No. 08-_____

081385 MAY 7 - 2009

In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

JOSEPH A. MOSES HARRIS, JR.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a law enforcement officer receives a detailed anonymous tip that a driver is driving drunk or dangerously, what degree of corroboration is required for the officer to make a valid *Terry* stop?

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Virginia Attorney General William C. Mims, on behalf of the Commonwealth of Virginia, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Supreme Court of Virginia.

INTRODUCTION

This Petition concerns whether the Fourth Amendment requires suppression of evidence obtained when law enforcement receives a detailed anonymous tip that a driver is driving drunk or otherwise dangerously. When confronted with this situation, the overwhelming majority of the States and one federal circuit distinguish the framework this Court applied in *Florida v. J.L.*, 529 U.S. 266 (2000), and hold that a stop based on an anonymous tip is proper if the innocent details of the call are promptly corroborated. The court below, along with a few other courts, mechanically apply the *J.L.* framework and invalidate the stop unless the anonymous tip contains "predictive" information or the officer observes dangerous driving behavior that corroborates the anonymous tip. The Court should grant the petition to resolve a deep and mature conflict among the lower courts concerning a recurring issue of significant practical importance.

OPINIONS BELOW

The decision of the Supreme Court of Virginia is published as *Harris v. Commonwealth*, 668 S.E.2d 141 (Va. 2008). It is reprinted in the Appendix at 1-20. The decision of a panel of the Court of Appeals of Virginia is unpublished, *Harris v. Commonwealth,* Record No. 2320-06-2 (Va. Ct. App. 2008). It is reprinted in the Appendix at 21-33.

JURISDICTION

The decision of the Supreme Court of Virginia was issued on October 31, 2008, and that court denied rehearing on February 6, 2009. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the Constitution of the United States, U.S. Const. amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

1. On December 31, 2005, around 6:30 a.m., while it was still dark, City of Richmond police received an anonymous telephone call that "there was a[n] intoxicated driver in the 3400 block of Meadowbridge Road, [who] was named Joseph Harris, and he was driving [a green] Altima, headed south, towards the city, possibly toward the south side." *App.* 2, 22. The caller reported a partial license plate number, "Y8066" and indicated that Harris was wearing a striped shirt.[1] *App.* 2. A police officer quickly located a green Altima traveling south on Meadowbridge Road, with the license plate number "YAR-8046." The car was driving within the posted speed limit. *App.* 2.

2. The officer observed Harris slow down at an intersection, as though he planned to stop, even though he had the right of way at the intersection. *App.* 2. The officer also observed Harris, who was driving around 25 miles per hour, slow down well in advance of a red light. Harris's brake lights went out as the car continued to move forward, and then came on again when the car stopped. *App.* 3, 23. Perhaps realizing that he was being followed by a police officer, Harris pulled his car over and stopped of his own accord. The officer then pulled behind Harris's

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[1] The written suppression motion filed by the defense states that the caller indicated that the car "was allegedly swerving on the road." Motion to Suppress, filed April 26, 2006. At trial, however, the officer did not mention this aspect of the tip.

car and activated the police car's emergency lights. *App.* 3, 24.

During the traffic stop, the officer noticed that Harris had a strong odor of alcohol on his breath, his eyes were watery, and his speech was slurred. *App.* 3. When he attempted to step out of the vehicle, Harris "kind of fell backwards" and caught himself on the door frame. Tr. 06/28/2006 at 41. The defendant dismally failed the field sobriety tests. Tr. 06/28/2006 at 42-48.

Harris filed a motion to suppress, contending that the stop was improper under *Terry*[2] because the officer lacked reasonable, articulable suspicion. The trial court denied the motion. *App.* 24-25. Ultimately, Harris was convicted of driving under the influence, subsequent offense. He was sentenced to serve three years in prison, with all but 90 days suspended. *App.* 35.

3. Harris appealed to Virginia's intermediate appellate court. A unanimous three-judge panel affirmed in an unpublished opinion. The Court of Appeals of Virginia reasoned that the nature of the tip, the officer's corroboration of innocent details of the tip as well as the officer's observations of the defendant's driving behavior justified the stop. *App.* 31-33. The court observed that "'[w]hen an informant reports open and obvious criminal conduct,' a lesser

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[2] *Terry v. Ohio*, 392 U.S. 1 (1968).

degree of corroborative information may be required to provide the tip with 'sufficient indicia of reliability' to justify a *Terry* stop." *App.* 30 (citation omitted). Harris appealed this decision to the Supreme Court of Virginia.

