No. 08-1385

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

BRIEF IN OPPOSITION

Joseph Ali Sadighian
Senior Assistant Appellate Defender
(Counsel of Record)

S. Jane Chittom
Appellate Defender

Jessica M. Bulos
Assistant Appellate Defender

OFFICE OF THE APPELLATE DEFENDER
701 E. Franklin Street,
Suite 1001
Richmond, Virginia 23219
Telephone: (804) 225-3598

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Counsel for Respondent

QUESTION PRESENTED

Whether a bare accusation of an intoxicated driver, reported by an anonymous tipster who offered no information indicating he or she contemporaneously observed any conduct supporting the accusation, is sufficient for a valid *Terry* stop without corroboration by the police.

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STATEMENT OF THE CASE

The case before this Court is one in which we know the person an anonymous tipster meant to accuse, but do not know (1) why the tipster said that person was intoxicated; (2) whether the call was made to 9-1-1; or even (3) the caller's exact words. The only evidence of the content of the tip in this case came from Officer Picard's summary thereof, provided at the suppression hearing. Notably, this is not a case where the Court can review an audio recording or transcript of the actual call made to the department of communications. The following excerpt of the suppression hearing transcript constitutes the entirety of the known information about the origin and content of the tip:

> A call was dispatched from the department of communications that there was a [sic] intoxicated driver in the 3400 block of Meadowbridge Road, was named Joseph Harris, and he was driving an Altima, headed south, towards the city, possibly towards the south side. There was a partial tag that was given for this green Altima. Partial tag was Young, or Y8066, and the driver was wearing a striped shirt.

Tr. 6/28/06 at 6; *see also* Petitioner's Appendix (Pet. App.) at 2, 22.

After receiving the dispatch, Officer Picard drove north on Meadowbridge Road, noticed a green Altima going south, and made a U-turn to follow the vehicle. Pet. App. 2, 23; *see also* Tr. 6/28/06 at 7. Officer Picard observed that the vehicle was a light green Altima with license plate number YAR-8046; he was unable to see the driver, however. Tr. 6/28/06 at 7, 9.

As he followed, Officer Picard observed the vehicle's rear brake lights activate three times. The first time the brake lights activated as the vehicle approached the intersection of Meadowbridge and Highland View Roads, an

intersection with no traffic control whatsoever. Tr. 6/28/06 at 14. The second time the brake lights activated fifty feet before the stop bar for the traffic light at the intersection of Meadowbridge Road and Brookland Park Boulevard. Tr. 6/28/06 at 15. The traffic light was red at the time, and the brake lights activated a third time when the vehicle actually stopped at the stop bar for the red light. Tr. 6/28/06 at 16.

The vehicle was traveling the speed limit of twenty-five miles per hour. Tr. 6/28/06 at 14. When the traffic light turned green at the intersection of Meadowbridge Road and Brookland Park Boulevard, the vehicle proceeded through the intersection, pulled over to the side of the road, and stopped. Tr. 6/28/06 at 12-13. Officer Picard pulled behind the vehicle and activated his lights and siren. Tr. 6/28/06 at 13. The time was 6:30 a.m. and it was still dark outside. Tr. 6/28/06 at 16. Officer Picard administered field sobriety tests to Harris and arrested him for driving under the influence. Tr. 6/28/06 at 52.

Harris filed a motion to suppress in the Richmond City Circuit Court and argued that Officer Picard made the stop based on an anonymous telephone call, during which the caller did not make a report indicating he or she was contemporaneously observing criminal behavior. Tr. 6/28/06 at 26. He noted that the present case differed from those cases where the anonymous tipster "identifies the behavior being observed." *Id.* Harris further argued Officer Picard did not observe any driving behavior corroborating the allegation of an intoxicated driver. Tr. 6/28/06 at 27. The trial court denied the motion to

suppress. Tr. 6/28/06 at 30. The case proceeded to trial and Harris was convicted of felony driving under the influence. Pet. App. at 34.

The Court of Appeals of Virginia affirmed the conviction after noting: "The sole issue on appeal is whether, based on the anonymous tip received from the dispatcher and Officer Picard's subsequent personal observations, Picard had reasonable suspicion to seize or detain Harris while he was parked on the side of the road." Pet. App. at 26. The Court of Appeals found: "Officer Picard sufficiently corroborated the criminal component of the anonymous informant's tip before he pulled in behind Harris's already-stopped vehicle...." Pet. App. at 32-33.

The Virginia Supreme Court reversed. The Court recognized that an "anonymous tip need not include predictive information when an informant reports readily observable criminal actions." Pet. App. at 8. It noted, however, 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." *Id.* Therefore, the Court considered whether the officer's observations, together with the anonymous tip, provided reasonable suspicion to justify the *Terry* stop.

The Court noted:

> In testifying during the motion to suppress about Harris' driving behavior, Officer Picard did not describe Harris' driving as erratic. Furthermore, an officer's subjective characterization of observed conduct is not relevant to a court's analysis concerning whether there is a reasonable suspicion because the Court's review of whether

> there was reasonable suspicion involves application of an objective rather than a subjective standard.

