COMMENT

Anonymous Tips Alleging Drunk Driving: Why "One Free Swerve" Is One Too Many

I. Introduction

Drunk driving has been referred to as many things, including selfish, stupid, and arrogant.[1] The very mention of the act no doubt incites many people. Mothers Against Drunk Driving, a non-profit organization, was even founded with the sole mission of ending drunk driving in America.[2] This organization claims that one in three people in the United States will be involved in an alcohol-related traffic accident in their lifetime.[3] It is probably a safe assumption that the majority of people who read this article have been affected in some way by drunk driving, whether by being personally involved in an accident with a drunk driver, a loved one being involved in the same, or even having friends who routinely drive while over the legal limit.

Drunk driving not only poses unique dangers, but also unique legal issues. This is evidenced by the current split in authority regarding whether an anonymous tip alleging drunk driving is sufficient constitutionally to justify an investigative traffic stop without prior independent police corroboration of the tip's allegations. The majority of courts hold that a responding officer is justified in conducting an investigative stop of the driver alleged to be drunk in the anonymous tip without first independently corroborating the tip's allegation of illegality.[4] The minority of courts,

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1. *See, e.g.*, Jennifer Steinhauer, *Mayor Vows to Continue to Press D.W.I. Battle*, N.Y. TIMES, May 23, 2002, at B6; Jim, Comment to *4 Time DUI Sentence: Woman Gets Jail Time*, WOWT CHANNEL 6 (Jan. 26, 2011, 6:59PM), http://www.wowt.com/home/headlines/4_Time_DUI_Sentence_114581064.html?storySection=comments; Monica Dean, *Police: Drunk Driving 'Is Just Stupid'*, NBC SAN DIEGO, Aug. 4, 2010, http://www.nbcsandiego.com/news/local-beat/Police-Drunk-Driving-Is-Just-Stupid-99 954129.html.

2. *See History of the Mission Statement*, MOTHERS AGAINST DRUNK DRIVING, http://www.madd.org/about-us/mission (last visited Feb. 12, 2011).

3. *Statistics*, MOTHERS AGAINST DRUNK DRIVING, http://www.madd.org/statistics/ (last visited Apr. 15, 2011) (citing NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., THE TRAFFIC STOP AND YOU: IMPROVING COMMUNICATIONS BETWEEN CITIZENS AND LAW ENFORCEMENT (Mar. 2001)).

4. *See* United States v. Wheat, 278 F.3d 722 (8th Cir. 2001); People v. Wells, 136 P.3d 810 (Cal. 2006); Bloomingdale v. State, 842 A.2d 1212 (Del. 2004); State v. Prendergast, 83 P.3d 714 (Haw. 2004); State v. Walshire, 634 N.W.2d 625 (Iowa 2001); State v. Crawford, 67 P.3d 115 (Kan. 2003); State v. Golotta, 837 A.2d 359 (N.J. 2003); State v. Scholl, 684

however, hold that an investigative traffic stop based solely upon an anonymous tip alleging drunk driving is an unconstitutional seizure under the Fourth Amendment of the United States Constitution.[5]

Legislatures[6] and courts alike have taken an overt stance against drunk driving, and it shows in the statistics. In 2009, close to 11,000 fatalities in the United States were caused by alcohol-impaired driving.[7] This number is less than half of what it was in the early 1980s.[8] Nevertheless, there is still more that can be done to continue to reduce the number of lives lost because of drunk driving. In dissent from the denial of certiorari of a recent petition to the Supreme Court, Chief Justice Roberts stated:

> The effect of the [minority position] will be to grant drunk drivers "one free swerve" before they can legally be pulled over by police. It will be difficult for an officer to explain to the family of a motorist killed by that swerve that the police had a tip that the driver of the other car was drunk, but that they were powerless to pull him over, even for a quick check.[9]

N.W.2d 83 (S.D. 2004); State v. Boyea, 765 A.2d 862 (Vt. 2000); State v. Rutzinski, 623 N.W.2d 516 (Wis. 2001).

5. *See* State v. Sparen, No. CR00258199S, 2001 WL 206078 (Conn. Super. Ct. 2001); Commonwealth v. Lubiejewski, 729 N.E.2d 288 (Mass. App. Ct. 2000); State v. Miller, 510 N.W.2d 638 (N.D. 1994); Hall v. State, 74 S.W.3d 521 (Tex. Ct. App. 2002); Harris v. Commonwealth, 668 S.E.2d 141 (Va. 2008); McChesney v. State, 988 P.2d 1071 (Wyo. 1999).

6. *See, e.g.*, Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 447 (1990) (dealing with a state law establishing sobriety checkpoints designed to mete out and remove drunk drivers from public roads); South Dakota v. Neville, 459 U.S. 553, 559 (1983) (dealing with a state implied consent law providing for the summary suspension of a person's driver's license upon arrest for drunk driving if the person refuses to submit to a blood alcohol test); *see also Administrative License Revocation*, MOTHERS AGAINST DRUNK DRIVING, http://www.madd.org/laws/administrative-license-revocation.html (listing the states that have implied consent laws that provide for the summary suspension of driver's licenses upon arrest for drunk driving suspicion) (last visited Apr. 15, 2012); *Sobriety Checkpoints*, MOTHERS AGAINST DRUNK DRIVING, http://www.madd.org/laws/sobriety-checkpoints.html (listing the states that have sobriety checkpoint laws) (last visited Apr. 15, 2012).

7. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., DOT HS 811-385 *Traffic Safety Facts*, 1 tbl.1 (2009), *available at* http://www.nhtsa.gov/staticfiles/ncsa/pdf/2010/811385.pdf.

8. *See* NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., *Traffic Safety Facts 1993: Alcohol*, 1 (1993), *available at* http://www-nrd.nhtsa.dot.gov/Pubs/93Alcohol.pdf.

9. Virginia v. Harris, 130 S. Ct. 10, 12 (2009) (Roberts, C.J., dissenting).

The majority position also has its problems. The Fourth Amendment is a powerful protector of individual privacy from arbitrary invasion,[10] and the majority of courts advocate crafting a blanket exception to this important individual right. This comment examines both sides of this thus far unresolved issue. In particular, it argues that while Fourth Amendment privacy is important and should be treated as such, in the majority of cases, the anonymous tip alleging drunk driving is reliable enough to render an investigative stop based solely on that tip reasonable under the Fourth Amendment. This is because of several key factors typically present in the drunk driving situation that make the anonymous tip alleging drunk driving sufficiently reliable to arouse reasonable suspicion on the part of responding officers.

Part II of this comment examines the history of the Fourth Amendment search and seizure clause, including relevant Supreme Court cases. In addition, it gives a brief synopsis of Tenth Circuit Court of Appeals and Oklahoma court decisions regarding anonymous tips. Part III examines the rationale behind both majority and minority holdings in the split, including a look at Oklahoma's position. Part IV argues that although the majority position's reasoning is flawed, the bulk of investigative stops based solely upon anonymous tips alleging drunk driving are reasonable under the Fourth Amendment. Part V concludes.

II. History of the Fourth Amendment

The Fourth Amendment of the United States Constitution states:

> 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.[11]

Dissenting in *Brinegar v. United States*, Justice Jackson stated that the rights given in this amendment should be categorized as indispensable freedoms.[12] This is because "[u]ncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary

10. *See* Camara v. Mun. Court, 387 U.S. 523, 528 (1967).
11. U.S. CONST. amend. IV.
12. 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

government."[13] Justice Jackson went further to say that a people's dignity, personality, and self-reliance can cease to exist when they are subjected to unchecked police power in the form of search and seizure.[14] Thus, the Fourth Amendment protects against government officials arbitrarily intruding upon individual privacy and security.[15] As with several other constitutional provisions, it applies to the States by way of incorporation into the Fourteenth Amendment.[16]

Historically, in ruling on Fourth Amendment cases where criminal activity was not observed firsthand, the Court has typically required the police to obtain judicial assent through the warrant procedure prior to searching or seizing.[17] This procedure requires a showing of probable cause, where an impartial decision maker determines whether there is a reasonable belief that what is sought will be found in a particular place.[18] The limited exceptions to complying with this warrant requirement include hot pursuit[19] and searches incidental to lawful arrests[20]—including searches of things under the immediate control of the person arrested[21]—and, in certain instances, searches of the place where the person is arrested.[22] Another exception to the warrant requirement is that law enforcement can make a brief investigative stop of an automobile if the officer has probable cause to believe searching the vehicle will provide evidence of a crime.[23]

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13. *Id.*

14. *Id.* at 180-81; *see also* Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held more sacred . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.")).

15. *Camara*, 387 U.S. at 528.

16. *Id.* (citing Ker v. California, 374 U.S. 23, 30 (1963)).

17. *See, e.g.*, Katz v. United States, 389 U.S. 347, 356-57 (1967); Beck v. Ohio, 379 U.S. 89, 96 (1964); Wong Sun v. United States, 371 U.S. 471, 477, 479, 480-81 (1963); Chapman v. United States, 365 U.S. 610 (1961); Jones v. United States, 357 U.S. 493, 497-98, 500 (1958).

18. 68 AM. JUR. 2D *Searches and Seizures* § 191 (2010).

19. Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 298-99 (1967) ("The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.").

20. Preston v. United States, 376 U.S. 364, 367 (1964) (citing Agnello v. United States, 269 U.S. 20, 30 (1946); Weeks v. United States, 232 U.S. 383, 392 (1914)).

21. *Preston*, 376 U.S. at 367 (citing Carroll v. United States, 267 U.S. 132, 158 (1925)).

22. *Id.* (citing United States v. Rabinowitz, 339 U.S. 56, 61-62 (1950)); Marron v. United States, 275 U.S. 192, 199 (1927); *Agnello*, 269 U.S. at 30.

23. *See, e.g.*, California v. Carney, 471 U.S. 386, 392 (1985); *Carroll*, 267 U.S. at 153; United States v. Williams, 827 F. Supp. 641, 645 (D. Or. 1993).

Although an investigative traffic stop is a seizure within the meaning of the Fourth Amendment,[24] an exception was carved out due to a combination of the impracticalities of obtaining a warrant to search a mobile vehicle—something that can disappear before a warrant can be attained and search lawfully done—and the fact that there is a decreased expectation in privacy associated with automobiles.[25] This was the state of the Supreme Court's Fourth Amendment jurisprudence until *Terry v. Ohio*.[26]

A. Terry v. Ohio

In *Terry*, the Court considered a class of police conduct that it had not previously ruled upon in terms of Fourth Amendment constitutionality—prompt police action based upon surveillance of an officer on patrol.[27] In ruling on the constitutionality of this branch of police conduct, the Court decided that when a police officer reasonably determines that criminal acts may be taking place, and where, in making initial inquiries the officer's suspicion is not quelled, he or she may conduct a careful, limited search of the suspicious person.[28] In other words, reasonable suspicion can lead to a constitutionally justifiable investigative stop under the Fourth Amendment.[29] This was a major divergence from the warrant requirement and per se unreasonable search presumption for those searches that were not accompanied with a warrant.[30] Under *Terry*, officers can not only search without a warrant in certain situations, but also search based upon a lower standard than probable cause—the reasonable suspicion standard.[31] These stops are now commonly known as *Terry* stops.[32]

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24. *See* Delaware v. Prouse, 440 U.S. 648, 653 (1979).

25. *Carney*, 471 U.S. at 392-93; 68 AM. JUR. 2D, *supra* note 18, § 192.

26. *See* Terry v. Ohio, 392 U.S. 1 (1968).

27. *Id.* at 20.

28. *Id.* at 30.

29. Virginia v. Harris, 130 S. Ct. 10 (2009) (Roberts, C.J., dissenting) (citing *Terry*, 392 U.S. at 22).

30. *Compare* Wong Sun v. United States, 371 U.S. 471, 481-82 (1963) (holding that an officer's acting on an informant's vague tip would subvert the principle that "[t]he arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause"), *and* Agnello v. United States, 269 U.S. 20, 33 (1925) (stating that "[warrantless] searches are held unlawful notwithstanding facts unquestionably showing probable cause"), *with Terry*, 392 U.S. at 22.

31. *See, e.g.*, Alabama v. White, 496 U.S. 325, 330 (1990); United States v. Sokolow, 490 U.S. 1, 7 (1989); Adams v. Williams, 407 U.S. 143, 147 (1972).

32. *See, e.g.*, Florida v. J.L., 529 U.S. 266, 270-71 (2000); *White*, 496 U.S. at 328-29; *Sokolow*, 490 U.S. at 7.

Following *Terry*, an issue developed regarding the circumstances where a tip from an informant could give rise to a constitutionally justifiable police seizure.[33] The Court first addressed the issue of whether an anonymous tip could give police reasonable suspicion in order to initiate a *Terry* stop in the 1990 case of *Alabama v. White*.

