless error"); People v. Jones, 70 N.Y.2d 547, 551-52, 517 N.E.2d 865, 868, 523 N.Y.S.2d 53, 56 (1987) (harmless error too speculative to be applied to *Rosario* violations); People v. Novoa, 70 N.Y.2d 490, 499, 517 N.E.2d 219, 224, 522 N.Y.S.2d 504, 509 (1987) ("this court has not deviated from the principle that harmless error analysis is inappropriate with respect to *Rosario* violations").

[185] If the *Jackson* court had followed the settled doctrine of *Rosario*, the court would have found that harmless error is simply inapplicable to *Rosario*. *See supra*

cluded that the harmless error analysis was appropriate and applicable only in some cases.[186] By declining to find the per se standard appropriate for *Jackson*, the court effectively invalidated the need for the per se standard in all *Rosario* situations. Simultaneously, the court continued to support a doctrine that holds harmless error inappropriate for all *Rosario* situations. This legalistic self-negation resulted from the court's deliberate shift in focus, a shift that allowed it to tacitly discard the per se principle for collateral attacks.

If, in fact, the question squarely before the court was the proper standard of review for *Rosario* in any instance, then the court's focus on which mechanism brought the claim before the court is either disingenuous or simply mistaken. While *Jackson* may have been the first case in which the court directly addressed the appropriate standard of review for CPL section 440.10 motions, it is misleading to assert that this case is one of first impression simply because the court had not yet explicitly ruled that the per se standard is applicable to CPL section 440.10 motions.[187] The *Rosario* doctrine clearly delineates that the per se standard is the only possible standard that properly may be applied to a *Rosario* violation; not because policy concerns mandate it, but because the nature of a *Rosario* violation precludes the use of the harmless error standard.[188] Therefore, *Jackson* did not really present a "novel"

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note 183.

[186] On the one hand, the *Jackson* court favorably discussed the court's per se standard for *Rosario*, referring to the *Rosario* rule as "a deeply held belief that simple fairness requires the defendant to be supplied with [Rosario material]." *Jackson*, 78 N.Y.2d at 644, 585 N.E.2d at 799, 578 N.Y.S.2d at 487. In the next breath, however, the majority stated, "we believe that a defendant raising a *Rosario* claim by way of a CPL 440.10 motion must make a showing of prejudice. We will not step in and cut off that inquiry. Neither our precedent nor our concern for fairness to the defendant requires that result." *Id.* at 647, 585 N.E.2d at 801, 578 N.Y.S.2d at 489.

[187] *Id.* at 638, 585 N.E.2d at 795, 578 N.Y.S.2d at 483.

[188] The dissent took issue with the majority's characterization of *Jackson* as purely a policy question. The *Rosario* doctrine represented something more than just a preference for a certain type of discovery obligation. *Rosario* represents an interest in full disclosure of certain materials by the prosecution and the legal and logical obstacles to determining the resultant harm of a failure by the prosecution to satisfy this requirement. According to the dissent, reducing *Rosario* to a policy issue subjected it, and other legal rules, to being obviated at any given time depending on the whim of the court. *Id.* at 659-60, 585 N.E.2d at 809, 578 N.Y.S.2d at 497 (Titone, J., dissenting).

question at all. It simply offered the court an opportunity to express its current position on *Rosario* in the context of a question on harmless error and timeliness.[189]

Avoiding this direct confrontation with *Rosario* successfully allowed some of its members to evade a sensitive and contentious issue. Yet doing so necessarily compelled an artificial construction of the law by the court as it related to collateral attacks and *Rosario*. This jurisprudential two-step forced the majority into a holding that is untenable on either academic or practical terms.[190] The new *Jackson* exception to *Rosario* created a host of internal inconsistencies that undercut the analytic persuasiveness of the majority's argument. In short, the decision formulated a rule that, by its own logic, is invalid and without intellectual integrity. When the holding is viewed contextually, the only reasonable conclusion one can draw is that the court should have either extended the per se standard to all *Rosario* claims or eliminated it altogether. Hence, the real question facing the court was whether to affirm or overturn *Rosario* in its present form, not how to "harmonize" *Rosario* with CPL section 440.10.[191]

1. Prejudice Per Se and a Satisfied Statute

An examination of the court's past *Rosario* decisions, as well as other decisions employing the per se rule, clearly demonstrate that *Jackson* should have recognized that the per se rule applies to all *Rosario* violations, regardless of the procedural vehicle employed. Because it is impossible to measure

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[189] As motions to vacate are not restricted by timeliness constraints, they conceivably can be filed at any time after the conviction. *Id.* at 645, 585 N.E.2d at 799, 578 N.Y.S.2d at 487. Extending *Rosario*'s per se standard to cover these motions would allow a defendant to obtain a reversal and a new trial any time after a conviction.

[190] Judging from post-*Jackson* cases, there were not enough votes on the bench to divorce *Rosario* from the per se standard altogether. People v. Banch, 80 N.Y.2d 610, 608 N.E.2d 1069, 593 N.Y.S.2d 491 (1992) (affirming use of per se standard for *Rosario* violations as the general rule by a six to one vote). By shifting the focus from *Rosario* to the standard of review required by CPL § 440.10, the majority in *Jackson* made it possible to place a time limitation on *Rosario* without forcing the bench to decide on *Rosario* in its totality. Thus, curbing *Rosario* was made more palatable to members who may not have been comfortable directly confronting the *Rosario* doctrine and stare decisis.

[191] *Jackson*, 78 N.Y.2d at 648, 585 N.E.2d at 801, 578 N.Y.S.2d at 490.

the impact of compliance failures after a verdict has been reached, the court has assumed that the defendant was harmed and suffered prejudice.[192] Accordingly, the existence of a *Rosario* violation meets the prejudice requirement of CPL section 440.10, allowing the statute to control the remedy while keeping *Rosario* intact. In short, if a *Rosario* violation is proven, then the defendant has suffered prejudice.

The majority, however, read the use of the word "prejudice" in CPL section 440.10 to mean that only a case-specific showing of prejudice would satisfy the statute. This interpretation is problematic because it ignores the reason why *Rosario* demands per se reversals in the first place. It is not just the violation itself that requires the reversal, but also its effect. A violation necessarily leaves the defendant ignorant of the state's witnesses' prior statements. Whether or not the defense would have been able to successfully impeach the state's witnesses and the effect this impeachment might have had on the jury are both purely speculative.[193] Moreover, since the defense is unaware of the materials at issue, it is impossible to know how the materials would have altered defense strategy—including its opening and closing arguments, and cross examination of other witnesses.[194] Hence, as the court has re-

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[192] People v. Jones, 70 N.Y.2d 547, 552 n.4, 517 N.E.2d 865, 868 n.4, 523 N.Y.S.2d 53, 56 n.4 (1987). "If *Rosario* material is denied the defendant, he has been deprived of what he should have. It matters not that the denial may have been inadvertent or immaterial." *Id.* at 553, 517 N.E.2d at 869, 523 N.Y.S.2d at 57. Thus, the focus of the rule was its effect on the defendant, not the prosecutor's desire or attempts to comply with it. It would be misleading to say that the prosecution's motives or behavior is completely irrelevant to *Rosario*. It can be argued that the per se rule is, in part, in place to help ensure compliance. *See infra* text accompanying notes 260-61. But the rule itself—mandatory disclosure of prior statements—is concerned solely with the defendant having all relevant materials in his possession. If he does not, then his ability to present his defense is impaired to a degree that cannot be qualitatively measured. *Jones*, 70 N.Y.2d at 552 n.4, 517 N.E.2d at 868 n.4, 523 N.Y.S.2d at 56 n.4.

[193] *Id.* at 552 n.4, 517 N.E.2d at 868 n.4, 523 N.Y.S.2d at 56 n.4. As the Court of Appeals previously stated,

> [t]he significant fact is that the conclusion that the information was of no value must necessarily be founded on sheer speculation as to what might have occurred and matters not in the record: i.e., the questions counsel might have asked or avoided asking, how the witness might have answered, and how such differences in the testimony might have affected the decision of the jury.

Id.

[194] *Id.* at 551-52, 517 N.E.2d at 868, 523 N.Y.S.2d at 56.

peatedly held, harmless error analysis is not an appropriate device for determining the degree of harm a *Rosario* violation may have caused a defendant, because it requires the court to speculate on a myriad of variables, including possible actions by the defense, before hazarding a guess as to a specific outcome.[195]

The dissent's approach, focusing on the rationale behind the per se standard, is more persuasive. The dissent noted that in cases involving the withholding of evidence, it is possible to determine the effect of a *Brady* violation by examining the probative value of the withheld materials.[196] In contrast, the dissent notes, "[i]n cases involving other classes of errors . . . the nature and quantum of proof is irrelevant in determining what constitutes 'prejudice,' and the inquiry requires a more subtle analysis."[197] These "classes of errors" refer to cases in which the nature of the error requires an automatic reversal.[198]

A good example of this judicial approach can be found in *People v. O'Rama*.[199] The Court of Appeals in *O'Rama* required a reversal when a trial court had violated its statutory duty to notify defense counsel of the precise contents of a juror's inquiry even though the defendant had failed to show prejudice because the error was "inherently prejudicial."[200] *O'Rama* illustrates that a per se reversal standard may be ap-

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[195] *Id.* at 552 & 552 n.4, 517 N.E.2d at 868 & 868 n.4, 523 N.Y.S.2d at 56 & 56 n.4. In addition, if the government believes a witness may be impeached, they may choose not to call that witness at all. The variety of different actions and reactions that may result from full compliance support the *Jones* court's holding.

