

Case Sequence:

New York's Rosario Rule

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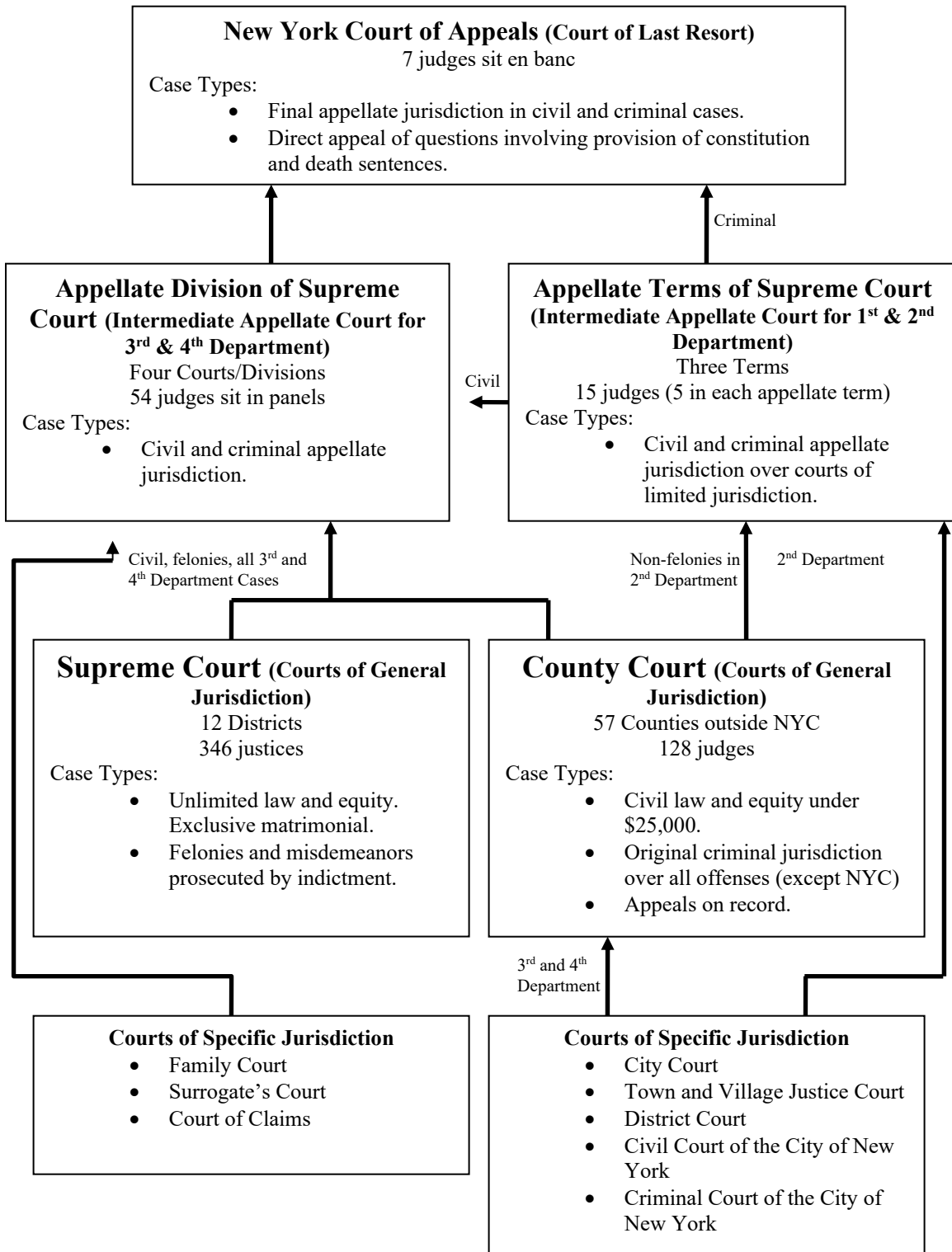
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New York State Court Chart



People v. Rosario

Court of Appeals of New York

January 19, 1961, Argued ; March 23, 1961, Decided

No Number in Original

Reporter

9 N.Y.2d 286 *; 173 N.E.2d 881 **; 213 N.Y.S.2d 448 ***; 1961 N.Y. LEXIS 1406 ****; 7 A.L.R.3d 17

Judges: Chief Judge Desmond and Judges Van Voorhis and Foster concur with Judge Fuld; Judge Froessel concurs for affirmance in a separate [****4] opinion in which Judges Dye and Burke concur.

Opinion by: FULD

Opinion

[*287] [**882] [***449] The appellant Luis Rosario stands convicted of murder in the first degree stemming from the death of a [*288] restaurant proprietor shot during the course of a robbery which the appellant and two accomplices committed and, on the record before us, there can be no possible doubt of his guilt. ¹ Indeed, he does not contest the sufficiency of the evidence, but he does raise a question which involves an important problem in the administration of the criminal law and merits our attention and consideration. It is the appellant's contention that the trial judge committed reversible error in refusing to turn over to defense counsel, for cross-examination purposes, statements given some time before the trial by three prosecution witnesses.

[****5] One of the three, Basilio Otero, was an eyewitness to the robbery. He had been about to leave the restaurant when the appellant, gun in hand, ordered him to the rear of the shop and into the lavatory; at the same time, he saw the other two defendants (who had been with the appellant) push the proprietor toward the rear. From behind the closed door, he heard a shot and, after a few minutes, came out to find the robbers gone. The second witness was Josephine Rodriguez, a girl friend of one of the other defendants; it was she to whom the appellant gave his gun after the robbery, informing her that he and the others had held up a man in a restaurant, taken \$ 75

from him and "shot him" when he refused to give them more. The third witness was the appellant's own girl friend, Jane Thompson, and to her the appellant admitted the "shooting", stating that "we had three guns and we shot together".

After each of these three witnesses had concluded his or her direct testimony, defense counsel requested that the witness' prior statements be turned over to them for possible use on cross-examination. Instead, the statements were submitted to the trial judge for his inspection. After reading [****6] each statement, he announced that he found some "variances" between [***450] statement and testimony and told defense counsel that they might examine and use only those portions of the statement containing the variances. In other words, he refused the request that the entire statement be given to the defense so that counsel might "determine for themselves" whether any other portions would be helpful upon cross-examination.

[*289] When it appears that a witness for the prosecution has made a statement, to police, district attorney or grand jury, the attorney for the defendant, naturally enough, desires to see it in the hope that it may assist him to impeach and discredit that witness. The question then arises whether the statement should forthwith be delivered to the defense or whether it should be handed over only if it is found, on inspection by the court, to contain material at variance with the witness' testimony in court. The United States Supreme Court has held that a defendant "is entitled to [**883] inspect" any statement made by the Government's witness which bears on the subject matter of the witness' testimony (see *Jencks v. United States*, 353 U.S. [****7] 657, 667, 668), whereas in New York we

¹The jury found one of the appellant's codefendants guilty of murder in the first degree, with a recommendation that he be imprisoned for life (Penal Law, § 1045-a); his appeal is now pending in the Appellate Division. As to the other defendant, the jury failed to agree on a verdict.

have allowed the defendant to see and use the statement only if it contains matter which is inconsistent with the testimony given by the witness from the stand. (See *People v. Walsh*, 262 N. Y. 140, 149; *People v. Schainuck*, 286 N. Y. 161; *People v. Dales*, 309 N. Y. 97; *People v. Bai*, 7 N Y 2d 152, 155.)

The procedure to be followed turns largely on policy considerations, and upon further study and reflection this court is persuaded 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. (Cf. U. S. Code, tit. 18, § 3500.)

A pretrial statement of a witness for the prosecution is valuable not just as a source of contradictions with which to confront him and discredit his trial testimony. Even statements seemingly in harmony with such testimony may contain matter which will prove [****8] helpful on cross-examination. They may reflect a witness' bias, for instance, or otherwise supply the defendant with knowledge essential to the neutralization of the damaging testimony of the witness which might, perhaps, turn the scales in his favor. Shades of meaning, stress, additions or omissions may be found which will place the witness' answers upon direct examination in an entirely different light. As the United States Supreme Court has so well observed, "Flat contradiction between the witness' testimony and the version of the events given [previously] * * * is not the only test of [*290] inconsistency. The omission from the reports of facts related at the [***451] 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 v. United States*, 353 U.S. 657, 667, *supra*.)

Furthermore, omissions, contrasts and even contradictions, vital perhaps, for discrediting a witness, are certainly not as apparent to the impartial presiding judge as to single-minded counsel for the accused; the latter is in a far better [****9] position to appraise the value of a witness' pretrial statements for impeachment purposes. Until his attorney has an opportunity to see the statement, it is asked, how can he effectively answer the trial judge's assertion that it contains nothing at variance with the testimony given or, at least, useful to him in his attempt to discredit such witness?

It is true that defense counsel will undoubtedly be in a position to cross-examine at greater length than without such pretrial statements. But there is nothing wrong in

this. It does not mean that the defense will be able to go on a tour of investigation seeking generally useful information. Our decision pre-supposes that the statement relates to the subject matter of the witness' testimony, that it is to be used for impeachment purposes only after direct examination and that the necessities of effective law enforcement do not require that the statement be kept secret or confidential. In any event, the extent of cross-examination is subject to control by the trial judge. In short, since "the State has no interest in interposing any obstacle to the disclosure of the facts" and since the "defense should be given the benefit" of [****10] any "information that can legitimately tend to overthrow the case made for the prosecution, or to show that it is unworthy of credence" (*People v. Davis*, 52 Mich. 569, 572, 573-574; [**884] *People v. Walsh*, 262 N. Y. 140, 150, *supra*), the defendant is entitled to see and use the entire statement. Otherwise, there is always a danger that something will be withheld from defense counsel which may assist him in impeaching the prosecution's witness.

It is our conclusion, therefore, that the trial judge should have turned over to the defendant the requested statements in their entirety. In this instance, though, we deem it not amiss to consider whether the ruling which he made prejudiced the [*291] defendant, whether, in other words, there was a rational possibility that the jury would have reached a different verdict if the defense had been allowed the use of the witness' prior statements. (See *People v. Kingston*, 8 N Y 2d 384, 387; *People v. Jackson*, 7 N Y 2d 142, 145; *People v. Mleczo*, 298 N. Y. 153, 162-163.) We believe not. On the record before us, there can be no possible question of the appellant's guilt, even apart from the [****11] testimony of the witnesses whose statements had been requested and refused. Not only was there evidence [***452] of admission to friends before and after the fatal robbery, not only was there proof of a confession to the district attorney, not only was there evidence of flight, but there was ballistics testimony indicating that the lethal bullet had issued from the appellant's gun. And, of the utmost significance, examination of the prior statements discloses that the few variances contained in them were of a most inconsequential character.