Pet. App. at 8-9 (citations omitted). It concluded that the observations of the police officer considered together with the anonymous tip did not give rise to reasonable suspicion of criminal activity. Pet. App. at 10.

REASONS FOR DENYING THE WRIT

There are several reasons for denying certiorari in the present case. First, Petitioner essentially seeks a complete abrogation of any reasonable suspicion standard when the police are presented with a bare accusation that a driver is intoxicated. However, even the cases relied upon by Petitioner and the Amicus support a different rule: Society's reasonable expectation of privacy requires *some facts* to support the tipster's allegation that the driver is intoxicated. This principle, recognized in almost all cases cited by Petitioner and the Amicus, appropriately balances society's reasonable expectation of privacy with the important public safety concern about drunk driving. It further balances society's reasonable expectation of privacy with important law enforcement interests in preserving police resources and making stops based on a sufficient quantity of information supporting a finding of reasonable suspicion. Such a rule is easily applied, simply by ensuring that the person to whom the anonymous tip is made asks a single follow-up question– *i.e.*, "Where are you and what did you see?" The answers will determine whether there is reasonable suspicion to support an investigatory stop.

Second, Petitioner's Question Presented rests on a non-existent factual premise – that the tip at issue here was "a detailed anonymous tip[.]" Pet. at 1, *see also* Pet. at 8 (referring to an "anonymous tip that provides a detailed, contemporaneously observed report of drunk or otherwise dangerous driving"); and 20 (referring to "an anonymous tip when the caller is reporting contemporaneously observed events"). On the contrary, the tip on its face is a bare accusation of an "intoxicated driver." Tr. 6/28/06 at 6. It lacks any information indicating the anonymous tipster was contemporaneously observing dangerous or erratic driving behavior supporting the accusation. Simply put, the tip lacked the requisite *quantity* of information to give rise to reasonable suspicion.

Moreover, by its use of the phrase "driving drunk or dangerously," Petitioner conflates a bare accusation of intoxication with a detailed report of dangerous or erratic driving behavior. Such a conflation is not supported by Petitioner's own case law.

Third, despite Petitioner and Amicus's ardent suggestions to the contrary, the Virginia Supreme Court's majority decision did *not* hold that *all* anonymous tips reporting intoxicated driving must be independently corroborated by police prior to effectuating a valid *Terry* stop. Rather, considering the totality of the circumstances, including the content of the tip, *see* Pet. App. at 5-8, the Court determined resolution of this particular case depended on whether the officer's observations sufficiently corroborated the tipster's bare allegation that Harris was an "intoxicated driver." Nothing in the Virginia Supreme Court majority

decision indicates the Court would reject an investigatory stop if and when presented with a tip containing an actual "detailed, contemporaneously observed report[,]" *see* Pet. at 8, of intoxicated driving.

Finally, the Virginia Supreme Court properly held that Officer Picard's observations did not sufficiently corroborate the anonymous tipster's bare accusation of intoxication. However, this portion of the Virginia Supreme Court's ruling is not properly before the Court, as Petitioner did not offer a Question Presented or any argument on the issue in its Petition. For all of these reasons the Petition for Certiorari should be denied.

ARGUMENT

I. The Decision Below Does Not Create A Certworthy Conflict Among the Lower Courts.

A. All Detentions, Including Traffic Stops, Require Some Articulable, Factual Basis To Believe A Crime Has Occurred, Is Occurring, Or Is About To Occur.

The government, as part of its contract with the governed, guarantees that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. In *Schmerber v. California*, 384 U.S. 757 (1966), this Court recognized that the "Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." *Id.* at 768.

Two years later, in *Terry v. Ohio*, 392 U.S. 1 (1968), this Court wrote, "[o]f course, the specific content and incidents of this right must be shaped by the context in which it is asserted. For 'what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.'" *Id.* at 9 (quoting *Elkins v. United States*, 364 U.S. 206, 222 (1960)).

The requirement that a temporary detention of a citizen be supported by reasonable cause to believe the person has committed, is committing, or is about to commit an offense applies equally to traffic stops. "Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]." *Whren v. United States*, 517 U.S. 806, 809-810 (1996). "[P]ersons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers." *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

The guiding principle in determining the propriety of an investigatory detention is "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Terry*, 392 U.S. at 19. The courts make this determination by examining "the totality of the circumstances" in each case. *Alabama v. White*, 496 U.S. 325, 330 (1990). Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. "Both factors – quantity and quality – are considered in the 'totality of the circumstances – the whole picture,' *United States v. Cortez*, 449 U.S. 411, 417 (1981), that must be

taken into account when evaluating whether there is reasonable suspicion." *White*, 496 U.S. at 330.

In the context of anonymous tips, where a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable. *Illinois v. Gates*, 462 U.S. 213 (1983). But, if the anonymous informant's tip carries sufficient indicia of reliability, it may provide reasonable suspicion for an investigatory stop. *White*, 496 U.S. at 330-31.

