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Joshua Aberman

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**CULPABILITY THROUGH ANONYMITY: WHY
NAVARETTE v. CALIFORNIA VASTLY
LOWERS THE STANDARD FOR REASONABLE
SUSPICION BASED SOLELY ON
ANONYMOUS TIPS**

*Joshua Aberman**

I. INTRODUCTION

“Report Drunk Drivers, Call 911.” All California motorists, or at least those who pay attention to signs posted along the highway, are familiar with this simple message.¹ Beginning in 2007, the California Office of Traffic Safety began a series of driving under the influence (DUI) crackdown campaigns, prominently featuring these signs as a means of raising awareness of, and combating, drunk driving.² The goal behind these signs is a simple one: to encourage motorists who observe erratic driving behavior to report any suspected drunk drivers so that police can investigate and take appropriate action.³ Given the undeniably devastating effect that drunk driving wreaks upon families and communities alike, there is tremendous support for efforts to curtail and punish this destructive behavior.⁴

* J.D. Candidate, May 2015, Loyola Law School, Los Angeles; B.A. Sociology, University of California, Davis, 2010. Thank you to Professor Justin Levitt for his guidance and valuable feedback in preparing this Comment. Thank you to the members of the Loyola of Los Angeles Law Review for their hard work and dedication. A special thank you to my sister and personal editor-in-chief for her help. Finally, thank you to my parents and family for their unconditional support and encouragement.

1. *DUI Crackdown*, CAL. OFFICE OF TRAFFIC SAFETY, http://www.ots.ca.gov/media_and_research/Campaigns/2010_December_DUI_Crackdown/default.asp (last visited Aug. 6, 2014) (“How often have you seen someone driving down the road that you were pretty sure was drunk, or at least driving dangerously? Haven’t you said to yourself, ‘I wish a police officer was here to see this and pull this guy over!’ Now . . . you can do something to help get drunk drivers off the road.”).

2. *See Past Campaigns*, CAL. OFFICE OF TRAFFIC SAFETY, http://www.ots.ca.gov/Media_and_Research/Campaigns/Past_Campaigns/default.asp (last visited Aug. 6, 2014).

3. *DUI Crackdown*, *supra* note 1.

4. *Impaired Driving: Get the Facts*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Apr. 17, 2013), http://www.cdc.gov/motorvehiclesafety/impaired_driving/impaired-driv

However, while stopping drunk driving is a necessary pursuit, California's implementation of a system centered on encouraging motorists to report suspected drunk drivers is not a perfect one. While these tips may direct police to potential drunk drivers, they do not authorize the police to execute investigative stops, searches, or seizures that fail to comport with the requirements of the Fourth Amendment. In fact, the Fourth Amendment, which protects "against unreasonable searches and seizures,"⁵ is seriously undermined when police can justify a search based on nothing more than an uncorroborated tip, left anonymously,⁶ which may have been provided for a malicious reason such as to embarrass the target or to create a pretense to search for evidence of other crimes.⁷

Chief among these concerns, from a constitutional standpoint, is that individuals may avail themselves of the opportunity to report drunk drivers anonymously.⁸ The resulting problem, entirely distinct from the issue of drunk driving, is when, and under what circumstances, a police officer can pull a car over based on an anonymous tip. The United States Supreme Court confronted this issue during its 2013 term in *Navarette v. California*.⁹

In *Navarette*, a bare majority of the Supreme Court decided what it termed a "close case" and concluded that an anonymous tip reporting reckless driving gives police reasonable suspicion to pull over the identified car.¹⁰ On the other hand, the four dissenting

_factsheet.html ("Every day, almost 30 people in the United States die in motor vehicle crashes that involve an alcohol-impaired driver. This amounts to one death every 48 minutes. The annual cost of alcohol-related crashes totals more than \$51 billion.").

5. U.S. CONST. amend. IV.

6. *Public Information—Frequently Asked Questions*, CAL. OFFICE OF TRAFFIC SAFETY, http://www.ots.ca.gov/Media_and_Research/Campaigns/2008_December_DUI_Crackdown/Public_Information/FAQs.asp (last visited Sept. 29, 2014).

7. *E.g.*, Bradley Zint, *Private Eye Takes the 5th More Than 200 Times in Fake-DUI Case*, L.A. TIMES, Mar. 24, 2014, <http://www.latimes.com/local/lanow/la-me-ln-private-detective-dui-lawsuit-20140324-story.html> (detailing how a private detective falsely reported that a mayor was driving erratically and likely drunk); *Marin County Family Falls Victim To 'Swatting,' Hoax 911 Calls Become Growing Problem For Police*, CBS SF BAY AREA (Sept. 3, 2014, 8:01 PM), <http://sanfrancisco.cbslocal.com/2014/09/03/marin-county-family-falls-victim-to-swatting-hoax-911-calls-become-growing-problem-for-police-prank-fairfax-celebrities-kardashian-justin-bieber-ashton-kutcher/> (describing several incidents of hoax 911 calls in California).

8. *Public Information—Frequently Asked Questions*, *supra* note 6 ("[Q:] Do I have to give my name if I call to report a suspected drunk driver? [A:] No. You can remain anonymous." (emphasis removed)).