4. The Supreme Court of Virginia granted the appeal and, by a vote of 4-3, reversed. *App.* 1, 11. The court reviewed the propriety of the stop under the analytic framework set forth in *Florida v. J.L.*, 529 U.S. 266 (2000). *App.* 6-7. First, the court found it problematic that the anonymous call did not provide "predictive" information. *App.* 6-7. Therefore, the court reasoned, the police lacked information that would demonstrate the informant's credibility and basis of knowledge. *App.* 6-7. Next, the court stated that "the crime of driving while intoxicated is not readily observable unless the suspected driver operates his or her vehicle in some fashion objectively indicating that the driver is intoxicated. Such conduct must be observed before an investigatory stop is justified." *App.* 8. Turning to the question of whether the officer witnessed sufficient corroboration of the anonymous tip, the court further concluded that while the defendant's behavior was "unusual," the officer did not observe "erratic" driving behavior. *App.* 8, 10. For example, the court reasoned, Harris's car "did not swerve." *App.* 9. The facts observed by the officer, such as driving to the side of the road, and slowing down "unusually" at an intersection, the court reasoned, were insufficient to "indicate that [Harris] was involved in the criminal act of operating

a motor vehicle under the influence of alcohol." *App.* 10. In the court's view, the officer's observations, "when considered together with the anonymous tip, were not sufficient to create a reasonable suspicion of criminal activity." *App.* 10. Therefore, the court concluded the officer lacked sufficient corroboration to make the stop and "Harris was stopped in violation of his rights under the Fourth Amendment." *App.* 10.[3]

5. Three justices dissented. *App.* 11. In their view, the anonymous tip, combined with the observations of the officer, sufficed to justify "the minimally intrusive traffic stop." *App.* 11. The dissent cited cases from other States that reached a contrary result. *App.* 15-16. Virginia petitioned for rehearing. The court denied rehearing on February 6, 2009. *App.* 41.

REASONS FOR GRANTING THE PETITION

This petition presents the Court with a discrete, recurring and practically significant issue of Fourth Amendment law that has divided the lower courts. At the heart of this divergence is the lower court's interpretation of this Court's decision in *J.L.* Certiorari is warranted to resolve this conflict and to provide guidance needed by law enforcement.

[3] The decision of the Supreme Court of Virginia was predicated exclusively on the Fourth Amendment. There is no issue of state constitutional or statutory law.

I. THE DECISION OF THE SUPREME COURT OF VIRGINIA DEEPENS AN EXISTING CONFLICT ON THE QUESTION PRESENTED.

In *J.L.*, this Court examined the propriety of a *Terry* stop based on a "barebones" anonymous tip "that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun." 529 U.S. at 268. There was no indication that the gun was being discharged or brandished. Police officers found a person matching this description at the bus stop and, upon frisking him, discovered a weapon. *Id.* The Court held that the stop was not proper. *Id.* The Court reasoned that the anonymous tip did not have a sufficient indicia of reliability to justify the stop. *Id.* at 270. The tip contained no predictive information, leaving the officers "without means to test the informant's knowledge or credibility." *Id.* at 271.

The Court further declined to recognize a "firearm exception" that would modify "the standard *Terry* analysis." *Id.* at 272. While acknowledging that "[f]irearms are dangerous," the Court refused to open the door to an "automatic" exception for firearms that 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." *Id.* The Court expressly reserved for a future case "circumstances under which the danger alleged in an anonymous tip might be so great

as to justify a search even without a showing of reliability." *Id.* at 273.

Courts have diverged in their interpretation of the Fourth Amendment with respect to the propriety of a stop based on an anonymous tip that provides a detailed, contemporaneously observed report of drunk or otherwise dangerous driving. A majority of courts have distinguished *J.L.* on a number of grounds, reasoning that: (1) an anonymous informant's accurate description of a vehicle and its location provides the tip with greater reliability than in the situation of a concealed firearm, because the informant presumably was an eyewitness to illegal activity that occurred in the open; (2) there is a qualitatively greater danger posed by drunk drivers, and a greater urgency for prompt action than a person who merely possesses a gun, but who is not using it in a threatening manner; (3) traffic stops are less invasive, physically and psychologically, than the frisk at issue in *J.L.*; and (4) the diminished expectation of privacy in one's automobile supports the validity of the stop. These courts hold that the Fourth Amendment permits a stop of a vehicle if the anonymous tip of drunk driving is sufficiently detailed, and even where the officer making the stop has not personally witnessed any dangerous driving. In contrast, other courts view *J.L.* as dispositive of the situation and hold that unless the anonymous tip of drunk or dangerous driving contains predictive information or is corroborated through the officer's

observation of erratic driving, the stop is invalid under the Fourth Amendment.[4]

