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is designed to promote socially desirable goals,[150] and a joint attempt at criminality obviously is not desirable behavior; to hold conversations furthering criminal conspiracy privileged because the conspirators happen to be married would "require a finding that . . . the commission of a crime would protect and strengthen the marital bond."[151]

The marital privilege seems important in fostering communication between partners in viable marriages. Nonetheless, the judiciary should guard against attempts on the part of wrongdoers to shield themselves from prosecution by exploiting the privilege. Hopefully, the joint criminality exception fashioned in *Watkins* will help preclude misuse of the privilege without advancing its complete abolition.

CRIMINAL PROCEDURE LAW

Court of Appeals establishes standards for production of confidential informants.

In an attempt to safeguard the rights of criminal defendants without unduly impairing the state's prosecutorial function, New York courts have been developing rules concerning disclosure and production of confidential police informers.[152] In *People v. Goggins*,[153] the New York Court of Appeals held that once it is estab-

675 (1929). Critics of the privilege maintain that the loss of evidence occasioned by its application is unjustifiable in view of the uncertainty of any beneficial effect. *See id.* at 686. One student commentator has urged that rising divorce rates and declining social emphasis upon family integrity demonstrate that the effort to preserve harmony between spouses has been futile. Comment, *Questioning the Marital Privilege: A Medieval Philosophy in a Modern World*, 7 CUM. L. REV. 307, 321 (1976).

[150] *See, e.g.*, W. RICHARDSON, EVIDENCE §§ 410, 428, 447 (10th ed. J. Prince 1973).

[151] People v. Watkins, N.Y.L.J., April 8, 1977, at 15, col. 2.

[152] Under the "informer's privilege," the identity of persons who impart information to law enforcement officials is protected against disclosure. *See* Roviaro v. United States, 353 U.S. 53, 59 (1957); W. RICHARDSON, EVIDENCE § 456 (10th ed. J. Prince 1973). In *Roviaro*, the United States Supreme Court recognized the value of informers to law enforcement organizations:

> The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

353 U.S. at 59. This privilege is particularly important in narcotics violation cases. *See, e.g.*, People v. Goggins, 34 N.Y.2d 163, 176, 313 N.E.2d 41, 48, 356 N.Y.S.2d 571, 581 (1974) (Jasen, J., dissenting), *cert. denied*, 419 U.S. 1012 (1974). Nonetheless, it has been indicated that the informer's privilege should not outweigh the defendant's right to confrontation where guilt or innocence is at stake. *See* 34 N.Y. at 173, 313 N.E.2d at 46-47, 356 N.Y.S.2d at 578.

[153] 34 N.Y.2d 163, 313 N.E.2d 41, 356 N.Y.S.2d 571, *cert. denied*, 419 U.S. 1012 (1974).

lished that an informant's testimony clearly is relevant to a defendant's guilt or innocence, the informer's identity must be disclosed.[154] By way of dictum, the Court observed that in certain circumstances actual production of an informant might be necessary to satisfy the underlying purpose of disclosure, which is to make the informant available to the defense.[155] The situations in which production would be warranted were not identified by the Court in *Goggins*. Recently, however, in *People v. Jenkins*,[156] the Court of Appeals amplified its prior decision by holding that when the *Goggins* relevance requirement for disclosure has been satisfied, the State may have a duty to produce an informant once under its control even though the informant's unavailability is not due to bad faith on the part of the State and despite the State's diligent efforts to locate the informer.[157] Such a duty arises, however, only if the defendant demonstrates that the testimony of the informant would either tend to exculpate the defendant, or cast a reasonable doubt

[154] 34 N.Y.2d at 170, 313 N.E.2d at 45, 356 N.Y.S.2d at 576. In *Goggins*, an informer introduced the police to a narcotics seller. After the informer left the scene, a purchase was made by an undercover officer. Defendant seller was arrested soon after by other officers informed of the transaction by the undercover operative. At trial, defendant challenged the reliability of the undercover officer's identification, demanding that disclosure of the informer's identity be ordered to resolve the issue. The *Goggins* Court held that where the issue is one of guilt or innocence, the decision whether to disclose may be rendered only after a full adversarial proceeding conducted either before or during the trial. In this proceeding, the defendant must establish a foundation for his disclosure demand, the crucial element of which is the relevance of the informer's testimony to defendant's guilt or innocence. *Id.* The test was found to be satisfied in *Goggins* because the informant's testimony was relevant to the issue of identification. Defendant was arrested at dusk in a public bar by a back-up team of undercover police furnished with only a sketchy description of him by the undercover officer who had transacted the sale. Additionally, a great deal of time had elapsed between the sale of the narcotics and the identification of defendant by the purchasing officer. *Id.* at 172, 313 N.E.2d at 46, 356 N.Y.S.2d at 577-78.