9. 134 S. Ct. 1683 (2014).

10. *Id.* at 1692.

Justices opined that the Court’s decision amounted to a “freedom destroying cocktail.”¹¹

Part II of this Comment discusses the factual background of *Navarette*. Part III considers the relevant legal background informing investigative stops and reasonable suspicion based on anonymous tips. Part IV sets forth the reasoning that the Court adopted in holding that the police officers’ investigative stop did not violate the Fourth Amendment because the officers had reasonable suspicion of an ongoing crime based on an anonymous tip. Part V questions the faulty reasoning and inconsistent application of precedent that forms the basis of the *Navarette* decision. Ultimately, Part VI concludes with the likely practical consequences of the *Navarette* decision, focusing on the probable expansion of police officers’ discretion to conduct investigatory stops based on anonymous tips at the cost of individuals’ Fourth Amendment rights.

II. FACTUAL BACKGROUND

On August 23, 2008, a 911 emergency dispatcher received a call from an anonymous¹² motorist.¹³ The motorist claimed that she had just been run off the road by a reckless driver.¹⁴ The motorist then supplied the 911 dispatcher with the make, model, and license plate number of the car.¹⁵ The 911 dispatcher passed this tip to a California Highway Patrol (CHP) police dispatcher, who recorded and broadcasted the message to police as “[s]howing southbound Highway 1 at mile marker 88, Silver Ford 150 pickup. Plate of 8–David–94925. Ran the reporting party off the roadway and was last seen approximately five [minutes] ago.”¹⁶

Based on this tip, a CHP officer responded to Highway 1 and located a silver truck, with a license plate matching the one reported

11. *Id.* at 1697 (Scalia, J., dissenting).

12. The caller actually identified herself by name in the 911 recording. *See id.* at 1687 n. 1 (majority opinion). However, the trial court and all subsequent reviewing courts treated the caller as anonymous because the 911 recording was not introduced into evidence during the suppression hearing, meaning that the caller’s identity was not part of the record. *Id.*; *see also* Garrett Epps, *Can an Anonymous Tip Get You Arrested for Drunk Driving?*, THE ATLANTIC (May 14, 2014, 9:00 AM), http://www.theatlantic.com/national/archive/2014/05/navarette/california/370803/?single_page=true (explaining why the 911 call was not introduced during the suppression hearing).

13. *Navarette*, 134 S. Ct. at 1686–87.

14. *Id.* at 1687.

15. *Id.* at 1686–87.

16. *Id.*

by the anonymous tipster, around thirteen minutes after the dispatch call, at mile marker 69.¹⁷ The CHP officer followed the truck for approximately five minutes.¹⁸ During this period, the operator of the truck did not drive erratically or perform any other vehicular maneuvers that would have given the surveilling police officers probable cause to pull over a motorist.¹⁹ Nevertheless, the officer pulled over the truck and was soon joined by a second officer who had separately responded to the broadcasted message.²⁰

When the two officers approached the truck, they smelled marijuana.²¹ The officers subsequently searched the vehicle and discovered thirty pounds of marijuana in the truck bed.²² As a result, the officers arrested the driver of the truck, Lorenzo Navarette, and his passenger and brother, José Navarette.²³

At trial, the Navarette brothers sought to suppress the evidence seized during the search of the truck. They argued the arresting officers pulled over the vehicle without the requisite reasonable suspicion of criminal activity that would have made the search reasonable within the meaning of the Fourth Amendment.²⁴ The trial judge rejected this argument and admitted the seized marijuana into evidence.²⁵ The Navarette brothers pleaded guilty to transporting marijuana and received a sentence of ninety days in jail and three years of probation.²⁶ The California Court of Appeal affirmed the trial court's determination as to the marijuana's admissibility and the Navarette brothers' subsequent sentencing.²⁷ The California Supreme Court declined to review the case and the United States Supreme Court granted certiorari.²⁸

17. *Id.* at 1687.

18. *Id.*

19. *See id.* at 1687; *id.* at 1696 (Scalia, J., dissenting) (noting that the driving during the five minutes of surveillance was "irreproachable" and that the officers did not witness a single traffic law violation).

20. *Id.* at 1687 (majority opinion).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *People v. Navarette*, No. A132353, 2012 WL 4842651 (Cal. Ct. App. Oct. 12, 2012), *aff'd*, 134 S. Ct. 1683 (2014).

28. *Navarette*, 134 S. Ct. at 1687.