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[4] The divergence among the lower courts has been the subject of academic commentary. *See* Denise N. Trauth, Comment and Case Note: *Requiring Independent Police Corroboration of Anonymous Tips Reporting Drunk Drivers: How Several State Courts Are Endangering the Safety of Motorists*, 76 U. CIN. L. REV. 323, 323-24 (2007) ("many state courts and the Court of Appeals for the Eighth Circuit have held that officers' corroborations of non-criminal details in anonymous tips reporting erratic or drunk driving can sufficiently justify investigatory stops of vehicles even if officers have not personally observed criminal activity or traffic violations. Some states, on the other hand, have held that anonymous tips about drunk or erratic driving are insufficient without officer corroboration of criminal activity or traffic violations to amount to the reasonable suspicion necessary for a Terry stop"); Jon A. York, Note: *Search and Seizure: Law Enforcement Officers' Ability to Conduct Investigative Traffic Stops Based Upon an Anonymous Tip Alleging Dangerous Driving When the Officers Do Not Personally Observe Any Traffic Violations*, 35 U. MEM. L. REV. 173, 175 (2003) ("Some courts have held that an anonymous tip, without police corroboration of the alleged traffic violation, is unreliable and cannot provide police with reasonable suspicion to initiate a traffic stop. Other courts, conversely, have held that such an anonymous tip may provide police with reasonable suspicion to initiate a traffic stop because of the public safety concerns posed by erratic or drunk drivers.").

A. Most courts uphold a *Terry* stop based on an anonymous tip of drunk or dangerous driving when the officer corroborates innocent details of the tip, without requiring the officer to observe erratic driving.

The leading case upholding such a traffic stop is *United States v. Wheat,* 278 F.3d 722 (8th Cir. 2001). An anonymous caller had reported that a "tan and cream-colored Nissan Stanza" or "something like that," with a license plate beginning with the letters W-O-C, was being driven erratically in the northbound lane of Highway 169. The caller said that the vehicle was passing on the wrong side of the road, cutting off other cars and being driven as if by a "complete maniac." *Id.* at 724. A police officer promptly identified the vehicle and stopped it immediately, without personally observing any dangerous driving. *Id.* at 724-25. Following the stop, the police obtained consent to search the vehicle and found 63.3 grams of cocaine. *Id.* The driver challenged the validity of the stop on the basis that the anonymous tip did not justify the *Terry* stop. *Id.* at 726.

The Eighth Circuit rejected the argument and upheld the stop. *Id.* at 742. First, the court noted that "[a] careful reading of the Supreme Court's Fourth Amendment jurisprudence suggests that this emphasis on the predictive aspects of an anonymous tip may be less applicable to tips purporting to describe contemporaneous, readily observable

criminal actions, as in the case of erratic driving witnessed by another motorist." *Id.* at 734. The court reasoned that "an anonymous tip conveying a contemporaneous observation of criminal activity whose innocent details are corroborated is at least as credible as the one in [*Alabama v.*]*White,*[496 U.S. 325 (1990)], where future criminal activity was predicted, but only innocent details were corroborated." *Id.* at 735. The court further noted the low risk that officers would fabricate a tip in this scenario, *i.e.* a call broadcast through a dispatcher. *Id.* The court stressed the "erratic and possibly drunk driver poses an imminent threat to public safety" and noted the lack of investigative alternatives to a traffic stop. *Id.* at 736-37. Finally, the court reasoned that a traffic stop is "less invasive, both physically and psychologically, than the frisk on a public corner that was at issue in *J.L.*" *Id.* at 737.

No fewer than nine state supreme courts, either citing *Wheat* with approval or upon similar reasoning, uphold stops based on anonymous tips of drunk or dangerous driving. These courts do not require the officer to corroborate the call by observing erratic driving by the suspect:

- *California v. Wells*, 136 P.3d 810 (Cal. 2006) (dispatch reported a call of a possibly intoxicated driver "weaving all over the roadway" in a blue van traveling northbound on Highway 99 at Airport Drive; distinguishing *J.L.* and citing *Wheat* with approval, the court upheld the stop based on

the officer's observation of a vehicle matching that description several minutes later);

- *Bloomingdale v. Delaware*, 842 A.2d 1212 (Del. 2004) (distinguishing *J.L.*, approving *Wheat*, and upholding a stop following an anonymous call that described the make, model, and color of the vehicle, provided the license tag number, identified the race and travel route of the driver, and stated that the vehicle was "driving all over the roadway"; vehicle was stopped within seconds of the broadcast, following the corroboration of innocent details);

