No. 08

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Petitioner,

v.

CADREE B. MATTHEWS,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of New Jersey

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Florida v. J.L., 529 U.S. 266 (2000), held that an anonymous tip that a person is carrying a gun, without more, does not justify a stop and frisk of that person. Here, during a lawful detention of an automobile, the police conducted a protective search and secured a handgun they suspected of being in the vehicle due to the totality of threatening circumstances, which included an anonymous report that someone in the vehicle was flashing a gun. Does *J.L.* require suppression of the handgun?

PARTIES BELOW

All parties to the judgment sought to be reviewed are parties to this petition.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

The Petitioner, the State of New Jersey, respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division, entered in the above-titled proceeding on March 10, 2008. Discretionary review of that opinion was denied by the New Jersey Supreme Court on July 15, 2008.

OPINIONS BELOW

The Order of the New Jersey Supreme Court denying discretionary review in this case is reported at *State v. Matthews,* 196 N.J. 344, 953 A.2d 763 (2008), and is reprinted in the Appendix at 1a. The opinion and judgment of the Superior Court of New Jersey, Appellate Division, which is sought to be reviewed, is reported at *State v. Matthews,* 398 N.J. Super. 551, 942 A.2d 797 (App. Div. 2008), and is reprinted in the Appendix at 2a to 13a. The unreported opinion of the Superior Court of New Jersey, Law Division, is reprinted in the Appendix at 13a to 19a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). On July 15, 2008, the New Jersey Supreme Court, the highest court in the state, entered an order denying the State of New Jersey's Petition for Certification, which sought discretionary review of the judgment of the New Jersey Superior Court, Appellate Division, which was entered in a reported opinion on March 10, 2008. The Appellate Division ruled that the respondent was entitled to the suppression of evidence under the Fourth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISION INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT IV

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

This case represents a potentially dangerous extension of the limited holding of *Florida v. J.L.,* to circumstances for which it was not intended. The lower court's expansive reading of *J.L.* also is in direct conflict with other precedents of this Court, including *Michigan v. Long,* 463 U.S. 1032 (1983), and *Terry v. Ohio,* 392 U.S. 1 (1967), which recognize police authority to conduct a protective search of a lawfully detained motor vehicle when the totality of circumstances supports a reasonable and articulable suspicion that the occupants are armed and dangerous and pose a threat to the investigating officers.

In this case, the Linden police received an anonymous report at 2:30 a.m. that someone was "flashing a gun" in a burgundy Dodge Durango bearing a temporary license tag at a specified location. When the police responded to the location about a minute later, they saw the burgundy Durango with the temporary tag parked across the street from a bar. The Durango had tinted windows that inhibited the officers' view into the vehicle. The officers were able to ascertain that there were at least three occupants, including the driver, in the vehicle, but were not sure if there were others. The testifying officer recounted his experience with automobile stops, which included

vehicles with tinted windows that contained weapons.

As a result of the report of someone in the Durango flashing a gun and the officer's inability to fully see the occupants or what they were doing inside, the officers performed a "high-risk" detention of the Durango as a safety precaution. The officers first ordered the occupants from the vehicle and patted them down for weapons. The officers then searched the passenger area of the Durango for weapons and located a gun underneath the front-passenger seat. The occupants were then arrested.

Meanwhile, Respondent suddenly arrived on the scene and, in an irate and combative manner, repeatedly tried to gain access to the Durango, despite being told by the police that an investigation was underway and that he should leave. He refused and was arrested for disorderly conduct and then for resisting arrest. After his arrest, Respondent confessed that the gun was his and he was ultimately charged with its unlawful possession, a charge to which he pleaded guilty and was sentenced.

Respondent was a party to a motion to suppress the gun, arguing that the seizure of the gun was unconstitutional under *Florida v. J.L.* After an evidentiary hearing on the motion, the judge, in a written opinion, denied defendant's motion to suppress, finding the gun was seized as a result of a lawful motor-vehicle detention and lawful protective search of the vehicle under *Michigan v. Long*; *Pennsylvania v. Mimms,* 434 U.S. 106 (1977); and *Terry v. Ohio.* Although the judge also cited to state caselaw, it is clear that he was relying on the aforementioned cases of this Court as the controlling law. See Appendix at 14a to 19a.

Defendant appealed to the New Jersey Superior Court, Appellate Division, and reiterated his claim that the seizure of the gun was unconstitutional under

J.L. as well as *Alabama v. White,* 496 U.S. 325 (1990). Respondent also relied on several state cases that applied federal authority. The Appellate Division, in a published opinion, ruled that the seizure of the gun violated the Fourth Amendment and reversed the order denying suppression of the evidence. The court ruled that the initial detention of the Durango was lawful. But the court relied on *J.L.,* and state cases interpreting *J.L.,* to rule that the anonymous tip did not justify the ensuing protective search of the lawfully detained vehicle that led to the seizure of the gun.

The State petitioned the New Jersey Supreme Court for discretionary review, asserting that *J.L.* was not intended to apply to cases such as these where the reasons for a protective search were based on the totality of threatening circumstances or where the initial detention of the vehicle was lawful. Rather, the State argued that *J.L.* was intended to apply only when the sole justification for both a stop and frisk was an anonymous tip regarding a person in possession of a gun. The court denied the State's Petition for Certification. See Appendix at 1a.

The State of New Jersey now petitions this Court for a writ of *certiorari* to review the state court's undue expansion of the holding of *J.L.* Unfortunately, the misapplication of *J.L.* is not limited to this case, but is occurring with increasing frequency in similar factual situations in cases around the country, all in conflict with not only *J.L.* itself, but other precedents of this Court as well.