B. Alabama v. White

In *Alabama v. White*, the issue before the Court was whether an anonymous telephone tip, somewhat corroborated by the police, provided a degree of reliability sufficient to give reasonable suspicion to justify an investigate stop.[34] The anonymous tip alleged that a woman would be leaving her apartment at a certain time, in a certain car, going to a particular place, and that she would be in possession of illegal drugs located inside of a brown briefcase.[35] Before ultimately ruling that the information contained in the anonymous tip was sufficient under the Fourth Amendment to support reasonable suspicion, the Court looked at previous decisions involving tips to the police.[36] The Court relied upon, inter alia, *Illinois v. Gates*, where it clarified the standard for evaluating when anonymous tips support probable cause.[37]

In *Gates*, the Court abandoned an old approach to determining whether probable cause was supported by an anonymous tip,[38] and instead adopted a totality of the circumstances approach.[39] But the Court in *Gates* was careful to note that the critical factors it laid out under the older approach for making the probable cause determination—veracity, reliability, and basis of knowledge of the informant—were still highly relevant.[40] The Court then noted that these same factors were applicable in the reasonable suspicion context; although, because of its nature, a lesser showing of the factors would meet the lower reasonable suspicion standard.[41]

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33. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 227 (1983) (considering whether an anonymous letter could give rise to probable cause in order to obtain a warrant); *Adams*, 407 U.S. at 147 (sustaining a *Terry* stop initiated based on a known informant's tip that was given in person).

34. 496 U.S. at 326-27.

35. *Id.* at 327.

36. *Id.* at 329-31.

37. *Id.* at 328 (citing *Gates*, 462 U.S. at 227).

38. *Id.* at 328.

39. *Id.*

40. *Id.* (quoting *Gates*, 462 U.S. at 230).

41. *Id.* at 328-29.

Relying on the language and rationale behind *Gates*, the Court in *Alabama v. White* established the test for whether an anonymous tip granted reasonable suspicion to police officers sufficient to justify a *Terry* stop.[42] Although acknowledging that the Court had previously stated in *Gates* that a bare-bones anonymous tip rarely demonstrates the informant's veracity or basis of knowledge, the Court in *White* stated that an anonymous caller could provide the police with reasonable suspicion when the tip was sufficiently corroborated by a law enforcement officer prior to performing an investigative stop.[43] The Court then proceeded to explain how it could be determined whether anonymous tips gave rise to reasonable suspicion.[44] It started out by noting that:

> [r]easonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.[45]

The Court then explained the totality of the circumstances approach for determining whether reasonable suspicion existed.[46] The two main factors are (1) the quantity of information that is passed on to police, and (2) the degree of reliability possessed by the information:[47] "[I]f 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."[48] This obviously implies the opposite is just as true—if a tip is more reliable, less information is required to establish reasonable suspicion.

It is important to note that the Court found the tip in *White* to be sufficiently corroborated by the police prior to the investigative stop.[49] The only thing the police corroborated prior to conducting the stop, however, seemed to be an instantaneous confirmation of the anonymous tip's

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42. *See id.* at 328-31.
43. *Id.* at 329, 331 (citing *Gates*, 462 U.S. at 237).
44. *See id.* at 330-31.
45. *Id.* at 330.
46. *See id.* at 330-31.
47. *Id.* at 330.
48. *Id.*
49. *Id.* at 331.

descriptive information.[50] Although acknowledging that *White* was a close case,[51] the majority placed great emphasis on the fact that the anonymous tip included some predictive element to it.[52] The tip at issue gave an accurate description of White's vehicle, an accurate time frame for White's departure from the apartment building, and also provided some corroboration for her destination.[53] Based upon this, the Court considered it reasonable to believe that a tipster's accurate description of an individual's plans indicates the likelihood that the tipster also has access to trustworthy information about that individual's criminal activities.[54]

After *Terry* and its significant lowering of the standard required of police in order to necessitate a seizure, *White* went a step further by allowing searches based on tips that would likely not have been allowed prior to the case. In upholding the investigative stop in *White* even though the tip "was largely uncorroborated, [the Court assured] that in the future virtually all tips [would] serve as an adequate justification for intrusive stops by the police."[55] This was so because the Court basically stated that law enforcement could find reasonable suspicion based on anonymous tips merely by corroborating the easily visible content of the tips themselves—the description of the car driven by the accused, its general direction, etc.

After the decision was handed down, lower courts began using the rationale behind *White* to uphold *Terry* stops when police were using anonymous tips and only corroborating descriptive details given in these tips before initiating a search and seizure.[56] Two major exceptions that many courts agreed upon were those when an anonymous tipster either alleged that a person illegally possessed a firearm[57] or that a person was

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50. Christopher L. Kottke, *Alabama v. White: The Constitutionality of Anonymous Telephone Tips in Support of "Reasonably Suspicion" and the Narrowing of Fourth Amendment Protections*, 14 AM. J. TRIAL ADVOC. 603, 620 (1991) (discussing the effect of the *White* decision on Fourth Amendment protections).

51. *White*, 496 U.S. at 332.

52. *See id.* at 331-32.

53. Joe Metcalfe, *Anonymous Tips, Investigative Stops and Inarticulate Hunches—Alabama v. White, 110 S. Ct. 2412 (1990)*, 26 HARV. C.R.-C.L. L. REV. 219, 227 (1991).

54. *White*, 496 U.S. at 332.

55. Metcalfe, *supra* note 53, at 220.

56. *See* United States v. Wheat, 278 F.3d 722, 727 (8th Cir. 2001); Jon A. York, *Search and Seizure: Law Enforcement Officer's Ability to Conduct Investigative Traffic Stops Based Upon an Anonymous Tip Alleging Dangerous Driving When the Officers Do Not Personally Observe Any Traffic Violations*, 34 U. MEM. L. REV. 173, 182 (2003) (discussing the effect of the *White* decision).

57. *See, e.g.*, United States v. DeBerry, 76 F.3d 84, 885-87 (7th Cir. 1996); United States v. Gibson, 64 F.3d 617, 619-25 (11th Cir. 1995); United States v. Bold, 19 F.3d 99,

driving in a drunk or erratic fashion.[58] When *Florida v. J.L.* came up, the Court took the opportunity to cabin the reasonable suspicion standard in the context of anonymous tips.

C. Florida v. J.L.

In *Florida v. J.L.*, the Court was asked to determine whether an anonymous tip asserting nothing more than that a person was carrying a gun was sufficient to give rise to a *Terry* stop based on reasonable suspicion.[59] The pertinent facts are these: (1) an anonymous caller reported that "a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun;"[60] (2) officers responded soon thereafter, and saw three black males hanging out at the named bus stop;[61] and (3) although there was no other reason for suspicion besides the vague tip, the officers frisked the young man wearing a shirt matching the tip's description and found a gun on him.[62]

In making its decision as to whether the responding officers had reasonable suspicion to conduct the stop and frisk, the Court primarily focused on the fact that the tip contained nothing that was not readily observable by an uninformed bystander.[63] The Court reasoned that without predictive information in an anonymous tip, the police have no means with which to test the informant's knowledge or credibility.[64] The Court arguably carried on the reasoning seen in *Alabama v. White*; however, it gave teeth to the predictive element that the *White* majority so heavily emphasized. In doing this, the Court stated that "reasonable suspicion . . . requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person."[65] As opposed to the *White* decision, where the Court reasoned that the corroboration of an anonymous tip which helped the police ensure they were stopping the determinate

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102-04 (2d Cir. 1994); United States v. Clipper, 973 F.2d 944, 946-51 (D.C. Cir. 1992), *abrogated by* United States v. Clipper, 313 F.3d 605 (D.C. Cir. 2002).

58. *See, e.g.*, State v. Slater, 986 P.2d 1038, 1041-46 (Kan. 1999); State v. Sampson, 669 A.2d 1326, 1327 (Me. 1996); State v. Melanson, 665 A.2d 338, 339-41 (N.H. 1995); State v. Lamb, 720 A.2d 1101, 1102-06 (Vt. 1998).

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

60. *Id.*

61. *Id.*

62. *Id.*

63. *See id.* at 269-72.

64. *Id.* at 271.

65. *Id.* at 272 (citing 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.4(h) (3d ed. 1996)).

person accused in the tip passed Fourth Amendment muster, the *J.L.* Court took the predictive element a step further in requiring that the tip also "be reliable in its assertion of illegality."[66]

In concurrence, Justice Kennedy stated that the fact that an informant's identity is unknown means that the informant is not putting his or her credibility on the line, and thus could lie with impunity.[67] In calling in anonymously, Justice Kennedy reasoned, the informant does not subject himself or herself to ramifications if the informant provides law enforcement with false information.[68] Further, without providing the predictive information so heavily focused upon in the *J.L.* opinion, the court is left without a means to judge the informant's credibility, and thus the risk of false allegations becomes unacceptable.[69]

The Court also declined to carve out a firearm exception from the *Terry* analysis.[70] In declining to do so, the Court stated that this would go too far—an anonymous call could be made in order to harass a person.[71]

In determining that a firearm exception would be contrary to the intent of the Fourth Amendment, the Court, in dicta, made a few important statements relevant to the development of this comment:

> The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk.[72]

The Court also implied that searches of locales that possess a lower expectation of Fourth Amendment privacy might be justifiable based upon information that would be insufficient to justify searches in other

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66. *Compare* Alabama v. White, 496 U.S. 325, 332 (1990), *with J.L.*, 529 U.S. at 272 (citing LAFAVE, *supra* note 65).

67. *J.L.*, 529 U.S. at 275 (Kennedy, J., concurring).

68. *See* Harris v. Commonwealth, 668 S.E.2d 141, 146 (Va. 2008) (explaining the effect of the implications of Kennedy concurrence).

69. *J.L.*, 529 U.S. at 275 (Kennedy, J., concurring); *see also Harris*, 668 S.E.2d at 146 (providing information that is available to any observer increases the likelihood that the tip could come from anyone ranging from "a concerned citizen, prankster, or someone with a grudge against [the alleged drunk driver]").

70. *J.L.*, 529 U.S. at 272.

71. *Id*.

72. *Id.* at 273-74.

locations.[73] By stating this, the Court left open the possibility that other factual situations, besides one where an anonymous tip alleged the illegal possession of a firearm, could be weighted so heavily in favor of the concern for public safety that the indicia of reliability required of an anonymous tip could be substantially lowered. Many courts have focused on this language in determining whether an anonymous tip alleging drunk driving is sufficient to satisfy a *Terry* analysis.[74]

D. Tenth Circuit and Oklahoma Courts' Anonymous Tip Precedent

Although both the Tenth Circuit Court of Appeals and Oklahoma courts have only considered whether anonymous tips give rise to reasonable suspicion a few times, the jurisdictions have largely mirrored what the Supreme Court has done.[75] The 1982 case of *Lunsford v. State* illustrates how Oklahoma courts addressed whether an anonymous tip was supported by reasonable suspicion prior to both *Alabama v. White* and *Florida v. J.L.*[76] In *Lunsford*, the Oklahoma Court of Criminal Appeals held that an investigative stop conducted solely on information provided by two unknown informants, where the officer knew nothing concerning the two informants' reliability or identity, and where the officer did not independently corroborate the information in the anonymous tip prior to performing the stop, was not constitutionally justifiable under the Fourth Amendment.[77]

In *United States v. Hinojos*, the Tenth Circuit Court of Appeals was faced with the question of whether a police officer's detainment and questioning of a man who was alleged to be involved in drug trafficking by an anonymous tipster was constitutionally permissible.[78] The anonymous tip included the number of occupants (two males), its point of departure (Odessa, Texas), and time, plus its direction of travel (east on Turner Turnpike).[79]

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73. Virginia v. Harris, 130 S. Ct. 10, 11 (2009) (Roberts, C.J., dissenting) (quoting *J.L.*, 529 U.S. at 274).

74. *See, e.g.*, United States v. Wheat, 278 F.3d 722, 736-37 (8th Cir. 2001); State v. Walshire, 634 N.W.2d 625, 629-30 (Iowa 2001); State v. Boyea, 765 A.2d 862, 867 (Vt. 2000).

75. *See generally* United States v. Hinojos, 107 F.3d 765 (10th Cir. 1997); Nilsen v. State, 203 P.3d 189 (Okla. Crim. App. 2009).

76. *See generally* Lunsford v. State, 652 P.2d 1243 (Okla. Crim. App. 1982).

77. *Id.* at 1245-46.

78. *Hinojos*, 107 F.3d at 767.

