

ORIGINAL

In the

Supreme Court of the United States

DELAWARE,

Petitioner

v.

WILLIAM J. PROUSE, III

Respondent

No. 77-1571

Washington, D. C.
January 17, 1979

Pages 1 thru 49

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Wednesday, January 17, 1979
Washington, D. C.

The above-entitled matter came on for argument
at 10:02 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

CHARLES M. OBERLY, III, ESQ., State Prosecutor, Department
of Justice, State Office Building, 820 N. French Street,
Wilmington, Delaware 19801 For Petitioner

DAVID M. LUKOFF, ESQ., Assistant Public Defender of the
State of Delaware, 820 French Street, Wilmington, Delaware 19801
For Respondent

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CHARLES M. OBERLY, III, ESQ.,
For Petitioner

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DAVID M. LUKOFF, ESQ.,
For Respondent

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CHARLES M. OBERLY, III., ESQ.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Delaware against Prouse.

Mr. Oberly, you may proceed whenever you are ready.

ORAL ARGUMENT OF CHARLES M. OBERLY, III, ESQ.,

ON BEHALF OF PETITIONER

MR. OBERLY: Mr. Chief Justice and may it please the Court:

The case that is presently before this Court for consideration concerns a very narrow question of whether police officers will be permitted to stop motor vehicles for the sole, limited purpose to conduct a license and a registration check.

The facts of this particular case are not in dispute. On November 30th, 1976, an officer of New Castle County Police Department stopped a motor vehicle in which the Respondent, Mr. Prouse, was an occupant.

The stop was motivated solely to check for a driver's license and registration of the driver of that vehicle. There was no other wrongdoing or facts indicating suspicion at the time the vehicle was stopped.

Upon approaching the vehicle, the officer noticed a smell of marijuana. A subsequent search and arrest ensued in which marijuana was found in the car and on the person of Mr. Prouse.

At the trial court a motion was made to suppress

the evidence which was granted and the holding was then appealed by the State of Delaware to the Delaware Supreme Court.

On January 30th, 1978, the Delaware Supreme Court affirmed the trial court's ruling holding that random stops without articulable facts should justify a reasonable suspicion that there is evidence of wrongdoing are unconstitutional under the Fourth and 14th Amendments.

The State of Delaware respectfully disagrees with that holding and sought certiorari in this Court.

In so ruling, the Delaware Supreme Court specifically recognized that there was a legitimate state interest in the enforcement of its motor vehicle laws.

Furthermore, the Delaware Supreme Court noted that it was adopting what it called a rigid invalidity rule and the state submits that such rigid rules have been eschewed by this Court where they do exact a high toll on the public and where they can frustrate legitimate law enforcement efforts.

It is the state's position that the Delaware Supreme Court reading of the 14th and 4th Amendment requirement of articulable suspicion erred in failing to apply the reasonableness test that has been used by this Court since Terry and Brignoni-Ponce.

The reasonableness test to measure police conduct has been applied on numerous instances and it caused the Court to consider the interest of society measured against the

individual rights that were involved in a particular case.

The test that has been set out calls for the Court to weigh the factors of the purpose and the degree of protection, the public perception of the stop or seizure that may be involved in a particular case and the alternative methods or procedures that would be available to conduct the particular search or stop in an alternative manner.

After considering these factors, the expectation of privacy of the individual should be considered and the intrusiveness of that particular search.

It is the state's contention that the Delaware Supreme Court erred in failure to give full consideration to these factors, that had it done so, that the interest of society would clearly have indicated that such stops should have been permitted.

Initially, the state would note that there is a legitimate state purpose in determining who has a driver's license and who has proper registration. There is perhaps no area of American life that is more regulated, more subject to rules than use of the automobile. When I walk out of this courtroom, I will be affected in seconds by the motor vehicle laws of the District of Columbia.

The entire way home will be affected.

The State of Delaware and other surrounding states and jurisdictions have a paramount concern as to who can drive,

when you can drive, where you can drive, who has insurance and who does not have insurance and it is submitted that this is more than just a minimal state interest, that it is a substantial state interest and I need not burden --

QUESTION: Did the police officer ask if the driver had insurance?

MR. OBERLY: In this particular case, no, he did not, Your Honor.

QUESTION: He did not, I know but would you say, would the state have -- would it be permissible for him to inquire of the driver on that subject on a random basis when he stopped him?

MR. OBERLY: Yes, Mr. Justice Stevens, in Delaware a registration cannot be obtained -- which is kept inside the car -- unless there is insurance. It is stamped on your registration that it is valid so in order to even get the stamp, you have to have shown that you have insurance.

In the interim, if the insurance had expired during that period of time the state would submit that you would be able to inquire because Delaware statute does require that all vehicle drivers carry a certain minimal amount of insurance for personal liability.

QUESTION: Would he also have the right, I suppose, to ask the man if he had had a drink within the last hour?

MR. OBERLY: I do not believe that he would have

that right unless he had some articulable suspicion to pursue it any further than that. The state is asking for solely a limited right simply to check whether or not the individual is qualified to drive and whether or not that vehicle is properly registered.

It is not asking that they be given permission to go any further than that.

QUESTION: I am having trouble with the word "random." Is that really the word or do they stop whoever they have some -- I hate to use the phrase -- gut reaction to stop?

MR. OBERLY: Your Honor, Mr. Justice Marshall, I --

QUESTION: You do not think they can, for example, stop every fourth car? That is what I would think would be random.

MR. OBERLY: I think if you use a classic definition of random that could possibly be correct. The Delaware Supreme Court and the state have used random as just being --

QUESTION: Is there any restriction on who can be stopped?

MR. OBERLY: Not by using the test that Delaware would request.

QUESTION: Can the police officer stop all negroes? And would that be all right.

MR. OBERLY: That would certainly not be all right.

QUESTION: Why?

MR. OBERLY: It would be certainly --

QUESTION: Well, suppose he stopped 20 per cent of them?

MR. OBERLY: If 20 per cent of the drivers in the State of Delaware happened to be negros then I submit --

QUESTION: Suppose he stopped all women? That would be all right.