III. LEGAL BACKGROUND

The Supreme Court began its analysis with a holding first articulated in its seminal decision *Terry v. Ohio*,²⁹ and subsequently developed by numerous cases: “in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”³⁰ This standard, which is commonly referred to as reasonable suspicion,³¹ is determined under the totality of the circumstances³² and “is dependent upon both the content of information possessed by police and its degree of reliability.”³³

These general principles governing *Terry* stops are particularly important in cases where the reasonable suspicion for the *Terry* stop is justified by an anonymous tip. The Court’s jurisprudence in this area is buttressed by two guidepost decisions determining whether an anonymous tip can provide reasonable suspicion: *Alabama v. White*³⁴ and *Florida v. J.L.*³⁵

In *White*, a divided Court held that an anonymous tip provided police officers with reasonable suspicion to conduct an investigative stop. The *White* tipster predicted that a woman named Vanessa White would leave a certain apartment building at a particular time, driving a distinct brown, Plymouth station wagon with a broken tail light, en route to a local motel, and carrying a brown attaché containing cocaine.³⁶ The officers placed Ms. White under surveillance and confirmed almost all of the detailed predictions of the anonymous tip.³⁷ The Court found it significant that the tipster was able to predict the future actions of a third party, ultimately

29. 392 U.S. 1, 21 (1968).

30. *Id.* The *Navarette* Court relied on a slightly different phrasing of this principle: “a particularized and objective basis for suspecting the particular person stopped of criminal activity.” 134 S. Ct. at 1687 (citing *United States v. Cortez*, 449 U.S. 411, 417–18 (1981)).

31. *See* Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 217–23 (1983).

32. *Cortez*, 449 U.S. at 417.

33. *Alabama v. White*, 496 U.S. 325, 330 (1990).

34. *Id.*

35. 529 U.S. 266 (2000).

36. *White*, 496 U.S. at 327.

37. *Id.* The Court noted that the officers did not corroborate every part of the tip, such as the name of the woman, but did corroborate the majority of the tipster’s predictions. *See id.* at 331.

holding that “the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify [an] investigatory stop.”³⁸

On the other hand, in *J.L.*, a unanimous Court held that an anonymous tip did not provide reasonable suspicion for an investigatory stop.³⁹ The anonymous tipster in *J.L.* reported that a young black male would be standing at a particular bus stop, wearing a plaid shirt, and carrying a gun.⁴⁰ The Court held that this tip lacked the indicia of reliability present in *White*.⁴¹ Specifically, the Court primarily focused on the lack of a predictive assertion revealing the tipster’s special familiarity with the suspect, and subsequent police corroboration of the tip, which failed to sufficiently justify the police’s investigatory stop.⁴² Furthermore, the Court expressly refused to find that the anonymous tip was reliable based on the tip’s description of readily observable information regarding location and appearance because such information does not reveal how a tipster has knowledge of concealed criminal activity.⁴³

IV. THE REASONING OF THE COURT

A. Majority Opinion

Writing for the *Navarette* majority,⁴⁴ Justice Thomas began his analysis of the anonymous tip’s reliability by observing that the anonymous informant, by virtue of claiming that she was run off the road, possessed eyewitness knowledge of the alleged reckless driving.⁴⁵ This first-hand knowledge entitled the tip to increased reliability.⁴⁶ Furthermore, the majority reasoned that this knowledge made the reliability of the anonymous tipster stronger than that of the

38. *Id.* at 332. For a discussion criticizing the *White* Court’s decision to find reasonable suspicion based on an anonymous tip, see Orrin S. Shifrin, *Fourth Amendment—Protection Against Unreasonable Search and Seizure: The Inadequacies of Using an Anonymous Tip to Provide Reasonable Suspicion for an Investigatory Stop*, 81 J. CRIM. L. & CRIMINOLOGY 760 (1991).

39. *Florida v. J.L.*, 529 U.S. 266, 268 (2000).

40. *Id.*

41. *Id.* at 271.

42. *Id.* at 272–74.

43. *Id.* at 272.

44. Justice Thomas was joined by Chief Justice Roberts and Justices Breyer, Alito, and Kennedy.

45. *Navarette*, 134 S. Ct. at 1689.

46. *Id.* (citing *Illinois v. Gates*, 462 U.S. 213, 234 (1983) (“[An informant’s] explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case.”)).

tipster in either *White* or *J.L.* because the police officers definitively knew how the *Navarette* tipster allegedly came to acquire her information.⁴⁷ And, as with both cases, the detaining police officer was able to corroborate the tip's factual assertions as to the car's defining characteristics and approximate location.⁴⁸

Additionally, the majority relied on principles of evidentiary admissibility to hold that the tip was reliable.⁴⁹ The Court looked to the timeline of events to infer the approximate time of the near-accident and concluded that the account of the accident given during the 911 call amounted to either a present sense impression or an excited utterance.⁵⁰ These types of statements are considered more reliable than most other out-of-court statements.⁵¹ Moreover, the Court reasoned that the fact that the call was placed to 911, which allows for recording, identifying, and tracing calls, ameliorates the potential for abuses of anonymous tips and increases the reliability of reports placed into such a system.⁵²

The Court next looked to whether the tip created reasonable suspicion of ongoing criminal activity so as to justify an investigative stop under *Terry*.⁵³ Therefore, the court was confronted with the issue of whether the tip, which described precisely one incident of reckless driving and contained no express assertion of drunk driving, created "reasonable suspicion of an ongoing crime such as drunk driving."⁵⁴ While noting that not all traffic violations imply intoxication, the Court relied on data analyzing symptoms of drunk driving to conclude that an allegation of weaving or driving over a center median line implies drunkenness.⁵⁵ The Court then reasoned that the allegation that the informant had been run off the road was the type of conduct that "bears too great a resemblance to paradigmatic manifestations of drunk driving" because it "suggests

47. *Navarette*, 134 S. Ct. at 1688–89.

