NAVARETTE: BEDEVILING COURTS FOR A LONG TIME TO COME

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INTRODUCTION

In applying legal rules to unique facts courts have drawn on the history of legal codes dating back to the Code of Hammurabi.[1] It is a difficult task because variables that comprise a specific event are infinitely complex while codes of rules that apply to those facts are necessarily simpler. Applying the rules from prior decisions is always a fact-intensive exercise for the courts. Differences commonly distinguish a model case from the one presently before a court. Proper analysis involves careful comparison of the facts. Straightforward rules against which facts can be tested are critical to the consistent outcomes demanded by a legitimate justice system.

The application of those rules by courts impacts the relationship of citizens to their government in important ways. People need to know what they can and cannot do without being interfered with by the government. Changes to rules must be carefully measured, easy to implement, and relatively infrequent. Otherwise, chaos can result. When plainly-stated workable rules already exist, unnecessary refinements often cause unnecessary confusion. In *Navarette* the United States Supreme Court significantly lowered the bar police must clear in order to conduct a traffic stop based on an anonymous tip that a driver might be impaired.[2] The decision has also muddied the waters considerably, causing confusion in the lower courts as judges try to digest and apply the new rule governing the constitutional validity of such traffic stops.

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[1] *See* Exxon Shipping Company v. Baker, 554 U.S. 471 at 491 (2008) (citing to Code of Hammurabi § 8, 13 (R. Harper ed.1904) (tenfold penalty for stealing the goat of a freed man)).
[2] Navarette v. California, 134 S. Ct. 1683 (2014).

The new rules of *Navarette* are so difficult to apply that confusion is evident everywhere. One Florida appellate judge recently wrote, "Can *Navarette* be read harmoniously with *J.L.* . . . ? I cannot say, but I do know that the issue will bedevil the courts for a long time to come."[3] The Court urgently needs to clarify the rules for applying its new anonymous tip doctrine or the rights of many may be trampled in the ensuing confusion. A set of cases illustrating this urgent need is presented here, taken from all levels of the judiciary.

To properly analyze the shortcomings of *Navarette* the first step is to understand the system previously in place that allowed courts to properly fit anonymous tips within the reasonable suspicion analysis required of officers in support of traffic stops. Then, deciding how *Navarette* fits (or does not fit) within the prior framework will identify issues with which courts are now struggling. A survey of decisions up and down the judicial food chain will illustrate the degree to which courts have digested the proper application of *Navarette*. Finally, a summary of the most important unanswered questions and how they *must* be addressed will complete the analysis.

I. THE ROAD TO REASONABLENESS: TERRY TO J.L.

A. Modern Fourth Amendment Doctrine Begins with Terry v. Ohio

One of the first things every new law student learns is the notion of the mythical "reasonable person." The U.S. Constitution incorporates a standard of reasonableness by requiring courts to balance the liberty interests of individuals with the interests of law enforcement in fighting

[3] Grant v. State, 139 So. 3d 415, 419 (5th DCA 2014) (Orfinger, J., concurring).

crime.[4] In terms of Fourth Amendment jurisprudence, the reasonable person is the measure of the everyday citizen who needs to know what she can and cannot reasonably do without "governmental invasion of a citizen's personal security."[5] The test for reasonableness applied by the Court in *Terry v. Ohio* was "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."[6]

Terry involved a seasoned officer with nearly four decades of experience.[7] Detective Martin McFadden observed two individuals exhibiting "casing" behavior.[8] The Court found that an officer with McFadden's background was justified in being suspicious of the observed behavior, and thus his approach to speak with Terry to investigate the matter was reasonable.[9] The Court further found that the officer was justified in patting the outer clothing of the suspects because he had "reason to believe that he [was] dealing with an armed and dangerous individual" and that a pat down was therefore reasonable under the circumstances, though there was not yet probable cause to make an arrest.[10] As it turned out, both Mr. Terry and Mr. Chilton were armed with firearms.[11]

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[4] U.S. CONST. amend. IV ("The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or thing to be seized.").
[5] Terry v. Ohio, 392 U.S. 1, 19 (1968).
[6] *Id.* at 20.
[7] *Id*. at 6.
[8] *Id.*
[9] *Terry*, 392 U.S. at 30.
[10] *Id.* at 27.
[11] *Id.* at 7.

Terry is the seminal case in which the Supreme Court adopted reasonable suspicion as the standard justifying a lawful stop under the Fourth Amendment. In subsequent refinements, the Court incrementally developed the reasonableness standard as applied to different factual circumstances. But throughout the ensuing cases, the Court maintained the overarching principle that "[t]he touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'"[12]

B. The Anonymous Tip Bookends: White & J.L.

Anonymous tips pose a particularly thorny issue in light of the reasonableness standard set by the Court. Unlike *Terry*, where a police officer with decades of experience witnessed behavior arousing his reasonable suspicion that a crime was about to be committed, anonymous tips come from citizen informants. What are the police to do when an unknown informant gives information to the police indicating that a specific individual has or is about to engage in criminal activity? A series of cases have attempted to give guidance as to what weight the police can give to such tips in investigating those activities and the extent to corroboration is required before seizing a person.