REASONS FOR GRANTING THE WRIT

The State Court's Suppression of a Handgun Found as a Result of a Limited Protective Search of a Lawfully Detained Vehicle is an Unwarranted Extension of the Holding of *Florida v. J.L.* in Direct Conflict with *Terry v. Ohio* and *Michigan v. Long*.

Reflecting a disturbing and dangerous trend among some courts across the nation, the state court in this case misconstrued and misapplied *Florida v. J.L.*, extending that decision far beyond its literal holding and the logic of its rationale. Unless this Court intervenes and clarifies the scope of *J.L.*, police officers in many jurisdictions will be powerless to protect themselves, and the public, when they are dispatched to investigate reports of recent gunplay, especially where, as in this case, the subject vehicle in which the reported gunman was believed to be concealed had darkened windows that prevented the responding officers from making corroborative observations at a safe distance.

The lower court's bizarre ruling that the stop in this case was lawful, but that the ensuing protective frisk of the vehicle was unlawful, reflects how the principles expressed in *J.L.* have been misused by several courts. This turns the reasonableness requirement of the Fourth Amendment on its head by requiring officers either to ignore reports of potential imminent gunplay — a manner of "de-policing" that cannot be tolerated much less condoned given the spate of gun and gang violence across the nation — or else requiring officers to employ unreasonable investigative tactics that would unnecessarily expose them to peril. This Court should now make clear that the required corroboration of anonymous reports under the Fourth Amendment need only be reasonable in the

circumstances, considering the nature and dangerousness of the reported conduct and the investigative options reasonably available to officers who are dispatched into harm's way.

The state court's misapplication of the Fourth Amendment due to its overly broad application of the narrow holding of *J.L.* to penalize reasonable police protective measures during the investigative detention of an automobile by suppressing a gun found as a result is in direct tension with *Terry v. Ohio* and *Michigan v. Long*. This case indeed presents important federal questions involving how and when the Fourth Amendment allows police to protect themselves and the public when conducting lawful investigative detentions of motor vehicles.

The state court found that an anonymous report of a person *flashing* a gun in a specifically described vehicle at 2:30 a.m. was insufficient under *J.L.* to justify a protective search of the vehicle. The court so found despite the fact that when, moments after receiving the report, the police lawfully detained the vehicle matching the description, they were prevented from fully confirming the details of the report because of their inability to adequately see inside the vehicle due to its tinted windows.

The motion judge and appellate court both correctly ruled that the initial detention of the Durango was lawful. But the appellate court unduly extended *J.L.* in reversing the motion judge's well-supported ruling that the scope of the ensuing intrusion into the passenger area of the lawfully detained vehicle was reasonably confined to address the safety concerns presented by the circumstances.

In contrast, the facts of *J.L.* were simple and straightforward. The police received an anonymous call stating that a young, black male, who was standing at a particular bus stop and wearing a plaid

shirt, was carrying a gun. The police went to the bus stop and saw J.L., a 15-year-old black male, standing there wearing a plaid shirt. The police immediately stopped and frisked him and found a gun in his pocket. Given these sparse facts, this Court issued a limited holding: an uncorroborated anonymous tip that a person is carrying a gun, without more, does not justify a stop and frisk of that person. 529 U.S. at 268–69.

J.L. was noteworthy as much for the circumstances to which it did *not* apply as it was for the limited circumstance to which it did apply. *J.L.* does not apply to protective searches where the initial investigative detention is lawful; it only applies when "the initial stop is at issue." *Id.* at 274. *J.L.* does not apply when the totality of circumstances are corroborative of the report to justify the protective search; *J.L.* only applies when a "bare-boned" anonymous tip is the sole justification for a stop and frisk. *Id.* at 271–73. *J.L.* does not address protective searches of lawfully detained automobiles due to the lesser expectation of privacy in them and the dangers inherent in roadside encounters; *J.L.* only applies to the stop and frisk of a person. *Id.* at 273–74. And *J.L.* does not apply when the anonymous report involves the more immediately dangerous and active "flashing" of a gun; *J.L.* applies only to reports of a firearm's mere passive possession. *Id.* at 272–73. The state court's unduly expansive application of *J.L.* undermines this Court's careful balance between protecting investigating officers, while protecting the rights of suspects.

The state court's first improper extension of *J.L.* was to forbid a protective search that took place during a *lawful* investigative detention. The motion judge found the initial investigative detention of the parked Durango to have been lawful. The appellate court affirmed this part of the ruling, and it is not at issue in this petition. *J.L.* is expressly limited to cases in

which the officer's authority to commence the initial forcible stop is at issue. This Court made clear that the holding of *J.L.* "in no way diminishes a police officer's prerogative, in accord with *Terry*, to conduct a protective search of a person *who has already been legitimately stopped.* We speak in today's decision only of cases in which the officer's authority to make the initial stop is at issue." *Id.* at 274 (emphasis added). *Terry* recognized that "police officers in properly discharging their investigative function may find themselves confronting persons who might well be armed and dangerous." 392 U.S. at 25.

But the state court ignored this critical limitation on *J.L.*'s holding and extended its reach to circumstances where it was never intended — and is ill-suited — by finding a protective search during an investigative detention to be unconstitutional under the Fourth Amendment, despite having already found the investigatory detention lawful. *J.L.*'s strictures on police reliance on anonymous tips in deciding when to conduct a stop do not necessarily obtain after the detention has lawfully begun and the police are confronted with a threat of danger. *J.L.* should not be extended to hamstring an officer's on-the-spot discretion to perform a protective search during a lawful detention. "'There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be bullet." *Terry,* 392 U.S. at 33 (Harlan, J., concurring).

