

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: DAVID CONN AND CAROL NAJERA, Petitioners v.  
PAUL L. GABBERT

CASE NO: 97-1802 c-2

PLACE: Washington, D.C.

DATE: Tuesday, February 23, 1999

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DAVID CONN AND CAROL NAJERA, :

4 Petitioners :

5 v. : No. 97-1802

6 PAUL L. GABBERT :

7 - - - - -X

8 Washington, D.C.

9 Tuesday, February 23, 1999

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States at  
12 10:12 a.m.

13 APPEARANCES:

14 KEVIN C. BRAZILE, ESQ., Fort Worth, Texas; on behalf of  
15 the Petitioners.

16 MICHAEL J. LIGHTFOOT, ESQ., Los Angeles, California; on  
17 behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:12 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in No. 97-1802, David Conn and Carol  
5 Najera v. Paul Gabbert.

6 Mr. Brazile.

7 ORAL ARGUMENT OF KEVIN C. BRAZILE

8 ON BEHALF OF THE PETITIONERS

9 Mr. Chief Justice, and may it please the Court:

10 To answer the first question of certiorari  
11 raised in this case, there has to be a determination made  
12 as to whether or not Petitioners in this case engaged in  
13 egregious or outrageous conscience-shocking conduct. This  
14 case, and the case of County of Sacramento v. Lewis, as  
15 well as the case of Washington v. Glucksberg, has set  
16 forth the test that should be used in -- in making the  
17 analysis in a substantive due process case such as this,  
18 which involves executive action.

19 What the Court has told us is that we look to  
20 the historical precedent, we look to the case precedent,  
21 and we look at the traditions of our Nation. In this  
22 case, the liberty interest at stake is the question of  
23 whether or not an attorney has a right not to be subject  
24 to a search at the time his client is testifying before  
25 the grand jury.

1           In this case, the Ninth Circuit found that the  
2 search warrant was in fact a valid warrant. Also, at this  
3 juncture of the proceeding -- this was a grand jury  
4 proceeding; there had been no charges filed against Miss  
5 Baker, so the sixth amendment right to counsel did not  
6 apply. What tradition normally requires to do a search of  
7 a person, whether it be an attorney or anyone else, is in  
8 fact a valid search warrant. That's what occurred in this  
9 case.

10           QUESTION: Mr. Brazile, if you -- you say the  
11 conduct wasn't egregious enough to meet what you say is  
12 the standard. But do you concede that it -- it was  
13 subject to some kind of sanction at all, to deliberately  
14 time the search -- the search with a warrant -- of the  
15 lawyer at the very moment when his client was being -- was  
16 testifying?

17           MR. BRAZILE: Justice Ginsburg, no, we --  
18 Justice Ginsburg, no, we do not. In this case, the search  
19 warrant was served between the hours that the warrant  
20 authorized. The warrant authorized a search any time  
21 between 7:00 a.m. and 10:00 p.m. in the evening. The  
22 warrant was executed at that time. It was a valid  
23 warrant. And when Miss Baker was before the grand jury,  
24 each time she made a request to consult with her attorney,  
25 the district attorneys and the grand jury foreperson

1 allowed her to leave the grand jury in order to consult  
2 with her lawyer.

3 Now, according to this Court's decision in U.S.  
4 v. Williams, she had no right to have that lawyer in the  
5 grand jury room with her. And it's not even established  
6 that she had a right to consult with him outside of the  
7 grand jury under this Court's case law. But there are  
8 other case law from the Federal circuits that do allow  
9 that -- that the witness has a right to consult with her  
10 lawyer.

11 QUESTION: But apart from what -- your -- your  
12 argument about constitutional violation is my question to  
13 you was, is there any sanction for this? If the warrant  
14 could have been -- it could have been executed before the  
15 witness appeared before the grand jury or after, but it  
16 wasn't a coincidence that they occurred simultaneously.  
17 And my question to you, just -- is -- is whether there is  
18 any sanction for this? Or if it doesn't meet the  
19 constitutional standard, that's it?

20 MR. BRAZILE: Well, there is a sanction for this  
21 type of conduct if -- under California laws and many  
22 others States, there is the tort of abuse of process. If  
23 they felt that the warrant was used for the -- for an  
24 ulterior motive, in an abusive way, they could have  
25 brought a tort action for abuse of process. So, there is

1 a State law remedy here.

2 QUESTION: Is it correct that the service was  
3 not coincidental, the time of the service? I mean, do you  
4 acknowledge that?

5 MR. BRAZILE: No, Your --

6 QUESTION: That it was calculated to --

7 MR. BRAZILE: No, Your Honor, we do not concede  
8 that the warrant was somehow calculated to interfere or to  
9 interrupt with Mr. Gabbert's practice of his profession.  
10 What in fact happened is, earlier in the morning, when  
11 they were up in the district attorney's office,  
12 Mr. Gabbert indicated that the documents that were  
13 requested in the subpoena, that he had the documents. He  
14 indicated that to Mr. Conn. And it was at that point he  
15 decided to go and to get the warrant.

16 QUESTION: Well, how does this -- I don't -- I'm  
17 just not familiar with this procedure. I mean, I would  
18 have thought that a client has an instrument of a crime,  
19 gives it to her lawyer. The government, I take it, has a  
20 right to it. I've just never heard of -- if the lawyer,  
21 who is an officer of the court, has an instrument of the  
22 crime that the government has a right to, why wouldn't the  
23 government just ask him for it, or subpoena it? I mean,  
24 I've never heard of a search warrant for -- for -- is this  
25 a normal procedure? I -- I don't understand.



1 MR. BRAZILE: Justice Breyer --

2 QUESTION: Justice Breyer hasn't practiced in  
3 California.

4 (Laughter.)

5 QUESTION: Well, I haven't either, but it is a  
6 rather unusual practice out there, I guess.

7 MR. BRAZILE: Well --

8 QUESTION: Is this typical out there?

9 MR. BRAZILE: Well, Justice --

10 QUESTION: Is this the way you normally get  
11 documents from lawyers?

12 MR. BRAZILE: Just -- Justice Stevens, there is  
13 a penal code section that applied here, that requires,  
14 when you serve a search warrant on a -- on a lawyer, there  
15 are certain formalities you have to comply with, one of  
16 which is -- is getting a special master appointed. So, in  
17 terms of getting the documents from Mr. Gabbert, they did  
18 get a special master, and they did obtain a search warrant  
19 from the court. That's the procedure that's --

20 QUESTION: So, that's the normal way you get  
21 documents from lawyers out in your -- your esteemed bar,  
22 you serve -- you serve warrants --

23 MR. BRAZILE: I do have --

24 QUESTION: -- rather than call them up and ask  
25 them or serve a subpoena? Is this typical? I mean --

1 MR. BRAZILE: Well, I think, yes, it is, Your  
2 Honor.

3 QUESTION: Wow. My brother is out in  
4 California. It's a jungle out there.

5 QUESTION: My family has lawyers out in  
6 California and never heard of this.

7 (Laughter.)

8 QUESTION: What? This is a normal thing; they  
9 don't just ask the lawyer, Please, give me the document?  
10 If the lawyer is uncertain about it, they need protection  
11 legally, and say, Bring -- get a subpoena, or --

12 MR. BRAZILE: Well -- well, Your Honor, Justice  
13 Breyer, what had occurred is they served a subpoena on the  
14 witness, Traci Baker. And part of that subpoena required  
15 her to produce the documents, not the lawyer.

16 QUESTION: So, why didn't they have a subpoena  
17 for the lawyer?

18 MR. BRAZILE: Pardon?

19 QUESTION: Why didn't they have a subpoena for  
20 the lawyer? If he wants that protection, I would have  
21 thought that the lawyer would just say, Here it is, if  
22 it's undisputed. And if it is disputed, why wouldn't they  
23 get a subpoena or some other court procedure?

24 MR. BRAZILE: Well, they chose to get a warrant.  
25 He was there. He indicated that he had the documents.

They obtained the warrant. If they had waited any longer, possibly to get a subpoena, he could have transferred the documents to someone else.