The *Goggins* test of relevance to guilt or innocence is similar to the balancing approach utilized by the United States Supreme Court in Roviaro v. United States, 353 U.S. 53, 62 (1957). *Roviaro* endeavored to strike a balance between the public interest in encouraging informers to come forward and "the individual's right to prepare his defense." *Id.* Unfortunately, the *Roviaro* Court offered no guidance with respect to procedural matters. *See* Note, *Disclosure of an Informant's Identity—The Substantive and Procedural Balance Tests*, 39 ALB. L. REV. 561, 563 (1975). Consequently, New York courts began to formulate differing procedural techniques. *Compare* People v. Malinsky, 15 N.Y.2d 86, 209 N.E.2d 694, 262 N.Y.S.2d 65 (1965), *with* People v. Delgado, 40 App. Div. 2d 554, 334 N.Y.S.2d 90 (2d Dep't 1972) (mem.). *Goggins* resolved the conflict by establishing procedures that govern the disposition of different categories of informant disclosure situations.

[155] 34 N.Y.2d at 173, 313 N.E.2d at 46, 356 N.Y.S.2d at 578.

[156] 41 N.Y.2d 307, 360 N.E.2d 1288, 392 N.Y.S.2d 587 (1977), *aff'g* 49 App. Div. 2d 683, 370 N.Y.S.2d 746 (4th Dep't 1975) (mem.), *and rev'g* People v. Law, 48 App. Div. 2d 228, 368 N.Y.S.2d 627 (4th Dep't 1975).

[157] 41 N.Y.2d 306-07, 360 N.E.2d at 1289, 392 N.Y.S.2d at 588-89.

on the reliability of the prosecutor's case.[158]

In *Jenkins,* defendants were charged with selling heroin to an undercover agent.[159] After a private conversation with Pat Adams, a police informant, they were introduced by Adams to an undercover agent. The defendants subsequently made a sale to the agent which was witnessed by the informant.[160] Although her identity was revealed by cross-examination of a prosecution witness,[161] Adams was unavailable for the trial. Out of fear for her own safety, she had moved to Florida with the assistance of the police and had subsequently disappeared.[162] The prosecution had undertaken efforts to locate the informer, but the search was fruitless.[163] At trial, it was defendants' position that they had not made the sale to the undercover agent. Since the informant was the only witness who would be able to establish this, defendants argued, her testimony was necessary to their defense.[164] Nevertheless, defendants' motion for production of the witness was denied by the trial judge and conviction followed.[165] The convictions were affirmed by the appellate division.[166]

In upholding the convictions, the Court of Appeals expanded upon its prior holding in *Goggins.* Judge Gabrielli, who authored the majority opinion, noted that the essential purpose of the disclosure rule was to make an informer possessing material information avail-

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[158] *Id.* at 310-11, 360 N.E.2d at 1290, 392 N.Y.S.2d at 590.

[159] *Jenkins* involved three defendants, Jenkins, Daniel, and Law, whose cases were consolidated on appeal. There were two separate trials, as Jenkins and Daniel were tried together. All the appeals involved the same issue, that of the production of the informer, Pat Adams, who had introduced each defendant to the same undercover agent.

[160] 41 N.Y.2d at 314-18, 360 N.E.2d at 1292-94, 392 N.Y.S.2d at 591-94 (Fuchsberg, J., dissenting).

[161] *Id.* at 309, 360 N.E.2d at 1289, 392 N.Y.S.2d at 588.

[162] The informer was provided with a hotel room, as she felt unsafe in her apartment. *Id.* at 310 n.1, 360 N.E.2d at 1290 n.1, 392 N.Y.S.2d at 589 n.1. Still feeling insecure in the hotel, she requested and received a plane ticket to Florida, paid for by the Federal Drug Enforcement Administration. *See* People v. Law, 48 App. Div. 2d 288, 291, 368 N.Y.S.2d 627, 631 (4th Dep't 1975).

[163] 41 N.Y.2d at 310, 360 N.E.2d at 1290, 392 N.Y.S.2d at 588-89.

[164] *Id.* at 314-15, 360 N.E.2d at 1292-93, 392 N.Y.S.2d at 591-92 (Fuchsberg, J., dissenting).

[165] *Id.* at 309, 360 N.E.2d at 1289, 392 N.Y.S.2d at 588.

