

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 82-1845

**TITLE** COLORADO, Petitioner v. ANTONIO GUADALUPE NUNEZ

**PLACE** Washington, D. C.

**DATE** January 17, 1984

**PAGES** 1 thru 38



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IN THE SUPREME COURT OF THE UNITED STATES

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COLORADO,	:	
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Petitioner	:	
	:	
v.	:	No. 82-1845
	:	
ANTONIO GUADALUPE NUNEZ	:	
	:	
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Washington, D.C.

Tuesday, January 17, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:17a.m.

APPEARANCES:

STEVEN LEON BERNARD, ESQ., Chief Trial Attorney, Adams County, Brighton, Colorado; on behalf of the Petitioner.

KENNETH H. STERN, ESQ., Denver, Colorado; on behalf of the Respondent.

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ORAL ARGUMENT OF

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1 balloons which contained heroin.

2 Mr. Nunez was charged with possession of a  
3 Schedule One Controlled Substance in Colorado and his  
4 counsel filed a motion to suppress the fruits of that  
5 search, alleging in part there was no probable cause for  
6 that search.

7 He also filed a motion for the disclosure of  
8 this particular confidential informant who provided this  
9 information. A hearing was held in September of 1982  
10 upon that motion for disclosure.

11 At that time, Mr. Nunez himself testified. He  
12 stated among other things that he was off in the  
13 mountains hunting in his motor home, that he had to been  
14 to Mexico, and that the only people who had been at his  
15 home within 24 hours of the 7th day of November of 1981  
16 were members of his immediate and extended family.

17 He also said at one point during cross  
18 examination that he did not know what heroin was.

19 The court, based upon this information,  
20 ordered the prosecution to disclose the name of the  
21 informant.

22 QUESTION: Mr. Bernard, do you think that the  
23 Colorado court based its holding on federal law?

24 MR. BERNARD: I certainly do, Justice  
25 O'Connor, and for the following reasons:

1           The court in the case of Colorado versus Nunez  
2           relied upon three prior Colorado decisions. The first  
3           decision was People versus Dailey which had been decided  
4           approximately one and a half years before.

5           In People versus Dailey, the Colorado Supreme  
6           Court referred at one point to the Colorado  
7           Constitution, but at that time it was only for the  
8           amount of information necessary to begin a veracity  
9           hearing.

10           QUESTION: Well, on that point, I think Dailey  
11           states that in Colorado the rule is that a defendant is  
12           entitled to a veracity hearing once he shows a good  
13           faith basis for believing the material in the affidavit  
14           was inaccurate. Now, do you think that that holding is  
15           based on federal law?

16           MR. BERNARD: Your Honor, I would like to say  
17           so, but I don't believe that I can, because there is an  
18           indication --

19           QUESTION: Well, no, it is not.

20           MR. BERNARD: There is an indication clearly  
21           that it was based upon the Colorado Constitution. But,  
22           the issue in this case concerns the disclosure of the  
23           informant. The Colorado court in Dailey --

24           QUESTION: The Roviario-McCray issue?

25           MR. BERNARD: That is correct. That is

1 correct.

2 QUESTION: On that you think the Colorado law  
3 is the same as or based on federal law on that aspect of  
4 the question?

5 MR. BERNARD: Yes. Justice Lohr said exactly  
6 that. They have adopted the same test of Roviario versus  
7 McCray.

8 If I may elaborate on my answer a little bit,  
9 in the Dailey opinion, the Colorado Supreme Court said  
10 specifically that while the Colorado Constitution may  
11 support a lesser amount of evidence shown, when it  
12 talked about what consequences, and disclosure is one of  
13 the consequences, that must flow from the decision the  
14 court must make after that showing, it referred  
15 specifically to both the United States Constitution and  
16 to the Colorado Constitution.

17 At that hearing -- After that hearing and  
18 after the order of disclosure, the prosecution took an  
19 interlocutory appeal to the Supreme Court of the State  
20 of Colorado in which that issue was addressed.

21 The Colorado Supreme Court affirmed the lower  
22 court's decision and we petitioned for certiorari. This  
23 Court granted review.

24 The issue in this case is essentially  
25 twofold.

1                   QUESTION: Excuse me. In Colorado is it true  
2 that you could have had an in camera hearing on this  
3 point?

4                   MR. BERNARD: That is correct, Justice  
5 Marshall.

6                   QUESTION: And, you didn't ask for it?

7                   MR. BERNARD: No, we did not.

8                   QUESTION: Why?

9                   MR. BERNARD: We were concerned for the  
10 informant's safety.

11                  QUESTION: In an in camera?

12                  MR. BERNARD: Yes, Your Honor.

13                  The first issue in this case is an issue that  
14 was reserved in Franks versus Delaware. In that opinion  
15 at page 170, Justice Blackmun reserved the issue, a  
16 difficult issue, of whether an informant should be  
17 disclosed after a satisfactory showing at a veracity  
18 hearing.

19                  The issue in this case also concerns where, as  
20 in the case at bar, if the counsel for the accused and  
21 the court both concede that the credibility of the  
22 police officer of Frank is not at issue, therefore,  
23 should there be disclosure at all?