Beyond that, the state court misread *J.L.*'s narrow holding to require suppression without considering the other suspicious and threatening factors in the totality of circumstances that elevated the officers' need to protect themselves. *J.L.*'s holding should be invoked only when a "bare-boned" anonymous tip is the sole basis for a stop and frisk. Courts must be careful not to employ *J.L.* so as to eschew a totality-of-circumstances analysis that is

more faithful to the Fourth Amendment. When reviewing the reasonableness of police conduct, courts must consider the totality of circumstances, the "whole picture." *United States v. Sokolow,* 490 U.S. 1, 7 (1989). A "divide-and-conquer analysis" is wholly inappropriate. *United States v. Arvizu,* 534 U.S. 266, 274 (2002). The totality of circumstances in this case amply justified the officers' protective search.

It is well established that, during an investigative detention of a motor vehicle, the police may immediately search those areas of an automobile in which a weapon may be placed or hidden if the police can articulate a reasonable belief that the occupants are armed and dangerous and may gain immediate control of a weapon. *See Long,* 463 U.S. at 1045–53. Essentially, the standard is whether a reasonably prudent officer, considering the totality of the circumstances, would believe that his or her safety and that of others was in danger. *Id.* at 1050.

The officer here credibly articulated reasons why he suspected that the Durango contained a dangerous weapon and that a protective search of the Durango was necessary. The requirement that the police articulate a reasonable suspicion is satisfied by a showing "considerably" less than a preponderance of the evidence. *Arvizu,* 534 U.S. at 274. It is a "rather lenient test," *United States v. Santana,* 485 F.2d 365, 368 (2d Cir. 1973), *cert. denied,* 415 U.S. 931 (1974), which "is obviously less demanding than for probable cause," which itself requires only "a fair probability that contraband or evidence will be found," *Sokolow,* 490 U.S. at 7, and does not even amount to a more-likely-than-not standard. *See Texas v. Brown,* 460 U.S. 730, 742 (1983). Moreover, a "reasonable suspicion can arise from information that is less reliable than that required to show probable cause." *White,* 496 U.S. at 330.

A reasonable suspicion requires that a police

officer merely articulate "some minimal level of objective justification," beyond a mere inchoate and unparticularized hunch that the vehicle may contain a weapon. *Sokolow,* 490 U.S. at 7. The anonymous report in this case, corroborated by the officers' observations and the circumstances, enabled them to articulate a justification far beyond an unparticularized hunch.

A reviewing court should give due weight to inferences drawn from the facts by resident judges and local law enforcement officers because the motion judge views the facts through the distinctive features of the community and the local officers view the facts through their experience and expertise. *Ornelas v. United States,* 517 U.S. 690, 699 (1996). Therefore, when both the motion judge and the responding officer determined that the encounter here was fraught with danger and needed to be quickly addressed, the reviewing court should not have so easily second-guessed them by reflexively invoking *J.L.*

To assess the reasonableness of the officer's limited protective search as a general proposition, it is also necessary to focus on the state interest giving rise to the intrusion. The need to search is balanced against the invasion which the search entails. *Terry,* 392 U.S. at 20–21. In this case, allowing police officers to safely conduct an investigative traffic detention involving potentially armed criminals, is profound. The intrusion here, while not insignificant, was limited to a protective search of the passenger area of a vehicle where a firearm could be located. This limited intrusion was justified given the substantial threat to the officers' safety.

Generally, *J.L.* is ill-suited to govern the protective search of a motor vehicle. Indeed, this Court expressly said that *J.L.* did not "hold that public safety officials in quarters where the reasonable expectation of Fourth Amendment privacy is

diminished . . . cannot conduct protective searches on the basis of information insufficient to justify searches elsewhere." *Id.* Although this Court listed, by way of example, airports and schools, there is no indication or logical reason that this abbreviated list is exhaustive. On the contrary, this Court has repeatedly recognized that automobiles are accorded a significantly reduced expectation of privacy given their pervasive regulation. *See, e.g., California v. Carney,* 471 U.S. 386, 391–93 (1985).

Surely, people do not enjoy the same expectation of privacy in what is placed under the front-seat of an automobile with multiple occupants as they do in the clothing they are wearing. *See Rakas v. Illinois,* 439 U.S. 128, 148–49 (1978) (recognizing no legitimate expectation of privacy for passengers in area under seat of car).[1] *See also United States v. Stanfield,* 109 F.3d 976, 980 (4th Cir.) (recognizing under *Long* that "area search of a vehicle is less intrusive than the frisk of the person"), *cert. denied,* 522 U.S. 857 (1997). Moreover, the exigencies attendant to an automobile's ready mobility that require an immediate search are not present with a pedestrian. *See Carney,* 471 U.S. at 392. *J.L.* was decided in the context of street-corner stop of a juvenile pedestrian and an intrusive frisk of his clothing. The present case entailed the mere act of looking under the front seat of a lawfully detained vehicle.

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[1] Petitioner acknowledges that it has not preserved its right to challenge respondent's right (or standing) to contest the legality of the seizure under the Fourth Amendment on expectation-of-privacy grounds. The State's failure to challenge respondent's standing before the motion court or in its petition to the state supreme court, despite having unsuccessfully raised the issue before the appellate court, likely precludes it from challenging standing in this petition. *See Steagald v. United States,* 451 U.S. 204, 208–11 (1981). Expectations of privacy are discussed herein to substantively show the reasonableness of the officers' conduct and the misapplication of *J.L.* to this case.