MR. OBERLY: I think, Your Honor, you are indicating the impossible.

QUESTION: Would that be all right, to stop all women?

MR. OBERLY: No, it would not be.

QUESTION: He can only stop whoever he wants to stop.

MR. OBERLY: That would be correct, Your Honor, that they would be able to stop whomever they want but however, if there are objective criteria that came forth in the --

QUESTION: Terry does not supply that. It does not have any help for you there at all, does it?

MR. OBERLY: I believe Terry does supply some help there in --

QUESTION: Can you stop anybody?

MR. OBERLY: No, but --

QUESTION: I thought this Court went to great detail to explain what happened in Terry. That policeman

watched Terry for about three or four hours, did he not?

MR. OBERLY: Yes, he did, Your Honor.

QUESTION: Well, does not random by definition mean nothing more than the person is driving a motor vehicle on the highway and that there is not any other ground for stopping him?

MR. OBERLY: That is the state's contention, yes, sir, Mr. Justice Rehnquist.

I would indicate that in Terry the Court did state that it was concerned with the possibility of harassment against either racial minorities or other minorities and it was contended in the opinion that it is virtually impossible and a futile protest to lay down rigid invalidity rules that can basically --

QUESTION: In Terry the policeman watched a man casing the joint.

MR. OBERLY: Yes, he did and that of course --

QUESTION: Was this driver casing any place?

MR. OBERLY: I am sorry?

QUESTION: What was he doing? He was driving a car and there is nothing illegal in that at all, is there?

MR. OBERLY: That is correct. He was doing nothing more than driving a car at the point when he was stopped.

QUESTION: There is nothing illegal in driving the car if he has a license and if he has insurance.

MR. OBERLY: That is correct.

QUESTION: And if he does not have a license, then it is illegal, is it not?

MR. OBERLY: That is correct. This is a threshold --

QUESTION: Your point is that Delaware claims the right to stop any car to see whether he has, number one, the license to drive it which implies carrying insurance and that that driver has the title papers to the car, I suppose, to check that?

MR. OBERLY: The registration would necessarily include that that car is properly titled and the name to whom it is registered and that is all the state seeks is a threshold determination of whether or not the occupant or the driver, I am sorry, the driver of a particular vehicle is qualified and fit to occupy a 4,000-pound vehicle on our highways or in the states.

QUESTION: Does Delaware have safety inspection laws?

MR. OBERLY: Delaware has a yearly inspection of the automobile at which time it is run through an inspection point to test the brakes, safety and the registration is signed and a fee is paid and a sticker is given the driver and it is put on the license and a card indicating the ownership of the vehicle is then stamped which indicates that the proper insurance is on there.

QUESTION: Well, you do not stop him to see if he has a sticker?

MR. OBERLY: No, the sticker is displayed on the license plate.

QUESTION: I should hope so.

QUESTION: This is only yearly.

MR. OBERLY: That is only yearly, Your Honor.

QUESTION: Does Delaware have a policy of making random stops?

MR. OBERLY: There is no set policy by any of the police departments in Delaware that I am aware of that requires any officers to conduct random stops. Random stops are frequently conducted, however and have been conducted by the police department in the State of Delaware.

QUESTION: Apart from a state policy is there any, does the record show whether this particular officer was working pursuant to any local policy or was it just his own initiative?

MR. OBERLY: The record so indicates it was his own initiative. At the particular time he stopped the automobile or the vehicle in which Mr. Prouse was located in he had a lull in activity. He was not responding to any other crime scenes and he saw the vehicle and he decided to stop it for the license registration check but he was acting on his own at that time.

QUESTION: Was the marijuana package in plain sight

or did he detect that first from the odor of the marijuana?

MR. OBERLY: As soon as he walked up to the car he never had the chance even to engage in the initial questioning before he smelled the marijuana.

He smelled the marijuana, walked back to the patrol car, called for radio assistance, since his stop was going to be obviously longer than he anticipated, went back to the car, asked the driver and the passengers to exit the vehicle at which time the marijuana was seen in plain view and a subsequent arrest of Mr. Prouse and a frisk of him found the marijuana -- additional marijuana on his person.

As I have indicated that the Delaware law requires that every driver, except in very limited circumstances, be licensed and to be licensed, it is the state's contention, that is the minimal standard which has been set up by the legislature to determine who may drive a motor vehicle.

Also, the legislature has set up a minimal standard that in order to drive an automobile so that the citizens of the state be protected, you have to have certain minimal levels of liability insurance and it is the state's further contention that unless police officers are given the right to stop vehicles to determine whether or not a person is a licensed driver and whether or not that vehicle is properly registered with insurance, then that the enforcement of the state motor vehicle laws will become a mere nullity and --

QUESTION: I did not think the issue here was whether or not the state could do this. The question was whether having done it in the manner it was done here, the marijuana seized could be used as evidence against the driver.

Is that the issue?

MR. OBERLY: Well, I think it is a combination of both.

QUESTION: You may be denied that without being denied any authority to stop and make a traffic check.

MR. OBERLY: That is a possibility. However, as noted in the footnote of the Delaware Supreme Court Opinion, that all sides are in basic agreement that the marijuana found in this case was in plain view that actually, there was articulable suspicion --

QUESTION: I know but I thought the issue really was whether or not you lost the conviction of Mr. Prouse.

MR. OBERLY: Yes.

QUESTION: On the ground that this evidence was illegally admitted, did you not?

MR. OBERLY: It was illegally seized. It never even got to trial. That is correct.

QUESTION: Well, then, what you want is that the conviction be reinstated.

MR. OBERLY: We would like the --

QUESTION: But I do not see if you lose and there

is an affirmance here, how that at all stops Delaware from making these stops.

QUESTION: Well, did not the Delaware Supreme Court say the stop violated the Fourth Amendment?

MR. OBERLY: Yes, the Delaware Supreme Court explicitly held that the stop violated the Fourth Amendment.

QUESTION: So that the police officers should no longer just stop people because they have been told that it violates the Fourth Amendment.