- *Hawaii v. Prendergast*, 83 P.3d 714 (Haw. 2004) (distinguishing *J.L.*, approving *Wheat*, and upholding a stop based on an anonymous tip that a silver Honda Accord with the license plate EGN 656 had crossed over the center line on a highway, almost caused several head-on collisions and almost hit a guardrail when officer corroborated those details shortly after receiving the call, even though the officer did not "personally observe the Accord moving erratically");

- *Iowa v. Walshire*, 634 N.W.2d 625 (Iowa 2001) (distinguishing *J.L.* and upholding validity of *Terry* stop when officer, without personally observing any "behavior that would generate reasonable suspicion," stopped a vehicle based on an anonymous telephone call describing the license plate, make, and model of the car, and the caller reported that

the suspect vehicle was driving in the median);

- *Kansas v. Crawford*, 67 P.3d 115 (Kan. 2003) (upholding stop based on an anonymous call of a "reckless driver," of a black Dodge pickup truck with Oklahoma plates on a specific road when trooper stopped the vehicle six minutes later);

- *Maine v. Lafond*, 802 A.2d 425 (Me. 2002) (*Terry* stop upheld when anonymous caller reported a "possible intoxicated driver operating a green Ford Explorer headed towards Brunswick on Old Bath Road" and officer shortly afterward observed the vehicle swerve to the right and cross the white fog line because the combination of the lane "straddle plus an anonymous tip with sufficient specificity that the vehicle could be identified");

- *New Hampshire v. Sousa*, 855 A.2d 1284 (N.H. 2004) (upholding stop and citing *Wheat* with approval where anonymous caller reported that a blue pickup truck with Massachusetts plate number 9557FO was "all over the road" and had entered Everett Turnpike at Exit 6 heading south; trooper stopped a vehicle matching this description several minutes later, even though the officer "did not observe any erratic driving");

- *New Jersey v. Golotta*, 837 A.2d 359 (N.J. 2003) (stop valid under the Fourth Amendment where officer, without observing dangerous driving, stopped a vehicle closely

matching the description provided by anonymous caller of a blue pickup truck, with a license plate VM-407B) driving erratically all over the road and weaving back and forth;

- *Vermont v. Boyea*, 765 A.2d 862 (Vt. 2000) (upholding as constitutionally valid a stop based on anonymous call that a "blue purple Volkswagen Jetta with New York plates, traveling south on I-89 in between Exits 10 and 11, [was] operating erratically" and officer corroborated these details within minutes of the call).

Finally, in contrast to the decision below, a number of state intermediate appellate courts have upheld as constitutional under the Fourth Amendment stops such as the one at issue here. *See New Mexico v. Contreras*, 79 P.3d 1111 (N.M. Ct. App. 2003); *New York v. Jeffery*, 769 N.Y.S.2d 675 (N.Y. App. Div. 2003).[5]

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[5] The Fourth Circuit has upheld a stop similar to the one upheld in *Wheat*. In *United States v. Elston*, 479 F.3d 314, 315 (4th Cir. 2007), an anonymous caller reported a drunk driver. The tip contained extensive details about the driver's "appearance, vehicle, weapon, behavior, and state of mind." *Id.* at 318. The court, treating the tip as anonymous, distinguished the scenario in *J.L.*, finding it significant that the caller reported contemporaneously observed events, and that the caller "was reporting an imminent threat to public safety." *Id.* at 318-19. Although not on all fours with the Eighth Circuit's decision in *Wheat*, the Fourth Circuit's approach to anonymous tips of drunk or dangerous driving cannot be squared with the Virginia Supreme Court's approach and will lead to inconsistent results depending on whether a case is brought in state or federal court.

B. A minority of courts hold that the Fourth Amendment requires the officer to observe erratic driving to establish the basis of knowledge of the anonymous caller reporting drunk or dangerous driving.