In the same manner, this Court also cautioned that the facts of *J.L.* did not require it to speculate about circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search without a showing of reliability. 529 U.S. at 273. This Court has repeatedly recognized that roadside investigative detentions involving suspects in vehicles have proved to be particularly dangerous for the responding officers. *See Long,* 463 U.S. at 1047–48; *Mimms,* 434 U.S. at 110; *Adams v. Williams,* 407 U.S. 143, 148 n.3 (1972). Indeed, this Court has recognized "that a significant percentage of murders of police officers occurs when the officers are making traffic stops." *Mimms,* 434 U.S. at 110 (citations omitted). It is too plain for argument that officer safety is both a legitimate and weighty concern when they conduct investigative detentions of automobiles, even more than during street encounters. *See id.*

If the officers merely detained the vehicle without the ability to search it, they would have been powerless to prevent the occupants from returning to the Durango. As it was, the suspects were all near the Durango during the protective search itself. The officers were reasonable to satisfy themselves that no gun was in the vehicle before they allowed the occupants to leave, which would have enabled them to return to the Durango with the gun inside, creating a potential hazard. As this Court observed in *Long,* "if the suspect is not placed under arrest, he will be permitted to reenter his automobile, and he will then have access to any weapons inside." 463 U.S. at 1051–52. Moreover, when the investigation is one of "close range," the officers are vulnerable, and they must be able to make a quick decision as to how to protect themselves and others from danger without being second guessed on appeal. *Id.* at 1052.

The motion judge correctly found that the police were reasonable to fear that the Durango contained a firearm. In this case, the reliability of the anonymous

report was sufficiently corroborated, not just because the minutes-old report was dead-on in its description of the vehicle and its location, but more importantly, because the officers' own observations independently caused them to suspect that dangerous activity may be afoot. The report became more reliable not only in its tendency to identify a determinant vehicle, but also in its assertion of dangerous criminality. *See J.L.,* 529 U.S. at 272. The officers' firsthand observations of threatening circumstances corroborated the anonymous report by lending credence to the informer's awareness of potentially violent criminal activity. The corroboration thus exceeded the informer's awareness of so-called innocent details, such as the make and color of a vehicle on the street.

Here, the Dodge Durango with temporary tags was parked on the street near a bar in the wee hours of the morning, with at least three occupants concealed behind darkened windows. The time of day and physical location at which the police encounter a motor vehicle are relevant in determining whether to take protective action. *See Long,* 463 U.S. at 1050. And "the fact that there is more than one occupant of the vehicle increases the possible sources of harm to the officer[s]." *Maryland v. Wilson,* 519 U.S. 408, 413 (1997).

The officers' reasonable fears were then greatly enhanced — and their ability to independently corroborate the presence of the gun itself simultaneously eliminated — by the fact that the windows of the Durango were tinted to the extent that the officers had difficulty seeing inside. The substantial danger facing officers when approaching vehicles with heavily tinted windows was discussed by the United States Court of Appeals for the Fourth Circuit. The unanimous opinion by Judge Luttig began by recognizing that "law enforcement officials literally risk their lives each time they approach occupied vehicles during the course of investigative

traffic stops." *Stanfield,* 109 F.3d at 978. "In recognition of the extraordinary dangers to which officers are exposed during such encounters, th[is] Court has consistently accorded officers wide latitude to protect their safety, . . . whenever they reasonably believe their safety might be in jeopardy." *Id.*

But "[t]he advent of tinted automobile windows" poses a "grave risk" to the safety of police officers and "has threatened to bring to naught these essential law enforcement protections." *Id.* "When, during already dangerous traffic stops, officers must approach vehicles whose occupants and interiors are blocked from view by tinted windows, the potential harm to which the officers are exposed increases exponentially, to the point . . . of unconscionability." *Id.* at 981. The Fourth Circuit emphasized, *"Indeed, we can conceive of almost nothing more dangerous to a law enforcement officer in the context of a traffic stop than approaching an automobile whose passenger compartment is entirely hidden from the officer's view by darkly tinted windows." Id.* (emphasis in original).

"As the officer exits his cruiser and proceeds toward the tinted-windowed vehicle, he has no way of knowing whether the vehicle's driver is fumbling for his driver's license or reaching for a gun[.]" *Id.* The officers do not know whether they are about to encounter law-abiding citizens "or to be ambushed by a car-full of armed assailants." *Id.* Responding officers may not even know whether a gun has been trained on them from the moment they arrived on the scene. *Id.* As one officer stated, "'If the suspect has a weapon, I might not see it until he rolls down the window. He may just shoot me through the window.'" *Id.* Since, as this Court noted in *Mimms, see* 434 U.S. at 110, officers face inordinate risks "every time they approach even a vehicle whose interior and passengers are fully visible, . . . the risk these officers face when they approach a vehicle with heavily tinted windows is . . . intolerable." *Id.* at 982. The court noted that

gang members often use tinted windows to hide their illegal activities. *Id.* at 981 n.3. The court further observed that "out of recognition of just such danger," many states had enacted laws regulating tinted windows. *Id.*[2]

During investigative detentions, officers "must make quick decisions" as to how to protect themselves and others when they are "particularly vulnerable," and thus they are not required to adopt "alternate means to ensure their safety." *Id.* at 983 (citations and internal quotations omitted). The Fourth Circuit recognized that this "Court has scrupulously avoided substituting its judgment for that of law enforcement as to how best to ensure officer safety." *Id.*

It would be generally insufficient to merely allow the officers to order the occupants from such a vehicle because the tinted windows could prevent the officers from knowing whether all occupants have been removed and from fully assessing the potential dangers emanating from the vehicle. And the reasonable and necessary order for the occupants to alight may pose "a separate danger unto itself' that must be addressed because it could enable the occupants to move about the vehicle and thereby possibly access a weapon. *Id.* at 983.

