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SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 84-1181  
**TITLE** NEW YORK, Petitioner V. BENIGNO CLASS  
**PLACE** Washington, D. C.  
**DATE** November 4, 1985  
**PAGES** 1 thru 60



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IN THE SUPREME COURT OF THE UNITED STATES

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NEW YORK, :  
Petitioner, :  
V. : No. 84-1181  
BENIGNO CLASS :  
-----x

Washington, D.C.  
Monday, November 4, 1985

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 11:47 o'clock a.m.

APPEARANCES:

STEVEN R. KARTAGENER, ESQ., Assistant District Attorney  
of Bronx County, New York, New York; on behalf  
of the petitioner.  
MARK C. COGAN, ESQ. New York, New York (Pro Hac Vice).

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C O N T E N T S

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1 question of search/non-search, unlike some other cases  
2 that have come before the Court recently in which that  
3 determination was the final outcome determinative here,  
4 regardless of how the Court determines the preliminary  
5 question, we suggest that the ultimate conclusion of the  
6 Court should be the same -- that there was no Fourth  
7 Amendment violation here -- because we do believe that  
8 even if this was a search here, the police officer's  
9 actions in this case of opening up a car door and  
10 reaching within with his hand to move aside a paper that  
11 covered the vehicle identification number was so  
12 manifestly reasonable, so minimally intrusive under the  
13 circumstances, that the proper balance between the  
14 individual's rights and the compelling interest of  
15 society was struck and that no Fourth Amendment sin  
16 occurred in this case.

17 QUESTION: Counsel, did the decision of the  
18 court below rest at all upon the New York Constitution?

19 MR. KARTAGENER: Your Honor, the decision of  
20 the court below cited the New York State Constitution  
21 once in the first sentence of the opinion, finding that  
22 the actions of the police officer violated the Fourth  
23 Amendment and the New York State Constitution, which by  
24 the way is worded in precisely the same fashion as the  
25 Fourth Amendment.

1           Only once does it mention the New York State  
2 Constitution, but we think it's rather clear under this  
3 Court's determination in Michigan v. Long, the Court  
4 does have jurisdiction to hear this case because after  
5 mentioning the New York State Constitution, it left it  
6 behind and went on to analyze the case in terms of the  
7 Fourth Amendment which was cited a number of times  
8 within the opinion, and because of the reliance that was  
9 placed on a number of the constitutional cases emanating  
10 from this Court, cases such as United States v.  
11 Chadwick, United States v. Chase, and a number of other  
12 cases, and we think that here they only cited the New  
13 York State Constitution once in Michigan v. Long -- it  
14 was twice, and in California v. Carney as well there was  
15 a citing to the State's Constitution.

16           But, we think it clear here that there was not  
17 the required plain statement that the decision in this  
18 case rested on an adequate and truly independent State  
19 ground.

20           QUESTION: Mr. Kartagener.

21           MR. KARTAGENER: Yes, Your Honor.

22           QUESTION: May I inquire whether under New  
23 York law, New York would have required exclusion of the  
24 evidence in question?

25           MR. KARTAGENER: Well, the New York Court of

1 Appeals said that under the Fourth Amendment, and this  
2 is the first case that has gone to the --

3 QUESTION: I am asking you, as a matter of New  
4 York law, because presumably you practice law there and  
5 are familiar with it.

6 MR. KARTAGENER: I would suggest, Your Honor,  
7 that New York law would not require the exclusion of  
8 evidence, that this is a case of first impression there.

9 The Court saw no need, as it has in so many  
10 other cases, as I might point out, Justice O'Connor,  
11 that Court, the New York Court of Appeals, is not shy  
12 about making its opinion known when it feels that New  
13 York law alone might require the exclusion of evidence  
14 although the Fourth Amendment does not.

15 I would suggest that since this case came down  
16 after Michigan v. Long, the New York Court of Appeals  
17 was on ample notice as to how to make that plain  
18 statement and chose not to do so. It said it violates  
19 the Fourth Amendment and the New York State  
20 Constitution, and basically left --

21 QUESTION: Would it have -- what about the  
22 statutory question? They also said, as I read the last  
23 paragraph, that Section 4 of the Vehicle and Traffic Law  
24 did not authorize the officer to do what he did.

25 MR. KARTAGENER: Well, that is done, Your

1 Honor, because that was refuting an argument that we  
2 made in our brief. They did not say that that statute,  
3 Vehicle and Traffic Law Section 401, prohibited the  
4 search.

5 They merely said that the search violated the  
6 Fourth Amendment and 401 which has nothing to do with  
7 vehicle identification numbers themselves, did not give  
8 the police the authority that we suggest that it might  
9 have, and we think that it is one thing to say that a  
10 statute doesn't give you the right to do it, and  
11 entirely another thing to say the Fourth Amendment  
12 proscribes it.

13 The Court did not say that VTL Section 401  
14 prescribed the search, Justice Stevens.

15 QUESTION: Would you go back -- you skipped  
16 over -- the wording is exactly the same?

17 MR. KARTAGENER: Yes. The New York's  
18 Constitution --

19 QUESTION: So, when they're talking about the  
20 Fourth Amendment, could they possibly be talking about  
21 the New York --

22 MR. KARTAGENER: Well, I think that because it  
23 is precisely the same wording, it's logical that they  
24 might frequently cite the New York counterpart to the  
25 search and seizure provisions of the federal



1 Constitution, but I think it's clear that the decision  
2 rested largely on federal grounds.

3 At the least, they were integrally  
4 interwoven. If I might suggest to the Court --

5 QUESTION: May I just pursue the statutory  
6 question one more moment. You said it didn't authorize  
7 them to do it?

8 MR. KARTAGENER: Yes.

9 QUESTION: But what good would it have done to  
10 say it authorized it if they had already held that it  
11 was constitutionally impermissible for the officer to do  
12 that? The statute couldn't authorize a violation of the  
13 Constitution.

14 MR. KARTAGENER: No. What we were suggesting,  
15 Your Honor, was that under New York law, because there  
16 is an obligation to surrender one's certificate of  
17 registration, and that's what VTL 401 is all about, that  
18 the giving over of the certificate of registration is  
19 meaningless if you can't compare the registration  
20 against the vehicle identification number.

21 We tried to draw an analog. Because the  
22 driver was required to hand over the certificate of  
23 registration, there had to be an absolute right under  
24 the statute to check the vehicle identification number  
25 out.

1           But what I think is critical once again is  
2 that that was an argument that we made as a  
3 justification for saying it fit in with the general  
4 scheme. The Court rejected that argument. But what  
5 they did say was, assuming that statute doesn't exist,  
6 what you really have here is a violation of the Fourth  
7 Amendment.

8           And, as I read this Court's decision in  
9 Michigan v. Long, I'd like to suggest that it's  
10 precisely the type of discussion that we're having right  
11 now, about whether New York law might require or  
12 wouldn't require, which has been eschewed by the Court's  
13 determination in Michigan v. Long that we shouldn't be  
14 getting into that type of a debate.

15           If the face of the opinion does not contain a  
16 plain statement from the State Court saying, we are  
17 deciding this essentially on an adequate and independent  
18 state ground -- perhaps here the New York State  
19 Constitution or statute, it's not going to do that, that  
20 opinion, and instead cites the Fourth Amendment  
21 repeatedly, and cases from this Court repeatedly.

22           We think it's rather clear that the Court,  
23 consistent with Michigan v. Long, has the jurisdiction  
24 to consider and to decide this case. This would not be  
25 an extension of that principle. If anything, it's a

1 diminution of sorts because in Michigan v. Long, as I  
2 pointed out, it had two citations to the State  
3 Constitution. Here we've got only one.

4 I've suggested to the Court that there are two  
5 bases, or two sides of the line here, search or  
6 non-search, and we suggest that we should prevail under  
7 either. But, we do believe that as a matter of  
8 constitutional law and as a matter of common sense, the  
9 scunder conclusion is that no search did occur here.