48. *Id.*

49. *Id.* at 1689–90.

50. *Id.* at 1689.

51. *Id.* (citing FED. R. EVID. 803(1), 803(2)).

52. *Id.* at 1689–90.

53. *Id.* at 1690–92.

54. *Id.* at 1690.

55. *Id.* at 1690–91. The Court relied on "the accumulated experience of thousands of officers" to determine which types of "erratic behaviors are strongly correlated with drunk driving." *Id.* at 1691 (citing NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., THE VISUAL DETECTION OF DWI MOTORISTS 4–5 (Mar. 2010), available at <http://nhtsa.gov/staticfiles/nti/pdf/808677.pdf>).

lane-positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues.”⁵⁶ In reaching this conclusion, the Court expressly found that the fact that the police officers had not personally observed any driving behaviors associated with drunk driving, which undermines rather than corroborates the anonymous tip, did not invalidate the officer’s reasonable suspicion to conduct an investigative stop.⁵⁷

The Court concluded that while this was a “close case,” the anonymous tip had sufficient indicia of reliability such that, under the totality of the circumstances, the police officers had reasonable suspicion to execute an investigative stop.⁵⁸ As a result, the Supreme Court affirmed the California Court of Appeal and ruled the evidence collected during the traffic stop admissible.⁵⁹

B. Dissent

Writing for the dissenting Justices,⁶⁰ Justice Scalia emphatically argued that the anonymous tip that was the subject of the case could not possibly give rise to reasonable suspicion under *Terry*, *White*, or *J.L.* Instead, the dissent argued, the majority opinion adopted a position accepted by several other courts⁶¹ but never by the Supreme Court: that an anonymous and uncorroborated tip regarding a possibly intoxicated driver provides reasonable suspicion for an investigative stop.⁶²

Principally, the dissent strongly questioned the majority’s reliance on *White*.⁶³ The only predictive value of the *Navarette* tip that could have aided the police in assessing the anonymous informant’s reliability was that a silver truck would be heading south on Highway 1. This falls far short of the predictive tip in *White*, which revealed to the police officers that the anonymous informant had a basis for knowing the otherwise unobservable fact that Ms. White would be carrying contraband.⁶⁴ Instead, the description

56. *Id.* at 1691.

57. *Id.* (citing *United States v. Arvizu*, 534 U.S. 266, 275 (2002)).

58. *Id.* at 1692.

59. *Id.*

60. Justice Scalia was joined by Justices Ginsburg, Sotomayor, and Kagan.

61. *E.g.*, *United States v. Wheat*, 278 F.3d 722, 729–30; *People v. Wells*, 136 P.3d 810, 814 (Cal. 2006); *State v. Walshire*, 634 N.W.2d 625, 626–27, 630 (Iowa 2001).

62. *Navarette*, 134 S. Ct. at 1692 (Scalia, J., dissenting).

63. *Id.* at 1693.

64. *Id.*

of the truck and its direction on the highway was information that would have been immediately discernible to anyone observing the truck.⁶⁵ It provided no basis to conclude that the tipster possessed familiarity with the truck driver's personal affairs such that the police could reasonably believe the informant had a basis for the assertion of illegal activity.⁶⁶

Next, the dissent criticized the majority for relying on the fact that the anonymous tip qualified as a present sense impression or an excited utterance, making the statements more reliable as a matter of evidentiary law.⁶⁷ The dissent pointed out that the tip likely lacked the immediacy necessary to qualify as a present sense impression or an excited utterance because a significant amount of time necessarily passed between the near-accident and its anonymous report.⁶⁸ Moreover, because it was attributed to an anonymous source, the tip was significantly less likely to enjoy the presumption of reliability that normally attaches to either present sense impressions or excited utterances.⁶⁹ Additionally, the dissent argued that the fact that the statement was placed to 911, and thus was recorded, did not affect the reliability of the information, particularly where the informant was unaware that her call was being recorded and could later be traced and identified.⁷⁰

Furthermore, the dissent highlighted that the anonymous tip did not contain an actual report of drunk driving, instead describing a single instance of reckless driving.⁷¹ Because the standard required to justify an investigative stop is evidence of ongoing criminal activity, the dissent argued that a report of a single incident of careless or reckless driving, explainable by any number of reasons,⁷² fell far short of asserting ongoing criminal activity.⁷³

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 1694 (citing 2 K. BROUN, MCCORMICK ON EVIDENCE 362, 367–69 (7th ed. 2013) [hereinafter MCCORMICK] (“There is no such immediacy here. The declarant had time to observe the license number of the offending vehicle, . . . to bring her car to a halt, to copy down the observed license number (presumably), and (if she was using her own cell phone) to dial a call to the police from the stopped car. Plenty of time to dissemble or embellish.”)).

69. *Id.*

70. *Id.*

71. *Id.* at 1695.