MR. OBERLY: That is the effect of the holding, that we are no longer allowed to stop people unless there are articulable facts, that they are --

QUESTION: May I suggest that is not really what is involved?

QUESTION: That is what the Supreme Court held, though.

MR. OBERLY: I submit that the test that the Supreme Court applied is a wrong interpretation of what the requirement of the Fourth Amendment is.

QUESTION: Of course you could, as Mr. Justice Blackmun suggests, carry out your policy, serve both the state's end and the end of the Fourth Amendment by saying that any evidence that comes from such a stop is inadmissible.

MR. OBERLY: As to other crimes.

QUESTION: Yes.

QUESTION: But logically, no evidence even of not having a driver's license or not having a registration would be admissible, either if this is a Fourth Amendment violation. I do not see how you could carry out your policy, if the policy is to try to find drivers without licenses and without registrations.

MR. OBERLY: That is the state's contention, we cannot possibly enforce these unless we have that right.

QUESTION: You can cancel their license. You can get them off the road. You may not be able to convict them.

MR. OBERLY: Your Honor, it is the state's belief that if we are not able to stop absent articulable suspicion and that the Delaware Supreme Court ruling is affirmed, the meaning of that would basically be that any person without a driver's license who has a suspended license, a revoked license or no insurance is being given notice that you may drive upon the roads of the State of Delaware unless you are unfortunate enough to drive past the officer who previously arrested you or you violate some other rule of the road and then we submit that it is possibly too late at that point, that the determination of who is fit and who is not fit is whether or not you possess that license, not whether or not you violate a law and then you are found not to possess a license.

QUESTION: Does Delaware pursue the practice also of setting up random check points at which the license of every

driver is checked?

MR. OBERLY: No, it does not, Your Honor and --

QUESTION: Many states do.

MR. OBERLY: Some states do. It is my understanding -- of course, the border patrol searches are fine examples of that.

QUESTION: I am not talking about border searches. I am talking about random check points that may vary from hour to hour so long as you stop every car that comes along, say, for twenty minutes or for an hour, you slow up traffic temporarily. That is done routinely in my City of Richmond, Virginia.

MR. OBERLY: It is the state's contention that the use of a road block type of procedure is much more than is required under the 14th Amendment.

QUESTION: But if you have a real problem the chances of catching people who violate the license law would be much greater if you could stop 500 cars in 20 minutes than if you go around at total random of picking up one here, there or yonder, do you not think?

MR. OBERLY: I have never seen a road block or participated in one. However, may I submit that that does not solve the basic problem. One, it inconveniences literally hundreds of people. Two, it necessarily makes police officers exercise random stops only at certain periods of time and certain localities pursuant to concerted plans or efforts, whereas police officers may be driving around doing their

procedures and their routine patrols and they have lulls and they have times when they really do not have anything else to do. It would require a greater effort additionally in addition to the amount of inconvenience it causes every driver.

I do not believe it necessarily is required. The application of the exclusionary rule to a case in which there has been no evidence whatsoever presented by the Respondent of discrimination which the state submits is not called for in this case.

The only possible use of the road block type situation would be to minimize the conceivable possibility of discrimination so that everyone is treated equally and it would be the state's contention that while that could possibly be the effect, on the other hand you are inconveniencing literally hundreds of individuals to gain benefit on the one hand and --

QUESTION: How can you say everybody is treated equally when it depends on which policeman you pass by?

MR. OBERLY: In the random stop situation you are referring to.

QUESTION: In the stop in the situation in Delaware. It depends on whether the policeman wants to stop you or not. Now, how can that apply to everybody? That applies to whoever is in the area of a policeman who feels like he ought to stop somebody.

MR. OBERLY: That is correct and there is --

QUESTION: Well, that is not equal or everybody. That is up to the whim of that policeman at that time, more than likely as to whether he had had coffee for breakfast or not.

Is not that true?

MR. OBERLY: The state does not think it is true.

QUESTION: And is that not what you are trying to keep away from with policemen?

MR. OBERLY: The state does not believe that that is true. This case --

QUESTION: Well, for example, the policeman said he knew the smell of marijuana. How did he happen to know that?

MR. OBERLY: I believe he knew that from his prior experience, prior arrests --

QUESTION: Why do we have to have dogs especially trained to smell marijuana if there are police who can smell it?

MR. OBERLY: Your Honor, the answer to that is that the situations involving dogs involves suitcases, luggage where it is not burned and the animals are able to ascertain a smell that a human would not be able to ascertain.

QUESTION: Mr. Oberly, you mentioned the hundreds of people would be inconvenienced by the suggestion Mr. Justice Powell made. Does the record tell us how often these random stops are made? Are there hundreds of people stopped? And if there are not, how can you be sure this is more effective than

the other way?

MR. OBERLY: Referring to hundreds of people, I am referring to the possibility of a road block which would stop some thoroughfare and line cars up. I am presupposing it would stop hundreds. There are no statistics in Delaware of which I am aware as to how many random stops have been made. The only --

QUESTION: On this particular officer, we do not know how often he does it, either.

MR. OBERLY: As the record indicates in our petition for certiorari, he does it occasionally when he has a lull in his activities.

QUESTION: What does that mean? Maybe a couple of times a week? Or a couple of times a day or --?

MR. OBERLY: Unfortunately, the record was never explored further.

QUESTION: So if he does it, say, two or three times a week, is this really a very significant deterrent? Does he catch very many people?

MR. OBERLY: Your Honor, if that individual does it two or three times a week times the 400 police officers in the state --

QUESTION: We do not know if they all do it. You told us there is no state policy or any local policy. This is one individual who happened to be out and had some extra time so he thought he would stop somebody.

MR. OBERLY: Your Honor, that is correct although I do know that it is done throughout the state but I cannot give --

QUESTION: Okay, you are not in a position to tell us how often or how successful the program is, how many people they actually find without drivers' licenses. You do not really have any information that tells us how wise this policy is, do you?

MR. OBERLY: No, there are no statistics kept in Delaware that I am aware of on that.

