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People v. Johnson

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SUPREME COURT OF NEW YORK

BRONX COUNTY

People v. Johnson[1]
(decided September 17, 2001)

Daniel Johnson was convicted of manslaughter in the second degree for stabbing Joseph Bauer to death.[2] He was sentenced to an indefinite term of imprisonment of five to fifteen years.[3] Johnson sought to vacate the judgment of conviction alleging that the prosecution denied him due process in violation of the Federal[4] and New York State[5] Constitutions by failing to turn over eyewitness statements that were exculpatory in nature.[6] Pursuant to Criminal Procedure Law ("C.P.L.") § 440.10(1),[7] Johnson filed a motion to vacate his conviction. His motion was granted.[8]

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[1] No. 98-8428, 2001 N.Y. Misc. LEXIS 651 (Sup. Ct. Bronx County Sept. 17, 2001).

[2] *Id.* at *2.

[3] *Id.*

[4] U.S. CONST. amend. XIV provides in pertinent part: "[N]or shall any State deprive any person of life, liberty or property, without due process of law . . . ."

[5] N.Y. CONST. art. I, § 6 provides in pertinent part: "No person shall be deprived of life, liberty, or property without due process of law."

[6] *Johnson,* 2001 N.Y. Misc. LEXIS at *2.

[7] N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2001) provides in pertinent part:

> At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that: (g) [n]ew evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant.

[8] *Johnson,* 2001 N.Y. Misc. LEXIS, at *2.

The eyewitness, Raffington Harrison, was arrested for his involvement in the homicide, but was not formally charged with a crime.[9] He remained in the state's control and agreed to testify against Johnson and his co-defendant, Karl Love.[10] The defendants were subsequently tried separately; Love's trial occurred three months after Johnson was convicted.[11] At the Love trial, Harrison testified regarding statements he made in August 1998.[12] His statements were on videotape and in the prosecution's possession from the time they were given.[13] The videotape was provided to Love and offered into evidence and as a result he was acquitted of all charges.[14] However, while the prosecution conceded that these statements were in the state's possession at the time of Johnson's earlier trial, they were not provided to the defendant for use at his trial.[15]

Johnson's motion to vacate the judgment of conviction was based upon a *Rosario* violation.[16] In *People v. Rosario,*[17] Luis Rosario was convicted of murder in the first degree when, during a robbery, he shot and killed a restaurant proprietor.[18] The New York Court of Appeals upheld Rosario's conviction in an appeal alleging reversible error by the trial judge when he refused to permit defense counsel's review of prior statements made by prosecutorial witnesses prior to trial.[19] The statements in question were submitted to the trial judge who subsequently determined that the inconsistencies between the prior statements and the witnesses' in-court testimony necessitated defense

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at *2-3.

[13] *Johnson,* 2001 N.Y. Misc. LEXIS at *3.

[14] *Id.* at *3.

[15] *Id.*

[16] *Id.* As articulated in *People v. Rosario,* any statement made by a government witness must be made available to the defense for purposes of cross-examination and impeachment. 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448 (1961).

[17] 9 N.Y.2d at 286, 173 N.E.2d at 881, 213 N.Y.S.2d at 448.

[18] *Id.* at 287-88, 173 N.E.2d at 882, 213 N.Y.S.2d at 449.

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

counsel's review of only the inconsistent portions of the statement.[20] As a result of Rosario's appeal, the Court of Appeals held that the trial judge should have turned over the statements in their entirety in accordance with the United States Supreme Court holding in *Jencks v. United States*.[21] In *Jencks*, the Court held that "a defendant is entitled to inspect any statement made by the Government's witness which bears on the subject matter of the witness' testimony."[22] The court's holding ultimately gave rise to a statute known as "The Jencks Act."[23] Clearly, the *Rosario* ruling was a divergence from prior law, but the court opined,

> [t]he 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.[24]

The holding in *Rosario* was not predicated on any provision in the New York State or Federal Constitution.[25] The

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[20] *Id.*

[21] 353 U.S. 657 (1957).

[22] *Rosario*, 9 N.Y.2d at 289, 173 N.E.2d at 883, 213 N.Y.S.2d at 450 (citing *Jencks*, 353 U.S. at 667-68).