79. *Id.*

Since this case arose prior to *Florida v. J.L.*, the Tenth Circuit relied heavily on *Alabama v. White* in its opinion.[80] The court noted that the anonymous tip in *Hinojos* was very similar to that in *White*.[81] Further, the court stated that even if the anonymous tip alone would not have given rise to reasonable suspicion sufficient to justify the officer's actions, the officer's corroboration of the truck's description, along with the fact that Hinojos was driving on the highway and in the direction predicted, rendered the investigative stop constitutionally justifiable.[82]

Finally, in a post-*Florida v. J.L.* decision, the Tenth Circuit considered whether an anonymous tip gave rise to reasonable suspicion sufficient to justify an investigative stop that turned up the illegal possession of a firearm and ammunition in *United States v. Copening*.[83] In stating that the stop was constitutionally justifiable, the court distinguished *Copening* from *J.L.* in several ways.[84] First, the anonymous tipster used an unblocked telephone number when he called 911.[85] The court found that this mitigated the threat of a tip designed to harass the person alleged to be in possession of the firearm.[86] Second, the anonymous tipster specifically insisted he had "firsthand knowledge of the alleged conduct."[87] Third, the tip included a detailed description of the car the accused was driving and what the tipster had seen, which further bolstered the tip's reliability.[88] Fourth, the Tenth Circuit remarked that the tipster's multiple 911 calls, following of the vehicle, and continual updating of the vehicle's location to the 911 dispatcher, "be[spoke] an ordinary citizen acting in good faith."[89] Essentially, the court found these facts to further prove that the anonymous tipster was not trying to harass or provide police with a phony tip.[90] Finally, the officer sufficiently corroborated the tip by ensuring that it was based on firsthand knowledge when he followed the vehicle for a while, according to the tip's instruction, prior to conducting the investigative stop.[91]

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80. *See generally id.*
81. *Id.* at 768.
82. *Id.* at 768-69.
83. United States v. Copening, 506 F.3d 1241, 1242-43 (10th Cir. 2007).
84. *Id.* at 1243, 1246-47.
85. *Id.* at 1247.
86. *Id.*
87. *Id.* (quoting United States v. Brown, 496 F.3d 1070, 1076 (10th Cir. 2007)).
88. *Id.* (citing United States v. Jenkins, 313 F.3d 549, 554-55 (10th Cir. 2002)).
89. *Id.*
90. *Id.*
91. *Id.*

Although the Tenth Circuit ruled this way in *Copening*, it stressed that its ruling was purely fact-driven, and that because the anonymous-informant context requires "significant 'skepticism and careful scrutiny,'"[92] it was not carving out a blanket exception that anonymous tips always give rise to reasonable suspicion sufficient to justify investigative stops under the Fourth Amendment.[93]

III. Split in Authority

Whether the Fourth Amendment allows police officers to conduct investigative stops based on anonymous tips alleging drunk driving is a pressing question that the Supreme Court has not yet addressed, and it has "deeply divided federal and state courts."[94] While some of the Court's decisions allow law enforcement to perform investigative stops based upon reasonable suspicion,[95] *J.L.* cabined the ability of law enforcement officers to act based on anonymous tips alone because, absent independent corroboration, anonymous tips were held typically to lack the indicia of reliability required to justify investigative stops based on reasonable suspicion.[96] Nevertheless, the Court in *J.L.* did leave open the possibility that the Fourth Amendment might require less in cases of greater danger.[97] The Court also stated that searches of places that possess a lower expectation of Fourth Amendment privacy than that of the physical person might be permissible based on lesser reliability.[98]

Many lower courts, including the only federal circuit court to consider the issue,[99] have placed great weight on this language in holding that stops based on nothing more than anonymous tips are justifiable under the Fourth Amendment.[100] Although this is the majority view, a significant minority

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92. *Id.* at 1247 (quoting Easton v. City of Boulder, 776 F.2d 1441, 1449 (10th Cir. 1985)).

93. *Id.* at 1247-48.

94. Virginia v. Harris, 130 S. Ct. 10, 10 (2009) (Roberts, C.J., dissenting).

95. *Id.* (citing United States v. Wheat, 278 F.3d 722 (8th Cir. 2001); People v. Wells, 136 P.3d 810 (Cal. 2006); Bloomingdale v. State, 842 A.2d 1212 (Del. 2004); State v. Prendergast, 83 P.3d 714 (Haw. 2004); State v. Walshire, 634 N.W.2d 625 (Iowa 2001); State v. Crawford, 67 P.3d 115 (Kan. 2003); State v. Golotta, 837 A.2d 359 (N.J. 2003); State v. Scholl, 684 N.W.2d 83 (S.D. 2004); State v. Boyea, 765 A.2d 862 (Vt. 2000); State v. Rutzinski, 623 N.W.2d 516 (Wis. 2001).

96. *Harris*, 130 S. Ct. at 10 (citing Florida v. J.L., 529 U.S. 266, 270 (2000)).

97. *See id.* at 11 (citing *J.L.*, 529 U.S. at 273).

98. *Id.* at 10 (quoting *J.L.*, 529 U.S. at 274).

99. *See generally Wheat*, 278 F.3d 722.

100. *See, e.g.*, *id.* at 736-37; *Walshire*, 634 N.W.2d at 630; *Boyea*, 765 A.2d at 867.

of courts have held the exact opposite and found that these stops are unconstitutional because they are an unnecessary intrusion on a person's reasonable expectation of privacy.[101] It is this split in authority that must be further considered in order fully to understand the complexity of the issue that the Supreme Court has thus far failed to resolve.[102]

In considering the rationale behind either allowing or prohibiting these stops, keep in mind that a typical factual situation is as follows: (1) the informant that reports the alleged drunk driving does not generally provide his or her name;[103] (2) the tip usually includes only descriptive information of the car, such as the make and color, at least a partial license plate, a general location of the vehicle's whereabouts, and is commonly accompanied by a conclusory statement as to the car's being driven erratically;[104] and (3) the responding officer does not independently

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101. *See, e.g.*, Commonwealth v. Lubiejewski, 729 N.E.2d 288 (Mass. App. Ct. 2000); Harris v. Commonwealth, 668 S.E.2d 141 (Va. 2008); McChesney v. State, 988 P.2d 1071 (Wyo. 1999).

102. *See Harris*, 130 S. Ct. at 10 (Roberts, C.J., dissenting) ("This is an important question that is not answered by our past decisions, and that has deeply divided federal and state courts.").

103. *Compare, e.g.*, *Wheat*, 278 F.3d at 724, 737 (allowing the stop even though the caller did not identify himself), People v. Wells, 136 P.3d 810, 811, 816 (Cal. 2006) (allowing the stop even though "[t]he record is silent as to the identity of the caller . . . ."), *Walshire*, 634 N.W.2d at 626, 630 (allowing the stop even though "the caller would not give a name"), *and Boyea*, 765 A.2d at 863, 868 (holding the stop to be constitutionally justifiable in a case involving an anonymous report), *with Lubiejewski*, 729 N.E.2d at 290, 293 (holding a stop to be unconstitutional when tip concerning erratic truck driving was made by unidentified motorist), *Harris*, 668 S.E.2d at 144, 147 (disallowing the stop when tipster was anonymous), *and McChesney* 988 P.2d at 1073, 1078 (holding a stop based on an anonymous tip to be unconstitutional).

104. *Compare, e.g.*, *Wheat*, 278 F.3d at 724, 737 (permitting the stop when the tip stated that "[a] tan-and cream-colored Nissan Stanza . . . whose license plate began with the letters W-O-C, was being driven erratically in the northbound lane of Highway 169 . . ." and complaining "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'"), State v. Scholl, 684 N.W.2d 83, 84, 90 (permitting the stop when "[t]he informant gave the license plate number of the vehicle . . . described the vehicle as a blue Toyota Tacoma pickup . . ." and that the informant had seen the driver "leaving Scarlet O'Hara's bar stumbling pretty badly . . ."), *and Boyea*, 765 A.2d at 863, 868 (permitting a stop based on a tip that a "blue-purple Volkswagen Jetta with New York plates, traveling south on I-89 in between Exits 10 and 11, [was] operating erratically"), *with Lubiejewski*, 729 N.E.2d at 290, 293 (holding unconstitutional a stop based on a tip that stated that "a pickup truck with Massachusetts license plate number D34-314 was traveling on the wrong side of Route 195 in the vicinity of Route 140 in New Bedford" and that "the truck had slowed down, crossed the grassy median strip, and then proceeded onto the correct side of the highway"), *Harris*, 668 S.E.2d

corroborate anything other than the descriptive details located in the anonymous tip before conducting an investigative stop.[105]

A. Courts That Hold These Stops to Be Constitutionally Justifiable

As previously stated, the majority of courts that have considered this issue have upheld these stops as constitutionally justifiable.[106] According to Chief Justice Roberts, in dissent from the denial of certiorari from a recent case petitioned to the Court, these courts have upheld these stops based on some combination of four reasons:

> (1) the especially grave and imminent dangers posed by drunk driving; (2) the enhanced reliability of tips alleging illegal activity in public, to which the tipster was presumably an

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at 147 (holding unconstitutional a stop based on a tip that stated that "there was a[n] intoxicated driver in the 3400 block of Meadowbridge Road, [who] was named Joseph Harris, and he was driving [a green] Altima, headed south, towards the city, possibly towards the south side"), *and McChesney*, 988 P.2d at 1073, 1078 (holding unconstitutional a stop based a tip that stated that "a red Mercury with temporary plates was weaving between lanes, passing cars, and slowing down in order to pass them again" and that the car "was traveling east on Interstate 90 twenty-five miles west of Gillette").

105. *Compare, e.g.*, *Wheat*, 278 F.3d at 724-25, 737 (upholding a stop in which the officer matched the makes and partial license plate number given in an anonymous tip "without having observed any incidents of erratic driving"), *Walshire*, 634 N.W.2d at 626, 630 (upholding a stop when "[t]he arresting officer located the car and stopped it, solely on the basis of the call; he did not personally observe any behavior that would generate reasonable suspicion for a traffic stop"), *and Boyea*, 765 A.2d at 863, 868 ("This was not an officer seeking independent verification that a driver was intoxicated, but rather one intent upon catching and stopping as soon as practically possible a driver whom he already suspected of being under the influence."), *with Lubiejewski*, 729 N.E.2d at 290, 293 (holding the stop unconstitutional when "[the arresting officer] made the stop of the truck as a result of the unidentified motorist's report, and not because of any observations he made concerning the operation of the vehicle"), *Harris*, 668 S.E.2d at 146, 147 (holding the stop unconstitutional when the officer, during the hearing suppression, "did not describe Harris' driving as erratic" before he acted on the anonymous tip and conducted a stop), *and McChesney*, 988 P.2d at 1073-74, 1078 (holding unconstitutional the stop when "[d]uring the time [the officer followed the alleged drunk driver, the officer] did not observe any erratic driving or any violations of the law," yet he still conducted an investigative stop based upon the tip).

106. *See Wheat*, 278 F.3d 722; People v. Wells, 136 P.3d 810 (Cal. 2006); Bloomingdale v. State, 842 A.2d 1212 (Del. 2004); State v. Prendergast, 83 P.3d 714 (Haw. 2004); People v. Shafer, 868 N.E.2d 359 (Ill. App. Ct. 2007); *Walshire*, 634 N.W.2d 625; State v. Crawford, 67 P.3d 115 (Kan. 2003); State v. Golotta, 837 A.2d 359 (N.J. 2003); *Scholl*, 684 N.W.2d 83; State v. Hanning, 296 S.W.3d 44 (Tenn. 2009); *Boyea*, 765 A.2d 862; State v. Rutzinski, 623 N.W.2d 516 (Wis. 2001).

> eyewitness; (3) the fact that traffic stops are typically less invasive than searches or seizures of individuals on foot; and (4) the diminished expectation of privacy enjoyed by individuals driving their cars on public roads.[107]

1. Drunk Driving and Its Unique Dangers

The reason most heavily focused upon by courts adhering to the majority view is the fact that drunk driving poses a significant risk to the public. Virtually every court holding these stops to be constitutional has been persuaded by the dangers surrounding drunk driving.[108] The only time a federal appellate court has considered the issue was in *United States v. Wheat*.[109] In its analysis, the Eighth Circuit distinguished the situation of an anonymous tip alleging a person driving drunk from that in *J.L.*, because "[i]n contrast to the report of an individual in possession of a gun, an anonymous report of an erratic or drunk driver on the highway presents a qualitatively different level of danger, and concomitantly greater urgency for prompt action."[110]

To go along with the increased level of danger associated with anonymous tips alleging drunk driving, the Eighth Circuit noted a critical distinction between cases where a person is alleged to possess a gun (like the situation in *J.L.*) and those where a person is alleged to be driving drunk.[111] Officers have less invasive choices at their disposal in alleged possessory offense cases.[112] In alleged possessory offense cases, officers can either "initiate a simple consensual encounter, for which no articulable suspicion is required,"[113] or officers can watch a person alleged to be illegally possessing a firearm, essentially looking for suspicious activity that would give rise to reasonable suspicion that criminal activity may be afoot, as was done in *Terry*.[114]

Since police officers do not have these less invasive options at their disposal with alleged drunk drivers, they only have two choices. An officer

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107. *Harris*, 130 S. Ct. at 11-12 (Roberts, C.J., dissenting).