[196] *Jackson*, 78 N.Y.2d at 653, 585 N.E.2d at 804-05, 578 N.Y.S.2d at 492-93. (Titone, J., dissenting); *see also supra* notes 49-51 (discussing *Brady* and exculpatory materials).

[197] 78 N.Y.2d at 653, 585 N.E.2d at 804, 578 N.Y.S.2d at 492 (citation omitted).

[198] *See, e.g.*, People v. Hilliard, 73 N.Y.2d 584, 540 N.E.2d 702, 542 N.Y.S.2d 507 (1989) (deprivation of basic right to representation not subjected to harmless error analysis); People v. Lewis, 64 N.Y.2d 1031, 1032, 478 N.E.2d 198, 198, 489 N.Y.S.2d 57, 57 (1985) (errors in trial court's closing instructions that deprive the defendant of his right to jury consideration of the crime elements are deemed prejudicial "'no matter how conclusive the evidence'") (quoting People v. Walker, 198 N.Y. 329, 334, 91 N.E. 806, 808 (1910)); People v. Brown, 48 N.Y.2d 388, 395, 399 N.E.2d 51, 54, 423 N.Y.S.2d 461, 464 (1979) (errors affecting jury's deliberative process prejudicial to the extent they tend to compromise the jury process).

[199] 78 N.Y.2d 270, 579 N.E.2d 189, 574 N.Y.S.2d 159 (1991).

[200] *Id.* at 280, 579 N.E.2d at 194, 574 N.Y.S.2d at 164.

plied not only to rules governing constitutional rights,[201] but also to rules where the violation does not readily lend itself to a post-hoc review.[202] As the *Jackson* dissent observes, "[t]he teaching of *O'Rama* and [other cited cases] is that certain kinds of errors occurring during trial are intrinsically prejudicial because they either detract from the process or impair the defendant's ability to present a defense."[203] Furthermore, "[they] represent a shorthand way of saying that errors with that class are prejudicial by their very nature and that, accordingly, nothing further need be shown to compel reversal."[204]

Both *Rosario* and *O'Rama* offer insight into which errors must be considered "inherently prejudicial." Significantly, the *O'Rama* decision expressly relied on the per se rationale of post-*Rosario* cases for support,[205] which further indicates the claim that *Rosario* violations, if established, would automatically satisfy the prejudice requirement of a collateral motion. Therefore, the court should have concluded that if Erick Jackson established a *Rosario* violation, he would have satisfied the statutory requirement. To hold that specific, individualized prejudice must be demonstrated is contrary to the principle and specific language of the *Rosario* doctrine.

The *Jackson* court ignored this precedent, stating: "we think it would be imprudent to read the prejudice requirement out of the statute by taking the per se error rule and applying it in CPL section 440.10 context."[206] This statement, however, reveals the majority's misreading of *Rosario*: it is the existence

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[201] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).

[202] By comparison, the court has found that judicial examinations for other violations, such as withholding evidence, can be properly evaluated. *See supra* note 53.

[203] *Jackson*, 78 N.Y.2d at 654, 585 N.E.2d at 805, 578 N.Y.S.2d at 493.

[204] *Id.* at 654, 585 N.E.2d at 805, 578 N.Y.S.2d at 493.

[205] The *O'Rama* court stated that an error committed in the instant case by the trial court was "inherently prejudicial." People v. O'Rama, 78 N.Y.2d 270, 280, 579 N.E.2d 189, 194, 574 N.Y.S.2d 159, 164 (1991) (citing People v. Jones, 70 N.Y.2d 547, 517 N.E.2d 865, 523 N.Y.S.2d 53 (1987) and People v. Perez 65 N.Y.2d 154, 480 N.E.2d 361, 490 N.Y.S.2d 747 (1985)). Although Judge Titone wrote the opinion in *O'Rama*, which he favorably cited in *Jackson*, it was unanimously supported by the *O'Rama* court. This leads to the conclusion that the court as a whole agrees there are errors that cannot be analyzed through a post-hoc harmless error review. Moreover, it supports the argument that the court considered a *Rosario* violation to be such an error since it unanimously approved this interpretation in *O'Rama*.

[206] *Jackson*, 78 N.Y.2d at 647, 585 N.E.2d at 801, 578 N.Y.S.2d at 490.

of prejudice that is assumed per se, not the need for reversal. Thus, the existence of a violation is an admission of prejudice which therefore necessitates the reversal. Hence, the reversal follows a finding of prejudice and does not "impugn" the statute or alter *Rosario*. Therefore, the *Jackson* majority's interpretation of the statutory requirements of CPL section 440.10, and the interaction between the statute and the *Rosario* doctrine, are critically flawed. The holding which results from this logical hiccup is altogether unwarranted.

2. The Resultant Internal Inconsistencies

By focusing on the type of appeal brought rather than the nature of the initial violation, the majority opinion has created internal inconsistencies in both the application of the *Rosario* rule and the implementation of CPL section 440.10.[207] As a result, CPL section 440.10 motions may sometimes be reviewed under a per se reversal standard, even though, according to *Jackson*, these are always supposed to be reviewed under a harmless error test if used to present a *Rosario* claim. Simultaneously, the *Rosario* rule, previously accorded per se status, now may be amenable to a harmless error analysis on occasion. This lack of internal coherence in *Jackson* leads to absurd and irrational results. For example, the majority found it appropriate for a lower court to apply a harmless error analysis to a *Rosario* violation in a post-appeal case. But, if the majority believes that *Rosario* is, in fact, reviewable under harmless error, it is unclear why the court would continue to disallow it in preappeal circumstances.[208] The majority cannot mean to

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[207] *Jackson* will allow some defendants pursuing CPL § 440.10 claims to retain the per se status, while other defendants with CPL § 440.10 claims will have to survive a harmless error analysis. Thus, although the majority maintains that *Jackson* both affirms the *Rosario* doctrine and requires that CPL § 440.10 has a prejudice requirement that controls the applicable standard of review, there will be cases where *Rosario* is given primacy over CPL § 440.10 and other cases where *Rosario* is subordinated to CPL § 440.10, even though in both instances a *Rosario* claim is being made through a CPL § 440.10 motion to vacate.

[208] The majority asserts that the contradictory approach to *Rosario* results from the court's desire to retain *Rosario* without overriding the prejudice requirement of CPL § 440.10. But, if the majority is correct in believing that the finality interests protected by the requirement for specific prejudice allow for harmless error to be applied to *Rosario*, then surely this societal interest would be operative in pre-appeal settings as well.

suggest that the process of affirming a conviction could transform an "inherently prejudicial" error into a non-prejudicial error when the error was not discovered until after the appeal was heard.[209]

Conversely, if a defendant's CPL section 440.10 motion is heard before the appeal reaches the appellate court, the per se rule must be applied.[210] Presumably, this is because the court still believes that it is impossible for the trial court to adequately judge the extent of prejudice suffered by the defendant.[211] If the appeal is decided before the CPL section 440.10 hearing, however, then suddenly, inexplicably, the lower court is capable of evaluating how the withheld materials would have affected the defense strategy, the witnesses' responses and the jury's decision. This distinction is illogical. Yet, since *Jackson* was decided, at least one lower court has followed the new rule and held that a *Rosario* violation becomes reviewable precisely when the appellate court affirms the defendant's conviction.[212]

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[209] This scenario assumes that the appellate court would be unaware of the violation. The affirmation would be a denial of the defendant's stated grounds for appeal. Obviously, the defendant would not have raised the *Rosario* issue because the violation was not known by the defendant prior to the appeal.

[210] *Jackson,* 78 N.Y.2d at 648, 585 N.E.2d at 801, 578 N.Y.S.2d at 489.

[211] As discussed earlier, the court has previously held that harmless error is inapplicable because it is impossible to determine what effect the material would have had on defense strategy, the reaction of the witness(es), and the credibility the jury might have assessed to the witness(es) in light of this new material. In short, the trial court would have no basis of knowledge for determining what might have taken place had the violation not taken place because there are simply too many unknown factors to include in a judicial calculation. *See supra* notes 40-42, 80-82 and accompanying text. Of course, one might say the above argument, coupled with the limited reach of the statutory-based limitations of *Jackson*, explains why the court left the per se standard in effect for violations on direct appeal. A more cynical approach might state that there was not enough support on the bench to roll back *Rosario* any further at the time *Jackson* was decided.

[212] In an interesting ruling, one court found that the appropriate standard of review for a pending CPL § 440.10 hearing had shifted when the appellate court's decision arrived. *See* People v. Machado, 159 Misc. 2d 94, 603 N.Y.S.2d 273 (Sup. Ct. Kings County 1993). How the court arrived at this holding is indicative of the confusion surrounding *Jackson*:

> The rule applicable between the two extremes, and to this case in particular, is less clear. But Judge Titone, who vigorously dissented in the *Jackson* case, has interpreted that case as requiring a showing of prejudice where, as here, the conviction has been affirmed by the Appellate Division prior to a determination of the CPL 440.10 motion. . . . Judge Titone's interpretation of the *Jackson* case—albeit a disapproving one—is

Post-trial stipulations offer another illustration of *Jackson*'s failings. *People v. Young*,[213] for example, involved a violation that was disclosed after the trial. The prosecution and the defense entered into a stipulation that expanded the record to reflect the error. This cooperative effort allowed the appellate court to rule on the *Rosario* claim while deciding the direct appeal. Without the stipulation, the appellate court would have heard the appeal while the *Rosario* issue was brought before the trial court. In such a case, if the motion is denied by the trial court, it then may be appealed to the appellate court, independent of the direct appeal.[214] *Jackson* deters efficiency-driven stipulations such as this because the prosecution surely would prefer that the trial court, not the appellate court hear the motion.[215] Using this process, if the appellate court affirms the conviction first, the trial court then must apply a more stringent test to the defendant's claim. In this scenario, the court's ability to apply harmless error to a *Rosario* violation evidently springs into being when the parties agree to the stipulation.