[23] Unites States v. Bagley, 473 U.S. 667, n.2 (1985) (citing The Jencks Act, 18 U.S.C. § 3500, which "requires the prosecutor to disclose, after direct examination of a Government witness and on the defendant's motion, any statement of the witness in the Government's possession that relates to the subject matter of the witness' testimony.").

[24] *Rosario*, 9 N.Y.2d at 289, 173 N.Y.2d at 883, 213 N.Y.S.2d at 450.

[25] People v. Jackson, 78 N.Y.2d 638, 644, 585 N.E.2d 795, 799, 578 N.Y.S.2d 483, 487 (1991). Defendant was convicted of six counts of felony murder and one count of second-degree arson. Defendant filed a motion to vacate his conviction based upon the People's failure to provide him with a statement made by a prosecutorial witness. The trial judge granted the

Court of Appeals has explained that the Rosario rule "in essence, [articulates] a discovery rule, based on a deeply held belief that simple fairness requires the defendant to be supplied with prosecution reports and statements that could conceivably aid in the defense's cross-examination of prosecution witnesses."[26] Fundamentally, the rule stands for the proposition that the defense should not be deprived of the right to inspect a witness' statement for use on cross-examination.[27] The very basis of the rule is to allow the defendant a reasonable opportunity to assess the witness' credibility.[28] This rule was later codified by the Legislature and became New York Criminal Procedure Law § 240.45.[29]

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defendant's motion and the appellate division affirmed. The People filed a motion for leave to appeal and subsequently the Court of Appeals reversed and remanded to determine if there was a reasonable possibility that the *Rosario* material in question was a factor in the verdict.

[26] *See, e.g., Id.*

[27] People v. Perez, 65 N.Y.2d 154, 158, 489 N.E.2d 361, 363, 490 N.Y.S.2d 747, 749 (1985). The defendant and a co-defendant were found guilty of felony murder and manslaughter. A witness, the sister of defendant's wife, was offered money to leave the area and not testify. This witness advised the district attorney who recorded the conversations between the witness and her sister and the sister's son. Defense counsel notified the court that this witness sought to solicit a bribe, but the prosecution did not acknowledge the situation. On cross-examination, the witness testified as to the prosecution's knowledge which prompted an appeal by the defendant based upon a *Rosario* violation. The Appellate Division affirmed the conviction. The Court of Appeals reversed and remanded for a new trial.

[28] *Id.* at 159, 489 N.E.2d at 364, 490 N.Y.S.2d at 750.

[29] N.Y. CRIM. PROC. LAW § 240.45 (McKinney 2001).

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

However, subsequent cases both enhanced and further developed the *Rosario* rule and refined the "per se" error rule. The "per se" error rule requires reversal whenever there is a complete failure by the prosecution in turning over *Rosario* material.[30] In *People v. Consolazio,*[31] decided fifteen years after *Rosario*, the New York Court of Appeals held the "per se" error rule is applicable when a motion is made on direct appeal from a judgment of conviction.[32] The court reaffirmed the *Consolazio* holding in *People v. Perez,*[33] *People v. Ranghelle,*[34] and *People v. Jones.*[35] Moreover, the *Jones* majority stated,

> [i]t is *defense counsel alone* who has the responsibility for making the strategic judgments and doing the careful preparation required for planning and executing an effective cross-examination of the People's witnesses and deciding whether and how to use the statements. When, as a result of the prosecutor's violation of the *Rosario* rule, defense counsel has been deprived of material of which he or she is unaware or cannot otherwise obtain, there is no way, short of speculation, of determining how it might have been used or how its denial to counsel might have damaged defendant's case.[36]

In *Jones*, the court held, "the prosecution's violation of the rule is . . . a complete failure to deliver the items . . . constitut[ing] per se error requiring reversal, and good faith or inadvertence on the part of the prosecutor is of no moment."[37]

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[30] *Jackson,* 78 N.Y.2d at 640, 585 N.E.2d 795 at 796, 578 N.Y.S. at 484.

[31] 40 N.Y.2d 446, 354 N.E.2d 801, 387 N.Y.S.2d 62 (1976). (finding that the *Rosario* materials in question were duplicate equivalents of material already in the possession of the defendant and thus did not represent a *Rosario* violation).

