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State v. Diamond: Compelled Disclosure of an Informant's Identity and the Law of Informant Privilege as a Function of Nonconstitutional Considerations

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STATE V. DIAMOND: COMPELLED DISCLOSURE OF AN INFORMANT'S IDENTITY AND THE LAW OF INFORMANT PRIVILEGE AS A FUNCTION OF NONCONSTITUTIONAL CONSIDERATIONS

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I. INTRODUCTION

The South Carolina Supreme Court has recently articulated, in *State v. Diamond*,[1] an exception to the evidentiary privilege which protects a police informant's identity. Although compelled disclosure is one of the "fundamental requirements of fairness,"[2] it is submitted that the use of such language, in the context of the criteria governing the release of an informant's identity, is based upon misinterpretation to the extent it suggests that the disclosure standards have a constitutional basis. This Article discusses *Diamond* and the origins of the informant privilege, not as a constitutional mandate, but rather as a product of the supervisory powers of courts to formulate rules of evidence.

II. BASIS OF THE PRIVILEGE AND ITS EXCEPTION

The informant's privilege is based on the policy of promoting the obligation of the ordinary citizen to report crime by preserving his anonymity.[3] This policy of protecting the flow of information should be balanced against the individual's right to prepare his defense,[4] which right includes the ability to compel

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1. 280 S.C. 296, 312 S.E.2d 550 (1984).
2. Roviaro v. United States, 353 U.S. 53, 60 (1957).
3. *Id.* at 59.
4. *Id.* at 62.

the attendance of and to confront witnesses.[5]

The guarantee of compulsory process exists to protect the accused's right to introduce witnesses in his behalf. In *Washington v. State of Texas*,[6] the Supreme Court stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.[7]

The Court held that the defendant's right to compulsory process outweighs the policies of a state statute barring an accomplice from testifying for the accused.

The due process clause of the fourteenth amendment, of which the right of confrontation is a part, is of equal importance in considering privilege. In *California v. Green*,[8] the Supreme Court held that the right to confront witnesses furthers the requirement that all evidence presented in a criminal case must possess sufficient indicia of reliability so that the trier of fact may assess it rationally:

> The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.[9]

Similarly, in *Chambers v. Mississippi*,[10] the Supreme Court

5. *See* U.S. CONST. amend. VI.
6. 388 U.S. 14 (1967).
7. *Id.* at 19.
8. 399 U.S. 149 (1970).
9. *Id.* at 158-59 (quoting Mattox v. United States, 156 U.S. 237, 242-43 (1895)).
10. 410 U.S. 284 (1973).

stated that rules of evidence may not be applied in a mechanical way to defeat the ends of justice.

Although these constitutional guarantees are of great importance to our scheme of justice, no constitutional right is absolute. Professor Westen explores the idea that privileges are designed to protect important relationships and interests by enabling a witness to keep even reliable and relevant information secret. The protection of these relationships and interests is said to outweigh the pursuit of truth. Westen concludes, however, that if an irreconcilable conflict arises between the policy of preserving governmental interests and that of assuring a fair trial, one must choose between preserving the privilege or prosecuting the accused. In such a case, the government must waive its privilege for the prosecution to continue. "Compulsory process does not deny the government's interest in secrecy, but prohibits the government from invoking secrecy at the defendant's expense."[11] It is submitted that where the lives of informants and police officers are at stake, this conclusion is an oversimplification. Even in those cases where the informant is a "mere tipster" (that is, did not take part in the actual transaction constituting the crime), withholding any information from a defendant disadvantages him to some degree. However, to allow inquiry into every tip would upset the operation of the criminal justice system. This point was demonstrated in *McCray v. State of Illinois*,[12] where the defendant demanded the identity of an informant who supplied police with probable cause to search his person. The Court quoted from a case where the New Jersey Supreme Court had reasoned:

> If a defendant may insist upon disclosure of the informant in order to test the truth of the officer's statement that there is an informant or as to what the informant related or as to the informant's reliability, we can be sure that every defendant will demand disclosure. He has nothing to lose and the price may be the suppression of damaging evidence if the State cannot afford to reveal its source, as is so often the case. And since there is no way to test the good faith of a defendant who presses the demand, we must assume the routine demand

11. Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 163 (1974). *See generally id.* at 159-177.