108. *See Wheat*, 278 F.3d 722; *Wells*, 136 P.3d 810; *Bloomingdale*, 842 A.2d 1212; *Prendergast*, 83 P.3d 714; *Shafer*, 868 N.E.2d 359; *Walshire*, 634 N.W.2d 625; *Crawford*, 67 P.3d 115; *Golotta*, 837 A.2d 359; *Scholl*, 684 N.W.2d 83; *Hanning*, 296 S.W.3d 44; *Boyea*, 765 A.2d 86; *Rutzinski*, 623 N.W.2d 516.

109. *See* 278 F.3d 722.

110. *Id.* at 729 (quoting *Boyea*, 765 A.2d at 867).

111. *See id.* at 736-37.

112. *Id.* at 736.

113. *Id.* (citing Florida v. Rodriguez, 469 U.S. 1, 5-7 (1984) (per curiam)).

114. *Id.* (citing Terry v. Ohio, 392 U.S. 1, 5-7 (1968)).

can either stop the automobile immediately to check if the driver is operating under the influence of alcohol, or that officer can sit back and watch the driver.[115] If the officer elects to sit back and watch the driver, this will inevitably lead to three possible outcomes: (1) the alleged drunk driver continues harmlessly down the road for several miles, and the officer stops his surveillance and leaves the driver alone; (2) the alleged drunk driver weaves onto the shoulder, injuring nobody and corroborating the anonymous tip; or (3) the alleged drunk driver swerves into oncoming traffic, runs a stop light, or otherwise causes extreme harm in a traffic accident.[116]

In referencing the dicta from *J.L.*, several courts have gone so far as to liken drunk drivers to mobile bombs.[117] Even those that have not reached for this analogy have either directly stated or insinuated that drunk driving poses a much greater level of danger than a person illegally possessing a firearm and that, therefore, drunk driving probably falls into what is commonly known as the "public safety exception" found in the *J.L.* dicta.[118]

Regardless of whether these courts have likened drunk drivers to mobile bombs, or stated or insinuated that drunk drivers pose such a level of danger as to meet the public safety exception found in the *J.L.* dicta, virtually all courts finding that these stops are constitutionally justifiable have held that drunk driving poses such an imminent level of danger that it is in the best interest of both the general public and the alleged drunk driver that these stops be allowed.[119] This way, a police officer can make a quick check, rather than being powerless to pull over an alleged drunk driver, essentially giving the driver "one free swerve."[120]

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115. *Id.* (citing *Boyea*, 765 A.2d at 862).

116. *Id.* at 736-37.

117. *See, e.g.*, *id.* at 737 (quoting *Boyea*, 765 A.2d at 867 ("[A] drunk driver is not at all unlike a 'bomb,' and a mobile one at that.")); State v. Crawford, 67 P.3d 115, 118 (Kan. 2003) (quoting State v. Slater, 986 P.2d 1038, 1046 (Kan. 1999) ("A motor vehicle in the hands of a drunken driver is an instrument of death. It is deadly, it threatens the safety of the public, and that threat must be eliminated as quickly as possible.")); State v. Golotta, 837 A.2d 359, 372 (N.J. 2003) (quoting State v. Tischio, 527 A.2d 388, 396 (N.J. 1987) ("We find the bomb example [in the J.L. dicta] to be particularly apt because, . . . this Court previously has described intoxicated motorists as 'moving time bombs.'")).

118. *See* Florida v. J.L., 529 U.S. 266, 273-74 (2000).

119. *See* Virginia v. Harris, 130 S. Ct. 10, 12 (2009) (Roberts, C.J., dissenting).

120. *Id.*

2. Increased Reliability of Anonymous Tips

Another factor that many courts have found to be in favor of allowing these stops is that the great majority of tips come from eyewitnesses to the erratic driving and are thus considered to be more reliable than tips alleging concealed criminal activity.[121] Courts have held that the risk of an anonymous caller falsely reporting a person's driving drunk is significantly lower when the caller is viewing the erratic driving. In considering the increased reliability of anonymous tips in the context of drunk driving, the Eighth Circuit in *Wheat* stated:

> [A] careful reading of the Supreme Court's Fourth Amendment jurisprudence suggests that this emphasis on the predictive aspects of an anonymous tip [as seen in *Florida v. J.L.*] 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.[122]

Further, the Eighth Circuit noted that neither *White* nor *J.L.* created a rule *requiring* a tip to contain predictive elements because this would be contrary to the totality of circumstances test enunciated by the Court.[123] Unlike both *White* and *J.L.*, the Eighth Circuit reasoned, the basis of an informant's knowledge is most always apparent in drunk driving tips, because these tips come from eyewitness observations.[124]

A Supreme Court of Vermont justice enunciated this exact sentiment in a concurrence in *State v. Boyea*:

> The offense alleged here did not involve a concealed crime—a possessory offense. What was described in the police dispatch to the arresting officer was a *crime in progress*, carried out in public, identifiable and observable by anyone in sight of its commission. Unlike the tip alleged in *White*—that White was

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121. *See, e.g.*, *Wheat*, 278 F.3d at 734-35 (stating that unlike possessory offense crimes, where the predictive information requirement may be the only way an informant's knowledge can be corroborated, in erratic driving cases, the tip "[a]lmost always . . . comes from . . . eyewitness observations"); *Golotta*, 837 A.2d at 367-68 (noting that anonymous tips placed through the 911 system are, by their nature, more reliable); State v. Hanning, 296 S.W.3d 44, 49-50 (Tenn. 2009) (quoting State v. Pulley, 863 S.W.2d 29, 32 (Tenn. 1993) ("[W]hen an informant reports an incident at or near the time of its occurrence, a court can often assume that the report is first-hand, and hence reliable.")).

122. *Wheat*, 278 F.3d at 734.

123. *Id.* (quoting United States v. Johnson, 64 F.3d 1120, 1125 n.3 (8th Cir. 1995)).

124. *See id.*

> carrying narcotics— . . . here a total stranger could have observed defendant's driving abilities. No intimate or confidential relationship was required to support the accuracy of the observation. The caller simply reported a contemporaneous observation of criminal activity taking place in his line of sight.[125]

In *Bloomingdale v. State*, the Supreme Court of Delaware stated that another reason that anonymous tips involving drunk drivers are generally more reliable is that these tips deal with automobiles.[126] "It would be difficult for a tipster accurately to place a moving vehicle in a particular location at a specific time if the tipster has not immediately observed that vehicle."[127] Because of this, the court held that law enforcement should be able to give greater weight to an anonymous tip alleging unsafe driving when the factual situation includes: "(a) the precise description of the vehicle; and (b) the officer's corroboration of the descriptive features of the vehicle and the location of its travel [is] in close temporal proximity to when the report was made."[128]

Finally, many of these courts have addressed Kennedy's concurrence in *J.L.* about the concern of harassment associated with reliance on anonymous tips. The gist of the consideration of the risk of harassment is that the risk of bad-natured hoaxes carried out by private citizens is outweighed by the considerable government interest in initiating a stop as soon as possible.[129]

Again, as seen with the reasoning by most courts in holding that drunk driving possesses a unique and imminent danger sufficient to distinguish it from *J.L.*, the reasoning employed by the Eighth Circuit and the Supreme Courts of Delaware and Vermont are merely representative—most courts have used similar logic in holding that anonymous tips provide reasonable suspicion under the Fourth Amendment.

3. Traffic Stops Possess Less Invasive Qualities than Searches and Seizures on Foot

Another way that courts adhering to the majority position distinguish the factual situation of an alleged drunk driver from the one in *J.L.* is that an

125. State v. Boyea, 765 A.2d 862, 875 (Vt. 2000) (Skoglund, J., concurring).

126. Bloomingdale v. State, 842 A.2d 1212, 1220-21 (Del. 2004).

127. *Id.* at 1221.

128. *Id.*

129. *See, e.g.*, *Wheat*, 278 F.3d at 735-36; *Bloomingdale*, 842 A.2d at 1220-21; State v. Hanning, 296 S.W.3d 44, 51 (Tenn. 2009).

investigative traffic stop is typically less invasive of individual privacy than a search and seizure on foot.[130] The Eighth Circuit in *Wheat* readily acknowledged that people have the right to proceed unmolested on public roads, and that investigative stops intrude upon that right.[131] In differentiating the investigative traffic stop from the publicly seen frisk that was considered in *J.L.*, however, the Eighth Circuit stated that investigative traffic stops are "considerably less invasive, both physically and psychologically."[132]

In *State v. Boyea*, the Supreme Court of Vermont stated that because an investigative stop and questioning was at issue, as opposed to "a hands-on violation of the person," the liberty interest at stake was not of as high of a level as was seen in the *J.L.* case.[133] The concurrence in *Boyea* even looked at *Michigan Dep't of State Police v. Sitz*, where the Supreme Court held that sobriety checkpoints were constitutional.[134] In doing so, the concurrence noted that the Court found that the sobriety checkpoint stop only slightly intruded upon motorists, which weighed in favor of allowing sobriety checkpoints to exist.[135] The concurrence finally implied that the properties of the investigative traffic stop were similar to the sobriety checkpoint stop, which in turn implied that the investigative traffic stop only slightly intrudes upon motorists.[136]

In another case, the Supreme Court of Tennessee ruled that an investigative traffic stop differed from the stop and frisk seen in *J.L.* in that the intervention by the police was brief and did not entail physical contact between the officer and alleged drunk driver.[137] Similarly, the Supreme Court of Iowa differentiated the drunk driver/anonymous tip situation from *J.L.* because the intrusion on privacy is less than that associated with a pat-down situation.[138] Although not all courts in the majority position have

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130. *See, e.g.*, *Wheat,* 278 F.3d at 737 (noting that investigative traffic stops are considerably less invasive than a public stop and frisk); *Hanning*, 296 S.W.3d at 51 (noting that an investigative stop lacks the physical contact of a stop and frisk, and is thus less invasive).

131. *Wheat*, 278 F.3d at 737 (citing Delaware v. Prouse, 440 U.S. 648, 657 (1979)).

132. *Id.*

133. State v. Boyea, 765 A.2d 862, 868 (Vt. 2000).

134. *See id.* at 875 (Skoglund, J., concurring).

135. *Id.*

136. *See id.* (implying that if the Court considered the issue at bar, "a brief investigative stop that poses less intrusion than a physical search of the person" would weigh in favor of allowing the search under the Fourth Amendment, as the Court held it to do in *Sitz*).

137. State v. Hanning, 296 S.W.3d 44, 51 (Tenn. 2009).

138. State v. Walshire, 634 N.W.2d 625, 630 (Iowa 2001).

considered the lower level of invasiveness posed by an investigative traffic stop as a means for distinguishing the drunk driving situation from that in *J.L.*, the courts that have considered it have all accepted this line of reasoning.

4. Drivers Possess a Diminished Expectation of Privacy on the Road

Finally, at least one court differentiated the drunk driving situation from that in *J.L.* by reasoning that drivers possess a diminished expectation of privacy on public roads.[139] This is because "in light of the pervasive regulation of vehicles capable of traveling on the public highways, individuals generally have a reduced expectation of privacy while driving a vehicle on public thoroughfares."[140] In stating this, the Supreme Court of California was looking at the line of United States Supreme Court cases considering and allowing sobriety checkpoints.[141] In order to justify sobriety checkpoints, the Court, along with other federal courts, announced that individuals driving on public roads possess a lower expectation of privacy while on those public roads.[142]

B. The Minority View: These Stops Violate the Fourth Amendment

Although the majority position is that traffic stops based on nothing more than anonymous tips alleging drunk driving are constitutionally permissible, the minority takes a different stance; holding that these stops, absent prior independent corroboration of drunken driving by law enforcement, are prohibited under the Fourth Amendment.[143] The courts in the minority position focus heavily on the *J.L.* opinion, holding that an anonymous tip alleging drunk driving is not factually distinct enough from the anonymous tip that alleged the concealed possession of the firearm.[144]

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139. *See* People v. Wells, 136 P.3d 810, 816 (Cal. 2006).

140. *Id.*

141. *See id.*

142. *See, e.g.*, Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451-52 (1990); Colorado v. Bertine, 479 U.S. 367, 372 (1987); California v. Carney, 471 U.S. 386, 392-93 (1985) (citing Cady v. Dombrowski, 413 U.S. 433, 440-41 (1973)); 68 AM. JUR. 2D, *supra* note 18, § 192.

143. *See* State v. Sparen, No. CR00258199S, 2001 WL 206078 (Conn. Super. Ct. Feb. 9, 2001); Commonwealth v. Lubiejewski, 729 N.E.2d 288 (Mass. App. Ct. 2000); State v. Miller, 510 N.W.2d 638 (N.D. 1994); Hall v. State, 74 S.W.3d 521 (Tex. Ct. App. 2002); Harris v. Commonwealth, 668 S.E.2d 141 (Va. 2009); McChesney v. State, 988 P.2d 1071 (Wyo. 1999).