The 1990 Supreme Court decision in *Alabama v. White* established the seemingly strong principle that *some* degree of corroboration is required to legitimize a tip provided by a fully

[12] United States v. Knights, 534 U.S. 112, 118 (2001) (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).

anonymous telephone caller.[13] In that case a caller told police that the driver of a car with a specific description with a broken taillight would leave a certain apartment at a given time and then drive to a specific motel while carrying a quantity of cocaine.[14] While some details were uncorroborated or inaccurate, much of the predicted activity was observed by officers who tailed the car.[15] When the police conducted a stop of the vehicle, the driver was found to be in possession of marijuana and cocaine.[16] The U.S. Supreme Court took the case up when Alabama's state courts found no reasonable suspicion to justify the stop.[17] The Court upheld the stop, holding that the stop was reasonable under the circumstances and in accord with the analysis of *Terry*.[18]

Justice White, writing for the Court, reiterated the "totality of the circumstances" approach taken by the Court in *Illinois v. Gates*.[19] That made sense because it is impossible to give a precise definition to what is "reasonable" that would apply to every conceivable occurrence. Rather, the Court established understandable principles to guide a "totality of the circumstances" analysis. For example, he noted that "an informant's 'veracity,' 'reliability,' and 'basis of knowledge' remain 'highly relevant in determining the value of his report.'"[20] These are the factors that delineated the boundaries of analysis in determining what is reasonable. A citizen informant whose information is discredited or one conveying no basis to know the facts claimed

[13] Alabama v. White, 496 U.S. 325 (1990).
[14] *Id.* at 327.
[15] *Id.*
[16] *Id.*
[17] *Id.* at 328.

[18] *White,* 496 U.S. at 329.
[19] Illinois v. Gates*,* 462 U.S. 213, 230 (1983).
[20] *White,* 496 U.S. at 328 (quoting *Gates* 462 U.S. at 230).

in the anonymous tip should be discounted.[21] Presumably, a tip from such a person would fail to provide reasonable suspicion since interfering with an individual's conduct of his ordinary affairs on such a basis would be patently unreasonable. Still, a court must decide which facts to assign to the "reliable" vs. "unreliable" and "veracious" vs. "mendacious" categories.

Interestingly, the *White* Court did say that "while the unverified tip may have been insufficient to support an arrest or search warrant, the information carried sufficient 'indicia of reliability' to justify a forcible stop."[22] Therefore the Court established the need for something more than an unverified anonymous tip, some indication(s) that the tip is reliable, in order to find reasonable suspicion to support a stop.

The legal community immediately recognized *White*'s new guidance in Fourth Amendment reasonable suspicion jurisprudence as it related to anonymous tips.[23] *White* arguably "'bridged the gap' between an unverified anonymous telephone tip and the creation of an officer's objective reasonable suspicion."[24] It was thought to represent the "outer fringes" of a boundary in which "the Court allowed a momentary 'investigation' by officers to support the reasonable suspicion required to make a stop."[25] Notably, the court referred to its decision in *White* as a "close case"

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[21] *Id.* at 329 ("Simply put, a tip such as this one, standing alone, would not 'warrant a man of reasonable caution in the belief' that [a stop] was appropriate.").
[22] *Id.*
[23] *See* Christopher L. Kottke's, Comment, Alabama v. White*: The Constitutionality of Anonymous Source Telephone Tips in Support of "Reasonable Suspicion" and the Narrowing of Fourth Amendment Protections,* 14 AM. J. TRIAL ADVOC. 603 (1991) (providing a detailed review of anonymous tip jurisprudence prior to the *White* decision and *White's* positioning within that context).
[24] *Id.* at 619.
[25] *Id.*

in upholding the constitutionality of the traffic stop.[26] Presumably a close case tilts only ever so slightly in favor of approving the investigatory stop.

To summarize *White,* the Court weighed the accuracy of the information provided by the tipster to assess the anonymous individual's veracity and reliability as well as his or her basis for having such knowledge.[27] While their motives are unknowable and perhaps even suspect, detailed reports from anonymous sources that contain verified predictive information may still be found reliable.

But from what harm is the Court protecting citizens? The *White* Court indicated that bare anonymous tips by themselves will rarely suffice because there is no way to know the veracity of the caller.[28] Veracity of an anonymous caller seems to have mattered a great deal to the *White* Court, but why?

Ten years after *White* the Court revisited the question of anonymous tips again in *Florida v. J.L.*[29] In that case an arrest was made based on an anonymous tip that "a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun."[30] When police arrived at the location and observed three black males, only one was wearing a plaid shirt.[31]

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[26] *See White,* 496 U.S. at 332 ("Although it is a close case, we conclude that under the totality of the circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of respondent's car.").
[27] *Id.* at 328-29.