12. 386 U.S. 300 (1967).

would have to be routinely granted. The result would be that the State could use the informant's information only as a lead and could search only if it could gather adequate evidence of probable cause apart from the informant's data. Perhaps that approach would sharpen investigatorial techniques, but we doubt that there would be enough talent and time to cope with crime upon that basis. Rather we accept the premise that the informer is a vital part of society's defensive arsenal. The basic rule protecting his identity rests upon that belief.[13]

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13. *Id.* at 306-07 (quoting State v. Burnette, 42 N.J. 377, 385, 201 A.2d 39, 43-44 (1964)). The Uniform Rules of Evidence incorporate an attempted compromise solution to the problem. Rule 509 provides:

> (a) *Rule of privilege.* The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.
>
> (b) *Who may claim.* The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished.
>
> (c) *Exceptions*
>
> (1) *Voluntary disclosure; informer a witness.* No privilege exists under this rule if the identity of the informer or his interest in the subject matter of his communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the government.
>
> (2) *Testimony on relevant issue.* If it appears in the case that an informer may be able to give testimony relevant to any issue in a criminal case or to a fair determination of a material issue on the merits in a civil case to which a public entity is a party, and the informed public entity invokes the privilege, the court shall give the public entity an opportunity to show *in camera* facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the court finds there is a reasonable probability that the informer can give the testimony, and the public entity elects not to disclose his identity, in criminal cases the court on motion of the defendant or on its own motion shall grant appropriate relief, which may include one or more of the following: requiring the prosecuting attorney to comply, granting the defendant additional time or a continuance, relieving the defendant from making disclosures otherwise required of him, prohibiting the prosecuting attorney from introducing specified evidence, and dismissing charges. In civil cases, the court may make any order the interests of justice require. Evidence submitted to the court shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the informed public entity. All counsel and parties are permitted to be present at every stage of proceedings under

III. *State v. Diamond*—COMPELLED DISCLOSURE BASED ON SURROUNDING FACTS AND CIRCUMSTANCES

In *State v. Diamond*, an undercover police officer purchased narcotics from a number of individuals as part of an extended narcotics investigation. During the investigation, the officer purchased heroin from Diamond, the defendant, after an informant introduced Diamond to him. The defendant was arrested five months after the transaction, and was later tried and convicted. At his trial, Diamond testified that he was not present at the scene of the transaction and contended that he had never seen the officer who claimed to have purchased drugs from him.[14] Diamond's defense was not a true defense of alibi, that is, that he was "elsewhere,"[15] but instead was a simple denial of the officer's testimony identifying him as the person who sold drugs on the day in question.

The evidence presented by the state disclosed that the informant who made the introduction was more than a mere "tipster." The testimony revealed that the informant told the defendant immediately after the introduction that the officer wanted "to pick up a package."[16] The informant took a quantity of heroin from the defendant and gave it to the officer in exchange for twenty-five dollars. The transaction was therefore initiated, brokered, and consummated in the informant's presence, with his full participation. Another officer monitored the transaction with an electronic listening device. At trial, the second officer's testimony did not corroborate or strengthen the undercover officer's identification of Diamond and was filled with inconsistencies, inaccuracies, and misstatements of fact with respect to the transaction. This testimony was described by the court as "at best, confused and contradictory."[17]

The defendant moved to require the prosecution to disclose the informant's identity. The trial court denied the motion and Diamond appealed his later conviction based on the court's rul-

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this subdivision except a showing *in camera* at which no counsel or party shall be permitted to be present.

UNIF. R. EVID. 509.

14. 280 S.C. at 296, 312 S.E.2d at 550.

15. *Id.* at 297, 312 S.E.2d at 550.

16. *Id.* at 298, 312 S.E.2d at 551.