144. *See, e.g.*, *Miller*, 510 N.W.2d at 644-45 (noting that the anonymous tip required independent police corroboration prior to the investigative stop); *Hall*, 74 S.W.3d at 527

As a result, the minority typically focuses on: (1) the lack of reliability associated with anonymous informants;[145] (2) both the lack of predictive information located in the tips, which would not be readily available to uninformed bystanders, and the risk of harassment associated with anonymous tips;[146] and (3) that the risk associated with drunk driving does not justify side-stepping an important constitutional restraint as found in the Fourth Amendment.[147]

1. Lack of Reliability Associated with Anonymous Informants

In one of the most recent cases that an anonymous tip alleging drunk driving has been considered, the Supreme Court of Virginia, in *Harris v. Commonwealth*, relied heavily on the language in *J.L.* dealing with decreased reliability associated with anonymous tips.[148] In *Harris*, the court stated that anonymous tips are relatively unreliable, which means more information is required in order for a responding officer to corroborate sufficiently the allegations contained in such tips.[149] Further, quoting *Alabama v. White*, the court stated, "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity."[150]

Similarly, holding that an investigative stop based solely upon an anonymous tip was constitutionally prohibited, the Court of Appeals of Texas, in *Hall v. State*, leaned heavily upon the fact that anonymous tips are considered less reliable.[151] Since the tip at issue was less reliable due to its anonymity, the test laid out in *Alabama v. White* required a greater level of information to give rise to reasonable suspicion.[152] Further, in quoting a prior decision, the court maintained, "a police officer generally cannot rely

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(noting that, as in *J.L.*, the anonymous tip was not sufficiently corroborated by police prior to stop); *Harris*, 668 S.E.2d at 147 (noting that the alleged driver's actions were not enough to give reasonable suspicion to the police officer, prior to his instigating an investigative stop).

145. *See, e.g.*, *Lubiejewski*, 729 N.E.2d at 291-93; *Miller*, 510 N.W.2d at 644-45; *Hall*, 74 S.W.3d at 525-27; *Harris*, 668 S.E.2d at 145-46; *McChesney*, 988 P.2d at 1075-77.

146. *See, e.g.*, *Lubiejewski*, 729 N.E.2d at 291-93; *Miller*, 510 N.W.2d at 644-45; *Hall*, 74 S.W.3d at 525-27; *Harris*, 668 S.E.2d at 145-46; *McChesney*, 988 P.2d at 1075-77.

147. *See Lubiejewski*, 729 N.E.2d at 291-93; State v. Boyea, 765 A.2d 862, 884-85 (Vt. 2000) (Johnson, J., dissenting).

148. *See Harris*, 668 S.E.2d at 145-46.

149. *Id.* at 145 (citing Florida v. J.L., 529 U.S. 266, 270 (2000)).

150. *Id.* at 145-46 (quoting Alabama v. White, 496 U.S. 325, 329 (1990)).

151. *See Hall*, 74 S.W.3d at 525.

152. *Id.*

on a police broadcast of an anonymous phone call to establish reasonable suspicion."[153]

All of the minority jurisdictions hold that something more than a bare-bones tip is required to give rise to reasonable suspicion.[154] This increased indicia of reliability can come from "an officer's prior knowledge and experience,"[155] predictive information with which to test the anonymous informant's basis of knowledge and veracity,[156] or even an increased number of calls making the same allegations.[157]

2. Lack of Predictive Information/Risk of Harassment

Another heavily emphasized reason for disallowing these stops is that anonymous tips generally include information that is readily available to anyone.[158] This was another reason for disallowing the stop and frisk that was seen in *J.L.*[159] There, the Supreme Court stated that this information is valuable because it helps the police correctly identify the accused.[160] However, this information is only valuable to a point, because without predictive information relating to the alleged criminal activity, police officers have no means with which to test the "informant's knowledge or credibility."[161]

In *Harris v. Commonwealth*, the Supreme Court of Virginia reasoned that an anonymous tip, which included the location of the vehicle, its make, color, license plate number, driver's name, and stated that the car was "headed south, towards the city, possibly towards the south side," did not suffice as predictive information.[162] Further, the court stated that an anonymous tip does not need to include such predictive information when it

153. *Id.* (quoting Garcia v. State, 3 S.W.3d 227, 234-35 (Tex. Ct. App. 1999)).

154. *See, e.g.*, *id.* (noting that "there must be some further indicia . . . from which a police officer may reasonably conclude that the tip is reliable and a detention is justified"); *Harris*, 668 S.E.2d at 145-46 (noting that a bare-boned tip, without predictive information, does not give rise to reasonable suspicion).

155. *Hall*, 74 S.W.3d at 525.

156. *Harris*, 668 S.E.2d at 145-46 (citing Florida v. J.L., 529 U.S. 266, 271 (2000)).

157. State v. Miller, 510 N.W.2d 638, 642 (N.D. 1994) (citing State v. Kettleson, 486 N.W.2d 227, 228 (N.D. 1992)).

158. *See, e.g.*, *id.*; *Harris*, 668 S.E.2d at 145; McChesney v. State, 988 P.2d 1071, 1076-77 (Wyo. 1999).

159. *See J.L.*, 529 U.S. at 269-72 ("The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.").

160. *Id.* at 272.

161. *Id.* at 271.

162. *Harris*, 668 S.E.2d at 144, 146.

is alleging a readily observable criminal activity.[163] In direct conflict with the courts in the majority, however, the court maintained that the crime of drunk driving is not, in and of itself, a readily observable criminal action.[164] Accordingly, the court stated that a police officer must personally see the instance of drunk driving prior to being justified in conducting an investigative stop.[165]

Similarly, the Supreme Court of North Dakota concluded that an investigative stop based upon a tip that gave details about the alleged drunk driver that could be easily obtained by the general public was unconstitutional.[166] In *State v. Miller*, the informant claimed he was working at a local Wendy's, and a driver waiting in the drive-thru line "could barely hold his head up."[167] The court declared that while this tip did give some evidence of possible criminal activity, the informant's allegation did not give rise to reasonable suspicion, absent the police officer independently corroborating the driver's drunkenness prior to conducting an investigative stop.[168]

These courts reason that if they allow police to conduct investigative stops based solely upon tips providing information readily available to uninformed bystanders, the possibility of the anonymous tip coming from a prankster or someone with a grudge would greatly increase.[169] Further, referencing the Kennedy concurrence in *J.L.*, it would allow tipsters to lie with impunity.[170]

3. Danger Posed by Drunk Driving Not Enough

Although somewhat implicit, proponents of the minority view deny that the increased risk posed by drunk drivers warrants allowing police officers

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163. *Id.* at 146.

164. *Compare id.*, *with* United States v. Wheat, 278 F.3d 722, 734 (8th Cir. 2001) (quoting State v. Boyea, 765 A.2d 862, 875 (Vt. 2000) ("The offense alleged here did not involve a concealed crime – a possessory offense. What was described . . . was a *crime in progress*, carried out in public, identifiable and observable by anyone in sight of its commission.")).

165. *Harris*, 668 S.E.2d at 146.

166. State v. Miller, 510 N.W.2d 638, 642-43 (N.D. 1994).

167. *Id.* at 639.

168. *Id.* at 644.

169. *See, e.g.*, Commonwealth v. Lubiejewski, 729 N.E.2d 288, 291 (Mass. App. Ct. 2000) (quoting Commonwealth v. Lyons, 564 N.E.2d 390, 393 (Mass. 1990) ("The corroboration went only to obvious details . . . . Anyone can telephone police for any reason.")); *Harris*, 668 S.E.2d at 144, 146.

170. *See Harris*, 668 S.E.2d at 144, 146 (quoting Florida v. J.L., 529 U.S. 266, 275 (Kennedy, J., concurring)).

to conduct investigative stops based solely on anonymous tips.[171] Dissenting in *State v. Boyea*, Justice Johnson stated, "public safety is not a novel concern of this century."[172] He then traced the history of the Fourth Amendment, focusing on the fact that when the Framers of the Constitution crafted the Fourth Amendment, they did so against the backdrop of living "under a system of unbridled search and seizure allegedly justified by dozens of 'dangers' that evolved in the British common law and statute books."[173]

In *Commonwealth v. Lubiejewski*, the Commonwealth of Massachusetts made two arguments based on the exigencies associated with drunk driving.[174] First, the Commonwealth argued that such an anonymous tip fell under the "emergency doctrine," as crafted in Massachusetts state courts.[175] Essentially, the emergency doctrine entails that there is a situation that requires immediate police action in order to protect life and property.[176] The Massachusetts Court of Appeals, however, stated that this doctrine did not apply. When the officer came across the alleged drunk driver, the driver was not driving erratically.[177] The court came to this conclusion even though the anonymous informant had stayed on the phone with the police and was following the vehicle, eventually seeing the vehicle driving on the wrong side of the road.[178] The reason for not recognizing the emergency doctrine was that the driver was on the correct side of the road when the officer came across him, and thus no emergency existed when the officer could have acted.[179]

Moreover, the Commonwealth argued that a "community caretaking function" applied. This allows police, without reasonable suspicion, to do such things as check on people in rest areas during cold weather, or other activities associated with the officer's concern for a person's well-being.[180]

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171. *See, e.g.*, *Lubiejewski*, 729 N.E.2d at 291-93 (implying that the circumstances were not exigent enough to give credence to emergency or community-caretaking exception arguments); State v. Boyea, 765 A.2d 862, 884-85 (Vt. 2000) (Johnson, J., dissenting) (noting that during the crafting of the Fourth Amendment, many other comparable dangers existed).

172. *Boyea*, 765 A.2d at 884-85 (Johnson, J., dissenting).

173. *Id.*

174. *See Lubiejewski*, 729 N.E.2d at 291-93.

175. *Id.* at 291-92.

176. *Id.* at 292.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

The Court of Appeals of Massachusetts held firm, though, stating that this exception could not be applied in instances where police officers were detecting, investigating, or acquiring evidence for the purpose of applying it to a person's violation of criminal law.[181]

By not giving credence to either one of these arguments, the Massachusetts court implied that the drunk driving situation did not impose such a high level of danger on the public as to fall into Justice Ginsberg's dicta in *J.L.*[182] Similarly, in *McChesney v. State*, where an anonymous tipster hotline was set up for the specific purpose of pulling drunk drivers off the road, the Supreme Court of Wyoming relied on highway patrol protocol when it ruled unconstitutional a stop based solely on an anonymous tip.[183] The highway patrol in Wyoming had been taught to respond to anonymous tips if they could "establish probable cause based upon their own observations[,] not relying on the [anonymous tips]."[184] Again, it is implicit in this that the Supreme Court of Wyoming did not hold the dangers associated with a possible drunk driver sufficient to allow police to sidestep the Fourth Amendment, absent independent corroboration of the erratic driving prior to the investigative stop.[185]

C. Oklahoma Takes the Minority Position

In the 2009 case of *Nilsen v. State*, the Oklahoma Court of Criminal Appeals—Oklahoma's highest criminal court—considered the issue of anonymous tips alleging drunk driving.[186] In *Nilsen*, an anonymous informant called into 911 and alleged that he or she had seen a person "drinking a beer while driving."[187] The tip included a description of the alleged drunk driver's vehicle, its license plate number, and a general location of its whereabouts.[188] A deputy sheriff located a vehicle matching the anonymous tip's description, and without observing any traffic violation or indication of criminal activity, conducted an investigative stop of the vehicle.[189] At trial, the deputy testified that "he observed no traffic offense,

181. *Id.*
182. *Id.*
183. 988 P.2d 1071, 1073 (Wyo. 1999).
184. *Id.* at 1077-78.
185. *See id.* (reasoning that law enforcement is taught not to rely solely on REDDI tips, holding that the tip was not itself sufficient, and implying that the situation was not exigent enough to sidestep a requirement).
186. *See generally* Nilsen v. State, 203 P.3d 189 (Okla. Crim. App. 2009).
187. *Id.* at 190.
188. *Id.*
189. *Id.* at 191.

no equipment failure or anything else that would have provided a basis for the stop" prior to pulling the vehicle over.[190]

In a summary opinion, the court traced the evolution of the case law regarding anonymous tips in the context of drunk driving.[191] The court stated that the key to *Alabama v. White* was that the police officer sufficiently corroborated the anonymous tip when the officer verified "significant aspects of the caller's predictions" prior to conducting the investigative stop.[192] The court then stated that the modest amount of reliability in *White* was not present in *J.L.* due to the lack of predictive information in the tip, which left no means for the police to test the tipster's knowledge or credibility.[193] The court then stressed the portion of *J.L.* that strengthened the predictive element requirement:

> While the [*J.L.*] Court acknowledged that the caller had provided an accurate description of the subject's 'readily observable location and appearance' which helped the police identify the accused it noted that '[s]uch a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.'[194]

After looking to precedent on the issue, the court sided with the minority of jurisdictions. It found that an anonymous tip alleging drunk driving, combined with a description of the accused's vehicle, the vehicle's general location, and the vehicle's license plate number, did not give rise to reasonable suspicion sufficient to justify an investigative stop under the Fourth Amendment.[195] The reasoning for this was threefold: (1) the informant was anonymous, and thus law enforcement had no way to assess the reliability of the tip; (2) there was a heightened risk of false accusation due to the informant remaining anonymous; and (3) the tip included only a means for which the responding officer could identify the accused drunk driver and did not contain predictive information that would help the responding officer corroborate the allegation of drunk driving.[196]

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190. *Id.*
191. *See id.* at 191-92.
192. *Id.* at 191 (citing Alabama v. White, 496 U.S. 325, 331 (1990)).
193. *Id.* (quoting Florida v. J.L., 529 U.S. 266, 271 (2000)).
194. *Id.* (quoting *J.L.*, 529 U.S. at 272).
195. *See id.* at 190-92.
196. *Id.* at 192.