[32] *Jackson,* 78 N.Y.2d at 641, 585 N.E.2d at 797, 578 N.Y.S.2d at 485 (citing *Consolazio*, 40 N.Y.2d at 454).

[33] 65 N.Y.2d at 154, 480 N.E.2d at 361, 490 N.Y.S.2d at 747.

[34] 69 N.Y.2d 56, 503 N.E.2d 1011, 511 N.Y.S.2d 580 (1986).

[35] 70 N.Y.2d 547, 517 N.E.2d 865, 523 N.Y.S.2d 53 (1987).

[36] *Id.* at 552, 517 N.E.2d at 868, 523 N.Y.S.2d at 56 (emphasis in original).

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

A defendant may file a motion pursuant to CPL § 440.10 only after exhausting all available direct appeals.[38] Despite prior decisions by the New York Court of Appeals and the stringent discovery requirements placed upon a *Rosario* claim, the Legislature requires that to prevail on a CPL § 440.10 motion, the defendant must show that he was actually prejudiced.[39] Notably, CPL § 440.10 does not apply specifically to a *Rosario* claim, but refers to "newly discovered evidence" (CPL § 440.10(1)(g)) and "improper and prejudicial conduct" (CPL § 440.10(1)(f)).[40] The *Jackson* court believed that any *Rosario* claim would naturally fall under § 440.10 (1)(f) by its very nature of being improper and prejudicial.[41] The court cited language in the *Rosario* decision that specifically obligates the prosecution to "turn over pretrial statements of prosecution witnesses' testimony,"[42] and failure to comply denotes a violation of "both statutory and common-law mandates,"[43] thus making it both improper and prejudicial.

By applying the "per se" reversal rule, the *Johnson* court was required to adhere to one of the three exceptions set forth by the New York Court of Appeals in *People v. Banch*.[44] First, "after exhaustion of a defendant's direct appeal, a new trial is required only if the defendant can demonstrate 'a reasonable possibility that the failure to disclose the *Rosario* material

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

[39] *Id*; see supra note 7.

[40] *Id.* at 645, 585 N.E.2d at 799, 578 N.Y.S.2d at 487; see supra note 7.

[41] *Id.*

[42] *Id.* at 646, 585 N.E.2d at 800, 578 N.Y.S.2d at 488.

[43] *Id.*

[44] People v. Banch, 80 N.Y.2d 610, 616, 608 N.E.2d 1069, 1072, 593 N.Y.S.2d 491, 494 (1992). Defendant was convicted of first degree manslaughter, attempted second degree murder and other related charges. Defendant made several inculpatory statements at the scene of the crime, in the hospital, and at the police station the next day. A police memo book, two affidavits used to obtain a search warrant, and a report prepared by a former district attorney were deemed *Rosario* material, but defense's motion for a new suppression hearing and/or a mistrial were denied. After conviction and affirmation by the appellate court, the Court of Appeals reversed and remanded for a new trial.

contributed to the verdict.'"[45] Second, "*Rosario* material cannot be produced because it has been lost or destroyed."[46] Under this exception, the court, having judged the degree of prosecutorial fault and ensuing prejudice to the defendant, can impose a sanction – "preclusion of the witness' testimony or an adverse inference charge."[47] The third exception is applied when the material withheld "is *not* the duplicative equivalent of material that was disclosed."[48] In *Banch*, the New York Court of Appeals concluded that "[t]he simple principle that underlies *Rosario* is that the ends of criminal justice are best served by full disclosure of the relevant facts."[49]

In *Clark v. Greiner,*[50] the defendant raised a *Rosario* claim when he alleged that the prosecution failed to provide a videotape of the victim's autopsy.[51] Specifically, he alleged that he was deprived of his Fourteenth Amendment right to a fair trial as a result of the prosecution's failure to produce the videotape.[52] The court stated,

> [w]hile the Rosario rule has a federal counterpart, *see Jencks v. United States*, neither the Rosario nor

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[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 616-17, 608 N.E.2d at 1073, 593 N.Y.S.2d at 495 (emphasis added.)

[49] *Id.* at 621, 608 N.E.2d at 1075-76, 593 N.Y.S.2d at 497-98.