17. *Id.*, 312 S.E.2d at 551.

ing on this issue. The South Carolina Supreme Court reversed Diamond's conviction and held that disclosure was required based on "the various factors and circumstances surrounding the drug transaction and the testimony given by the police officers."[18] The court analyzed the informant identity disclosure issue in light of three prior decisions: *Roviaro v. United States*,[19] a United States Supreme Court decision compelling disclosure in a federal criminal proceeding; *McLawhorn v. North Carolina*,[20] a Fourth Circuit Court of Appeals decision compelling disclosure in a state criminal proceeding; and *State v. Batson*,[21] an earlier South Carolina Supreme Court decision refusing to compel disclosure in a state criminal proceeding. Each case was one of first impression on the subject of informant privilege and involved a generally similar factual situation. If the Fourth Circuit's "fundamental fairness" language in *McLawhorn* is correct in its implication that the disclosure in *Roviaro* was mandated by the Constitution,[22] the decision in *Batson* appears to contravene that federal mandate.

IV. *Roviaro, McLawhorn* AND *Batson*: COMPELLED DISCLOSURE AND ITS CASES OF ORIGIN

The Supreme Court's 1957 decision in *Roviaro* is the seminal case on the compelled disclosure of an informant's identity, an exception to the informant's privilege. At the defendant's trial for violating the Narcotic Drugs Import and Export Act,[23] the government relied on the testimony of two federal narcotics agents and two state police officers. The four had engaged in the surveillance of a drug transaction between the defendant and the informant. The transaction took place in the informant's car, with one of the local agents secreted in the trunk. The same officer overheard what he believed to be a conversation about the sale of narcotics and saw the defendant, whom he knew by sight,

18. *Id.* at 299, 312 S.E.2d at 552.

19. 353 U.S. 53 (1957).

20. 484 F.2d 1 (4th Cir. 1973).

21. 261 S.C. 128, 198 S.E.2d 517 (1973).

22. The court there concluded that "this refusal to reveal the identity of a participant in the offenses charged constitutes a denial of fundamental fairness required by the fourteenth amendment." 484 F.2d at 2-3.

23. 21 U.S.C. § 174 (1976).

retrieve a package from a tree, return to the informant's car, deposit the package, and walk away. One of the federal agents found the package immediately thereafter when he went to the car. That package contained narcotics.

Less than an hour after the transaction, the defendant and the informant were taken into custody, the latter to preserve his confidentiality. At trial, it was undisputed that on the night of the arrest, while in the stationhouse with the defendant present, the informant indicated to the arresting officers that he did not know the defendant. Although a majority of the Court concluded that this fact undermined the identification of the defendant, the statement could have been explained by the fact that it appears the informant was still playing his role as a codefendant in order to prevent disclosure of his informant status.[24] In its analysis, the Court in *Roviaro* balanced the public interest in protecting the flow of information about criminal activities against the defendant's right to prepare and present his defense.[25] Recognizing several instances where the informant's privilege would be inapplicable, the Court stated that one such exception existed where disclosure is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause."[26] In concluding that "no fixed rule with respect to disclosure is justifiable," the Court stated that the issue must be resolved in light of the facts and circumstances of each case, including, for example, the crime charged, potential defenses, and the likely significance of the informant's testimony.[27]

Several of the foregoing factors noted by the Court in *Roviaro* warrant further discussion. First, assuming that *Roviaro* has federal constitutional bases, any state action in criminal proceedings violates the fourteenth amendment due process guarantees if that action abridges a right of the accused that is "fundamental to the American scheme of justice."[28] In *Roviaro*, the

24. *See* 353 U.S. at 67-68 (Clark, J., dissenting).

25. 353 U.S. at 62.

26. *Id.* at 60-61.

27. *Id.* at 62.