QUESTION: Do you have regulations, statewide regulation of the police department which says that you are authorized to do this?

MR. OBERLY: No, there is not any state-authorized except the statement in the law which the police are charged with enforcement of all laws of the state and the motor vehicle author laws.

QUESTION: Well, do you not have manuals which say if a guy is holding up a bank you arrest him and things like that?

MR. OBERLY: No, we do not, not to that extent.

QUESTION: You do not have manuals for police in Delaware?

MR. OBERLY: There are police training manuals which act --

QUESTION: Well, is that in the training manual?

MR. OBERLY: Not that I am aware of, Your Honor.

QUESTION: And you do not know of any statewide regulations which require the police officer to do this?

MR. OBERLY: No, I do not know of any.

QUESTION: This man was a state policeman?

MR. OBERLY: He was a New Castle County police officer.

QUESTION: And how many counties are there in Delaware, three?

MR. OBERLY: There are three counties. New Castle County has its own separate police department of approximately 200 officers. There is the Delaware State Police which covers the entire state which has 400-plus officers.

QUESTION: What percentage of the population of Delaware is concentrated in New Castle County?

MR. OBERLY: Approximately 75 per cent.

QUESTION: And is the Delaware Turnpike between Wilmington South to Newark and Stanton in New Castle County?

MR. OBERLY: The entire portion of the turnpike is in New Castle County.

QUESTION: How many lanes are there each way on that?

MR. OBERLY: There were three lanes in each direction.

QUESTION: My question, if we understood each other,

included all the police in Delaware, city, county, state.

MR. OBERLY: Yes, I am not aware of written policy in this area.

QUESTION: Thank you.

QUESTION: Tell me, does Delaware have one of these programs for checks of agricultural products?

MR. OBERLY: The border-type search for agricultural products like California?

QUESTION: Something like that.

MR. OBERLY: No, I have been a lifelong resident of Delaware and I do not know of any type of policy like California has and some of the western states have.

QUESTIONS: Trucks -- no commercial vehicles automatically have to stop at the -- when they come into the state?

MR. OBERLY: No. There is only one weighing station that has just been implemented in the State of Delaware but there is not a weighing process that is utilized for all states that are using our highways, either. They are just simply stopped, again, the same way automobiles are stopped to check whether or not the truck drivers have their correct papers, whether it is interstate commerce papers or not and that is done on a random basis, likewise.

Against it, the state submits, is a substantial interest in this case. The facts of this case are of crucial significance. It is submitted that the encroachment on the

individual's liberty is minimal. The state is not asking for anything more than the right to simply check the license and registration. It is not asking to be given the right to conduct flashlight searches and numerous other horrors that are paraded before the Court in the Respondent's brief. The intrusion is minimal at best and the anxiety and the stigma that has been attached has been, it is submitted, is grossly overplayed.

I do not believe that any of the citations used by the Respondent support the argument, certainly use of Brignoni-Ponce in footnote 8 does not support their argument and the reservation in Martinez-Fuerte of this Court in footnote 14 does not support the argument that this Court has in any way laid down the rule to guide in these particular-type cases.

Lastly, it would be the state's contention that we would respectfully request that this Court apply the use of the word "reasonableness" in interpreting what the Fourth Amendment requires in weighing the society's interest, loss of life, the property damage of who is fit to drive and who can be insured and weigh that against the minimal inconvenience of a driver who is stopped and it is the state's contention that that would come down on the side of the state to exercise this type of activity.

There has been no allegation of discrimination by the Respondent. There are no facts other than supposition or hypothesis that this could be abused. Case law is clear that

in situations where there is abuse that can be shown -- it was shown in the Hyland case cited by the Defendants where long-haired individuals were stopped and no case of which the state is aware has the exclusionary rule ever been extended to a situation in which there has been no proof of illegal police conduct and we would submit that that would be an erroneous extension of the exclusionary rule.

QUESTION: Mr. Oberly, it may be of no legal significance but as I read the record, there was no conviction in this case, was there? Was not the trial before Judge Grant the motion to suppress in the appeal taken before the Supreme Court of Delaware before trial?

MR. OBERLY: That is correct.

MR. CHIEF JUSTICE BURGER: Mr. Lukoff.

ORAL ARGUMENT OF DAVID M. LUKOFF, ESQ.

ON BEHALF OF RESPONDENT

MR. LUKOFF: Mr. Chief Justice and may it please the Court:

The question presented in this argument is whether police officers may randomly stop motor vehicles for license and registration checks. I think we first have to look at the facts. Specifically, I would like to refer the Court to some additional facts.

We do not disagree with the state's position, the facts stated in their Appendix. However, there are some

additional facts which I believe are important.

First of all, this was a night-time seizure.

Secondly, the word "random" is very important.

The Delaware Supreme Court used the word "random." The Delaware Superior Court used that word. But I think we have to look at Officer Avena's answer to a question as to what random meant to him.

He was asked by the prosecutor, was the stop in a random manner? That was essentially the question. His response was, "I saw the car in the area and I was not answering any complaints so I decided to pull them off."

If we define random in that way we are using the word as meaning arbitrary.

QUESTION: Well, it is your position that anything, anything that was found in the car following this stop may not be used in evidence in any single case. Is that right?

MR. LUKOFF: That is correct, Mr. Chief Justice.

QUESTION: Suppose instead of the prohibited drugs they had found in the trunk of the car a human being bound and gagged who was being kidnapped? You could not prosecute the kidnapper for that offense, then, under your theory and under the theory of the Supreme Court of Delaware.

MR. LUKOFF: Mr. Chief Justice, unless there were some facts that would help --

QUESTION: Take the same facts precisely but instead

of marijuana it is a 14-year-old girl bound and gagged in the trunk of the car but still alive.

MR. LUKOFF: The ultimate result of this rule would be that that could not be used.

QUESTION: Could not be used.

QUESTION: Mr. Lukoff, if just stopping to ask him for a driver's license, how would they find the man in the trunk?

MR. LUKOFF: Well, that, Mr. Justice Stevens, is the entire point. The state is asking here for the mere opportunity to seize the vehicle for a moment, as they state, for checking license and registration.