[28] *White,* 496 U.S at 329 (quoting Illinois v. Gates, 462 U.S. at 238, "the veracity of persons supplying anonymous tips is 'by hypothesis largely unknown, and unknowable.'").
[29] Florida v. J.L., 529 U.S. 266 (2000).
[30] *Id.* at 268.
[31] *Id.*

None of the three engaged in illegal conduct and the police saw no weapon.[32] Nevertheless, on the basis of an unrecorded call from an anonymous person, an officer elected to frisk the young man and removed a firearm from his jacket.[33]

J.L. was a juvenile not licensed to carry a concealed weapon.[34] Under Florida law, being a juvenile in possession of a firearm is a criminal offense, as is carrying one without a license. The defense moved to suppress the gun evidence arguing that the seizure and search lacked the requisite reasonable suspicion.[35] Justice Ginsburg wrote, "The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person."[36] The Court asserted that some verification of facts beyond a suspect's identifying characteristics is necessary to find reasonable suspicion. It rejected the notion "that the standard *Terry* analysis should be modified to license a 'firearm exception.'"[37]

As one writer put it, "[T]he Court declined to carve out a 'firearms exception' to the Terry doctrine, which would grant officers the right to stop and frisk suspects based on an unsubstantiated anonymous tip where the offense alleged was possession of a firearm."[38] Without discounting the threat of armed criminals and dangerous firearms, the Court upheld the right of people to be left alone unless police have reasonable suspicion that they are doing something wrong. The real danger against which the Fourth Amendment protects, according to

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[32] *Id.*
[33] *Id.*

[34] *J.L.* 529 U.S at 269.
[35] *Id.*
[36] *Id.* at 272.
[37] *Id.*
[38] Rob Drummond, Florida v. J.L.: *Phone Calls, Guns, and Searches,* 27 AM. J. CRIM. L. 415, 416 (2000).

Justice Ginsburg, is that such exceptions "would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun."[39] In other words, a nefarious fabricator desiring to vicariously utilize the police as agents of revenge should not be able to do so based on bare assertions. The indicia of reliability requirement explained by the Court in *White* were thus reaffirmed in *J.L.*

Justice Ginsburg was careful to point out that there might be exceptions: "We do not say, for example, a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm . . . ."[40] She did, however, focus tightly on the lack of reliability inherent in a purely anonymous tip.[41]

White is therefore not a categorical rule but only the starting point, while *J.L.* represents the other end of that analytical continuum. With the issue of anonymous tip jurisprudence framed in that context, the Court then decided *Navarette* in 2014, a case that seems to carve out an exception for anonymous reports of possible drunk driving in a way the court declined to do for criminal firearm possession.

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[39] *J.L.* 529 U.S. at 272.
[40] *Id.* at 273.
[41] Writing for the Court, Justice Ginsburg focused specifically on the absence of accountability with anonymous sources. *See* i*d*. at 270 ("Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, see Adams v. Williams, 407 U.S. 143, 146-47 (1972), 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity,' Alabama v. White, 496 U.S. at 329.").

II. NAVARETTE: AN ATTEMPT FIT A SQUARE PEG INTO A ROUND HOLE

Against the jurisprudential backdrop of *White* and *J.L.* we assess where *Navarette v. California* falls, if anywhere, along the continuum from *White* to *J.L.* Unlike the unanimous verdict in *J.L.*, the *Navarette* Court split 5-4 with vigorous dissent on the part of Justice Antonin Scalia, who was joined in an uncommon alliance by Justices Sotomayor, Ginsburg, and Kagan.[42] The Court acknowledged that *Navarette*, like *White*, was a "close case."[43] It is already influencing trial court cases broadly in unpredictable and contradictory ways.

A. Overview and Facts of the Case

A California Highway Patrol (CHP) dispatcher in one county received a call from the CHP dispatcher in another county about an anonymous report of a vehicle being driven dangerously.[44] The specific behavior the caller cited, according to the second dispatcher, was that the subject vehicle had run her off the road.[45] The caller described the pickup truck and its tag number, which was relayed to patrol officers.[46] The caller also noted the specific location where the alleged dangerous driving behavior occurred, a fact to which the court gave great weight according to Justice Scalia.[47] Significantly, the caller did not convey any predictive information

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[42] *Navarette,* 134 S. Ct. at 1692 (Scalia, J., dissenting).
[43] *Id.*
[44] *Id.* at 1686-87.
[45] *Id.* at 1687.
[46] *Id.* at 1686.
[47] *Navarette,* 134 S. Ct. at 1696 ("The Court concludes that the tip, plus confirmation of the truck's location, produced reasonable suspicion that the truck not only had been *but still was* barreling dangerously and drunkenly down Highway 1.") (Scalia, J., dissenting).

regarding future behavior other than the direction the police could expect the vehicle to be traveling.[48]

Eighteen minutes after receiving the call a CHP officer spotted the truck in the general area reported by the anonymous tipster.[49] Five minutes later, without observing any driving anomalies, the officer executed a stop of the vehicle solely on the basis of the anonymous tip.[50] As he approached the truck he smelled marijuana and subsequently discovered thirty pounds of cannabis in the truck, resulting in an arrest and prosecution.[51] As it turns out, this was the only crime for which prosecution occurred. No charge of impaired driving was ever made against the driver.