24                  Before we get --

25                  QUESTION: Do you think the federal



1 Constitution imposes some limits on how liberal a  
2 state's rule of evidence can be on that point?

3 MR. BERNARD: Your Honor, I believe that this  
4 goes to a question of Fourth Amendment interpretation  
5 and the exclusionary rule.

6 First of all, beginning with Aguilar and  
7 Spinelli and with this Court's recent decision in  
8 Illinois versus Gates, there is clearly an issue of  
9 whether a confidential informant can be used in a search  
10 warrant. When that happens, that becomes a Fourth  
11 Amendment issue.

12 This is not merely a question of evidentiary  
13 law, but this is a question of the application of the  
14 Fourth Amendment.

15 The question is, therefore, does the Fourth  
16 Amendment require disclosure if, after a veracity  
17 hearing, there is a certain showing.

18 QUESTION: Do you think the Fourth Amendment  
19 forbids the disclosure of an informant's name?

20 MR. BERNARD: Yes. We submit that the Fourth  
21 Amendment does that. And, we submit, even assuming in  
22 certain situations that the Fourth Amendment does permit  
23 disclosure of an informant's name after an appropriate  
24 showing at a veracity hearing in our case, that should  
25 not be because the whole purpose of a veracity hearing

1 is to question whether the state itself has erred in any  
2 way, whether there has been police misconduct, if the  
3 affiant's credibility is not at issue. In other words,  
4 if the affiant in good faith relied upon what he was  
5 told by his informant, then there is no purpose, no  
6 application, no deterrant result for the exclusionary  
7 rule.

8 QUESTION: How will you get to the veracity if  
9 you don't admit who the person is, if you don't have an  
10 in camera investigation? You use the word "veracity."  
11 That means truth, doesn't it? How do you get to the  
12 truth if you hide the truth?

13 MR. BERNARD: Well, Justice Marshall, first of  
14 all, I do not believe that the purpose of using  
15 confidential informants is to hide the truth. I think  
16 this Court has recognized what their use is in the past.

17 The issue at a veracity hearing --

18 QUESTION: Well, what remedy does the defense  
19 counsel have if the government says we have this  
20 information, but we won't tell you where we got it from?

21 MR. BERNARD: First, the defense counsel could  
22 strenuously cross examine the affiant himself. The  
23 affiant was present in --

24 QUESTION: Whom I assume also is very capable.

25 MR. BERNARD: Pardon me?

1 QUESTION: He is very capable. He is not a  
2 run-of-the-mill person.

3 MR. BERNARD: The affiant?

4 QUESTION: The officer, yes.

5 MR. BERNARD: I would hope that the officer --

6 QUESTION: He is a well trained person?

7 MR. BERNARD: Yes, sir.

8 QUESTION: So, if you can't break him down,  
9 then you lose.

10 MR. BERNARD: Not necessarily, Your Honor.  
11 There is --

12 QUESTION: What else can you do?

13 MR. BERNARD: There are alternative forms of  
14 information. For example, as in this case, information  
15 from the accused himself, information from other people  
16 whom the accused may bring into the court who have  
17 information to give to the court on this issue.

18 Hypothetically, if the assertion had been that  
19 I had not been at my home when that person said I was  
20 there, and the defendant could bring in people who could  
21 say, yes, he was not at his home, he was with me. That  
22 would be an alternative form of establishing that  
23 information.

24 So, I submit there are at least two  
25 alternatives. One is questioning the affiant and one is

1 permitting the defense himself to bring in information  
2 to attack the credibility of the affiant.

3 QUESTION: But, why can't you have the in  
4 camera hearing?

5 MR. BERNARD: An in camera hearing --

6 QUESTION: Is there somebody in there that you  
7 don't trust?

8 MR. BERNARD: No.

9 QUESTION: Because if you say so, I will ask  
10 you to name them.

11 MR. BERNARD: No.

12 QUESTION: Well, why can't you have an in  
13 camera hearing?

14 MR. BERNARD: Because an in camera hearing, we  
15 feel, has certain threats. One threat is this. If an  
16 informant knows that he is going to be brought before a  
17 court, even in camera without defense counsel present,  
18 he may not provide the police the information that is  
19 necessary to either solve a crime or to --

20 QUESTION: If I assume that correct and I also  
21 assume that on the same facts an informant would not  
22 hesitate to lie because nothing could be done about it.

23 MR. BERNARD: Justice Marshall, I submit that  
24 there is always the possibility that an informant may  
25 lie and I think that is undeniable. There is always the



1 possibility that a police officer may lie. But, I don't  
2 think that the presumption is either that police  
3 officers or informants lie. I think that the privilege  
4 itself was established to permit a flow of information.

5 And, I think in McCray versus Illinois Justice  
6 Weintraub foresaw exactly the problem that we see in this  
7 case.

8 In the quote that I have cited in my brief,  
9 Justice Weintraub says that if a defendant knows that he  
10 can submit to the court any evidence at all, the court  
11 itself is going to order disclosure because they have no  
12 ability to impeach. At that point, the informant will  
13 always be disclosed and the whole chain of information  
14 will be broken, the flow of information will be dried  
15 up.