QUESTION: But he's an officer of the court.

MR. BRAZILE: Exactly.

QUESTION: I would assume that he would not take a -- a -- is there some reason not to go on the normal presumption that people try to follow the law, who are lawyers?

MR. BRAZILE: Well, the problem that the prosecutors were confronted with -- days before the appearance of the witness before the grand jury, the subpoena, which required the documents, had been served on Mr. Gabbert at his office. He had been in communication with Mr. Conn days and a couple of weeks before the incident occurred.

So, he knew exactly what documents they were after, and he never at one time volunteered, Oh, by the way, here they are; I'll give them to you, you don't need to subpoena anyone.

In their minds, the witness was giving the documents to her lawyer. She was not producing the documents as required by the subpoena. To search Mr. Gabbert, if the documents are in fact in his briefcase, they wanted to get a warrant --

1 QUESTION: When did the subpoena require the  
2 production of the documents?

3 MR. BRAZILE: Pardon?

4 QUESTION: The subpoena required the production  
5 of the document where and when?

6 MR. BRAZILE: The subpoena required the  
7 production of the documents on March 21st, 1994, the day  
8 of her grand jury testimony.

9 QUESTION: Well, she didn't have a duty to  
10 produce it before she showed up before the grand jury, did  
11 she?

12 MR. BRAZILE: She had to produce it with -- with  
13 her at her grand jury testimony.

14 QUESTION: At the time of her testimony?

15 MR. BRAZILE: Correct.

16 QUESTION: So, at the time you served the -- the  
17 search warrant, she was not in default on the subpoena,  
18 was she?

19 MR. BRAZILE: Well, she hadn't gone before the  
20 grand jury at that point time.

21 QUESTION: Right.

22 MR. BRAZILE: But she had also earlier indicated  
23 that the documents that -- when her apartment was  
24 searched -- I believe it was on March the 18th -- she told  
25 them during that search that all the documents that you

1 want, I've turned over to my lawyer.

2 QUESTION: And I presume --

3 QUESTION: But there's -- there's no doubt, I  
4 take it, that the subpoena was valid under California law?

5 MR. BRAZILE: Yes, Mr. Chief Justice Rehnquist,  
6 the subpoena was valid under California law. There has  
7 never been any challenge to the warrant -- I mean to the  
8 subpoena.

9 QUESTION: And I assume that the reason it was  
10 served that morning was that she said she wasn't bringing  
11 the documents with her, because her lawyer had them, and  
12 that they wanted the documents in order to examine her  
13 before the grand jury when she appeared?

14 MR. BRAZILE: That's -- that's correct, Justice  
15 Scalia.

16 QUESTION: So, if you didn't get the doc -- the  
17 documents from the lawyer, and she showed up without them,  
18 she'd have to go ahead with her grand jury testimony  
19 without the documents to cross-examine her with?

20 MR. BRAZILE: And, essentially, that's what  
21 happened. And --

22 QUESTION: Well, did you -- when -- when your  
23 client got to that point, did -- did your client say to  
24 the -- to the lawyer, We -- we are told that you have the  
25 documents subject to the subpoena; will you give them to

1 us or do we have to subpoena you or get a search warrant;  
2 did they say that?

3 MR. BRAZILE: To the lawyer?

4 QUESTION: Yes.

5 MR. BRAZILE: No, they did not.

6 QUESTION: Did they say, Please give them to us?

7 MR. BRAZILE: No.

8 QUESTION: They didn't do that?

9 MR. BRAZILE: No, they did not.

10 QUESTION: Why didn't they do that?

11 MR. BRAZILE: There was a discussion upstairs,  
12 before they went down to the grand jury room. And  
13 Mr. Gabbert indicated that he had the documents and that  
14 the documents were in his briefcase. At that --

15 QUESTION: But nobody said, May we have them;  
16 they're subject to subpoena?

17 MR. BRAZILE: Mr. Conn did not say that, but  
18 Mr. Gabbert knew full well that the documents were subject  
19 to a subpoena, because a subpoena was served on his  
20 office.

21 QUESTION: No, I'm sure he did. I just wanted  
22 to know whether anybody asked for them.

23 MR. BRAZILE: I -- I don't believe so, Your  
24 Honor. No.

25 QUESTION: Nobody did.

12

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1 QUESTION: But this case comes to us on summary  
2 judgment. I take it you can argue the case -- that you do  
3 argue the case on the assumption that it might be proved  
4 that this warrant was timed so as to deliberately  
5 interfere with the representation of the client before the  
6 grand jury. And you say that even if that is so, there is  
7 no substantive due process violation. Is -- is that your  
8 position?

9 MR. BRAZILE: Justice Kennedy, that's correct.  
10 Even if it was timed in that fashion, there still would  
11 not be a substantive due process right violation here.

12 QUESTION: Do you concede that there may well be  
13 a fourth amendment violation -- that's not before us; and  
14 I take it that will be inquired into on remand to the  
15 district court -- but do you concede, for the sake of  
16 argument, that there may be a fourth amendment violation?

17 MR. BRAZILE: I don't concede that there was a  
18 fourth amendment violation because --

19 QUESTION: But there may be, that that's an open  
20 question?

21 MR. BRAZILE: Well, as to the second search that  
22 occurred after the grand jury testimony, that is still an  
23 open question. And that issue will have to be resolved --

24 QUESTION: I'm sorry, you -- you've got the  
25 better of me. The second search?

1 MR. BRAZILE: There were two searches, Your  
2 Honor. The --

3 QUESTION: I thought we were talking about the  
4 search that was going on during the grand jury testimony.

5 MR. BRAZILE: That -- that's correct. But --

6 QUESTION: That -- I thought that was -- that --  
7 that was the search which he says interfered with his  
8 right to represent his client.

9 MR. BRAZILE: Correct. And the Ninth Circuit  
10 has held that that search was a valid -- that warrant was  
11 a valid warrant. So, there really is no Fourth Amendment  
12 question.

13 QUESTION: Well, it may be a valid warrant, but  
14 an unreasonable search. Is -- is the question of the  
15 reasonableness of that search still an open question?

16 MR. BRAZILE: No.

17 QUESTION: Okay. And --

18 QUESTION: Because that was put under the fifth  
19 amendment. The other part of the case that is still alive  
20 in the district court, as I understand it, was put under  
21 the fourth amendment, because there was no warrant for the  
22 second search.

23 MR. BRAZILE: That's correct --

24 QUESTION: I see.

25 MR. BRAZILE: -- Justice Ginsburg.



1 QUESTION: And in -- in -- in that light, since  
2 there is this piece of the case that unquestionably  
3 remains alive --

4 MR. BRAZILE: That's correct.

5 QUESTION: -- the second, unwarranted search,  
6 why wouldn't it be open to the plaintiff to amend the  
7 complaint to assert that the first search violated the  
8 fourth amendment, because, although there was a warrant,  
9 it was -- the timing of it was unreasonable?

10 MR. BRAZILE: In this case, I think the -- the  
11 way the complaint was pled, yes, they would have to amend  
12 the complaint to state such a cause of action. But it  
13 would be our position that under these facts, the  
14 execution of that warrant was not unreasonable.

15 QUESTION: But it would still be as -- there's  
16 nothing that is before us now that would foreclose the  
17 plaintiff from, in the district court, moving to amend the  
18 complaint to add to the fourth amendment claim that's  
19 already there, this further fourth amendment claim?

20 MR. BRAZILE: Not as to the first search. As --  
21 they could amend the complaint as to the second search.

22 QUESTION: No. The second search is not before  
23 us, as I understand it.

24 MR. BRAZILE: That's correct.

25 QUESTION: That's in the district court.

1 MR. BRAZILE: That's correct.

2 QUESTION: You have made an argument that this  
3 is not a violation of the fifth amendment due process  
4 clause. My question to you is, it was never asserted that  
5 it's a violation of the fourth amendment. But one of the  
6 amici -- amici briefs made that suggestion, that if  
7 there's anything wrong here, it has to do with the fourth  
8 amendment, not the fifth amendment.