QUESTION: Let me add a factor. The victim, hearing some conversation, makes enough noise in the back of the trunk so that the suspicions of the police are excited and aroused.

MR. LUKOFF: There is obviously no question that they could assist the victim. That is of first and utmost importance.

QUESTION: Just save the victim but not prosecute the kidnapper.

MR. LUKOFF: I think the ultimate result, Mr. Chief Justice, is that is in fact the case. Because that evidence -- because the seizure would be invalid.

QUESTION: Let me extend that beyond. Instead of

a live victim who could tap on the trunk of the car and get some attention, the policeman having found some illegal, some contraband material, marijuana, heroin, guns, a bagful of currency in large amounts, then decides to search the entire car and he finds a dead body in the back.

On your theory he cannot be prosecuted for possession of a dead body if that is a crime in Delaware or for the murder if he is --

MR. LUKOFF: Mr. Chief Justice, if I may, the example in the kidnapping case, if I may go to that for a moment, of course the victim could testify and there would be evidence from that victim, the possession of the person or persons --

QUESTION: That is why I moved to somebody who cannot testify.

MR. LUKOFF: Who cannot testify. That was my understanding of your change.

QUESTION: Mr. Lukoff, do you understand the State of Delaware to be seeking to justify the practice on the basis that there is some probability or at least a possibility that by stopping cars they may find some dead bodies and guns and so forth and so on? Is that the justification for this practice?

MR. LUKOFF: Mr. Justice Stevens, that is not their justification, as I see it.

QUESTION: I suppose if it were you could stop people in high crime areas and say, do you have a gun? and frisk

them. There are a lot of ways you can find evidence of crime if you do not have any limitation on the amount of stopping and searching you do.

MR. LUKOFF: That is, in fact, the case. The state is not asking, as I understand it, to have the authority to go beyond just the initial seizure. They are not attempting to search the vehicle or stop the vehicle in any manner looking for other evidence.

QUESTION: Suppose we return to my question now, to complete your answer about the body in the back of the car.

MR. LUKOFF: Mr. Chief Justice, the difficulty, of course, is that that is not the direct state interest. I think it would follow as the most horrible situation, perhaps, that assuming that, in fact, the body is in the back of the car, that if the seizure is invalid, the seizure is unconstitutional, that it would therefore follow that evidence would be excluded.

But that is not what the state is looking for nor asserting as an interest here. Their interest, they claim, is one of traffic safety, that the documents that are possessed by the individual in some way are going to assist them in that traffic safety.

QUESTION: Before you move on --

MR. LUKOFF: Yes, Mr. Justice Powell.

QUESTION: -- may I ask you a question? Does Delaware have game wardens?

MR. LUKOFF: It is my understanding, Mr. Justice Powell, that they have Fish and Game, they have an environmental protection officer or game warden, similar, I believe they are.

QUESTION: Are you a hunter?

MR. LUKOFF: I am not, Mr. Justice Powell.

QUESTION: Well, perhaps you are not familiar with the practice of game wardens of making random stops to see whether the hunters have licenses and also to see whether or not they have game in their bags that is unauthorized to be killed at that time or perhaps duck hunters have killed more than the limit. Are you familiar with that?

MR. LUKOFF: I am not familiar with that procedure although here, if that is the case --

QUESTION: I can tell you personally that is the case.

MR. LUKOFF: I would --

QUESTION: That is also true with federal game wardens. They sometimes use helicopters.

MR. LUKOFF: It would be Respondent's position, Mr. Justice Powell, that there is a substantial interest, if nothing else, the protection of game which this kind of seizure of the person who is licensed with a specific hunting license to carry a weapon, be it an antique weapon or a modern gun.

QUESTION: You are not suggesting protecting game

is more important than protecting the public from unlicensed drivers, are you?

MR. LUKOFF: From unlicensed drivers? If it is merely a question of unlicensed drivers I think that there perhaps is a greater protection or at least the same protection but from unsafe drivers that is a different question. Unsafe drivers, we would submit, are a greater --

QUESTION: Let me ask you, are there more drivers than there are hunters?

MR. LUKOFF: That is also true, Mr. Justice Marshall.

QUESTION: I would expect that when you are driving you are not a hunter.

QUESTION: You would not think that the conservation of game is more important than the control of marijuana and heroin and whatnot, would you?

MR. LUKOFF: They are at least equally important, Mr. Chief Justice. Another important factor that I believe was brought out by Mr. Justice Powell was that there are no regulations.

If this is such an important interest to the state, why does not the state through legislation and through the Attorney General's opinions or through police officers, superior police officer guidelines, set up regulations for these types of stops?

QUESTION: I thought you conceded that it was an important interest.

MR. LUKOFF: Mr. Justice Rehnquist, we did not concede that -- we concede that traffic safety is an important interest and that is the asserted interest that the state has presented here.

QUESTION: Well, the State of Delaware has determined, apparently, that the way it will further that interest is by the policy of random stops that apparently everyone has agreed upon in discussing this. You describe it as arbitrary. The state describes it as random. When a police officer is not called out on any other thing more major, he simply will stop a car at random without any reason to believe that the person does not have a license and without any articulable grounds for suspicion.

MR. LUKOFF: That is what the state is attempting to get.

QUESTION: That is their policy. Do you --

MR. LUKOFF: I would disagree with you, sir.

QUESTION: That is what Officer Avena did, at any rate.

QUESTION: Mr. Lukoff, do you agree that that is the state policy or the policy of one police officer?

MR. LUKOFF: That is not, as I understand it, the state policy, Mr. Justice Marshall.

Mr. Justice Rehnquist, I would refer specifically to questioning of Officer Avena in the suppression hearing in which he was asked whether there are departmental regulations and he answered in the negative, none that he knew of. And whether there was an Attorney General guideline and he also answered in the negative and I have reviewed the statutes and there is nothing in the statutes which permit this.

QUESTION: Well, then, let us say it was the policy of this particular officer to do that. No one disagrees about that, do they?