B. Analysis by Justice Thomas and the Majority

Justice Clarence Thomas, writing for the majority, began his analysis with *White v. Alabama*, pointing out that the police needed the reasonable suspicion of *Terry* combined with the reliability of the information upon which the police were acting as required by *White*.[52] Justice Thomas went on to discuss *J.L.,* rejecting bare bones assertions without corroboration,

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[48] *Id.* at 1687-88. Regarding *White*, Justice Thomas points out that "By accurately predicting future behavior, the tipster demonstrated 'a special familiarity with respondent's affairs,' which in turn implied that the tipster had 'access to reliable information about that individual's illegal activities.'" He also contrasted this fact with *J.L.*, writing that in *J.L.* "the tip included no predictions of future behavior that could be corroborated to assess the tipster's credibility.".

[49] *Id.* at 1689.

[50] *Id.* at 1696. (Scalia, J., dissenting) (describing the driving observed by the police as "irreproachable," much less suspicious).

[51] *Id.* at 1687.

[52] *Navarette*, 134 S. Ct. at 1687. "The 'reasonable suspicion' necessary to justify such a stop 'is dependent upon both the content of information possessed by police and its degree of reliability.'" (quoting *White* 496 U.S at 330).

prediction of future behavior, or a basis for the tipster's knowledge of the alleged criminality.[53] It is along this continuum that the Court attempts to position the facts of *Navarette*.

Justice Thomas wrote, "By reporting that she had been run off the road by a specific vehicle . . . the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving."[54] He does not explain why such a claim overcomes the dangers of the nefarious fabricator from whom Justice Ginsburg said the courts must protect in *J.L.* If a person with foul intentions wishes to unleash the intrusive actions of police into a rival's life, would such a person not also claim to be an eyewitness? Is an unsubstantiated report of suspected drunk driving more akin to the illegal possession of a gun or to someone carrying a bomb, where Justice Ginsburg suggested there might have been a different outcome in *J.L.*?[55]

Justice Thomas speculated that *J.L.* might have resulted in a different outcome had the caller provided a basis for his knowledge. "The tipster did not explain how he knew about the gun, nor did he suggest that he had any special familiarity with the young man's affairs."[56] It seems that a fabricator need only *claim* to have seen the illegal activity to give police reasonable suspicion. But as long as a party is fabricating, it hardly seems extraordinary that he would add any fabrications needed to satisfy the Court. That kind of analysis guts the Fourth Amendment protections against bare bones allegations from which the Court has said repeatedly it should protect.

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[53] *Id.* at 1689.
[54] *Id.*
[55] *J.L.,* 529 U.S. at 273-74.
[56] *Navarette,* 134 S. Ct. at 1688.

The Court went further to analyze what credibility should be afforded such a tip since 911 emergency systems have caller identification and trace capabilities.[57] Yet the public today is well aware of the widespread availability of prepaid cell phones that provide as much anonymity as the old public pay phones, a point made emphatically the by the Second Circuit Court of Appeals in *U.S. v. Freeman* just a year before *Navarette* was decided.[58]

The Court cites the technical capabilities of the 911 system as only one factor in the relevant circumstances justifying a finding of reasonableness.[59] The Court points out that reliability only matters where "it creates reasonable suspicion that 'criminal activity may be afoot.'"[60] In this regard, the Court explains why a report of a motorist being run off the road by another vehicle gives rise to the reasonable suspicion of drunk driving.[61] Quoting from *Ornelas v. United States*, the Court said that reasonable suspicion arises from "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[62] But the Court makes no reference to many other forms of distracted driving encountered in everyday life that could explain such an occurrence. Some studies have shown that cell phone use while driving is

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[57] *Id.* at 1689 ("A 911 call has some features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity.").
[58] United States v. Freeman, 735 F.3d 92, 98 (2d Cir. 2013) ("Moreover, while the government argues that the fact that her number is known would now allow police to track her down, and thus she could be open to the consequences of false reporting, she never has been tracked down, so there is no way for this Court to determine that the number actually would trace back to the individual who made the phone call. There is nothing offered to suggest, for example, that the phone was not a prepaid phone, which would be as anonymous as a call placed from a public pay phone.").
[59] *Navarette,* 134 S. Ct. at 1689-90.
[60] *Id.* at 1690 (quoting *Terry* 392 U.S. at 30.).
[61] *Id.*
[62] Ornelas v. United States*,* 517 U.S. 690, 696 (1996).

at least as dangerous as driving at the legal alcohol limit of .08.[63] Government studies cite driver distraction generally as the cause of many injury crashes.[64] Texting, eating, changing a radio station, or other behaviors commonly associated with momentary recklessness go completely unexplored in *Navarette*. According to the majority it is reasonable to attribute a single instance of recklessness exclusively to alcohol use in order to support a traffic stop to the exclusion of other causes.

Incredibly, Justice Thomas argues "Nor did the absence of additional suspicious conduct, after the vehicle was first spotted by an officer, dispel the reasonable suspicion of drunk driving."[65] As noted previously, the officer pulled the driver over a full five minutes after initiating his observation. During that period no aberrant driving behavior was observed.[66] Those five minutes constitute a complete lack of corroboration, which was a key factor in *White*. There is a good explanation for this. It was never alleged that the driver was impaired.