16 If at a veracity hearing the purpose is to  
17 determine whether there is probable cause to believe  
18 that the accused has committed a crime and probable  
19 cause to believe that at his residence are the fruits of  
20 that crime, then in this case the disclosure of the  
21 informant is an ancillary part of that. It is part of  
22 the probable cause determination.

23 Since Aguilar and Spinelli and Gates made  
24 rules under our Constitution to govern the use of  
25 confidential informants and warrants the decision

1 whether to disclose them becomes a Fourth Amendment  
2 consideration here.

3 As I said to Justice O'Connor earlier, it is  
4 not a question of evidentiary law, state evidentiary  
5 law, it is part and parcel of the Franks versus Delaware  
6 analysis and it is part and parcel of the issue that  
7 this Court reserved in that case.

8 There is an issue as to whether there was an  
9 independent and adequate state grounds for this decision  
10 which Justice O'Connor raised. The tests that this  
11 Court has established in a series of cases, Delaware  
12 versus Prouse, South Dakota versus Neville, culminating  
13 with Michigan versus Long, which was decided in July of  
14 1983, I believe, indicates that this Court presumes that  
15 there is not an independent and adequate state grounds  
16 if there is not a clear and express showing on the face  
17 of the opinion.

18 In this case, as far as the issue of  
19 disclosure is concerned, there was no clear and  
20 independent showing of state law. As far as any remedy  
21 to be derived from a veracity hearing, there was no  
22 clear and independent showing of state law.

23 Based upon that presumption, I submit that  
24 this Court does and should take jurisdiction.

25 In the Colorado Supreme Court's decision in

1 the Nunez case -- It referred, as I said earlier, to  
2 three cases -- The case of Dailey, the case of Martinez,  
3 and the case of Bueno. In Dailey, when the Court talked  
4 about disclosure, it referred to two things. First,  
5 Franks versus Delaware, which was a case decided by this  
6 Court on Fourth Amendment grounds, and then the Court  
7 talked about solely in Dailey if there is the affiant's  
8 perjury or reckless disregard for the truth, the  
9 Colorado Court discussed that remedy in terms of Dailey  
10 -- Excuse me, in terms of Franks only. In other words,  
11 in terms only of the Colorado Constitution.

12 In fact --

13 QUESTION: Of what Constitution?

14 MR. BERNARD: Excuse me, in the United States  
15 Constitution. I apologize, Justice White. My mistake.

16 In fact, that Court said that the test for  
17 disclosure is the same as this Court established in  
18 Roviaro and in McCray versus Illinois.

19 QUESTION: May I just ask one question about  
20 the disposition of the case? Your brief ends by saying  
21 the judgment should be reversed. Do you mean by that to  
22 say that the Colorado Supreme Court could not reinstated  
23 its prior judgment and explain that it really did mean  
24 to base it on Colorado law?

25 MR. BERNARD: Justice Stevens, that is always

1 a possibility. The Colorado Supreme Court could say  
2 this was a decision that should have been decided on  
3 Colorado State law, refer to the Colorado Constitution  
4 and decided that way.

5 QUESTION: So, the outcome of the case con-  
6 ceivably -- we don't say it would -- but conceivably be  
7 exactly the same no matter what we do.

8 MR. BERNARD: I would submit that if this  
9 Court reversed, the Colorado Supreme Court would be  
10 bound by this Court's opinion. If, in a later case, the  
11 Colorado Supreme Court wished to adopt the Colorado  
12 Constitution, then it could do so.

13 QUESTION: But, do you think we can tell them  
14 they must hold a veracity hearing?

15 MR. BERNARD: Well, I believe --

16 QUESTION: I mean, they must direct the lower  
17 court to hold a veracity hearing?

18 MR. BERNARD: I believe so, especially since  
19 it referred to the United States Constitution. And,  
20 since this Court is the ultimate arbiter of that  
21 Constitution, I believe that this Court can say that.

22 QUESTION: And they have lost their authority  
23 to reach the same conclusion based on state law?

24 MR. BERNARD: I would submit that they have.

25 QUESTION: Well, Mr. Bernard, that is quite a



1 remarkable conclusion, I think, that you reach in answer  
2 to Justice Stevens' question that -- I can see how we  
3 could say in correct case that the Fourth Amendment  
4 doesn't require the sort of rule which the Colorado  
5 Supreme Court thought it required, but you are saying  
6 that even though the Colorado Supreme Court wished to  
7 base its ruling on state law, the Fourth Amendment  
8 prevents it from doing that.

9 MR. BERNARD: No, I am not saying that,  
10 Justice Rehnquist.

11 QUESTION: Well then, could you spell out  
12 exactly how you reach the conclusion that you do in  
13 answer to Justice Stevens' question?