MR. LUKOFF: Well, the disagreement is that he says he does it sometimes. I do not know if it is a full-blown policy but the problem there is, of course, that that leads to the individual officer's whim. It is arbitrary. He can choose whomever he pleases, for whatever reason.

QUESTION: Well, unless the Constitution forbids him from doing it, he is entitled to it, I take it.

MR. LUKOFF: Our position is that the Constitution, in fact, forbids him from doing it, the Fourth Amendment specifically.

QUESTION: You would say the same thing if there was a written policy for every officer to make ten stops a day.

MR. LUKOFF: That is true, Mr. Justice White.

QUESTION: And the random problem has no relevance here. It really does not.

MR. LUKOFF: Mr. Chief Justice, the difficulty with randomness is how you test whether it is truly random. If there is some form of electronic device which picks every tenth car in a truly random manner, that may be random.

QUESTION: Well, can you not assume that a policeman can count up to ten?

MR. LUKOFF: We can assume that but we cannot assume that he --

QUESTION: He does not need an electronic device to stop every tenth car, does he?

MR. LUKOFF: He does not need that, Mr. Chief Justice, but the difficulty is that how do we check as to whether or not he in fact is doing that? Again, it is arbitrary, if all he says is, "I stopped the tenth car." We do not know it was not the eleventh or the ninth.

QUESTION: Your response to Mr. Justice White indicates that it would not make any difference for your case in the position you are taking whether the state legislature had authorized the Attorney General to promulgate rules, guidelines and he promulgated them and said the officers may do thus and so, you would still make the same points.

MR. LUKOFF: Mr. Chief Justice, that presents a slightly different problem. There are different legal issues that may be involved if the legislature has spoken, being the duly-elected officials of the people. The question there is,

again, there would have to be some way to test the guidelines, we submit.

QUESTION: I think that your response to the Chief Justice certainly differs from -- shows that you differ, at least, from my understanding of constitutional law that I would think that the action taken by the state here and represented by a state attorney represents the policy of the state, albeit you cannot argue that it is a uniformly-applied policy and that for the legislature to place its imprimata on the policy does not make it any different from a constitutional point of view.

MR. LUKOFF: Well, Mr. Justice Rehnquist, the state has not taken it upon itself to give us any guidance. There is nothing in the record that can be shown or that I know of personally about the State of Delaware in which they have said, "This procedure is going to be followed."

It is true, the state has appealed this case, has brought writ of cert to this point but that does not give us the sanction that the defense would submit is necessary.

QUESTION: Does the Supreme Court of Delaware have any authority to speak for the State of Delaware?

MR. LUKOFF: Yes, it does, Mr. Justice Marshall.

QUESTION: Well, it said, "We rule that before the government may single out an automobile to stop it, there must exist specific facts justifying the intrusion. Conversely, a random stop in the absence of specific justifying facts is

unreasonable and unconstitutional."

That is the Supreme Court of the State of Delaware.

MR. LUKOFF: That is correct, Mr. Justice Marshall.

I have spoken to that issue.

QUESTION: Does that have as much authority as the designee of the Attorney General's office?

MR. LUKOFF: Being one of the --

QUESTION: Or the policemen?

MR. LUKOFF: Clearly as much authority if not greater.

QUESTION: I do not understand that.

QUESTION: Would you say that the Supreme Court of Delaware was -- felt itself constrained by the Federal Constitution or that it was simply ruling as a matter of state policy?

MR. LUKOFF: Mr. Justice Rehnquist, that was brought out in our brief in our third point, the question of whether there were adequate state grounds. We brought that out because we felt the Court should be aware of that.

QUESTION: There is not a federal case on that page, not one. There is a Pennsylvania case, a New York case, a Nebraska case, a South Carolina case but not one federal case.

MR. LUKOFF: The court, the Supreme Court of Delaware did not refer to Brignoni, did not refer to Martinez to support its opinion. There is --

QUESTION: Well, what is the significance of the sentence, "The Delaware Constitution, Article I, Section VI, is substantially similar to the Fourth Amendment and a violation of the latter is necessarily a violation of the former."

MR. LUKOFF: Mr. Justice Brennan, the significance is that there is an ambiguity in the Delaware opinion as to whether they are relying solely upon the federal question or, in fact, they are also relying upon independent state grounds.

QUESTION: Well, are you suggesting that that is the decision -- that this decision rests both on the Delaware Constitution and the Fourth Amendment?

MR. LUKOFF: It appears to rely upon both but, again, it is ambiguous.

QUESTION: And if it does rely on both?

MR. LUKOFF: If it does rely upon adequate and independent state grounds, then this Court --

QUESTION: If it does rely on both, then it does rely on adequate and independent state grounds. Is that it?

MR. LUKOFF: That is the difficulty with the ambiguity. If it in fact relies upon those grounds, then this Court, I would submit, would not have the jurisdiction, because it could be possibly merely an advisory opinion that this Court could render.

QUESTION: It is clearly a constitutional argument.

QUESTION: Mr. Lukoff, on the question that was

raised before, your opponent suggests that the ultimate test under the Fourth Amendment is one of reasonableness and in your view is there any difference in the strength of the presumption of reasonableness of state action depending on whether the policy determination has been made by the state legislature on the one hand or by an isolated police officer on the other?

MR. LUKOFF: There may be the presumption of legitimacy or a stronger case when the legislature has spoken because the legislature, we assume, speaks for the people and perhaps the people have accepted this kind of intrusion but we do not know that in this case because Delaware has not spoken to this specific issue.

However, it has spoken through statute to the , specifically to the question of nonannual inspections of vehicles in which we recited in our brief and in Title 21, Section 2144 in which Delaware said in essence that a police officer may upon reasonable cause, stop a vehicle for an inspection, well, that -- the legislature has spoken in that area, spoken about nonannual inspections and that appears to be important to us because they have already made a decision specifically in that area and the words "reasonable cause" can readily be interpreted as articulable facts.

QUESTION: Well, why did not the Supreme Court of Delaware go off on that ground?