This court is exceeding slow to disregard error as harmless under section 542 of the Code of Criminal Procedure, particularly in a capital case. However, in the one before us, we are as convinced as judges may ever be, in view of the overwhelming proof of guilt and the absence of any real inconsistency between prior statement and trial testimony, that the jury would not have decided the case differently even if defense counsel had had the use of the statements in question. In other words, it may not be said

that any substantial right of the appellant was prejudiced by the trial court's erroneous ruling.

The judgment of conviction should [****12] be affirmed.

Concur by: FROESSEL

Concur

Froessel, J. (concurring). I agree for affirmance, but not under section 542 of the Code of Criminal Procedure.

For many years it has been the rule in this State "that where a witness in a criminal case testifies to having made * * * a statement and the statement is in court and an inspection of it by the presiding judge reveals contradictory matter, *its use for cross-examination on the question of credibility* may and usually should be permitted" (*People v. Walsh*, 262 N. Y. 140, 149-150, emphasis supplied; see, also, *People v. Schainuck*, 286 N. Y. 161; *People v. Dales*, 309 N. Y. 97, 102-103; *People v. Bai*, 7 N Y 2d 152, 155).

[*292] In *Walsh* we did not say that the prosecutor was required to turn over the entire statement. In *Schainuck* we recognized that the "use" of the statement was for the purpose of comparing the "conflicting versions", and spreading them both before the jury. It has thus been the invariable practice to give to a defendant access to the statement of a People's witness only insofar as it contains contradictory matter. Indeed there can be no doubt what we meant in the *Walsh* [****13] case for, as recently as a little more than a year ago, in *People v. Bai* (*supra*), we stated that on the new trial a witness' statement, which conflicted in some respects with his testimony at the trial, "might well be released *in part* to the defendant under *People v. Walsh* (262 N. Y. 140)" (emphasis supplied). That is precisely what was done here.

[**885] I see no good reason why we should now change the long-standing *Walsh* rule, so that, as the majority hold, even "statements seemingly in harmony with such [witness'] testimony" must be surrendered to defense [***453] counsel because they may somehow "prove helpful on cross-examination". In a criminal action, the People have the burden of overcoming the presumption of innocence which rightfully belongs to a defendant and proving his guilt beyond a reasonable doubt. The courts have no right to add to the People's burden the necessity of

giving defense counsel ammunition in a game of semantics.

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 [****14] and immaterial variances in a prior statement of a witness, and

skillfully playing on them before the jury. Such a practice would undoubtedly prolong trials and produce confusion, without in any way promoting the ends of justice.

The rule as followed in New York State is a sound one and should not be abandoned. While we should always remember that a defendant's rights must be zealously safeguarded, we should not forget that the rights of the People of the State ought not be whittled away by judicial decision. The majority suggest that an impartial presiding Judge might not be alert to the latent possibilities of an item in a statement, and only the defense is adequately equipped to decide as to the effective [*293] use of a witness' pretrial statement. We are not here concerned with a defense attorney's right to exploit a witness' pretrial statement except insofar as it affects the defendant's right to a fair trial and the interests of justice. I refuse to concede that a Trial Judge is less able than a defendant's attorney to see to it that this right is accorded the defendant.

Despite the majority's doubt about the capabilities of a Trial Judge, and their fear "that something [****15] will be withheld from defense counsel which may assist him in impeaching the prosecution's witness", it nevertheless votes to affirm the conviction in this capital case. It holds that we as 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? Should he err, the appellate courts may correct him, as in any other case of error.

Since the rule enunciated in *People v. Walsh* (*supra*), and reaffirmed in *People v. Bai* (*supra*), is a sound one, which in nowise deprives defendant of a fair trial, we should not change it now. The court below faithfully followed the rule we laid down, and accordingly we should affirm.

People v. Consolazio

Court of Appeals of New York

May 6, 1976, Argued ; July 6, 1976, Decided

No Number in Original

Reporter

40 N.Y.2d 446 *; 354 N.E.2d 801 **; 387 N.Y.S.2d 62 ***; 1976 N.Y. LEXIS 2918 ****

Judges: Jones, J. Chief Judge Breitel and Judges Jasen, Gabrielli, Wachtler, Fuchsberg and Cooke concur.

Opinion by: JONES

Opinion

[*451] [**803] [***64] On this appeal, we agree with defendant that under principles of double jeopardy as enunciated by the United States Supreme Court the People were barred from appealing to the Appellate Division from the trial order dismissing certain counts of defendant's indictment. We reject, however, defendant's contentions that because his challenge to the jury panel was denied and because he was denied disclosure of prosecution notes of pretrial witness interrogations, reversible error was committed with respect to those counts on which he was found guilty.

During the years 1968 to 1971, appellant, an attorney, approached numerous individuals in his community with proposals that they invest in various schemes yielding quick, high interest returns. Many of these people, who had known appellant as an attorney, friend, customer, neighbor or employee, gave him money; no significant portion of any [****13] of the "invested" funds was ever returned. In consequence appellant was indicted on 57 counts, 44 for grand larceny in the second degree and 13 for grand larceny in the third degree. At trial in Nassau County Court one count was severed; 50 counts were dismissed at the conclusion of the People's case, nine with [**804] the consent of the prosecutor; and appellant was convicted on the remaining six counts. Cross appeals were taken to the Appellate Division. On appellant's appeal the six convictions were affirmed. On the People's appeal the Appellate Division reinstated 39 of the 41 counts which had been dismissed over the People's objection, and the dismissal of the other two counts was affirmed.

We first deal with the appeal taken to the Appellate

Division by the People from the trial order of dismissal. Under our decision in *People v Brown* (40 NY2d 381) such appeal was barred under the Supreme Court's formulation of the right [*452] not to be placed twice in jeopardy. Accordingly, the order of the Appellate Division must be modified, and the case remitted to that court for dismissal of the appeal taken by the People to that court.

As to the six counts on which [****14] the jury returned a verdict of guilty, appellant advances several contentions that errors committed during his trial require reversal of his convictions thereon. We conclude that none of such contentions is of sufficient substance to warrant reversal; some, however, merit brief attention.

It is first contended that the prosecutor's failure to turn over certain "worksheets" [***65] compiled in preparation for trial and the trial court's acquiescence in such refusal constituted reversible error. These worksheets were in the form of unsigned questionnaires containing printed questions (e.g., "When did you first meet Mr. Consolazio?" "Who introduced you to him?" and "How did it come about that you invested with him?") and handwritten notes made by the interviewing officer that capsulized the witnesses' answers thereto. During trial defense counsel requested that the prosecution turn over (a) all exculpatory material as required under *Brady v Maryland* (373 U.S. 83) and *People v Simmons* (36 NY2d 126), and (b) all prior statements made by prosecution witnesses as required under *People v Rosario* (9 NY2d 286, mot for rearg den 9 NY2d 908, cert den 368 U.S. 866, mot for rearg [****15] den 14 NY2d 876, mot for rearg den 15 NY2d 765). While

the prosecutor turned over all Grand Jury testimony of each of the various witnesses, existence of the worksheets was not at that time revealed. When it came out later in the trial that such question-answer sheets did exist, defense counsel demanded their disclosure under both a *Brady* and a *Rosario* rationale. The trial court found that the worksheets did not fall within *Rosario* in that they constituted a person's "conception" of what a prospective witness told him rather than the "statements" of such witness. As to the *Brady* branch of the defense motion, the court refused to examine all the worksheets as requested by defense counsel but rather accepted the prosecutor's representation that nothing contained in the questionnaires constituted exculpatory material.

At the Appellate Division that court itself examined the worksheets and concluded that "even assuming that they should have been made available to [the defense], no prejudice [*453] resulted from the failure to so make them available". We concur in result.

With respect to the *Brady* aspect of appellant's argument, we agree that it was error [****16] for that court not itself to have examined the worksheets to determine whether, as claimed by the defense, such worksheets contained exculpatory material. While a prosecutor must of necessity "have *some* discretion in determining which evidence must be turned over to the defense" (*People v Fein*, 18 NY2d 162, 171-172; emphasis in original), where, as here, there was some basis for argument that material in the possession of the prosecutor might be exculpatory, deference to [**805] the prosecutor's discretion must give way, and the duty to determine the merits of the request for disclosure then devolves on the trial court. We have, however, examined the worksheets, as did the Appellate Division, and we agree with that court that nothing contained therein constituted exculpatory material. Thus, while we agree that the trial court erroneously relied on the representations of the prosecutor as to the nonexistence of exculpatory material, we conclude that such error was harmless. In so concluding, we find it to be of critical significance that the error related to the procedure by which it was determined that the worksheets contained no exculpatory material, not to the determination [****17] itself.

With respect to the *Rosario* branch of defendant's argument, we hold that the trial court erroneously concluded that the worksheets did not constitute "prior statements" of prosecution witnesses within the contemplation of the rule of that case. The character of a statement is not to be determined by the manner in which it is recorded, nor is it changed by the presence or absence of a signature. Thus it has been held that a witness' statement in narrative form made in preparation for trial by an

Assistant District Attorney in his own hand is "a record of a prior statement by a [***66] witness within the compass of the rule in *People v. Rosario* * * * and therefore not exempt from disclosure as a 'work product' datum of the prosecutor". (*People v Hawa*, 15 AD2d 740, affd 13 BY2d 718; and see *People v Horton*, 19 AD2d 80, 25 AD2d 720, affd 18 NY2d 355; cf. *People v Butler*, 33 AD2d 675, affd 28 NY2d 499.) Accordingly, we conclude that the prosecutor's worksheets, containing as they do abbreviated notes capsulizing witnesses' responses to questions relating directly to material issues raised on defendant's trial, fall within the reach of our [*454] [****18] holding in *Rosario*. Indeed this was obliquely recognized by the District Attorney, who with commendable candor informed the trial court that the signatures of the witnesses were not affixed to the questionnaire forms when completed in the hope that *Rosario* disclosure could thereby be obviated.