10 Why do I say that? Because we know that the  
11 term "search" has a very special meaning in the  
12 decisions of this Court. There is no search unless the  
13 Government intrudes upon a reasonable, justifiable or  
14 legitimate, if you will, expectation of privacy that the  
15 individual has, and we suggest to you that clearly,  
16 under the circumstances of this case, the Respondent  
17 could have had no reasonable expectation of privacy.

18 Why? To begin with, we're dealing with an  
19 automobile, not the individual's person, not his home,  
20 not his office, an automobile which this Court has  
21 recognized involves a reduced expectation of privacy in  
22 the first instance.

23 And why is there that reduced expectation of  
24 privacy? Some of the early decisions of this Court  
25 noted the relatively open configuration of the Court --

1 of the car, excuse me. But in California v. Carney the  
2 Court says, but there's another very special thing.  
3 Cars are pervasively regulated.

4 Well, here you have pervasive government  
5 regulation of a car. You have a car being stopped  
6 because of traffic infractions. Everybody knows you  
7 have to hand over your registration, your license, and  
8 today frequently the insurance card, and yet -- and  
9 presumably to give meaning to that governmental  
10 regulation.

11 Yet, what happens if you can't look at the  
12 VIN? It means that the whole concept of regulating  
13 automobiles becomes nugatory. Why? Because the VIN,  
14 the Vehicle Identification Number, is the heart of, the  
15 sine qua non of that entire pervasive regulatory scheme.  
16 Why? Because my registration and anyone else's usually  
17 has the car's Vehicle Identification Number.

18 QUESTION: In this case did he make any use of  
19 the VIN, the officer?

20 MR. KARTAGENER: Well, the officer tried to  
21 look at it, Justice Stevens. He wanted to check it  
22 out. It is, we suggest, a very routine procedure for  
23 police officers to do that.

24 QUESTION: What did he do in this case? Did  
25 he actually write it down or phone it in or anything

1 like that?

2 MR. KARTAGENER: Well, what happened, Justice  
3 Stevens, was that as the car was stopped and pulled over  
4 for the two traffic infractions, the driver got out of  
5 the car and proceeded back to the police car to speak to  
6 one of the officers who was standing there, Officer  
7 Meyer.

8 QUESTION: Is that customary in New York,  
9 incidentally? Isn't it good police practice to keep the  
10 supposed offender in the automobile?

11 MR. KARTAGENER: Well, Justice Blackmun, I'll  
12 be quite frank about that. The best police practice, I  
13 do believe, and I've read some of the police training  
14 manuals, is to keep the individual in the car on some  
15 occasions, depending on the circumstances.

16 However, in Pennsylvania v. Mimms, it was  
17 condoned to bring an individual out of the car if there  
18 is a concern for the police officer's safety. There  
19 doesn't have to be a reasonable suspicion or anything.  
20 Sometimes he'll bring the individual out of the car.

21 Generally speaking, I do believe, police  
22 officers maintain greater control by keeping the  
23 individuals in the car. But what happened here, it's  
24 not the police officer who got the individual out of the  
25 car. What happened was, answering Justice Stevens'

1 question, is that the car was pulled over. Before the  
2 police officers even got up to the individual's car, the  
3 Respondent here, the defendant down below, gets out of  
4 his car and walks back to the police officers' car.

5 As he was speaking to Officer Meyer, his  
6 partner, his regular partner, Officer McNamee, walked up  
7 to the Respondent's car to try to look at the vehicle,  
8 inspect the Vehicle Identification Number.

9 What happened then? He assumed because it was  
10 an older car, and the earlier case before this Court  
11 that he dealt with a very expensive car, this was not  
12 such an expensive car. It was a '72 Dodge Duster. It  
13 was an older car. The officer assumed the VIN might be  
14 on the door jamb as the older cars had, so he opened up  
15 the car door to look on the door jamb, did not see the  
16 VIN number there.

17 He then knew that it would have to be in one  
18 location, on the dashboard in a position that should be  
19 viewable through the windshield, because mandatory  
20 federal regulation now says that ever since 1969 the VIN  
21 belongs there so everybody, including police officers,  
22 can look at it.

23 And, what does he find? A little bit of  
24 paper, a mischievous scrap of paper, is covering the VIN  
25 number. So, although my adversary here --

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CHIEF JUSTICE BURGER: We will resume there at  
1:00 o'clock, ccounsel.

MR. KARTAGENER: Yes, Your Honor. Thank you.

[Whereupon, at 12:00 p.m., the above entitled  
matter was recessed, to reconvene at 1:00 p.m. this same  
day.]

1 AFTERNOON SESSION

2 [1:00 p.m.]

3 CHIEF JUSTICE BURGER: You may resume  
4 argument, counsel.

5 MR. KARTAGENER: Thank you, Mr. Chief Justice.

6 ORAL ARGUMENT BY STEVEN R. KARTAGENER, ESQ.

7 ON BEHALF OF PETITIONER -- Resumed

8 MR. KARTAGENER: I hate to leave a question  
9 unanswered, and so if I may answer the question that was  
10 asked of me by Justice Stevens at the end of the  
11 morning's argument, the question was did the police  
12 officer do anything with the Vehicle Identification  
13 Number, if I remember the answer correctly.

14 And the answer, Justice Stevens, is that he  
15 never really had the opportunity to do anything with it  
16 because as he was reaching into the car to move the  
17 scrap of paper off of the VIN number he looks down, and  
18 what does he notice? Lo and behold, sticking out from  
19 underneath the seat -- he did not look under the seat,  
20 bukt sticking out by about an inch is the handle of a  
21 pistol.

22 He recovered the pistol and then the Vehicle  
23 Identification Number became at least somewhat de  
24 minimis because what they were confronted with then was  
25 the felony of an unlawful weapons possession.



1           But I would point out also, the defendant, the  
2 Respondent here, did receive two traffic infractions  
3 summonses in addition to being arrested for the felony  
4 and to some extent the VIN number became at least  
5 somewhat -- or less important because they also  
6 discovered during the course of their inquiry and  
7 discussions with the defendant that he was an unlicensed  
8 driver as well.

9           So, the likelihood is, this was not going to  
10 be the type of case where they would check a VIN number  
11 and let the defendant perhaps drive on his way. This  
12 was a situation where he was not going to be allowed to  
13 get back into that car and drive it.

14           QUESTION: I would suppose your reasons for  
15 wanting to know the VIN number to determine whether  
16 maybe it was a stolen vehicle or something might have  
17 been increased rather than decreased when you suspected  
18 him of other wrongful conduct?

19           MR. KARTAGENER: Well, we do not suggest that  
20 he was suspected of any wrongful conduct in the form of  
21 a stealing of the car or anything like that.

22           QUESTION: But then, why do you look at the  
23 VIN number?

24           MR. KARTAGENER: You check the VIN number for  
25 a number of reasons. The only way you can tell for sure

1 that a car is the car described in a registration  
2 certificate or in an insurance card is by comparing that  
3 number with the VIN number.

4 If you don't make that comparison those pieces  
5 of paper don't mean that much, quite frankly.

6 QUESTION: Do you suppose that when they got  
7 him down to the police station on the possession of the  
8 gun charge, that somebody would check out to see whether  
9 he was driving a stolen car at that time?

10 MR. KARTAGENER: Well, certainly we would  
11 suggest that under the circumstances, if he is going to  
12 be arrested for the weapon, the police have an absolute  
13 right to check the VIN number and if it turns out to be  
14 stolen that would be an added charge that he was going  
15 to face.

16 QUESTION: Do you think there might be some  
17 connection between this man's cooperative conduct in  
18 getting out of his car and going to the policeman, and  
19 the fact that he knew he had a pistol under the seat?

