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Court of Appeals Modifies Goggins Standard for Disclosure of Informant's Identity

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laudable goals of plea bargaining will be achieved, while preventing a defendant from entering a guilty plea under any misconceptions.

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Court of Appeals modifies Goggins standard for disclosure of informant's identity

The well-established prosecutor's privilege to withhold the identity of a confidential informant[188] often conflicts with a criminal defendant's constitutional rights of confrontation and due process.[189] In *People v. Goggins,*[190] the Court of Appeals sought to resolve this

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plea and the terms thereof . . . . The judge may not accept a plea of guilty or no contest from a defendant without first determining that the plea is a product of informed choice.

[188] Although the privilege is often said to belong to the informant, it "is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." Roviaro v. United States, 353 U.S. 53, 59 (1957). The prosecutor's right to preserve the anonymity of informants was created by the courts in the interest of public policy, independently of any statutory or constitutional mandate. *See* Note, *Disclosure of an Informant's Identity — The Substantive and Procedural Balance Tests,* 39 ALB. L. REV. 561, 564 (1975) [hereinafter cited as *Informant's Identity*]. *See generally* Scher v. United States, 305 U.S. 251 (1938).

[189] *See* Roviaro v. United States, 353 U.S. 53, 60 (1957). *See also* United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963); Cannon, *Prosecutor's Duty to Disclose,* 52 MARQ. L. REV. 517 (1969); Note, *The Prosecutor's Duty to Disclose After* United States v. Agurs, 1977 U. OF ILL. L.F. 690, 690. The *Roviaro* Court held that the informant privilege is overridden when "the dislcosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause . . . ." 353 U.S. at 60-61. This principle was to govern disclosure in hearings to determine the existence of probable cause and in proceedings to establish the defendant's guilt or innocence. *Id.*

New York cases initially indicated judicial reluctance to require disclosure of an informant's identity in probable cause cases. *See* People v. Cerrato, 24 N.Y.2d 1, 246 N.E.2d 501, 298 N.Y.S.2d 688 (1969), *cert. denied,* 397 U.S. 940 (1970); People v. Malinsky, 15 N.Y.2d 86, 209 N.E.2d 694, 262 N.Y.S.2d 65 (1965). The privilege was less consistently applied, however, where disclosure was relevant to the determination of guilt itself. *Compare* People v. Casiel, 42 App. Div. 2d 762, 346 N.Y.S.2d 349 (2d Dep't 1973) *with* People v. Jones, 76 Misc. 2d 547, 350 N.Y.S.2d 539 (Sup. Ct. N.Y. County 1973). *See generally* W. RICHARDSON, EVIDENCE § 456 (10th ed. 1973). The probable cause line of cases culminated with People v. Darden, 34 N.Y.2d 177, 313 N.E.2d 49, 356 N.Y.S.2d 582 (1974), in which the Court of Appeals ruled that where the evidence, apart from the potential testimony of the informant, fails to establish probable cause, the judge should examine the informant in an in camera hearing and provide the defense with a "summary report" of the testimony. *Id.* at 181, 313 N.E.2d at 52, 356 N.Y.S.2d at 586. On the same day that *Darden* was decided, the Court also decided People v. Goggins, 34 N.Y.2d 163, 313 N.E.2d 41, 356 N.Y.S.2d 571, *cert. denied,* 419 U.S. 1012 (1974), in which guidelines were established to govern disclosure when the defendant's guilt or innocence is in issue. *See* note 191 *infra.* Distinguishing *Goggins* from cases involving a determination of probable cause, the Court concluded that the *ex parte,* in

conflict by ruling that an informant's identity must be disclosed where the defendant has shown that the informant's potential testimony is relevant to the question of guilt or innocence.[191] In *People v. Peltak*,[192] the Court of Appeals recently held that disclosure is required where the defendant raises an alibi defense and an informant is one of several prosecution witnesses placing him at the scene of the crime.[193] More significantly, the Court stated in dictum that, even if the defendant had not met the *Goggins* standard, disclosure should still have been granted unless the state made "some showing" of an interest in protecting the informant's identity.[194]

The defendant in *Peltak* was indicted for selling narcotics to an undercover agent.[195] Although two informants were present at the restaurant-bar where the sale took place, and at least one informant identified the defendant prior to the sale, it was unclear whether either had actually observed the crime.[196] Contradicting the testimony of the agent and two officers who had accompanied him, the defendant and six witnesses testified at trial that the defendant was not in the restaurant-bar when the illegal exchange allegedly occurred.[197] To buttress his alibi defense, the defendant moved for disclosure of the identities of the informants.[198] The motion was denied, and the defendant subsequently was convicted.[199] The Ap-

camera proceeding was inappropriate, since the "defendant's right to the full benefit of the adversary system should not be denied, nor qualified . . . by interposing the 'neutral' Judge to assess whether the disclosure is relevant or material . . . ." 34 N.Y.2d at 169, 313 N.E.2d at 44, 356 N.Y.S.2d at 575.