At the heart of this confusion is the court's refusal to take an unambiguous position on *Rosario* and the per se standard. If, as the *Jackson* majority claims, a harmless error analysis is inapplicable to *Rosario* violations, then it follows that it should be inapplicable to all *Rosario* violations. But if, as the *Jackson* majority also claims, a harmless error analysis is applicable to *Rosario* violations, then it also follows that the harmless error standard always should be applicable.[216] The majority apparently tried to resolve this analytical anomaly by allowing the procedural mechanism propelling a defendant's claim to de-

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adopted as a correct statement of the law.
Id. at 102-03, 603 N.Y.S.2d at 279.

[213] 79 N.Y.2d 365, 591 N.E.2d 1163, 582 N.Y.S.2d 977 (1992).

[214] *Id.* at 372, 591 N.E.2d at 1167, 582 N.Y.S. at 981; *see also* N.Y. CRIM. PROC. L. § 440.10.

[215] Prior to *Jackson*, the per se rule would apply regardless of the forum. The stipulation provided a measure of economic efficiency without affecting the standard of review. The prosecution now simply has to decline to enter such a stipulation in order to keep the motion to vacate before the trial court.

[216] Such reasoning begs the fundamental question in *Jackson*. Is *Rosario* a rule that can be properly evaluated in a harmless error analysis? If the court believes that it can, then it ought to overturn its precedent and reformulate the rule. If *Rosario* is simply not a violation that can be so analyzed, then *Jackson* is a decision reductio ad absurdum.

termine which standard of review applies. The lack of any meaningful relationship between the requisite procedure and the violation, however, renders this approach absurd.

Further complicating the situation, the court seems to assert that the type of review given a violation is based on whether the appeal is direct or collateral when, in fact, the only criterion for determining the standard of review is the chronological status of the appeal. Thus, some motions to vacate receive one standard, others another. The defining characteristic is always whether the direct appeal is pending or already decided—not the existence of the statutory constraints of a motion to vacate.

As the above analysis indicates, the majority's reliance on the procedural means of appeal, rather than on the violation or the statutory remedy, is untenable, particularly since the procedural vehicle is not dispositive of the issue. The truly dispositive element is whether the decision of the appellate court has been handed down, which in this context represents nothing more than a symbolic demarcation of time passed since the conviction at trial.[217] Hence, it would appear that perhaps it was not really the language of the statute, nor the nature of *Rosario*, that demanded the court's holding. Given the lack of intellectual currency behind the court's stated rationale, perhaps the dissent is correct when it argues that the real driving force behind the holding is the majority members' desire to avoid upsetting established convictions.[218] This would indicate that *Jackson* is indeed more reflective of personal policy preferences than judicial reasoning.[219]

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[217] In cases such as *Jackson*, the *Rosario* violation is not before the appellate court so the affirmation of the conviction has no relationship to the violation. Therefore, the appellate decision has no legal correlation to the violation. It is, however, the last time that the case is assured of coming before the court. Thus, if the Court of Appeals wanted to institute some form of a time-line for *Rosario*, pegged to an event in the procedural process, the appellate process is not only the most pragmatic place to do so, it also is the last point at which it could be done.

[218] *See supra* text accompanying note 162.

[219] The dissent complained that the holding in *Jackson* was less a product of legal analysis than a reflection of the subjective policy preferences of the majority. *Jackson*, 78 N.Y.2d at 659-60, 585 N.E.2d at 808-09, 578 N.Y.S.2d at 496-97 (Titone, J., dissenting). The majority countered that *Rosario* was originally a policy decision and the holding in *Jackson* was designed to balance a valid, competing policy interest. *Id.* at 645, 585 N.E.2d at 799, 578 N.Y.S.2d at 487. To better understand the dissent's charge, it is important to understand the practical result

Since the court's decision is not justified by legal mandate, stare decisis or legislative directives, then perhaps the only way the holding could retain a measure of credibility would be if it were supported by some genuine interest necessitating this result. As a matter of logic, the majority's reaffirmation of *Rosario* in principle requires a compelling interest to warrant the creation of a *Jackson* exception.[220] The majority believed that finality was sufficiently compelling to warrant the abandonment of *Rosario* in the post-appeal setting.

B. *The Policy of Finality in the Context of* Rosario

Putting aside whether or not *Rosario* requires a per se assumption of prejudice, and assuming, that the statutory language could be read to reflect the legislature's interest in finality, the pivotal question remains whether finality justifies the holding. While finality is certainly a legitimate issue in criminal jurisprudence, an examination of finality in the context of *Rosario* violations demonstrates that the *Jackson* exception does not advance any of the interests inherent in finality as a policy consideration.

The majority declared the result in *Jackson* was necessitated by the societal interest in finality as expressed by the legislature in CPL section 440.10.[221] This construction by the

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of *Jackson*. The *Jackson* exception places a de facto limitation on per se reversals for *Rosario* violations with the exact time-table dependent on each case's appellate review schedule. This means that for approximately two years a defendant may be able to obtain a per se reversal. The subsequent retrial would take place soon after. The logistical and practical burdens on the prosecution of retrying the case generally are not that severe. If, however, there is a substantial time lag between the original trial and a retrial, 10 years for example, then the level of difficulty in retrying the case normally would be substantially greater. See *infra* text accompanying notes 242-43 for a discussion of the difficulties in retrying cases. Therefore, it appears that the *Jackson* majority was willing to accept the consequences of a per se standard for *Rosario* when the violations were raised within a short time after the trial, but not when the issue was raised at a later time when it would be more difficult for the prosecution to reconvict.

[220] If *Rosario* is still a viable doctrine, then an exception based on the timeliness of a motion that has no time constraints ought to promote some substantial or compelling interest to displace it.

[221] *Jackson*, 78 N.Y.2d at 646, 585 N.E.2d at 800, 578 N.Y.S.2d at 488. As Judge Titone noted in his dissent, however, these arguments are left unarticulated. "[T]he word 'policy' appears no less than 11 times in the majority's opinion and at least seven references are made to balancing society's and defendant's interests, as

court contains two errors. First, legitimate interests protected by finality are not material to post-appeal *Rosario* claims. Second, the meaning given to the finality doctrine by the court is problematic. The *Jackson* court appeared more concerned with the difficulties inherent in retrying old cases than with the more immediate benefits of finality—such as conserving judicial resources and avoiding multiple opportunities for litigation.[222]

1. *Jackson* Fails to Protect Finality Interests

Invocations of finality are perhaps justifiable in the context of criminal convictions.[223] Economic efficiency, the allocation of scarce judicial resources, and the need for closure in settled convictions are valid societal and judicial interests.[224] The *Jackson* exception, however, will not promote these goals, nor ensure that guilty parties are properly punished in accordance with their sentences. An examination of the consequences of extending the per se standard to all *Rosario* violations—regardless of the timeliness of the complaint—clearly illustrates that finality is not germane to *Rosario*. There is no reason to believe that there would be more than a handful of cases where post-appeal CPL section 440.10 motions would be filed for *Rosario* violations.[225] Thus, there is little likelihood

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though the mere repetition of those concepts alone has the power to persuade." *Id.* at 650, 585 N.E.2d at 803, 578 N.Y.S.2d at 491.

[222] *See id.* at 647, 585 N.E.2d at 800, 578 N.Y.S.2d at 488-89.

> Presumably, the Legislature, in balancing the competing policy concerns, including its own right sense of justice, recognized the need for defendants to receive their punishment unless they were able to show that they were entitled to the statutory remedy and that they had been prejudiced by the trial error that was at issue in the motion to vacate.

Id. Having established legislative intent on behalf of the legislature, the court went on to say, "[i]n including a prejudice requirement in CPL 440.10(1)(f), the Legislature was concerned about society's interest in finality of judgments. We too recognize this interest is formidable." *Id.* at 647, 585 N.E.2d at 801, 578 N.Y.S.2d at 489. The use of "presumably" indicates that this is the majority's opinion of what the legislature intended because it is what the majority would have intended. The majority's statement regarding the legislature's concerns appears to be a transposition of its own view of finality for that of the legislature.

[223] People v. Crimmins, 362 N.Y.2d 230, 326 N.E.2d 787, 367 N.Y.S.2d 213 (1975) (discussing need for finality in context of harmless error analysis in criminal appeals).

[224] *See, e.g.*, Custis v. United States, 114 S. Ct. 1732, 1739 (1994).

[225] *Rosario* was decided in 1961. It took 30 years for this issue to come square-

that there would be an undue drain on the judicial system's resources.[226] Furthermore, since *Rosario* violations are considered so inherently prejudicial as to merit automatic reversal when raised on direct appeal, the importance of finality is, in and of itself, an insufficient reason to risk the integrity of final judgments and the need for just punishment.