MR. LUKOFF: The question of safety, although

raised, did not come up quite as clearly, perhaps as in this case.

QUESTION: The statute you are referring to is a safety inspection, not a driver's license or motor vehicle registration statute?

MR. LUKOFF: It is a safety inspection but then the registration statute is also a safety inspection, Mr. Justice Rehnquist. It is a safety inspection.

QUESTION: But at any rate the Supreme Court of Delaware did not rely on that statute --

MR. LUKOFF: It did not.

QUESTION: -- in saying the officer exceeded his authority under the statute.

MR. LUKOFF: They did not rely on that statute in reaching their opinion.

QUESTION: Did you file a response to the petition for certiorari?

MR. LUKOFF: Yes, we did, Mr. Justice Stewart.

QUESTION: I just did not seem to have it here among my papers. In that response did -- oh, I see it, it is mimeographed.

MR. LUKOFF: That is correct, Mr. Justice Stewart.

QUESTION: In your brief in opposition did you point out the possibility that this opinion of the Delaware Supreme Court may rest on, as I put it, an independent state

ground?

MR. LUKOFF: Yes, we did.

QUESTION: You did.

QUESTION: I think that the problem is the last paragraph --

MR. LUKOFF: I am sorry, Mr. Justice Marshall?

QUESTION: The last paragraph of the Supreme Court of Delaware's opinion said specifically the Fourteenth Amendment of the United States Constitution.

MR. LUKOFF: They did not speak of the state constitution in the last paragraph. That is true.

QUESTION: But they did mention in the Federal Constitution --

MR. LUKOFF: They clearly mentioned the Federal Constitution.

QUESTION: And some people think the last paragraph of an opinion is the opinion.

MR. LUKOFF: They also, Mr. Justice Marshall, in the first paragraph, spoke about both a violation of the federal and state constitutional guarantees, in the first paragraph of the opinion.

QUESTION: We hold therefore, which --

MR. LUKOFF: I agree.

QUESTION: Okay. And what about it?

QUESTION: What about the Court's posing of the

issue as being whether or not this stop violated the Fourth and Fourteenth Amendments?

That is the specific issue.

MR. LUKOFF: Again, not referring to the state Constitution --

QUESTION: On page 5 of the -- and I suppose you would agree if the reason it violated the state constitution was that it violated the Fourth Amendment.

MR. LUKOFF: The Delaware Supreme Court interpreted the state constitution as being essentially the same as the -- the state constitution provision as being essentially the same as the --

QUESTION: Well, why do you think they posed the legal issue as being whether the Fourth and Fourteenth Amendments were being violated?

MR. LUKOFF: I believe that may have been how the question was asked and was referred to on briefs by both sides and the issue was issued on a Federal Constitutional grounds below even though the state constitution obviously has provisions which are comparable to the Federal Constitution.

Beyond the nature of the intrusion we are talking about here I think it is important that the Court look at the nature of the intrusion. Here is a nighttime stop, 7:20 in the evening, November. The lights are used. There is clearly the anxiety, the concern, the fear, the similar kinds of anxiety

and subjective intrusion that this Court considered so important in Brignoni.

QUESTION: Are you suggesting that if it had been high noon on a sunny day --

MR. LUKOFF: He would not have --

QUESTION: -- it would be different?

MR. LUKOFF: Mr. Chief Justice, it would not be different in the constitutional aspects.

QUESTION: Well, is that not all that we are talking about here, the constitutional aspect?

MR. LUKOFF: The nature of the -- the reason I brought in the fact that it was nighttime is because it shows that this type of arbitrary seizure can be accomplished at any time of the day or night.

QUESTION: Yes, well, one explanation and it would seem to be an obvious one, is that at 12:00 midnight a policeman probably has more time to make random stops than he does at high noon and therefore might do it more often.

MR. LUKOFF: Mr. Chief Justice, I --

QUESTION: Does it make any difference to your constitutional argument?

MR. LUKOFF: It does not. It goes to the subjective nature of the intrusion to some extent. It is a factor. The individuals, the sudden appearance of the vehicle, the police vehicle with the lights and the siren, et cetera, this

is the nature of the subjective intrusion, how it is affecting the individual who is being seized and the day or night is a factor but not a constitutional factor and that is it. It goes to the nature of the intrusion itself.

QUESTION: Your whole argument is like the states, it is a little bit of an amalgam of everything, is it not? I mean, you would not want to subtract the nighttime element from your case any more than the state would want to subtract some of the elements from its case. That is what the Fourth Amendment is all about, reasonableness.

MR. LUKOFF: Well, whether or not it was day or night in the balance, in the reasonableness balance would not, we submit, make a difference.

QUESTION: So you say, then, that the nighttime aspect thing simply does not make any difference.

MR. LUKOFF: It is one additional factor. It does not, in the ultimate testing it is a factor and only that this stop was nighttime. It is a fact that was there.

Now, the Court, I do not believe could fashion a rule that said it is okay in the daytime but not at nighttime. We are not asking that. We are suggesting --

QUESTION: What if Officer Avena had testified that he made stops only between sunrise and sunset because he realized it was kind of a hairy experience for somebody to have a whirling red light pull up behind him at night? Would you

think your case was any weaker?

MR. LUKOFF: No, Mr. Justice Rehnquist.

QUESTION: What is your position as to Mr. Justice Powell's suggestion of a random checkpoint set-up?

MR. LUKOFF: Mr. Justice Blackmun, the position of the Defendant is that the random checkpoint stops which the State of Delaware specifically did not reach in the lower opinion are, as this Court has held, less intrusive in terms of the very subjective and the objective intrusiveness, I believe, that was held in Martinez and --

QUESTION: And so? What is your position? That is what I am trying to understand.

MR. LUKOFF: Our position is that --

QUESTION: I know it is less-intrusive but I do know know what your position is.

MR. LUKOFF: It is less-intrusive but it raises other issues. It is -- we believe would be one factor in deciding the nature of -- the difficulty, of course, is that the random stop -- excuse me, the roadblock point does eliminate some of the intrusiveness. Whether it is still constitutionally permissible makes a more difficult question, to say the least, because of the less-intrusive nature.