[190] 34 N.Y.2d 163, 313 N.E.2d 41, 356 N.Y.S.2d 571, *cert. denied*, 419 U.S. 1012 (1974).

[191] 34 N.Y.2d at 170, 313 N.E.2d at 45, 356 N.Y.S.2d at 576. The *Goggins* Court stated that the defendant "must show a basis in fact to establish that his demand does not have an improper motive and is not merely an angling in desperation for possible weaknesses in the prosecution's investigation . . . ." *Id.* at 169, 313 N.E.2d at 44, 356 N.Y.S.2d at 575. Although the Court noted that the best case is made out for disclosure when the informant was a participant in or an eyewitness to the crime, *id.* at 169-70, 313 N.E.2d at 44, 356 N.Y.S.2d at 576, it also indicated that disclosure might be warranted where the informant's role was a minor one but the other evidence was equally balanced, *id.* at 170, 313 N.E.2d at 45, 356 N.Y.S.2d at 576. The Court stated that "the truly crucial factor in every case is the relevance of the informer's testimony to the guilt or innocence of the accused." *Id.*

[192] 45 N.Y.2d 905, 383 N.E.2d 556, 411 N.Y.S.2d 4 (1978), *rev'g* 54 App. Div. 2d 1051, 389 N.Y.S.2d 34 (3d Dep't 1976).

[193] 45 N.Y.2d at 906, 383 N.E.2d at 557, 411 N.Y.S.2d at 5.

[194] *Id.*

[195] 54 App. Div. 2d at 1051, 389 N.Y.S.2d at 35. The defendant was charged with sale of a dangerous drug in the fourth degree. *See* N.Y. PENAL LAW, ch. 1030, § 220.30, [1965] N.Y. Laws 1654 (repealed 1973).

[196] 45 N.Y.2d at 906, 383 N.E.2d at 556, 411 N.Y.S.2d at 5.

[197] *Id.*

[198] *Id.*

[199] *Id.*

pellate Division, Third Department, affirmed the conviction, finding no "close identity question" requiring the testimony of the informants, since three officers had positively identified the defendant.[200]

On appeal, the Court of Appeals reversed and ordered a new trial.[201] At the outset, the majority[202] noted that a defendant may become entitled to disclosure of an informant's identity either by developing his defense or by exposing weaknesses in the prosecution's case.[203] Observing that the testimony of six witnesses corroborated the defendant's alibi,[204] the Court reasoned that disclosure was warranted since the informants' testimony was relevant to the credibility of the alibi, which, in turn, was obviously relevant to the ultimate question of guilt or innocence.[205]

Having found that the defendant had satisfied the *Goggins* standard, the Court went on in dictum to state that even if this standard had not been met, disclosure would have been mandated.[206] The Court noted that the prosecution had acknowledged that the informants had been inactive for over two years and that the district attorney's office was unable to locate them.[207] Since the defendant had "made [an] initial showing as to the importance of disclosure," the Court concluded that the prosecution would "have come forward with some showing" to support its claim of privilege.[208] In the Court's view, where the state's interest in preventing disclosure is "attenuated" when weighed against the probative significance of the informant's testimony, the informant should be identified.[209]

In the time since *Goggins* was decided, the New York courts have addressed informant disclosure questions in a variety of fac-

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[200] 54 App. Div. 2d at 1051-52, 389 N.Y.S.2d at 35. The appellate division found it significant that "[n]either of the two informants introduced [the agent] to defendant or was present when the illegal sale was negotiated or effectuated." *Id.*

[201] 45 N.Y.2d at 905, 383 N.E.2d at 556, 411 N.Y.S.2d at 4.