28. Benton v. Maryland, 395 U.S. 784, 796 (1969). It should be noted that the Fourth Circuit Court of Appeals specifically relied on this decision in conjunction with *Roviaro* for the proposition that "limitations on the privilege of nondisclosure arise from the Fourth Amendment's requirement of fundamental fairness to the accused." 484 F.2d at 5.

fundamental right apparently at issue was "the individual's right to prepare his defense."[29] The criminal statute involved allowed conviction unless the accused explained or justified possession of narcotics.[30] The character of this statute was of particular importance to the Court's decision that the government had allocated a burden of proof to the defendant and had unfairly withheld from him the means of satisfying that burden when it denied him potentially material information—an informant's identity. Although the Court concluded that the statute was not a "burden shifting" provision and that it "merely places on the accused, at a certain point, the burden of going forward with his defense,"[31] subsequent analysis of the constitutionality of presumptions in criminal law has blurred the distinction.[32]

The other key determinant of compelled disclosure in *Roviaro* was the use of the defendant's remarks to the informant during the transaction. The Court categorized this factor as one which "particularly emphasizes the unfairness of the nondisclosure," for only the informant could "controvert, explain, or amplify"[33] the officer's testimony as to the defendant's statements. It is submitted that the use of such hearsay testimony is not a matter of constitutional dimensions in all instances.[34] Additionally, *Roviaro* was tried before a judge alone,[35] an instance that generally permits a judge, as fact finder, to consider evidence more prejudicial than a jury under the same circumstances.[36]

It is clear, then, that the Court in *Roviaro* reasoned that the defendant's rights to prepare and present his defense were fundamentally jeopardized both because it was impossible for him to satisfy the burden allocated to him and because he was not

29. 353 U.S. at 62.

30. *Id.* at 62-63.

31. *Id.* at 63.

32. *See* Sandstrom v. Montana, 442 U.S. 510 (1979); Mullaney v. Wilbur, 421 U.S. 684 (1975). *But see* State v. Gaines, 271 S.C. 65, 244 S.E.2d 539 (1978); State v. Attardo, 263 S.C. 546, 211 S.E.2d 868 (1975).

33. 353 U.S. at 64.

34. *See* Dutton v. Evans, 400 U.S. 74 (1970); Bruton v. United States, 391 U.S. 123 (1968). The Court in *Dutton* stated: "It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now." 400 U.S. at 80.

35. 353 U.S. at 55.

36. *See Bruton*, 391 U.S. at 128-29; Parker v. Randolph, 442 U.S. 62, 69-70 (1979); *In re* Lawson, 273 S.C. 560, 562, 257 S.E.2d 745, 746 (1979).

allowed to "confront" a witness who may or may not have been adverse to his interests, had he chosen to call that witness in his behalf. The Court weighed other facts against protecting the informant's identity. These facts included that the informant set up the transaction and was prominent in its actual completion, and that it was possible that his testimony might have disclosed an entrapment or cast doubt upon the defendant's identity as the one who delivered the package or upon the composition of the package itself.[37] Additionally, the majority in *Roviaro* noted, in the opinion's closing lines, that a minor inconsistency in the chain of evidence was an additional factor that affected the credibility of two of the officers, giving further reason for disclosure.[38]

In *McLawhorn v. North Carolina*,[39] the defendant, who was being prosecuted for selling drugs, filed a petition for habeas corpus in federal district court, alleging that the State's refusal to reveal the identity of an informant was a denial of due process.[40] The Fourth Circuit Court of Appeals, citing *Roviaro*, concluded that a refusal to reveal the identity of a *participant* in the transaction constituted "a denial of fundamental fairness required by the Fourteenth Amendment"[41] and ordered the defendant released or retried within a reasonable period of time.

McLawhorn's conviction resulted from an extended narcotics investigation by an undercover police officer, similar to that in *Roviaro*, covering a period of approximately four months. The informant introduced McLawhorn to the undercover officer and, during their meeting, the defendant sold cocaine to the officer. The transaction occurred in the defendant's car, the informant arranged and negotiated it, and both the officer and the informant exchanged money with the defendant. As in *Diamond* and *Roviaro*, the informant's full participation in the transaction was uncontested.

The court in *McLawhorn* looked at the totality of attendant

37. 353 U.S. at 64.

38. *Id.* at 65.

39. 484 F.2d 1 (4th Cir. 1973).

40. It should be noted that the defendant in this instance appears to have been given opportunity in a state court to litigate a federal constitutional issue which was decided adversely to him. As to subsequent litigation of other due process issues in federal collateral proceedings, see Stone v. Powell, 428 U.S. 465, 483 (1976).