Imagine the outcome in *White* had the police followed the subject vehicle and found no evidence of anything claimed by the anonymous caller. What the driver in *Navarette* did was to drive perfectly, which ought to have dispelled any suspicion that the driver was impaired. It is

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[63] *See* David L. Strayer et al., *A Comparison of the Cell Phone Driver and the Drunk Driver*, 48 J. HUM. FACTORS & ERGONOMICS SOC'Y 381, 388-90 (2006). Professor Strayer and his colleagues found that "[d]rivers using a cell phone exhibited a delay in their response to events in the driving scenario and were more likely to be involved in a traffic accident" while alcohol impaired drivers were more aggressive and followed closer to other cars. The study confirmed the finding of previous studies that found the risk associated with cell phone use similar to that of driving under the influence of alcohol at the legal limit of .08.

[64] *See* NHTSA's National Center for Statistics and Analysis, *An Examination of Driver Distraction as Recorded in NHTSA Databases,* Traffic Safety Facts Research Note (Sept. 2009), *available at* http://www-nrd.nhtsa.dot.gov/Pubs/811216.pdf. (Showing a trend toward a higher annual percentage of fatalities occurring from crashes involving distracted driving: 11% in 2005, 14% in 2006, 15% in 2007, and 16% in 2008).

[65] *Navarette,* 134 S. Ct. at 1691.

[66] *Navarette,* 134 S. Ct. at 1696.

well established that the odds that a person is driving while impaired can be predicted through the observation of certain visual cues.[67] Officers are trained, using published data from the National Highway Transportation Safety Administration, to make reasonable suspicion decisions based on such cues.[68] The inability to conform driving behavior to accepted standards despite every effort to do so is precisely why such visual cues are relied upon by police. Because these physical manifestations are held to be so reliable, it is reasonable to conclude that their absence dispels suspicion impairment, and that an impaired driver could not drive impeccably for a significant time with no outward indication that he is impaired. Yet on the basis of an unverified anonymous claim, potentially from an ill-intending source, made via a 911 call that could have come from an anonymous pre-paid cell phone and with no corroboration of the caller's claims, the Court found that there was reasonable suspicion to support the stop.

While the majority rightly argues that "reasonable suspicion 'need not rule out the possibility of innocent conduct,'" this principle is hardly applicable.[69] Considering the totality of the circumstance, including non-alcohol related reasons a driver might have a single episode of recklessness, and the lack of verification of even a slight infraction, there is far more than the mere "possibility" of innocent conduct. Arguably, innocent conduct is the most reasonable interpretation of these facts.

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[67] *See* NHTSA's *The Visual Detection of DUI Motorists* Traffic (Mar. 2010), *available at* www.nhtsa.gov/staticfiles/nti/pdf/808677.pdf. For example, the probability of impairment is 30% if driving at night without headlight, 65% if driver turns with a wide radius or straddles the center line, and 50% for stopping without cause in a traffic lane. 10% can be added to the higher percentage if two or more indicators are observed.

[68] *See* 2006 NHTSA SFST Manual (Aug. 10, 2006) *available at* http://oag.dc.gov/publication/2006-nhtsa-sfst-manual. Section V, entitled "*Phase 1: Vehicle in Motion*" of this officer training manual, specifically covers visual cues giving rise to reasonable suspicion justifying a traffic stop.

[69] *Navarette,* 134 S. Ct. at 1691 (quoting United States v. Arvizu, 534 U.S. 266, 277 (2002)).

Finally, as in *J.L.*, the tip in Navarette lacked any predictive quality.[70] Thus another lingering question remains: Is predictive information a requirement or not?

C. Strange Bedfellows: Justice Scalia's Vigorous Dissent

Joined by Justices Ginsburg, Sotomayor, and Kagan, Justice Antonin Scalia wrote a vigorous dissent in which he strongly criticized the majority's reasoning. He summarized the impact of *Navarette,* asserting that

> law enforcement agencies follow closely our judgments on matters such as this and they will identify at once our new rule: *So long as the caller identifies where the car is, anonymous claims of a single instance of possibly careless or reckless driving, called in to 911, will support a traffic stop*.[71]

Emphasizing the allegation that the defendant's vehicle ran the tipster off the road, Justice Scalia writes that "the police had no reason to credit that charge and many reasons to doubt it, beginning with the peculiar fact that the accusation was anonymous."[72] He noted that the police knew nothing about the anonymous tipster or her veracity.[73] In fact, the entire purpose of anonymity is so that a tipster cannot be held accountable.[74] *White* is described as "[t]he most extreme case, before this one, in which an anonymous tip was found to meet"[75] the standard of

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[70] *J.L.*, 529 U.S. at 271.