A minority of lower courts, including the Supreme Courts of Virginia and Wyoming and the Appeals Court of Massachusetts, have staked out a different position. In *McChesney v. Wyoming*, 988 P.2d 1071 (Wyo. 1999), the police received an anonymous report that a red Mercury with temporary plates was driving erratically by weaving between lanes, passing cars, and slowing down to pass again. *Id.* at 1073. The officer positioned his car ahead of the location of the reported vehicle and noticed a car matching the description about seven to ten minutes after the dispatch. *Id.* He began to follow the car and noticed that the driver looked into his side and rear view mirrors, and the passengers were also looking in his direction. The officer did not witness any erratic driving. The officer made a traffic stop after the vehicle pulled into a convenience store parking lot. *Id.* at 1074. Upon approaching the vehicle, the officer noticed the odor of marijuana and green leafy material on the driver's shirt. *Id.*

The analysis of the Wyoming Supreme Court closely tracks the analysis of the Supreme Court of Virginia in the case at bar. The Wyoming Supreme Court observed that the anonymous tip did not provide predictive information. *Id.* at 1077. The court

dismissed the "driver's glances in his mirror" as "inconsequential," and noted that the officer "did not observe any erratic or illegal driving." *Id.* The court held that "[w]ithout independent observation of suspicious or illegal activity, [the] Officer [ ] did not have a reasonable suspicion to stop" the defendant. *Id.* at 1078. Therefore, the court held, the arrest violated the Fourth Amendment. *Id.* at 1074 n.1, 1078.

Similarly, in *Massachusetts v. Lubiejewski*, 729 N.E.2d 288 (Mass. App. Ct. 2000), an anonymous caller reported that a pickup truck with license plate number D34-314 was traveling on the wrong side of Route 195 in the vicinity of Route 140 in New Bedford. *Id.* at 290. The anonymous caller called a second time to report that the vehicle had slowed down, crossed the grassy median strip, and then proceeded to the correct side of the highway. *Id.* The officer noticed a pickup truck with a matching license plate number in the area, but did not observe any erratic driving. *Id.* Nevertheless, the officer stopped the car. *Id.* Assessing the propriety of the stop on appeal, the Massachusetts Court of Appeals held that the stop was not valid because the anonymous tip was not sufficiently corroborated. *Id.*[6]

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[6] The Supreme Court of North Dakota went even further in *Anderson v. Director, North Dakota Dep't of Transportation*, 696 N.W.2d 918 (N.D. 2005). A caller reported a "possible reckless driver or drunk driver." *Id.* at 923. The caller stated that he was following the suspect vehicle and continued to provide location

(Continued on following page)

Also reflective of this line of thinking is *Connecticut v. Sparen*, 2001 WL 206078, No. CR00258199S (Conn. Super. Ct. 2001) (unpub.), where the court relied on *J.L.* to conclude that a traffic stop was invalid under both the state and federal constitutions. *Id.* at *2. The stop was based on an anonymous tip at 12:15 a.m. describing "a small blue station wagon with a temporary Connecticut registration plate . . . traveling in a southerly direction on Clark Lane in Waterford," and the caller stated that the vehicle was "weaving badly" on the roadway. *Id.* at *1. The officer corroborated these details, but "never observed the defendant operate erratically, or engage in any violation of the law." *Id.* The court reasoned that the "anonymous tip was devoid of any historical or predictive information about the suspect that might have aided the police to test the informant's knowledge or credibility. Finally, the responding officer did not make any independent observation of the defendant's operation before initiating the motor vehicle stop." *Id.* at *2.

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updates. *Id.* The caller provided a description of the suspect vehicle, including the license plate numbers. *Id.* at 919. Even though the caller was not truly anonymous, because dispatch had described the caller's vehicle and the police officer had observed the caller's vehicle pull over, the court nevertheless held that the stop of the vehicle was invalid under the Fourth Amendment. *Id.* at 923.

The analysis in these cases cannot be squared with the analysis of the Eighth Circuit and the nine state supreme courts who uphold such stops. Nearly identical facts lead to different outcomes based on a diverging interpretation of what is permissible under the Fourth Amendment.

C. The lower courts have acknowledged the existence of this split in authority.

A number of appellate courts have acknowledged the existence of this split in authority. The Eighth Circuit noted the view from certain state supreme courts that "*J.L.* does not prevent an anonymous tip concerning erratic driving from acquiring sufficient indicia of reliability to justify a *Terry* stop, even when the investigating officer is unable to corroborate that the driver is operating the vehicle recklessly and therefore unlawfully." *Wheat*, 278 F.3d at 729. After analyzing these cases, the court observed that "[a] handful of lower courts to have considered this issue in light of *J.L.* have reached a different conclusion, however." *Id.* at 730. The California Supreme Court noted the "split of authority" on this question. *Wells,* 136 P.3d at 814. Likewise, the Supreme Court of Hawaii discussed in great detail the authorities on both sides of the question. *See Prendergast*, 83 P.3d at 720-23. The New Hampshire Supreme Court contrasted the minority of courts that "have concluded that anonymous tips of drunk or erratic driving are unreliable, requiring police corroboration of the tip's *incriminating details*" with the majority of

courts that have "concluded that, in a drunk or erratic driving case, certain tips are sufficiently reliable and detailed, when viewed in the totality of the circumstances, to establish reasonable suspicion." *Sousa*, 855 A.2d at 1288 (emphasis added). The New Jersey Supreme Court observed that, while its holding was in accord with the majority view, "a few state courts have viewed these issues differently." *Golotta*, 837 A.2d at 372. Finally, the Supreme Court of Vermont held that it agreed with the "majority of courts" that uphold such traffic stops, but noted that "[t]he case law is not unanimous." *Boyea*, 765 A.2d at 864, 866.