Turning then to whether the withholding of such worksheets must here result in the setting aside of defendant's conviction, we conclude not in the circumstances of this case. We hold, of course, 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, or that a witness' prior statements were totally consistent with his testimony at trial. (*People v Malinsky*, 15 NY2d 86, 90-91; *People v Paige*, 48 AD2d 6; cf. *People v Zabrocky*, 26 NY2d 530, 536-537; *People v West*, 29 NY2d 728; *People v Peacock*, 31 NY2d 907; *People v Sanders*, 31 NY2d 463.) We thus reject arguments that consideration of the significance of the content or substance of a witness' prior statements can result in a finding of harmless error.*

[****19] [**806] The present case, however, presents a significantly different issue. Our examination of the Grand Jury testimony of the various prosecution witnesses (which testimony was turned over by the prosecutor to the defense) reveals that the witnesses' statements contained in the worksheets were the same as the statements made by such witnesses before the Grand Jury. The worksheets in this instance were nothing more than duplicative

*To be distinguished are those appeals from pre-*Rosario* convictions as to which this court applied a harmless error analysis where violations of the *Rosario* rule were found. (See, e.g., *People v Rosario*, 9 NY2d 286, 291, *supra*; *People v Hernandez*, 10 NY2d 774; *People v Turner*, 10 NY2d 839; *People v Fasano*, 11 NY2d 436; *People v Hurst*, 10 NY2d 939; *People v Pereira*, 11 NY2d 784; *People v Hawa*, 13 NY2d 718, *supra*; *People v Horton*, 18 NY2d 355, *supra*; for a statement to this effect see *People ex rel. Cadogan v McMann*, 24 NY2d 233, 237.)

equivalents of statements previously turned over to the defense -- the only difference being as to the particular form in which such statements were recorded. In this circumstance it was not error to fail to turn over worksheets which would have been cumulative only. (Compare *People v Kass*, 25 NY2d 123, 127.)

In reaching the conclusion that we do in this case we make a supplemental observation. When *Rosario* material is requested by a defendant, in the ordinary situation it should be of negligible practical significance whether on comparative [*455] examination such material would or would not prove to be equivalent duplication of material [***67] already in the defendant's possession. On the one hand, if inspection were to lead [****20] to the conclusion that the material sought was a counterpart of other material already possessed by the defendant, the prosecutor would have infrequent occasion to object to its disclosure. On the other hand, if examination were to disclose that it was not a duplicative equivalent, then, of course, the defendant would be entitled to full disclosure. Reflection thus suggests that once it is determined that the writings sought by the defendant come within the *Rosario* rule, the better practice would be to direct a turnover forthwith. No sufficiently useful purpose would appear to be served by engaging in a collateral analysis as to whether the defendant would or would not be technically entitled to disclosure.

We do not reach appellant's challenge to the jury panel. It is explicitly provided in CPL 270.10 (subd 2) that such a challenge must be made "in writing" and "before the selection of the jury commences, and, if it is not, such challenge is deemed to be waived". In this instance while a motion to challenge the jury panel was made orally before jury selection began (and then rejected) the written notice was not given until after selection of the jury had been completed although [****21] before any witness had

been sworn. In this circumstance, irrespective of the willingness of the trial court to consider the motion on the merits, the error if any in the denial of the motion was not preserved for our review. We accord no substance to appellant's further contention that his challenge was predicated on constitutional grounds and that the strictures of CPL 270.10 (subd 1) apply only to challenges based on "departure from the requirements of the judiciary law". We read CPL 270.10 (subd 2) as intended by the Legislature to govern all challenges to the panel, whatever may be the particular ground advanced.

As to appellant's other contentions, it suffices to note that in our opinion the refusal of the trial court to charge explicitly with reference to "reliance" as an essential element of larceny by false promise was not error in view of the verbatim quotation of the applicable sections of the Penal Law in full. Similarly, in consequence of the failure of defense counsel to register a protest, any error with respect to the right of the jury to consider evidence presented to support the dismissed counts was not preserved for our review.

[*456] Accordingly, the [****22] order of the Appellate Division should be modified by reversing so much of the order as reinstated 39 of the counts dismissed by the trial court and the case remitted to the Appellate Division with directions that the appeal by the People with respect thereto be dismissed, and, as so modified, the order should be affirmed.

[**807] Order modified and case remitted to the Appellate Division, Second Department, for further proceedings in accordance with the opinion herein and, as so modified, affirmed.

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People v. Raghelle

Court of Appeals of New York

November 20, 1986, Argued ; December 19, 1986, Decided

No Number in Original

Reporter

69 N.Y.2d 56 *; 503 N.E.2d 1011 **; 511 N.Y.S.2d 580 ***; 1986 N.Y. LEXIS 21237 ****

Judges: Simons, J. Chief Judge Wachtler and Judges Meyer, Kaye, Alexander, Titone and Hancock, Jr., concur.

Opinion by: SIMONS

Opinion

These two appeals present, in different contexts, various problems involving the application of the *Rosario* rule (see, *People v Rosario*, 9 NY2d 286, rearg denied 9 NY2d 908, cert denied 368 U.S. 866, rearg denied 14 NY2d 876, rearg denied 15 NY2d 765; see also, CPL 240.45). That rule requires [****7] generally that the People provide defense counsel with all pretrial statements of prosecution witnesses. The questions raised by these prosecutions include the nature of *Rosario* material; the obligation of the People to produce it even though it is available to the defense by subpoena; whether the People may be excused because of their good faith in failing to deliver such material; and whether the People's omissions in these cases constitute a failure to produce, and thus are not subject to harmless error analysis, or merely a delay which does not require reversal unless it caused substantial prejudice to the defendant (see, *People v Perez*, 65 NY2d 154, 159). For reasons hereafter stated, both judgments must be reversed.

People v Raghelle

Defendant Patsy Raghelle appeals from an order of the Appellate Term affirming a judgment convicting him of obstruction of governmental administration, second degree; menacing and harassment. The Appellate Term affirmed the judgment, notwithstanding the People's failure to timely provide *Rosario* material to defendant, finding that the failure was not deliberate and did not deprive defendant of a fair trial.

The convictions [****8] arose from an incident which occurred when complainant Doreen Nazario, a New York City Department of Sanitation enforcement agent,

attempted to serve defendant with a summons for violating city codes in the repair of his Brooklyn apartment building. Nazario claimed that defendant threw a piece of wood at her and threatened to blow off her head with a nearby rifle. Following this incident, Nazario filed charges in the city's 77th police precinct. Later that day, after an alleged confrontation between Department of Sanitation Supervisor Harry De Vito and defendant outside a Department of Sanitation garage, De Vito filed a second complaint against defendant in the 72nd police precinct. The two complaints were filed at different precincts because proper procedure required that the complaint reports be filed in the [*60] precinct in which the incident occurred, and the two incidents involving defendant had occurred in different precincts. The latter complaint, in the 72nd precinct, resulted in a second harassment count against defendant which was subsequently dismissed after trial.

De Vito's complaint report for this second incident was included in the People's production of [****9] *Rosario* material prior to trial. The Nazario complaint report filed with the 77th police precinct and detailing her account of the first incident was not. Thus, during his cross-examination of Nazario, defense counsel moved for production of her report. The prosecutor stated that it was not in the People's possession [***583] and that Officer Lloyd, another police officer scheduled to testify later in the trial, [**1014] would bring it with her when she appeared. The Trial Judge refused to adjourn the trial until the report was produced, ruling that defense counsel could recall the complainant for further cross-examination after receipt of the report, if necessary. When Officer Lloyd appeared, however, she did not have the report. Defense counsel did not make any motion directed at the failure to

produce the report at that time, but, at the close of the People's case, he moved to dismiss the complaint because the People had failed to comply with the requirements of the *Rosario* rule. The prosecutor argued that she had not violated the rule because the report was not in the People's possession, that she had made every effort to produce it and that Officer Lloyd's [****10] failure to recognize it was understandable because the report in the 77th precinct identified defendant by another name. The Trial Judge denied defendant's motion, finding that the failure to produce did not appear to be "terribly prejudicial in any way". Both sides rested their case and the jury was instructed that the evidence was closed. The report was subsequently produced before summations started. It was brief, and not inconsistent with the witnesses' testimony, but did omit some details of the incident about which complainant had testified. After seeing the report, defense counsel renewed his motion to dismiss the complaint and the Trial Judge again denied the motion, reasoning that inasmuch as the report was not inconsistent with Ms. Nazario's testimony defendant had not been prejudiced in cross-examining her. Nevertheless, the court offered defendant the opportunity to recall Nazario for further cross-examination. Counsel declined the offer.

[*61] *People v Buster*

Defendant John Buster appeals from an order of the Appellate Division, First Department, that affirmed, without opinion, the judgment convicting him of one count of robbery, first degree, and two [****11] counts of robbery, second degree. All three charges stemmed from a single incident during which Aquilino Benitez, a student attending Columbia University, was robbed by two men in the elevator of his apartment building. At trial, Benitez was the chief witness for the prosecution. He testified that on the day in question two men entered the elevator with him at the ground floor, stopped it at the sixth floor, and then robbed him of jewelry and money after displaying a gun and a knife. Although Benitez described the event in detail, he gave no description of the robbers beyond differentiating between them as "older" and "younger". Benitez made an in-court identification of defendant and his codefendant, and he testified to his prior identification of the two men during separate lineups at the police station.

The defense theory was misidentification. Aware that incident reports completed by a police officer and a Housing Authority detective contained descriptions of the robbers obtained from Benitez that varied from the physical attributes of defendant and his codefendant, and assuming that these incident reports constituted all the

Rosario material to which the defendant was [****12] entitled, defense counsel contented himself with eliciting a detailed description of the two robbers from Benitez. He later called the police officer and the Housing Authority detective, as witnesses for defendant, and questioned them regarding the descriptions of the robbers contained in their incident reports in an attempt to impeach Benitez's testimonial descriptions by showing the inconsistent descriptions contained in the incident reports.

On cross-examination and over defense counsel's repeated objections and requests for a sidebar, the prosecutor was permitted to elicit testimony that both officers had kept memo books containing notes of their investigation of the Benitez complaint. In response to the prosecutor's questions as he read from the memo books, both witnesses acknowledged that they made the notes while interviewing Benitez shortly after the robbery and by their testimony they confirmed that Benitez's description [****584] of the robbers at trial and his description of them made during their investigation was [**1015] consistent. The discrepancies in the incident reports, they testified, were due to errors [*62] in their own transcription of Benitez's [****13] statements from the memo books to the incident reports. Apparently, the books were never physically delivered to defendant's counsel before all parties had rested and the evidence was closed. Defense counsel then moved for a mistrial and the Trial Judge belatedly recognized that the memo books constituted *Rosario* material that had not been provided to defendant. Nonetheless, she denied defendant's motion and instead instructed the jury to disregard all testimony concerning the memo book entries. Defendant was subsequently convicted of all three charges, and the judgment was affirmed by the Appellate Division.