41. 484 F.2d at 2.

circumstances in reaching its conclusion that disclosure of the informant's identity was compelled by "fundamental fairness."[42] Further, although the decision does attach particular significance to the informant's role as "participant" as opposed to mere "tipster,"[43] the recent case of *United States v. Brinkman*[44] indicates that the Fourth Circuit's analysis will not focus on the labels given the role of the informant in a transaction but rather on the "propriety of the district court's assessment of the *Roviaro* balance in light of 'the particular circumstances' of the case."[45] The district court in *Brinkman* balanced the concerns as follows:

> This Court is persuaded that the public interest in maintaining the anonymity of an undercover agent who, according to the Government's statement, is currently involved in other investigations which would be virtually crippled by revealing the agent's true identity, outweighs the need for the Defendant to learn the true identity of an agent who was not a witness or a participant in the crime with which the Defendant has been charged, and was minimally involved with introducing the Defendant to a government agent.[46]

Thus, because the court relied strongly on the *Roviaro* balance in its recent consideration of the issue, the most important aspect of *McLawhorn* appears to be its strong factual similarity to *Roviaro*.

The case of first impression on compelled disclosure in South Carolina is *State v. Batson*,[47] a 1973 decision that predated *McLawhorn* by a single month. In *Batson*, two women approached the defendant and his friend at a bar and indicated their desire to purchase narcotics. When the friend indicated that he would sell narcotics he had hidden at another location, the women, who were State Law Enforcement Division (SLED) informants, contacted a SLED agent. The agent arrived at the bar soon thereafter with another male agent. After introductions and preliminary negotiations, all of the parties left the bar and

42. *Id.* at 5.
43. *Id.*
44. 739 F.2d 977 (4th Cir. 1984).
45. *Id.* at 981.
46. *Id.* (citing the district court).
47. 261 S.C. 128, 198 S.E.2d 517 (1973).

went to a site where the friend retrieved a package. The parties then traveled to the friend's house. Once there, the parties counted money and narcotic tablets but the exchange was delayed to allow the informants to leave before any arrests were made. After the informants departed, the transaction was completed and the defendant and his friend, a juvenile, were arrested for distribution of the narcotic LSD.

The juvenile friend pleaded guilty to the charge against him. Batson, however, contended that he did not participate in the crime. After the state presented its case against Batson, consisting of the testimony of a single SLED agent, the juvenile was called on Batson's behalf. Both he and Batson testified that Batson's only interest throughout the evening in question was the amorous pursuit of one of the female informants. Both testified that during the counting of the drugs and money and the negotiations that took place with the SLED agents, Batson was in a bedroom with one of the informants. However, Batson did not make an effort, prior to trial, to determine the informant's identity.[48]

The South Carolina Supreme Court affirmed the trial court's refusal to compel disclosure of the informant's identity. The court began its analysis by stating that the informant privilege has a common law origin. The court addressed *Roviaro* and its balancing test, but pointed out that the burden rests on the defendant, by timely motion,[49] to show facts and circumstances which establish that his need for disclosure outweighs society's interest in protecting the flow of information by secreting an informant's identity. The court in *Batson* found that the request for disclosure was "raised purely as a matter of trial strategy."[50] It was intended "to serve the dual purpose of creating doubt in the minds of the jurors and laying a possible ground for appeal in the event of conviction."[51] Because Batson made no effort prior to trial to obtain the informant's identity, the court concluded that the motion for disclosure was properly refused.

It is submitted that *McLawhorn* and *Diamond* share such

48. *Id.* at 131, 198 S.E.2d at 519-520.
49. *Id.* at 134-35, 198 S.E.2d at 520.
50. *Id.* at 135, 198 S.E.2d at 520.
51. *Id.*

sufficient factual similarity with *Roviaro*, the "leading case"[52] on informant privilege, that the result should be the same in all three cases. The more fundamental question is whether the Constitution *mandates* that the result in all three be the same, or whether *Roviaro* merely suggests it in such words that the whisper of "fundamental requirements of fairness" is misinterpreted as the shout of due process guaranteed by constitutional principle. It is, after all, curious that the opinion of Justice Burton in *Roviaro* speaks in terms of "reversible error,"[53] of "prejudicial error,"[54] and of the basic "unfairness of the nondisclosure"[55] on the facts before the Court and yet clearly and most carefully refrains from holding that due process was violated on the totality of those facts in issue. Further, the Court in *Roviaro* clearly and carefully omits any reference whatsoever to due process or the specific part of the Constitution which compels the result. However, the opinion contains clear support for the proposition that the common law furnishes the basis for the privilege, apart from any constitutional requirements, and permits an exception based upon the needs of fairness and upon a sufficient showing that disclosure is "material to the ends of justice."[56]