[202] Judge Gabrielli dissented from the memorandum decision and voted to affirm on the opinion of the appellate division. *Id.* at 907, 383 N.E.2d at 557, 411 N.Y.S.2d at 5 (Gabrielli, J., dissenting).

[203] *Id.* at 906, 383 N.E.2d at 557, 411 N.Y.S.2d at 5 (quoting People v. Goggins, 34 N.Y.2d 163, 172, 313 N.E.2d 41, 46, 356 N.Y.S.2d 571, 578, *cert. denied,* 419 U.S. 1012 (1974)).

[204] 45 N.Y.2d at 906, 383 N.E.2d 557, 411 N.Y.S.2d at 5. The *Peltak* Court noted that additional evidence had been offered in support of the defense's position. *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *Id.* at 907, 383 N.E.2d at 557, 411 N.Y.S.2d at 5 (citing Brady v. Maryland, 373 U.S. 83, 86-87 (1963)).

tual settings.[210] The most important factors in interpreting the *Goggins* standard have been the weight of the evidence against the defendant[211] and the role of the informant in the crime and arrest.[212]

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[210] There exist a multitude of cases on the issue whether an informant's testimony is relevant to guilt or innocence. For examples, see People v. Singleton, 42 N.Y.2d 466, 368 N.E.2d 1237, 398 N.Y.S.2d 871 (1977); People v. Lee, 39 N.Y.2d 388, 348 N.E.2d 579, 384 N.Y.S.2d 123 (1976); People v. Leyva, 38 N.Y.2d 160, 341 N.E.2d 546, 379 N.Y.S.2d 30 (1975); People v. Pena, 37 N.Y.2d 642, 339 N.E.2d 149, 376 N.Y.S.2d 452 (1975); and People v. Rodriguez, 62 App. Div. 2d 929, 403 N.Y.S.2d 275 (1st Dep't 1978). It may be that the frequent reversals on appeal of disclosure determinations, *see* notes 211-212, *infra,* are attributable to the delicate nature of the discretion committed to the trial judge, who does not enjoy the benefit of hindsight in making the determination. In fact, the *Goggins* Court stated that "[t]he *Roviaro* case . . . makes it clear that . . . the issue is one to be determined in the exercise of a sound discretion by the Trial Judge." 34 N.Y.2d at 169, 313 N.E.2d at 44, 356 N.Y.S.2d at 575 (citation omitted). The Court's attempt to elaborate the basic considerations involved is perhaps evidence that it was aware of the difficult task it was assigning to the lower courts.

[211] Disclosure of the informant's identity often is sought to challenge the prosecution's proof on the issue of whether the defendant has been properly identified as the criminal. In such cases, disclosure is warranted only where it is necessary to resolve a conflict in the evidence. *See* People v. Singleton, 42 N.Y.2d 466, 368 N.E.2d 1237, 398 N.Y.S.2d 871 (1977); People v. Pena, 37 N.Y.2d 642, 339 N.E.2d 149, 376 N.Y.S.2d 452 (1975); People v. Martin, 54 App. Div. 2d 624, 387 N.Y.S.2d 434 (1st Dep't 1976); People v. Simpson, 47 App. Div. 2d 665, 364 N.Y.S.2d 198 (2d Dep't 1975). Of course, disclosure may be ordered where it would be helpful in breaking a deadlock on the question of guilt itself. *See* People v. Rodriguez, 62 App. Div. 2d 929, 403 N.Y.S.2d 275 (1st Dep't 1978).

It also should be noted that, even where a fact issue may be resolved by bringing the informant into the trial, disclosure of his identity still may be denied where the truth can be reached in another fashion. *See* People v. Jones, 58 App. Div. 2d 657, 396 N.Y.S.2d 61 (2d Dep't 1977); People v. Wills, 48 App. Div. 2d 935, 370 N.Y.S.2d 22 (2d Dep't 1975).