[166] Defendant Law's conviction was affirmed in People v. Law, 48 App. Div. 2d 228, 368 N.Y.S.2d 627 (4th Dep't 1975), with the court holding that production would not be appropriate because the defendant made no showing of necessity for the informer's testimony. *Id.* at 234, 368 N.Y.S.2d at 634. Defendants Jenkins' and Daniel's convictions were affirmed in People v. Jenkins, 49 App. Div. 2d 683, 370 N.Y.S.2d 746 (4th Dep't 1975) (mem.), on the ground that the exact issue had been decided in *People v. Law,* wherein it was held "under identical circumstances that the production of the informant was not required." *Id.*

able to the defendant for examination.[167] Ordinarily, disclosure of the informer's identity would accomplish this objective. The Court found, however, that where an informer who was under the control of law enforcement authorities disappears, more than mere disclosure is required; the duty to disclose in such a situation includes a diligent effort on the part of the prosecution to produce the witness.[168] Turning to the question of when production might be compelled if these diligent efforts fail, the *Jenkins* Court noted that, absent bad faith on the part of the prosecution in either deliberately concealing an informant or failing to make a diligent effort to produce him, "the right to production does not flow from the right to disclosure."[169] Reasoning that the prosecution should not be penalized because of the voluntary disappearance of the informer, the Court held defendants to a burden greater than the *Goggins* relevance test to obtain production.[170] The *Jenkins* standard for production requires a defendant to show that the proposed testimony either would be exculpatory in nature or would raise a reasonable doubt concerning the validity of the prosecution's case.[171] In the instant case, Judge Gabrielli found that although the *Goggins* test was satisfied, the extra burden was not carried by defendants since there

[167] 41 N.Y.2d at 309, 360 N.E.2d at 1289, 392 N.Y.S.2d at 588. This concept is grounded in the sixth amendment right to confrontation of witnesses, which formed the basis of the *Goggins* Court rationale. *See* 34 N.Y.2d at 168, 313 N.E.2d at 44, 356 N.Y.S.2d at 574.

[168] 41 N.Y.2d at 309, 360 N.E.2d at 1289, 392 N.Y.S.2d at 588.

[169] *Id.* (citations omitted). Jurisdictions that have considered the availability of the right to production seem to agree that it is not necessarily coextensive with the right of disclosure. *See, e.g.*, United States v. Super, 492 F.2d 319, 321 (2d Cir.), *cert. denied*, 419 U.S. 876 (1974); United States v. Truesdale, 400 F.2d 620 (2d Cir. 1968); White v. United States, 330 F.2d 811 (8th Cir.), *cert. denied*, 379 U.S. 855 (1964).

[170] 41 N.Y.2d at 312, 360 N.E.2d at 1291, 392 N.Y.S.2d at 590.

[171] *Id.* at 310-11, 360 N.E.2d at 1290, 392 N.Y.S.2d at 589. The *Jenkins* Court utilized a standard similar to that developed in a line of Supreme Court cases. In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court reversed the defendant's conviction because the prosecutor suppressed a companion's pretrial statements which were favorable to the accused. The Court found that this type of prosecutorial misconduct deprives a defendant of due process "where the [suppressed] evidence is material either to guilt or to punishment" regardless of the absence of bad faith. *Id.* at 87. The holding was refined in a recent Supreme Court decision, United States v. Agurs, 427 U.S. 97 (1976). *Agurs* dealt with nontestimonial exculpatory evidence withheld by the prosecution—specifically, a murder victim's prior convictions. Reasoning that reversal should not be required whenever such an error cannot be categorized as harmless, the *Agurs* Court adopted a standard whereby an error is deemed reversible only if the omitted evidence would have created a reasonable doubt in the context of the entire case. *Id.* at 112. This standard bears a resemblance to the one articulated by the *Jenkins* majority. Although the latter deals with an informer's potential testimony, and the former with nontestimonial evidence, both concern a defendant's access to potentially crucial material. Thus, the *Jenkins* requirement that potential testimony have doubt-creating tendencies in order to warrant reversal appears to have precedential support.

was insufficient proof of any exculpatory or doubt-creating quality of the proposed testimony.[172]

In a dissenting opinion, Judge Fuchsberg contended that since the informer was the only person able to corroborate any of the testimony in the case, her testimony was vital and therefore satisfied the "higher standard of materiality and relevance" enunciated by the majority.[173] Positing that the majority would require defendants to demonstrate that the testimony would be favorable to the defense in order to obtain production of the information, the dissent stated that this would "be but to mock" fundamental rights as articulated in *Goggins*.[174] Furthermore, Judge Fuchsberg believed that the conduct of the prosecutor in allowing Adams to leave the state, especially in light of a prosecutor's knowledge of the habits of informers, was the equivalent of bad faith.[175]

At first blush, the holding of the *Jenkins* Court appears consistent with the stated purpose of *Goggins*—to make an informer possessing relevant information available to the defendant. Production is a device utilized to ensure the effectiveness of disclosing an informer's identity. In instances where the informer is unavailable due to the prosecutor's bad faith, production is quite properly ordered; otherwise the defendant is as effectively denied access to the informer as if disclosure never occured.[176] Where the informer is unavailable through no fault of the prosecutor, however, it would be

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[172] 41 N.Y.2d at 311-12, 360 N.E.2d at 1291, 392 N.Y.S.2d at 590.