In his concurring opinion in *Florida v. J.L.*, 529 U.S. 266, 275 (2000), Justice Kennedy noted that an anonymous tip may "have certain other features, either supporting reliability or narrowing the likely class of informants, so that the tip does provide the lawful basis for some police action." A citizen informant's report of a crime he or she witnessed falls into this category. For example, in *State v. Williams*, 623 N.W.2d 106 (Wis.), *cert. denied*, 534 U.S. 949 (2001), the Wisconsin Supreme Court held an anonymous tip by a woman observing drug sales in the back alley of her house was reliable:

> We have recognized the importance of citizen informants and, accordingly, apply a relaxed test of reliability, that "shifts from a question of personal reliability to 'observational' reliability." In particular, we view citizens who purport to have witnessed a crime as reliable, and allow the police to act accordingly, even though other indicia of reliability have not yet been established.

Id. at 115 (internal citations omitted).

The Virginia Supreme Court itself has also previously recognized that "'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.'" *Jackson v. Commonwealth*, 594 S.E.2d 595, 603 (Va. 2004) (quoting *United States v. Wheat*, 278 F.3d 722, 734 (8th Cir. 2001), *cert. denied*, 537 U.S. 850 (2002)). However, as the Virginia Supreme Court noted in this case: "[T]he crime of drunk driving 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." Pet. App. at 8. The Virginia Supreme Court's recognition of *Wheat*, indicates its potential willingness to adopt the Eighth Circuit's standard in an appropriate case – *i.e.*, a case in which the anonymous tipster reports contemporaneously observed *erratic driving behavior*, supporting the allegation of intoxication.

B. The Virginia Supreme Court's Decision Does Not Conflict With The Decisions Of Most Jurisdictions Concerning Anonymous Tips of Drunk Driving.

The majority of Petitioner's cases demonstrate why the Virginia Supreme Court properly reversed the trial court's denial of suppression in this case. The cases support a balance between the independent elements comprising the totality of the circumstances considered in the reasonable suspicion analysis when presented with anonymous tips reporting erratic or dangerous driving behavior.

In *Wheat*, *supra*, which Petitioner characterizes as the "leading case" on the issue (*see* Pet. at 10), the anonymous caller offered specific facts supporting the

allegation of drunk driving. The police received an anonymous phone call that "a tan – and cream-colored Nissan Stanza 'or something like that,' whose license plate began with the letters W-O-C, was being driven erratically in the northbound lane of Highway 169, eight miles south of Fort Dodge Iowa." The critical fact in *Wheat*, which is notably absent from this case, is that the caller elaborated that "the Nissan was passing on the wrong side of the road, cutting off other cars, and otherwise being driven as if by a 'complete maniac.'" 278 F.3d at 724.

The Eighth Circuit Court of Appeals found the initial stop of the vehicle was supported by reasonable suspicion because the "anonymous caller provided an extensive description of a vehicle that, based on his contemporaneous eyewitness observations, he believed was being operated dangerously, and *cited specific examples of moving violations.*" *Id.* at 737 (emphasis added). In light of the quantity of information contained in the tip, the Eighth Circuit concluded that "emphasis on the predictive aspects of an anonymous tip" proving the tip's reliability was "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. Indeed, as the Eighth Circuit noted, "the more extensive the description of the alleged offense, the greater the likelihood that the tip will give rise to reasonable suspicion." *Id.* at 732 n.8.

Wheat did not endorse a traffic stop based on a bare accusation of an "intoxicated driver." *Wheat* required that the tip "*also contain a sufficient quantity of information to support an inference that the tipster had witnessed*

an actual traffic violation that compels an immediate stop." *Id.* at 732 (emphasis added).

As the Wisconsin Supreme Court did in *Williams, supra,* the Eighth Circuit in *Wheat* relaxed the reliability prong of reasonable suspicion for an anonymous tip, which provided a detailed, contemporaneously observed report of criminal activity, that is, of erratic or otherwise dangerous driving behavior. The Eighth Circuit cautioned, however: "A law enforcement officer's mere hunch does not amount to reasonable suspicion; *a fortiori,* neither does a private citizen's." *Id.* at 732 (internal citations omitted); *see also* 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, 343 (2007) (citing *Wheat,* 278 F.3d at 732 and noting that, to justify an investigatory stop, the anonymous tip of drunk driving "must contain information that the caller actually witnessed a traffic violation, as a mere hunch by a private citizen cannot amount to reasonable suspicion").