72. The dissent points to use of a cell phone, an intense sports argument, personal animus based on a “Make Love, Not War” bumper sticker, carelessness, and recklessness as equally

Finally, the dissent pointed to the police officer's decision to follow the Navarettes' silver truck for five minutes, ostensibly for the purpose of confirming reckless driving, as the final blow to any credible assertion that the police officers possessed reasonable suspicion of an ongoing crime.⁷⁴ While lauding this as good police work, the dissent asserted that the police officer's failure to identify any traffic violations within the surveillance period meant that the anonymous tip was not just uncorroborated, but actively undermined.⁷⁵ Therefore, because a drunk driver possesses no ability to "turn off" the symptoms of drunk driving, the police officer's failure to observe any behavior consistent with driving while intoxicated foreclosed the possibility of any reasonable suspicion of drunk driving.⁷⁶ Thus, the dissent would have held that the investigative stop of the car was unconstitutional.⁷⁷

V. ANALYSIS

This Comment will analyze the majority's faulty logic in two main contexts: first, in finding reliability based on a tip's contents qualifying as a hearsay exception, and second, in overstating the importance of the tip's permanent recording. Next, this Comment will evaluate *Navarette* as an application of *J.L.*, rather than as a minimization of *White*'s predictive tip requirement. Finally, it will examine how lower courts are likely to interpret and apply *Navarette* to future cases involving anonymous tips.

A. *The Navarette Decision Was Premised on Faulty Reasoning*

1. Evidentiary Rules of Trial Admissibility Should Not Inform the Determination of an Officer's Reasonable Suspicion

As a matter of evidentiary law, the rule against hearsay requires that out-of-court statements be excluded at trial when offered for their truth.⁷⁸ An exception to this general exclusionary rule attaches when the statement is a present sense impression or an excited

likely reasons for the Navarettes' driving behavior which caused the anonymous informant to be run off the road. *Id.*

73. *Id.* at 1695–96.

74. *Id.* at 1696–97.

75. *Id.* at 1696.

76. *Id.*

77. *See id.* at 1697.

78. FED. R. EVID. 801(c); MCCORMICK, *supra* note 68, at 182–83.

utterance, under the rationale that the declarant has not had the necessary time to fabricate a lie.⁷⁹ The *Navarette* dissent makes strong points regarding the tip's likelihood of not being sufficiently immediate to qualify under either of these exceptions.⁸⁰ It also raises serious concerns about whether statements that may be classified as excited utterances or present sense impressions, but for the fact that they were said anonymously, are entitled to the same presumption of reliability.⁸¹

However, one fundamental question must be asked preliminarily: Why look to hearsay exceptions to inform the reliability of an anonymous tip for purposes of the Fourth Amendment? The evidentiary admissibility of an anonymous tip only comes into play if police officers act on the anonymous tip, discover evidence of illegal activity, charges are brought by a prosecutor, and a judge rules the evidence admissible because it was collected during a search that was consistent with the Fourth Amendment. Then, and only then, is a trial held where the tip, as an out-of-court statement, may be offered for its truth. Duplicating the evidentiary exception relevant at trial as the indicia of Fourth Amendment compliance in investigative stops might intuitively seem like a good idea because it creates consistency in what is "reliable," but in fact, such a procedure commits the logical fallacy of circular reasoning.

While it is true that the totality of the circumstances must be considered to assess the reliability of an anonymous tip, the rationale for admitting present sense impressions or excited utterances—that there has been no time to fabricate a lie—is not at all relevant as an indicia of reliability.⁸² The Fourth Amendment asks whether an anonymous tip contains sufficient indicia of reliability to support "a particularized and objective basis for suspecting the particular person stopped of criminal activity," rather than the likelihood that the informant fabricated information.⁸³ The required indicia of

79. FED. R. EVID. 803(1) (defining a present sense impression as "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it"); *id.* at 803(2) (defining an excited utterance as "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused").

80. *Navarette*, 134 S. Ct. at 1693–94 (Scalia, J., dissenting).

81. *Id.* at 1694 (citing MCCORMICK, *supra* note 68, at 367–69).

82. *See* FED. R. EVID. 401; *see* FED. R. EVID. 402.

83. *United State v. Cortez*, 449 U.S. 411, 417–18 (1981); *see* *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968).

reliability⁸⁴ has never previously been informed by whether the tip ultimately turned out to be true.⁸⁵ If that were not the case, then the proper method of analysis would simply ask whether the tip turned out to be true and then retroactively deem it reliable or unreliable based on that result.

However, ultimate truth is the only point on which a present sense impression or excited utterance is more reliable than other out-of-court statements in the context of admissibility; these types of spontaneous statements are generally considered to be more reliable because there has been insufficient time to fabricate them.⁸⁶ Ultimate truth neither gives police reason to believe that the informant himself is more reliable nor provides an anonymous tip with sufficient indicia of reliability to give rise to reasonable suspicion. This is necessarily true because a determination as to an anonymous tip's ultimate truth can only be made after police have already acted based on the tip, but reasonable suspicion must exist prior to such action.