IV. Analysis

Roughly one death occurs every forty-eight minutes in America due to alcohol-related traffic accidents.[197] In 2009, the 10,839 deaths associated with alcohol-impaired driving accounted for thirty-two percent of the total number of traffic fatalities in the United States.[198] In Oklahoma, the statistic is in perfect correlation with the national number—thirty-two percent of all traffic fatalities in the state, or 235 deaths, resulted from alcohol-impaired drivers in traffic accidents in 2009.[199] Notwithstanding the statistics, a blanket exception to traditional Fourth Amendment protections, as advanced by the majority position, is unwarranted.

The overarching standard for Fourth Amendment reasonableness entails balancing the invasiveness of a given search or seizure against the governmental interest in performing the search or seizure.[200] As stated in *White* and applied in *J.L.*, an anonymous tip can lead to reasonable suspicion when the tip contains either a sufficient quantity of information, or degree of reliability, when viewed under the totality of the circumstances.[201]

Applying the *White*/*J.L.* rule to the drunk driving situation, the majority of investigative stops based solely upon anonymous tips alleging drunk driving are reasonable under the Fourth Amendment. First, the level of invasiveness posed by the investigative traffic stop associated with the anonymous tip alleging drunk driving is much lower than that posed by the stop and frisk search associated with the anonymous tip alleging a concealed possessory offense. This sets a low threshold to meet in terms of Fourth Amendment reasonableness. As a result of this low threshold, a lower degree of reliability is required of the anonymous tip alleging drunk driving than was required of the tip in *J.L.*

Although unnecessary, the anonymous tip alleging drunk driving possesses relatively high indicia of reliability. Thus, because there are several factors present in the drunk driving situation that when weighed in the totality of the circumstances surpass the threshold required by the low

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197. *See* DEP'T OF TRANSP., NAT'L HWY. TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS OKLAHOMA 2005-2009, at 6 (2009), *available at* http://www-nrd.nhtsa.dot.gov/departments/nrd-30/ncsa/STSI/40_OK/2009/40_OK_2009.PDF.

198. *See id.*

199. *See id.*

200. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 21 (1968); Camara v. Mun. Court, 387 U.S. 523, 537-38 (1967).

201. *See* Florida v. J.L., 529 U.S. 266, 270-72 (2000); Alabama v. White, 496 U.S. 325, 330 (1990).

level of invasiveness posed by the situation, most investigative stops are reasonable even without independent police corroboration. Some of these factors are always present in the drunk driving situation. For example, anonymous tips are not very "anonymous" anymore. Also, the crime of erratic driving is a readily observable criminal action.

Even though these factors alone are typically not enough to weigh in favor of a reasonable stop under the Fourth Amendment, when other factors are present, the situation possesses indicia of reliability high enough to grant reasonable suspicion to the responding officer. First, when a tip comes from a firsthand observer, it makes it more likely that the assertions of illegality in that tip are legitimate. Moreover, when a tip provides a certain detail of information so that a responding officer can easily find the accused in a short amount of time, it further provides for greater indicia of reliability.

When all of these factors exist in a given situation, the anonymous tip alleging drunk driving possesses a degree of reliability high enough, under the totality of the circumstances, to give rise to reasonable suspicion sufficient to justify an investigative stop, even without prior independent police corroboration. This degree of reliability is more than sufficient to meet the low threshold set by the level of invasiveness posed by the investigative stop. When some factors are not present, it is likely that a stop would be unconstitutional under the Fourth Amendment. Finally, in cases that can be considered "close calls," the social policy that has been advanced by the Court in attempting to rid roads of drunk drivers pushes these cases over the edge of reasonableness, so to speak, thereby rendering the investigative stop constitutional.

A. Drunk Driving Does Not Fit into the Public Safety Exception

First, a blanket "drunk driving exception" from traditional Fourth Amendment protections, as advocated by the majority position, is unwarranted. In *Florida v. J.L.*, Justice Ginsburg, in dicta, created what has come to be known as the public safety exception for anonymous tips. Justice Ginsburg stated that there could be situations where the level of danger associated with the alleged criminal activity in an anonymous tip could be so great as to justify an investigative police search even though a given tip lacks the usual requirement for reliability.[202] Although the Court refrained from enumerating the situations that would fit into this paradigm, Justice Ginsburg used the example of a tip alleging a person carrying a

202. *J.L.*, 529 U.S. at 273-74.

bomb as being sufficiently dangerous to not require the same indicia of reliability prior to police being able to conduct a *Terry* stop constitutionally.[203] Virtually every court in the majority position has held that the drunk driver poses a similar danger to the public as a bomb,[204] which means that these courts have found that the drunk driving situation fits into this public safety exception paradigm.

The drunk driver does pose a real danger to the public. Despite this, courts that have held to the majority view primarily because of the idea that the drunk driver fits into the public safety exception paradigm are incorrect. Some courts may argue the drunk driver fits into this paradigm because of a combination of the number of deaths that drunk driving causes, the imminence of the threat posed by drunk driving, and because the drunk driver is similar to a mobile bomb.[205]

It is true that roughly 120,000 people have lost their lives in alcohol-related traffic accidents since 2000 when the *J.L.* decision was announced.[206] The number of gun-related deaths between 2000 and 2007, however, is nearly double that at 238,405.[207] If the allegation in *J.L.* of the illegal gun possession was not enough to justify a public safety exception, then the allegation of a different criminal activity, drunk driving, which causes roughly half the number of deaths that guns do, should not be treated as per se reasonable based solely on the harm it causes.

Hence, something more is needed. Courts adhering to the majority view state that the drunk driver is much more like a bomb in that at any given

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203. *Id.*

204. *See, e.g.*, United States v. Wheat, 278 F.3d 722, 737 (8th Cir. 2001) (quoting State v. Boyea, 765 A.2d 862, 867 (Vt. 2000) ("[A] drunk driver is not at all unlike a 'bomb,' and a mobile one at that.")); State v. Crawford, 67 P.3d 115, 118 (Kan. 2003) (quoting State v. Slater, 986 P.2d 1038, 1046 (Kan. 1999) ("A motor vehicle in the hands of a drunken driver is an instrument of death. It is deadly, it threatens the safety of the public, and that threat must be eliminated as quickly as possible.")); State v. Golotta, 837 A.2d 359, 372 (N.J. 2003) (quoting State v. Tischio, 527 A.2d 388, 396 (N.J. 1987) ("We find the bomb example [in the J.L. dicta] to be particularly apt because . . . this Court previously has described intoxicated motorists as 'moving time bombs.'")).

205. *See, e.g.*, *Wheat*, 278 F.3d 722, 736-37; People v. Wells, 136 P.3d 810, 815 (Cal. 2006); Bloomingdale v. State, 842 A.2d 1212, 1221 (Del. 2004); *Boyea*, 765 A.2d at 867.

206. *See* NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., TRAFFIC SAFETY FACTS, 2 fig. 1 (2009), *available at* http://www.nhtsa.gov/staticfiles/ncsa/pdf/2010/811385.pdf.

207. *U.S. Firearm Deaths and Death Rates Per 100,000 Population by Year Group and Intent*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, http://www.bradycampaign.org/xshare/Facts/Trends_-_U.S._Firearm_Deaths_and_Death_Rates_by_Year_and_Intent.pdf (last visited Feb. 12, 2011).

point in time a drunk driver can lose control of his or her vehicle, much like at any given point in time a bomb can be detonated.[208] The problem with this reasoning is that it fails to take into account the fact that someone illegally possessing a gun can pull the gun out and shoot at any moment. Just like the drunk driver can lose control of his or her vehicle at any time, a person possessing a gun can cause harm to the public in an instant. Thus, the drunk driving situation is no more dangerous than the situation where a person illegally possesses a gun; in fact, based solely upon the statistics, the drunk driving situation is *less* dangerous. Since the drunk driving situation is no more dangerous to the public than the illegal possession of a gun (which did not fit into the public safety exception), the drunk driving situation does not fit into Justice Ginsburg's public safety exception paradigm.

Furthermore, the public safety exception in *J.L.* is only dicta.[209] By its very definition, dictum is not controlling judicial precedent.[210] Thus, the majority's primarily basing its holding on this public safety exception language is inappropriate. Nevertheless, this does not mean that all investigative stops based solely upon anonymous tips alleging drunk driving are per se unreasonable.

B. Low Level of Invasiveness Posed by Investigative Traffic Stop Sets Low Threshold

While the majority holding is flawed in primarily grounding its reasoning in *J.L.*'s dicta, most anonymous tips alleging drunk driving do justify responding officers performing investigative stops based solely on these tips. To begin with, investigative traffic stops associated with anonymous tips alleging drunk driving pose a low level of invasiveness to the public. This sets a low bar for the totality of the circumstances to meet in terms of Fourth Amendment reasonableness.

The reasoning for this low level of invasiveness is twofold: (1) the investigative traffic stop occurs in a vehicle—a place so heavily regulated by the government that it is hard to see how a person could have a high expectation of privacy while operating one; and (2) in an initial investigative traffic stop, there is no physical contact between the police officer and the suspect.

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208. *See, e.g.*, *Wheat*, 278 F.3d at 737; *Crawford*, 67 P.3d at 118; *Golotta*, 837 A.2d at 372.

209. *See* Florida v. J.L., 529 U.S. 266, 273-74 (2000).

210. *See* 20 AM. JUR. 2D *Courts* § 134 (2005); BLACK'S LAW DICTIONARY 519 (9th ed. 2009).

1. Lower Expectation of Privacy in Vehicles

It is no secret that in order to operate a motor vehicle legally on a public thoroughfare, many requirements must be met. In Oklahoma, these include acquiring an appropriate driver's license, having automobile insurance, having a current license tag, registration, and title for one's vehicle, one's vehicle meeting certain minimum safety requirements, wearing a seat belt while driving, and properly using child restraint seats when carrying a child under six years of age.[211] All of these regulations have led the Supreme Court of the United States to consistently hold that occupants of automobiles have a reduced expectation of privacy while operating these automobiles.[212]

The Supreme Court's recognition of a diminished expectation of privacy associated with motor vehicles does not automatically mean that a police stop for any reason is justified. But it does mean that less indicia of reliability possessed by an anonymous tip will suffice to meet Fourth Amendment reasonableness. There is no similar case law stating that, despite the various regulations a person has to abide by while in public—having a license to carry a gun,[213] wearing clothes,[214] not jaywalking,[215] etc.—a person's physical self possesses a lower expectation of privacy. Granted, an automobile being pulled over by a police officer is still invasive like the *Terry* stop and frisk in *J.L.* in that the nature of the stop is investigative—the officer is looking for evidence of a crime. Nonetheless, because of the Supreme Court's consistently noting this decreased expectation of privacy associated with automobiles, the investigative traffic stop, which occurs while the person is in an automobile, poses a low level of invasiveness to the public.

2. No Physical Contact in an Investigative Stop

Another reason the investigative traffic stop poses a low level of invasiveness is that there is no physical contact in an initial investigative stop in response to drunk driving allegations. Conversely, there is clear physical contact between the officer and the suspect when a *Terry* stop and frisk is conducted to search for a concealed weapon. This may seem all too

211. *See* OKLA. DEP'T OF PUBLIC SAFETY, OKLAHOMA DRIVER'S MANUAL 3-1, 3-2, 3-3 (2010), *available at* http://www.dps.state.ok.us/dls/pub/ODM.pdf.

212. *See* California v. Carney, 471 U.S. 386, 392 (1985) (citing Cady v. Dombrowski, 413 U.S. 433, 440-41 (1973)); 68 AM. JUR. 2D, *supra* note 18, § 192.

213. *See* 21 OKLA. STAT. § 1290.5 (Supp. 2007).

214. *See id.* § 1021(A)(1).