20 MR. KARTAGENER: Well, I certainly think that  
21 is a reasonable inference to draw from the  
22 circumstances, Your Honor. And indeed, the lower state  
23 courts found that there was some reasonable suspicion  
24 tied to his getting out of the vehicle and walking over  
25 to the police car, but I do not come before the Court

1 today to argue vigorously that that in and of itself  
2 creates reasonable suspicion that the car is either  
3 stolen or that there is a weapon in the car. I don't  
4 argue that.

5 QUESTION: That's something for the fact  
6 finders, I suppose.

7 MR. KARTAGENER: Well, the facts found by the  
8 lowest court, the Supreme Court, Bronx County, the trial  
9 court, it was reasonable suspicion. But the New York  
10 Court of Appeals disavowed that and said that the  
11 getting out of the car in and of itself does not create  
12 that type of reasonable suspicion.

13 QUESTION: When an unarmed man walks up to two  
14 policemen, you think that's suspicious?

15 MR. KARTAGENER: No. I'm suggesting, Your  
16 Honor, that --

17 QUESTION: Do you?

18 MR. KARTAGENER: No.

19 QUESTION: I didn't think so.

20 MR. KARTAGENER: I do not. But, I was not the  
21 fact finder, and I'd say that that, standing alone, Your  
22 Honor, it can be a whole bunch of things. Sometimes a  
23 certain look by an individual might add to it, but --

24 QUESTION: It doesn't help me to decide that.

25 MR. KARTAGENER: I'm sorry, Your Honor?

1 QUESTION: It doesn't help me to decide --

2 MR. KARTAGENER: The fact that he got out and  
3 walked --

4 QUESTION: Yes.

5 MR. KARTAGENER: Well, it does in one respect,  
6 Your Honor, because I think it helps us in one important  
7 respect. This Court, in Pennsylvania v. Mimms, said  
8 that in the context of a routine traffic stop with any  
9 concern that an individual is armed, you have the right  
10 to force the individual to get out of the car. We  
11 didn't even have to move the person.

12 QUESTION: How were you worried about this man  
13 being armed, when the gun's in the car and he's out of  
14 the car?

15 MR. KARTAGENER: Well, that brings us, quite  
16 frankly, to a latter portion of our brief which I'd like  
17 to answer and that is, if we are going to be dealing  
18 with the question of concern about the individual being  
19 armed, and I would suggest that doesn't go to the  
20 question of whether it's a search or whether it's a  
21 reasonable search, but if we address our last argument  
22 which is that where police have a right to stop a car  
23 initially, may they check the car, perform a visual  
24 frisk, for purposes of finding out whether there's a  
25 gun, I think that's something that the law would support.

1 I think it is reasonable even if he is out of  
2 the car, just as in a Belton situation, if an individual  
3 is handcuffed, the police still have the right to search  
4 the interior of the car if there's been a full-blown  
5 arrest.

6 We suggest that it is a much more fluid  
7 situation when someone has not been subjected at that  
8 point to the full-blown arrest and handcuffed, can  
9 theoretically get back into the car if he wishes to take  
10 a desperate effort because he knows he's got a gun  
11 there, and perhaps hurt the police.

12 And I would suggest, Your Honor, when we  
13 address -- and I don't wish you to dwell on it at great  
14 length now -- the final portion of our argument, but I  
15 would point out that our final argument in the brief in  
16 which we argue that there should be a right, where there  
17 has been a lawful traffic stop, and there exists the  
18 right to execute a full arrest, if the police officers  
19 decided whether or not to do that there should be the  
20 right to do a visual frisk of the interior of the car to  
21 protect the police officers.

22 We make that argument because I think the  
23 statistics, the real world statistics, support it and I  
24 think the Court is very sensitive to police safety, both  
25 in the Belton context and in the context we'd ask it to

1 be sensitive to, in sub-point "D" of our brief.

2 QUESTION: When they got him down to the  
3 station, the man in the car, wouldn't they make a  
4 routine inventory?

5 MR. KARTAGENER: Absolutely.

6 QUESTION: Of the contents of the car?

7 MR. KARTAGENER: If the car is in fact seized  
8 and brought down to the station, they would absolutely  
9 under New York law do a routine inventory which under  
10 South Dakota v. Opperman would be completely proper  
11 under the circumstances.

12 So, under the circumstances there would be an  
13 inevitable discovery type of situation. In fact, he's  
14 arrested for something and brought down to the police  
15 station.

16 QUESTION: Yes, but I gather for this traffic  
17 offense, but for the gun in the car they would never  
18 have taken the car to the police station?

19 MR. KARTAGENER: That's not entirely clear,  
20 Your Honor, for the following reasons.

21 QUESTION: Ordinarily, if it's -- what was the  
22 traffic offense?

23 MR. KARTAGENER: The traffic offenses  
24 initially observed, but not all of them, was speeding  
25 and driving with a shattered windshield.

1 QUESTION: Well, ordinarily don't they just  
2 give you a ticket, or have I been lucky?

3 MR. KARTAGENER: Well, I think we've all --  
4 perhaps we've all been lucky in that respect, Your  
5 Honor. But the fact remains that under New York law  
6 there could have been an arrest.

7 QUESTION: Is that what usually happens?

8 MR. KARTAGENER: I looked for statistics and I  
9 could not find any, on what usually happens. But if I  
10 might answer it and say, this case is a little  
11 different, Your Honor.

12 In this case not only was there the speeding  
13 but there was an added, very important factor which we  
14 address in sub-point "C" of our brief and that is that  
15 he was also determined to be an unlicensed driver.

16 This individual, under no circumstances in  
17 this case -- the gun had not been found, just like an  
18 intoxicated driver could not be allowed to get back into  
19 that car and drive it away. There is a very substantial  
20 possibility that he would have been arrested as well  
21 because --

22 QUESTION: Did you say he was unlicensed, or  
23 he did not have his license?

24 MR. KARTAGENER: No, I think the record is  
25 rather clear, if you look at page 836 of the Joint

1 Appendix, that he was an unlicensed driver and in fact  
2 received a summons for being an unlicensed driver, not  
3 that he wasn't carrying it on that day but that he was  
4 an unlicensed driver, and that was the testimony at the  
5 suppression hearing.

6 QUESTION: When did they know that?

7 MR. KARTAGENER: Excuse me, Your Honor?

8 QUESTION: When did they know that?

9 MR. KARTAGENER: One of the police officers  
10 learned that at the scene. He was speaking --

11 QUESTION: Didn't he just know that he didn't  
12 have his license?

13 MR. KARTAGENER: No. The police officer at  
14 the scene, I believe was told by the defendant that he  
15 was an unlicensed driver. I mean, he determined that he  
16 was unlicensed.

17 QUESTION: So, the police then would have had  
18 to get in the car anyway?

19 MR. KARTAGENER: Well, that is one of our  
20 substantial points, Your Honor, and that is that even if  
21 you were to find that putting aside the larger argument,  
22 which is the general right of police officers to enter a  
23 car in conjunction with a routine traffic stop such as  
24 this, particularly when you're dealing with an  
25 unlicensed driver, there has to be because of that



1 status as a wrongful driver on the highways an  
2 expectation that if you are lawfully stopped there will  
3 have to be some police intrusion into the interior of  
4 your vehicle to pull it over, lock it, or tow it away.

5 QUESTION: There were two police officers,  
6 weren't there?

7 MR. KARTAGENER: There were two police  
8 officers.

9 QUESTION: And one of them got in the car  
10 without knowing anything except that this fellow had  
11 been speeding?

12 MR. KARTAGENER: He -- the word was "got in  
13 the car." If I might suggest, I don't view this as a  
14 getting in the car.

15 Admittedly, there was a technical entry. He  
16 opened the door and reached into it.

17 QUESTION: I'll change my language, entered  
18 the car, when he entered the car.

19 MR. KARTAGENER: Reached into it, if I may be  
20 permitted, Your Honor. He reached into the car. It's  
21 not even a full body entry, as in some cases, and he did  
22 that before he learned that it was an unlicensed driver.