The Fourth Circuit was rightly "convinced that the presence of windows so tinted that the vehicle's interior compartment is not visible is, in itself, a circumstance that would cause an officer reasonably to believe that his safety might be in danger[.]" *Id.* at 984. In fact, in a case similar to the present case, the

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[2] Indeed, such windows in the present case could have provided an independent objective basis to detain the Durango. *See* N.J. Stat. Ann. § 39:3-74 (forbidding non-transparent material on windshields and front-side windows); *State v. Cohen,* 347 N.J. Super. 375, 380–81, 790 A.2d 202, 205–06 (App. Div. 2002) (justifying traffic stop due to car's darkly tinted windows).

Second Circuit found that the officers' "inability to see in the darkly tinted car windows, when combined with the report of a firearm in the car, provided a sufficient basis under *Terry* for the officers to further investigate." *United States v. Bold,* 19 F.3d 99, 100–04 (2d Cir. 1994). The court considered the officers' limited ability to confirm the anonymous tip created by the tinted windows to be significant among the totality of circumstances. *Id.* at 104. *See also Holeman v. City of New London,* 425 F.3d 184, 188, 190 (2d Cir. 2005) (finding protective search reasonable after police pulled over car with tinted windows in pre-dawn hours while investigating "prowler call" in "troubled neighborhood"); *United States v. Leland,* No. 03-33-B-W, 2003 U.S. Dist. LEXIS 18852, at *14–15 (D. Me. Oct. 22, 2003) (upholding "high-risk traffic stop" due in part to "dark-tinted windows").

In addition to the dangers inherent in approaching an SUV with tinted windows and containing at least three occupants, perhaps the most significant distinction from *J.L.* lies in the fact the report spoke of the "flashing" of a gun as opposed to its passive concealed possession. The public act of flashing a gun is obviously more immediately dangerous than the mere possession discussed in *J.L.,* which in some states is not even illegal. The firearm here was reported precisely because it was *not* concealed. Rather, its display was seen by someone who thought it necessary to report it to police. This circumstance gave rise to a fair inference that the weapon had just been or was about to be used to shoot, threaten, or intimidate someone. The present case is precisely a situation where "it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." *See Terry,* 392 U.S. at 23.

The report of the "flashing" of a gun by one of several suspects hidden behind the tinted windows of a vehicle parked near a bar at 2:30 a.m. bespeaks a

potentially fatal and imminent threat to public safety that demands immediate police intervention. This is all too far removed from the mere concealed possession of a gun by J.L., a minor standing in plain view on a street corner, who was not imminently dangerous and whose every move and gesture could have been subject to complete police observation in an attempt to corroborate the report. A pedestrian's movements are exposed to the public and amenable to surreptitious observation without risking "death or injury with every passing moment." *People v. Dolly,* 150 P.3d 693, 697 (Cal.), *cert. denied,* 128 S. Ct. 45 (2007). But inside the tinted-windowed Durango, full corroboration was impossible. The responding officers were compelled to act, and to have done so in way that did not compromise anyone's safety.

Several United States Courts of Appeals have distinguished *J.L.* when the anonymous report indicated an immediate use of a gun as opposed to its concealed possession. *See United States v. Harrell,* 268 F.3d 141, 150–51 (2d Cir. 2001) (Meskill, C.J., concurring) (distinguishing *J.L.* where anonymous tip indicated suspects "waived guns at him" because of imminent danger to community); *United States v. Hicks,* 531 F.3d 555, 557–59 (7th Cir. 2008) (distinguishing *J.L.* from "ongoing emergency" caused by reported threat to shoot someone with pistol); *United States v. Terry-Crespo,* 356 F.3d 1170, 1176 (9th Cir. 2004) (distinguishing report of brandishing or threatening to use handgun as "a contemporaneous emergency event" that is accorded greater reliability than the report of simple possession of gun in *J.L.); United States v. Holloway,* 290 F.3d 1331, 1332–40 (11th Cir. 2002) (distinguishing anonymous call reporting ongoing threat of firearm use requiring immediate police action from mere allegation of concealed weapon in *J.L.*), *cert. denied,* 537 U.S. 1161 (2003).

This crucial distinction between a "flashing" gun

or the like versus simple possession was perhaps most cogently identified by the Third Circuit in a 2-1 opinion joined by then-Circuit Judge Alito: "we think that the critical element alleged in the tip was not the mere presence of a gun, but the fact that violent crimes were in the process of being committed." *Nelson v. United States,* 284 F.3d 472, 483 (3d Cir.), *cert. denied,* 537 U.S. 940 (2002). The circuit court agreed with the district judge that a report of ongoing criminal activity should be distinguished from one in which "there's a guy hanging out on the street and he's got a gun on him" and "there was no indication that he was engaged in or about to engage in any kind of criminal activity." *Id.*

The Third Circuit recognized that "J.L. was addressing a tendency by courts to use suspicion of possession of a gun to justify the stop, but it did not disturb [this] Court's consistent prior teaching that an officer, in determining whether there is reasonable suspicion, may take into account reports of an active threat, including the presence and use of dangerous weapons." *Id.* In short, "J.L. did not disturb the officers' ability to consider the prospect of harm to others or to themselves" when conducting a investigative detention. *Id.* A dissenting judge, however, disagreed and found no such distinction. *See id.* at 485–89 (Ambro, J., dissenting).