Navarette ignores this logic entirely. Instead, under *Navarette*, an investigative stop is justified because an anonymous tip qualified as an excited utterance or present sense impression and, if evidence of a crime is subsequently uncovered, an individual will be prosecuted based on a seizure that did not comply with the Fourth Amendment, thus completing the circular reasoning loop.

Additionally, to the extent that reasonable suspicion requires a police officer to specifically articulate the grounds for his belief of ongoing criminal activity, evidentiary rules are wholly irrelevant.⁸⁷ A tip is usually conveyed to a police officer through the combination of a 911 dispatcher and a police dispatcher.⁸⁸ It is highly improbable that a police officer, hearing a dispatcher's report, would think, much less have sufficient information to conclusively determine, that an anonymous tip is sufficiently credible because it appears to recount a

84. See Part V.B, *infra*.

85. In *J.L.* it did not matter that the defendant was actually found carrying a gun, and in *White* it did not matter that the defendant was actually in possession of cocaine. See generally *Florida v. J.L.*, 529 U.S. 266 (2000); *Alabama v. White*, 496 U.S. 325 (1990). Indeed, *Navarette* held that the police officer possessed reasonable suspicion despite the fact that the defendant was not ultimately driving while intoxicated. See *Navarette*, 134 S. Ct. at 1687.

86. *Idaho v. Wright*, 497 U.S. 805, 820 (1990) ("The basis for the 'excited utterance' exception, for example, is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation . . ."); MCCORMICK, *supra* note 68, at 365.

87. See *Terry*, 392 U.S. at 21–22.

88. See *Navarette*, 134 S. Ct. at 1686–87.

very recent event, possibly while the tipster is still in an excited state.⁸⁹ As such, the applicability of a hearsay exception could not, and should not, influence the determination of an anonymous tip's reliability.

2. The *Navarette* Court Created a Per Se Rule Allowing for Reasonable Suspicion Based on Anonymous 911 Reports of Moving Violations

The *Navarette* Court listed several laws and regulations that allow individuals to listen to a false tipster's voice and subject him or her to prosecution, and concluded that this increased the veracity of a tipster's claims.⁹⁰ In so doing, the Court purported not to create a new exception to 911 calls, claiming that "[n]one of this is to suggest that tips in 911 calls are *per se* reliable."⁹¹ However, the very next line of the opinion admits that "a reasonable officer could conclude that a false tipster would think twice before using such a system."⁹²

Therefore, the Court's reasoning can be applied to any recorded call, 911 or otherwise, and such a call may be used as the basis for a police officer's reasonable suspicion.⁹³ Going forward, by way of analogy to *Navarette*, the Court created a *per se* rule recognizing anonymous tips reported through 911 as sufficiently reliable to provide an officer with reasonable suspicion, while expressly purporting not to.

Additionally, even the most reliable tip only justifies an investigative stop when it creates reasonable suspicion that ongoing criminal activity may be afoot.⁹⁴ Therefore, in the context of a 911 phone call reporting suspected drunk driving, the content of the tip must describe behavior that reasonably leads a police officer to

89. Compare *id.* (transcribing the dispatchers as: "[s]howing southbound Highway 1 at mile marker 88, Silver Ford 150 pickup. Plate of 8-David-94925. Ran the reporting party off the roadway and was last seen approximately five [minutes] ago"), with FED. R. EVID. 803(1) (requiring a statement nearly contemporaneously with observance), and FED. R. EVID. 803(2) (requiring a statement made under the stress of excitement of the event).

90. *Navarette*, 134 S. Ct. at 1689–90 (citing 47 CFR § 20.18(d)(1) (2013); CAL. PENAL CODE § 148.3 (West 2014); *id.* § 653x (West 2010)).

91. *Navarette*, 134 S. Ct. at 1690.

92. *Id.*

93. See *id.* at 1694 n.2 (Scalia, J., dissenting) ("The Court's discussion of reliable 911 traceability has so little relevance to the present case that one must surmise it has been included merely to assure officers in the future that anonymous 911 accusations—even untraced ones—are not as suspect (and hence as unreliable) as other anonymous accusations. That is unfortunate.")

94. See *Terry*, 392 U.S. at 30.

believe that a motorist is driving while intoxicated. To aid in its determination of which behavior is consistent with drunk driving, the Supreme Court looked to a study by the National Highway Traffic Safety Administration (NHTSA).⁹⁵

The NHTSA study identified four principal categories of driving behaviors which suggest a motorist is driving under the influence: (1) problems in maintaining proper lane positioning; (2) speed and braking problems; (3) vigilance problems; and (4) judgment problems.⁹⁶ More specifically, the study identifies behavior such as weaving, wide turns, near collisions, driving too quickly, driving too slowly, responding slowly to traffic signals, failure to signal, following too closely, and unsafe lane changes, among many others, as examples of behavior that predicts drunk driving at a statistical confidence rate of between 35 and 90 percent.⁹⁷

Of course, reasonable suspicion for an investigative stop requires far less than certainty of illegal activity.⁹⁸ While the Court has never placed an exact percentage on how certain officers must be, *Navarette* expressly endorses the NHTSA's findings of driving behaviors that predict drunk driving at confidence intervals as low as 35 percent. It follows, then, that a police officer who receives an anonymous report complaining of any of the more than twenty driving behaviors identified in the NHTSA study can pull over the identified car on suspicion of drunk driving.⁹⁹

As a result of the broad array of behavior that suggests drunk driving, almost any report of less-than-ideal driving, even absent an assertion that the tipster believes the offending driver is indeed drunk, will give police the necessary reasonable suspicion to execute an investigative stop. This result, enabled by the logic and holding of the *Navarette* decision, is repugnant to any traditional concept of freedom from unreasonable searches and seizures.¹⁰⁰

95. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *supra* note 55, at 4–5.