9 So, could the complaint be amended to so assert?

10 MR. BRAZILE: It's -- it's -- Justice Ginsburg,  
11 yes, the complaint probably could be amended.

12 QUESTION: Well, that issue isn't before this  
13 Court at all, is it?

14 MR. BRAZILE: No, it's not before this Court,  
15 but --

16 QUESTION: Getting to the issue that -- that is  
17 before this Court. Assuming the warrant was issued and --  
18 and was executed in a way deliberately to interfere with  
19 the representation of the client, is -- is the only State  
20 law cause of action to -- to remedy that, an abuse of  
21 process?

22 MR. BRAZILE: There would be a State law --

23 QUESTION: Or there's some other remedies?

24 MR. BRAZILE: Justice Kennedy, there would be a  
25 cause of action for abuse of process. There could also be

1 a cause of action for intentional infliction of emotional  
2 distress. There could be a cause of action for breach of  
3 mandatory duty under California law. There's a government  
4 code section -- I believe it's 815.6 -- that allows for  
5 such a cause of action.

6 QUESTION: Does the existence of those cause of  
7 actions bear on the question of whether there is a Federal  
8 substantive due process right?

9 MR. BRAZILE: Those cause of actions, no.

10 QUESTION: That -- that is to say, if there is  
11 adequate remedies under the State -- an adequate remedy  
12 under State law, is that a ground for saying that there is  
13 no substantive due process right under the 14th amendment?

14 MR. BRAZILE: Yes, it could be. Because if --  
15 if we allow for any and every alleged governmental tort to  
16 be a 14th amendment violation, then the 14th amendment  
17 essentially becomes a font of tort law.

18 That's why what we're saying in our -- our  
19 position is that, in order to have a 14th amendment  
20 violation, you need a complete ban or exclusion from the  
21 practice of the profession, not this temporary delay or  
22 interruption in the practice of the profession. Which, in  
23 this case, Your Honor, was -- was a period of less than 20  
24 minutes. And once this interruption was over, he then  
25 continued to represent his client at the contempt hearing.

1 QUESTION: Well, is there any case from our  
2 Court that says there's a substantive due process right to  
3 practice law?

4 MR. BRAZILE: The cases from this Court, Your  
5 Honor, don't -- in my opinion, don't go that far. And I  
6 haven't seen a case. There's the case of Board of Regents  
7 v. Roth. There's also the case of Cafeteria Workers v.  
8 McElroy. Those cases deal with someone losing their job.  
9 But, by analogy, those cases would suggest, and it's our  
10 position, that you have to have a ban or exclusion or  
11 foreclosure of the employment in order to state a 14th  
12 amendment right.

13 QUESTION: And Roth and Cafeteria Workers also  
14 were an employer-employee situation, were they not?

15 MR. BRAZILE: That's correct. And in those  
16 situations, I think it's -- the -- the right is even more  
17 important or more significant, because they're totally out  
18 of a job. Mr. Gabbert was not put out of work.  
19 Mr. Gabbert continued to represent Miss Baker immediately  
20 after the search.

21 QUESTION: And he represented her during the  
22 search.

23 MR. BRAZILE: He -- he did. In fact, he did,  
24 Your Honor, yes.

25 QUESTION: But is there a right to practice law,

1 to get a license, if you qualify, a right that the State  
2 cannot arbitrarily deny you? There is such a right, is  
3 there not?

4 MR. BRAZILE: There -- there's -- you have a  
5 right to practice your chosen profession -- profession,  
6 Justice Ginsburg. But that right does not extend so far  
7 that any interruption or delay in your practice of your  
8 profession states a substantive due process 14th amendment  
9 claim. And -- and the crux of our argument here is that  
10 where you have this temporary delay or interruption in --  
11 in the practice of someone's profession, that doesn't rise  
12 to the level of a 14th amendment claim.

13 There are other remedies available. Again, the  
14 State tort remedies, an action for abuse of process, an  
15 action for intentional infliction of emotional distress,  
16 of a negligence tort. There are -- there are several  
17 other remedies.

18 What we don't want to see is the floodgates  
19 opened here, that any interruption of a profession -- and  
20 this case is not limited just to lawyers; this case would  
21 apply to any profession, whether it be an accountant, a  
22 secretary, anyone who is practicing their profession --

23 QUESTION: A secretary is not a profession. Is  
24 it only professions it's limited to? I mean --

25 MR. BRAZILE: Well, any -- any --

1 QUESTION: What if I'm a plumber and the  
2 government unreasonably interferes with my --

3 MR. BRAZILE: I think, under the Ninth Circuit's  
4 decision in this case, if you're a plumber and we execute  
5 a --

6 QUESTION: Right.

7 MR. BRAZILE: -- a valid warrant on you when  
8 you're fixing a -- a pipe in someone's home --

9 QUESTION: Right.

10 MR. BRAZILE: -- potentially you could sue the  
11 government for a 14th amendment claim, by saying, Well,  
12 the search interrupted or delayed my fixing of the pipe,  
13 and I couldn't practice my plumbing profession to the  
14 highest standards. It does that far. It would apply to  
15 any profession, not just lawyers.

16 QUESTION: If there had been a real interference  
17 with representation before the grand jury, I take it the  
18 client would have had a sixth amendment cause of action --  
19 the client?

20 MR. BRAZILE: The -- the client potentially had  
21 a sixth amendment cause of action. However, because this  
22 was a grand jury proceeding, no formal charges had been  
23 initiated. It's questionable whether or not the sixth  
24 amendment would actually be triggered. This Court has  
25 opinions that --

1 QUESTION: Is there any -- is there any  
2 indication that that wrong could -- could be alleged by  
3 the attorney?

4 MR. BRAZILE: For -- for -- on behalf of --

5 QUESTION: There's a -- well, there's a standing  
6 problem, isn't there?

7 MR. BRAZILE: Yes, oh, absolutely, under this  
8 Court's decision in Warth v. Seldin, the Court has held  
9 that you cannot assert, under Section 1983, the rights of  
10 a third party. And that's essentially what the lawyer  
11 would be doing if he was suing based upon the client's  
12 sixth amendment rights. And this Court has criticized  
13 that, and condemned that practice, in U.S. v. Williams,  
14 which was a grand jury case that the Court decided a few  
15 years ago.

16 QUESTION: May I ask, just because I'm curious,  
17 did you ever get the document?

18 (Laughter.)

19 QUESTION: Justice Stevens, I -- I believe,  
20 later, there was a search of Mr. Gabbert's office, I  
21 believe that same day. And, quite frankly, I don't recall  
22 if we got the actual documents we were looking for. There  
23 was the -- the first letter, which essentially was a  
24 script for her testimony, when she testified at the first  
25 trial. But I don't believe we got any other documents.

1 QUESTION: Well, the two pages that were --  
2 there was two pages of the -- there were two pages of the  
3 letter that were delivered at -- at the search. Was that  
4 not true? Didn't -- didn't he give two pages of the  
5 letter?

6 MR. BRAZILE: I believe there were a couple of  
7 pages of the letters, Justice Kennedy, that were provided.  
8 I believe that's correct.

9 QUESTION: Is this -- is this -- I'm still -- I  
10 know this isn't directly on the point, but I'm somewhat  
11 concerned about going into the lawyer's office, searching  
12 the office, as if that's a normal procedure. What is the  
13 normal procedure?

14 Wouldn't you ask the witness for the letter?  
15 You subpoenaed the letter. You -- you subpoenaed the  
16 letter. She says, I don't have it; I won't give it to  
17 you. Now, if she's given it to her lawyer, can't she ask  
18 it back. Wouldn't you hold her in contempt? If a State's  
19 entitled to it --

20 MR. BRAZILE: Well, what they did here --

21 QUESTION: -- wouldn't the judge say, Put her in  
22 prison until she gives him the letter? And if he's not  
23 entitled to it, she shouldn't -- they shouldn't have it.  
24 I mean, what's the normal procedure?

25 MR. BRAZILE: Well, Justice Breyer, what they



1 did here is they got a warrant not only for Mr. Gabbert,  
2 they also got a warrant for -- for Traci Baker. Because  
3 the plan was -- or the idea was you would search  
4 Mr. Gabbert for the documents. And then, if he somehow  
5 passed the documents to someone, you could also search  
6 Miss Baker.