Before *Wheat,* several state courts recognized that an anonymous tip could provide reasonable suspicion if the tip contained a sufficient quantity of information to support the tipster's allegation of intoxication:

- *State v. Walshire,* 634 N.W.2d 625, 626 (Iowa 2001) (The police received an anonymous tip about a vehicle with a suspected drunk driver who was driving in the median and dispatch specifically reported that the cellular tele phone caller was directly behind the

suspected vehicle. The stop was upheld because the tip demonstrated the tipster's basis of knowledge: the caller observed the accused driving in an erratic manner);

- *State v. Rutzinski*, 623 N.W.2d 516, 525, 526 (Wis. 2001) (The anonymous tipster indicated she was the vehicle in front of the suspicious driver; she provided specific facts that the alleged intoxicated driver was weaving, varying his speed erratically, and was tailgating. In upholding the stop, the court noted the informant "provided the police with verifiable information indicating his or her basis of knowledge," demonstrating the tipster was making personal observations of unlawful activity contemporaneously with the 911 call);
- *State v. Boyea*, 765 A.2d 862 (Vt. 2000) (Anonymous tip reporting that a specifically described vehicle traveling in a certain direction on a specific highway was "operating 'erratically'"), *cert. denied*, 533 U.S. 917 (2001);
- *State v. Melanson*, 665 A.2d 338, 340 (N.H. 1995) ("[A]n explicit and detailed description of alleged wrongdoing is entitled to greater weight than a general assertion of criminal activity") (Quotation omitted).

Following *Wheat*, courts have expressly adopted its rationale, holding that an anonymous tip requires more than a bare allegation of intoxication:

- *United States v. Elston*, 479 F.3d 314, 315, 318 (4th Cir. 2007) (Upholding a stop based on an anonymous caller's 911 report that

Elston was "highly intoxicated," "driving crazy," that he possessed a nine millimeter handgun with three extra clips of ammunition, and that he had threatened to "let [ ] them off in somebody;" reasoning that an anonymous call is "more likely to be reliable if it provides substantial detail about the individuals and the alleged criminal activity it describes; if it discloses the basis of the informant's knowledge; and, especially, if the informant indicates that her report is based on her contemporaneous personal observations of the call's subject;" noting that the substance of the tip was in "sharp contrast to the 'bare-boned' tip[] considered in *J.L.*");[1]

- *People v. Wells*, 136 P.3d 810, 814-15 (Cal. 2006) ("*Wheat* concluded that tips of drunken or erratic driving may indeed provide reasonable suspicion justifying a traffic stop" if, among other things, the tip "indicate[s] the caller had *actually witnessed a contemporaneous traffic violation* that compels an immediate stop, *rather than merely speculating or surmising unlawful activity*"), *cert. denied*, 550 U.S. 937 (2007) (Internal citations omitted; emphasis added);
- *Bloomingdale v. State*, 842 A.2d 1212, 1222 (Del. 2004) (In addition to providing accurate descriptive details of the car and its location, to

[1] Petitioner compares the stop in *Elston* to the stop in *Wheat* and points out that the Fourth Circuit found significant that the caller reported contemporaneously observed events, and that the caller "'was reporting an imminent threat to public safety.'" Pet. at 14 n.5 (quoting *Elston*, 479 F.3d. at 319). However, this quote from *Elston*, referencing the caller's report of a threat to public safety, concerned the handgun and not the driving behavior. The full quote from the Fourth Circuit stated: "Of additional significance is the fact that Taylor was reporting an imminent threat to public safety – an individual who had expressly threatened to shoot someone in the very near future." *Id.* at 319.

support reasonable suspicion for a *Terry* stop, an anonymous tip of erratic driving "must also provide sufficient information to support the inference that the informant has actually witnessed a traffic violation that warrants an immediate stop");

- *State v. Sousa*, 855 A.2d 1284, 1285 (N.H. 2004) (An anonymous caller's report that a blue pickup truck with a specific plate number was "all over the road" was sufficient to justify a traffic stop);
- *State v. Pendergast*, 83 P.3d 714, 715-16 (Haw. 2004) (An anonymous tip that a silver Honda Accord with a specific license plate had crossed over the center line on a highway, almost caused several head-on collisions, and almost hit a guardrail was sufficient to support a traffic stop);
- *State v. Crawford*, 67 P.3d 115, 116 (Kan. 2003) (An anonymous tip that a specific vehicle, traveling in a specific direction on the highway was "being driven recklessly" was sufficient to support the stop);
- *State v. Contreras*, 79 P.3d 1111, 1112 (N.M. Ct. App. 2003) (An anonymous 911 report that a specific car was "driving erratically" was sufficient to justify a traffic stop).[2]

The anonymous tip at issue before this Court is significantly different from the tips of dangerous or erratic driving in the aforementioned cases. The tips in

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[2] The Amicus relies on *Kaysville City v. Mulcahy*, 943 P.2d 231 (Utah Ct. App. 1997), *abrogated on other grounds by State v. Saddler*, 104 P.3d 1265 (Utah 2004), where the tipster was identified. The Utah appellate court said that fact placed the tip so "high on the reliability scale" that the report to the dispatcher was presumed to be "reliable and truthful." *Id.* at 237. Moreover, the tipster reported that "'a drunk individual' had been at his front door," *id.* at 233, giving rise to an inference of the tipster's personal observation of the accused's intoxicated condition. Thus, *Mulcahy* is inapposite.

those cases include specific details of the accused's driving behavior. In stark contrast, the tip in this case is devoid of any such details of Harris's *driving behavior.* The only details are to identification of the person, his name, clothing, and type of car. The tip focuses on who the person is rather than on facts supporting the accusation that the person is an "intoxicated driver." This tip is the equivalent of an anonymous call to a police station informing the police "There is an intoxicated driver in the 1600 block of Pennsylvania Avenue, who is named Barack Obama, and he is driving a black Escalade, wearing a black suit, and is headed northwest, possibly towards Georgetown."