23 But his partner at the scene did know that.  
24 We suggest, and it is one of the arguments in our brief,  
25 and it's not such a novel proposition, there are

1 certainly circuit court decisions from the circuit  
2 courts of appeal that accept the concept of police team  
3 knowledge.

4 It should be the knowledge, the combined  
5 knowledge of the state, made up of both police officers  
6 at the scene, that should govern the quantum of  
7 knowledge that the police officers had to justify the  
8 action.

9 If I might get back --

10 QUESTION: Well, why do you use the computer?

11 MR. KARTAGENER: Excuse me, Your Honor?

12 QUESTION: Why do you use the computer, if  
13 every officer's got all of the information? I don't  
14 know what you are trying to tell us.

15 MR. KARTAGENER: Well, I'm suggesting --

16 QUESTION: That an officer in New York knows  
17 what all of the officers -- how many officers do you  
18 have in New York?

19 MR. KARTAGENER: I see what Your Honor is  
20 saying. I'm not suggesting that we're going to give the  
21 knowledge of one police officer to the whole police  
22 department. If I may, that's not my point. My point is  
23 to urge upon the Court an acceptance of what is called  
24 the police team knowledge.

25 That way, there are two police officers at the

1 scene of an incident. You don't give them all of the  
2 knowledge of every police officer in New York City, but  
3 the combined knowledge of those two police officers  
4 should justify whatever action the State takes, and you  
5 should not have to parse out, that's what this police  
6 officer knew, that's what the other officer knew.

7           If I might suggest, we don't have to accept  
8 that principle to say that this was a reasonable search  
9 under the circumstances. I have argued, and I think  
10 legitimately, that it is not a search at all because  
11 there was no legitimate expectation of privacy in the  
12 VIN number or the information in it, nor could the  
13 defendant or respondent create a legitimate or  
14 reasonable expectation of privacy by allowing a piece of  
15 paper to cover that VIN number, just as the people in  
16 Oliver could not create a reasonable expectation of  
17 privacy by putting up "don't trespass" signs.

18           QUESTION: I suppose if it had been the  
19 practice of the manufacturer to put the VIN number under  
20 the back seat -- would you be making the same argument,  
21 that they just didn't have any interest in the privacy  
22 of the VIN number, even if you had to get into the car  
23 and take out the back seat?

24           MR. KARTAGENER: The answer, Your Honor, is  
25 that that could not be the decision of the manufacturer

1 because by federal regulation it must be where it's  
2 located in the dashboard, precisely for the reason that  
3 everybody can see it.

4 But if I may answer your question, if it's  
5 under the hood, let us say, or in the back seat and  
6 there was a legitimate basis for checking the Vehicle  
7 Identification Number, yes, we would say that if police  
8 officers know that that's where the Vehicle  
9 Identification Number is, they have the right to check  
10 it out once probable cause exists, and you do have  
11 probable cause here for the traffic infractions.

12 QUESTION: Well, on that basis you should just  
13 say that you can always search a car any time you stop  
14 somebody who is subject to an official arrest; as long  
15 as there's probable cause. You don't have to arrest him.

16 MR. KARTAGENER: That is one of our arguments,  
17 sort of, Your Honor, if I might say, and that is we  
18 don't advocate rambling searches. What we do say is  
19 this. If there is probable cause to effect an arrest,  
20 as Your Honor pointed out, we do believe the police  
21 should have the right for a different reason to engage  
22 in a self-protective visual frisk, if you will, of the  
23 interior of the car.

24 If I might be permitted to, I would like to  
25 reserve the remaining time that I have for rebuttal.

1 CHIEF JUSTICE BURGER: Mr. Cogan.

2 ORAL ARGUMENT OF MARK C. COGAN, ESQ.

3 ON BEHALF OF RESPONDENT

4 MR. COGAN: Thank you, Mr. Chief Justice, and  
5 may it please the Court:

6 I would like to commence my argument by  
7 responding to a question that was posed both by Justice  
8 O'Connor and Justice Stevens before the lunch break, and  
9 in doing so we would like to emphasize that it is our  
10 contention that the judgment of the New York Court of  
11 Appeals was decided on adequate and independent state  
12 grounds, both in the New York State Constitution,  
13 Article 1, Section 12 which was cited by the Court of  
14 Appeals in its decision in this case, in which that  
15 Court is used in a whole host of cases: to declare a  
16 substantial independent right against unreasonable  
17 searches and seizures under New York's Constitution, and  
18 also under Section 401 of the Vehicle and Traffic Law.

19 In its opinion rendered below, the Court of  
20 Appeals discussed the New York Vehicle and Traffic Law,  
21 Section 401, to determine whether in the case of an  
22 ordinary traffic violation, whether an officer has a  
23 right to search the car for the Vehicle Identification  
24 Number.

25 The Court of Appeals held that Section 401

1 gives the officer absolutely no authorization to conduct  
2 a search. The correct procedure for an officer to  
3 follow when he wants VIN information, other information  
4 to identify the car, is for the officer to make a demand.

5 The officer has a right under Section 401 to  
6 demand the VIN from the motorist.

7 QUESTION: Well, Mr. Cogan, if that were  
8 dispositive of the case, why did the New York Court of  
9 Appeals write all the rest of the opinion it did on the  
10 constitutional issue?

11 MR. COGAN: The Court of Appeals addressed  
12 both the constitutional issues, state and federal, and  
13 the statutory issue, and the mere fact that the Court  
14 not only addressed constitutional but also statutory  
15 grounds for this search is not dispositive of the  
16 question, whether there were in fact adequate and  
17 independent state grounds.

18 QUESTION: Does the New York Court of Appeals  
19 have any rule that it prefers to avoid constitutional  
20 decisions if a decision could be placed on a statutory  
21 basis?

22 MR. COGAN: I don't know of any such policy  
23 that has been enunciated in its cases, but quite often  
24 state courts will address both statutory and  
25 constitutional issues in a single opinion. What the

1 Court first addressed, it first addressed itself to the  
2 question whether this was a search that violated --

3 QUESTION: Mr. Cogan, does New York have a  
4 rule that if there's no violation of the Constitution  
5 but merely an action in excess of statutory authority,  
6 that the exclusionary rule will apply? Is there any  
7 such case?

8 MR. COGAN: The case that would come to my  
9 mind would be People against Marsh, decided more than  
10 ten years ago by the Court of Appeals, which was the  
11 case where the Court first enunciated the fact that in  
12 New York there is no authorization for a search upon an  
13 ordinary traffic stop.

14 And, in People against Marsh, the Court  
15 addressed itself to the question whether a search was  
16 authorized by the statute and it also considered whether  
17 the search was authorized under the Constitution. It  
18 found the answer to both those questions was no, and so  
19 our answer would be that the search in violation of  
20 statutory or constitutional dictates mandates exclusion  
21 of the evidence.

22 QUESTION: But you've got violations of both,  
23 is what you're saying? We don't know for sure whether  
24 they would have excluded if there had only been a  
25 statutory violation, and that's why perhaps they had to

1 decide the constitutional question in order to include  
2 the other one.

3 MR. COGAN: What the Court of Appeals decided  
4 was that this was an unlawful search, and it decided  
5 that on three different grounds, each of which is an  
6 independent ground for decision, and in so holding the  
7 Court of Appeals had no choice other than to suppress  
8 the evidence.

9 QUESTION: If the Court had said, we do this  
10 on the basis of the Constitution and our statute, we  
11 wouldn't have this case?

12 MR. COGAN: We would maintain that the Court  
13 of Appeals did say that, in effect, in its opinion.

14 QUESTION: I didn't --

15 MR. COGAN: The Court may not have used those  
16 precise words.

17 QUESTION: Well, did you urge them to rule on  
18 the federals?

19 MR. COGAN: Throughout the entire litigation  
20 of this case in the state courts, the defendant  
21 maintained that this search violated his rights under  
22 state and federal law.