In the balancing test it may sway the scales towards the validity of the stop. We are not in a position to say that it, in fact, does do that.

QUESTION: Is not there a factor on the other side, though, there as to the reasonableness element in that if you try to conduct a roadblock on the Delaware Turnpike at a busy time, you are not just going to intrude the same amount on the people you actually stop. You are going to slow down and stop a whole bunch of people and inconvenience them in a way that you do not if you follow the policy followed here.

MR. LUKOFF: That may be true based -- but again, the requirement, I think, if you use the roadblock type -- assuming the roadblock is a valid constitutional mechanism, if you use it, it would appear important, to say the least, that the state set up guidelines as to when it can be used and what time so to lessen that kind of inconvenience that would perhaps come out of an I-95, the Delaware Turnpike rush hour problem.

I think that that kind of problem can be circumvented by setting up your roadblocks, if you are going to use them and if that is a permissible --

QUESTION: So then if someone driving I-95 Delaware Turnpike during rush hour would feel confident he, at least, would never be asked for his driver's license or his motor vehicle registration because the state would not set up a road block at that time.

MR. LUKOFF: No, I am not suggesting they cannot, Mr. Justice Rehnquist but I believe the factors of the time

element is important in the decision as to whether a roadblock would be effective and there may be a greater interest in the lack of the inconvenience to the generally lawfully motoring public than there would be gain in a safety manner from stopping every vehicle.

QUESTION: Mr. Lukoff, I have a rather serious question to ask. The record, as I understand it, shows that Mr. Prouse was not the driver of the car, that there were three passengers in the car and that the officer's testimony suggests that he was not the driver.

I do not think under Raicus against Illinois he has standing to raise the Federal Constitutional issue. So is it not necessary to dismiss the writ as improvidently granted?

MR. LUKOFF: Mr. Justice Stevens, the record is ambiguous. There is some question ---

QUESTION: Did not the officer testify, "I don't believe he was the driver"? He indicates here on arrest. This is page A-12.

MR. LUKOFF: He talked about, the officer did testify in that regard but he was not clear totally and a part of the difficulty of course is that it is clear from the record that Mr. Prouse was the registered owner of the vehicle, that he had a proprietary interest in the vehicle because of his ownership.

Now, I do not believe Raicus would apply in the

standing aspect here because, if I recall Raicus, that type of, they did not reach the decision as to whether the registered owner -- or if they did, they spoke the registered owner had the proprietary interest.

Raicus, as I understand it, spoke about the passengers who had no proprietary interest.

QUESTION: The record shows he was the owner of the vehicle?

MR. LUKOFF: Yes, Mr. Justice Stevens. I am looking at the state's Appendix referring to a-10 and the answer is, "I know the car was registered to him but I don't know who was driving." So that develops both the ownership of his but also the ambiguity as to who was driving as to that answer.

QUESTION: Thank you.

MR. LUKOFF: Obviously, this whole case has a lot to do with police officers' discretion and this Court has, throughout its history, spoken about the concept of unfettered discretion in police officers and their ability to take action without guidelines or controls.

It is our position that the state interest asserted of safety is not, in fact, enhanced by these stops. It is further our position that a rule permitting these kind of stops would allow uncontrolled, unfettered discretion of the police officers to stop whomever they pleased.

According to the Delaware Safety Council, 148,900,000 vehicles are on the roads today.

The rule the state would have you determine is the ability of a police officer to stop any one of those vehicles at any time of the day or night without any cause on the pretext of checking licenses and registration.

That power is great. As is true in many instances, that power should not be abused. Absolute discretion, like absolute power, corrupts absolutely.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Lukoff.

Do you have anything further, Counsel?

REBUTTAL ARGUMENT OF CHARLES M. OBERLY, III, ESQ.

MR. OBERLY: The only comment the state would like to make is, again, the Respondents relied on Brignoni heavily and I submit that this Court in Brignoni noted that it gave border patrol officers the right to stop cars for questioning before the enforcement of the immigration laws and it used a test, basically articulable suspicion test and the reason, I submit, or the state submits, the Court utilized that test was in that opinion it specifically states that there are objective criteria in which you can determine that articulable suspicion such as somebody might use a car of a certain length.

There might be Mexican that would have a haircut that you could tell and there may be people ducking down in the

seat. There may be information that the border patrol agents have received that would give the articulable suspicion to stop and the difference between those cases and this case is there is absolutely no indicia or criteria that a police officer can look at and say, "That person does not have insurance."

"That person does not have a license." And lacking that, if the states' motor vehicle laws are to be enforced, they have to be given that right. Unless there is a showing of abuse which can be dealt with, unless there is a showing of a pretext -- and there was none here -- then it is not proper for the Court to extend the exclusionary rule just on a hypothetical situation that does not exist.

QUESTION: Mr. Oberly, would you comment on the suggestion that this decision may rest on the Delaware Constitution as well as the Federal Constitution?

MR. OBERLY: As I read the Delaware Supreme Court Opinion it simply says, our Article I Section VI is like the federal. We will interpret the Federal Constitution.

If the Federal Constitution would require certain tests we would go along with that and it is very clear --

QUESTION: Well, I know but it did not. I do not read it as saying, or do you, that we are compelled by the interpretations of the Fourth Amendment similarly to interpret the Delaware Constitution?

MR. OBERLY: I do not know whether they read it as

they were compelled to but it is my clear reading of that opinion that they did not consider the state constitution separately and independently. They took this solely on the Fourth Amendment as applied to the states through the Fourteenth Amendment.

QUESTION: I wonder if it is the kind of case -- we have had several of them -- where we have remanded to the State Supreme Court to tell us whether they did or did not rest on the State Constitution.

Do you suppose that might be appropriate here?

MR. OBERLY: I do not believe it would necessarily be appropriate. I think the Supreme Court has very clearly indicated that they interpret this as Fourth Amendment case but I imagine that is a possibility.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.
The case is submitted.

[Whereupon, at 11:00 o'clock a.m. the case was submitted.]

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