In *People v Rosario*, we held that "a right sense of justice" entitles a defendant to inspect the prior statements of a prosecution witness, prior to cross-examination, whether or not his statements vary from his testimony on the stand (*People v Rosario*, 9 NY2d 286, 289, *supra*). Recognizing that even statements which appear to be harmonious with trial testimony may nevertheless be valuable, we required that "[as] long as the statement relates to the subject matter of the witness' testimony and contains nothing that must be kept confidential, defense counsel [****14] should be allowed to determine for themselves the use to be made of it on cross-examination" (*id.*).

We have periodically refined the rule to ensure that a defendant "receives the full benefit of a [prosecution] witness' statements for impeachment purposes" (*People v Poole*, 48 NY2d 144, 149). Thus, for example, in *People v Malinsky* we extended *Rosario*'s disclosure requirement to apply to statements of prosecution witnesses testifying at

suppression hearings, and we held that the *Rosario* rule covers the notes of a police officer witness made in connection with defendant's arrest (*see, People v Malinsky*, 15 NY2d 86, 90-91; *see also, People v Gilligan*, 39 NY2d 769, 770 [notes and reports of investigating officers]). In *People v Consolazio*, we held that prosecutor's worksheets are *Rosario* material subject to disclosure reasoning that "[the] character of a statement is not to be determined by the manner in which it is recorded, nor is it changed by the presence or absence of a signature" (*People v Consolazio*, 40 NY2d 446, 453). Most recently we applied the *Rosario* rule to taped statements made by a prosecution witness to private parties [****15] where the tapes were in the possession of the prosecution (*People v Perez*, 65 NY2d 154, 158-159, *supra*).

[*63] Notwithstanding the strong presumption of the discoverability of prior statements of prosecution witnesses under the *Rosario* rule, we have fashioned some commonsense limits to mandatory disclosure. Thus, we have held that *Rosario* does not create a right of a defendant to examine the prosecutor's entire file or produce material which "the necessities of effective law enforcement would require to be kept confidential" (*see, People v Poole*, 48 NY2d 144, 149, *supra*). Nor does it impose an obligation on the People to produce statements that are "duplicative equivalents of statements previously turned over to the defense" (*People v Consolazio*, 40 NY2d 446, 454, *supra*; *see also, People v Payne*, 52 NY2d 743). Statements are not the "duplicative equivalent" of previously produced statements, however, just because they are "harmonious" or "consistent" with them (*see, People v Consolazio, supra*, p 454 [and cases cited therein]; *People v Rosario*, 9 NY2d 286, 289-290, *supra*; *compare, People v Kass*, 25 NY2d 123, 127 [retranscribed notes]). [****16] Thus, once it is determined [***585] that the statements sought by a defendant come within the *Rosario* rule, [**1016] the better practice is to turn over the statements immediately without further analysis as to whether the defendant is technically entitled to disclosure (*People v Consolazio*, 40 NY2d 446, 454-455, *supra*).

When the People delay in producing *Rosario* material, the reviewing court must ascertain whether the defense was substantially prejudiced by the delay. When, however, the prosecution fails completely in its obligation to deliver such material to defense counsel, the courts will not attempt to determine whether any prejudice accrued to the defense. The failure constitutes per se error requiring that the conviction be reversed and a new trial ordered (*see, People v Perez*, 65 NY2d 154, 159-160, *supra*). Finally, the People's good-faith effort to locate, identify and discover all *Rosario* material does not excuse their failure to produce covered material (*compare, People v Bigelow*,

66 NY2d 417, 427 [rejecting the "good-faith exception" to the warrant requirement]; (*People v Simmons*, 36 NY2d 126, 132 [People's good faith [****17] will not excuse failure to turn over *Brady* material]).

These rules compel the conclusion that both judgments must be reversed and new trials ordered.

In *People v Ranghelle*, the 77th precinct complaint report, which contained a synopsis of complainant Nazario's allegations against defendant constituted a statement of a [*64] prosecution witness that should have been disclosed after she testified for the People (*see, e.g., People v Gilligan*, 39 NY2d 769, 770, *supra*). Although the description of the incident contained in the complaint report was consistent with Ms. Nazario's testimony, it lacked essential details to which she later testified at trial, omissions which might have constituted important material for cross-examination. Accordingly, it constituted *Rosario* material (*see, People v Rosario*, 9 NY2d 286, 289, *supra*).

The People's contention that defendant's conviction should be affirmed because the People attempted in good faith to produce the report, and the delay in its production caused no prejudice, is inapposite. The People's good faith in attempting to obtain the report is irrelevant and the failure to produce it before the evidence [****18] was closed was not a "mere delay"; it constituted a complete failure to comply with the *Rosario* rule as we have interpreted it (*see, e.g., People v Perez*, 65 NY2d 154, 159-160, *supra*).

Finally, we do not accept the People's argument that the *Rosario* rule should not be applied where the prior statement of the prosecution witness is not in the sole custody of the People, or where the defense has knowledge of, and access to it. Where, as here, the existence of a complaint report filed with a police precinct is readily ascertainable by the prosecutor, there is no reason to dilute the *Rosario* obligation by holding that defense counsel should have himself subpoenaed the document. As we observed in *Rosario*, "the State has no interest in interposing any obstacle to the disclosure of the facts", and society's interest in maintaining criminal trials as truth-finding processes requires that the burden of locating and producing prior statements of complaining witnesses, filed with police agencies, remain solely with the People (*see, People v Rosario*, 9 NY2d 286, 290, *supra*).

In the *Buster* case, the People contend that defendant is seeking to impose an [****19] obligation on them to produce material so that he may impeach his own witnesses. Because defendant called the officers to testify, they contend the People were not obliged to produce the officers' memo books or, at worst, that their failure to do so could be error only if it resulted in prejudice to defendant.

The memo book notes of the investigating officers, however, [***586] consisted of statements made by complainant Benitez, the prosecution's primary [**1017] witness. They detailed his initial description of the robbery and the robbers [*65] and, as such, the information constituted *Rosario* material which should have been produced following Benitez's direct testimony (*see, e.g., People v Malinsky*, 15 NY2d 86, 90-91, *supra*). Moreover, the oral testimony by the officers concerning the contents of their memo books does not constitute production of the material. The books themselves had to be delivered to defense counsel and delivered long before this stage of the trial if any claim based on delay is to be entertained. Inasmuch as there is no evidence in the record that the books were ever delivered to defense counsel, there can be no claim that the People's [****20] failure constituted a delay and that defendant's case was not

substantially damaged by it (*compare, People v Perez*, 65 NY2d 154, 159, *supra*).

Finally, the People contend that they had no obligation to produce the memo books because the notes they contained were duplicative of Benitez's statements transcribed in the officers' incident reports. It is sufficient answer to observe that the descriptions contained in the two materials varied. The inconsistencies were minor, to be sure, but they nevertheless may be found, and thus the People cannot claim the descriptions in the memo books were the "duplicative equivalents" of the descriptions in the incident reports.

Accordingly, the order, in each case, should be reversed and a new trial ordered.

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People v. Fishman

Court of Appeals of New York

May 25, 1988, Argued ; June 30, 1988, Decided

No Number in Original

Reporter

72 N.Y.2d 884 *; 1988 N.Y. LEXIS 1648 **; 528 N.E.2d 1212; 532 N.Y.S.2d 739

Judges: Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Hancock, Jr., and Bellacosa concur; Judge Titone dissents and votes to reverse in an opinion.

Opinion

MEMORANDUM.

The order of the Appellate Division should be affirmed.

Defendant was convicted of attempted murder and conspiracy for his involvement in an unsuccessful plot to kill his wife. Defendant agreed to pay Jose Lopez and Fernando Castro \$ 25,000 to kill her and on August 13, 1985, pursuant to that agreement, Lopez shot her several times.

On March 7, 1986, two weeks before commencement of defendant's trial, Castro pleaded guilty to conspiracy for his involvement in the murder plot. On March 26, 1986, he was called as a prosecution witness at defendant's trial; at that time, defense counsel requested production of Castro's plea proceeding minutes, claiming that they constituted *Rosario* material. The prosecutor responded that [**3] he had ordered the minutes from the court stenographer, but had not received them, and that the minutes were a matter of public record. The trial court denied defense counsel's request, ruling that the plea minutes, which counsel could obtain at any time, were not *Rosario* material. On appeal, defendant renews his [*886] argument that the minutes constituted *Rosario* material which the People were obligated to produce. We disagree.

The *Rosario* rule has no application in the circumstances of this case, where untranscribed plea minutes of a potential prosecution witness have been ordered but not received by the prosecution. Having had no immediate access of their own to the statements (*contrast, People v Ranghelle*, 69 NY2d 56, 64), the People cannot be held responsible for a failure to turn them over to defendant.

We cannot agree with the new, boundless reading of CPL 240.45 proposed by the dissent; nothing in the legislative history points to such a legislative intention. As for the dissent's views regarding "sandbagging" (dissent, at 888), the focus of this appeal is *Rosario*; during the colloquy before the trial court -- when defendant [**4] preserved his objection for our review -- not even defendant made the arguments now suggested by the dissent as a basis for reversing this conviction.

To the extent they have been preserved, defendant's remaining contentions are without merit.

Dissent by: TITONE

Dissent

The majority holds that "untranscribed plea minutes of a potential prosecution witness [which] have been ordered but not received by the prosecution" do not fall within the scope of the *Rosario* rule. Because I believe that this holding is inconsistent with the express language and spirit of CPL 240.45 (1), I respectfully dissent.

On March 7, 1986, one of defendant's accomplices, Fernando Castro, pleaded guilty to conspiracy in exchange for his testimony against defendant at his upcoming trial for attempted murder. The prosecution did not inform defendant of this fact until March 20, the day before his trial began. At that time, the prosecutor told defendant's counsel that Castro "might" testify at trial. During his opening statement, the prosecutor stated that Castro would

testify. When defense counsel requested that the prosecution provide him with a copy of the plea minutes in order to effectively cross-examine [**5] Castro the People responded that the minutes were as yet untranscribed. The trial court, after noting that both the prosecution and the defense had equal access to the transcript, concluded that the prosecution had no obligation to provide defendant with the minutes under *People v Rosario* (9 NY2d 286).