14 MR. BERNARD: Certainly. This Court can  
15 decide the federal issue present in this case. If it  
16 does so, then the Court must say that since the Colorado  
17 Supreme Court referred to the consequences under the  
18 United States Constitution, the Colorado Supreme Court  
19 cannot take the United States Constitution and do what  
20 it wanted to do in this case.

21 If the Colorado Supreme Court wishes to rely  
22 on the State Constitution, I concur it is the ultimate  
23 arbiter of that Constitution.

24 QUESTION: Yes. And, in any mandate that  
25 comes down from this Court to a state court reversing

1 the state court opinion says the judgment is reversed  
2 and the cause or matter for further proceedings is not  
3 inconsistent with this opinion. Wouldn't such a  
4 proceeding be a hearing by the Colorado Supreme Court in  
5 which it said, well, we also relied on our State  
6 Constitution or, although we didn't before, we now rely  
7 on our State Constitution to reach the result we did?

8 MR. BERNARD: Justice Rehnquist, I would  
9 submit that that certainly is a possibility, however,  
10 if, in fact, that were the case, I am not cognizant of  
11 the subsequent decisions in Michigan versus Long at the  
12 state level and South Dakota versus Neville at the state  
13 level.

14 QUESTION: That wouldn't take our jurisdiction  
15 away to hear the case, but I think that that would mean  
16 that your answer to Justice Steven's question perhaps  
17 ought to be reconsidered.

18 MR. BERNARD: Well, Justice Rehnquist, I guess  
19 what my position is is this; that this Court can tell  
20 the Colorado Constitution it can't do what it did under  
21 the United States Constitution. If it wishes to do that  
22 under the Colorado Constitution, I suppose they can do  
23 so.

24 QUESTION: Haven't several state supreme  
25 courts done that after we have reversed on the federal

1 ground here?

2 MR. BERNARD: Yes.

3 QUESTION: The Opperman case, I think, South  
4 Dakota.

5 MR. BERNARD: Yes. And, I know California has  
6 done that too.

7 QUESTION: Several of them have done that.  
8 That might lead some people to the conclusion that the  
9 Court should not have been so ambiguous about the basis  
10 of its holding.

11 MR. BERNARD: Well, ultimately I think that  
12 that is probably an appropriate resolution anyway. If a  
13 court does decide that it is going to rely on state law  
14 -- I think Michigan versus Long says if it is going to  
15 do that it should make it very clear and that has not  
16 been done in this case.

17 Ultimately, there is no Fourth Amendment  
18 violation if an affiant in good faith --

19 QUESTION: Well, this case was decided before  
20 we decided Michigan and Long, wasn't it?

21 MR. BERNARD: Yes, by the Colorado court it  
22 was.

23 QUESTION: Did we ever say before Michigan and  
24 Long that the State Supreme Court had to say clearly  
25 when it relied on the --

1 MR. BERNARD: At the time the Colorado case  
2 was decided, there was in existence the following cases:  
3 Delaware versus Prouse, South Dakota versus Neville, and  
4 those cases indicated that there is an appropriate basis  
5 for this Court taking jurisdiction. There may be an  
6 independent ground, but it is not adequate and that was  
7 the prior test.

8 In fact, in our petition for writ of  
9 certiorari, in the jurisdiction statement at pages 1  
10 through 9, we did argue those cases and not Michigan  
11 versus Long.

12 I think even under those tests there is an  
13 appropriate basis for this Court to take jurisdiction  
14 and there is not independent adequate state grounds.

15 QUESTION: But, you do contend, don't you,  
16 that Michigan against Long announced a new rule of law?

17 MR. BERNARD: Well --

18 QUESTION: Do you argue that rule is  
19 retroactive?

20 MR. BERNARD: Your Honor, I am --

21 QUESTION: Maybe that is the issue in the  
22 case, whether Michigan against Long is retroactive.

23 MR. BERNARD: That is not the issue here  
24 obviously.

25 QUESTION: Well, it is a jurisdictional issue



1 I might suggest.

2 MR. BERNARD: This Court has to decide whether  
3 it has jurisdiction. And, we have not briefed whether  
4 Michigan versus Long is retroactive nor whether --

5 QUESTION: Are you content to have us decide  
6 the jurisdictional issue without reference to Michigan  
7 against Long?

8 MR. BERNARD: I would prefer to have it  
9 because I think it is clearer.

10 QUESTION: You think it is a little helpful to  
11 you?

12 MR. BERNARD: Yes, I do.

13 QUESTION: Yes.

14 MR. BERNARD: The exclusionary rule which was  
15 applied in this case, because the evidence was  
16 suppressed when the state refused to disclose its  
17 informant, balances two social issues. First of all,  
18 the deterrent of police misconduct against convicting  
19 guilty people. There is no deterrence by the  
20 application of the exclusionary rule if there is no  
21 police misconduct. Therefore, if there is no deterrent  
22 effect, there is no need to let the guilty go free.

23 The purpose of a veracity hearing, therefore,  
24 has to be determine if the affiant, not the informant,  
25 has engaged in misconduct.

1           There will be, I would submit, an effect on  
2 law enforcement in revealing the names of confidential  
3 informants on a regular basis. That will dry up sources  
4 of information which lead to the solving of crimes and  
5 dry up sources of information that lead to the  
6 apprehension of criminals.