23 QUESTION: And you didn't urge the federal?

24 MR. COGAN: We urged both state and federal  
25 law.



1           QUESTION: Well, why didn't you argue just the  
2 state?

3           MR. COGAN: The answer, Your Honor, Justice  
4 Marshall, is that we maintain that the search violated  
5 both state and federal law. We saw no need to limit  
6 ourselves --

7           QUESTION: I understand.

8           MR. COGAN: -- to -- now, if I may turn to the  
9 substantive issues addressed in this appeal, should this  
10 Court reach the Fourth Amendment issue framed by the  
11 Petitioner, we maintain that the Court should hold that  
12 Officer McNamee conducted an unreasonable search when he  
13 entered Mr. Class's car in order to see the vehicle  
14 identification number, where Officer McNamee had  
15 absolutely no factual grounds to believe that the car  
16 was stolen.

17           Officer McNamee never stated the reason why he  
18 wanted to see the VIN. He never suggested that he had  
19 any belief that the vehicle was stolen, and indeed under  
20 the facts of the case there could have been no such  
21 reasonable belief.

22           The only thing that Officer McNamee knew when  
23 he plunged into Mr. Class's car was that this person had  
24 been stopped for driving five to ten miles per hour  
25 above the speed limit and that he had a cracked

1 windshield. Without even waiting to hear what Mr. Class  
2 disclosed to his partner, Officer Meyer, in the way of  
3 registration, the insurance documents for the car which  
4 Mr. Class produced and were in order, Officer McNamee  
5 proceeded straight to the car and went inside.

6           Officer McNamee did not wait to hear any  
7 communication from his partner, and since there was no  
8 communication between the officers at the scene of the  
9 stop, Petitioner's argument that the collective  
10 knowledge of the officers is plainly without any merit.

11           This Court has held that one officer's  
12 knowledge can be imputed to another officer only where  
13 there has been some kind of communication between the  
14 officers, or a directive, for instance from one police  
15 department to another police department, as the Court  
16 decided in Hensley.

17           QUESTION: You say we held in Hensley that  
18 that was the only way it could be done?

19           MR. COGAN: The only way that we have been  
20 able to find it in this Court's decisions, that  
21 information can be imputed is where there has been  
22 communication.

23           QUESTION: But your sentence could be  
24 confusing. I think it's one thing to say that the Court  
25 has held it may be done in this way, and has never held

1 it may be done in any other way, and it's another thing  
2 to say that the Court has held that it may be done in  
3 this way and only this way.

4 I take it, it was the former that you meant to  
5 say?

6 MR. COGAN: That's right, Your Honor. There  
7 has never been a holding that mere collective knowledge  
8 is sufficient to give an officer authorization.

9 QUESTION: Has there ever been a holding that  
10 it is insufficient?

11 MR. COGAN: Exactly. The intrusion into Mr.  
12 Class's car plainly constituted search under this  
13 Court's decisions. Why did it constitute a search?  
14 Because intruding into Mr. Class's car, Officer McNamee  
15 made the physical entry and by doing so he was able to  
16 expose areas of the passenger compartment of the vehicle  
17 which would not have been visible to him without making  
18 that intrusion.

19 That is the basic definition of a search.  
20 There can be no other interpretation as to that matter.  
21 Having conducted a search, and we're not necessarily  
22 contending this was a full-blown search of the car  
23 necessitating probable cause, we're not maintaining that  
24 the officer needed to have probable cause in order to  
25 make his intrusion.

1 All we would state --

2 QUESTION: Probable cause to do what?

3 MR. COGAN: To enter the car, probable cause  
4 to believe that the car was stolen. Officer McNamee --

5 QUESTION: Or that it contained some --

6 MR. COGAN: Some contraband.

7 QUESTION: Some contraband, or evidence of  
8 crime?

9 MR. COGAN: We're not maintaining that  
10 probable cause is the standard. All we are stating is  
11 that when an officer makes such an intrusion into a car,  
12 exposes areas not otherwise visible to the outsider,  
13 that constitutes a search and he may not do so unless he  
14 has some factual basis for believing that there would be  
15 some contraband or some stolen car.

16 QUESTION: As you read the record, he opened  
17 the door, right?

18 MR. COGAN: He opened the door because he  
19 thought the VIN was on the door panel.

20 QUESTION: He reached in for the paper?

21 MR. COGAN: He leaned inside, reached for the  
22 papers.

23 QUESTION: He never went in there, he never  
24 went in the car?

25 MR. COGAN: He leaned into the car.

1 QUESTION: He never went in there? Well, he  
2 did put his rear end in there, did he?

3 MR. COGAN: It seems that he put his head in  
4 the car, and shoulders, perhaps.

5 QUESTION: His top end, then?

6 MR. COGAN: I'm sorry?

7 QUESTION: His top end, of his body?

8 MR. COGAN: That's right.

9 QUESTION: And that's as far as he went, when  
10 he saw the gun?

11 MR. COGAN: Right.

12 QUESTION: After he saw the gun did he have a  
13 right to search everything in reason, once he saw a  
14 felony?

15 MR. COGAN: I would concede that.

16 QUESTION: And the possession of a gun in New  
17 York is a felony?

18 MR. COGAN: Once he saw the gun, and Mr. Class  
19 was certainly --

20 QUESTION: He could search everything,  
21 couldn't he?

22 MR. COGAN: Certainly, and if he had seen the  
23 gun as in Texas against Brown, if he had seen the gun  
24 without entering the car he could have seized it.

25 QUESTION: But he did.

1 MR. COGAN: Under the plain view doctrine --

2 QUESTION: He did, without entering the car.

3 MR. COGAN: In Texas --

4 QUESTION: His eyeballs entered the car.

5 MR. COGAN: Well, the record shows, in our  
6 opinion, Your Honor, that Mr. -- that Officer McNamee  
7 opened the door, leaned into the car, whatever part of  
8 his body that was in the car, the top part of his body  
9 if you will, was inside the vehicle because when he saw  
10 the weapon he saw it by looking down. His head must  
11 have been inside the car.

12 QUESTION: You say that he could not have seen  
13 it from outside the car?

14 MR. COGAN: Certainly there is nothing in the  
15 record.

16 QUESTION: That says he could, but --

17 MR. COGAN: There is no support in the record  
18 for the proposition that this weapon could have been  
19 seen from outside the car.

20 QUESTION: Suppose --

21 MR. COGAN: Petitioners never --

22 QUESTION: Suppose they hadn't found the gun;  
23 all they found was the number which had been obscured  
24 and you couldn't see it from outside, and suppose in a  
25 criminal prosecution later it became, that number became

1 relevant.

2 Would that number have been admissible?

3 MR. COGAN: Would it have been relevant, had  
4 the --

5 QUESTION: No, no, not relevant. Would it  
6 have been admissible? Assume it had been relevant to  
7 some element of the crime that was charged. Now, he  
8 couldn't get that VIN number without getting inside the  
9 car.

10 Would you say that that would be also  
11 excludable?

12 MR. COGAN: As long as the officer had no  
13 right to enter the vehicle, the fruits of that search,  
14 the evidence that he obtained as a result of that  
15 intrusion, must be suppressed.

16 QUESTION: Do you think then that the  
17 availability of a vehicle identification number to an  
18 officer depends on him having either reasonable  
19 suspicion or probable cause or something along those  
20 lines?

21 MR. COGAN: Well, we would say that in order  
22 for an officer to make a physical entry into a vehicle,  
23 he has to have some factual grounds sufficient to  
24 suggest a reasonable possibility that the car is stolen.

25 QUESTION: You don't think Congress intended

1 to make VIN's regularly available to law enforcement  
2 people?