7 So, when you're looking for these kind of  
8 documents, the appropriate procedure is to get a warrant,  
9 present an affidavit of probable cause to -- to an  
10 independent judge, and let him make a determination  
11 whether or not we can do a search.

12 The prosecutors in this case were trying the  
13 best they knew how to follow the book here, by getting a  
14 warrant and -- which -- a warrant that's been upheld to be  
15 a valid search warrant in this case.

16 QUESTION: But the one thing they couldn't do,  
17 based on the time they executed this, was to have that  
18 document when she appeared in the grand jury room, because  
19 the document, she said, was with her lawyer. Her lawyer  
20 was in another room being searched. So, if the purpose  
21 was to get her in the grand jury room with the letter,  
22 then -- then why didn't they wait -- what did you say, the  
23 whole thing took 20 minutes -- wait to start her testimony  
24 for 20 minutes?

25 MR. BRAZILE: He was there. They didn't know

1 for certain whether or not he had the documents. He  
2 indicated that he had the documents in his briefcase.

3 QUESTION: I thought he took the two pages out  
4 first thing.

5 MR. BRAZILE: Pardon?

6 QUESTION: I thought the two pages were turned  
7 over by the lawyer himself, not -- they were not the  
8 result of -- of searching his briefcase.

9 MR. BRAZILE: No. During -- during the search,  
10 I don't believe they got the two pages, Justice Ginsburg.

11 QUESTION: Well, then maybe my memory is -- is  
12 faulty. I thought that -- that the master turned up  
13 nothing, but the lawyer himself had produced, once the  
14 search started, the two pages.

15 MR. BRAZILE: I -- I -- Justice Ginsburg, I  
16 don't believe that's an accurate reflection of the record.  
17 It was my recollection that -- that the search by the  
18 special master didn't uncover any of the documents that  
19 were being sought.

20 QUESTION: Yes. But -- but what is your  
21 recollection about when those two pages were turned over,  
22 and in what manner?

23 MR. BRAZILE: I don't believe Mr. Gabbert turned  
24 over those documents. I believe that's what the record  
25 will show.

1           What I'd like to do now is to address the issue  
2 of the second question of certiorari, which is the  
3 question of -- of qualified immunity. It's our position  
4 that this right that's being alleged here, this right to  
5 practice the profession, really is the right as to whether  
6 or not a lawyer has a right not to be subject to being  
7 searched at a grand jury proceeding when his client is  
8 testifying. And based upon the clearly established case  
9 law, there is no such right that was recognized under the  
10 case law in 1994.

11           The case law talks about --

12           QUESTION: You've been arguing up to now that  
13 there's no such right as of the case law right now, have  
14 you not?

15           MR. BRAZILE: That -- that's correct, Your  
16 Honor. But this -- what I was --

17           QUESTION: Afore certiorari, then?

18           MR. BRAZILE: That -- that's correct.

19           QUESTION: Mr. Brazile, may I just interrupt you  
20 to read from the Ninth Circuit's decision?

21           MR. BRAZILE: Yes, Justice.

22           QUESTION: It says: At Gabbert's request, the  
23 search took place in a private room. Before he was  
24 actually searched, Gabbert gave Oppenheim, who was the  
25 special master, two photocopied pages of a three-page

1 letter from Lyle Menendez to Baker.

2 So, I think that my recollection was correct in  
3 that respect, that the lawyer voluntarily, at the very  
4 beginning of the search which turned up nothing, turned  
5 over two pages of a three-page letter.

6 MR. BRAZILE: That's correct, Your Honor. I  
7 stand corrected.

8 Chief Justice Rehnquist, as you indicated, the  
9 qualified immunity issue, if the Court determines that  
10 there was no egregious or conscience shocking --  
11 conscience shocking conduct in this case, or that there is  
12 no substantive due process right involved here, we don't  
13 even get to the -- to the qualified immunity issue. And  
14 there's even a suggestion, I believe, in a concurring  
15 opinion by Justice Stevens, in the case of County of  
16 Sacramento v. Lewis, that the Court could even go  
17 directly, first, to the issue of qualified immunity.

18 Here, when one looks at the -- the case law, the  
19 question is, what is the relevant case law? It's our  
20 position that the relevant case law for the purposes of  
21 deciding what is or what is not qualified immunity is a  
22 decision of this Court or a decision of the Federal  
23 district courts, and not something that's based purely  
24 upon a district court opinion.

25 There's a few circuits -- or, actually, many of

1 the circuits -- the Second, the Fourth, the Sixth, the  
2 Seventh, the 10th and 11th -- that do not allow distr  
3 court opinions to establish clearly established law. And  
4 what we're urging that this Court do in this case is to  
5 use or adopt the bright line standard for establishing  
6 whether or not there's been a violation of clearly  
7 established law.

8 In a case of -- of this nature, where you have  
9 very unique circumstances, you need a high degree of  
10 factual correspondence or similarity from the prior case  
11 law. No case has been cited that involves a situation  
12 such as this, where you're involved with a grand jury,  
13 there's an issue of where there's no -- the sixth  
14 amendment right is not in -- in play. And here also, you  
15 have a valid warrant.

16 Inherent in any execution of the warrant is  
17 going to be some kind of delay or disruption. Prosecutors  
18 in this case, the Petitioners, had no way of knowing that  
19 the conduct they engaged in would violate the 14th  
20 amendment rights of Mr. Gabbert. There's no case that  
21 would have put them on notice or made it very obvious or  
22 apparent to them that they were in violation of such a  
23 right.

24 And this right of undue interference, or  
25 unreasonable interference, with the right to practice a

1 profession is very vague and abstract. There needs to be  
2 some clear-cut guidelines. There are no clear-cut  
3 guidelines under the case law as of 1994. Therefore, the  
4 issue of qualified immunity should have applied in this  
5 case, because the law was not clearly established. They  
6 were not knowingly in violation of the law based upon the  
7 facts and circumstances confronting them.

8 QUESTION: Is it your position that if there  
9 is -- going back to this substantive question of whether  
10 or not -- if there is a right, it's under the fourth  
11 amendment?

12 MR. BRAZILE: Correct, Justice Kennedy. If  
13 there is a right here, it would arise under the fourth  
14 amendment, not the 14th. And -- and the qualified  
15 immunity defense is -- is right-specific. If they have --

16 QUESTION: Do you think there is a right not to  
17 have a warrant that's timed so as to unreasonably  
18 interfere with your occupation?

19 MR. BRAZILE: It would be our position -- I  
20 don't believe that the fourth amendment would give a cause  
21 of action based upon the state of the case law. But if  
22 there is a possibility -- and it's our position that there  
23 is not a fourth amendment violation here, based upon when  
24 the warrant was served -- but if there is a possibility of  
25 a cognizable claim under the Constitution, it's under the

1 fourth amendment and not the 14th amendment.

2 And because the issue of qualified immunity is  
3 right-specific, that insofar as there are 14th amendment  
4 claim concerns here, that the qualified immunity defense  
5 should apply and preclude a 14th amendment claim in this  
6 particular action.

7 QUESTION: Mr. Brazile, you mentioned possible  
8 State tort remedies. Is there anything -- is there any  
9 kind of ethical guide for district attorneys that -- that  
10 would address how you deal with witnesses and lawyers  
11 in -- in the grand jury setting?

12 MR. BRAZILE: The district attorney's office  
13 does have a manual that governs grand jury proceedings.  
14 But I don't believe it's specific as to the situation that  
15 arose here. And I can't think of any ethical rules that  
16 would have governed this situation that they were faced  
17 with. Because these were some rather unique circumstances  
18 that they were confronted with.

19 So, I think the remedy, if there is one, is  
20 through the State tort law. And I think, clearly, as I  
21 indicated earlier, Justice Ginsburg, the tort of abuse of  
22 process is what would remedy a situation like this, where  
23 they're alleging that we used the warrant in a deliberate  
24 fashion to somehow deprive someone of -- of a right or to  
25 harm a particular person.