7           It is a sad but true fact that some people  
8 will not come forward and cooperate with the police  
9 unless they are assured of anonymity.

10           QUESTION: Sometimes it is bad for their  
11 health, is it not?

12           MR. BERNARD: It is, Your Honor. And, that  
13 sadly has been something that has happened in the past.

14           As we indicated before, we say that there is  
15 no need as a matter of law ever to reveal an informant's  
16 name and I discussed with Justice Marshall the  
17 alternatives to disclosure of that informant.

18           However, even if an informant should be  
19 revealed in some circumstances, he should not be  
20 revealed here.

21           It was only private action in this case,  
22 although there has been some indication by the  
23 Respondent that the Respondent didn't mean to say that  
24 he did not question the affiant's credibility,  
25 nonetheless, the record contains four separate references

1 to the fact that he was concerned with the informant,  
2 not the affiant's credibility.

3 Secondly, disclosure does not serve in this  
4 case, because there was no police misconduct, the Fourth  
5 Amendment, or the purposes of the exclusionary rule.

6 Even people who are involved at the fringes of  
7 the warrant process are going to be affected by the fact  
8 that they will not be assured of anonymity.

9 We ask this Court to at least, as far as the  
10 Fourth Amendment is concerned, indicate to the State of  
11 Colorado that the disclosure of informants should not  
12 occur at veracity hearings, and even if this Court feels  
13 that disclosure is in some cases appropriate, we ask  
14 this Court to indicate that the disclosure of the  
15 informant in this case was inappropriate because there  
16 was no indication, no allegation, and no proof that the  
17 affiant lied or recklessly disregarded the truth.

18 CHIEF JUSTICE BURGER: Mr. Stern?

19 ORAL ARGUMENT OF KENNETH H. STERN, ESQ.

20 ON BEHALF OF THE RESPONDENT

21 MR. STERN: Mr. Chief Justice, and may it  
22 please the Court:

23 The way this case has been postured, both in  
24 the briefs and during oral argument, is inconsistent  
25 with the record below. The Petitioner has raised and

1 melded together three separate issues, only one of which  
2 was ever adjudicated in the Colorado court system.

3 In Colorado, the process of challenging a  
4 search warrant, in making a veracity challenge, has  
5 three separate steps. One step is making a threshold  
6 preliminary showing to be entitled to a hearing in the  
7 first place. The second step is actually being  
8 successful on the merits --

9 QUESTION: What is the purpose of that  
10 veracity hearing as you call it out there?

11 MR. STERN: In Colorado?

12 QUESTION: Yes.

13 MR. STERN: Well, the purpose of the veracity  
14 hearing at this point in time under Colorado law is to  
15 see if the affiant either committed perjury or reckless  
16 disregard of the truth. The Colorado Supreme --

17 QUESTION: Let's put that in concrete terms.  
18 What did the affiant say about the informant? What did  
19 he say that is going to be tested in this hearing?

20 MR. STERN: One, does the information even  
21 exist; and, two, if the informant does exist, did he  
22 actually relate to the affiant what the affiant placed  
23 in the affidavit.

24 QUESTION: Now, that doesn't tell me much in  
25 concrete terms. What is it said that the informant



1 informed to the police in this case?

2 MR. STERN: In the affidavit there is certain  
3 information allegedly stated by an informant.

4 QUESTION: What was it?

5 MR. STERN: It was that on a certain date that  
6 the informant was in the home of the defendant and  
7 observed the defendant engaged in certain conduct.

8 QUESTION: And, what was the conduct?

9 MR. STERN: The conduct was packaging heroin.

10 QUESTION: And, what happened when they made  
11 the search?

12 MR. STERN: They did find heroin.

13 QUESTION: Does that have any bearing on  
14 whether he was telling the truth?

15 MR. STERN: Obviously, it would have some  
16 bearing, Chief Justice, however, there are other  
17 possible sources of information that could have lead to  
18 the conclusion that Mr. Nunez had heroin which didn't  
19 come through an informant. In fact, a number of the  
20 commentators have stated that it is possible that  
21 information could have come through an illegal wiretap.

22 QUESTION: Now, let me see. I am not sure I  
23 track you. You say the informant told the police that  
24 on a given day he was in the home of Nunez and that he  
25 saw him engaged in handle dope, packaging it?

1 MR. STERN: That is correct.

2 QUESTION: And then he gave that information  
3 to the police?

4 MR. STERN: That is correct.

5 QUESTION: And, they put that in whatever form  
6 is required in Colorado law to get a warrant to search  
7 the house, is that right?