[71] *Navarette,* 134 S. Ct. at 1692 (emphasis added) (Scalia, J., dissenting).
[72] *Id.*
[73] *Id.* at 1692 (Scalia, J., dissenting) ("The California Highway Patrol in this case knew nothing about the tipster on whose word—and that alone—they seized Lorenzo and José Prado Navarette. They did not know her name. They did not know her phone number or address. They did not even know where she called from (she may have dialed in from a neighboring county . . . .")).
[74] *Id.*
[75] *Id.* at 1693.

establishing "a particularized and objective basis for suspecting the particular person stopped of criminal activity."[76] Justice Scalia then recounted the facts of *White* in which much of the information was corroborated before the traffic stop while in *Navarette* corroboration was completely absent.[77] Four justices agreed that the new *Navarette* rule puts at least some anonymous tip cases outside the *White* - *J.L.* analysis continuum.

D. The Danger of Anonymous Nefarious Fabrications

In an Amicus brief filed in *Navarette* two examples of fraudulent anonymous tips were particularly disturbing.[78] Though both cases involved police misconduct, these calls could easily have been made by a private citizen.

In one case, a police officer called in a phony tip claiming that the mayor of the town was driving drunk.[79] After passing field sobriety tests, the mayor was released but went on his own to the local hospital for a blood test. His blood alcohol level was .02, well below the legal limit.[80] The false report resulting in the mayor's seizure was presumably made for political purposes.

In the second case, a police chief noticed the vehicle of a man he knew to have been convicted of driving while intoxicated parked at a bar.[81] What the police chief did not know was that the man had already called his wife to let her know he had too much to drink and would not

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[76] *Id.* (quoting United States v. Cortez, 449 U.S. 411, 417-18 (1981)).
[77] *Navarette,* 134 S. Ct. at 1693.
[78] Brief for National Association of Criminal Defense Lawyers and National Association of Federal Defenders as Amici Curiae in Support of Petitioners, Navarette v. California 134 S. Ct. 1683 (2014) (No. 12-9490), 2013 WL 6213276.
[79] *Id*. at 18.
[80] *Id*.
[81] *Id*. at 19.

be driving home right away.[82] The chief concocted a ruse in which he called the bar to report an emergency involving an ambulance at the man's home.[83] He then arranged for another officer to report an anonymous tip about a suspicious vehicle. On the basis of that tip the man was pulled over and convicted of driving over the legal limit.[84]

Both of hese episodes of fabrication appear to be precisely the danger Justice Ginsburg warned of in *J.L.*[85]

E. More Questions than Answers

The Court had before it the two cases cited above as well as many others. Nevertheless, it held that anonymous tips, at least as applied to reports of drunk driving, are inherently reliable when made via the 911 system by someone claiming to have been personally affected.[86] But does this presumption comport with the everyday experiences of most people? Even worse, is it now more difficult for officers to understand what is and is not constitutionally permissible? Is the essential element that the tip involves drunk driving, and is therefore related to behavior more dangerous than other criminal behaviors? Or is the essential element that the call came in to a 911 dispatcher rather than to the non-emergency police line?

Furthermore, why is a call to 911 presumed to be truthful? Consider one publicity-seeking father's fraudulent report that his child had been swept away in a helium balloon in the infamous

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[82] *Id*.
[83] *Brief for National Association of Criminal Defense Lawyers* at 19.
[84] *Id*.
[85] *J.L.*, 529 U.S at 272.
[86] *Navarette,* 134 S. Ct. at 1690-92.

case known as the "balloon boy" hoax, carried out despite the risk and ultimate outcome of criminal prosecution.[87] Could other motivations not give rise to false reports despite the illegality of such conduct?

All of these questions point to one central question: Where does *Navarette* fit within the *White – J.L.* spectrum? The Court seems to indicate that, given some possibility of identifying the caller, anonymous DUI tips are not fully anonymous under previous analysis. The Court carefully disavowed any intent to overturn either *White* or *J.L.*, but refers to those two cases as "useful guides."[88] Whether *Navarette* fits at all is something with which courts are now struggling.

III. CONFUSION ABOUNDS

A. How to Apply Navarette: State Supreme Court Confusion

Courts are already applying *Navarette* in mystifying ways. Some interpretations stand in stark contrast to one another, while others raise the question whether judges on the same court agree on what the new doctrine even is. Comments on this confusion appear in dicta and in concurring and dissenting opinions throughout our judiciary.

Evans v. Arkansas is one example.[89] An anonymous caller gave police the identity of a robbery suspect who could be found at a certain motel.[90] The police relied on the tip plus an

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[87] *TRANSCRIPT: Frantic 911 Call From Parents of 'Balloon Boy',* FOXNEWS (Oct. 16, 2009), *http://www.foxnews.com/story/2009/10/18/transcript-frantic-11-call-from-parents-balloon-boy.html* (last visited Dec. 27, 2015).
[88] *Navarette,* 134 S. Ct. at 1688.
[89] Evans v. Arkansas, 454 S.W.3d 744 (Ark. 2015).
[90] *Id*. at 746.

arrest warrant to enter the room, gather evidence, and make an arrest. The defendant argued "that an anonymous tip that was not corroborated or verified does not establish a reasonable belief."[91]