[212] "Undoubtedly the strongest case for disclosure is made out when it appears that the informant was an eyewitness or a participant in the alleged crime." People v. Goggins, 34 N.Y.2d 163, 169-70, 313 N.E.2d 41, 44, 356 N.Y.S.2d 571, 576, *cert. denied,* 419 U.S. 1012 (1974); *see* People v. Rodriguez, 62 App. Div. 2d 929, 403 N.Y.S.2d 275 (1st Dep't 1978); People v. Banks, 45 App. Div. 2d 1024, 358 N.Y.S.2d 201 (2d Dep't 1974). Where the role of the informant is to introduce the parties to the sale, disclosure usually has been ordered. People v. Goggins, 34 N.Y.2d at 170, 313 N.E.2d at 45, 356 N.Y.S.2d at 576; People v. Rivera, 53 App. Div. 2d 819, 385 N.Y.S.2d 537 (1st Dep't 1976). *But see* People v. Lee, 39 N.Y.2d 388, 348 N.E.2d 579, 384 N.Y.S.2d 123 (1976); People v. Pena, 37 N.Y.2d 642, 339 N.E.2d 149, 376 N.Y.S.2d 452 (1975); People v. Garcia, 51 App. Div. 2d 329, 381 N.Y.S.2d 271 (1st Dep't 1976). Where an informant "did not set up" or participate in or was not present at the drug sale, however, disclosure may be refused. *See* People v. Leyva, 38 N.Y.2d 160, 172, 341 N.E.2d 546, 554, 379 N.Y.S.2d 30, 40 (1975); *cf.* People v. Hawkins, 49 App. Div. 2d 181, 374 N.Y.S.2d 182 (4th Dep't 1975) (disclosure granted though informant involved only in a "preliminary function").

As the cases indicate, the informant's role in the crime would seem inherently unreliable as a factor to be considered in whether disclosure is warranted on the identification question. The informant may be of negligible help on the identity question notwithstanding that he was an eyewitness to the drug sale, as when there is a quick sale in a dark, crowded public bar. On the other hand, he may be able to identify the defendant even if he had no role in the sale and never before dealt with him, as where an informant waits outside an apartment during a sale and views the departing defendant in a well-lit corridor.

By finding a second distinct ground on which to base disclosure in *Peltak,* however, the Court expanded the *Goggins* rule. Disclosure was granted even though the state presented the credible testimony of three officers, and the informants neither witnessed nor participated in the crime.[213] Another significant consequence of *Peltak* is that once the defendant makes an "initial showing" that disclosure is warranted, the prosecution has the onus of persuading the court otherwise.[214] Previously, the *Goggins* rule was always interpreted as placing on the defendant the burden of proving that the informant's potential testimony may be relevant to guilt or innocence.[215] Unfortunately, the Court did not clearly indicate the quantum of evidence which will be necessary to make out an "initial showing."

Consistent with the traditional *Goggins* standard, the *Peltak* Court focused on the evidence presented on behalf of the defendant in determining whether to grant disclosure.[216] In its dictum, however, *Peltak* modified this procedure by suggesting that, at some point, the burden is placed upon the prosecution to affirmatively demonstrate a specific interest in withholding the informant's identity.[217] By stressing this requirement, it is submitted that the Court may have overlooked the state's important concern with general anonymity for informants as a matter of law-enforcement policy.[218] Whether the Court's failure to emphasize the state's interest

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[213] 45 N.Y.2d at 906, 383 N.E.2d at 556, 411 N.Y.S.2d at 5.

[214] *See* text accompanying note 208 *supra.*

[215] Whether the *Goggins* rule, requiring relevance to the guilt or innocence of the defendant before granting disclosure, is itself constitutionally permissible depends upon its conformity to the minimum standards for disclosure established by the Supreme Court in *Roviaro. See* Pena v. LeFerve, 419 F. Supp. 112, 114 (E.D.N.Y. 1976) (*Roviaro* guidelines were intended to ensure constitutional right to a fair trial). Interestingly, the *Roviaro* Court expressed the rule in terms of relevancy to "the defense of an accused," 353 U.S. at 60-61, while the Court of Appeals in *Goggins* spoke of relevancy to "guilt or innocence," 34 N.Y.2d at 170, 313 N.E.2d at 45, 356 N.Y.S.2d at 576. *See* notes 189 & 191 *supra.* The *Goggins* Court's reference to guilt or innocence may be attributable to the fact that the Court was carefully distinguishing the cases dealing solely with probable cause as opposed to actual trial of the action. In any event, no constitutional challenge to the *Goggins* rule has been mounted on this ground. The Supreme Court's formulation of the rule on disclosure, however, does seem to lend itself to a slightly more favorable interpretation for the defendant, since disclosure of informant testimony relevant to "the defense of an accused" but not clearly crucial to guilt or innocence would seem to be due. It is suggested that if the Court of Appeals were to interpret its *Goggins* mandate as being in fact coextensive with *Rovairo,* some of the harsh results occasionally flowing from the "guilt or innocence" rule would be alleviated, thereby eliminating the need for the new balancing test of *Peltak.*