Indeed, Judge Ambro's dissent in *Nelson* is noteworthy precisely because it is emblematic of system-wide confusion. Despite the logic and precedential support for the police action here, confusion does indeed exist in applying *J.L.* to cases like this. This Court's intervention is thus urgently needed. For example, a district court's opinion, which was later reversed on other grounds, tried to reconcile the Third Circuit's reasoning in *Nelson* with *J.L.*, but found that an anonymous report that "a male had just flashed a gun at 'a bum,' at Broad and South Streets in Philadelphia" did not pose a sufficient risk of danger to

justify police intervention. *United States v. Torres,* No. 06-630, 2007 U.S. Dist. LEXIS 8414 (E.D. Pa. Feb. 5, 2007), *rev'd o.g.,* 534 F.3d 207 (2008). But that "bum" on the wrong end of that flashing gun might respectfully disagree.

Conversely, in the Fourth Circuit, a district court ruled that an anonymous report describing the threatening "brandishing" of a firearm distinguished that case from *J.L. See United States v. Elston,* 2005 U.S. Dist. LEXIS 45310, at *9–10 (W.D. Va. April 18, 2005). The Court of Appeals affirmed the district court, agreeing that the tip relayed an imminent threat to public safety, thus distinguishing *J.L.* The court ruled that the imminent threat faced by the officers carried substantial weight in assessing the reasonableness of their actions. 479 F.3d 314, 319 (4th Cir. 2007).

Courts have also found that an anonymous report of an erratic driver justifies a traffic stop because a drunk driver is a far more grave and immediate threat to public safety than the mere passive possession of a concealed gun. *See, e.g., United States v. Wheat,* 278 F.3d 722, 724–37 (8th Cir. 2001). But the California Supreme Court correctly found that a report of the immediate threat occasioned by the use of a gun, as opposed to its mere passive possession, is an equal threat to public safety and recognized that "there is no reason to think that anonymous phoned-in tips concerning contemporaneous threats with a firearm are any more likely to be hoaxes than are anonymous phoned-in tips concerning a contemporaneous event of reckless driving." *Dolly,* 150 P.3d at 694–701. Indeed, "the interest in protecting human life . . . is . . . an important factor to consider in assessing the requisite level of reliability." *Id.* at 698.

Florida, however, the state from which *J.L.* arose, has come to the opposite conclusion from the Third Circuit and California — but not without

significant internal disagreement. In a case in which an anonymous caller reported that a person was "waving" a firearm, an intermediate Florida court distinguished *J.L.* by recognizing that "the content of the original tip described not merely the easily falsified and otherwise unverifiable fact that the defendant was carrying a concealed firearm as in *J.L.*, but rather the quite obvious and extremely dangerous fact that a firearm was being openly displayed." *Baptiste v. State,* 959 So.2d 815, 816 (Fla. Dist. Ct. App. 2007). That court found that under such "circumstances, the 'tip' itself rendered it reasonable to effect the stop necessary to inquire further." *Id.*

A deeply divided Florida Supreme Court subsequently quashed this holding as violative of the Fourth Amendment under *J.L.* and said that "the officers could have approached Baptiste and engaged him in conversation." *See* No. SC07-1453, 2008 Fla. LEXIS 1614 (Fla. Sept. 18, 2008). One concurring justice did not sign on with the majority's reasoning, see *id.* at *46 (Cantero, S.J., concurring), and a strong two-justice dissent recognized the danger of preventing the police from taking immediate protective measures and the futility of the exclusionary rule under such circumstances. *Id.* at *46–58 (Wells, J., dissenting).

To illustrate just how dangerously *J.L.* has been misconstrued, we need only look to the majority opinion in *Baptiste* that endorsed an earlier lower court ruling, *see Rivera v. State,* 771 So.2d 1246 (Fla. Dist. Ct. App. 2000), that a report that the "occupants of two vehicles are *actively exchanging gunfire*" to be insufficient under *J.L.* to justify a *Terry* stop. *See* 2008 Fla. LEXIS 1614, at *38–41. Petitioner here urges that the dissenting opinion in *Baptiste*, as well as the lower court's opinion, are more faithful to the careful balance struck by the Fourth Amendment and the holdings of *J.L., Long,* and *Terry*. It would be potentially fatal to both responding officers as well as to members of the public at large if an officer who has

a duty to respond but is powerless to investigate the active exchange of gunfire, beyond merely observing the suspects, without having the authority to take reasonable protective measures.

Like Florida, Virginia has also rejected the approach of most federal circuits and California and inappropriately given *J.L.* a blunderbuss application. In *Jackson v. Commonwealth,* 594 S.E.2d 595 (Va. 2004), the Virginia Supreme Court reversed a correct application of *J.L.* by the Court of Appeals of Virginia (which itself was the product of a 6–4 ruling). *See* 583 S.E.2d 780 (Ct. App. Va. 2003) (en banc). Virginia's high court disregarded the totality of circumstances that distinguished the case from *J.L.*, most notably the immediacy of the threat conveyed by the report of a "brandished firearm in a car," and suppressed the fruits of the search largely because the anonymous tip did not convey predictive information. 594 S.E.2d at 601–03. A majority of the Virginia appellate court had appropriately distinguished *J.L.* because the report of a brandished firearm is an open and obvious crime that presents an imminent public danger for which *J.L.* was not intended to preclude reasonable police protective measures. 583 S.E.2d 788–93. The appellate court cogently recognized that the consequences of such an inflexible application of *J.L.* are "unwise at best and dangerous at worse." *Id.* at 791. Petitioner urges that the Virginia appellate court's majority opinion represented a sounder reading of *J.L.*

Like the Virginia Supreme Court, the New Jersey court's application of *J.L.* held the anonymous report to an unrealistic standard. This Court's rejection of the so-called "firearm exception" in *J.L.* should not be read to eliminate or discourage reliance on anonymous tips among the totality of circumstances when an immediate threat is reported. Rather, this Court simply held that an uncorroborated anonymous tip about a person with a gun cannot be the *sole, per se*

basis for the stop and frisk. 529 U.S. at 272. Here, the anonymous report of a displayed gun was corroborated by the suspicious and threatening circumstances.