8 MR. STERN: Correct.

9 QUESTION: And then the police took that  
10 warrant and went and searched the house, is that right?

11 MR. STERN: Correct.

12 QUESTION: And then they found the packages  
13 exactly as the informant said they would, is that right?

14 MR. STERN: Very close to how he said they  
15 would be, that is correct.

16 QUESTION: What is the problem about his  
17 veracity then?

18 MR. STERN: The problem about his veracity is  
19 that the defendant testified that the informant could  
20 not have done what it was alleged he had done in the  
21 affidavit because on those dates in question the  
22 defendant had not been in his home. He was away for two  
23 weeks. He could not have been delivering heroin using  
24 his vehicle during those two weeks. He was not in his  
25 home when the informant said he was there. He was on a

1 fishing trip and that the only people who were there the  
2 second half of the day were his immediate relatives.

3 So, there was testimony from the defendant  
4 that created in the mind of the trial court judge a good  
5 faith basis and fact to question the accuracy of the  
6 affidavit. And, under that particular test, under  
7 Colorado law --

8 QUESTION: What if the informant had said to  
9 the police that he had been in the home of this man on a  
10 day within recent weeks or months, and he could not  
11 remember the day or the week, but that he distinctly saw  
12 him putting narcotics in packages on that day unnamed?  
13 It would make it a little difficult for the man to say  
14 he wasn't there at that time, wouldn't it?

15 MR. STERN: That would create a different  
16 problem of proof.

17 QUESTION: Would it be sufficient to issue a  
18 warrant if the informant could not fix the date?

19 MR. STERN: That would be up to the magistrate  
20 to determine if that was sufficient to establish  
21 probable cause.

22 However, in the instant case, you have an  
23 informant saying he was located in the house at a  
24 particular time when, based upon testimony under oath by  
25 the defendant and other collateral evidence, he could

1 not -- At least created a reasonable basis and fact to  
2 believe that he could not have been in the house, and,  
3 therefore, Colorado, under Colorado's common law, as an  
4 evidentiary matter allows the informant to be disclosed,  
5 either in camera or to all the parties so that the  
6 defendant can have a reasonable opportunity to make the  
7 showing that he must make at the veracity hearing  
8 itself.

9 QUESTION: Who was it that had to decide  
10 whether the defendant here was telling the truth when he  
11 said he was out on a fishing trip on that day?

12 MR. STERN: The trial court judge.

13 QUESTION: Without a jury?

14 MR. STERN: Without a jury.

15 QUESTION: And, is that an in camera  
16 proceeding in Colorado or is it an open hearing?

17 MR. STERN: Well, the first stage where the  
18 defendant must meet his burden of showing good faith  
19 basis and fact -- the affidavit contains inaccuracies --  
20 is an opening hearing. If after hearing that, the trial  
21 court judge decides that the defendant has met his  
22 burden and, therefore, is entitled to either disclosure  
23 in camera or to all the parties, then they would proceed  
24 accordingly.

25 QUESTION: Mr. Stern, do you think that



1 applying the standard and the balancing explained in the  
2 Roviario opinion under the federal standard for when an  
3 informant's identity will be disclosed, that the  
4 disclosure would have been ordered in this case applying  
5 that standard?

6 MR. STERN: Applying that standard, I believe  
7 it would have been.

8 QUESTION: There would have been disclosure?

9 MR. STERN: There would have been disclosure.

10 QUESTION: Do you think the Colorado court  
11 applied that standard?

12 MR. STERN: I do not.

13 As I was stating before, the issue regarding a  
14 preliminary threshold showing and the issue of what you  
15 must prove to be successful at the veracity hearing  
16 itself were never raised in this case.

17 In fact, if you were to remand this case --  
18 the motion to suppress which contained the veracity  
19 challenge is still pending before the trial court. It  
20 was never decided. The only issue ever decided was  
21 disclosure of confidential informants.

22 So, therefore, if the case was reversed, we  
23 would pick up with that veracity challenge and go to  
24 hearing on it.

25 Suppression was not issued pursuant to the

1 Fourth Amendment. Suppression was issued as a discovery  
2 sanction. After the motion to disclose, informant was  
3 decided, was heard, the trial court judge ordered  
4 disclosure. When the prosecution did not comply with  
5 that discovery order, the defense counsel filed a second  
6 motion to suppress. That second motion to suppress,  
7 which was ultimately granted, was based as a sanction  
8 for failure to comply with the discovery order.

9 QUESTION: Well, this chronology doesn't lead,  
10 I would think, to the necessary conclusion that there is  
11 not a federal basis for the Supreme Court of Colorado's  
12 decision. It is just that its decision is a narrower  
13 one than you say your oponents have painted.

14 MR. STERN: My response is twofold. First,  
15 the only issue is the motion to disclose informant.  
16 Second, if you were to look at the four corners of the  
17 Nunez opinion, there is not one federal authority cited,  
18 not one federal case cited. It is only state cases.

19 QUESTION: Well, let me put this question --  
20 Supposing that the District Court in Adams County says I  
21 am going to order the disclosure of this informant  
22 pursuant to Roviario, which I think as being on us, the  
23 no suppression, but, in like Hickman against Hiller  
24 where someone has to go to jail in order to raise a  
25 question in Appellate Court, the District Court says,

1 no, we won't disclose, but I am going to appeal to the  
2 Supreme Court of Colorado. The Supreme Court of  
3 Colorado says under Roviario this informant should have  
4 been disclosed. I think that person can come here and  
5 say you have got a federal question, don't you?