[173] *Id.* at 315, 360 N.E.2d at 1293, 392 N.Y.S.2d at 592 (Fuchsberg, J., dissenting).

[174] *Id.* at 316, 360 N.E.2d at 1294, 392 N.Y.S.2d at 593 (Fuchsberg, J., dissenting). Judge Fuchsberg emphasized that the informant had never been available to the defendants, rendering it virtually impossible to prove that her testimony would be favorable. *Id.*

[175] *Id.* at 317-18, 360 N.E.2d at 1294, 392 N.Y.S.2d at 593-94 (Fuchsberg, J., dissenting). According to the *Jenkins* majority, if the prosecutor acts in bad faith in failing to secure the informer's presence, production would be mandated. Judge Fuchsberg believed that Adams' disappearance, effectuated with official cooperation, was equivalent to bad faith. The majority disagreed, basing its opinion upon the premise that the prosecution acted in good faith. *See id.* at 310, 360 N.E.2d at 589, 392 N.Y.S.2d at 1290.

[176] Other courts considering this problem generally have adopted the view that in certain instances the State must either produce an informant or suffer dismissal. *See, e.g.*, Hernandez v. Nelson, 298 F. Supp. 682 (N.D. Cal. 1968), *aff'd*, 411 F.2d 619 (9th Cir. 1969) (where prosecutor deliberately allowed an informer who was a material witness to disappear, production or dismissal is mandated); People v. Kiihoa, 53 Cal. 2d 748, 349 P.2d 673, 3 Cal. Rptr. 1 (1960) (where authorities purposely postponed arrest to allow informer to escape, a fair trial was denied the defendant). *See also* People v. Goliday, 8 Cal. 3d 771, 505 P.2d 537, 106 Cal. Rptr. 113 (1973) (due to deliberate failure to obtain informer's full name, prosecutor ordered to provide information sufficient to make informer available to defendant); Eleazer v. Superior Court, 1 Cal. 3d 847, 464 P.2d 42, 83 Cal. Rptr. 586 (1970) (prosecutor must provide information adequate to enable defendant to locate informer and must engage in good faith search).

unfair to place an absolute duty of production upon the state without requiring proof of some additional need for the testimony.

Upon closer analysis, however, it appears that the *Jenkins* standard may effectively eliminate a defendant's right to force production in the absence of bad faith on the part of the State. While the majority opinion necessitates only a showing that an informer's testimony is likely to be favorable,[177] this standard is not susceptible to neat and precise applicalion. If, as Judge Fuchsberg contended, the application of this principle in *Jenkins* indicates that a defendant must show a missing informant's testimony to be favorable to the defense, production would seem unavailable to many defendants. Indeed, those having the greatest need for an informant's testimony, defendants who claim that the informant is the only person in a position to refute the facts presented by the prosecution, would face an almost insurmountable barrier to production. In the event that the *Jenkins* rule is applied this strictly, a defendant establishing bad faith or lack of diligence on the part of the State would have the greatest likelihood of obtaining production. Conversely, should the standard be applied in a less-demanding manner, it may become feasible to demonstrate a significant probability of exculpatory or doubt-creating tendencies in an informant's testimony and thereby force production.[178] Notwithstanding this uncertainty regarding the proper application of the *Jenkins* rule, it is hoped that New York prosecutors, now on notice of disclosure and production standards, will exercise a high degree of care in the handling of informers.

INSURANCE LAW

Ins. Law § 671(4): Physical therapy expenses and chiropractic fees includable in calculating no-fault's "serious injury" threshold.

Section 671(4)(b) of New York's no-fault insurance law allows a "covered person" to maintain an action against another covered person for "noneconomic loss" if the former has incurred reasonable and necessary medical expenses in excess of $500.[179] The legislature

[177] 41 N.Y.2d at 311, 360 N.E.2d at 1291, 392 N.Y.S.2d at 590.

[178] It is possible that in *Jenkins*, the prosecutor's case was of such strength that the standard applied by the majority could not be met. There also appeared to be other evidence that undercut the defendants' contention. *See* 41 N.Y.2d at 312, 360 N.E.2d at 1291, 392 N.Y.S.2d at 592. Perhaps if presented with a weaker prosecution case, this burden could have been carried, for then the informant's testimony would have weighed more heavily upon the outcome of the case.

[179] N.Y. INS. LAW § 671(4)(b) (McKinney Supp. 1976-1977). N.Y. INS. LAW § 671(4)(b)