3 MR. COGAN: In its regulations, in the federal  
4 regulations where manufacturers are required to place  
5 the VIN on a certain part of a vehicle, the reason why  
6 we have the regulations structured in that way is  
7 because it's assumed that in many cases a VIN could be  
8 seen without making a physical intrusion.

9 QUESTION: What about looking through the  
10 windshield?

11 MR. COGAN: Looking through the windshield  
12 without entering the vehicle at all, and that's often  
13 what will happen.

14 QUESTION: So, as to that, you have no  
15 objection?

16 MR. COGAN: No, certainly. We do not maintain  
17 that an officer can't see what's in plain view.

18 QUESTION: But it couldn't be done in this  
19 case because there was a piece of paper over the VIN?

20 MR. COGAN: In this case it so happened, and  
21 I'm sure that if Your Honors will notice cars you see  
22 parked on the street, you will see that in many cases  
23 vehicles have all kinds of scraps of paper in the base  
24 -- we're talking about in the base of --

25 QUESTION: Should the driver be able to



1 benefit from the fact that he obscures the VIN from a  
2 view that would not have amounted to a search?

3 MR. COGAN: Well, this would be my answer,  
4 there is nothing in the record here to suggest that this  
5 VIN was covered up intentionally. It was at most  
6 inadvertent. The Petitioner tries to make what he can  
7 as to whether it was intentional or negligent.

8 But, in fact, there is nothing in the record  
9 to suggest --

10 QUESTION: Does the law require -- does the  
11 law require the driver to reveal the VIN to an officer?

12 MR. COGAN: There is no regulation that  
13 prohibits a motocrist from allowing a scrap of paper to  
14 settle on top of --

15 QUESTION: No, no. What if the officer says,  
16 I want to get in your car to look at the VIN number.  
17 Must the driver let him in?

18 MR. COGAN: This is addressed by New York  
19 State law. The Legislature has determined that --

20 QUESTION: How about federal law?

21 MR. COGAN: I don't know of any such statute,  
22 but under New York law, which we think is very relevant  
23 to this case and which the Court of Appeals addressed --

24 QUESTION: Where was the driver when the  
25 policeman put his head in the car?

1 MR. COGAN: Once Mr. Class was stopped for his  
2 five to ten miles an hour speeding violation, he walked  
3 -- he proceeded, he exited his car, walked up to Officer  
4 Meyer, showed him -- said, "What can I do for you,  
5 Officer," showed him his registration, insurance papers.

6 He had closed the door after he exited the  
7 vehicle.

8 QUESTION: Well, get to my question. Was the  
9 car empty when the policeman put his head in the car?

10 MR. COGAN: Empty of what? There were no  
11 other passengers.

12 QUESTION: Passengers, yes, that's what --

13 MR. COGAN: No, no other occupants. Mr. Class  
14 was --

15 QUESTION: If he had been sitting in the car,  
16 it would have been perhaps more normal, the officer  
17 might have simply said, "give me" whatever it was he was  
18 looking for and there wouldn't have been any occasion  
19 for him to put his head inside.

20 MR. COGAN: That's right, and that's what, we  
21 maintain, is exactly --

22 QUESTION: It was an empty car.

23 MR. COGAN: -- is exactly what was wrong in  
24 this case. Officer McNamee --

25 QUESTION: You can't give him a VIN.

1 MR. COGAN: Right.

2 QUESTION: I thought that's in the body, metal.

3 MR. COGAN: It's attached to the vehicle.

4 QUESTION: It's part of the vehicle.

5 MR. COGAN: Correct, it's on a --

6 QUESTION: I mean, you can't hand it out.

7 MR. COGAN: No, clearly you can't. The  
8 statute that the New York Legislature has adopted, as  
9 interpreted by the highest authority on New York law,  
10 the New York Court of Appeals, provides that an officer  
11 is to demand the information of the motorist. He has no  
12 right to undertake a search for this information.

13 QUESTION: But the Court didn't tell us what  
14 the officer does if the driver says, "I'm sorry, I won't  
15 tell you."

16 MR. COGAN: This is speculation, of course,  
17 but what might have happened had Officer McNamee asked,  
18 as he properly should have done, for the Vehicle  
19 Identification Number information, he -- certainly, had  
20 Mr. Class refused him access to that information Mr.  
21 Class would have committed a further violation of the  
22 traffic law and could have received a summons.

23 QUESTION: Is there a statute that says you've  
24 got to give your accurate identification?

25 MR. COGAN: There's a statute that requires

1 Mr. Class -- the statute we're talking about is Section  
2 401, requires the motorist to give to the officer the  
3 registration and other documentation including the VIN  
4 number.

5 QUESTION: I thought I asked you a while ago,  
6 and I thought you said there was no such law?

7 MR. COGAN: I'm sorry, maybe I didn't  
8 understand your question.

9 QUESTION: The motorist is obligated to give  
10 the officer the VIN number?

11 MR. COGAN: That is right, New York law,  
12 Section 401.

13 QUESTION: And you say the statute doesn't  
14 allow -- the New York courts have ruled that the law  
15 does not permit the officer to enter the car, is that  
16 right?

17 MR. COGAN: That's right. Self-help is not an  
18 option.

19 QUESTION: Even if the driver refuses?

20 MR. COGAN: It's not clear whether the officer  
21 would have a --

22 QUESTION: But it is clear that if he refuses,  
23 he's committed a crime?

24 MR. COGAN: He has not committed a crime.  
25 He's committed a violation of the Vehicle and Traffic

1 Law, which is New York is not classified a crime.

2 QUESTION: And you couldn't arrest for it?

3 MR. COGAN: There is authorization for an  
4 arrest in a case of a traffic violation, and this may go  
5 back to Justice Brennan's question earlier. There is  
6 authorization under New York statutes for an arrest for  
7 the most minor vehicle traffic violation.

8 But, as the New York Court of Appeals has held  
9 repeatedly, an arrest is not the appropriate procedure  
10 for an officer to follow. It is far -- it is anything  
11 but inevitable for an officer to place a motorist under  
12 arrest for an ordinary traffic --

13 QUESTION: Mr. Cogan, if there were a  
14 situation here where the officers had probable cause to  
15 place Mr. Class under arrest, would they then have the  
16 right to enter the vehicle?

17 MR. COGAN: Merely upon the existence of  
18 probable cause to arrest for a traffic violation, no,  
19 Your Honor.

20 QUESTION: For some other violation?

21 MR. COGAN: Mere probable cause to arrest is  
22 not a sufficient ground for making a search incident to  
23 arrest. We have cases going back many years, that this  
24 Court has decided, which hold that the search incident  
25 to arrest power exists only where there has been a

1 custodial arrest, not a mere --

2 QUESTION: They certainly have the power to  
3 enter the car and inventory it under those  
4 circumstances, don't they?

5 MR. COGAN: When --

6 QUESTION: So, what's the difference?

7 MR. COGAN: Under New York against Belton, of  
8 course, the officer has the power to conduct a search  
9 incident to arrest.

10 QUESTION: If he arrests.

11 MR. COGAN: If he arrests. That is the big  
12 "if" in this case, and despite Petitioner's assertions  
13 there is nothing in this record or any reason to believe  
14 that Mr. Class would have been arrested for his traffic  
15 violation.

16 QUESTION: But there is plenty to believe that  
17 he had never been allowed to get back in his car?

18 MR. COGAN: I'm not sure that's correct, Your  
19 Honor.

20 QUESTION: They would have let him drive away  
21 without a license?

22 MR. COGAN: It is not mandated that an officer  
23 place him under arrest under those circumstances.

24 QUESTION: I didn't ask about that. They may  
25 not have arrested him. What if they said, "Why don't

1 you just go ahead and walk home, we'll take care of your  
2 car"?

3 MR. COGAN: The car might have been secured  
4 right there and they would have awaited some family  
5 member to drive it away.