Finding sufficient quantity of information when an anonymous tipster reports contemporaneously observed potentially criminal activity comports with the reliability the common law assigns to present sense impressions. "Significantly, in our common law contemporaneous accounts of situations have long been regarded as especially credible, and thus exempt from the hearsay rule as present sense impressions...." *Wheat*, 278 F.2d at 736 n.11.

The tip in the case before this Court lacks the common thread in the pre- and post-*Wheat* cases, specifically, the reporting of any facts indicating the caller perceived the event or condition described. As in *J.L.*, all that is known about the caller is "that an anonymous tip came in by a telephone call and nothing more." *J.L.*, 529 U.S. at 275 (Kennedy, J. concurring). An identified caller or a caller who risks being identified would add to the totality of the circumstances constituting reasonable suspicion, but, in this case, "...the informant has not placed his credibility at risk and can lie with impunity." *Id.*

exist for an investigatory traffic stop based on an anonymous caller's "belief" that the driver was intoxicated and was speeding because the caller did not state any facts indicating she personally observed Lee drinking, speeding, or driving erratically);

- *Olson v. Commissioner of Pub. Safety*, 371 N.W.2d 552 (Minn. 1985) (Affirming the lower court's rescission of revocation of Olson's driver's license for drunk driving where the anonymous tip leading to the traffic stop stated only that the tipster observed "a-possibly a drunken driver" driving a specific car, with a specific license number; reasoning that the tip lacked the necessary "specific and articulable facts to support the bare allegation" that the driver was "possibly" drunk and, therefore, that the stop was not justified by reasonable suspicion);
- *Campbell v. State of Washington Dep't. of Licensing*, 644 P.2d 1219, 1220, 1221 (Wash. Ct. App. 1982) (Reversing revocation of Campbell's driver's license on the basis of a drunk driving conviction, when Campbell was stopped solely because of a conclusory tip from an unidentified passing motorist that he was drunk; recognizing "that the seriousness of the suspected criminal conduct is a relevant consideration," but holding "there must still exist some measure of objective fact from which the conclusion of criminal conduct can reasonably be derived").

An inference of personal observation of intoxication may arguably arise from the description of a person's driving behavior, such as was provided in many of the cases cited by Petitioner and the Amicus – *e.g.*, that the person is weaving, crossing into oncoming traffic, or generally driving erratically. In contrast, an inference of personal observation does not arise from the bare accusation that an individual is "an intoxicated driver." *See Bloomingdale v. State, supra*, 842 A.2d at 1220 n.4 ("We do not place weight on the *potential cause*[s] of erratic driving, which are numerous. Only rarely will the tipster perceive actual drinking while driving. What the tipster can perceive is *unsafe* driving.") (Emphasis added). For this reason, Petitioner's use of the phrase "driving drunk *or* dangerously," *see* Pet. at i, 1, 8, 11, 21, 26 (emphasis added), is an improper conflation of a bare accusation of intoxication with a detailed report of dangerous or erratic *driving behavior*.

Absent a requirement that the tip possess a sufficient quantity of information so that it is clear the tipster is relating a contemporaneously observed event, the possible scenarios for stopping vehicles would be limitless. For example: (1) A hypersensitive tipster may report every car that squeals its tires, drives just over the speed limit, or accelerates quickly to the maximum speed; (2) A tipster could report anyone seen leaving a bar and getting into a car because the person was drinking at a bar without knowing if the drink was coke or rum and coke; (3) A tipster could see two people leaving a bar walking to a car, know one is intoxicated, and report an "intoxicated driver" without confirming that the intoxicated person was the driver; (4) A tipster could report

a disabled person leaving a restaurant/bar and mistake the effect of his disability on his gait as evidence of intoxication; or (5) A tipster could make a report of an intoxicated driver because someone pays them to make the call. Such a landscape would also be fertile ground for pranksters.