Initially, the *Rosario* rule requiring the People to provide the defendant with a witness' prior statements was a judicially created doctrine designed to enhance the fairness of [**887] criminal proceedings. However, the Legislature subsequently enacted CPL 240.45 (1) (a), which provides: "After the jury has been sworn and before the prosecutor's opening address * * * the prosecutor shall, subject to a protective order, make available to the defendant * * * [any] written or recorded statement, including any testimony before a grand jury * * * made by a person whom the prosecutor intends to call as a witness at trial, and which relates to the subject matter of the witness's testimony." The majority apparently takes the position that this statute was merely a codification of the *Rosario* rule affording a defendant no greater rights than does our [**6] case law. However, the language and legislative history of CPL 240.45 (1) (a) compel a contrary conclusion.

CPL 240.45 (1) (a) explicitly requires that any written or recorded statement of a person whom the prosecutor intends to call as a witness be made available to the defendant after the jury is sworn and before the prosecutor's opening address. On its face, the statute requires that the People provide defendant with a statement embodied in the plea minutes of an accomplice, where the People call the accomplice as a witness. The legislative history of CPL 240.45 indicates that it was designed to reduce the element of surprise, with its inherent unfairness, in criminal trials, as well as to broaden discovery. Indeed, the goal of this legislation was to expand discovery in criminal cases beyond that provided for in *Rosario*. * The

statute demands fair play by both the prosecution and the defense, a goal that was not met here.

[**7] [**888] Unlike the case where the defendant seeks the victim's personal account of the crime (*see, People v Reedy*, 70 NY2d 826, 827), the People in this case were active participants in the accomplice's plea. In contrast, the defendant was not a participant and absent a notification by the prosecution, had no way of knowing that a plea was taken. The result of the failure to provide the transcript under these circumstances was that the defendant was subjected to the surprise and unfairness that the Legislature sought to prohibit by enacting CPL 240.45.

The majority relies on the fact that, unlike statements filed with police agencies (*People v Ranghelle*, 69 NY2d 56, 64), and Grand Jury testimony (*see, CPL 240.45 [1] [a]*), the plea minutes here were not in the control of the People (*see, People v Reedy*, 70 NY2d 826, 827, *supra*; *People v Jones*, 70 NY2d 547, 550). The determinative factor, however, is whether the statement might have been of use to the defense (*People v Ranghelle, supra*, at 64; *see also, People v Rosario, supra*, at 289). [**8]

Here, the People failed to inform defendant that Castro would testify until after the trial actually commenced. They then advised defendant that the minutes of Castro's plea had not been transcribed. Finally, the People placed the burden on defendant to obtain the minutes. This course of conduct effectively "sandbagged" defendant. The People's resources would have made all of this unnecessary and it was incumbent upon them to provide defendant with a transcribed copy of Castro's plea.

Accordingly, I would reverse and remit for a new trial.

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*The chief sponsor of the bill stated that the statute "expands criminal discovery provisions for both the defense and prosecution" (Bill Jacket, L 1979, ch 412, Mem of Senator Stafford). The memorandum approving the bill states that it provides "expanded discovery for both the defense and prosecution in criminal cases", that "[the] element of surprise in criminal trials and its inherent unfairness, will be reduced", and that the provision was "developed together with the Senate and Assembly Codes Committees and the Office of Court Administration, in consultation with the Criminal Justice Section of the State Bar Association, and the State District Attorneys' Association among others" (Bill Jacket, L 1979, ch 412, Governor's Approval Mem, 1979 McKinney's

Session Laws of NY, at 1801). A letter submitted by the District Attorneys' Association agreed that the bill represents "a reasonable and balanced step forward in broadening pre-trial discovery" (Bill Jacket, L 1979, ch 412). Finally, a further memorandum in support of the bill indicated that "[the] enactment of this measure would have a significant impact upon the criminal justice process. Trials would become fairer as the element of surprise is reduced" (Bill Jacket, L 1979, ch 412, Mem of Office of Court Administration, at 4, 1979 McKinney's Session Laws of NY, at 1891).

People v. Bailey

Court of Appeals of New York

November 18, 1988, Argued; December 15, 1988, Decided

342

Reporter

73 N.Y.2d 812 *; 534 N.E.2d 28 **; 537 N.Y.S.2d 111 ***; 1988 N.Y. LEXIS 6466 ****

Judges: WACHTLER, C.J., and SIMONS, KAYE, ALEXANDER, TITONE, HANCOCK and BELLACOSA, JJ., concur.

Opinion

MEMORANDUM.

The order of the Appellate Division, 135 A.D.2d 643, 522 N.Y.S.2d 221, should be affirmed.

At defendant's trial, it was discovered that a prosecution witness—a privately employed security guard—had made a report to his employer regarding the incident for which defendant was being prosecuted. Defendant claims that the People's failure to discover and preserve the statement constitutes a Rosario violation (*see*, CPL 240.45[1][a]; *People v. Rosario*, 9 N.Y.2d 286, 213 N.Y.S.2d 448, 173 N.E.2d 881). The lower courts found, however, with sufficient support in the record, that the People did not know of the statement's existence or contents, and that the document was never in the People's possession or control. Under these circumstances, the statement produced by the witness solely for his private employer was not *Rosario* material (*see, People v. Reedy*, 70 N.Y.2d 826, 827, 523 N.Y.S.2d 438, 517 N.E.2d 1324).

WACHTLER, C.J., and SIMONS, KAYE, ALEXANDER, TITONE, HANCOCK and BELLACOSA, JJ., concur.

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People v Martinez

Court of Appeals of New York

January 16, 2014, Argued; February 18, 2014, Decided

No. 13, No. 14

Reporter

22 N.Y.3d 551 *; 6 N.E.3d 586 **; 983 N.Y.S.2d 468 ***; 2014 N.Y. LEXIS 203 ****; 2014 NY Slip Op 1098; 2014 WL 590560

Judges: Opinion by Judge Read. Judges Graffeo, Smith and Pigott concur. Chief Judge Lippman dissents and votes to reverse in an opinion in which Judges Rivera and Abdus-Salaam concur. Opinion by Judge Read. Judges Graffeo, Smith and Pigott concur. Chief Judge Lippman concurs in result in a separate opinion in which Judges Rivera and Abdus-Salaam concur.

Opinion by: READ

Opinion

This appeal calls upon us to decide whether the trial judge abused his discretion when he declined to give an adverse inference charge regarding the loss of the handwritten complaint report (commonly referred to as a "scratch 61") prepared by a police officer who responded to a 911 call reporting a robbery. Defendants Selbin Martinez (Selbin) and Christopher Martinez (Christopher) (collectively, defendants) were subsequently convicted of attempted robbery in connection with this incident. For the reasons that follow, we conclude that the judge did not abuse his discretion. [2]

I

On Friday, July 17, 2009, at roughly 4:00 p.m., 45-year-old Armando Irizarry, [****2] Sr. (Irizarry), a self-employed repairman, [*555] returned from a job to his apartment on the 14th floor of a high-rise building on Havemeyer Avenue in the Bronx. The building is public housing owned by the New York City Housing Authority, and Irizarry had lived in the same apartment [***470] [**588] there for about seven years. He was well-acquainted with defendants, longtime residents of an apartment on the building's 13th floor. Through the years, he had engaged in casual conversation with them both.

Irizarry saw Christopher "[a]lmost every day . . . hanging out" in the hallway on the 14th floor, "either smoking cigarettes or talking to his friend," who lived on that floor.

Christopher and this friend were inseparable. Irizarry owns a Jack Russell terrier, a very nervous dog that "hated" Christopher. When Irizarry left his apartment with the dog to go downstairs and outside to walk her, the terrier would bark at Christopher, who invariably reacted by "run[ning] awkwardly . . . like hopping" as he "back[ed] up away from" the dog, scared. Irizarry also encountered Selbin a few times a week in the building. He noticed that Selbin, too, had "a particular way [of] walk[ing]" and holding his shoulders. Irizarry [****3] described himself as "really bad with people and faces," which forced him "to rely on movements and physical characteristics to remember people."

Upon arriving home, Irizarry received a call from his adult son, who had been waiting for him at a neighbor's apartment. Irizarry intended to return to work to finish up a job so that he could get paid for it the next day. But first, after his son "implied that he was hungry," Irizarry ordered takeout from a Chinese restaurant and gave his son \$20 to pay for the food. At about 5:00, he accompanied his son into the 14th floor's well-lit hallway on the way to the elevator and downstairs to the lobby to pick up the food delivery.

Two elevators and adjacent stairwells A and B are located outside Irizarry's apartment. Because one of the elevators was typically out of order, Irizarry's son peered through the elevator windows to see which one was working at the

time. Meanwhile, Irizarry heard noise in stairwell B. When he opened the stairwell's door out of curiosity, he spotted someone "all in black" crack the door on the floor below and "t[ake] a peek" at him, but he was not alarmed; he closed the door and headed back to the elevator. Suddenly, though, [****4] a man emerged from the stairwell, dressed from head to toe in black. His face hidden behind a ski mask that exposed only his mouth and eyes, the man also wore sunglasses, a hat and gloves. Armed with a [*556] baseball bat, he was closely followed by a second man, similarly clad all in black, with his head and face concealed by a hood and a ski mask that exposed only his eyes. The second man carried a gun.

Irizarry "right away" recognized the first man as Selbin "because of the way he walks" and because he is "really slim and tall." Assuming at first that Selbin was just joking around, Irizarry stepped up to him upon his approach and asked, "What's up, Silence?," a [3] reference to Selbin's nickname. In response, Selbin pushed Irizarry and told him to "Give it up." Now fearful that Selbin and his companion intended harm and sensing that Selbin was ready to swing the bat at him, Irizarry pulled out from his pocket a sock in which he had stuffed a billiard ball. He always carried this makeshift weapon with him for protection.

Irizarry threatened Selbin with the billiard ball, and called out to his son to alert him to the danger. Selbin then walked toward Irizarry's son, swinging the bat from side [****5] to side and signaling him to be quiet by putting a finger up to his mouth and vocalizing "Shh." As Selbin made this gesture, he inadvertently revealed his [***471] [**589] mustache.¹ Irizarry's son backed away from Selbin, edging toward the elevators and sliding in the direction of stairwell A.