Indeed, Congress has recognized that the brandishing of a gun is worthy of more punishment than its mere possession when committing a crime. *See* 18 U.S.C. § 924(c)(1)(A)(ii) (assessing minimum term of seven years for brandishing as opposed to five years for merely possessing). In New Jersey, such flashing in the presence of others itself could have been an aggravated assault. *See* N.J. Stat. Ann. § 2C:12-1 (knowingly pointing firearm, whether or not it was loaded, in direction of another with extreme indifference to human life is aggravated assault).

As we have become all too aware, concerned citizens throughout this country are routinely being frightened into silence, fueling the perception that violent street gangs can terrorize our most vulnerable communities with virtual impunity. To break this vicious cycle of crime and intimidation, police *must* act when an anonymous report warns of immediate gun use. Reviewing courts, in turn, must recognize and safeguard the community's right to be free from the plague of gun violence.

Long before the current arms race among "Bloods" and "Crips," and before gang members earned their "stars" by shooting innocent bystanders and police officers, this Court has been sensitive to the value of anonymous tips in helping the police perform their most basic duty to protect society. *Illinois v. Gates,* 462 U.S. 213, 237 (1983). Indeed, "a standard that leaves virtually no place for anonymous citizen informants is not required" by the Fourth Amendment. *Id.* at 238. The danger in according too little weight to anonymous tips was forcefully stated by the United States Court of Appeals:

> There is the equal danger . . . that

> according no weight to "anonymous" tips in the reasonable suspicion calculus will undermine the ability of concerned citizens to report illegal activity and to thereby make their neighborhoods more safe. Residents of neighborhoods are in the best position to monitor activity on the street. But residents, also fearful of the consequences, might not always wish to identify themselves and volunteer their names. According no weight as a matter of law to such anonymous tips would only discourage concerned residents from even calling police, would burden the rights of ordinary citizens to live in their neighborhoods without fear and intimidation, and would render citizens helpless in their efforts to restore safety and sanctity to their homes and communities.

United States v. Perkins, 363 F.3d 317, 326 (4th Cir. 2004), *cert. denied*, 543 U.S. 1056 (2005). *J.L.* was simply a commonsense recognition that reliance on an anonymous tip *alone* requires scrutiny. The opinion did not signal a departure from *Gates* to virtually eliminate the use of an anonymous report in the totality of circumstances equation.

Petitioner urges this Court to reaffirm its realistic and flexible approach when deciding whether an anonymous report has been sufficiently corroborated. *See id.* at 325 ("A rigid rule demanding the presence of predictive information is thus unjustified by *White* and *J.L.*, and it would be wholly inconsistent with the flexible nature of reasonable suspicion analysis.") *But see United States v. Reaves*, 512 F.3d 123, 124–28 (4th Cir. 2008) (invalidating investigative stop under *J.L.* due mainly to lack of predictive information in anonymous tip).

Specifically, when police respond to an anonymous report regarding the active handling and use of a gun, a reviewing court examining the "predictive aspects" of the tip should neither require nor expect police to delay pre-emptive action until they personally observe the suspect repeat his unlawful gun display. While such forbearance might be appropriate in the case of an anonymous tip of ongoing drug activity, the consequences of such delay in reacting to a recent report involving the "flashing" of a gun are far too dire. Had the officers here waited until an occupant flashed a gun at them, assuming the officers survived, the resulting Fourth Amendment event could have escalated well beyond a mere stop or a frisk and turned fatal. *Cf. Tennessee v. Garner,* 471 U.S. 1 (1985) (holding that police use of deadly force is governed by Fourth Amendment).

Aside from these life-and-death concerns, it would make no sense to require police officers to personally observe a replay of the reported gun flashing as a prerequisite to reasonable suspicion, since any such direct observation of a gun by police would constitute full probable cause, sailing past the much lower and more flexible reasonable suspicion level of proof, rendering the *Terry* standard redundant and irrelevant.

When, as in this case, police respond to an anonymous report of a gun being flashed and personally observe suspicious circumstances, those firsthand observations satisfy the corroboration requirement, even though the officers have yet to actually see the reported firearm itself. That conclusion is consistent with a faithful reading of *J.L.,* where this Court emphasized that the officers in that case had not personally observed any suspicious circumstances and relied exclusively on a "bare-boned" tip. 529 U.S. at 274.

Petitioner asks this Court to heed Chief Judge

Friendly's warning that "courts should not set the test of sufficient suspicion that the individual is 'armed and presently dangerous' too high when protection of the investigating officer is at stake." *United States v. Riggs,* 474 F.2d 699, 705 (2d cir.), *cert. denied,* 414 *U.S.* 820 (1973). Petitioner urges a realistic assessment of police behavior, mindful of the persistent violence in society. Applying such a realistic approach to the present facts, and recognizing that on the front line against violence, the police are particularly vulnerable, the officers acted as they were reasonably expected to act. Certainly, police officers in these circumstances would be derelict in their duty if they did not take action to protect the public.