[216] *See* 45 N.Y.2d at 906, 383 N.E.2d at 556, 411 N.Y.S.2d at 5; text accompanying note 205 *supra.*

[217] *See* 45 N.Y.2d at 906, 383 N.E.2d at 556, 411 N.Y.S.2d at 5; text accompanying notes 206-209, *supra.*

[218] The anonymity privilege is designed to encourage citizens to report criminal acts to

is attributable to its ruling that the *Goggins* standard was satisfied, or whether it believed that such interest is minimal, must, regrettably, await further clarification.

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Police failure to permit defendant to contact mother violates right to assistance of counsel, requiring suppression of confession

Prearraignment or indictment statements elicited from an unrepresented defendant who voluntarily has waived his right to counsel[219] in the absence of an attorney are admissible against him.[220]

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the appropriate authorities and to cooperate in efforts to apprehend criminals. *See* Roviaro v. United States, 353 U.S. 53, 59 (1957); M. HARNEY & J. CROSS, THE INFORMER IN LAW ENFORCEMENT 100-06 (2d ed. 1968); 2 COLUM. J. OF L. & SOC. PROB. 47 (1966). While many informants volunteer their aid to law enforcement officials in return for plea bargaining concessions or recommendations for lighter sentences, *see* HARNEY & CROSS, *supra,* at 41-42, it also is true that law-abiding citizens quite frequently serve as informants. *Id.* at 31-41. Indeed, this tactic has proven particularly effective in the legal offensive against narcotics. *See id.* at 26; *Informant's Identity, supra* note 188, at 562.

[219] *See* U.S. CONST. amend. VI. The defendant's right to counsel attaches upon the commencement of "adversary judicial criminal proceedings" against him. Kirby v. Illinois, 406 U.S. 682, 689 (1972). In New York, this critical stage of the prosecution has been held to commence at the time of indictment, People v. DiBiasi, 7 N.Y.2d 544, 549-51, 166 N.E.2d 825, 828-29, 200 N.Y.S.2d 21, 24-25 (1960), arraignment, People v. Meyer, 11 N.Y.2d 162, 164, 182 N.E.2d 103, 104, 227 N.Y.S.2d 427, 428 (1962), and court-ordered prearraignment lineups, Coleman v. Alabama, 399 U.S. 1, 7 (1970); People v. Coleman, 43 N.Y.2d 222, 225-26, 371 N.E.2d 819, 822, 401 N.Y.S.2d 57, 59-60 (1977). *See generally The Survey,* note 258 *infra.* Moreover, the Supreme Court has held that a defendant must be afforded the right to counsel in any pretrial confrontation after indictment where there is a "potential [for] substantial prejudice to defendant's rights . . . and . . . counsel [would be able] to help avoid that prejudice." United States v. Wade, 388 U.S. 218, 227 (1967); *see* Gilbert v. California, 388 U.S. 263 (1967).

[220] In Miranda v. Arizona, 384 U.S. 436 (1966), the Court held that the prosecution may not use statements elicited from a defendant under custodial interrogation unless, prior to the questioning, the defendant had been advised of his sixth amendment right to counsel and his fifth amendment privilege against self-incrimination. *Id.* at 444. According to *Miranda,* however, a defendant may waive these rights outside the presence of an attorney if the waiver is made voluntarily, intelligently and knowingly. *Id.* at 475; *see* Brewer v. Williams, 430 U.S. 387, 404 (1977); Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

Under New York law, however, once an attorney has entered the proceedings, a waiver by the defendant may be made only in the presence of his lawyer. People v. Hobson, 39 N.Y.2d 479, 481-82, 348 N.E.2d 894, 896, 384 N.Y.S.2d 419, 420 (1976), *discussed in The Survey,* 51 ST. JOHN'S L. REV. 201, 216 (1976); *see* People v. Arthur, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968); People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963). Furthermore, following indictment or arraignment, the defendant may not waive his right to counsel in the absence of an attorney. People v. Settles, 46 N.Y.2d 154, 162-63, 385 N.E.2d 612, 616, 412 N.Y.S.2d 874, 879 (1978), *discussed in The Survey,* notes 258-286 and accompanying text *infra.*