It is the nature of a *Rosario* violation itself, not the level of judicial review imposed, that makes an increase in the number of post-appeal motions to vacate highly improbable. There is absolutely no reason to think that explicitly maintaining the per se standard would somehow trigger post-appeal discoveries of past violations. There is simply no relationship between the ability to discover violations and the existence of an available remedy.[227] Put more directly, a defendant's finding that the prosecution withheld discovery material is dependant on factors completely outside the appellate process. Means of discovery notwithstanding, many courts, prior to *Jackson*, had already assumed that *Rosario* carried a per se standard.[228] Despite the existence of such a defendant-friendly judicial perspective, there has been a profound absence of collateral, post-direct appeal *Rosario* claims. The infrequency of such claims is likely to continue regardless of the standard used.

A *Rosario* violation comes into existence when the prosecution fails to deliver its witnesses' prior statements to defense counsel prior to trial.[229] If testimony at trial does not reveal the violation and the prosecution does not opt to acknowledge the error, no mechanism exists to notify the defendant that such a prior statement had been made. Without knowledge of

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ly before the Court of Appeals. In fact, *Jackson* and its companion case, People v. Bin Wahad, 79 N.Y.2d 787, 587 N.E.2d 274, 579 N.Y.S.2d 636 (1991), were the first and only cases where the collateral attack took place well after the conviction was affirmed.

[226] *Jackson* was the first case in 30 years to raise a *Rosario* violation years after the appeal. Finality is not at issue since the context of *Jackson* and like cases make the possibility of other similar circumstances remote. This removes the question of judicial efficiency from the discussion.

[227] Claims of *Rosario* violations must be grounded in the knowledge that something specific was withheld. Either the defendant is aware of *Rosario* material or he is not.

[228] People v. Jackson, 142 Misc. 2d 853, 538 N.Y.S.2d 677 (Sup. Ct. Kings County 1988).

[229] People v. Perez, 65 N.Y.2d 154, 159, 480 N.E.2d 361, 364, 490 N.Y.S.2d 747, 750 (1985).

the withheld statement, the defendant cannot file a CPL section 440.10 motion.[230] Furthermore, since the appellate process concerns matters in the record, it is highly unlikely that the defendant's appellate counsel would be able to independently, discover the existence of the violation through preparing the appeal.

Discounting a new investigation by appellate counsel, there are two means by which the violation might be uncovered. The first is if the prosecution recognizes the error on its own and notifies the defendant.[231] The second is when the error is revealed through a civil action related to the criminal event. As in *Jackson*, a civil suit might lead to uncovering a *Rosario* violation.[232] However, the defendant will not automatically enjoy the benefits of this discovery. Since, there is no necessary relationship between the civil suit and the defendant, the attorney in the civil action will not be looking necessarily for such errors in the discovery process. Moreover, the attorney in the civil action is not obligated to inform the defendant of the violation if he or she is not representing the defendant.[233]

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[230] To be completely accurate, the defendant can always file a CPL § 440.10 motion, but courts may deny it without a hearing if the defendant cannot produce a withheld statement. This is why, for all practical purposes, a defendant cannot pursue a CPL § 440.10 motion on *Rosario* grounds unless he has knowledge of a specific violation.

[231] The standard of review shift in *Jackson* leads to an interesting hypothetical question. If a prosecutorial discovery of a violation in the pre-appeal stage would trigger an automatic reversal, but a post-appeal discovery would lead to a harmless error analysis, it is more likely that any such prosecutorial discoveries will be made after the appeal has been heard. Since the due diligence required of prosecutors under *Rosario* is to be carried out prior to and during the trial, not after the judgment, the prosecution is not required to confirm its compliance with the rule once the jury's verdict is in. It might appear then, in the context of *Jackson*, that any such verification of compliance by the prosecution, undertaken on their own initiative, would probably be delayed until after the appeal is ruled on, if it is done at all.

[232] *See also* People v. Bin Wahad, 79 N.Y.2d 787, 587 N.E.2d 274, 579 N.Y.S.2d 636 (1991) (companion case to *Jackson* in which defendant discovered *Rosario* material via civil action after direct appeal was exhausted).

[233] Robert Sullivan, Jackson's attorney for the CPL § 440.10 hearing and subsequent appeals, chose to inform Jackson of the *Rosario* material. He could just as easily have chosen not to. Erick Jackson was very lucky that Robert Sullivan opted to take Jackson's case when Jackson had no idea that there was an issue to act on. If he had not, Erick Jackson would still be serving his original sentence, unaware of the errors that led to his new trial.

Because defendants have such a low probability of discovering the violation after the trial, a different holding in *Jackson* would not have led to a greater number of valid CPL section 440.10/*Rosario*-based motions to vacate. For most defendants, the burden of proving an actual violation at a CPL section 440.10 hearing obviates the collateral *Rosario* attack as a viable avenue for reversal. Consequently, an inundation of *Jackson*-like cases is highly improbable and does not pose a risk to the goal of finality.

Another aspect of finality, protecting the integrity of the trial and appellate process, also is not relevant to *Jackson*. It can, of course, be argued that once a defendant is properly convicted and sentenced, the prescribed punishment must be meted out or the entire trial process will be undermined. Fundamental to this fairness argument, however, is a requirement that the conviction be arrived at in a just manner.[234] It is patently clear that when the defendant's conviction is achieved through an "inherently prejudicial" error at trial, the principle of upholding the conviction must be subordinated to the interests of fairness.[235]

If, as the *Jackson* court noted, the *Rosario* rule is predicated on "a right sense of justice,"[236] then presumably, violation of this rule could lead to an injustice. Indeed, because of the possibility of injustice, if a *Rosario* violation is raised in the pre-appeal stage of a case, the *Jackson* majority would grant a per se reversal. Therefore, one can conclude that an injustice done at trial eclipses the need for finality, just as the unjustness of the conviction legitimizes any subsequent re-litigation. Accordingly, the goals of finality in fact-finding and adjudication of criminal charges are not at risk when the purported violation emanates from *Rosario* material.

2. The Actual Finality Interest Behind *Jackson*

As this Comment previously observed, the *Jackson* court's distinction between direct and collateral appeals rests on a

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[234] *See, e.g.*, Custis v. United States, 114 S. Ct. 1732 (1994).

[235] People v. O'Rama, 78 N.Y.2d 270, 280, 579 N.E.2d 189, 194, 574 N.Y.S.2d 159, 164 (1991).

[236] People v. Rosario, 9 N.Y.2d 286, 289, 173 N.E.2d 881, 883, 213 N.Y.S.2d 448, 449 (1961).

false dichotomy.[237] The court's reliance on the distinction between pre- and post-conviction discovery of a violation is without merit and serves no useful purpose.[238] Moreover, the legitimate concerns that lie at the heart of finality are not at issue in *Rosario* cases, and its introduction into *Jackson* is inappropriate. It is curious that in its application of finality to collateral *Rosario* motions, the court did not discuss in detail those aspects of finality with which it was most concerned. Perhaps this is because the court had given finality another meaning, albeit one with a more arbitrary bend.

Apparently when the court refers to finality, it is addressing neither the integrity of a jury trial nor the need to uphold verdicts for the sake of judicial efficiency. Rather, the court is actually concerned with instances where there is a substantial period of time between the original conviction and the CPL section 440.10 hearing. The court is clearly alarmed that retrying a case years after the first trial would present the state insurmountable obstacles.[239] As the dissent noted, something about applying a per se standard of reversal to previously affirmed criminal convictions is apparently unacceptable to the *Jackson* majority.[240] It is seemingly this specter of convicted felons launching collateral attacks on their convictions at a time when it is no longer practical for the state to renew prosecution that vitiates or lessens the injury of the *Rosario* violation and justifies placing an additional burden of proof on a defendant.

The majority's prioritizing the timeliness aspect of *Jackson*

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[237] *See supra* text accompanying notes 211-22.

[238] Opponents of the per se standard might argue that the distinction actually serves a very valuable purpose. Namely, *Rosario* violations that are de minimis and could not, in any conceivable way, have led to a different verdict at trial cannot automatically result in a vacatur of the conviction. This position, however, would require courts to repudiate the *Rosario* doctrine as espoused in the post-*Rosario* cases. Since the *Jackson* majority announced its continued support for this doctrine, which was reaffirmed in a post-*Jackson* case, the argument has no force in relation to *Jackson*. *Jackson*, 78 N.Y.2d 638, 585 N.E.2d 795, 578 N.Y.S.2d 483 (1991); People v. Banch, 80 N.Y.2d 610, 616-17, 608 N.E.2d 1069, 1072-73, 593 N.Y.S.2d 491, 494-95 (1992) (citing People v. Martinez, 71 N.Y.2d 937, 524 N.E.2d 134, 528 N.Y.S.2d 813 (1988) and People v. Consolazio, 40 N.Y.2d 446, 354 N.E.2d 801, 387 N.Y.S.2d 62 (1976)).

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

[240] See *supra* note 160 for an explication of the dissent's criticism of the *Jackson* majority's approach to jurisprudence.

is misplaced considering that CPL section 440.10 motions are permissible at any time after a conviction is entered.[241] Had the legislature been concerned with upsetting older, settled convictions it most certainly could have included a provision in the statute to distinguish between pre- and post-appeal situations. Alternatively the legislature could have created a time limitation to bar older motions. In addition, since the delay in time prior to the filing of a CPL section 440.10 for a *Rosario* violation results from prosecutorial error, it is unfair that the consequence of those errors should be a burden for the defendant.

Certainly the more time that elapses after a trial, the more difficult it becomes to retry the case. Witnesses and evidence are harder, if not impossible, to find years after the fact. Yet just as it is harder for the prosecution to put on a second trial long after the first was completed, it is also harder for the defense to properly contest the charges.[242] More importantly, the court does not clearly state why this burden should be borne by the defendant and not by the prosecution.[243] Since the error originated with the prosecutor's actions it seems only just that if either party is to be penalized it ought to be the prosecution, not the defendant.