The decision of the South Carolina Supreme Court in *Batson* can be rationalized, on the other hand, on the record's failure to demonstrate a bona fide need for disclosure, and on the assertion of "need" purely as a matter of trial strategy. The dissent of Justice Clark in *Roviaro* addressed this same consideration, categorizing the efforts of the defense in that case as "shadowboxing with the prosecution . . . hoping to get a reversible error."[57] The fact that, thirty years later, the defense bar commonly terms Roviaro's strategy of waiving a jury trial and having the matter tried before the court alone as a "slow guilty plea" also lends support to this contention.

Diamond cited three precedents for the standard governing the privilege and its exception. Although these precedents at first appear to have constitutional underpinnings, the factors

52. 280 S.C. at 297, 312 S.E.2d at 550. The court in *Diamond* called *Roviaro* the leading case on informant privilege.

53. 353 U.S. at 55.

54. *Id.* at 65.

55. *Id.* at 64.

56. *Id.* at 61 n.9.

57. 353 U.S. at 70 (Clark, J., dissenting).

and circumstances discussed by the court in *Diamond*, when examined further, represent three basic common law concerns that weigh substantially for disclosure, apart from any constitutional mandate. It is submitted that the court in *Diamond* was guided primarily by these three criteria as a method of balancing policy and fairness in ruling that the trial judge in that case abused his discretion in not compelling disclosure of the informant's identity.

First, the court in *Diamond* focused upon the establishment of a bona fide need for disclosure by the defendant.[58] The record indicated that the undercover police officer was involved in a long-term investigation, requiring many purchases from a number of suspects. The investigation occurred over a period of months, and more than eleven months elapsed between the officer's single four or five minute transaction with the defendant and the trial date. By presenting these facts, the defendant clearly established a genuine identification issue.

Second, the court's opinion addressed generally the actions of law enforcement in undertaking the investigation, including the decision to involve the informant personally in the actual transaction. This involvement made the informant a participant and material witness rather than a mere tipster. It is questionable whether an informant's identity is truly confidential when he is extensively involved in a large investigation.[59]

Finally, perhaps the most significant factor in the analysis was the *Diamond* court's assessment of the potential that exists for abuse of the privilege with respect to testimony. Unlike *Roviaro*, where the Court merely alluded to the potential, the *Diamond* court found that the testimony of at least one of the officers involved raised reasonable and substantial questions of veracity.[60] Under those circumstances, the *Diamond* court appeared particularly concerned with assuring that the defendant had an opportunity to determine whether the informant's testimony would help or damage his cause.

An adequate nonconstitutional basis therefore exists for the decision in *Diamond*; the court merely weighs competing evidentiary interests in balancing the privilege against the case for dis-

58. 280 S.C. at 297, 312 S.E.2d at 551.
59. *Id.* at 297-98, 312 S.E.2d at 551.
60. *Id.* at 298, 312 S.E.2d at 551.

closure. The court does this by assessing all factors and circumstances, by scrutinizing the defendant's need for the informant's identity, and by examining the reasonableness of the claim of privilege and the potential for the abuse of testimony. The question remains, however, whether the "fairness" at stake in this process is also one of constitutional dimensions.

V. *Colorado v. Nunez* AND COMPELLED DISCLOSURE AS A MATTER OF STATE LAW

In a recent case, *Colorado v. Nunez*,[61] the United States Supreme Court indicated that compelling informant disclosure is basically a matter of limiting a common law evidentiary privilege, rather than a matter of enforcing a constitutional requirement. The Court, in a per curiam opinion, dismissed a writ of certiorari as improvidently granted, "it appearing that the judgment of the court below rested on independent and adequate state grounds."[62] Justice White concurred in the dismissal, joined by the Chief Justice and Justice O'Conner, and underscored the fact that the federal constitution did not compel the result reached by the state court.[63] Justice White wrote that the state court based its decision on a state rule of law compelling disclosure of an informant's identity upon a showing of a reasonable basis for questioning the accuracy of informant information contained in a search warrant.