1           So -- but it's not the 14th. That's not the  
2 vehicle. Because we don't want to have the 14th amendment  
3 as a vehicle or a mode for setting rules that are going to  
4 govern criminal procedure or rules that -- or we don't  
5 want the 14th amendment to somehow supervise how the grand  
6 jury proceedings are run. Leave that to the States. And  
7 if there's a harm that's caused, let the State tort remedy  
8 be involved.

9           This is not the kind of egregious, outrageous  
10 conduct that's shocking of the conscience.

11           QUESTION: Thank you, Mr. Brazile.

12           Mr. Lightfoot, we'll hear from you.

13           ORAL ARGUMENT OF MICHAEL J. LIGHTFOOT

14                       ON BEHALF OF THE RESPONDENT

15           MR. LIGHTFOOT: Mr. Chief Justice, and may it  
16 pleased the Court:

17           Our contention has been, from the time that we  
18 filed the complaint in this matter, throughout the course  
19 of the litigation, that the prosecutor's action here was  
20 to intentionally time the execution of the search warrant  
21 so as to prevent Mr. Gabbert from giving counsel to his  
22 client outside the grand jury, and specifically with  
23 respect to her potential invocation of the fifth  
24 amendment. And ultimately, it was the purpose of the  
25 prosecutors to get her, the client, to reveal information



1 to the grand jury that she was otherwise reluctant to do.

2 QUESTION: Am I right in thinking that  
3 Mr. Gabbert was available every time she wanted to consult  
4 while she was in the grand jury room?

5 MR. LIGHTFOOT: Our allega -- the answer is no,  
6 Your Honor. Our allegations in the complaint reflect that  
7 their actions deprived him of being available, to be of  
8 assistance to her, at the times when she was allowed to  
9 leave the grand jury.

10 QUESTION: And did the -- did the case get any  
11 more developed than just on the basis of a complaint and  
12 answer? Were there any depositions or affidavits or  
13 summary judgment proceedings?

14 MR. LIGHTFOOT: There -- there were, Your Honor.  
15 There were depositions of Mr. Gabbert, the -- the two  
16 defendants. In fact, all the parties who were involved in  
17 the search, as well as Miss Baker, the grand jury witness  
18 and the client of Mr. Gabbert. Mr. Gabbert testified that  
19 he was taken approximately 40 feet away from the grand  
20 jury room, and that the process of the execution took a  
21 period of time. It was, as -- as the Court may know,  
22 we've indicated in the briefs, the --

23 QUESTION: Well, you just said something, "he  
24 was taken." Didn't he ask to have the search done in a  
25 private room?

1 MR. LIGHTFOOT: He did, Your Honor, that's  
2 correct. And then he was taken away from the entrance to  
3 the grand jury room, where he was standing with his  
4 client, and taken to an available room in the environs of  
5 the grand jury, which was, according to her testimony,  
6 three to five car lengths' away from Mr. Gabbert.

7 QUESTION: But every time she asked if she could  
8 go to that room, she was told, Yes, you can.

9 MR. LIGHTFOOT: With all due respect, Justice  
10 Ginsburg, that's not what the evidence indicates. When  
11 she first walked into the grand jury while he was -- he  
12 was being searched down the hall, she was asked a question  
13 about her relationship with Lyle Menendez. Her response  
14 was: My lawyer is in the process of being searched. I  
15 have had not had an opportunity to -- to seek his counsel.  
16 May I leave and seek his counsel?

17 She was allowed by the foreperson to leave.  
18 When she left the room, she couldn't find him. An  
19 employee of the district attorney's office went down to  
20 Mr. Gabbert, told Mr. Gabbert that his client was looking  
21 for him. They never -- he -- Mr. Gabbert never conversed  
22 with his client. He called out: I'm in the process of  
23 being searched. They're going to have to wait.

24 She then --

25 QUESTION: Why couldn't he have just said,

1 Client, tell them to wait, instead of giving his --  
2 giving -- if he had said that, then maybe all of this  
3 could have been avoided.

4 MR. LIGHTFOOT: Well, you know, Your Honor, she  
5 was a 24-year-old young waitress, very unsophisticated.  
6 He was in the process --

7 QUESTION: Well, he wasn't. Why couldn't he  
8 just have said, Can you interrupt the search for a moment  
9 while I talk to my client?

10 MR. LIGHTFOOT: Your Honor, what --

11 QUESTION: Could he -- did he ask to do that?  
12 Did he ask to have the search stopped? Incidentally, how  
13 long did this search take, for Pete's sake? I mean, it --  
14 it -- the way it's described, "I am in the process of  
15 being searched," I mean, what did it take, 20 minutes?

16 MR. LIGHTFOOT: Twenty minutes to a half an  
17 hour. He had with him, Your Honor, he had the file in  
18 this case, which included his interview notes of his  
19 interview with the client, which the -- despite the  
20 objections of Mr. Gabbert, were read in their entirety by  
21 the special master. He --

22 QUESTION: Who did nothing with them. I mean,  
23 nothing -- none of that was turned over to the prosecutor.

24 MR. LIGHTFOOT: No, Your Honor. But Mr. Gabbert  
25 consistently made the claim that under California law,

1 Section 1524, the statute under which the search was being  
2 conducted, that once he invoked the privilege, under that  
3 law, the search has to stop. And the master continued to  
4 read -- as a matter of fact, one of the reasons, as  
5 indicated in the complaint, that did not allow Mr. Gabbert  
6 to leave the room was that the special master, who was in  
7 possession of the documents, insisted on copying the  
8 interview notes that Mr. Gabbert had made during his  
9 interview with the client.

10 QUESTION: May -- may I interrupt you just to  
11 ask this question?

12 MR. LIGHTFOOT: Yes, Your Honor.

13 QUESTION: You said that under the California  
14 statute that governs this, once he invoked the privilege,  
15 the search should have stopped. And you say it did not.  
16 Does he have a cause of action under the California  
17 statute?

18 MR. LIGHTFOOT: We -- we pled it under the  
19 independent jurisdiction of the Federal court. And it was  
20 dismissed by the trial court as being a novel claim that  
21 had not yet been recognized in the California courts.

22 QUESTION: Well, could we --

23 QUESTION: So, are you taking -- I'm sorry.

24 QUESTION: I'm sorry.

25 QUESTION: Are you taking that question up? Did

1 you raise that before the circuit?

2 MR. LIGHTFOOT: We did, Your Honor.

3 QUESTION: Okay. Now, may I -- one related  
4 question. I take it, based on the representations of --  
5 of counsel on the other side, that you did not, or have  
6 not, raised a claim that this search, under the warrant,  
7 was an unreasonable search within the meaning of the  
8 fourth amendment; is that correct?

9 MR. LIGHTFOOT: We did, Your Honor, but not on  
10 the basis of the timing of the search, so as to prevent  
11 him from giving counsel to his client.

12 QUESTION: Is there any reason that you could  
13 not raise that claim?

14 MR. LIGHTFOOT: Well, Your Honor, we didn't --  
15 we don't see this as a -- as a -- as particularly a fourth  
16 amendment problem.

17 QUESTION: Well, you're -- you're saying you  
18 want us to see it as a 14th amendment problem, but my  
19 question is, why shouldn't you raise it as a fourth  
20 amendment problem? We have said a number of times that if  
21 a claim for relief can be raised under a specific  
22 constitutional guarantee, that's the guarantee to invoke,  
23 and not the broad generality of substantive due process  
24 under the 14th amendment.

25 So, I -- I -- I think you have a burden to

1 indicate why you have not raised the timing of the search  
2 as an issue of reasonableness under the fourth amendment.

3 MR. LIGHTFOOT: Your Honor, I -- I assume that  
4 Your Honor is referring to the Albright v. Oliver and  
5 Graham v. Connor. And my understanding of the holdings in  
6 those cases is that where there is a textual source in the  
7 Bill of Rights for the particular behavior that we raise  
8 as being violative of our client's constitutional rights,  
9 then we should pursue that particular violation.