Citing *Bloomingdale* and *Wheat, supra*, Petitioner argues that the concern regarding pranksters is diminished in the case of anonymous tips reporting drunk or erratic driving. *See* Pet. at 25-26. However, these cases are distinguishable in two crucial ways: (1) the tips in *Bloomingdale* and *Wheat* described contemporaneously observed driving behavior of the accused justifying the allegation of drunk driving and allaying any prankster concerns; and (2) the tipster in the present case placed Mr. Harris in the same block where he often resided with his girlfriend at 3419 Meadowbridge Road. (Tr. 6/28/06 at 80). In this case, the question arises: How many times are we, as individuals, seen driving in our own neighborhoods daily, such that our neighbors could set their clocks by our comings and goings? A prankster could easily use this knowledge to anonymously report a false allegation of our drunk driving in our own neighborhoods. *See Alabama v. White, supra*, 496 U.S. at 333 (Stevens, J., dissenting) (noting that an individual's neighbors can often predict when and where that individual might be going on any given day). Accordingly, the prankster concern arising from a bare allegation of drunk driving cannot be allayed in this case by the rationale expressed in *Wheat* and *Bloomingdale.*

In the context of an anonymous call, states can balance the Fourth Amendment requirement of reasonable suspicion with the important public

safety concern regarding drunk driving by eliciting further information establishing the basis for the caller's accusation of intoxication. The requisite quantity of information discussed in *Wheat* and its progeny, may be gained by training dispatchers to ask one more question when an anonymous caller merely asserts a particular driver is intoxicated. The question – "Where are you and what did you see?" – ensures the caller is witnessing the illegal conduct and avoids dispatching patrols away from legitimate investigations.[6]

The stop of a vehicle, although less intrusive than a *Terry* stop and frisk of an individual, *see Michigan v. Sitz*, 496 U.S. 444, 451-52 (1990), nevertheless implicates the Fourth Amendment. *See Delaware v. Prouse*, *supra*, 440 U.S. at 653.[7] Training police dispatchers to ask the one question of the anonymous caller who makes a bare accusation of an intoxicated driver would serve a dual purpose for law enforcement: (1) protecting valuable police resources, and (2) providing the officer with enough information to make an immediate stop. Requiring some quantity of information balances the Fourth Amendment protection from the ensuing limited, but still intrusive, traffic stop with the

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[6] In *J.L.*, this Court recognized that a report of a person carrying a bomb possibly would not need to bear the same indicia of reliability demanded for a report of a person carrying a firearm in order to justify a stop and frisk. *J.L.*, 529 U.S. at 273-274. But the exigency in the bomb scenario does not permit the 9-1-1 operator to ask one more question, as the tipster likely would not stay on the line because (1) they are getting away from the bomb, (2) they are responsible for the bomb, or (3) they are involved in some way with the bomb or bomber.

[7] Petitioner cites *Colorado v. Bertine*, 479 U.S. 367 (1987) for the proposition that "it is settled law that there is a 'diminished expectation of privacy in an automobile.'" Pet. at 26. However, in *Bertine*, this Court discussed an occupant's diminished expectation of privacy in the compartments and containers within a car; the Court did not hold that the driver had a diminished expectation of privacy as to the seizure of his person. *See generally Bertine*. In this regard, *Prouse* remains settled law. *See* 440 U.S. at 663 ("As *Terry v. Ohio*, *supra*, recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles").

significant public interest, and with the aforementioned important law enforcement interests.

States can easily put procedures and training systems in place to ensure dispatchers obtain a sufficient factual basis supporting an anonymous tipsters accusation of intoxication.[8] Candidates for dispatcher positions already may have to pass various tests and attend training classes.[9] Indeed, national organizations such as the National Academies of Emergency Dispatch,[10] The Association of Public-Safety Communications Officials,[11] and the National Emergency Number Association,[12] are membership organizations that provide training and certification for emergency dispatch or 9-1-1 operators. The United States Department of Labor has also noted: "When handling calls, dispatchers question each caller carefully to determine the type, *seriousness*, and location of the emergency."[13]

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[8] *See* United States Department of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook, 2008-09 Edition: Dispatchers – Training, Other Qualifications, and Advancement, at <http://www.bls.gov/oco/ocos138.htm#training> (last visited July 9, 2009) (noting the various training classes and tests currently required of candidates for dispatcher positions).

[9] *Id.*

[10] <http://www.emergencydispatch.org> (last visited July 9, 2009).

[11] < http://www.apco911.org/new/about/> (last visited July 9, 2009).

[12] <http://www.nena.org> (last visited July 9, 2009).

[13] United States Department of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook, 2008-09 Edition: Dispatchers – Nature of the Work, at <http://www.bls.gov/oco/ocos138.htm#training> (last visited July 9, 2009).

C. The Present Case Does Not Fall Within A "Split" Among The State And Federal Courts.

Any split among the state and federal courts exists only in a few cases that require police corroboration in addition to a tip that describes contemporaneous driving behavior or contemporaneous observations of the driver's condition.[14] This case is not one of those cases. Rather, this case involves only a bare accusation of an "intoxicated driver," without any factual observations supporting the accusation. As previously discussed, and as Petitioner recognizes, *see* Pet. at 8, 26-27, most cases applying a "drunk driving exception" to *J.L.*, including *Wheat*, require that the tip indicate the caller witnessed a contemporaneous traffic violation, rather than merely "surmising unlawful activity." *People v. Wells*, *supra*, 136 P.3d at 815; *see also Wheat*, 278 F.3d at 732, and other cases discussed *supra*.