215. *See* 47 OKLA. STAT. ANN. § 11-501 (West 2001).

obvious. The fact is, however, that because of this difference, the investigative stop of an automobile in response to an anonymous tip alleging drunk driving is less invasive of a person's privacy. Looking back to *Terry v. Ohio*, where the Supreme Court first crafted the reasonable suspicion standard, a major point of concern in allowing the stop and frisk of a suspect without an officer first obtaining a search warrant was the degree of invasiveness associated with a frisk.[216] While the officer will always make contact with the suspect when he or she performs a physical frisk of a person in attempt to find a concealed weapon, when an officer conducts an investigative traffic stop in response to an anonymous tip alleging drunk driving, he or she merely has a short conversation with the suspect while the suspect remains in his or her car. There is no physical contact made in this context. Thus, while the investigative traffic stop is admittedly a seizure no matter how brief and no matter what the purpose is,[217] the traffic stop is much less like a search than the physical frisk of a person.

Law enforcement officers are no doubt put through extensive training in order to learn to detect signs of intoxication in motorists. They can use this training to minimize the level of invasiveness posed by investigative stops based on drunk driving allegations. By contrast, police officers have no means with which to make a hands-on frisk less invasive. Placing one's hands on another, no matter how limited the search, is quite an invasion of that person's privacy. Further, it is not only physically invasive—when an officer frisks a person, it also has psychological effects on that person, including embarrassment, or even a sense of being violated. This is not the case with the investigative traffic stop. It can be safely assumed that if someone had to choose between a hands-on violation by a strange, armed cop, and a conversation with that strange, armed cop while sitting in a vehicle, ten out of ten people would elect for the conversation.

The low level of invasiveness posed by an investigative traffic stop creates a low threshold for circumstances to meet before a given stop is reasonable. Accordingly, the totality of the circumstances in a given case requires a tip to possess lower indicia of reliability prior to a stop based upon that tip being reasonable under the Fourth Amendment.

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216. *See* Terry v. Ohio, 392 U.S. 1, 25 (1968) (noting that the physical frisk of a person "must surely be an annoying, frightening, and perhaps humiliating experience").

217. *See* Delaware v. Prouse, 440 U.S. 648, 653 (1979).

C. The Indicia of Reliability Is Sufficient the Majority of the Time

Due to the low threshold set by the invasiveness posed by the investigative traffic stop, a lower indicia of reliability is required of the anonymous tip alleging drunk driving than was required of the tip in *J.L.* in order for a given stop to be reasonable under the Fourth Amendment. Although this is the case, the anonymous tip alleging drunk driving possesses relatively high indicia of reliability. This is because there are several factors typically present in the drunk driving situation that, when weighed in the totality of the circumstances, are more than sufficient to grant reasonable suspicion to the responding officer sufficient to justify a given investigative traffic stop based solely on an anonymous tip.

Some of these factors are always present in the drunk driving situation. These factors alone are typically not enough to weigh in favor of a reasonable investigative traffic stop. When other factors are present in a given situation, however, the level of reasonableness required by the Fourth Amendment is more than met. To better understand this, a look at each is warranted.

1. Factors Always Present

Some of the factors that lead to a higher degree of reliability in the drunk driving situation are always present. In other words, by its very nature, the anonymous tip alleging drunk driving is more reliable than the anonymous tip alleging the concealed possessory offense. These factors that are always present are: (a) the fact that anonymous tips are no longer truly "anonymous;" and (b) that the crime of erratic driving is a readily observable criminal action.

a) Anonymous Tips Are No Longer "Anonymous"

Concurring in *Florida v. J.L.*, Justice Kennedy warned of an anonymous tipster's ability to "lie with impunity" in the anonymous tip framework.[218] Courts and commentators alike have used this as one of their strongest points when advancing the minority position.[219] Even the Eighth Circuit in

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218. Florida v. J.L., 529 U.S. 266, 275 (2000) (Kennedy, J., concurring).

219. *See, e.g.*, Commonwealth v. Lubiejewski, 729 N.E.2d 288, 291 (Mass. App. Ct. 2000) (quoting Commonwealth v. Lyons, 564 N.E.2d 390, 390 (Mass. 1990); Harris v. Commonwealth, 668 S.E.2d 141, 146 (Va. 2009) (quoting *J.L.*, 529 U.S. at 275 (Kennedy, J., concurring)); State v. Boyea, 765 A.2d 862, 880-81 (Vt. 2000) (Johnson, J., dissenting); Michael B. Kunz, "One Free Swerve"?: Requiring Police to Corroborate Anonymous Tips in Order to Establish Reasonable Suspicion for Warrantless Seizure of Alleged Drunk Drivers 86-88 (2010) (unpublished Distinguished Student Research Paper, American University

United States v. Wheat admitted that the risk of harassment is a real concern with the anonymous tip, although it sided with the majority position regarding tips alleging drunk driving.[220]

While this seems like a strong point at first blush, a closer look reveals that the risk of harassment associated with anonymous tips is overstated. Justice Kennedy's concurrence stated that without any means of testing the tipster's credibility, the risk of false accusation becomes unacceptable in the anonymous tip framework.[221] Yet, the thrust of Justice Kennedy's concurrence was support for the use of caller identification by 911 systems so that if a tip proves false, the tipster may be held accountable for his or her actions.[222] In other words, caller identification can both limit this risk of false accusation, and sometimes provide a means for law enforcement to assess the reliability of the tip.

Today, caller identification has been implemented by 911 systems across the country.[223] In fact, the Federal Communications Commission rules that typically allow a person to block one's number from caller identification services do not allow number blocking for calls placed to emergency services lines.[224] Thus, when a person calls into systems such as 911, that person's name and/or phone number—even the address if the call is placed from a landline—is available to the 911 operator so that emergency vehicles can be pointed in the direction of the place of emergency (or the false accuser).[225]

While this does not account for the nearly seventy percent of all 911 calls placed by cellular phones,[226] the FCC has implemented rules requiring cellular telephone service providers not only to ensure that the cellular phones they sell are capable of location services, but also to make it possible to trace calls placed to emergency services providers to very specific locations.[227] The FCC rules require service providers to be able to

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Washington College of Law), *available at* http://digitalcommons.wcl.american.edu/stu_distinguished_papers/1/.

220. *See* United States v. Wheat, 278 F.3d 722, 729, 735-36 (8th Cir. 2001).

221. *J.L.*, 529 U.S. at 275 (Kennedy, J., concurring).

222. *See id.* at 274-76.

223. PRIVACY RIGHTS CLEARINGHOUSE, FACT SHEET 19: CALLER ID AND MY PRIVACY 3 (2000), *available at* http://www.privacyrights.org/fs/fs19-cid.htm.

224. *Id.*

225. *Id.*

226. *See Guide: Wireless 911 Services*, FCC.GOV (May 26, 2011), http://www.fcc.gov/guides/wireless-911-services).

227. *See id.*; *Cell Phones and 9-1-1*. NAT'L EMERGENCY NO. ASS'N, http://www.nena.org/?page=911Cellphones (last visited Oct. 4, 2012).

pinpoint the location of a caller from a mobile phone when a call is placed to 911 so that the operator has this information at hand.[228] This is obviously so that emergency services vehicles can quickly respond to the caller and give assistance as needed. Just as with calls placed from landlines, though, the ability to identify the phone number and location from which a call is placed into the 911 system greatly reduces the likelihood of a tipster being capable of using law enforcement to harass someone without recourse.

Due to the widespread use of caller identification by emergency services lines,[229] the "anonymous informant" is no longer very anonymous. Consequently, false accusers typically no longer have the ability to make phony allegations without being held accountable by the law. In fact, courts have held that when an informant's identity is known, and can thus be held accountable for false accusations, this mitigates the issue surrounding the police officer's not having a suspicion based on his or her own observations.[230]

Further, another reason heavily emphasized by courts in the minority position is the decreased reliability associated with anonymous informants.[231] Because the anonymous informant is no longer truly anonymous, law enforcement is sometimes provided with a means to test the reliability of the tip prior to responding. For instance, if a person calls in from a landline in Norman, Oklahoma, and alleges he or she is watching a driver in a specific car swerving all over the interstate in Oklahoma City, a responding officer has the means to test the informant's veracity and basis of knowledge. In this situation, the officer could conclude that not only the informant was lying, but also the informant needed to be held accountable for his or her actions. Conversely, if a tip is placed from a cellular telephone located on the same interstate where the drunk driver is alleged to

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228. *See Guide: 911 Wireless Services*, *supra* note 226; *Cell Phones and 9-1-1*, *supra* note 227.

229. This assumes both Enhanced 911 and Wireless E911 being implemented across the country. *See Guide: 911 Wireless Services*, *supra* note 226; *Cell Phones and 9-1-1*, *supra* note 227.

230. *See* Adams v. Williams, 407 U.S. 143, 147 (1972) ("[W]hile the Court's decisions indicate that [the known] informant's unverified tip may have been insufficient for [an] arrest or search warrant, the [uncorroborated] information carried enough indicia of reliability to justify the officer's forcible stop of [the suspect].") (citations omitted); *cf.* United States v. Copening, 506 F.3d 1241, 1247 (10th Cir. 2007).

231. *See, e.g.*, Hall v. State, 74 S.W.3d 521, 525 (Tex. Ct. App. 2002); Harris v. Commonwealth, 668 S.E.2d 141, 145-46 (Va. 2009) (noting that a bare-boned tip, without predictive information, does not give rise to reasonable suspicion).

be in Oklahoma City,[232] the responding officer is given more reason to believe that the tip is legitimate. Once again, however, if the tip proves to be false, the officer has the means to track down the person who owns the cellular phone, and can hold him or her accountable for his or her wrongdoing.

Because law enforcement now has a means to hold false accusers accountable for their actions, it can be said that this will deter future false accusers. Additionally, as the number of potential false accusers decreases, the likelihood that the majority of tips reported are legitimate skyrockets. Finally, law enforcement officers can now not only hold false accusers accountable, decreasing the likelihood a tip called in is false, but also officers can sometimes test the informant's veracity or basis of knowledge prior to responding to a given tip based on the location of the tipster in relation to the location of the alleged drunk driver.

The only caveat to this is that a person could go so far as to place a phony anonymous tip from either a payphone or public phone. If this were to occur, the person would have a chance at lying with impunity because it would be difficult for law enforcement to find out who placed the anonymous call when the caller identification system only listed the location of the payphone. What is more, the officer would not have a means to test the reliability of the tip prior to responding. This small subset of anonymous tips would admittedly have to be treated with more skepticism.

b) Erratic Driving Is a Readily Observable Criminal Action

Another factor that boosts the indicia of reliability possessed by the anonymous tip alleging drunk driving is that erratic driving is a readily observable criminal action. This is important because if erratic driving is a readily observable criminal action, anonymous tips alleging drunk driving become much more reliable than a given tip alleging a concealed possessory offense, which requires a showing of informant reliability prior to giving law enforcement reasonable suspicion.[233] The minority position has even conceded that if an alleged crime is readily observable, an

232. This assumes E911 Phase II has been implemented in the area. Although it is becoming widespread, it will not be available in all areas until the deadline of September 11, 2012. *See Guide: 911 Wireless Services*, *supra* note 226; *Cell Phones and 9-1-1*, *supra* note 227.

233. Florida v. J.L., 529 U.S. 266, 274 (2000).

anonymous tip does not have to include predictive information that would show a tipster's insider information.[234]

In order to understand what exactly a readily observable criminal action entails, a look at the dictionary is warranted. "Readily" is defined as "quickly," or "without difficulty."[235] Further, "observable" is defined as "visible; discernible; noticeable."[236] Putting these two definitions together, a readily observable criminal action would be one that is noticeable without difficulty, or quickly visible.

To better understand why erratic driving is readily observable, recall the two major Supreme Court cases, *supra*. In *Alabama v. White*, the anonymous tip alleged the possession of illegal drugs located in a brown briefcase.[237] This clearly would not fall into the category of a readily observable criminal action. Prior to the police conducting an investigative stop, the only way that an anonymous tipster could have known of the woman's transporting the drugs was if that tipster possessed insider information. Therefore, in objectively looking at an anonymous tip alleging the concealed transport of drugs, the risk of the tip being unreliable, whether because it was fabricated in order to harass the woman or otherwise, was very high. This is why the Court stated that something more than a bare-bones tip alleging the illegal possession of drugs located in a briefcase was required—a showing of reliability that indicated the anonymous informant possessed inside information.[238]

Similarly, in *J.L.*, the crime alleged was the illegal possession of a firearm.[239] In objectively looking at an anonymous tip alleging the possession of a concealed firearm, this also would not fall into the category of a readily observable criminal action. Unless the accused inadvertently showed his gun to a bystander, the only way an anonymous tipster could have known of the concealed weapon was if that tipster possessed insider information pertaining to the accused's illegally possessing the concealed firearm.

While it is possible that the young man in *J.L.* did accidentally expose his gun to a bystander, the anonymous informant did not relay this fact

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234. *See Harris*, 668 S.E.2d at 146 (citing Jackson v. Commonwealth, 594 S.E.2d 595, 603 (Va. 2004)).

235. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1500 (2d ed. 1983).

236. *Id.* at 1235.