The Arkansas Supreme Court held that, in executing an arrest warrant, officers could not have formed a reasonable belief that the defendant was in a particular motel room based solely on an uncorroborated anonymous tip.[92] The Court then cited to *Navarette*, believing it held that "an anonymous tip, without a sufficient indicia of reliability, cannot provide a basis for finding reasonable suspicion to make a traffic stop."[93] While that quote is in *Navarette*, the context in which it was used by the *Evans* Court offers no support for its holding. Responding to this perceived mischaracterization of *Navarette*, Arkansas Chief Justice Jim Hannah pointed out that "because the majority's reference to *Navarette* will likely cause confusion, it should not be included in the opinion."[94] In a footnote, the majority attempted to redeem its use of *Navarette* by explaining its reasoning but that explanation was equally confusing.[95] The fact that justices on the same Court found it necessary to publicly debate their different understanding of *Navarette* within the opinion, concurrence, and footnote indicates just how severe the confusion is.

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[91] *Id.*
[92] *Id.* at 748.
[93] *Id.*
[94] *Evans* at 749-50 (Hannah, C.J., concurring).
[95] *Id.* at 751. ("The concurring opinion's attack on our citation of *Navarette* bears some explaining. The Navarette Court stated 'The indicia of the 911 caller's reliability here are stronger than those in *[Florida v.] J.L.* where we held that a bare-bones tip was unreliable. 529 U.S. [266] at 271 [120 S. Ct. 1375, 146 L.Ed.2d 254 (2000)]. Although the indicia present here are different from those we found sufficient in *White,* there is more than one way to demonstrate "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *[United States v.] Cortez,* 449 U.S. 411, 417–418 [101 S. Ct. 690, 66 L.Ed.2d 621 (1981)]. Under the totality of the circumstances, we find the indicia of reliability in this case sufficient to provide the officer with reasonable suspicion that the driver of the reported vehicle had run another vehicle off the road. That made it reasonable under the circumstances for the officer to execute a traffic stop.' Accordingly, the *Navarette* Court stated that more was required than a 'bare-bones tip.'").

Sitting en banc, Washington's highest court applied its understanding of *Navarette* in an even more confusing way in *State v. Z.U.E.*[96] A juvenile was convicted of unlawful possession of cannabis found during a search pursuant to a lawful arrest.[97] The initial stop of the vehicle in which the defendant was a passenger was examined in light of the doctrine explained in *Navarette*.

Multiple anonymous tips were made to 911 along with two calls from identified callers. The Court sought to determine "whether . . . the information provided by multiple 911 callers was reliable and sufficient to justify an investigatory *Terry* stop of the car in which the defendant was a passenger."[98] One caller gave a described an occupant of the vehicle, a minor reportedly carrying a gun.[99] The Court noted that a tip from someone named Dawn, "was made contemporaneous to the unfolding of the events, it came through an emergency 911 line rather than the police business line, and the caller provided her name and contact information. All these factors tend to bolster the reliability of the tip."[100]

Dawn further claimed that she witnessed the girl, whom she said was seventeen years old and in possession of a gun, giving the gun to the defendant.[101] The Court observed that the officers had little reason to doubt this caller's veracity.[102] Nevertheless, "because the caller did not offer any factual basis in support of that allegation, the officers could not ascertain how the caller

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[96] State v. Z.U.E., 352 P.3d 796 (Wash. 2015).
[97] *Id.* at 799.
[98] *Id.* at 613.
[99] *Id.* at 622.
[100] *Id.*
[101] *Z.U.E.*, 352 P.3d at 798.
[102] Id. at 802.

knew the girl was 17 rather than, say, 18 years old," and therefore no factual basis for the caller's conclusion of a crime was established.[103] That factor invalidated the *Terry* stop despite strong support of the caller's credibility in other areas.[104] Washington's Supreme Court appears to believe that the caller's claim in *Navarette*, that the driver had run her off the road, was the dispositive factor despite the officer's own observations. The Court seemed to disregard the facts upon which *Navarette* was decided when it wrote

> [i]n this case, the State can point to no observations supporting a reasonable suspicion of criminal activity. The officers themselves did not observe the female passenger with a gun, nor could they reasonably confirm the female's age prior to the stop. And because the officers never contacted any of the 911 witnesses, they were unable to establish whether the tips were obtained in a reliable manner.[105]

But this was also true in *Navarette*. The Washington Supreme Court, therefore, appears confused as to how *Navarette* relates to such a case.

Given that the highest courts in at least two states have found the application of *Navarette* so confusing, it comes as no surprise that the lower courts are also exhibiting similar confusion.

B. Misapplication: Lower Courts are Equally Confused

One Florida case, decided by the 4th Circuit Court sitting in its appellate capacity, demonstrates similar confusion. After a comprehensive discussion of *Navarette* the Court concluded "[r]ecent Supreme Court case law indicates that a traffic stop can be justified by

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[103] *Id.* at 802-03.
[104] *Id*. at 798.
[105] *Id.* at 802.

corroboration of an anonymous tip."[106] That is odd since the officer in *Navarette* did not corroborate the behavior reported to him. The *Smith* court demonstrated further confusion when it wrote that "[i]n the case at bar, the tipster's indication that Petitioner was driving erratically is not to the level of the tip in *Navarette*. For there is a distinct difference in being run off the road, and witnessing a person drive erratically."[107] Only the combination of the anonymous call and subsequent corroboration supported upholding the constitutionality of the traffic stop in *Smith*.[108] Without corroboration the Court would presumably have found the stop to violate the Fourth Amendment. Is this Court correct that *Navarette* applies only when the anonymous reporter was personally affected by the dangerous driving, and otherwise no report of recklessness will suffice?