In any event, the existence of a limited number of state cases contrary to the holdings in *Wheat* and its progeny, including an unpublished trial court opinion

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[14] **Wyoming:** *McChesney v. State*, 988 P.2d 1071 (Wyo. 1999) (requiring independent police corroboration prior to investigatory stop of vehicle which anonymous informant reported "was weaving between lanes, passing cars, and slowing down in order to pass them again.);

Massachusetts: *Commonwealth v. Lubiejewski*, 729 N.E.2d 288, 290-93 (Mass. App. Ct. 2000) (holding an anonymous call claiming a pickup truck had been driving on the wrong side of the road could not justify an investigatory stop when the officer had not personally witnessed any erratic driving, and the caller had already told the dispatcher that the truck had returned to the correct side of the road);

Connecticut: *State v. Sparen*, 2001 WL 206078, No. CR00258199S (Conn. Super. Ct. 2001) (unpub.) (holding an anonymous call reporting a specific car "was weaving badly upon the roadway" did not provide reasonable suspicion for investigatory stop because the tip was "devoid of any historical or predictive information about the suspect" and when the officer "did not make any independent observation" of the illegal driving behavior).

Implicit in the Virginia Supreme Court's holding is the reasoning that had the anonymous tipster relayed an observation of Harris's specific driving behavior supporting the allegation of intoxication, then the stop would have been justified even without police corroboration or predictive behavior offered by the tipster. Thus, the Virginia Supreme Court's decision in the instant case is consistent with the reasoning of *Wheat* and its progeny. Indeed, in a future case, where a tipster reports a suspected intoxicated driver is weaving, passing cars on the wrong side of the road, and/or driving the wrong way down a one-way street, the Commonwealth will likely stress how this case is distinguishable.

The reasoning of *Wheat* and its progeny preclude a finding of reasonable suspicion in light of the substance of the tip at issue in this case. The tip in the present case amounts to a bare accusation that Harris was an "intoxicated driver." It lacked any details indicating the tipster contemporaneously observed specific driving *behavior* supporting the allegation. To find reasonable suspicion on the basis of a bare accusation alone, without police corroboration of the tipster's allegation of illegality, would permit a finding of reasonable suspicion on the basis of a private citizen's mere hunch. When this Court has long held that a law enforcement officer's mere hunch cannot amount to reasonable suspicion, *see Terry*, 392 U.S. at 27, surely, neither can a private citizen's. *See Wheat*, 278 F.3d at 732. Otherwise, the exceptions to the reasonable suspicion standard would "swallow the rule." *J.L.*, 529 U.S. at 273.

In essence, what Petitioner seeks is a complete abrogation of any reasonable suspicion standard based solely on the nature of the crime being reported. Such

abrogation was not recognized in *Wheat* or its progeny; nor, for the reasons previously stated, should it be in the present case. Respondent respectfully requests that certiorari be denied.

II. Petitioner Does Not Argue That The Virginia Supreme Court Was Incorrect In Finding The Officer's Observations Did Not Corroborate The Anonymous Tip Or Independently Provide Reasonable Suspicion To Justify The Stop.

A. Petitioner Has Waived The Issue Regarding Whether Officer Picard's Observations Of Harris's Driving Behavior Corroborated The Tip's Allegation That Harris Was Intoxicated.

At the outset, it must be noted that the premise of Petitioner's Question Presented and entire argument on Petition is that no police corroboration of dangerous driving behavior was necessary in this case. Indeed, in its introduction, Petitioner contends that the officer needed to corroborate only the innocent details of the anonymous tip. *See* Pet. at 1. Petitioner offers just a single suggestion that when an officer observes "'unusual' driving, those observations strongly support the propriety of the stop." Pet. at 27.

Petitioner presents no Question Presented, nor makes any argument, that the Virginia Supreme Court incorrectly held that Officer Picard's observations "when considered together with the anonymous tip, were not sufficient to create a reasonable suspicion of criminal activity ...." Pet. App. at 10. In other words, Petitioner never argues that Harris's driving behavior corroborated the tip's allegation that he was intoxicated. Thus, the propriety of the Virginia Supreme Court's decision in this regard would not properly be before the Court if

certiorari were granted. *See* SUP. CT. RULE 15.2; *see also* SUP. CT. RULE 14.1 (a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court").

B. The Virginia Supreme Court Correctly Held That Officer Picard's Observations Did Not Corroborate The Anonymous Tip's Assertion Of Criminal Activity.

In the event the Court was to decide this issue constitutes a "subsidiary question fairly included" within Petitioner's Question Presented, *see* SUP. CT. RULE 14.1 (a), Respondent maintains the Virginia Supreme Court correctly determined Officer Picard's observations did not sufficiently corroborate the anonymous tipster's assertion of illegality. Braking before an uncontrolled intersection is not indicative of criminal behavior; rather, it is prudent. *See* VA. CODE ANN. § 46.2-820 (specifying that "when two vehicles approach or enter an uncontrolled intersection at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right"); *Pistolesi v. Staton*, 481 F.2d 1218, 1221 (4th Cir. 1973) (recognizing that upon reaching an uncontrolled intersection, "a driver has a duty to look for approaching traffic with reasonable care under all the surrounding circumstances"); *Weakly v. United States*, 158 F.2d 703, 705 (4th Cir. 1946) (stating that a driver approaching an uncontrolled intersection "must proceed with ever present probability in mind that at every intersection he is likely to meet another vehicle traveling the street which he is about to cross").