Unlike other types of claims under CPL section 440.10, *Rosario* claims result not from novel grounds for appeals articulated years after the trial, but from prosecutorial actions, beyond the control of the defendant.[244] The court's use of finality here places the burden of proof upon the defense simply

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[241] N.Y. CRIM. PROC. L. § 440.10.

[242] If the state can still mount an effective prosecution, the defendant may be hard pressed to find witnesses. This is made more complicated because the defendant's friends who testified for him may now be dead or in jail, and impartial bystanders are harder to find where the defendant has not had any contact with them since the trial. Compounding this problem is the fact that the defendant usually has more limited resources than the state in terms of tracking down missing people and gathering evidence. In addition, the state may be able to have prior testimony of now-unavailable witnesses read into the record at retrials.

[243] The court could not have meant to say that had the defendant been aware of the violation at an earlier time a "right sense of justice" would require a new trial, but since he had spent many years in jail, perhaps unnecessarily, this sense of justice no longer operated.

[244] The cause of the violation may be intentional or inadvertent, but in either case, the prosecutor is the actor whose conduct causes the violation. The defendant has no means to influence compliance.

because it was unaware of a fact in the exclusive possession of the prosecution. This result is unfair, since it punishes the defendant for prosecutorial error or misconduct. Although the majority opinion mentions this consequence, it does so without noting its relevance to questions of timeliness.[245]

The *Rosario*-based motion to vacate is a scenario unlike others raised in CPL section 440.10 motions.[246] Thus, any argument that a per se standard for *Rosario* violations made via CPL section 440.10 motions would offer defendants the opportunity to exploit procedural rules without substantive grounds for the appeal, is specious at best.[247] Consequently, the finality argument, offered without explanation is just not supportable. The rule promulgated in *Jackson* will not protect any interest properly served by finality.

One might wonder what the fuss is all about, considering how infrequently cases like *Jackson* arise. The answer is that retaining the per se standard for collateral motions would not negatively affect the justice system; removing it would. This is best understood by shifting the spotlight from the exemption's impact on the defendant to its potential influence on prosecutorial behavior.

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[245] The court, referring to the prosecution's dominion over the prior statements, stated that "simple fairness" underlied *Rosario*. *Jackson*, 78 N.Y.2d at 644, 585 N.E.2d at 799, 578 N.Y.S.2d at 487. Of course, it can be argued that all violations subject to a harmless error test involve burden-shifting. *Rosario* violations can be distinguished, however, because the finding of harm is ordinarily considered to be too speculative for a reviewing court.

[246] In many cases, the new evidence may well be something that defense counsel could have, and thus should have, discovered prior to the trial and so it cannot be considered "new" evidence. This is exactly what the court decided when notified that Julio Cruz could not have overheard Jackson admitting to the arson. The court did not challenge Jackson's assertion that he and Cruz were housed in separate facilities—a fact that, absent proof of some remarkable auditory prowess on Cruz's part, was clearly exculpatory. The court did, however, find that this particular point was something that defense counsel could have discovered before Jackson's original trial. The fact that they failed to investigate Cruz or his statement was tantamount to waiving or failing to preserve an issue for appeal. People v. Jackson, 65 N.Y.2d 265, 269-70 n.3, 480 N.E.2d 727, 730 n.3, 491 N.Y.S.2d 138, 141 n.3.

[247] Obviously, filing a CPL § 440.10 motion does not guarantee a hearing. Futhermore, even if a defendant can make a sufficient showing that *Rosario* material may have been withheld, she still has to prove its existence at the hearing and avoid having the statement classified as an exception to the rule. *See, e.g.*, People v. Consolazio, 40 N.Y.2d 446, 354 N.E.2d 801, 387 N.Y.S.2d 62 (1976) (duplicative equivalents do not constitute *Rosario* material).

C. *The Long-Term Impact of* Jackson: *Rewarding Non-Compliance*

The *Jackson* court correctly noted that very few cases involving post-appeal *Rosario* violations ever come before the court.[248] Yet the low volume of such cases does not mean that *Jackson* will be a case of minimal impact. The end result of *Jackson* will be that far more cases involving *Rosario* violations will not be heard until the appellate process has concluded.[249] This is because under *Jackson*, prosecutors who admit to *Rosario* violations during trial face an automatic reversal when the record reflects the transgression. But prosecutors who can postpone a CPL section 440.10 hearing until after the appeal will reap the benefits of the defendant's new burden of proof. Clearly the prosecution has an incentive to delay post-conviction hearings for as long as possible to gain the more generous standard.

The *Jackson* holding provides prosecutors with an added inducement not only to delay CPL section 440.10 hearings, but to withhold prior statements altogether. This is the very type of behavior that the *Rosario* doctrine was designed to prevent. *Jackson*'s promise of a more friendly standard of review for prosecutors who withhold statements or fail to comply diligently with discovery portends inevitable disaster for at least some future defendants. But, as is the case with undiscovered *Rosario* violations, only the prosecution will know for sure.

Of course, *Rosario* violations occur for reasons other than the intentional withholding of known documents. For example, the prosecution might have no knowledge of police reports or related documentation as to a prospective witness and no immediate way to recognize that an error had been committed.[250] Less convincingly perhaps, the prosecutor may possess

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[248] "In the 31 years since *Rosario* was decided, this case is the first before this Court to raise a *Rosario* violation in the context of a CPL 440.10 brought motion after direct appeal was completed." *Jackson,* 78 N.Y.2d at 648, 585 N.E.2d at 801, 578 N.Y.S.2d at 489.

[249] If the court meant to assert that there would continue to be very few similar cases reaching the Court of Appeals after *Jackson* it probably would be correct. But that would only be because *Jackson* was dispositive of the issue, not because CPL § 440.10 hearings for Rosario violations on a post-appeal basis will continue to be as rare as before *Jackson.* Indeed, the prosecution can only benefit by delaying such hearings until the appeal has been heard.

[250] The validity of the lack of knowledge argument is case-specific. In certain

the statements but believe they are not *Rosario* material.[251] It would be reductive to say that the purpose of the per se standard was simply to prevent a prosecutor who was willing to withhold evidence from doing so. As the court has stated, the focus of the *Rosario* rule is to provide the defendant with the prior statements before trial. If the prosecution fails to do this, the defendant is not being accorded what is needed to mount a fair defense.[252]

The court also was concerned, however, with the possibility of prosecutorial misconduct. In *People v. Vilardi*,[253] the court touched on the purpose of the *Rosario* doctrine stating that "in a related area, we have found our State concerns for fairness and prosecutorial misconduct to be of such paramount importance that we have imposed a rule of automatic reversal for nondisclosure."[254] Thus, the court found

> a backward-looking, outcome-oriented standard of review that gives dispositive weight to the strength of the People's case clearly provides diminished incentive for the prosecutor, in first responding to discovery requests, thoroughly to review files for exculpatory material or to err on the side of disclosure where exculpatory value is debatable.[255]

The facts in *Jackson* illustrate the lengths that some prosecutors are willing to go to not only defend the *Rosario* error, but to perhaps knowingly commit the initial violation. The assistant district attorneys who prosecuted Jackson failed to turn over prior statements by a star witness who indicated that he did not believe that the fire had been a result of arson.[256] These statements had been made directly to a prose-

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cases prosecutors very well may be unaware that a police officer who is testifying for the state has made certain reports which were not turned over to the prosecutors. For example, the police had a policy at one time of writing reports that they would later use to brief commanding officers for high profile cases. These reports usually were not turned over to the district attorney's office and could have constituted *Rosario* violations. McKinley Jr., *supra* note 7, at B3. But, the more boundless argument that the prosecutors cannot reasonably be expected to know what material is in existence as a general rule already has been discounted by the Court of Appeals. *See infra* note 264 and accompanying text.

[251] *See supra* text accompanying note 56.

[252] *See, e.g.*, People v. Jones, 70 N.Y.2d 547, 517 N.E.2d 865, 523 N.Y.S.2d 53 (1987).

[253] 76 N.Y.2d 67, 555 N.E.2d 915, 556 N.Y.S.2d 518 (1990).

[254] *Id.* at 76, 555 N.E.2d at 919, 556 N.Y.S.2d at 522.

[255] *Id.* at 77, 555 N.E.2d at 915, 556 N.Y.S.2d at 523.

[256] People v. Jackson, 154 Misc. 2d 718, 722-23, 593 N.Y.S.2d 410, 412-13 (Sup.

cutor who later testified at the CPL section 440.10 hearing that he had destroyed his notes of those interviews with the investigators.[257] Moreover, he also testified to doing so as a normal matter of course.[258] Additional internal memoranda dealt directly with the fire marshal's testimony.[259] In none of these instances could ignorance of the materials' existence be claimed. In addition, the *Rosario* rule is not an arcane, little-used legalism. The prosecutors were not new to their jobs and must have been well-versed in their official discovery responsibilities. Hence, it is unlikely that these omissions or failure to disclose were completely accidental.