At that point, Irizarry turned his attention to the other man so as "to put space between" that man's gun and Irizarry's son. As he advanced, brandishing his billiard ball, the gunman immediately retreated to stairwell B by running backward "just like . . . when he [saw Irizarry's] Jack Russell dog. Exactly the same thing," which is when and how Irizarry recognized Christopher.

Irizarry then grabbed his son and pulled him into stairwell A, and closed and blocked the door, which has a window. As Selbin tried to pry the door open and Irizarry, who is much heavier, resisted, Selbin's ski mask shifted, uncovering his chin, nose and cheek. Afraid that Christopher might gain access to stairwell A from another floor and shoot him and his son, Irizarry opened the door

slightly, swung "as hard as [he] could" and hit Selbin with the billiard ball, flooring [****6] him. Certain that Selbin was "dizzy, confused because [he] hit him hard," Irizarry "decided to run for [his] life" and "dragged his] son with [him], all the way downstairs to the first floor," where he called 911 at [*557] 5:47 p.m. Irizarry told the operator that he thought he knew the perpetrators' identities, but he did not then name them.²

Irizarry's son had been holding the \$20 in his hand while waiting for the elevator, and at some point—he believes when his father jerked him into the stairwell—he dropped the money in the hallway. After making the 911 call, Irizarry and his son went back up to the 14th floor and looked for the \$20 to no avail. Before returning to Irizarry's apartment, they did, however, find a single lens from a pair of sunglasses on the floor in front of stairwell A. With this discovery, Irizarry deduced that he must have hit Selbin in the face with the billiard ball.

The day this [****7] happened, Police Officer Hairo Franco and his partner were working [4] from 5:30 p.m. until 2:00 a.m. the next morning as part of a plainclothes police unit organized to combat street-level violence. They were patrolling the precinct when they received a radio call from the dispatcher telling them of a 911 call reporting a robbery at the Havemeyer address. They arrived at the building at 5:55 p.m. and went to Irizarry's apartment, where they spoke with him and his son. Irizarry gave the police a description of the perpetrators. He still did not identify either of them by name, however. Officer Franco called the "Viper" unit, responsible for monitoring the security cameras in the building, and learned that no one fitting the descriptions given by Irizarry had been seen leaving the premises. Officer Franco and his partner then canvassed the building, starting at the roof, but found no suspects.

After speaking with Officer Franco, Irizarry and his son were taken to the police station where they spoke to a detective. During this interview, Irizarry identified Selbin as one of the perpetrators. He told the police where Selbin lived, and at about 7:00 p.m. that evening, they arrived at defendants' [****8] apartment, where a young girl answered the door and indicated she was alone. When defendants' mother got home from work a few minutes later, the [***472] [**590] police told her they were looking for Selbin and asked for permission to check the

¹ Irizarry's son, however, was unable to identify either perpetrator.

² As related by Christopher's attorney, on the tape of the 911 call Irizarry is heard to say "I think I know who they are . . . Yeah they were wearing masks and a hat and glasses and everything . . . but I think I know who they are." As noted later, the jury heard the tape of the 911 call.

apartment. She agreed. In one of the bedrooms, the officers moved an ironing board obstructing the closet door and discovered Selbin inside, huddling on the floor under a jumble of clothes; he sported a fresh [*558] cut and lump on his forehead.³ Officer Franco placed Selbin under arrest. Christopher, who was in the apartment at the time, was arrested by another officer at 8:00 a.m. the next day.⁴

On July 29, 2009, the grand jury handed down a 17-count indictment accusing defendants of committing various crimes, including attempted robbery, assault, grand and [****9] petit larceny, criminal possession of stolen property and criminal weapon possession. At the ensuing joint jury trial in November 2010, Irizarry, his son and Officer Franco testified as narrated. The jury also heard the 911 tape and viewed a photograph taken by Officer Franco at the time of Selbin's arrest to show the condition of his forehead.

On cross-examination, Irizarry conceded that some of the details he recounted in his testimony seemingly differed from contemporaneous accounts based on information that he provided to law enforcement. For example, the detective who interviewed him at the precinct recorded that Irizarry stated that "none of the perpetrators said anything" to him, and the criminal [5] complaint signed by Irizarry did not mention that either of the perpetrators swung a bat at him or his son. He explained these inconsistencies or omissions by saying he was in shock at the time and so may have forgotten to tell the police or the district attorney some details, or they may have neglected to record some details or they may not have fully understood him because of his accent.

Officer Franco on cross-examination acknowledged that the only "paperwork" or notes he created [****10] between the time he first arrived at the Havemeyer address and Selbin's arrest were to be found in his memo book. When he returned to the precinct after the arrest, he prepared a scratch 61, which he "put . . . in the bin where it gets filed." Asked if this was "[t]he same file as the other paperwork in this case that was turned over to the prosecutor," Officer Franco answered "No." He confirmed that he never gave the scratch 61, the handwritten complaint report, to the prosecutor and did not

³ Irizarry testified at trial that he did not observe any cuts on Selbin's face when he saw him the previous day.

⁴ It is not evident from the record when exactly Irizarry named Christopher as the other perpetrator. At trial, Irizarry attributed his delay in identifying Selbin and Christopher by name to the shock and trauma he experienced in the immediate aftermath of his encounter with them, and fear of reprisal.

have it with him. Neither Officer Franco's memo book nor the typewritten complaint report set out any description of the perpetrators.

[*559] At the conclusion of the People's case, Christopher's attorney requested the scratch 61 prepared by Officer Franco. The prosecutor indicated that this document had never been turned over to the District Attorney's office, and, as she understood Officer Franco's testimony, he could not locate it. Christopher's attorney responded as follows:

"[Officer Franco] said he put it in the bin where it's supposed to go and—I would call upon for the production of that [sic]. And if that cannot be produced, I would ask that the jury be instructed that they can draw an adverse inference [****11] on that."

The judge said he would consider this application, which Selbin's attorney joined.

[**473] [**591] Selbin presented no evidence; Christopher, however, demonstrated for the jury his manner of walking, running and hopping backward. After the close of evidence, the following exchange took place:

"[Christopher's attorney]: One quick thing. The scratch 61, Your Honor, is preserving [sic] on that application?"

"THE COURT: I am not going to charge. There is a reason to be said he doesn't have it any more [sic], and therefore, I'm not going to give you an unfavorable inference charge."

Both attorneys took exception.

During summations, the defense attorneys characterized Irizarry's testimony as incredible, and adduced various claimed or actual inconsistencies between his trial testimony and prior statements attributed to him. Christopher's attorney stressed that Irizarry identified his [6] client as the gun-wielding perpetrator solely on the basis of a supposedly distinctive, "awkward[]" way of backing up. He argued that when Christopher demonstrated his manner of walking backwards for the jurors, they could see for themselves that his client did not move awkwardly. Neither attorney mentioned the lost scratch 61 [****12] (*cf. People v Haupt*, 71 NY2d 929, 931, 524 NE2d 129, 528 NYS2d 808 [1988], discussed *infra*).

The trial judge submitted seven counts to the jury: two counts of attempted first-degree robbery (Penal Law §§ 160.15 [4]; 110.00 [attempted forcible stealing of property where a firearm is displayed]; Penal Law §§ 160.15 [3];

110.00 [attempted forcible stealing of property involving the use or threatened use of a [*560] dangerous weapon]), and a count each of attempted second-degree robbery (Penal Law §§ 160.10 [1]; 110.00 [attempted forcible stealing of property when aided by another person actually present]), attempted third-degree robbery (Penal Law §§ 160.05; 110.00 [attempted forcible stealing of property]), attempted second-degree assault (Penal Law §§ 120.05 [2]; 110.00 [attempting to cause physical injury to another person by means of a deadly weapon or dangerous instrument]), attempted grand larceny in the fourth degree (Penal Law §§ 155.30 [5]; 110.00 [attempting to steal property, regardless of its value, by taking it from the person of another]) and criminal possession of a weapon in the fourth degree (Penal Law § 265.01 [2] [knowingly possessing a dangerous or deadly weapon or instrument with intent to use it unlawfully [****13] against another]). As part of the identification charge, the judge instructed the jury that "[w]hen [Irizarry] testified about Selbin Martinez he said he recognized his manner of walking[,] body[] shape and saw a portion of his face." Selbin's attorney objected that the trial judge thereby erroneously instructed the jury that Irizarry made a facial identification of Selbin.

On November 19, 2010, the jury acquitted defendants of both counts of attempted first-degree robbery, and also acquitted Christopher of attempted second-degree robbery. The jury, however, convicted Selbin of attempted second-degree robbery, and Christopher of attempted third-degree robbery. On March 10, 2011, Supreme Court sentenced Selbin as a second felony offender to a determinate prison term of 4½ years, to be followed by five years of postrelease supervision; and Christopher to an indeterminate prison term of 1 to 3 years. Both defendants appealed.

In May 2012, a panel of the Appellate Division affirmed Christopher's conviction and sentence, holding that the evidence was legally sufficient and the verdict was not against the weight of the evidence (95 AD3d 677, 945 NYS2d 239 [1st Dept 2012]). The court noted [****14] that Irizarry saw [***474] [**592] Christopher almost daily and identified him "by a distinctive body movement, which [Irizarry] had seen [Christopher] make many times"; that "[a] distinctive gait or body movement may be a valid means of identification"; and that "the trial court granted [Christopher] permission to demonstrate his gait or body movements, and the jury had an opportunity to make its own judgment regarding their distinctiveness" (*id.* at 678). The Appellate Division further concluded that the trial judge properly exercised his discretion when he [*561] declined to deliver an adverse [7] inference charge with respect to the lost scratch 61, in light of the

absence of evidence of bad faith or prejudice.

In November 2012, a different panel of the Appellate Division rejected Selbin's legal sufficiency and weight-of-the-evidence claims (100 AD3d 537, 954 NYS2d 91 [1st Dept 2012]). The court noted that Irizarry told the jury that he recognized Selbin, whom "he had seen . . . in his apartment building on a regular basis for years," by virtue of his "body type and . . . manner of walking," and that, additionally, he "saw a portion of [Selbin's] face that was left exposed, and heard him speak during the incident" (*id.* at 537). [****15] Further, a few hours after the crime the police discovered Selbin in his apartment, "hiding in a closet underneath a pile of clothing" with "a bump and a fresh cut on his head," an injury that was consistent with Irizarry's testimony that he fended Selbin off with a blow to the head with a billiard ball (*id.* at 538). The Appellate Division again concluded that the trial judge properly exercised his discretion in declining to deliver an adverse inference charge with respect to the lost scratch 61.