[50] 2001 U.S. Dist. LEXIS 1317 (E.D.N.Y. Feb. 2, 2001). Defendant, Samuel Clark, his brother and 14-year old Rene Perez shot and killed a livery driver. Clark was convicted of murder in the second degree and sentenced to 23 years to life and given a concurrent sentence of 5 to 15 years for criminal possession of a weapon in the second degree. Clark appealed his conviction. While the direct appeal was pending, he filed a § 440.10 motion to vacate judgment claiming the failure to received the autopsy audiotape was a *Rosario* violation. The motion was denied and the appellate division unanimously affirmed the judgment of conviction. The Court of Appeals denied defendant's application for leave to appeal and a writ of habeas corpus was filed. The United States District Court for the Eastern District of New York denied the writ, "because Clark has not made a substantial showing of the denial of a constitutional right." *Id* at *17.

[51] *Id.* at *14.

[52] *Id.*

> the Jencks rule is compelled by the United States Constitution. Of course, the failure to fulfill a disclosure obligation 'can implicate constitutional rights if it violates the due process mandates of Brady v. Maryland and its progeny'.[53]

In *Brady v. Maryland,*[54] the Supreme Court upheld the decision of the Maryland Court of Appeals that suppression of evidence by the prosecution was "a violation of the Due Process Clause of the Fourteenth Amendment."[55] The Supreme Court cited the rule articulated in *Mooney v. Holohan*:[56]

> It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.[57]

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[53] *Id* at *15 (citations omitted).

[54] 373 U.S. 83 (1963). Defendant Brady and a companion, Boblit, were sentenced to death after being found guilty of murder in the first degree. Boblit, in extrajudicial statements, admitted he was the one who committed the actual homicide. These statements were withheld by the prosecution until after Brady received the death sentence. The trial court denied Brady's motion for a new trial based on this newly discovered evidence, as well as, post-conviction relief under the Maryland Post Conviction Procedure Act. On appeal, the Maryland Court of Appeals remanded for a new trial on the issue of punishment alone holding that the suppression of Boblit's statement was a due process violation.

[55] *Id.* at 86.

[56] 294 U.S. 103 (1935).

[57] *Brady*, 373 U.S. at 86 (citing *Mooney* 294 U.S. at 112).

The Court later expanded the holding in *Mooney* in *Pyle v. Kansas*[58] and held "allegations . . . from the deliberate suppression . . . of favorable evidence . . . charge a deprivation of rights guaranteed by the Federal Constitution."[59] Moreover, the Court held that even in spite of good faith by the prosecution, evidence that is material to guilt or punishment is a violation of the accused's due process.[60] This underscores the principle that "the administration of justice suffers when the accused is treated unfairly."[61] The Court further opined:

> A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of architect of a proceeding that does not comport with standards of justice . . . .[62]

Brady guarantees that the due process requirements of the Fourteenth Amendment are satisfied at all times. Every state in the Union has an obligation to "guard and enforce every right secured by [the] Constitution."[63] In particular, Article I, § 6 of New York State's Constitution[64] emulates the precepts of the Fourteenth Amendment. "The clauses are formulated in the same words and are intended for the protection of the same fundamental rights of the individual and there is, logically, no room for distinction in definition of the scope of the two clauses."[65]

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[58] 317 U.S. 213 (1942).

[59] *Brady*, 373 U.S. at 86 (citing *Pyle*, 317 U.S. at 215-16).

[60] *Id.* at 87.

[61] *Id.*

[62] *Id.* at 87-88.

[63] *Mooney*, 294 U.S. at 113.

[64] N.Y. CONST. art. I, § 6, states in pertinent part, "No person shall be deprived of life, liberty or property without due process of law."

[65] Central Savings Bank v. New York, 289 N.Y. 9, 10, 19 N.E.2d 659, *cert. denied*, 306 U.S. 661 (1939).