II. THE MINORITY VIEW IS FLAWED AND RESTS ON A MISREADING OF THIS COURT'S PRECEDENTS.

A. Anonymous tips and *Terry* stops.

Starting with *Terry*, this Court has "recognized that a law enforcement officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further." *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 185 (2004). A *Terry* stop requires "reasonable, articulable suspicion that criminal activity is afoot." *Terry*, 392 U.S. at 30. Although the officer must point to more than an "inchoate and unparticularlized suspicion or 'hunch' of criminal activity," *id.* at 27, the "'reasonable suspicion' standard is a less demanding standard than probable

cause and requires a showing considerably less than preponderance of the evidence." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). The propriety of the stop is assessed under the totality of the circumstances. *White*, 496 U.S. at 328.

An anonymous tip can furnish the basis for a *Terry* stop. *White*, 496 U.S. at 332. Such tips present special concerns, however. At least in the context of concealed crimes such as drug possession or the concealed possession of a firearm, "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." *Id.* at 329. *See also J.L.*, 529 U.S. at 270. The anonymous caller may be an unaccountable prankster, or someone who harbors a grudge. Nevertheless, an anonymous tip may "have certain other features . . . so that the tip does provide the lawful basis for some police action." *J.L.*, 529 U.S. at 275 (Kennedy, J., concurring).

B. The logic of this Court's Fourth Amendment jurisprudence supports the propriety of stops such as the one at issue here.

Although this Court has not answered the precise question posed here, its precedents support a *Terry* stop based an anonymous tip when the caller is reporting contemporaneously observed events, the officer corroborates the innocent details of the tip, and the tip involves activity that presents an

imminent danger of harm to the public—such as drunk or erratic driving.

"A careful reading of [this] Court's Fourth Amendment jurisprudence suggests that this emphasis on the predictive aspects of an anonymous tip may be less applicable to tips purporting to describe contemporaneous, readily observable criminal actions, as in the case of erratic driving witnessed by another motorist." *Wheat*, 278 F.3d at 734. When the factual basis for reasonable suspicion is provided by an anonymous informant, the informant's veracity or reliability, and the basis of his knowledge are "highly relevant" factors in determining whether the totality of the circumstances justified the stop. *Illinois v. Gates*, 462 U.S. 213, 230 (1983).

> Unlike with clandestine crimes such as possessory offenses, including those involving drugs or guns, where corroboration of the predictive elements of a tip may be the only means of ascertaining the informant's basis of knowledge, in erratic driving cases, the basis of the tipster's knowledge is likely to be apparent. Almost always, it comes from his eyewitness observations, and there is no need to verify that he possesses inside information.

Wheat, 278 F.3d at 734. "What is described in these drunk or dangerous driving reports is a *crime in progress*, carried out in public, identifiable and observable by anyone in sight of its commission." *See Boyea*, 765 A.2d at 875 (Skoglund, J., concurring)

(emphasis in original). Therefore, "[t]he basis for an informant's knowledge in a reckless driving case is clear, whereas the basis for the informant's knowledge in *J.L.* was not." *Prendergast*, 83 P.3d at 723. Moreover, when an informant describes an automobile with particularity and pinpoints the location of a moving vehicle, and the officer confirms this information within minutes of the call, the officer can reasonably conclude that the information contained in the call is reliable. *Bloomingdale,* 842 A.2d at 1220 ("Tips reporting erratic driving also may be more reliable because they usually will be made close in time to when the tipster observes the potential criminal activity."). "The greater mobility of automobiles also increases the reliability attributed to the tip by its readily observable, descriptive details. It would be difficult for a tipster accurately to place a moving vehicle in a particular location at a specific time if the tipster has not immediately observed that vehicle." *Id.* at 1221.