10 QUESTION: Well, the textual source here is the  
11 reasonableness requirement of the 14th -- of the fourth  
12 amendment. And is -- is there some reason that you cannot  
13 raise this issue -- it may, you know, be a -- a new  
14 issue -- but is there some reason you can't raise the  
15 issue there? It's a new issue under the -- under the 14th  
16 amendment, too. So, why not raise it under the fourth?

17 MR. LIGHTFOOT: Because our claim, Your Honor,  
18 does not have to do with the manner in which they seized  
19 the evidence.

20 QUESTION: It has the manner -- it has to do  
21 with the manner in which the search was conducted. Your  
22 claim, as I understand it, is that the search was  
23 conducted deliberately in a way to interfere with the  
24 right of your client to -- the right of your client to  
25 advise his client when called to testify before a grand

1 jury. Why is that not, at least on the face of it, an  
2 issue of reasonableness that could be raised under the  
3 fourth amendment?

4 MR. LIGHTFOOT: Because, Your Honor, it's my  
5 understanding that the fourth amendment guards against  
6 unreasonable activity in the procuring of evidence. We  
7 are concentrating on the behavior of the prosecutors in  
8 separating Mr. Gabbert from his client. It's -- it's the  
9 same as if they had locked them on an elevator or told  
10 him, as he was standing outside the grand jury room, that  
11 there was a death in his family to get him out of the  
12 building so that --

13 QUESTION: In any case, you don't want to -- you  
14 don't want to pursue that avenue of relief?

15 MR. LIGHTFOOT: Well, we haven't, Your Honor.  
16 We -- I -- I'm saying honestly to the Court that we filed  
17 fourth amendment claims with respect to the search that  
18 took place 40 feet --

19 QUESTION: The second -- yeah --

20 MR. LIGHTFOOT: -- and we did not pursue that as  
21 one of the bases, because we thought that it more properly  
22 fell within the due process clause.

23 QUESTION: My questions are much the same. I  
24 want to know exactly what your claim is in its narrowest  
25 sense. Is it a substantive due process violation that you

1     allege?

2             MR. LIGHTFOOT:  It is, Justice O'Connor.

3             QUESTION:  And what holding of this Court do you  
4 think comes closest to supporting recognition of a  
5 substantive due process violation here?

6             MR. LIGHTFOOT:  If I were bound to -- to  
7 identify one case, it would be Meyer v. Nebraska, decided  
8 in 1923, Your Honor.

9             QUESTION:  Well, that's not teaching German in a  
10 school.  That seems a rather far cry.

11            MR. LIGHTFOOT:  Well, Your Honor, you know,  
12 respectfully, I don't think it is a far cry.  What we're  
13 talking about is we're -- we know, going back into the  
14 last century, that everyone has a due process right to  
15 practice a profession or to engage in the calling of one's  
16 choice.

17            QUESTION:  Well, what -- what case supports that  
18 proposition?

19            MR. LIGHTFOOT:  Going back to the Dent case, in  
20 the 1890's, the 1915 case of Truax v. Raich --

21            QUESTION:  Well, those cases were all overruled  
22 in the thirties and forties.

23            MR. LIGHTFOOT:  Your Honor, the -- the case that  
24 was decided in 1923, the Meyer v. Nebraska, was a case  
25 that was a direct appeal of a man who was the teacher and



1 convicted of the crime of teaching in German during a  
2 small portion of his teaching day, approximately a half an  
3 hour.

4 QUESTION: Well, if that is the case you relied  
5 on, surely you lose on the qualified immunity ground.  
6 Because it's -- it's a great leap, wouldn't you agree,  
7 from that to supporting your present claim?

8 MR. LIGHTFOOT: Well, that's the -- that's the  
9 closest case in the Supreme Court. There -- there's a  
10 case in the Eighth Circuit, decided in -- in 1974; Wounded  
11 Knee v. FBI, a 1983 case, where the Court held that there  
12 was a constitutional right to practice law that was  
13 interfered with.

14 QUESTION: Well, but now, wait a minute. Do  
15 you -- do you say that an attorney cannot be searched,  
16 pursuant to a valid warrant?

17 MR. LIGHTFOOT: Not at all, Your Honor.

18 QUESTION: And that's what happened here. There  
19 was a valid warrant; you concede that?

20 MR. LIGHTFOOT: We -- for purposes of this  
21 argument, we do, Your Honor.

22 QUESTION: Right.

23 MR. LIGHTFOOT: But -- but, Your Honor, we're  
24 not -- we don't claim that every time an attorney is  
25 searched that there's a due process violation. This

1 search occurred at the precise -- and this is what the  
2 Ninth Circuit held -- at the precise moment in time when  
3 the lawyer was retained to represent the witness --

4 QUESTION: Well, of course there was a reason;  
5 they wanted to get a letter to use to examine the client,  
6 the lawyer's client, about her communications with the  
7 Menendez Defendants.

8 MR. LIGHTFOOT: But, Your Honor, it was made  
9 clear to the prosecutors as early as the day the -- the  
10 subpoena was served on the lawyer that she had a fifth  
11 amendment right to refuse production. Which was  
12 ultimately -- that was the ruling of the California court.  
13 It was -- it was a clear example of her -- her exercising  
14 her fifth amendment right.

15 And so, when he -- when Mr. Gabbert came to  
16 court with his client on the morning -- the following  
17 Monday morning, of course she intended to exercise her  
18 fifth amendment right, if he had been allowed to counsel  
19 her, and refuse to produce it.

20 QUESTION: Isn't that what happened, though,  
21 Mr. Lightfoot? You -- you said that this was a device to  
22 get that witness to talk despite her fifth amendment  
23 privilege. But as I understand what went on, she never  
24 did. She just -- she said, Can I talk to my lawyer, and  
25 when it didn't work out, she came back and read from her

1 card, her fifth amendment rights. And she did that twice.

2 MR. LIGHTFOOT: That's correct.

3 QUESTION: But she didn't -- she didn't give any  
4 testimony?

5 MR. LIGHTFOOT: She didn't. And it was  
6 fortuitous, Your Honor. But she never had the  
7 opportunities to get the counsel, the advice from her  
8 lawyer, that she had -- had retained him for and for which  
9 he was there to give her.

10 QUESTION: Well, what would he have told her  
11 different from "Read the card I gave you"?

12 MR. LIGHTFOOT: Well, it depends, Your Honor, on  
13 what -- I mean, the reason that the lawyer is there --  
14 you -- a lawyer, to act professionally, must understand  
15 what the question is before he can legitimately counsel  
16 his client to invoke the fifth amendment. If she was  
17 asked questions that did not -- did not call for answers  
18 that might tend to incriminate her, she was duty bound to  
19 answer those questions truthfully.

20 QUESTION: Yes, but we know now what the  
21 questions were. And it seems that she did precisely what  
22 he would have counseled her to do.

23 MR. LIGHTFOOT: Well --

24 QUESTION: Maybe -- go ahead, answer that,  
25 please, sir.

1 MR. LIGHTFOOT: Well, it's fortuitous that it  
2 happened that way, Your Honor. But when he went to the  
3 grand jury, she had no idea what questions would be asked,  
4 nor did he. And it was his right to be there, to counsel  
5 her, as she came out. She had a right to leave the grand  
6 jury and seek his advice. He was protecting her --

7 QUESTION: Did she -- have we said there's a  
8 right to have counsel in grand juries?

9 QUESTION: No.

10 QUESTION: A constitutional right?

11 MR. LIGHTFOOT: Well, Your Honor, this -- in --

12 QUESTION: That's new to me.

13 MR. LIGHTFOOT: -- in 1976, in the Mondujano  
14 case, this Court said, with regard to the prosecutor's  
15 admonition to a target before a Federal grand jury: You  
16 have the right to leave the room and seek the advice and  
17 consult with counsel. And this Court said that is a  
18 correct recital of the law.