6 MR. STERN: Absolutely.

7 QUESTION: You just say that is not what  
8 happened here.

9 MR. STERN: That is absolutely not what  
10 happened, because, again, if you look at the four  
11 corners of the Nunez opinion, they don't mention a  
12 single federal case or federal authority. Even if this  
13 Court should decide to go beyond the four corners of the  
14 opinion and look to the underlying cases, yes, Roviario  
15 is mentioned. However, in no way is it mentioned as  
16 being compelling or binding upon the Colorado Supreme  
17 Court.

18 In fact, the particular rules of law which  
19 govern disclosure in Colorado, number one, that there be  
20 a good faith basis and fact to question the accuracy of  
21 the affidavit; and, number two, that a defendant must  
22 show that there is a reasonable basis and fact to  
23 believe either, one, the informant doesn't exist, or,  
24 two, if he does exist, he did not relate to the police  
25 officer what is contained in the affidavit, are unique

1 creations of Colorado law.

2 When the Colorado Supreme Court made these  
3 specific rules, they did not cite any federal authority  
4 at all. In fact, they didn't even cite the authority  
5 from any other jurisdiction. This is the creation of  
6 Colorado law pure and simple.

7 And, Roviario is mentioned, but there is  
8 nothing in the opinion that states even explicitly or  
9 implicitly that we are compelled to follow Roviario. We  
10 are required to follow Roviario. In fact, the Model  
11 Penal Code is also mentioned. Professor Lafave's  
12 Treatise on Search and Seizure is mentioned. Neither of  
13 them are mentioned in any kind of binding way, but  
14 merely for guidance. And, when the decision is actually  
15 made, it is again a unique creation of Colorado law.

16 And, yes, there is no plain statement pursuant  
17 to Michigan v. Long. And, as the questions clearly  
18 showed, the decision in Michigan v. Long came five  
19 months after the decision in Nunez.

20 But, what we really have in this case is not a  
21 situation where we are arguing or where the Respondent  
22 is arguing that there is an independent and adequate  
23 state ground, because that implies that there is a  
24 federal ground to begin with, and it is the Respondent's  
25 position that there is no federal ground whatsoever in



1 the instant case. It was determined entirely on state  
2 law.

3 And, that the other issues regarding  
4 preliminary threshold showing and regarding what a  
5 defendant needs to be successful on a veracity challenge  
6 were matters decided in other cases. And, as a matter  
7 of fact, in the Dailey case, what the Colorado Supreme  
8 Court said about veracity challenges is not only  
9 consistent with Franks, but they stated our rule was the  
10 same prior to Franks.

11 And, in fact, in the Appendix to the Franks  
12 decision, it lists Colorado as one of the states that  
13 allows a veracity challenge based upon the exact same  
14 showing that came down in Franks v. Delaware prior to  
15 your decision.

16 QUESTION: Do you think Roviario is itself a  
17 decision which construes the federal Constitution?

18 MR. STERN: Roviario is -- This Court, as I  
19 understand it, is acting in a supervisory capacity  
20 dealing with an evidentiary matter based upon federal  
21 common law.

22 QUESTION: But, McCray, of course, would be  
23 construing the Constitution.

24 MR. STERN: Absolutely. And, in fact, it was  
25 McCray that established clearly that Roviario was not

1 constitutional litigation or adjudication, but was  
2 rather this Court acting in a supervisory capacity.

3 And, there is nothing inconsistent in McCray  
4 from what Colorado has done. In fact, I think the  
5 McCray decision is the most supportive of the authority  
6 and right of the Colorado Supreme Court to create  
7 evidentiary rules regarding the common law informant's  
8 privilege as it sees fit, just the way it can create  
9 privileges with respect to the husband and wife  
10 privilege.

11 QUESTION: Well, it can be more favorable to  
12 the defendant, criminal defendant in that area. It  
13 can't be less favorable. Isn't that what it --

14 MR. STERN: Well, the only way, in my opinion,  
15 that the United States Constitution would get involved  
16 in this question would be if the Colorado Supreme Court  
17 interpreted the common law informant's privilege in such  
18 a way that it infringed upon defendant's rights.

19 For example, if it said a defendant may never  
20 get disclosure for trial or at a suppression hearing,  
21 that would run afoul of the Fourteenth Amendment. But,  
22 if Colorado did come up with a liberal interpretation,  
23 certainly since there is no constitutional principle or  
24 no constitutional right enjoyed by a law enforcement  
25 agent or by the informant to not have the identity

1 disclosed, I don't believe that emanates from any  
2 constitutional provision, but rather from the common  
3 law.

4           Given that fact, as long as the Colorado  
5 Supreme Court does not run afoul of another  
6 constitutional provision by cutting off some of  
7 defendant's other rights, I don't believe it is a  
8 constitutional issue at all. And, it is not even a  
9 federal issue which we have been arguing throughout  
10 these proceedings. It is purely a matter of state  
11 concern.