Second, neither *J.L.* nor *White* involved a situation of imminent danger. The mere possession of a gun does not, by itself, bespeak danger. On the other hand, "[a] motor vehicle in the hands of a drunken driver is an instrument of death. It is deadly, it threatens the safety of the public, and that threat must be eliminated as quickly as possible." *Crawford*, 67 P.3d at 118. The Fourth Amendment does not require the police "to wait at whatever risk to the driver and the public. We are not persuaded that the Constitution compels this result. Rather, an

anonymous report of erratic driving must be evaluated in light of the imminent risk that a drunk driver poses to himself and the public." *Boyea*, 765 A.2d at 863. The Vermont Supreme Court distinguished the anonymous report of a gun in *J.L.*, observing that

> [i]n contrast to the report of an individual in possession of a gun [as in *J.L.*], an anonymous report of an erratic or drunk driver on the highway presents a qualitatively different level of danger, and concomitantly greater urgency for prompt action. In the case of a concealed gun, the possession itself might be legal, and the police could, in any event, surreptitiously observe the individual for a reasonable period of time without running the risk of death or injury with every passing moment. An officer in pursuit of a reportedly drunk driver on a freeway does not enjoy such a luxury. Indeed, a drunk driver is not at all unlike a "bomb," and a mobile one at that.

Id. at 867. Indeed, this Court observed that "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990). Thus, while law enforcement officers who receive an anonymous tip of a concealed gun or narcotics can observe the suspect for a considerable period of time to develop additional evidence, that calculus is different in the context of a report of a drunk driver. The longer the officer follows and

observes the suspect, the greater the danger that the driver or innocent motorists or pedestrians will be injured or killed. *Wheat*, 278 F.3d at 736-37.[7] Part of the reasonableness calculus demanded by the Fourth Amendment turns on the existence of imminent danger. *See Payton v. New York,* 445 U.S. 573, 586 (1980) (exigent circumstances justifies warrantless entry into home).

Requiring a police officer to actually observe erratic driving to corroborate the anonymous tip reflects a fundamental misunderstanding of what the Fourth Amendment requires. "[A] police officer who corroborated the claim of reckless driving would then have not merely reasonable suspicion to justify an investigatory stop, but probable cause to make an arrest." *Wheat*, 278 F.3d at 733. Requiring the police to observe dangerous driving as the standard for corroboration of an anonymous tip would cause the police to "lose the intermediate step of investigative stops based on reasonable suspicion." *Id.*

Third, the minority of courts that invalidate traffic stops such as this one stress the potential for pranksters and persons bearing grudges to harass innocent persons. *App.* 7. *See also McChesney*, 988 P.2d at 1077 (noting the "potential for abuse" of

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[7] Furthermore, an officer investigating concealed narcotics can initiate a consensual encounter with the suspect. *Florida v. Rodriguez*, 469 U.S. 1, 5-7 (1984) (per curiam). That option is not available to an officer dealing with a moving vehicle.

anonymous tips reporting drunk drivers). However, that danger is diminished in this context. Tips involving a drunk or dangerous driver are "less likely to involve a malicious tipster attempting to subject someone he dislikes to a police search than are tips of other varieties." *Bloomingdale*, 842 A.2d at 1220.

> The short period of time available to a tipster to notify the police accurately of the location of a moving vehicle suggests that the citizen reporting the driver is likely on the road herself and trying rapidly to report an imminently dangerous situation. For example, it would be a very imprecise method of accomplishing harassment to report the subject as a driver who might be driving erratically, as contrasted with reporting activities that would result in a frisk or search of the person. Automobiles can travel at high rates of speed and change direction rapidly. To harass someone by reporting him as an erratic [or drunk] driver would at least require knowledge that the person is driving a specific vehicle, at a particular time, and in a discrete area. A police officer must then be near that location at the same time and promptly respond to the report by pulling over the vehicle. Because this is such an intricate, improbable and imprecise method of harassing another, the risk that an anonymous tip of erratic [or drunk] driving has been submitted by a

> malicious, false informant becomes significantly reduced.

Id.

In addition, "the risk that law enforcement officers themselves will fabricate such a tip in order to harass innocent motorists is negligible." *Wheat*, 278 F.3d at 735. "Where, as in this case, the tip originates in the form of a 9-1-1 call, and is subsequently broadcast [or its contents relayed] over the police radio channel, there is no chance that the investigating officer has invented the tip." *Id.*

Finally, and further distinguishing *J.L.*, a traffic stop involves a lesser intrusion, physically and psychologically, than the pat down at issue in *J.L.* *Wheat*, 278 F.3d at 737. A "brief motor-vehicle stop and questioning" differs in its intrusiveness from a "hands-on violation of the person." *Boyea,* 765 A.2d at 868. Moreover, it is settled law that there is a "diminished expectation of privacy in an automobile." *Colorado v. Bertine*, 479 U.S. 367, 372 (1987). *See also South Dakota v. Opperman*, 428 U.S. 364, 386 (1976).