Despite the extent and exculpatory nature of the *Rosario* violations, Erick Jackson discovered this exculpatory evidence by sheer luck.[260] Had Robert Sullivan's clients settled with Waldbaum's and the city at an earlier date, Sullivan might never have come across these documents and Jackson would still be serving his life sentence.[261] One can only speculate as to how many other violations have been committed in other cases because a prosecutor withheld *Rosario* material, inadvertently or intentionally, without the error being discovered. As a matter of inductive reasoning, if the prosecution was willing to go to such lengths to convict Erick Jackson, it is inevitable that other, similar violations have also occurred. Furthermore such flagrant violations took place despite the potential for a per se reversal. It appears self-evident that weakening the per se standard would only result in a dilution of the compliance component of *Rosario* and encourage greater disregard for prosecutorial discovery obligations.

The per se standard also prevents inadvertent violations more effectively than does the harmless error standard. For obvious reasons, prosecutors have decried these per se standard as too severe and administratively taxing. Between the

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Ct. Kings County 1992); *see also supra* text accompanying notes 101-04, 169.

[257] 154 Misc. 2d at 731, 593 N.Y.S.2d at 419.

[258] *Id.* Interestingly enough, such a comment could point to countless *Rosario* violations committed over the prosecutor's career.

[259] *Id.* at 724, 593 N.Y.S.2d at 414.

[260] A secondary argument to be made in favor of the pre-*Jackson*, *Rosario* doctrine is the limited discovery rules in criminal cases. In essence, Erick Jackson was saved by the more liberal civil discovery rules.

[261] Hoffman, *supra* note 7, at A29.

police reports, witness statements, and assorted law enforcement reports and miscellaneous summaries, criminal trials unquestionably can generate tremendous amounts of paperwork. But, if compiling *Rosario* material is indeed a burden, that burden must rest with the prosecution, since it is the only party with the ability to provide the defendant with the appropriate documentation. The Court of Appeals made its view on this point clear in *Ranghelle*, stating "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."[262]

Ultimately, *Rosario* violations occur only when the prosecution fails to hand over prior statements and information related to its prospective witnesses.[263] Given that reversals stem from their own actions, prosecutorial complaints over the per se standard are unconvincing. These complaints are further undermined by how easily prosecutors can comply with *Rosario*. As the court recently noted in *People v. Banch*, "the difficulty is not with the *Rosario* doctrine but with the People's seeming lack of care in discharging their discovery obligation."[264]

The Court's statement indicates that the prosecution does not always take due care to sufficiently gather *Rosario* documentation or release the materials to defense counsel.[265] These occasional failures sometimes may be self-remedying through late compliance which discloses the material at trial

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[262] People v. Ranghelle, 69 N.Y.2d 56, 64, 503 N.E.2d 1011, 1016, 511 N.Y.S.2d 580, 585 (1986). At least one member of the Court of Appeals believes that the per se standard places too great a burden on the state. According to Judge Bellacosa, the per se standard "'plants an uncertainty into every tried criminal case. It is a law enforcer's nightmare . . . .'" People v. Banch, 80 N.Y.2d 610, 625, 608 N.E.2d 1069, 1078, 593 N.Y.S.2d 491, 500 (1992) (Bellacosa, J., dissenting) (quoting his dissent in People v. Jones, 70 N.Y.2d 547, 557, 517 N.E.2d 865, 872, 523 N.Y.S.2d 53, 59-60 (1987)) (citations omitted).

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

[264] *Banch*, 80 N.Y.2d at 621, 608 N.E.2d at 1076, 593 N.Y.S.2d at 498.

[265] In addition, prosecutors may occasionally look to circumvent *Rosario* altogether. In *Consolazio*, the prosecutor admitted that he kept the witnesses' signatures from being affixed to their questionnaires to avoid the *Rosario* requirement. People v. Consolazio, 40 N.Y.2d 446, 454, 354 N.E.2d 801, 805, 387 N.Y.S.2d 62, 66 (1976).

without necessarily triggering a reversal.[266] The possibility that the material may be exempt from *Rosario* because it is duplicative also provides a disincentive for due diligence.[267] The end result is that even with the per se standard, and presuming the good faith of prosecutors, prosecutorial compliance with *Rosario* is far from automatic.

The *Jackson* holding creates a new window of escape for prosecutors who have not complied with *Rosario*. Had the court simply applied the assumption of prejudice to *Rosario* violations as it had done previously,[268] the People's obligations under *Rosario* would not have changed. But, basing the standard of review of a case on its chronological position will have immediate consequences on prosecutorial strategy. No longer relegated to arguing that the statements are outside the scope of *Rosario* or qualified as duplicative equivalents, the prosecution now may simply wait out the appeal. If successful, their violation, previously substantial enough to merit automatic reversal, suddenly becomes harmless error unless the defendant can show otherwise.[269]

Thus, the long-term effect of the *Jackson* holding does not actually address finality or issues of efficiency. Rather, it promotes outcome-derivative thinking. Prosecutors, already willing to risk per se reversal for failure to meet their "ethical and professional obligations,"[270] are now presented with the opportunity to transform prosecutorial error into a meaningless "technical error."[271] Trial judges no longer will look simply for the existence of the error, but instead will weigh the evidence to determine whether the error could have possibly changed

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[266] See *supra* notes 65-66 for a comparison of delay and failure.

[267] The possibility of avoiding full disclosure may periodically lead to a balancing test for some prosecutors. On one side is the possible damage the defense can wreak if the material is provided, and on other is the potential for the violation to be discovered. This is certainly not meant to imply that prosecutors as a whole seek to avoid discharging their obligations, but where there are legitimate loopholes in the *Rosario* requirement, it should not be surprising that the pressure to win at trial, coupled with the competitive nature of the adversarial system, may lead to the occasional "error" in compliance.

[268] *See* People v. Jones, 70 N.Y.2d 547, 517 N.E.2d 865, 523 N.Y.S.2d 53 (1987).

[269] People v. Jackson, 78 N.Y.2d 638, 585 N.E.2d 795, 578 N.Y.S.2d 483 (1991).

[270] People v. Vilardi, 76 N.Y.2d 67, 555 N.E.2d 915, 556 N.Y.S.2d 518 (1990) (citations omitted).

[271] People v. Banch, 80 N.Y.2d 610, 626, 608 N.E.2d 1069, 1079, 593 N.Y.S.2d 491, 501 (1992) (referring to *Rosario* violations as "technical errors").

the outcome of the trial. The lack of a bright line rule, coupled with the inherently speculative nature of assessing prejudice in *Rosario* violations, will lead to more haphazard, post-hoc arbitrary remedies. The unfortunate consequence is that while *Jackson* does not necessarily spell the end of *Rosario*, it certainly is a significant step backwards in protecting the right of defendants to have fair and proper access to the materials necessary to help insure a fair trial.[272]

D. Jackson *and the Lower Courts: The Effect of Decentralization*

At first glance, the *Jackson* exception appears to present an unambiguous rule that lower courts can easily follow. The *Jackson* court's holding specifically states that when a defendant makes a CPL section 440.10 motion for a *Rosario* violation and his direct appeal has been exhausted, the motion must be reviewed under a harmless error analysis.[273] Although *Jackson* seemingly posits a bright line rule for when

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[272] The dissent in *Jackson* criticized the majority opinion as marking, for all intents and purposes, the end of *Rosario*. The dissent reasoned that if *Jackson* would require CPL § 440.10 motions based on *Rosario* violations to satisfy harmless error tests, the only types of violations that would pass judicial muster were those where the withheld material was clearly contradictory. Therefore, according to the dissent, the material also would be exculpatory and would actually be *Brady* material. The dissent also read the majority opinion as holding that all such CPL § 440.10 motions were to receive the harmless error test, not just those decided in post-appeal cases. *Jackson*, 78 N.Y.2d at 658-59, 585 N.E.2d at 808, 578 N.Y.S.2d at 496 (Titone, J., dissenting). Although there is some merit to this view, it is somewhat inaccurate. While it most probably will prove to be true that many prior statements will fall under the *Brady* umbrella, some of the post-*Jackson* cases indicate that some courts will set a fairly low prejudice requirement. *See, e.g.*, People v. Banch, 80 N.Y.2d 610, 617, 608 N.E.2d 1069, 1073; 593 N.Y.S.2d 491, 495 (1992). Consequently, there will be, or at least can be, cases where the material is not sufficiently exculpatory to meet *Brady* standards but can still clear the *Jackson* hurdle. In addition, the *Jackson* dissent's fear that the phrasing of the majority in *Jackson* would be taken to mean that the appellate review time-line was only dicta has been proven unfounded, at least for now, by a subsequent case. *See id.* at 615, 608 N.E.2d 1072, 593 N.Y.S.2d 494 (*Rosario* violations subject to harmless error analysis in post-appeal setting only).

[273] As the court stated: "Thus, we hold that a defendant who has exhausted direct appeal and who seeks to raise a *Rosario* claim by way of a CPL 440.10 motion will be required to make an actual showing that prejudice resulted from the prosecution's failure to turn over *Rosario* material." *Jackson*, 78 N.Y.2d at 641, 585 N.E.2d at 797, 578 N.Y.S.2d at 485.

either standard of review must be applied, its failure to define what constitutes sufficient prejudice to warrant a reversal has surrendered judicial consistency to decentralized, subjective discretion.[274] This leaves the lower courts in the position of applying harmless error tests without any guidelines from the Court of Appeals. Negating one standard without giving more than a passing nod to its replacement inevitably leads to subjective holdings, unpredictability, and dissimilar treatment for similarly situated defendants.