In that regard, we cannot help but add that protective-search jurisprudence should not be obsessively driven by the speculative possibility that an anonymous caller might be a prankster. This purported risk should not be overstated. Petitioner is not aware of any empirical study showing that anonymous callers are more likely to be lying than not. *See Dolly,* 150 P.3d at 699 (recognizing absence of any indication that such false and malicious communications present a widespread problem). It is reasonable to believe that at least "a fair percentage" of anonymous calls are truthful. Indeed, "a fair probability" is the benchmark for probable cause, a far more stringent standard than reasonable suspicion.

Anonymous tips, as with all other evidence, should be viewed through the prism that reasonable suspicion, like probable cause, deals with probabilities, not certainties. Thus police reliance on this information in determining whether to conduct a protective search when life and limb is at stake is reasonable; it would be foolhardy to ignore it. In fact, this Court recognizes that *Terry* accepts the risk that officers may stop and frisk innocent people, and that possibility does not render the police investigative action unreasonable. *See Illinois v. Wardlow,* 528 U.S.

119, 126 (2000).

This Court has taken care when weighing an anonymous report to "hold the balance true" and to rely on "balanced judgment rather than exhortation." *Gates,* 462 U.S. at 241. The balance of risks in this case clearly weighs in favor of what the officers did. "'[T]he risk of false tips is slight compared to the risk of not allowing the police immediately to conduct an investigatory stop.'" *Dolly,* 150 P.3d at 699 (quoting *Wheat,* 278 F.3d at 735). If the anonymous report of the flashing gun were false, then the police would have conducted an unnecessary protective search of the Durango — a potentially embarrassing intrusion to be sure. But if the accurate report of the flashing gun were ignored, someone could have been shot and killed. A true constitutional balance would allow a brief, minimally intrusive protective search of the vehicle, rather than ban protective searches based in part on anonymous tips. Balanced judgment under these circumstances recognizes the significance of the anonymous report and rejects the reflexive and simplistic exhortations against these crucial leads.

Indeed, a question left unanswered by the state court is: what should the officers have done? Surely no one would suggest that the officers do nothing. That would be inconsistent with their duty to protect the public. Patient observation here would have been inappropriate, given the immediate and deadly capacity of a drawn gun to be fired. Nor could the officers have safely initiated a consensual field inquiry, since they would have recklessly exposed themselves to potential gunfire had they casually approached the vehicle while its multiple occupants remained concealed from view behind darkened windows. Nor could they have allowed the occupants back into the lawfully detained vehicle after having ordered them out, without first satisfying themselves that the vehicle did not contain a weapon. "When officer safety . . . is at issue, officers should not have to make fine

judgments in the heat of the moment." *Thornton v. United States,* 541 U.S. 615, 632 (2004) (Scalia, J., concurring).

The officers in these circumstances had no practical choice but to do what they did — initiate a high-risk detention of the Durango and perform a limited intrusion into the passenger area to secure the gun. The same circumstances that justified the initiation of this encounter necessitated the safety precautions that were taken, including the protective frisks to find and secure the firearm that figured so prominently in the anonymous report that triggered this investigation. *See Terry,* 392 U.S. at 19–20 (determining the reasonableness of a protective search involves a dual inquiry: "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").

In the face of the real world's dangers, peace officers dispatched into harm's way must be allowed to take objectively reasonable precautions. That being so, reviewing courts must take care not to issue rulings that are too far removed from how the police actually gauge risks and perform their duties. Indeed, the facts of this case illustrate the emergent need to secure a firearm suspected of being in a detained motor vehicle that is under investigation. Respondent appeared in the midst of the encounter in an agitated state and violently tried to enter the vehicle, presumably to get the handgun that he later confessed to possessing. Had the police not performed a protective search of the car, the suspect could have reached for the gun, creating an untold hazard for all concerned. This case confirms that dangerous consequences are not hypothetical, as reflected in statistics cited by this Court that demonstrate all too clearly that law-enforcement officers face a high risk of violence when conducting traffic stops. *See, e.g., Wilson,* 519 U.S. at 413.

Finally we must note how inapt the remedy of exclusion is here. The motion judge factually found that the officers implemented the high-risk investigative detention and protective search of the Durango out of fear for their own safety and that of the public. When officers credibly testify that they acted out fear of danger to human life and limb, and their good faith actions were limited to alleviating that fear, reflexive application of the exclusionary rule utterly fails to serve its deterrent purpose. *See Hudson v. Michigan,* 547 U.S. 586, 591–99 (2006). Particularly during a rapidly unfolding investigative detention, peace officers will act — and indeed they should be encouraged to do so — to protect life and limb, irrespective of the later possibility of suppression.

Indeed, this Court so observed in *Terry*: "Regardless of how effective the [exclusionary] rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal." 392 U.S. at 14. "[A] rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime." *Id.* at 15. Thus even when an appellate court might later disagree with the officers' good-faith, on-the-spot decision to protect themselves, exclusion is disproportionate and unjust, providing an undeserved windfall to a dangerous criminal without any corresponding protection to Fourth Amendment rights.

To conclude, *J.L.* was narrowly drawn and should remain confined to those cases in which the only reason the police stopped and frisked a person was an anonymous tip about a person carrying a gun. *J.L.* was not designed to deal with the many emergencies that the police face in the performance of

their duties. As the foregoing discussion demonstrates, the outer limits of *J.L.'s* utility in protective-search jurisprudence are inconsistently applied by the various federal circuits and state courts. This petition presents a unique opportunity for this Court to clarify when *J.L.* should be applied to discourage police conduct, and more importantly, when it should not.

CONCLUSION

Based on the foregoing arguments, Petitioner respectfully urges that this petition for a writ of *certiorari* be granted.

Respectfully submitted,

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