Accordingly, the enforcement of these fundamental rights is the principal purpose of the Fourteenth Amendment.[66] "That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions."[67] It has been held that when a prosecutor violates a defendant's constitutional rights, and his actions result in an unfairly won conviction, such conviction *is* the fundamental denial of due process.[68] In cases considering both the Fourteenth Amendment and the New York State Constitution, it was "held that due process of law is 'law in its regular course of administration through courts of justice.'"[69] As a result, it was determined that no man, through that process of law, can be "deprived of his liberty . . . ."[70]

Assuredly, the withholding of exculpatory evidence rises to the level of deprivation of due process and violates the very precepts of the Fourteenth Amendment and § 6 of the New York State Constitution. The purpose of the *Brady* rule is not to supplant the adversary system in uncovering the truth, but rather a means to ensure justice.[71] The same can be said for the *Rosario* doctrine. Thus, the prosecutor is required to disclose any favorable evidence or any evidence that will have a significant impact on the defendant's right to a fair trial.[72] This rule applies to exculpatory as well as impeachment evidence.[73]

The United States Supreme Court in *United States v. Agurs*[74] first articulated the standard of materiality in determining a potential *Brady* violation. In *Bagley* the Court explained how

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[66] *Mooney*, 294 U.S. at 113.

[67] *Id.* at 112.

[68] Hammer v. Saffle, 1993 U.S. App. LEXIS 3583, *17, *cert. denied*, 510 U.S. 952 (1993).

[69] People *ex rel.* Hammer v. Leubischer, 34 A.D. 577, 584-85 (1898) (citations omitted).

[70] *Id.* at 585.

[71] United States v. Bagley, 473 U.S. 667, 675 (1985).

[72] *Id.* at 675-76.

[73] *Id.* at 676.

[74] 427 U.S. 97 (1976).

Agurs had established three circumstances where post-trial discovery of favorable evidence might be known to the prosecution but withheld.[75] First, the prosecution's use of known perjured or false testimony;[76] second, where there was *no* request by the defendant for *Brady* material and favorable evidence was withheld;[77] and finally, where a request was made by the defendant and such evidence was not disclosed.[78] In the latter instance, failure by the prosecution "to make any response is seldom, if ever, excusable."[79] The Bagley Court then analyzed how *Strickland v. Washington* had further expanded the standard:[80]

> We find the *Strickland* formulation of the *Agurs* test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.[81]

A defense counsel's pretrial agreements and trial decisions are significantly impacted as a result of requested evidence that is withheld by the prosecution.[82] This prosecutorial blunder erroneously results in the presumption that the evidence does not exist.[83]

In summary, the *Rosario* rule and the doctrine articulated in *Brady v. Maryland* and its progeny offer defendants state

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[75] *Bagley*, 473 U.S. at 678.
[76] *Id.* at 680.
[77] *Id.* (emphasis added).
[78] *Id.* at 681.
[79] *Id.*
[80] 466 U.S. 668 (1984).
[81] *Bagley*, 473 U.S. at 682.
[82] *Id.* at 682-83.
[83] *Id.*

constitutional, state statutory, and Federal Constitutional guarantees mandating justice in their trial. *Rosario* entitles the defendant to have access to statements made by prosecution witnesses prior to any cross-examination conducted at trial.[84] New York courts have expanded the original holding in *Rosario* to cover statements made at suppression hearings, notes of a police officer made at the time of the defendant's arrest, prosecutor's worksheets and taped statements of prosecution witnesses made to a private party.[85] New York's CPL codifies the *Rosario* holding and provides a statutory avenue for defendants to file motions to vacate their convictions whenever the prosecution withholds evidence which will ultimately benefit them. While neither the judicial holdings or the statute create an absolute right to review a prosecutor's file, it does obligate the prosecutor to act in good faith.[86] As the *Ranghelle* court wrote, "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."[87]

Moreover, the Fourteenth Amendment and Article 1 § 6 of the New York State Constitution require that "no person shall be deprived of life, liberty, or property without due process of law."[88] These provisions are clearly established in the *Brady* doctrine and in New York's criminal procedure law. Both mandate a new trial whenever a suppression of material evidence is found, thereby ensuring due process guarantees. As the *Brady* court asserted, "[t]he United States wins its point whenever justice is done its citizens in the courts."[89]

Donna A. Napolitano

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[84] *Ranghelle*, 69 N.Y.2d at 56, 503 N.E.2d at 1011, 511 N.Y.S.2d at 580.
[85] *Id.*
[86] *Id.* at 63, 64.
[87] *Id.*
[88] N.Y. CONST. art. I, § 6.
[89] *Brady*, 373 U.S. at 87.