The Colorado Supreme Court in *Nunez* affirmed the trial court's suppression of seized evidence after the state refused to disclose an informant's identity. At the suppression hearing, the defendant offered testimony disputing the facts which formed the basis of the warrant to search the defendant's house. After the court granted the suppression motion, the state took an interlocutory appeal to the Colorado Supreme Court.[64] That court affirmed the trial court's judgment "solely on the ground that

61. 104 S. Ct. 1257, *reh'g denied*, 104 S. Ct. 1932 (1984).

62. *Id.*

63. *Id.* (White, J., concurring).

64. In South Carolina, an appeal in a criminal case cannot be taken until the final judgment is rendered on the indictment. An appeal which is taken from a pre-trial ruling is interlocutory in nature and may be dismissed. State v. Allen, 277 S.C. 595, 291 S.E.2d 459 (1982); State v. Hubbard, 277 S.C. 568, 290 S.E.2d 817 (1982); State v. Thomas, 275 S.C. 274, 269 S.E.2d 768 (1980).

disclosure of the informant's identity was essential to [the defendant's] motion to suppress."[65] Concurring that "neither the federal constitution nor any decision of this Court"[66] requires such a result, Justice White in *Nunez* stated that the Colorado rule authorizing a defendant at a suppression hearing to impeach the credibility of an *informant*, and not just the credibility of an *affiant*, rested largely on state law.[67] The particular decisions of the Colorado Supreme Court which create this rule,[68] however, appear to be rooted in the Colorado court's analysis of two United States Supreme Court decisions, *Franks v. Delaware*[69] and *Roviaro*.

The Court held in *Franks* that where a defendant makes a substantial preliminary showing that a statement substantiating a finding of probable cause was false and intentionally, or with reckless disregard, included by the *affiant* in a search warrant affidavit, the defendant is entitled to a separate evidentiary hearing into the veracity of the warrant allegations. If the defendant's allegations are established by a preponderance of the evidence and the court concludes that the false information is essential to establish probable cause, the warrant is void and the evidence seized pursuant to it must be suppressed. The Court in *Franks*, however, specified that the rule announced "has a limited scope"[70] and that the decision was intended to allow impeachment "only . . . of the *affiant*, not of any nongovernmental informant."[71] The decision in *Franks* distinguished an earlier decision of the Court, *Rugendorf v. United States*,[72] where a motion to suppress based on inaccuracies in the affidavit was held properly denied on grounds that the misstatements there "were of only peripheral relevancy to the showing of probable cause, and, not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit."[73] The majority

65. 104 U.S. at 1257 (White, J., concurring).

66. *Id.* (White, J., concurring).

67. *Id.* at 1257-58 (White, J., concurring).

68. People v. Martinez, 658 P.2d 260 (Colo. 1983); People v. Dailey, 639 P.2d 1068 (Colo. 1982).

69. 438 U.S. 154 (1978).

70. *Id.* at 167.

71. *Id.* at 171.

72. 376 U.S. 528 (1964).

73. *Id.* at 532.

opinion in *Rugendorf* was written by Justice Tom C. Clark,[74] author of the dissenting opinion in *Roviaro*, and made no mention of a constitutional basis for informant disclosure in its brief discussion of *Roviaro*.[75]

At the heart of Justice White's opinion in *Nunez* is *McCray v. Illinois*,[76] in which the Court declined to hold that an informant's identity must always be disclosed in criminal proceedings.[77] Of particular significance in *McCray* was the discussion of federal court informant disclosure solely in the context of the Court's power to formulate evidentiary rules for federal criminal cases. The Court repeatedly referred to the same issue presented on a state court appeal as one of *state* evidence law. The Court stated that by permitting the prosecution to withhold the informant's identity, the Illinois Supreme Court "was following well-settled Illinois law,"[78] an "Illinois evidentiary rule,"[79] and a "well-established testimonial privilege, long familiar to the law of evidence."[80] The Court pointed out that it has "the ultimate task of defining the scope to be accorded to the various common law evidentiary privileges in the trial of federal criminal cases[,]. . . [a] task which is quite different, of course, from the responsibility of constitutional adjudication."[81] *Roviaro* was then discussed as a product of this "supervisory jurisdiction,"[82] and not as a case involving constitutional adjudication.