6 QUESTION: I would think they could enter the  
7 car, though, and turn the lights off and make sure the  
8 ignition was off?

9 MR. COGAN: Even if they had not made an  
10 arrest?

11 QUESTION: Yes, if they just said, "You can't  
12 get back in your car, you don't have a license." What  
13 about that?

14 MR. COGAN: The mere fact that he didn't have  
15 a license --

16 QUESTION: That means that he couldn't drive  
17 away in his car.

18 MR. COGAN: Well, we would maintain that's not  
19 necessarily the case, in New York at least. I don't  
20 know what the procedures are --

21 QUESTION: You mean under New York law,  
22 unlicensed drivers may drive?

23 MR. COGAN: There's nothing saying that the  
24 officer's required to take him off the road, as he would  
25 in a case where there's an intoxicated driver who's a

1 positive menace to the others on the highway.

2 QUESTION: But there's no question that an  
3 officer has the authority --

4 MR. COGAN: Absolutely.

5 QUESTION: -- to prevent him from driving?

6 MR. COGAN: And it is our contention that the  
7 mere authority to place somebody on arrest has never  
8 been recognized as giving the power to conduct a  
9 search. The arrest -- the power to conduct a search  
10 incident to arrest enters into the picture only after  
11 there has been an arrest.

12 QUESTION: They could just issue him a  
13 citation for driving without a license, and they say,  
14 look, you can't drive. We're not arresting you, we're  
15 not going to make a custodial arrest but we're certainly  
16 going to drive your car away and you can pick it up when  
17 some member of your family -- we can't leave this car on  
18 the highway so we're going to drive it down to the  
19 police station, you can come and pick it up when you  
20 want to, have your mother do it, have your father --  
21 now, they certainly would be authorized to do that under  
22 the New York law, wouldn't they?

23 MR. COGAN: They were authorized to do that.  
24 They had not taken custody of his car at the time of  
25 that search.



1 QUESTION: And then could they do an inventory  
2 search at the station house?

3 MR. COGAN: Certainly, under Opperman.

4 QUESTION: In that circumstance?

5 MR. COGAN: If this were an Opperman case  
6 where there had been a --

7 QUESTION: Not quite Opperman, in the case  
8 that Justice White put to you, they could drive it away  
9 down to the station house?

10 MR COGAN: Had they taken his car into  
11 custody, it seems that they would have had the power to  
12 conduct an inventory search.

13 QUESTION: And even before an inventory, I  
14 suppose if the officers started to get in the car to  
15 drive it away, which you say he was authorized to do,  
16 and he happened to glance down and see the gun, he could  
17 seize the gun?

18 MR. COGAN: It's possible. It's possible.  
19 There are any number of scenarios that might have  
20 happened in this case.

21 QUESTION: Well, we're talking about this  
22 case, not ten million other.

23 MR. COGAN: And what happened in this case,  
24 Your Honor, is that without any information as to Mr.  
25 Glass's licensed or unlicensed status, Officer McNamee

1 went directly into the vehicle and at that point he --

2 QUESTION: Well, he didn't enter the vehicle.

3 He put his head into the vehicle. I'm trying to get  
4 these facts a little clearer and not slide over them.

5 So, when he approached the car, if the driver  
6 had been sitting in it, he surely would have had a right  
7 to say, "Where is your VIN? Where is it so I can see  
8 it?"

9 Could he see it without putting his head in  
10 the car?

11 MR. COGAN: Could he have seen it -- well, had  
12 Mr. Class been seated in the car, let's say, had the  
13 officer prudently told him to keep his hands in view,  
14 which is a recommended procedure, "Please remove the  
15 piece of paper that's covering up the VIN," as he had a  
16 right to do under New York law, he could have seen the  
17 VIN without making any intrusion into the vehicle.

18 QUESTION: And not put his head in the car?

19 MR. COGAN: He wouldn't have had to put his  
20 head in the car to see the VIN.

21 QUESTION: Where was it located?

22 MR. COGAN: The Vehicle Identification Number  
23 is commonly found on a plate that is affixed to the  
24 lower base of the dashboard.

25 QUESTION: You say he could see that without

1 putting his head in the window?

2 MR. COGAN: Certainly, no question about it.

3 QUESTION: He could see it right through the

4 --

5 MR. COGAN: Right through the windshield. A

6 VIN is something that --

7 QUESTION: But that's only if the driver

8 removed the piece of paper?

9 MR. COGAN: That's right.

10 QUESTION: So that, if the driver had said,

11 "No, I'm not removing any paper at all," you say the

12 officer could not have stuck his head in the car and

13 removed the paper himself?

14 MR. COGAN: Under New York law, it's not clear

15 what the officer's remedy be had Mr. Class refused to

16 remove the piece of paper. We maintain that the mere

17 refusal to remove the paper, the mere refusal to give

18 the VIN information, does not give any reasonable

19 suggestion that the car is stolen.

20 There are many other things these officers

21 could have done, had they had a suspicion that that car

22 was stolen. There is no need in this case for the

23 police to intrude into Mr. Class's vehicle.

24 QUESTION: You have just conceded a few

25 minutes ago, I think, in response to a similar question,

1 that they could have made him take a bus home or walk  
2 home, and taken the car down to the station.

3 Now, as Justice White suggested, one of his  
4 questions suggested, when the officer got in the car,  
5 right at that point isn't it likely that he would have  
6 seen the gun?

7 MR. COGAN: Under that scenario, it's possible  
8 he could have seen the gun.

9 QUESTION: Suppose he didn't see it there.  
10 You have conceded too that when it got down to the  
11 police station they could have made an inventory search  
12 and perhaps they are required to make an inventory  
13 search?

14 MR. COGAN: It's possible that could have been  
15 done too.

16 QUESTION: Then what's the problem?

17 MR. COGAN: The problem, Your Honor, is the  
18 "if" because in this case the "if," the assumption that  
19 the custody of Mr. Class, the arrest, the inventory of  
20 the car, all of these things are very much speculation  
21 in this case.

22 There is no reason -- there was no testimony  
23 in this case that the officers inevitably would have  
24 done X, Y or Z.

25 QUESTION: How did the car get off the street?

1 MR. COGAN: I'm not sure how it got off the  
2 street.

3 QUESTION: Do you think the officers let an  
4 unlicensed driver drive the car away?

5 MR. COGAN: When Mr. Class was arrested for  
6 possession of the weapon the police took custody of the  
7 car. But we certainly can't look to the -- in  
8 retrospective hindsight to look to the fact that he was  
9 arrested and therefore justify the original entry that  
10 was the cause of the discovery of that evidence.

11 In summary, Your Honors, we maintain that --

12 QUESTION: Mr. Cogan, if you're summarizing,  
13 when and exactly at what point do you say the unlawful  
14 conduct occurred, when he opened the door or when he  
15 stuck his head in?

16 MR. COGAN: The unlawful conduct in this case  
17 occurred when Officer McNamee opened the door of the  
18 car. At that point --

19 QUESTION: So, it would have been unlawful  
20 even if the VIN had been right --

21 MR. COGAN That is right. That is our  
22 position. But of course, in this case Officer McNamee  
23 went further than that and leaned into the vehicle,  
24 disturbed papers on the dashboard.

25 One other point I'd like to make, Your Honors,

1 is in rebuttal to the Petitioner's contention that there  
2 is no expectation of privacy in a vehicle. Now, this  
3 Court has held that a person does not have the same  
4 expectation of privacy in a car that he has in his  
5 home. Certainly, we're not contending that he has the  
6 same expectation of privacy there, nor has this Court  
7 ever held that there is no expectation of privacy at all  
8 in a vehicle.

9 People keep all kinds of very private things  
10 in their cars, even things, say, in a two-car family a  
11 husband might have a car and keep things in it that he  
12 wouldn't be comfortable having his wife see. There  
13 might be things pertaining to a medical condition --

14 QUESTION: Mr. Cogan, when was the last time  
15 to your knowledge that this Court ever sustained a  
16 search of a car, ever upheld a search of a car?