19 And every circuit since that time has pointed to  
20 that language --

21 QUESTION: Constitutional right, did we say?

22 MR. LIGHTFOOT: Well, it didn't say a  
23 constitutional right, Your Honor. But I can't -- but we  
24 know --

25 QUESTION: Either it is or it isn't. And what

1 is bothering me, I guess, like perhaps others, is it's  
2 you're not even close. Either she does have the right or  
3 she doesn't. If in fact she does, then maybe her sixth  
4 amendment right was violated. And if she doesn't, no  
5 right was violated. He's entitled not to be searched  
6 unreasonably. Either you had an unreasonable search or  
7 you didn't. If you did, then in fact the fourth amendment  
8 is violated. If you didn't, nothing is violated.

9           Either way, no matter how you parse it, there's  
10 no 14th amendment right of due process substantive at  
11 issue in this case. This case is about reasonable  
12 searches and seizures. This case is about right to a  
13 lawyer before a grand jury. That's the end of it.  
14 There's nothing else.

15           All right. What's your response to that?

16           MR. LIGHTFOOT: Well, Justice Breyer, I would --  
17 I would respectfully disagree. When -- when the lawyer  
18 went to the grand jury with his client at that moment in  
19 time, he had a right. We know, going back to the  
20 jurisprudence of this Court, going back to the 1950's, in  
21 *Annis v. Myers*, that this Court found that the fifth  
22 amendment is drained of any significance at all if the  
23 lawyer isn't there to assist the client in how to decide  
24 whether or not to invoke it. It's not self-executing.

25           QUESTION: Even if -- Mr. Lightfoot, even if we

1 took your best argument, didn't your client have some kind  
2 of obligation to mitig -- something akin to mitigation of  
3 damages, both for himself and for the client? And as has  
4 been suggested before, he could have said, when he knew  
5 his client was looking for him, Please tell her, or,  
6 Please, on my behalf, ask them to hold up until this  
7 search is finished. I mean, he -- he had a couple of  
8 opportunities, and he didn't -- didn't do anything to  
9 lessen whatever the trauma might have been for his client.

10 MR. LIGHTFOOT: Well, Justice Ginsburg, the only  
11 opportunity he had was when the district attorney's  
12 employee -- and I -- I've indicated this to the Court  
13 already -- told him that his -- his client wanted to talk  
14 to him. He said to the D -- district attorney's employee,  
15 They're going to have to wait -- obviously referring to  
16 the course of the grand jury proceedings -- until the  
17 master finishes with his search of me, because I'm -- I'm  
18 being occupied here.

19 And as we indicate in our brief, if you're the  
20 subject of process, you don't have the right to walk away,  
21 to take --

22 QUESTION: Could not he not have said -- you  
23 said this was a representative of the D.A. -- Would you  
24 please tell your boss to hold up until this search is  
25 completed? He didn't say that. He just said, They're

1 going to have to wait, as though they would -- they would  
2 execute his non-request just because he said that.

3 MR. LIGHTFOOT: Well, in hindsight, Your Honor,  
4 maybe that would have been the best course. But at -- at  
5 the moment in time, as he indicated in his deposition, he  
6 was -- his -- his attention was to the -- the search that  
7 was taking place, which involved not only attorney-client  
8 documents that related to Miss Baker, but to two other  
9 clients, as well. And the master insisted on reading all  
10 the documents in those files.

11 QUESTION: Mr. Lightfoot, let me ask you a  
12 question which I think is basically Justice Breyer's  
13 question. But let me go about it in a slightly different  
14 way.

15 We have said that we are not going to engage  
16 in -- in recognition of a proliferation of due --  
17 substantive due process rights if there is relief  
18 available under more specific guarantees of the  
19 Constitution. There are at least two possible ways of  
20 approaching this case. One of them you have done, you  
21 have followed, by saying: I claim the due process right.

22 Another way of approaching it, in which there's  
23 no standing problem at least, is by claiming that there  
24 was a violation of the fourth amendment because the timing  
25 of the search and the reasons for -- for that timing

1 amount -- make it -- make it an unreasonable search.

2 If -- if ultimately this Court would not  
3 recognize the unreasonability -- the unreasonableness,  
4 rather -- of the search under the fourth amendment, what  
5 good reason would there be for us to recognize a  
6 substantive due process right to redress the same claim?

7 MR. LIGHTFOOT: Because, Your Honor, the actions  
8 of the prosecutors amount to a serious, serious subversion  
9 of the adversary system here. When Mr. Gabbert --

10 QUESTION: But you recognize -- you've already  
11 conceded, and quite rightly, that there's no per se rule  
12 against searching lawyers. And, therefore, it would seem  
13 to me that the simplest way to approach the case would be  
14 by asking, is there something in particular about this  
15 search of the lawyer that somehow allows for relief,  
16 despite the fact that lawyers themselves are open to  
17 fourth amendment searches, in -- in much the way that  
18 other people are? That's a simple way of going about the  
19 case.

20 Why don't we go about it in the simple way. And  
21 if we don't find a simple reason for recognizing the  
22 right, why go to a more complicated level?

23 MR. LIGHTFOOT: Because my answer, Your Honor,  
24 is that the core of the behavior that we claim amounts to  
25 the constitutional violation is the action of the



1 prosecutors in stepping in and subverting the right of the  
2 lawyer to give advice as to the invocation or  
3 non-invocation of the fifth amendment by his client.  
4 That -- the prosecutors know from the moment they take an  
5 oath, in California, that they are to support the State  
6 and Federal Constitution. The defense lawyer's role, in  
7 California and elsewhere in this country, is to protect  
8 the client. The client has a constitutional right, before  
9 a grand jury, to invoke the fifth amendment.

10 If you take the lawyer away, then you subvert  
11 the process. It's egregious behavior because, as the  
12 Ninth Circuit indicated in this case, Your Honor --

13 QUESTION: My understanding is that there is no  
14 constitutional right to a lawyer before grand jury. So  
15 that the argument you're now making is just totally wrong.

16 MR. LIGHTFOOT: Your Honor, our claim doesn't  
17 rest on whether or not Ms. Baker had a sixth amendment  
18 right to counsel. She was -- she was afforded the right,  
19 under practice and procedure in California, to leave the  
20 grand jury. You can't give a right and then --

21 QUESTION: You also said earlier in your  
22 argument that -- that she refused to -- she had a right  
23 not to turn -- a fifth amendment right not to turn over  
24 the documents.

25 MR. LIGHTFOOT: She did, Your Honor.

1 QUESTION: What is that? You have a right not  
2 to turn over a document that would incriminate you?

3 MR. LIGHTFOOT: If the production itself would  
4 incriminate you --

5 QUESTION: My, it's wondrous things happen to  
6 the -- to the Bill of Rights out there in California  
7 apparently.

8 (Laughter.)

9 QUESTION: There -- there is a fifth amendment  
10 right not to turn over evidence which you have if -- if  
11 the evidence would incriminate you?

12 MR. LIGHTFOOT: If the act of production would  
13 tend -- you're virtually saying, "These are my documents,"  
14 that verbal conduct is incriminating. And that's what  
15 Mr. Gabbert had indicated to the prosecutors beforehand;  
16 asked for a period of time so that he could make the  
17 motion -- pursue a motion to quash before the court, which  
18 was denied.

19 When he did attempt to file the motion on -- on  
20 the Friday before the Monday appearance, the first thing  
21 the prosecutors did was to get a search warrant and go out  
22 themselves and search through her apartment, to see if  
23 they could find the documents.

24 It was their intent, when they took him aside,  
25 not to get the documents from him, but to bring her in,

1 unrepresented, and get her to waive her fifth amendment  
2 right, and give them the opportunity to explore her  
3 relationship with Lyle Menendez. That's what our theory  
4 is.

5 They could have done that a number of ways. The  
6 way they chose to do it was to use the search warrant to  
7 separate them. And that's what we --

8 QUESTION: How -- how long was she before the  
9 grand jury? Does that appear from the record?

10 MR. LIGHTFOOT: I believe for approximately 15  
11 to 20 minutes. She was allowed to leave on two occasions,  
12 and remained outside the grand jury before she was ordered  
13 to come back in and -- and answer questions.