The Court in *McCray* removed itself further from the suggestion that due process was at issue in *Roviaro* by broadening the context of the decision to one "where the issue was the fun-

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74. In his opinion in *Rugendorf* and in his dissent in *Roviaro*, Justice Clark focused on a practical analysis of the problems and concerns of law enforcement in using informants in criminal case investigation. This would be a natural extension of his twelve years as a federal criminal prosecutor, the last four of which were served as Attorney General of the United States. Perhaps the credibility wrought by this practical knowledge of the subject matter accounts for the tentative language of the majority opinion in *Roviaro*. The author of that majority opinion, Justice Burton, was a former United States Senator, state legislator, and Mayor of Cleveland, Ohio.

75. 376 U.S. at 534-35.

76. 386 U.S. 300 (1967).

77. *See also* State v. Bernotas, 277 S.C. 106, 283 S.E.2d 580 (1981), *cert. denied*, 455 U.S. 1017 (1982); State v. Shupper, 263 S.C. 53, 207 S.E.2d 799 (1974).

78. 386 U.S. at 305.

79. *Id.*

80. *Id.* at 308.

81. *Id.* at 309.

82. *Id.*

damental one of innocence or guilt."[83] The Court in *McCray* then removed any doubt that it intended by its decision to render *Roviaro* a constitutional nullity when it stated that the *Roviaro* court "carefully reviewed"[84] the circumstances of Roviaro's trial for the particular factors which compelled disclosure. The discussion in *McCray* not only omitted the two key factors which stood as the particular "constitutional" concerns of the Court in *Roviaro*, but found no support for the petitioner's position that either of two constitutional provisions were violated by the circumstances of McCray's trial,[85] both assertions apparently formulated to match Justice Burton's analysis in *Roviaro*.[86]

VI. Conclusion

The decision of the South Carolina Supreme Court in *Diamond* is the first articulation, by a South Carolina court, of factors and criteria to be balanced in favor of compelled disclosure of an informant's identity. In reaching its conclusion, the court appeared to have been particularly influenced by factors which established (1) the defendant's bona fide need for such information in preparing and proving his defense, (2) the unreasonableness of law enforcement in relying on the privilege at trial in light of its conduct preceding arrest and trial, and (3) the perceived potential for law enforcement abuse of the privilege on the record before the court. All of these criteria reflect policy considerations and competing interests which the highest court of any state might weigh in limiting the scope of its own evidentiary privilege, or which a state legislature might consider in codifying the privilege and its limitations.[87]

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83. *Id.*

84. *Id.* at 310-11.

85. *Id.* at 312-14. The court there was referring to arguments based on the due process clause of the fourteenth amendment and the sixth amendment right of confrontation, as applied to the states by the fourteenth amendment.

86. 353 U.S. at 62-64.

87. On March 1, 1984, legislation providing that the name of an informant might not be disclosed except under certain circumstances was introduced in the South Carolina Senate and was referred to the Judiciary Committee. This bill, S.840, died in Committee. For other discussion of the interaction between the judiciary and the legislature in promulgating rules of evidence, see Ghent, *Victim Testimony in Sex Crime Prosecutions*, 34 S.C.L. Rev. 583 (1982).

Although *Diamond* defers to the decision in *Roviaro* as the "leading case" on informant privilege, this 1957 decision of the United States Supreme Court is also the leading source of confusion on whether limitations on informant privilege are matters of constitutional adjudication or are based on the authority of the courts of various jurisdictions to formulate rules of evidence. Cases such as *McCray* and *Nunez* indicate that *Roviaro's* suggestion that the issue is one of constitutional proportions is of questionable continued validity.