96. *Id.* at 4.

97. *Id.* at 5.

98. *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

99. *See* NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *supra* note 55, at 5.

100. *See* U.S. CONST. Amend. IV; *see also Navarette*, 134 S. Ct. at 1692 (Scalia, J., dissenting) (“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. This is not my concept, and I am sure would not be the Framers’, of a people secure from unreasonable searches and seizures.”).

B. Navarette Is Significantly More Analogous to J.L. than to White.

The facts of *Navarette* are difficult to distinguish from those of *Florida v. J.L.*¹⁰¹ At best, the greatest distinction is that the tipster in *J.L.* did not explain how he knew that the black male had a gun,¹⁰² while the *Navarette* tipster had personal knowledge of reckless driving because she was allegedly run off the road.¹⁰³ However, both tips contained only factual assertions as to easily observable details of the subject to be searched—the black male in *J.L.* and the silver truck in *Navarette*—and did not predict any future activity that necessarily suggested personal knowledge that could be the basis for reliability.¹⁰⁴ The most that could be said of the predictive value of the *Navarette* tip, which was not articulated by the *Navarette* tipster but was instead inferred from her story, was where along the Highway the police could expect to find the offending driver.¹⁰⁵

Nevertheless, the *Navarette* Court concluded that the case presented a situation more similar to *White* than to *J.L.*¹⁰⁶ However, the *White* tip predicted future activity that was not readily observable or otherwise knowable to someone who did not have personal knowledge of the activities described within the tip.¹⁰⁷ In contrast, the *Navarette* tip shares nothing more with the *White* tip than that each tip described a car with sufficient specificity for police to identify the vehicle on the road. Such a description, alone, would not have previously risen to the level of reliability and predictive content necessary to support reasonable suspicion for an investigate stop. Therefore, at least in the context of reports of erratic driving, *Navarette* represents a tremendous expansion of police power to detain and investigate the purported subject of an anonymous tip.¹⁰⁸

101. 529 U.S. 266 (2000).

102. *Id.* at 271.

103. *Navarette*, 134 S. Ct. at 1689. For a more detailed discussion of the connection between one instance of reckless driving and suspicion of the ongoing crime of drunk driving, see Part V.A.2, *supra*.

104. *See J.L.*, 266 U.S. at 268–69; *see Navarette*, 134 S. Ct. at 1686.

105. *See Navarette*, 134 S. Ct. at 1686–87.

106. *See id.* at 1692 (“Like *White*, this is a ‘close case.’”).

107. *Id.* at 1688.

108. *Navarette* does not represent the first time the Court has inconsistently applied exceptions in the arena of DUI investigations. *Compare Mich. Dept. of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (holding that a suspicionless DUI checkpoint is constitutional), *with City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000) (holding that a suspicionless drug checkpoint is unconstitutional).

C. Predicting the Future After *Navarette*

As a practical reality, the Court's decision in *Navarette* will have broad-sweeping consequences for reasonable suspicion based on anonymous tips. In arguing the case, California's primary position was that the governmental interest in stopping drunk driving and protecting citizens was so great that the reasonable suspicion required to justify an investigative stop was necessarily lower than in other cases.¹⁰⁹ Notably, both the majority and dissenting opinions in *Navarette* wholly omitted any discussion of this position.¹¹⁰

While a cursory reading of the opinion might suggest that the Court implicitly rejected California's argument for an augmented balancing test, a more in-depth examination reveals that California, and by extension all state and federal governments, got far more than what they argued for in their brief.¹¹¹

As discussed in Section V.A.1, the Court found that a tip containing either a present sense impression or excited utterance is inherently reliable. And as discussed in Section V.A.2, the Court also reasoned that a tip recorded through 911 is more reliable because the call can be traced back to the tipster, and a false tip might subject him to criminal liability. In sum, these two justifications amount to an easy-to-satisfy formula for finding reasonable suspicion based on anonymous tips because most reports of emergencies are placed through 911 and describe events that took place recently enough to qualify, under *Navarette*, as present sense impressions or excited

109. Respondent's Brief On The Merits at 10, *Navarette v. California*, 134 S. Ct. 1683 (2014) (No. 12-9490), 2013 WL 6673706, at *10, available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/12-9490_resp.authcheckdam.pdf (“[T]he importance of the governmental interest is an indispensable component of reasonableness balancing.”). Indeed, the Argument section of California's brief consists of six sections, the point headings for four of which contain the phrase “governmental interest.” *Id.* at ii–iii. California's position was supported by the United States, thirty-two other states and the District of Columbia. Brief for the United States as Amicus Curiae Supporting Respondent at 19–25, *Navarette v. California*, 134 S. Ct. 1683 (2014) (No. 12-9490), 2013 WL 6805695, at *19–25; Brief of Florida, 31 other states, and the District of Columbia as Amici Curiae in Support of the Respondent, State of California at 21–24, *Navarette v. California*, 134 S. Ct. 1683 (2014) (No. 12-9490), 2013 WL 6805695, at *21–24.