12           And, again, as Justice Marshall inquired,  
13 Colorado has not adopted any kind of per se rule so that  
14 any time there is an informant in an affidavit a  
15 defendant is entitled to disclosure. In fact, Colorado,  
16 in its decisions, has clearly stated it supports the  
17 common law informant's privilege. It gives it a great  
18 deal of weight.

19           And, in reaction to that in the instant case,  
20 it states that a defendant must make a preliminary  
21 showing. There is a mandatory showing a defendant must  
22 make before he can gain disclosure.

23           And, secondly, there is another safeguard  
24 built in and that is the in camera hearing, which in  
25 this case was not requested by the prosecution, but in

1 other cases has been requested and has been granted, and  
2 is a way to actually balance this very difficult problem  
3 between keeping the information --

4 QUESTION: Of course, if you are right,  
5 whether this is quite a sensible opinion of the Supreme  
6 Court -- We can think they are bananas if we want to,  
7 but if it is the state ground, it is none of our  
8 business.

9 MR. STERN: That is true. I was hoping to  
10 convey the opinion that they weren't bananas, but --

11 (Laughter)

12 MR. STERN: -- that is absolutely correct.

13 In conclusion, Respondents would argue that  
14 the writ that previously has been granted in this case  
15 should be dismissed as being improvidently granted or,  
16 at a minimum, the decision of the Colorado Supreme Court  
17 should be affirmed.

18 CHIEF JUSTICE BURGER: Do you have any thing  
19 further, Mr. Bernard?

20 MR. BERNARD: Just one, Mr. Chief Justice,  
21 just one point.

22 ORAL ARGUMENT OF STEVEN LEON BERNARD, ESQ.

23 ON BEHALF OF THE PETITIONER -- REBUTTAL

24 MR. BERNARD: The issue on disclosure was  
25 argued below and the record will bear that out. But, I



1 think that there is some confusion here between what Mr.  
2 Stern says and what I say.

3 Mr. Stern suggests that this is merely a  
4 discovery issue. I submit that it is not a discovery  
5 issue. The issue here is the use of disclosure in a  
6 veracity hearing which triggers constitutional issues of  
7 probable cause and police misconduct. It is not a  
8 question of disclosure for trial at which an accused may  
9 want to have someone who witnessed the crime present to  
10 testify. But, it is an issue of the warrant process and  
11 the warrant process is part and parcel of this Court's  
12 determination.

13 In Dailey, the case upon which the Colorado  
14 Supreme Court relied, when that Court discussed  
15 disclosure it referred to the Fourth Amendment, to  
16 Franks versus Delaware, to the sanctions that should  
17 fall under Franks versus Delaware, and under the Fourth  
18 Amendment, and in no place did it refer to any bit of  
19 Colorado Constitution. It talked about McCray, it  
20 talked about Roviario, it talked about Franks.

21 QUESTION: May I interrupt you right there?  
22 On the reference to Roviario, is it the state's position  
23 that that was a constitutional case?

24 MR. BERNARD: No, however --

25 QUESTION: Then, what is the relevance of the

1 Colorado Supreme Court's reference to Roviario?

2 MR. BERNARD: Roviario talks about the  
3 privilege in a general sense. In Roviario -- That was  
4 not in this context. It was a situation where the  
5 accused saw the crime, the act upon which the charge was  
6 based, and that was the focus of this Court's concern in  
7 Roviario. It was a due process concern.

8 QUESTION: Doesn't the citation of Roviario,  
9 which is a non-constitutional case, by the Colorado  
10 Supreme Court suggest that they thought they had a  
11 non-constitutional issue before them?

12 MR. BERNARD: I don't think it is that  
13 clear, Your Honor. I submit --

14 QUESTION: But, to the extent that Roviario  
15 sheds any light on the matter, it would point in that  
16 direction, wouldn't it?

17 MR. BERNARD: Well, there was also the  
18 reference to Franks versus Delaware which is obviously a  
19 constitutional issue.

20 QUESTION: Yes, but the earlier Colorado cases  
21 did precede Franks against Delaware, didn't they?

22 MR. BERNARD: Yes, they did.

23 And, the issue as far as Roviario was concerned  
24 is that in Roviario the Court was talking about the  
25 existence of an informer privilege. In McCray, it

1 talked about the disclosure of informants when the issue  
2 was not whether the informant perceived the crime on  
3 which the charge was based. And, finally we have now  
4 the melding of McCray and Franks presented in this case.

5 CHIEF JUSTICE BURGER: Thank you, gentlemen,  
6 the case is submitted.

7 We will hear arguments next in Massachusetts  
8 against Sheppard.

9 (Whereupon, at 10:54 a.m., the case in the  
10 above-entitled matter was submitted.)

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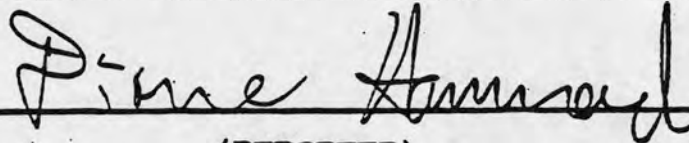
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