The Eighth Circuit noted the relevance of the following factors in assessing the propriety of a traffic stop based on an anonymous tip of a drunk or erratic driver: (1) the "quantity of information, such as the make and model of the vehicle, its license plate numbers, its location and bearing, and similar innocent details, so that the officer, and the court, may be certain that the vehicle stopped is the same one as the one identified by the caller"; (2) the time

interval between receipt of the tip and location of the suspect vehicle; and (3) the nature of the information provided regarding a specific danger, *e.g.*, that the driver is "drag racing" or an allegation of "erratic driving" and an indication that the caller has personally observed the driving. *Wheat*, 278 F.3d at 731-32. In addition to these criteria, to the extent the officer corroborates the anonymous caller by observing "unusual" driving, those observations strongly support the propriety of the stop. Contrary to the holding of the lower court, the officer need not wait to observe "erratic" driving such as swerving, before making a stop. Under this analytical framework, the officer in the case at bar acted reasonably under the Fourth Amendment in conducting a brief investigatory stop to confirm or dispel a danger posed by a potential drunk driver.

III. RESOLUTION OF THE ISSUE IS OF GREAT PRACTICAL SIGNIFICANCE TO LAW ENFORCMENT AND TO PUBLIC SAFETY.

This Court has noted the "carnage caused by drunk drivers" and has observed that drunk driving "occurs with tragic frequency on our Nation's highways." *South Dakota v. Neville*, 459 U.S. 553, 558 (1983). Indeed, the Court has "repeatedly lamented the tragedy." *Id. See also Sitz*, 496 U.S. at 451. The National Traffic and Highway Safety Administration

estimates that in 2007, 12,998 persons were killed in alcohol related accidents.[8] In 2007, over 1.4 million drivers were arrested for driving under the influence of alcohol or narcotics.[9] In addition, whether drunk or not, aggressive drivers also present a grave danger to other motorists.[10]

The technology available to law enforcement has made great strides in enabling police to identify the address and telephone number of a caller who uses a cellular telephone.[11] Most 911 systems can identify the telephone number and location of a caller who is using a cellular telephone.[12] In spite of these technological advances, callers reporting drunk or dangerous driving will remain anonymous in the following frequently recurring instances: (1) a caller who uses a public pay phone; (2) when the police honor a request for anonymity, perhaps from someone

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[8] *See* http://www.fcc.gov/pshs/services/911-services/.

[9] Department of Justice (US), Federal Bureau of Investigation (FBI). Crime in the United States 2007: Uniform Crime Reports. Washington (DC): FBI; 2008. Available at URL: http://www.fbi.gov/ucr/cius2007/data/table_29.html.

[10] *See, e.g.*, http://ohs.delaware.gov/information/aggdrive.shtml (linking aggressive driving to 43% of all motor vehicle crashes).

[11] *See* http://www.fcc.gov/pshs/services/911-services/enhanced 911/Welcome.html (describing regulatory mandates placed upon cellular telephone callers that require the identification of the cell number and location of a 911 caller who uses a cell phone).

[12] *See* http://www.nena.org (website for the National Emergency Number Association).

who fears reprisals; (3) not all jurisdictions have adopted the technology needed to identify the caller's cell number;[13] (4) some prepaid cell phones, paid for with cash, are virtually untraceable; (5) a 911 call from a deactivated, lost or stolen cell phone; and (6) cellular telephone calls routed through a "roaming" arrangement. *See* Geoffrey D. Smith, Note: *Private Eyes Are Watching You: With the Implementation of the E-911 Mandate, Who Will Watch Every Move You Make?*, 58 FED. COMM. L.J. 705 (2006) (detailing history of statutes upgrading 911 system to enable responders to obtain information about cell phone caller).

As one former police officer notes, "[t]he issue of anonymous tips presents itself daily in every police agency across America."[14] Police officers should know when stops in this recurring scenario are permissible under the Fourth Amendment and when they are not. Given this combination of circumstances, the resolution of this issue is of great practical significance to law enforcement and to the public.

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[13]A map showing the availability of various 911 systems is available at http://nena.ddti.net/.

[14]Jason Kyle Bryk, *Anonymous Tips to Law Enforcement and the Fourth Amendment: Arguments for Adopting an Imminent Danger Exception and Retaining the Totality of the Circumstances Test*, 13 GEO. MASON U. CIV. RTS. L.J. 277 (2003).

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be **GRANTED**.

Respectfully submitted,

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