So too, it is prudent to brake fifty feet prior to the stop bar at a red light, rather than continuing forward at a full twenty-five miles per hour and then slamming on the brakes only a few yards prior to the stop bar. *See* VA. CODE ANN. § 46.2-880 (Tables of speed and stopping distances: setting forth that at twenty-five miles per hour an automobile travels 36.7 feet per second and the total stopping distance is eighty-five feet). Nor was the officer's subjective characterization of Harris's braking as "erratic" sufficient to provide reasonable suspicion to justify the stop. As the Virginia Supreme Court noted, Officer Picard did not describe Harris's driving as erratic at the motion to suppress; he only did so at trial. *See* Pet. App. at 8. Accordingly, that evidence cannot be considered on appeal, as the court did not consider the trial evidence when ruling on Harris's suppression motion. *See United States v. McRae*, 156 F.3d 708, 711 (6th Cir. 1998); *United States v. Quintanilla*, 25 F.3d 694, 698 (8th Cir. 1994); *United States v. Hicks*, 978 F.2d 722, 724 (D.C. Cir. 1992); *see also* 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.1(b), at 18 (4th ed. 2004).

In any event, as the Virginia Supreme Court correctly held, an officer's subjective characterization of observed conduct is not relevant to a determination of reasonable suspicion. Rather, the review of whether reasonable suspicion existed involves an objective standard. *See Terry*, 392 U.S. at 21-22; *see also* Pet. App. at 9.

When determining whether a particular set of facts rises to a reasonable suspicion, courts should apply a commonsense approach to balance the interests of the individual to be free from unnecessary seizures, and the interest of the

state to effectively prevent, detect, and investigate crimes. *United States v. Hensley*, 469 U.S. 221, 228 (1985). This Court, in *Michigan v. Sitz*, *supra*, rejected a constitutional challenge to a state's sobriety checkpoint program, noting the low "'level of intrusion on an individual's privacy caused by the checkpoints,'" as balanced against the state's strong interest in apprehending drunk drivers. *Id.* at 449. The fact everyone was stopped for a few seconds was significant, as this Court explained that "[d]etention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard." *Id.* at 451.

Sitz allows a special type of stop at a minimal level of intrusion to law abiding citizens without individualized suspicion. Such broad scale searches and seizures in the absence of individualized suspicion have been upheld by this Court in border searches, *see United States v. Ramsey*, 431 U.S. 606 (1977), and school searches, *see New Jersey v. T.L.O.*, 469 U.S. 325 (1985). But nothing in *Sitz* suggests anything less than individualized or reasonable suspicion is required when the police focus on an individual driver outside of the sobriety checkpoint situation.

Unlike a sobriety checkpoint, which is established pursuant to pre-approved "guidelines setting forth procedures governing checkpoint operations, site selection, and publicity[,]" *Sitz*, 496 U.S. at 447, the stop in the present case is akin to a random stop. In *Delaware v. Prouse*, *supra*, this Court observed that random stops of motorists involve the "kind of standardless and unconstrained discretion [which] is the evil the Court has discerned when in previous cases it

has insisted that the discretion of the official in the field be circumscribed, at least to some extent." 440 U.S. at 661.

Safe driving alone does not sufficiently corroborate an anonymous tipster's bare accusation of intoxication; nor does it independently provide an officer with reasonable suspicion. *See Salt Lake City v. Bench*, 177 P.3d 655, 660 (Utah Ct. App.) (rejecting the inference that "cautious driving is indicative of intoxication or other wrongdoing"), *cert. denied*, 199 P.3d 337 (Utah 2008). An innocent man leaving his girlfriend's house on a Sunday morning may become aware of a police car behind him and pull over to let the police continue on their way.

The Virginia Supreme Court held: "Officer Picard's observations, when considered together with the anonymous tip, were not sufficient to create a reasonable suspicion of criminal activity, and that, therefore, Harris was stopped in violation of his rights under the Fourth Amendment." Pet. App. at 10. The decision of the Virginia Supreme Court is consistent with this Court's long line of cases that have followed *Terry*. Indeed, "[t]o insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion 'would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . .'" *Prouse*, 440 U.S. at 661 (quoting *Terry*, 392 U.S. at 22).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Joseph Ali Sadighian
Senior Assistant Appellate Defender
(Counsel of Record)

S. Jane Chittom
Appellate Defender

Jessica M. Bulos
Assistant Appellate Defender

OFFICE OF THE APPELLATE DEFENDER
701 E. Franklin Street,
Suite 1001
Richmond, Virginia 23219
Telephone: (804) 225-3598

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Counsel for Respondent