14 QUESTION: The 20 minutes includes the time she  
15 was outside, or was she --

16 MR. LIGHTFOOT: It does. No, it includes -- she  
17 was -- she was only asked four questions, Your Honor,  
18 during the course of her appearance. She was not asked  
19 about the documents.

20 And as the Court knows, the search warrant that  
21 the prosecutors got on the morning in question was a  
22 search warrant not only to search Mr. Gabbert, through the  
23 special master, but to search Miss Baker, as well, for the  
24 documents. They had the special master there, and they  
25 had a police officer, who could have searched.

1           If they were intent on finding the documents on  
2 the person of Miss Baker, they could have searched her  
3 outside the grand jury room. They didn't do that. They  
4 brought her in and, before asking her to produce the  
5 documents, they asked her questions that would have  
6 obviously invoked her -- her right not to give testimony  
7 that would intend to incriminate her.

8           QUESTION: There's nothing here that shows that,  
9 on the two occasions when she left and came back, that the  
10 prosecutors inside the grand jury room knew that she  
11 hadn't been able to find her lawyer.

12           MR. LIGHTFOOT: Well, there -- there is, Your  
13 Honor. Because, as I indicated before, they put this  
14 search in motion when she first came in and was asked a  
15 question about her relationship with -- with Lyle  
16 Menendez. He -- she indicated, My client -- my lawyer is  
17 not available; he is being searched --

18           QUESTION: Yes, but she went out in search of  
19 her lawyer.

20           MR. LIGHTFOOT: She went out --

21           QUESTION: She said, Can I see my lawyer? They  
22 said, Yes. She went out to look for her lawyer. She came  
23 back. They knew that she went out to look for her lawyer.  
24 Did they know, when she came back into the room, that she  
25 hadn't found him?

1 MR. LIGHTFOOT: Well, the record indicates, Your  
2 Honor, that, after she left the grand jury the first time,  
3 that the two prosecutors left the grand jury room, as  
4 well. So, they would have seen her out in the hallway.  
5 And as we know, it was one of the employees of the  
6 district attorney's office, during that break, who  
7 actually spoke to Mr. Gabbert.

8 And the other indication is that Mr. Oppenheim,  
9 who was there, having been picked by the district  
10 attorney's office as the special master to perform this  
11 search, he never came back and reported his findings until  
12 after her appearances before the grand jury. So --

13 QUESTION: Well, would he report -- under  
14 California law, would the special master report to the  
15 grand jury?

16 MR. LIGHTFOOT: No, he would report to the  
17 prosecutors, Your Honor.

18 QUESTION: That's who the special master reports  
19 to under that California law?

20 MR. LIGHTFOOT: No, Your Honor. There's no  
21 provision in the statute who he reports to. But he was  
22 picked by the district attorney, brought to the building,  
23 and accompanied the district attorneys and introduced to  
24 Mr. Gabbert. And when they -- when he ultimately did  
25 report to anybody, he reported back to the prosecutors

1 what the results of his search were.

2 QUESTION: And that -- that was all as  
3 contemplated by California law?

4 MR. LIGHTFOOT: Well, not -- not all of that,  
5 Your Honor. The California law requires that when the  
6 master first approaches the lawyer who is the subject of  
7 the warrant, that the lawyer be given the opportunity to  
8 essentially turn it into a subpoena and voluntarily turn  
9 the documents over. Which is exactly what Mr. Gabbert did  
10 here. He had copies of two of the three pages. And as  
11 the Ninth Circuit indicated, his first act was to turn  
12 those over to the special master.

13 But the -- despite the mandate of the California  
14 statute, the -- the search continued. The mandate of the  
15 statute is that if at any point the lawyer invokes the  
16 attorney-client privilege with respect to any of the  
17 materials, then it's the duty of the master to seal the  
18 documents and take them to a court for that court to  
19 resolve the disputes with respect to the privilege.

20 And as we know, Mr. -- from the record --  
21 Mr. Gabbert invoked the privilege consistently during the  
22 20 minutes to a half an hour that the search took place.  
23 And according to Mr. Oppenheim, the master's testimony,  
24 because the documents didn't have the words  
25 "attorney-client privilege" on them, he didn't view them

1 as privileged.

2 And so, when he went back to the prosecutors, he  
3 told them there was nothing in the files that was  
4 privileged. And that's when the second search took place  
5 outside the grand jury room.

6 Your Honor, with respect to the -- to the  
7 question of qualified immunity, the Petitioners in this  
8 case ask this Court to set down a rule that there must be  
9 some factual correspondence between a previous case of  
10 this Court and the facts of this case. That suggestion  
11 was rejected, explicitly -- explicitly rejected -- by this  
12 Court in 1997, in the Lanier case.

13 And as this Court said in -- in Lanier, that it  
14 is -- it is not unusual for the -- a general proposition  
15 appearing in a prior Supreme Court case to be sufficient  
16 to give a clear or fair warning of what the constitutional  
17 right is.

18 And as this Court remembers in Lanier, the --  
19 the right that was involved was the right of victims not  
20 to be subjected to sexual abuse by a State judge. And the  
21 authority for the -- the previous Supreme Court opinion  
22 for -- that set out that right was Rochen, which, as the  
23 Court knows, was a -- a serious physical violation of the  
24 person of -- of the defendant in that case. But --

25 QUESTION: In this case, you're relying on

1 Meyer?

2 MR. LIGHTFOOT: I'm sorry, Your Honor?

3 QUESTION: In this case, as I understand it,  
4 you're relying on Meyer and Nebraska?

5 MR. LIGHTFOOT: Well, we're -- we're relying on  
6 Meyer. We're relying on the Schware case, back in the  
7 19 -- v. the Board of Examiners for the State of New  
8 Mexico, which held that a person has a right to practice  
9 law. That was a procedural due process case, but the  
10 right itself was the right to practice law.

11 We rely on the Eighth Circuit case of --

12 QUESTION: The Schware didn't hold that there  
13 was a substantive due process right to practice law.

14 MR. LIGHTFOOT: It identified -- it identified a  
15 right that Mr. Schware had to practice law.

16 QUESTION: But wasn't that given to him by the  
17 State of New Mexico?

18 MR. LIGHTFOOT: Well, he -- he was -- he was  
19 pursuing a right under the -- the liberty clause in the  
20 14th amendment, Your Honor. That's -- that's exactly what  
21 we're -- what we're doing here.

22 QUESTION: But the -- the right, in any case,  
23 was -- was a right, as it were, in Gross. In other words,  
24 a right to choose a profession and, generally, to practice  
25 it. Schware did not deal, as I understand it, with



1 specific interferences on a sort of a client-based or  
2 case-based rationale.

3 MR. LIGHTFOOT: No, Your Honor. But this Court  
4 has never held that there has to be a total ban on the  
5 exercise of somebody's right before it gives rise to --

6 QUESTION: But this is much -- I mean, this is a  
7 tiny slice. If you -- if you think of the right to  
8 practice law. We'll take the Griffith case. I have a  
9 right to practice law if I'm qualified, even if I'm not a  
10 citizen. That general right. And then, to take 20  
11 minutes out of lawyer's life and say that that involves  
12 the right to practice law, it's rather overblown, it seems  
13 to me.

14 MR. LIGHTFOOT: May I respond to your question,  
15 Justice Ginsburg?

16 QUESTION: Go ahead.

17 MR. LIGHTFOOT: Your Honor, that may be. But  
18 this is the most significant moment in this  
19 representation, where her answer to a question may be  
20 irreversible if she doesn't get the right advice from the  
21 client. And that's what this -- that's what the Ninth  
22 Circuit case said was so egregious about the conduct in --  
23 in this case.

24 CHIEF JUSTICE REHNQUIST: Thank you,  
25 Mr. Lightfoot.

1 MR. LIGHTFOOT: Thank you, Your Honor.

2 CHIEF JUSTICE REHNQUIST: The case is submitted.

3 (Whereupon, at 11:12 a.m., the case in the  
4 above-entitled matter was submitted.)

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# CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

DAVID CONN AND CAROL NAJERA, Petitioners v. PAUL L. GABBERT  
CASE NO: 97-1802

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY: Jonathan M. May  
(REPORTER)