Extent of Influence: Trial Court DUI Suppression Hearings

Even in the state trial courts the correct application of *Navarette* is confusing. One Brevard County, Florida judge applied *Navarette* to a case in which an anonymous caller reported that a car she observed "almost hit a number of traffic poles."[109] In relating the call to a patrol officer, the dispatcher gave the vehicle's make, model, and partial tag number with the report of the aberrant driving.[110] Unlike the *Smith* court, however, this court summarized *Navarette* as representing that "an anonymous tipster's report of reckless driving can provide the reasonable

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[106] Smith v. Dep't of Highway Safety and Motor Vehicles, 22 Fla L. Weekly Supp. 6a (Fla. Cir. Ct. 2014).
[107] *Id.*
[108] *Id.* ("[T]he anonymous tip and the deputy's observations give rise to reasonable suspicion . . .").
[109] Florida v. Clayton, 23 Fla. L. Weekly Supp. 382a (Fla. Brevard County Ct. 2015).
[110] *Id.*

suspicion [required] to conduct a stop" without requiring more.[111] The Court further observed, "While the degree of personal impact to the callers is different, the concern in the two situations is the same . . . that the vehicle was being driven in a manner that posed a significant risk of great harm to the motoring public."[112]

Thus two Florida courts at the county or circuit court levels hold different views of what *Navarette* actually stands for. Is there a "distinct difference in being run off the road, and witnessing a person drive erratically"[113] or is "the concern in the two situations . . . the same"? [114]

CONCLUSION

Perhaps the U.S. District Court for the Northern District of Maryland came as close as is presently possible to getting it right. In *United States v. Pollins*, the Court stated that "if *Navarette* was a 'close case,' and the tip in that case included several more indicia of reliability than the anonymous call at issue here, then the call in this case cannot on its own establish the reasonable suspicion necessary for a *Terry* stop."[115] Maybe it really is as simple as weighing the number of indicia of reliability in a case against those in *Navarette* and looking to see which way the scale tips.

But if it really is that simple the courts should not be ruling in such confusing ways. Uncertainty at all levels of the judiciary is obvious just from the few cases analyzed here. Does *Navarette* offer guidance for cases having nothing to do with suspected drunk driving? The

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[111] *Id.*
[112] *Id.*
[113] *Smith,* 22 Fla L. Weekly Supp. 6a.
[114] *Clayton,* 23 Fla. L. Weekly Supp. 382a.
[115] United States v. Pollins, 2015 WL 6940116 at *7 (D. Md. Nov. 9, 2015).

judges on the *Evans* court differed on that point. Are all indicia of reliability irrelevant if the anonymous caller fails to indicate a factual basis for how they came about their knowledge of illegality, as the *Z.U.E.* court seems to have believed? Or do officers need to observe the illegality reported by the tipster as the same court seemed to believe? The outcome in *Navarette* on that particular question was just the opposite.

Was Justice Scalia right in his view that the new rule allows for a traffic stop based on an anonymous tip of a single episode of reckless driving reported to a 911 dispatcher if the caller can say where the vehicle is located?[116] Must the caller report direct personal impact from the reported aberrant driving, or may the police conduct a stop where the same dangerous driving behavior affected other drivers and property but not the caller? Is impaired driving the only crime for which no corroboration is required or does the new rule apply to other crimes as well? And is it really true that "there a distinct difference in being run off the road, and witnessing a person drive erratically" as Florida's 4th Circuit Court believes? [117]

Clear answers must come from the United States Supreme Court itself. It is important to protect the public from drunk drivers. The police need to be able to act upon anonymous reports from concerned citizens. But is it asking too much of them to observe a suspect themselves for just a little while to corroborate the information reported? How much greater risk is involved if an officer takes a few extra minutes to follow a suspected drunk driver to ensure there was not a mere momentary distraction like an unruly child in a back seat? After all, the driver has already

[116] *Navarette*, 134 S. Ct. at 1692 (Scalia, J., dissenting).
[117] *Smith* 22 Fla L. Weekly Supp. 6a.

been on the road for a considerable period of time before the officer locates the vehicle, the identity of which she *does* have to verify.

Answering these questions is vital because it is not just the police, prosecutors, defense attorneys, and judges who need answers. Citizens need to know what the police can and cannot do to them. Factually positioning a case along a continuum such as the one delineated by *White* and *J.L.* may be challenging but it is easier than trying to decipher how the facts of a particular case comport with the holding in *Navarette*. Clarifying rulings are necessary to answer the questions posed here. The Supreme Court must act quickly to head off the emerging signs of confusion percolating in the judiciary over its unreasonably confusing holding in *Navarette*.

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