110. See generally *Navarette v. California*, 134 S. Ct. 1683 (2014).

111. The Court appeared motivated to provide a clear rule for law enforcement officers, which had previously been missing in cases involving DUI stops. *E.g.*, *Missouri v. McNeely*, 133 S. Ct. 1552, 1569 (2013) (Roberts, C.J., concurring in part and dissenting in part) (“But the circumstances in drunk driving cases are often typical, and the Court should be able to offer guidance on how police should handle cases.”). The same judges that did not fully join the majority opinion in *McNeely* joined the majority in *Navarette*. *Id.* at 1556.

utterances. This formula can be satisfied in multiple scenarios beyond drunk driving, including situations where the governmental interest may not be as high, or where such interest is radically different from the interest of protecting the public's safety by eliminating drunk driving.¹¹² Instead, the governmental interest in responding to 911 calls supplants the governmental interest intimated by the factual circumstances of the particular emergency reported within the call, and satisfies the reasonable suspicion requirement in one step.

In today's day and age of mass data storage, nearly all 911 calls are recorded and, in most states, copies of all emergency calls are even made available to the public.¹¹³ Because of such laws, after *Navarette* there is no doubt that a police officer can constitutionally act on any tip placed with 911, so long as the tip provides some reason to believe that any criminal activity is ongoing.¹¹⁴ Simply put, the Fourth Amendment requires more before police officers may constitutionally initiate a search and seizure.

VI. CONCLUSION

The Supreme Court's holding in *Navarette* allows police to constitutionally perform an investigative stop in situations where they previously would not have had reasonable suspicion to do so. Going forward, with this precedent in mind, police will almost always be justified in deciding to pull over a motorist to investigate an anonymous report of drunk driving. The "evil" of this result is not immediately apparent. After all, no police officer or judge wants to explain to a grieving mother that her son was killed by a drunk driver

112. At oral argument, the Court spent considerable time discussing hypotheticals involving anonymous tips describing a bomb or a kidnapped girl. *E.g.*, Transcript of Oral Argument at 17–20, *Navarette v. California*, 134 S. Ct. 1683 (2014) (No. 12-9490). In particular, Chief Justice Roberts expressed doubt about a rule in *Navarette* that would limit police officer's ability to constitutionally act on anonymous tips dealing with such important subjects. *Id.*

113. See *State Laws Relating to Confidentiality of 9-1-1 Call Recordings and Photographs of Emergency Scenes*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/telecommunications-and-information-technology/confidentiality-of-911-call-recordings.aspx> (last updated Dec. 27, 2013) (surveying state law and concluding that only twelve states place restrictions on 911 call recordings).

114. Although the foundation for such a rule had been laid since as early as *J.L.*, the Court had never previously authorized such an exception to the reasonable suspicion requirement of a *Terry* stop. See *Florida v. J.L.*, 529 U.S. 266, 274–76 (2000) (Kennedy, J., joined by Roberts, C.J., concurring) (opining that an anonymous tip is reliable when an anonymous informant places his identity at risk through a voice recording).

because, despite an anonymous tip reporting the motorist as a potential drunk driver, the police officer was constitutionally restricted to following the vehicle until he personally observed erratic driving behavior that would justify an investigative stop. The *Navarette* rule serves to protect the son's life, whether he is the drunk driver that is the subject of the anonymous tip or the innocent victim, by allowing police to immediately stop a car that was the subject of an anonymous tip.

Instead, the "evil" of *Navarette*—the previously impermissible incursion into Fourth Amendment rights—lies in the logic by which the Court reached its decision. The Court's reasoning is unlikely to influence police in the line of duty who can premise an investigatory stop on the most minor of moving violations, including failure to show a turn signal and driving too quickly or too slowly.¹¹⁵ On the other hand, *Navarette* will be tremendously influential to the trial and magistrate judges who are tasked daily with assessing the constitutionality of police officers' actions. The signal to them is clear: police always have reasonable suspicion to conduct a *Terry* stop based on an anonymous report of subpar driving behavior.

More dire still, an anonymous tip left through 911 that provides information regarding ongoing criminal activity—DUI-related or not—must now be given a presumption of reliability because the 911 call is recorded. As such, *Navarette* portends to recreate and significantly lower the standard by which all anonymous tips are deemed to give rise to reasonable suspicion justifying a police investigative stop. The inevitable effect is that all American citizens are less secure in their Fourth Amendment right to freedom from unreasonable searches and seizures.

115. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *supra* note 55, at 4–5.