This lack of guidance has created two distinct, but related problems. The first concerns the burden of proof the defendant must satisfy to have his motion granted. While *Jackson*, and subsequently, *Banch*, described the standard as one of "reasonable possibility" that the failure to disclose the material "contributed to the verdict,"[275] both cases fail to articulate a clear and useful definition of this standard. The second problem is one encountered by both the trial and appellate courts attempting to measure the level of prejudice suffered. Although these two issues appear virtually identical at first, they actually address different aspects of the harmless error test.[276]

1. The Court of Appeals' Definition of Prejudice

The point of confusion stems from the court's oft-stated opinion that harmless error cannot be applied to *Rosario* because of the nature of the violation. The *Jackson* majority now says that while this is still true,[277] the lower courts must ap-

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[274] The lack of uniformity is a direct result of the mixed messages inherent in *Jackson*. On one hand, *Jackson* indirectly affirmed the *Rosario* doctrine, which says that harmless error cannot be applied to *Rosario* violations. Yet, on the other hand, *Jackson* proceeded to require the courts to apply the test anyway. *Id.* at 648, 585 N.E.2d at 801, 578 N.Y.S.2d at 489.

[275] *Jackson*, 78 N.Y.2d at 649, 585 N.E.2d at 802, 578 N.Y.S.2d at 490.

[276] The first issue, defining both "possibility" and "contributed to the verdict," is in fact distinct from the one involving the quantum of evidence, although there is of course some overlap between the two. Defining "possibility of contributing to the verdict" requires an examination of the value of the evidence in terms of how much weight the jury might have given it. This becomes increasingly difficult when the previously non-disclosed material relates to a more tangential witness. The second question concerning the degree of harm actually suffered by the defendant entails an examination of the potential use-value of the undisclosed material rather than what value the jury had assigned to this particular bit of testimony. Both analyses involve the same material, but to slightly different ends.

[277] The majority does not explicitly say that this is so. But, in the absence of

ply it anyway.[278] Thus, a determination as to what use might have been made of previously undisclosed material or the impact it may have had on the jury, is remanded to the speculation of the trial court. Assuming for the moment that reasonable people can disagree over such hypothetical suppositions, the inevitable result of *Jackson* is that the outcome of a defendant's motion turns upon not just the facts at hand, but who hears the motion as well. Thus, not only will there be an unavoidable decline in consistency and predictability in determining future *Rosario* violations, but, given the volatility of the debate on *Rosario* and the widely contrasting judicial opinions on its rational legitimacy,[279] the disparity between different courts' rulings may be quite severe.

In a recent decision, the Court of Appeals indicated that it viewed *Jackson* as a narrow exception to *Rosario* rather than a more substantial reassessment. In *People v. Banch*, the court held that pre-trial hearings were subject to the same *Rosario* standards as trials.[280] Addressing *Rosario*, the court stated, "[u]nderscoring the seriousness of the *Rosario* obligation, we have recognized only three exceptions to the rule of per se reversal."[281] Two of these exceptions involve materials that could not, or need not, be disclosed.[282] The third exception, *Jackson*, provided for "cases arising on collateral review pursuant to CPL 440.10, after exhaustion of a defendant's direct appeal."[283] The court went on to say that a new trial was required if "the defendant can demonstrate 'a reasonable possibility that the failure to disclose the Rosario material contributed to the verdict.'"[284]

The court's standard of a "reasonable possibility" previous-

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any alternative language, one must assume that the stated principle of the *Rosario* doctrine is still operative.

[278] *See Jackson*, 78 N.Y.2d 638, 585 N.E.2d 795, 578 N.Y.S.2d 483.

[279] *See supra* note 9.

[280] 80 N.Y.S. 610, 608 N.E.2d 1069, 593 N.Y.S.2d 491 (1992).

[281] *Id.* at 616, 608 N.E.2d at 1072, 593 N.Y.S.2d at 494.

[282] The first exception concerns material that is the "duplicative equivalent" of other produced material. The second concerns lost or destroyed material. In the latter instance, the trial court looks to both the degree of prejudice to the defendant and prosecutorial fault in order to impose an appropriate sanction or preclusion. *Id.* at 616-17, 608 N.E.2d at 1072-73, 593 N.Y.S.2d at 494-95.

[283] *Id.*

[284] *Id.*

ly had been a relatively easy standard for the defendant to meet. In *Jackson*, the court elaborated only briefly on the type of standard to be applied. A year earlier, however, Judge Judith Kaye, writing for the court in *People v. Vilardi*,[285] discussed more fully the use of the "reasonable possibility" standard when a defendant had to prove prejudice resulting from a prosecutor's withholding material which was specifically required to be provided to the defense. The court stated that it found "the prosection's failure to turn over specifically requested evidence to be 'seldom, if ever, excusable' and to verge on prosecutorial misconduct."[286] Because of the severity of the violation, the defendant has the burden of proof but is only obligated to meet the threshold of "possibility" rather than the more arduous "probability" standard. Judge Kaye's inclusion of the "possibility" standard in the discussion of the *Jackson* exception in *Banch* infers that the *Rosario* violation is "seldom, if ever, excusable."[287] The *Jackson* majority also used *Vilardi* as its point of reference for the "possibility" standard, further indicating that the lower threshold was intended and that supporting the argument that Judge Kaye's language in *Vilardi* applied equally to *Rosario* violations.[288]

In contrast, Judge Bellacosa dissented in *Banch*, arguing that the reasoning in *Jackson* was persuasive and should have been applied more widely.[289] Bellacosa's dissent derives from his desire to roll back *Rosario* to its original state and to the court's disagreement over *Rosario* generally.[290] This ongoing

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[285] 76 N.Y.2d 67, 555 N.E.2d 915, 556 N.Y.S.2d 518 (1990).

[286] *Id.* at 74, 555 N.E.2d at 918, 556 N.Y.S.2d at 521.

[287] *Id.* at 75, 555 N.E.2d at 916, 556 N.Y.S.2d at 522.

[288] The majority held that a defendant seeking relief through a CPL § 440.10 motion under *Jackson* "must demonstrate a reasonable possibility that the failure to disclose the *Rosario* material contributed to the verdict." One reason for employing this standard, the court stated, was that "it is the standard that is currently in use for *Brady* material." *Jackson*, 78 N.Y.2d at 649, 585 N.E.2d at 802, 578 N.Y.S.2d at 490 (citation omitted).

[289] *Banch*, 80 N.Y.2d at 621-27, 608 N.E.2d at 1076-79, 593 N.Y.S.2d at 498-501. (Bellacosa, J., dissenting).

[290] Judge Bellacosa was not joined in his concurring opinions in *Jones*, 70 N.Y.2d 547, 553, 517 N.E.2d 865, 869, 523 N.Y.S.2d 53, 57 (1987) and *Novoa*, 70 N.Y.2d 490, 499, 517 N.E.2d 219, 225, 522 N.Y.S.2d 504, 510 (1987). It may have been that his opinion was not widely shared. It also may have been that he advocated doing away with the per se standard completely, replacing it perhaps with a open-file discovery process. *Banch*, 80 N.Y.2d at 626-27, 608 N.E.2d at 1079, 593 N.Y.S.2d at 501 (Bellacosa, J., concurring). Such an extreme position may have

dispute intimates why, despite *Banch*'s rather clear language regarding the relatively low levels of prejudice needed to satisfy *Jackson*, some lower courts have applied a more prosecutor-friendly approach in post-*Jackson* cases.[291]

Two related factors may explain this deviation. One is that the court in *Jackson* sent mixed signals concerning its underlying intent. There are certainly statements in the holding that can be construed as applying the *Jackson* exception to post-conviction cases, not just post-appeal cases.[292] It is not surprising that lower court judges who were displeased with the *Rosario* rule before *Jackson* may have seized on this aspect of the holding to authorize a deviation from the *Banch* court's interpretation of *Jackson*. In addition, prosecutors have contended in several cases that whenever a CPL section 440.10 motion is reviewed, it should be scrutinized under the harmless error test since the per se rule only applies to appellate review of direct appeals.[293] This leads to the second factor: judges may take the position that "commonsense limitations" to *Rosario* lead to a broader use of judicial discretion when applying the harmless error test in specific cases.[294]

2. Disparity and Confusion in the Lower Courts

A review of some of the lower courts' post-*Jackson* decisions demonstrate that the contradictory language in *Jackson* has created confusion over the proper standard of analysis. In *People v. Bianco*,[295] for instance, the trial court introduced its

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dissuaded other members of the bench from signing on to his opinions, even if they had agreed that the *Ranghelle* decision might have taken *Rosario* too far.

[291] *See infra* notes 302-06.

[292] The majority stated that, "on postconviction motion, where as we hold today, CPL 440.10 requires a finding that the defendant was prejudiced by the failure to turn over *Rosario* material." *Jackson*, 78 N.Y.2d at 649, 585 N.E.2d at 802, 578 N.Y.S.2d at 490. Taken literally, the above statement obviously would support the argument that *Jackson* does indeed stand for the elimination of the per se standard for all CPL § 440.10 motions.

[293] People v. Robles, 194 A.D.2d 750, 600 N.Y.S.2d 77 (2d Dep't 1993); People v. Townsend, 156 Misc. 2d 494, 593 N.Y.S.2d 956 (Sup. Ct. Kings County 1993); People v. Nikollaj, 155 Misc. 2d 642, 589 N.Y.S.2d 1013 (Sup. Ct. Bronx County 1992).

[294] *Jackson*, 78 N.Y.2d at 644, 585 N.E.2d at 799, 578 N.Y.S.2d at 487.