A Judge of this Court granted Christopher's and Selbin's separate motions for leave to appeal (20 NY3d 987, 982 NE2d 622, 958 NYS2d 702 [2012]; 20 NY3d 1063, 985 NE2d 924, 962 NYS2d 614 [2013]). We now affirm.

II

In *People v Rosario* (9 NY2d 286, 173 NE2d 881, 213 NYS2d 448 [1961], *cert denied* 368 US 866, 82 S Ct 117, 7 L Ed 2d 64 [1961]), defendant, convicted of capital murder, contended that the trial judge committed reversible error in refusing to turn over the pretrial statements of three prosecution witnesses for purposes of cross-examination. At the time, our case law obligated the trial judge to inspect a prosecution witness's pretrial statements and disclose to the defense any material at variance with the witness's trial testimony (*see People v Walsh*, 262 NY 140, 149-150, 186 NE 422 [1933]). After making the [****16] requisite inspection, the trial judge in *Rosario* announced some "variances" between statements and testimony and told defense counsel that they might examine and use those portions of the statements containing these discrepancies.

Noting that in *Jencks v United States* (353 US 657, 667, 77 S Ct 1007, 1 L Ed 2d 1103, 75 Ohio Law Abs 465 [1957]), the United States Supreme Court had held that in federal prosecutions a defendant was entitled to inspect any statement made by a government witness bearing on the subject matter of the witness's testimony, we commented that

"[t]he procedure to be followed turns largely on policy considerations, and upon further study and [*562]

reflection this court is persuaded 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 [***475] [**593] should be allowed to determine for themselves the use to be made of it on cross-examination" (*Rosario*, 9 NY2d at 289; see also CPL § 240.45 [1] [a] [codifying our holding in *Rosario*]).

[8] We ruled that the trial judge should have disclosed [****17] the requested statements in their entirety, and then considered whether the defendant was thereby prejudiced, "whether, in other words, there was a rational possibility that the jury would have reached a different verdict if the defense had been allowed the use of the witness' prior statements" (*Rosario*, 9 NY2d at 291). Applying this standard, we concluded that the judge's error did not prejudice the defendant (*id.*). Accordingly, we affirmed the conviction.

Over time, though, we "eschew[ed] harmless error analysis in cases arising during direct appeal in which the defendant was deprived of *Rosario* material at trial" in favor of a rule always requiring a new trial in this situation (*People v Banch*, 80 NY2d 610, 615, 608 NE2d 1069, 593 NYS2d 491 [1992]). We reasoned that "[h]armless error analysis in such cases would necessarily require weighing the potential impeachment value of the withheld material," but "[a]n appellate court . . . is ordinarily no better equipped than the trial court to make such an evaluation, and it was the inadequacy of the trial court in that regard—as compared to single-minded counsel for the accused—that compelled the *Rosario* holding" in the first place (*id.*). Thus, as stated in *People v Ranghelle* (69 NY2d 56, 63, 503 NE2d 1011, 511 NYS2d 580 [1986]), [****18] where

"the prosecution fails completely in its obligation to deliver [*Rosario*] material to defense counsel, the courts will not attempt to determine whether any prejudice accrued to the defense. The failure constitutes per se error requiring that the conviction be reversed and a new trial ordered . . . [T]he People's good-faith efforts to locate, identify and discover all [*563] *Rosario* material does not excuse their failure to produce covered material."⁵

The so-called "*Ranghelle* Rule" proved controversial

⁵The *Rosario* material at issue in *Ranghelle* was a complaint report, which was given to defense counsel after the evidence closed and before summations.

within the Court (see *People v Jones*, 70 NY2d 547, 553, 517 NE2d 865, 523 NYS2d 53 [1987] [Bellacosa, J., concurring on constraint of "(t)he recently declared coup de grace that failure to turn over *Rosario* (9 NY2d 286, 173 NE2d 881, 213 NYS2d 448) material 'constitutes per se error requiring that the conviction be reversed' " (quoting *Ranghelle*, 69 NY2d at 63]), and the law enforcement community. Finally, the legislature, as part of the Sexual Assault Reform Act (L 2000, ch 1), amended the Criminal Procedure Law to add a new section 240.75 to "overturn[]" the *Ranghelle* Rule, "a top priority for [****19] law enforcement officials for more than 15 years" (see Governor's Press Release, 2000 NY Legis Ann at 4). Section 240.75 prohibits reversal where a defendant has been deprived of *Rosario* material at a trial or other proceeding [9] absent a reasonable possibility that the nondisclosure materially contributed to the result.⁶

[**594] [***476] Notably, the rule of per se reversal epitomized by *Ranghelle* never applied when *Rosario* material was lost or destroyed (see *Banch*, 80 NY2d at 616 [describing this situation as an exception to the *Ranghelle* Rule]). Rather, we required a showing of prejudice as a prerequisite to a sanction (see e.g. *People v Martinez*, 71 NY2d 937, 940, 524 NE2d 134, 528 NYS2d 813 [1988]). Here, defendants argue that they were [****20] indeed prejudiced by the unavailability of the scratch 61, and so the trial judge abused his discretion when he declined to issue an adverse inference charge, the mildest sanction available. Additionally, Selbin urges that "there is a strong presumption that the defendant has been prejudiced to at least some degree" whenever *Rosario* material is lost or destroyed and, further, that this principle is implicit in our precedents, citing *People v Wallace* (76 NY2d 953, 955, 565 NE2d 471, 563 NYS2d 722 [1990]) and *People v Joseph* (86 NY2d 565, 570-571, 658 NE2d 996, 635 NYS2d 123 [1995]).

[*564] The defendant in *Martinez* was convicted of first-degree robbery as a result of an armed holdup of a cafe. Identification was the main issue in the case, and at the *Wade* hearing, the cafe's cashier testified that he had described the robber to police officers immediately after the robbery, and that they wrote down what he said. This

⁶Specifically, section 240.75 states that

"[t]he failure of the prosecutor . . . to disclose statements that are required to be disclosed [under the *Rosario* rule] shall not constitute grounds for any court to order a new pre-trial hearing or set aside a conviction, or reverse, modify or vacate a judgment of conviction in the absence of a showing by the defendant that there is a reasonable possibility that the non-disclosure materially contributed to the result of the trial or other proceeding."

was apparently a surprise to both the defense attorney and the prosecutor, who had not previously known that any undisclosed *Rosario* [****21] material might exist. The defendant moved to preclude the cashier from testifying on the ground that the written record of his statement to the police officers had not been served upon him.

The court then held a hearing at which an officer testified that on the night of the crime, she and her partner had responded to a radio call for a robbery in progress. When they arrived at the cafe, the cashier came to their car and provided a description of the robber. She saw her partner "writing for a few seconds," either in his memo book or a scratch 61, but did not see what he wrote; he immediately transmitted the cashier's description of the robber over the radio, and the tape of the radio transmission was provided to the defendant (*id.* at 939). The officer who jotted something down was unavailable to testify, and despite diligent efforts, the People were never able to find any notes or follow-up reports he may have created. The judge denied defendant's motion to preclude the cashier's testimony, but gave an adverse inference charge to the jury. The defendant was convicted, and appealed the judge's *Rosario* ruling. [10]

We observed that

"it is no answer to a demand to produce that the material has [****22] been lost or destroyed. If the People fail to exercise care to preserve it *and defendant is prejudiced by their mistake*, the court must impose an appropriate sanction. The determination of what is appropriate is committed to the trial court's sound discretion, and while the degree of prosecutorial fault may be considered, *the court's attention should focus primarily on the overriding need to eliminate prejudice*" (*Martinez*, 71 NY2d at 940 [emphases added]).

Under the circumstances, we noted, the adverse inference charge overcame any "remote" possibility of prejudice owing to failure to turn over *Rosario* material, "if indeed there was any" [*565] (*id.*). This case, then, does not, as defendants suggest, stand for the proposition that a judge must [***477] [**595] impose a sanction whenever *Rosario* material is lost or destroyed, even if the possibility of prejudice is remote; or that an adverse inference charge must be given for the "inadvertent destruction" of a scratch 61.

In *Haupt*, decided the same day as *Martinez*, the defendant was found mentally incompetent to stand trial and confined to a mental institution for 16 years before he was tried and convicted of murder. During the lengthy lapse of time between [****23] arrest and trial, evidence, some of

which was *Rosario* material, was lost or destroyed "through inadvertence" (*Haupt*, 71 NY2d at 930). On appeal, the defendant claimed that he was thereby deprived of due process and a fair trial, and the ability to cross-examine witnesses by use of their prior statements; he sought dismissal of the indictment. The Appellate Division held that "under the circumstances, there was no basis for dismissal of the indictment *or the imposition of some lesser sanction* upon the prosecution because of these losses" (128 AD2d 172, 173, 515 NYS2d 537 [2d Dept 1987] [emphasis added]).

On appeal, we commented that this was not a case like *Ranghelle* where the People did not turn over statements "in their possession or within their power to produce," and the remedy was automatic reversal and a new trial (71 NY2d at 930). We decided that "[w]hen . . . the defendant claims that the loss of the evidence deprived him of a fair trial, the court must consider a number of factors including the proof available at trial, the significance of the missing evidence and whether the loss was intentional or inadvertent" (*id.* at 931). To the extent that any of the lost material "might have a bearing" on [****24] the "crucial issue" at trial in this case, which was the defendant's sanity at the time of the shooting, "defense counsel on cross-examination and later on summation, noted its absence and emphasized the People's responsibility for its loss and the potential impact on the defense" (*id.*). This was enough for us to conclude that the defendant was not entitled to dismissal of the charge.

Relying on *Haupt*, Christopher argues that "[i]n fashioning an appropriate sanction for the People's failure to preserve evidence, courts should consider the proof available at trial, the significance of the missing evidence, and whether [11] the loss was intentional or inadvertent" (emphasis added). In *Haupt*, though, consideration of these factors resulted in a determination there was no prejudice and so *no* sanction was warranted.