17 MR. COGAN: When is the last time? I can't  
18 honestly say, Your Honor.

19 QUESTION: There have been a lot of car search  
20 cases in the last few years, haven't there?

21 MR. COGAN: And we maintain that under no  
22 decision of this Court has the action of Officer McNamee  
23 ever been justified. Lacking any articulable grounds  
24 for entering the car, we maintain that Officer McNamee  
25 conducted an unreasonable search in violation of the

1 Fourth Amendment.

2 Should the Court reach the Fourth Amendment  
3 question, we would maintain that the judgment of the  
4 Court of Appeals be affirmed. Also, of course, we  
5 maintain that this case is not even reviewable by this  
6 body, by this Court, because the decision rests on  
7 adequate and independent state and constitutional  
8 grounds, statutory and constitutional grounds.

9 Thank you very much.

10 ORAL ARGUMENT OF STEVEN R. KARTAGENER, ESQ.

11 ON BEHALF OF PETITIONERS - Rebuttal

12 MR. KARTAGENER: Your Honors, if I may be  
13 allowed a reply, I think as the questions of this Court  
14 have pointed up to some extent, the Respondent brought  
15 the police action in this case on himself to some  
16 extent. He allowed the VIN to be covered. He chose to  
17 get out of the car and walk away from it.

18 My colleague -- or my adversary, I should say,  
19 here, seems to suggest that the Fourth Amendment should  
20 be something that rewards a motorist for defeating the  
21 Congressional intent in having exposed VIN numbers, that  
22 if he chooses not to keep it exposed as expected by  
23 Congress the Fourth Amendment should rule it improper if  
24 a police officer merely reaches in to uncover the VIN.

25 I suggest -- the silliness, I think of the New

1 York Court of Appeals' position that what the police had  
2 to do here was send the individual back into the car to  
3 move a piece of paper out of the way himself is pointed  
4 up and underscored by the fact that the police do have  
5 some right to be concerned about police safety, and as  
6 Justice Marshall and Justice Brennan pointed out in  
7 their dissent in the Michigan v. Long case, they thought  
8 that if we're concerned about police safety once the  
9 individual's out of the car, the most minimal thing to  
10 do is for the police officer to go into the car if he's  
11 looking for a registration, once the motorist has told  
12 him where it is, and go to that certainly identifiable  
13 place.

14 Here, this police officer was not engaged in a  
15 rummaging search of the car. He looked under no seats.  
16 He went to the place on the dashboard, moving across  
17 open space, where he expected the VIN to be located,  
18 happened to look down and see a gun butt.

19 And, if I might respond to something Justice  
20 White spoke about, could the police officer even have  
21 seen it from outside, possibly? Yes.

22 Why? Because it's a settled fact in this  
23 case, the gun butt was out one inch from under the  
24 seat. Now, it's true that this police officer didn't  
25 notice it at the time, although a pedestrian on the



1 other side of the car might have been able to, and I  
2 think Texas v. Brown says the police will have the same  
3 rights as any pedestrian on the street.

4 The police officers might have been able to  
5 see it from outside the car. So --

6 QUESTION: What time of day was it?

7 MR. KARTAGENER: Excuse me?

8 QUESTION: What time of day was it?

9 MR. KARTAGENER: It was about 4:30 in the  
10 afternoon. It had rained earlier in the day but it was  
11 daylight out, no flashlights necessary. Had he been  
12 looking for a gun he might have seen it. It happened to  
13 pop up, if you will, or jumped out and bit him as he  
14 happened to be reaching across, but it really was  
15 sticking out in plain view from under the seat.

16 QUESTION: Well, plain view from where?

17 MR. KARTAGENER: Plain view, I would certainly  
18 -- once the door was opened, we believe, reasonably --  
19 but it would seem pretty obvious from outside the car  
20 had the police officer been looking for it.

21 I say this, Justice Rehnquist, because there  
22 is a finding of fact in this case that out from under  
23 the seat, towards the front of the car by at least one  
24 inch, was the observable, identifiable gun butt.

25 QUESTION: That doesn't mean that you could

1 see it just standing up outside the car, looking in the  
2 plane of vision that you would be looking through a  
3 window?

4 MR. KARTAGENER: Quite frankly, Your Honor, to  
5 the extent that you asked me can it be done, I think it  
6 can be done. To see if it could be done I went to a  
7 car, I mean to see what the views were, I went to the  
8 other side rather than the driver's side, looked in the  
9 open window, and you really can't see everything coming  
10 out an inch from under the seat of a car.

11 But, the Court doesn't have to determine that  
12 in this case. I just suggest that it was not the type  
13 of rummaging search that the Court need believe it  
14 implicates the Fourth Amendment. It was really sticking  
15 out from under the seat.

16 QUESTION: Wouldn't it be reasonable for me to  
17 assume that if that were true, the policeman would have  
18 so testified?

19 MR. KARTAGENER: Well, I think what he  
20 testified, Your Honor, was that he wasn't looking for a  
21 gun at that time. He was just looking to check the VIN  
22 number and happened to notice the gun.

23 QUESTION: Do you characterize that he could  
24 see it from the outside?

25 MR. KARTAGENER: Well, no. What I'm

1 suggesting --

2 QUESTION: That he did --

3 MR. KARTAGENER: He approached it from the  
4 driver's side, Your Honor. All I'm saying --

5 QUESTION: So, now you are going to testify to  
6 it?

7 MR KARTAGENER: No, what I'm saying, Your  
8 Honor, is that just a viewing from the other side might  
9 have allowed for it, and all I'm suggesting is that this  
10 Court said in Texas v. Brown, the fact that a police  
11 officer may be able to twist his head and see something  
12 on an angle puts him in the same position as any  
13 pedestrian.

14 QUESTION: But, your problem is to get the  
15 officer into the car to look at the VIN number.

16 MR. KARTAGENER: And we suggest that this was  
17 a very --

18 QUESTION: If he can go in to see the VIN  
19 number, why, he could notice a gun in plain sight,  
20 couldn't he? How do you get him into the car to see the  
21 VIN number without arguing one of your other arguments?

22 MR. KARTAGENER: Well, I think the way he  
23 legitimately opens the door to look at the VIN numbers  
24 because looking at that VIN number was part and parcel  
25 of the probable cause to deal with the traffic

1     infractions that he observed.

2             Had the paper not covered the VIN, he might  
3     have noticed it from outside.

4             QUESTION: Every time you make a traffic stop  
5     you should be able to check the VIN number?

6             MR. KARTAGENER: Absolutely, Your Honor. We  
7     think that's clear, and we think there was a very  
8     reasonable --

9             QUESTION: Even if it entails entering a car?

10            MR. KARTAGENER: Well, I suggest that you  
11     don't have to decide the broad issue, if it's anywhere  
12     in the car, but certainly when it's on the dashboard.  
13     Yes, I would suggest that in any case where a VIN  
14     number's covered on the dash, and the driver stepped  
15     away from the car, it's not necessary for the police  
16     under Mimms to bring the driver back to the car, to open  
17     up the door and step in, and indeed they probably would  
18     have seen the gun at that point anyway.

19            So, in closing, I'd simply like to say that we  
20     would like the Court to find, as we think that it  
21     should, that the actions of the police officers in this  
22     case were so eminently reasonable, and the ruling and  
23     opinion of the New York Court of Appeals was not  
24     reasonable, and therefore that you should reverse that  
25     judgment of that Court.

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Thank you very much.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:46 p.m., the case in the  
above-entitled matter was submitted.]

Alderson Reporting Company, Inc., hereby certifies that the  
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#84-1181 - NEW YORK, Petitioner V/ BENIGNO CLASS

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BY Paul A. Richardson

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