[295] 153 Misc. 2d 509, 582 N.Y.S.2d 622 (Sup. Ct. Cayuga County), *rev'd*, 183 A.D.2d 284, 591 N.Y.S.2d 287 (4th Dep't 1992).

opinion as one of first impression regarding the *Jackson* rule.[296] The court initially established a relatively low threshold for the "reasonable possibility" test and then determined that this standard had been met.[297] On appeal the court's order granting the motion was reversed.[298] Unlike the trial court, the appellate court believed that the prejudice requirement included a reasonable possibility that the jury would have acquitted the defendant had the *Rosario* material been properly disclosed, rather than a reasonable possibility that the verdict was unduly influenced.[299] The appellate court also ruled that because no contradictory statements were involved in the case at hand, there was no impeachable material, and therefore no prejudice.[300] Thus, the trial and appellate courts disagreed over the interpretation of the harmless error standard itself, and over the definition of impeachable material.[301]

People v. Robles[302] also involved a lack of consensus between the trial and appellate courts. This time the trial judge held that *Jackson* required the court to treat all CPL section

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[296] While it is not completely clear that it was a case of first impression, the court relied on only *Jackson* and pre-*Jackson* cases for support. *Id.*

[297] The court treated "possibility" as meaning "a difference in degree between that which common sense views as likely at all and that which is seen as more likely than not." *Id.* at 515, 582 N.Y.S.2d at 626. In addition, " '[c]ontributing' to a verdict" was defined as "an element of materiality or importance. Not necessarily rising to *sine qua non* status . . . ." *Id.*

[298] People v. Bianco, 183 A.D.2d 284, 591 N.Y.S.2d 287 (4th Dep't 1992).

[299] *Id.* at 288, 591 N.Y.S.2d at 291.

[300] *Id.* Thus, in one of the first cases to be decided in the post-per se period, an appellate court immediately dispensed with the Court of Appeals's long-standing interpretation of impeachable materials. *See* People v. Rosario, 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448 (1961) (stating non-contradictory statements may still have impeachment value).

[301] The intermediate appellate court did not state that it disagreed with the lower court's reading of "contributing to" or "possibility," although it used different language. The appellate court's only stated disagreement is with the degree of prejudice suffered by the defendant. The fundamental problem with the appellate court's treatment of *Bianco*, however, is the court's search for contradictory statements as the linchpin of prejudice. The essential argument in *Rosario* itself is that prior statements can have all sorts of value, even if they do not offer direct contradiction. What use may be made of this material can best be answered by defense counsel, and the results of this usage would be pure conjecture. *See supra* note 39. Hence, any finding based solely on the presence of directly conflicting statements runs counter to the basic tenets of the entire *Rosario* doctrine.

[302] 153 Misc. 2d 859, 583 N.Y.S.2d 138 (Sup. Ct. Kings County 1992), *remanded by* 194 A.D.2d 750, 600 N.Y.S.2d 77 (2d Dep't 1993).

440.10 motions as requiring harmless error analyses, regardless of the status of the defendant's appeal.[303] Although the court found a *Rosario* violation, it did not find sufficient prejudice to warrant a vacatur.[304] The appellate court, however, ruled that the trial court had erred by applying the harmless error test, since *Banch* had determined that as long as the defendant's appeal was pending, the per se standard still applied.[305]

Robles seems to have settled the question concerning which standard of review applies to pre-appeal CPL section 440.10 motions. As indicated by the cases above, however, the investigation into prejudice may still yield conflicting results. For example, the trial judge may find prejudice only to have the appellate court determine that there was none. These contradictory rulings underscore the Court of Appeals' observation that determining the prejudicial impact of a Rosario violation is just too speculative to allow for a harmless error analysis.[306]

Assuming that reasonable people may disagree with the results of the harmless error tests as applied to *Rosario* violations, inevitably judges will be partially influenced by their personal acceptance of one of the principles of *Rosario*.[307] A per se proponent might point to the "speculation" argument

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[303] *Id.* at 861, 583 N.Y.S.2d at 139.

[304] *Id.* at 862, 583 N.Y.S.2d at 140.

[305] *Robles*, 194 A.D.2d 750, 600 N.Y.S.2d 77 (2d Dep't 1993). In an ironic twist, the trial judge in *Robles* was a former assistant district attorney who had been part of the prosecution team in *Jackson*. *See supra* note 171. All things considered, his failure to see any prejudice to the defendant is not astonishing. Nor is his interpretation of *Jackson* particularly surprising, although the latter was not necessarily shared by other members of the bench. In a similar case decided after the CPL § 440.10 motion was denied in *Robles*, but before its reversal, another court considered the same argument. Although it acknowledged the *Robles* decision, the court disagreed with the *Robles* court's conclusion. "Logic dictates . . . that a *per se* standard apply since to require a showing of prejudice at this stage would force the trial court to deny the motion on the very grounds upon which the appellate court must reverse as *per se* error." People v. Nikollaj, 155 Misc. 2d 642, 648, 589 N.Y.S.2d 1013, 1017-18 (Sup. Ct. Bronx County 1992); *see also* People v. Townsend, 156 Misc. 2d 494, 593 N.Y.S.2d 956 (Sup. Ct. Kings County 1993) (applying per se error for CPL § 440.10 motion hearing because defendant had not yet perfected direct appeal).

[306] *See supra* notes 73-77 and accompanying text.

[307] 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448, *cert. denied*, 368 U.S. 866 (1961).

articulated in *People v. Jones*,[308] as well the compliance component, to justify granting a lower standard for the defendant. Alternatively, a judge may believe that where there had been convincing evidence at trial, and when the *Rosario* material is not clearly exculpatory, granting the CPL section 440.10 motion would be tantamount to freeing a guilty party on a technical violation. If the issue is determined at the judge's discretion, it is unlikely that he or she would choose to do so.[309]

Ultimately, the question is whether a particular judge would be willing to reverse a conviction for someone who may very well be guilty when there is some evidence that, absent the violation, the defendant "possibly" could have been acquitted. This is more of a policy decision than a strict question of jurisprudence and legal reasoning. These decisions, no matter how objective the judges may believe them to be, are by definition subjective. As Judge Titone notes in his dissent in *Jackson*, "[t]he term prejudice . . . is fraught with ambiguity."[310] Such abstruseness makes disparate judgments unavoidable, even amongst the most well-intentioned people.[311]

Thus, by allowing the continued use of the harmless error analysis, the Court of Appeals has sanctioned dissimilar results for similar cases. The happenstance selection of a judge or judges may be the determining factor in cases where previously random results automatically had been precluded. This

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[308] 70 N.Y.2d 547, 517 N.E.2d 865, 523 N.Y.S.2d 53 (1987).

[309] In this scenario the *Jackson* dissent's fears regarding the de facto end of *Rosario* are closest to being realized. Some courts may simply refuse to grant reversals unless convinced that the defendant has a reasonable possibility of being innocent, as opposed to being "not guilty." This is a problem inherent in having already been convicted. The defendant may have his motion denied because the court believes that the defendant committed the crime and so does not deserve to benefit from an incidental error by the prosecution. Of course, it is important to remember that Erick Jackson was assumed to be guilty after his conviction and, despite the overwhelming evidence to the contrary, there are undoubtedly those who still believe that he was in fact guilty.

[310] *Jackson*, 78 N.Y.2d at 653, 585 N.E.2d at 804, 578 N.Y.S.2d at 492.

[311] This is not to say that a judge is likely to deny a motion in contravention of the obvious facts. Where there is both strong evidence of guilt and a *Rosario* violation that may have affected the verdict, however, a judge may be inclined to deny the motion, even if the defendant's claim meets the standard alluded to in *Jackson* and *Banch*, because she believes that there is still too much evidence of guilt to warrant a new trial. This possibility explains, in part, why the Court of Appeals may have removed judicial discretion from the equation in People v. Rosario, 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448 (1961).

disparity in the application of the law demands that the Court of Appeals abandon *Jackson* and confront *Rosario* directly.[312]

IV. CONCLUSION

People v. Jackson should have been a simple case for the Court of Appeals. The *Rosario* cases had explicitly and repeatedly held that failure to provide prior statements of government witnesses automatically prompted reversal. The *Jackson* decision is notable in that it marks the first time in over thirty years that the court refused to apply that principle. If *Jackson* stood for nothing else, it indicated a new willingness by the court to put aside the reasoning behind *Rosario* when the results troubled the court. Defense advocates may be worried by the implications in *Jackson* and what it augers for *Rosario*'s future.

But *Jackson* also represents another policy issue—one that another court, perhaps at another time in history, may have relied on for a diametric holding. In *Jackson*, six firefighters died tragically. The fire department's claim of arson led to extensive headlines and political pressure on law enforcement agencies to produce a conviction. Once the prosecution moved against Erick Jackson they were unable to turn back. As exculpatory evidence developed, it was buried. The intentional and deplorable misconduct of certain prosecutors involved in the case illustrates precisely why compliance is an issue in criminal trials. Moreover, it demonstrates the manifestly unjust consequences that abuse of power can wreak.

While *Jackson* was an exceptional case, it stands for the idea that in the highly politicized and adversarial world of crime and criminal prosecution, there must be some deterrent to prosecutorial negligence or impropriety. For, as *Jackson* so clearly establishes, when the prosecution is determined to convict a person who is without the financial resources to pursue a thorough, private investigation, there is no check on their authority, and no institution to prevent abuse. Perhaps the ma-

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[312] Given that the author of the majority opinion in *Jackson* has been removed from the New York Court of Appeals, and one of the dissenters has resigned, it remains to be seen what direction the court would take if it were to revisit this issue in the future.

jority was correct in seeing *Jackson* as a contest between competing policies. A "right sense of justice," however, demands a different outcome.

Michael Lumer