Finally, *Wallace* and *Joseph* are cases where we concluded that the defendants were prejudiced by the deliberate destruction [*566] of *Rosario* material and so sanctions were called for. In *Wallace*, the *Rosario* material consisted of contemporaneous notes taken by an undercover officer to describe the individual from whom he bought drugs, and the arresting officer's notes recording that description [****25] as the undercover officer broadcast it to him. The officers destroyed the notes after the arrest. The defendant asked for an adverse inference charge, the trial judge denied the request and the Appellate Division affirmed, concluding there was no fault or prejudice. On appeal to us, the "sole argument [made was that the] defendant was not prejudiced by the discarding of this material and we limit[ed] our review to that question"

(*Wallace*, 76 NY2d at 955). Disagreeing with the lower courts, we concluded that "[u]nder the facts of this case," the defendant was "impermissibly prejudiced" and therefore the trial judge abused [***478] [**596] his discretion when he declined to impose any sanction (*id.*).

In *Joseph*, we framed the issue as whether the People violate their *Rosario* obligations when a document subject to disclosure has been deliberately destroyed and "a testimonial reconstruction is required to establish its contents" (*Joseph*, 86 NY2d at 567). "Concluding that the fallibility of human memory makes the necessary flawless reconstruction all but impossible," we held that "a document that has been destroyed can never be deemed the 'duplicative equivalent'⁷ of one that exists and remains available [****26] for inspection" (*id.*). The unavailable *Rosario* materials in *Joseph* were envelopes in which the arresting officer placed vials of crack cocaine, and on which he wrote the arrestee's name (there were two arrestees—an accused buyer and an accused seller) and the time and location of the arrest. The arresting officer testified that he destroyed these envelopes after transferring the information on them to his online booking sheet and complaint report.

First, we concluded that the officer's testimony and the disclosed police reports were not duplicative equivalents of the discarded envelopes. Then we decided that, in light of the defense theory (misidentification of the buyer as the seller) and the facts of the case, the defendant had made a "colorable claim of prejudice" (*id.* at 571). We distinguished *Haupt* as [****27] a case [*567] where "the relevance of the lost document was marginal," and emphasized the deliberate nature of the envelopes' destruction (*id.* at 571-572). Citing *Wallace*, we therefore held that [12]

"[g]iven the articulable showing of prejudice that the defendant made, the unavailability of the documents from which a less conjectural showing might have been made and, finally, the circumstances of the documents' loss, the trial court's refusal to impose the limited sanction [of an adverse inference charge] constituted an abuse of discretion as a matter of law" (*id.* at 572).⁸

⁷We never applied the rule of per se reversal in cases where the withheld *Rosario* material was the "duplicative equivalent" of other material made available to the defendant (*see People v Consolazio*, 40 NY2d 446, 454, 354 NE2d 801, 387 NYS2d 62 [1976]; *see also Banch*, 80 NY2d at 616-617 [describing the duplicative-equivalent rule as another of the rare exceptions to per se reversal for *Rosario* violations]).

⁸There was a vigorous dissent in this case. The dissenting

While the results of these cases differ, based on their particular facts, our rule is clear: nonwillful, negligent loss or destruction of *Rosario* material does not mandate a sanction unless the defendant establishes prejudice (*see Martinez*, 71 NY2d at 940; *Banch*, 80 NY2d at 616). If prejudice is shown, the choice of the proper sanction [****28] is left to the sound discretion of the trial judge, who may consider the degree of prosecutorial fault (*Martinez*, 71 NY2d at 940). The focus, though, is on the need to eliminate prejudice to the defendant (*id.*).

Here, defendants did not establish prejudice, as is their burden. Defendants [****479] [**597] fault the trial judge for not analyzing prejudice when he denied their request for an adverse inference charge, but they did not even mention the word. Instead, Christopher's attorney requested the instruction simply because the scratch 61 could not be produced. The judge essentially (and correctly) ruled that inadvertent loss alone was insufficient to require a sanction.

Of course, it is difficult to imagine how defendants might have been prejudiced by the loss of the scratch 61, as the defense attorneys and the judge all no doubt knew. A scratch 61 is a handwritten complaint report that Officer Franco placed in a bin for typing, likely by a civilian employee of the police department. Defendants were provided the typewritten complaint report, which would have differed from the scratch 61 only if the typist made a mistake—i.e., the handwritten scratch 61 is not subject to editing before typing. Defendants [****29] therefore necessarily depend on a series of improbable events to create the [*568] prospect of prejudice. First, there must have been an error in transcription and that error must have resulted in omission from the complaint report of material that appeared in the scratch 61. Additionally, the omitted material must have contradicted something important that Irizarry said on the stand or in other statements made by or attributed to him. Based on such happenstance, Selbin suggests that perhaps "the scratch 61 stated that at some point Irizarry claimed that neither of the assailants said anything to him," in which case the jury would have been less likely to believe that Selbin told him to "Give it up," the only evidence of a threatened forcible taking. The dissent speculates that maybe the scratch 61 "contained a description of the gunman that did not match Christopher[']s appearance]" in which case "the People's case against him would have crumbled" (dissenting op at 569).

judge would have held that the defendant did not, in fact, show prejudice as a result of the destruction of the envelopes, and therefore would have affirmed the defendant's conviction (*see Joseph*, 86 NY2d at 573 [Levine, J., dissenting]).

If conjecture like this, built on a foundation of fortuity, is sufficient for a showing [13] of prejudice, the loss or destruction of *Rosario* material is not just presumptively prejudicial, as Selbin advocates, it is per se prejudicial. [****30] And while Criminal Procedure Law § 240.75 does not directly apply in a case where the claim relates to the proper sanction when *Rosario* material has been lost to the defendant's prejudice, its enactment clearly signals the legislature's antipathy toward per se rules leading to the reversal of convictions for *Rosario* violations.

Finally, we have examined and consider to be without merit defendants' claims that their respective attempted robbery convictions are not supported by legally sufficient evidence, and Selbin's claim that the judge's identification charge with respect to him was improper.

Accordingly, the orders of the Appellate Division should be affirmed.

Dissent by: LIPPMAN (In Part)

Dissent

Chief Judge Lippman (dissenting in part). I would find that the trial court erred in failing to give the requested adverse inference instruction as a minimal sanction for the failure to turn over the lost "scratch 61" [****31] report. This error was harmless as to Selbin Martinez in light of the overwhelming evidence of his guilt. However, given that the evidence against Christopher Martinez was far from overwhelming, the error cannot be considered harmless as to him. Therefore, I would reverse Christopher's conviction.

Upon discovering that the police officer had filled out a handwritten "scratch 61" that had not been turned over to the [*569] prosecution and which could not be located, defense counsel requested that the [***480] [**598] court give the jury an adverse inference instruction. The court denied the request. Defendants argue that the "scratch 61" was *Rosario* material and that, had it been produced, as is required, it would have provided additional grounds for cross-examination of complainant.

The People have an obligation to preserve *Rosario* material and to produce it upon demand (*see People v Martinez*, 71 NY2d 937, 940, 524 NE2d 134, 528 NYS2d 813 [1988]). "If the People fail to exercise care to preserve it and defendant is prejudiced by their mistake, the court *must* impose an appropriate sanction" (*Martinez*, 71 NY2d at 940 [emphasis added]; *see also People v James*, 93 NY2d

620, 644, 717 NE2d 1052, 695 NYS2d 715 [1999]). When deciding upon a sanction, "the court's attention [****32] should focus primarily on the overriding need to eliminate prejudice to the defendant" (*Martinez*, 71 NY2d at 940).

As the majority points out, the per se reversal (or *Ranghelle*) rule never applied to [14] lost *Rosario* material (*see* majority op at 563). Rather, "some showing of prejudice is essential" in cases where *Rosario* material has not been appropriately preserved (*see People v Joseph*, 86 NY2d 565, 571, 658 NE2d 996, 635 NYS2d 123 [1995]). However, we have also observed that, when the document at issue is in fact unavailable, it may be difficult for the defendant to articulate a concrete claim of prejudice, since he cannot know what information the lost document contained (*see Joseph*, 86 NY2d at 571). We therefore recognized that some degree of conjecture is inherent in an objection on this basis (*see Joseph*, 86 NY2d at 571). "Since it was the conduct of the police that resulted in the loss of the [document] and made it impossible to know whether the information [it] contained

was consistent with the People's position at trial, the People cannot now be heard to complain that the defendant's showing of prejudice is not sufficiently definite and clear" (*Joseph*, 86 NY2d at 571 [citation omitted]).

The majority [****33] opinion cannot be squared with this reasoning. The majority simply concludes that, "it is difficult to imagine how defendants might have been prejudiced" (majority op at 567). This reflects a deficit of imagination: if, for example, the "scratch 61" contained a description of the gunman that did not match Christopher, the People's case against him would have crumbled. Moreover, the majority's ruling provides absolutely no incentive to retain these types of forms. Given the loss of the material, defendants are left to speculate as to what [*570] value that document may have held. It simply is not a satisfactory result to penalize defendant for being unable to establish a concrete injury. Particularly in this case, where the document was prepared between the two defendants' arrests and complainant's identification of Christopher was so delayed, the handwritten complaint report might have been extremely useful. Moreover, the evidence against Christopher was thin and the sanction requested was a modest one. The trial court did not invoke lack of prejudice as a basis for its denial; it merely stated "there is a reason . . . he doesn't have it anymore." Under the circumstances, it was an abuse of [****34] discretion for the trial court to deny the requested charge. Similar to the situation presented in *Martinez*, although the prospect that Christopher suffered prejudice by the loss of the "scratch 61" might have been "remote," that possibility

would have been obviated by the requested jury instruction [***481] [**599] (*see* 71 NY2d at 940).

Here, identification was the central issue. The only evidence against Christopher, aside from the nonincriminating fact that he is Selbin's brother, was complainant's testimony identifying Christopher by his "awkward" way of jumping back. The gunman's only feature that was not covered by a mask were his eyes, which complainant specifically testified he did not look at because he was focusing on the gun. The gunman did not make a sound, nor did he sustain any injury that linked him to the incident. Moreover, despite complainant's claim that he knew the gunman was Christopher, he did not provide Christopher's name to the police until after Selbin's arrest. In the absence of overwhelming evidence, "there is no occasion for consideration of any doctrine of harmless

error" (*People v Crimmins*, 36 NY2d 230, 241, 326 NE2d 787, 367 NYS2d 213 [1975]). [15]

In *People v Christopher Martinez*: Judges Graffeo, Smith and Pigott concur with Judge Read; Chief Judge Lippman [***35] dissents and votes to reverse in an opinion in which Judges Rivera and Abdus-Salaam concur.

Order affirmed.

In *People v Selbin Martinez*: Judges Graffeo, Smith and Pigott concur with Judge Read; Chief Judge Lippman concurs in result in a separate opinion in which Judges Rivera and Abdus-Salaam concur.

Order affirmed.

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