237. Alabama v. White, 496 U.S. 325, 327 (1990).

238. *See id.* at 332.

239. Florida v. J.L., 529 U.S. 266, 269 (2000).

when he called the police and made the allegations.[240] Further, the responding officers testified that the suspect made no movements out of the ordinary upon their arrival, nor gave them reason for suspicion in any other way.[241] Because the informant did not state that he had observed the suspect expose his weapon, and the responding officers testified the way that they did, it explains why the Court reasoned that the informant had to have possessed insider information regarding the concealed possessory offense. This, in turn, explains why, as in *White*, the Supreme Court in *J.L.* stated that such a tip would have to include a showing of insider information prior to giving rise to reasonable suspicion.[242]

Comparing both the illegal possession of drugs hidden in a plain, commonly-used briefcase, and the illegal possession of a gun hidden under a person's clothes with the crime of erratic driving, there is a clear difference. In drunk driving cases, tipsters are seeing people driving on the wrong side of the road,[243] cutting other cars off,[244] stumbling out of bars prior to getting behind the wheel,[245] and almost causing head-on collisions or hitting guardrails.[246] The things anonymous tipsters are seeing in these cases are readily observable to anyone in the accused's vicinity. Noticing things that are visible without difficulty to anyone that is sharing the road with the alleged drunk driver does not require the insider knowledge that it would take for a person to know that John Doe is carrying illegal drugs in his briefcase, or that he is carrying a firearm concealed beneath his clothes.

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240. *Id.* at 268.

241. *Id.*

242. *Id.* at 272.

243. *See* Commonwealth v. Lubiejewski, 729 N.E.2d 288, 290 (Mass. App. Ct. 2000) (tipping that "a pickup truck with Massachusetts license plate number D34-314 was traveling on the wrong side of Route 195 in the vicinity of Route 140 in New Bedford").

244. *See* United States v. Wheat, 278 F.3d 722, 724 (8th Cir. 2001). (tipping that "[a] tan- and cream-colored Nissan Stanza . . . whose license plate began with the letters W-O-C, was being driven erratically in the northbound lane of Highway 169 . . . ." and complaining "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.'"); McChesney v. State, 988 P.2d 1071, 1073 (Wyo. 1999) (tipping that "a red Mercury with temporary plates was weaving between lanes, passing cars, and slowing down in order to pass them again").

245. *See* State v. Scholl, 684 N.W.2d 83, 84 (S.D. 2004) ("The informant gave the license plate number of the vehicle . . . described the vehicle as a blue Toyota Tacoma pickup" and that the informant had seen the driver "leaving Scarlet O'Hara's bar stumbling pretty badly").

246. *See* State v. Prendergast, 83 P.3d 714, 715-16 (Haw. 2004) (stating that the informant "reported that the [alleged drunk driver] had almost caused several head-on collisions and had almost hit a guardrail").

The minority would no doubt argue that regardless of a person's driving erratically, it does not mean he or she is drunk. While driving erratically and driving drunk are not mutually dependent upon each other, whether a person is drunk or otherwise, a vehicle's being operated erratically still legally justifies an officer to stop the vehicle.[247] Accordingly, the fact that erratic driving—whether caused by alcohol-impairment or not—is a readily observable criminal action, boosts the reliability of the tip alleging such driving.

2. Factors That, When Present, Weigh in Favor of Allowing These Stops

Though the factors above will most always be present in the drunk driving situation, those factors alone are typically not enough to justify investigative stops under the Fourth Amendment. Other "elevating circumstances" are required by the *White*/*J.L.* rule for dealing with anonymous tips and reasonable suspicion. These "elevating circumstances" include: (a) when a tip includes enough information so that it can be reasonably concluded the tip comes from a firsthand observer; and (b) when a tip provides enough descriptive information so that the accused can be found by a responding officer in a very short amount of time.

a) When Tips Come from Firsthand Observations

When a tip alleging drunk driving comes from contemporaneous, firsthand observations, it further increases the tip's indicia of reliability. Whether the tip is from another motorist sharing the road with the alleged drunk driver calling in from his or her cellular telephone,[248] a person seeing someone stumble out of a bar and get in a car to leave,[249] or a worker at a

247. *See, e.g.*, England v. State, 560 P.2d 216, 218 (Okla. Crim. App. 1977) ("In a number of cases, this Court has approved the stopping by officers of motorists whose method of driving convinced the officers that the manner in which the vehicle was being driven made it a menace to the traveling public."); Moore v. State, 306 P.2d 358, 360 (Okla. Crim. App. 1957).

248. *See, e.g.*, *Wheat*, 278 F.3d at 724 (tipping that "[a] tan-and cream-colored Nissan Stanza . . . whose license plate began with the letters W-O-C, was being driven erratically in the northbound lane of Highway 169" and complaining "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'"); State v. Walshire, 634 N.W.2d 625, 625 (Iowa 2001) ("The call was apparently made on a cellular phone because the caller was following the subject car."); *Lubiejewski*, 729 N.E.2d at 290 (involving "an unidentified motorist," which reported that a truck was driving erratically on the highway).

249. *See Scholl*, 684 N.W.2d at 84 (tipping by anonymous informant that he had seen the driver "leaving Scarlet O'Hara's bar stumbling pretty badly" prior to getting behind the wheel and driving off).

fast food chain seeing a person in the drive-thru line barely being able to hold his or her head up while behind the wheel,[250] when informants simply report things they are contemporaneously viewing while in the accused's vicinity, the assertion of illegality in the tip is much more likely legitimate. As the Eighth Circuit noted,[251] when an informant is also a firsthand observer, the degree to which the reliability of the tip's allegations of criminal activity increases, which means the amount of information required to provide law enforcement with reasonable suspicion decreases under the totality of the circumstances.

This does not mean that any tip alleging drunk driving will be the product of contemporaneous observation, thus requiring less information to give rise to reasonable suspicion. Instead, there is a threshold that informants must meet when they make allegations in order to ensure law enforcement that the informant has "firsthand observer status." For instance, a tip that only states, "a red Nissan Maxima is driving northbound on I-35, and the driver is drunk" would not meet this threshold. This sort of tip does not give enough information regarding the tipster's observations, and it is thus just as likely that the tip is false as it is that the tip is legitimate.[252]

A tip that would meet this threshold would look more like this: "A red Nissan Maxima with the license plate of G-K-U-3-6-5, driving northbound on I-35, which just passed the Indian Hills Road exit, is being operated by a drunk driver. I know the driver is drunk because I watched him drink eight beers in the last hour at O'Connell's Pub and stumble out to his car to get behind the wheel. Further I followed him and have seen him swerve several times, almost causing several accidents." In a tip like this, not only is the informant claiming firsthand knowledge, but also the informant is making much more specific allegations regarding the accused's criminal conduct.

The bulk of majority jurisdictions have considered tips that look more like the latter example in determining whether these tips give rise to

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250. *See* People v. Shafer, 868 N.E.2d 359, 361 (Ill. App. Ct. 2007) (dealing with "an employee of Wendy's restaurant, [who] had called regarding a person who 'was causing a disturbance and was intoxicated' while ordering food at the restaurant's drive-thru"); State v. Miller, 510 N.W.2d 638, 639 (N.D. 1994) (involving a Wendy's employee, who called to report that a specific car in the drive-thru line was being driven by someone who "could barely hold his head up").

251. *See Wheat*, 278 F.3d at 734.

252. *Cf.* Florida v. J.L., 529 U.S. 266, 268 (2000). The tip in the example is very similar to the tip in *J.L.*, which the Court stated was not sufficient to grant reasonable suspicion to the responding officer. *Id.* at 272.

reasonable suspicion.[253] Such tips meet the threshold indicating they are coming from firsthand observers. Also, remember that law enforcement has the means to both test the tipsters' veracity and hold them accountable if the tips prove to be false via reverse-911 systems.[254] This is in stark contrast to the situation in *J.L.*, where nothing was known about the anonymous tipster who called the police[255] and the allegation was merely conclusory—"the accused is illegally in possession of a gun."[256] In not knowing a single thing about the informant—whether he or she had observed the young man accidentally exposing his concealed weapon while in public or was merely placing the call to harass or otherwise get the young man into trouble with the law—the likelihood that the conclusory allegation of illegality in the tip was true was not very high. Thus, the allegation in the anonymous tip in *J.L.* did not justify the investigative stop and frisk that the police conducted.

The minority position would argue that the tip seen in *J.L.* could, in fact, have come from a firsthand observer. There is no doubt that this is a possibility. Despite this, in looking at anonymous tips, what is in the realm of possibilities is not the same as what is known to be true when applying a totality of the circumstances test to determine if reasonable suspicion existed prior to the stop. If there would have been something known about the anonymous informant in *J.L.*, such as the informant contemporaneously observing the accused carrying a gun where it was visible to anyone in the accused's vicinity, the tip would have become more reliable. But this was not the case.[257] Because of this, the Court stated that something more was required than a bare-bones tip, or in other words, something that would help show the tip's reliability.[258]

b) When Tips Point Law Enforcement to the Accused Quickly

Another factor that, when present, increases the tip's reliability is when the tipster is able to place the alleged drunk driver in a specific location

253. *See Wheat*, 278 F.3d at 724; Bloomingdale v. State, 842 A.2d 1212, 1213 (Del. 2004); State v. Prendergast, 83 P.3d 714, 715-16 (Haw. 2004); *Walshire*, 634 N.W.2d at 625-26; State v. Golotta, 837 A.2d 359, 361 (N.J. 2003); *Scholl*, 684 N.W.2d 83, 84; *Boyea*, 765 A.2d at 863 ; *Rutzinski*, 623 N.W.2d at 519.

254. *See supra* Part IV.B.2.

255. *J.L.*, 529 U.S. at 268.

256. *See id.*

257. *See id.*

258. *Id.* at 274.

where police can easily locate the driver.[259] This may not be predictive in the sense that the informant does not usually allege a final destination where the drunk driver is travelling, as appeared to be the tipping point in *White* when the Supreme Court allowed the investigative stop based upon an anonymous tip alleging the illegal possession of drugs.[260] Nevertheless, as the Supreme Court of Delaware noted in *Bloomingdale v. State*, if an informant can place the vehicle in a location where the responding officer can quickly locate it, the probability that the informant's allegation of drunk driving being true increases.[261] This is because it would be very difficult to fabricate a tip against a person in a car, which has the capability of travelling at high speeds and readily changing directions, so that a responding officer could easily be able to locate the alleged drunk driver.

If the purpose of a fabricated anonymous tip were to have the police harass the accused, then it would be fairly easy to succeed in placing such a tip against a person on foot who remains in a set location for a meaningful amount of time, as was the case in *J.L.*[262] It would not be remotely difficult to know where a person one dislikes is hanging out and place a false tip alleging that the person is committing any number of crimes at that location. Placing such a tip alleging drunk driving is a much more difficult proposition. In the drunk driving context, the accused is behind the wheel of a vehicle, which is capable of disappearing in an instant.[263] If a tipster can point the otherwise-clueless responding officer to the accused in a short amount of time, the tipster almost certainly has to possess some sort of firsthand knowledge regarding the driver. Firsthand knowledge, in turn, increases the likelihood that the allegations of illegality in the tip are legitimate, as seen *supra*.[264]

The minority would certainly argue that there is no real showing of reliability with regard to the assertion of illegality in an anonymous tip,

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259. *See, e.g.*, State v. Crawford, 67 P.3d 115, 117 (Kan. 2003) (locating and conducting the investigative stop six minutes after receiving the report of the anonymous tip); State v. Scholl, 684 N.W.2d 83, 84 (S.D. 2004) (observing the car described in the report and conducting an investigative stop three to four minutes after responding to the report of the alleged drunk driver); State v. Boyea, 765 A.2d 862, 863 (Vt. 2000) (locating the alleged drunk driver within five minutes).

260. *See* Alabama v. White, 496 U.S. 325, 331-32 (1990).

261. *See* Bloomingdale v. State, 842 A.2d 1212, 1220 (Del. 2004).

262. *See J.L.*, 529 U.S. at 268.

263. *See Bloomingdale*, 842 A.2d at 1220; *cf.* California v. Carney, 471 U.S. 386, 392-93 (1985) (explaining why a vehicle is excepted from traditional warrant requirements); 68 AM. JUR. 2D, *supra* note 18, § 192.

264. *See supra* Part IV.C.1.

even when a tip can place a vehicle where a responding officer can easily locate it. While this may be true in isolation, when an informant, who is no longer truly anonymous and can be held accountable for his or her actions, witnesses first-hand a readily observable criminal action, such as erratic driving, and simply calls in a report of what he or she is seeing, and the responding officer can quickly find the described vehicle in the location it is alleged to be, the likelihood that a tip is accurate, not only in its ability to identify the vehicle and driver (the innocent details), but also in its assertion of illegality (the fact that a person is driving erratically) increases dramatically.

Due to the low level of invasiveness posed by the investigative traffic stop, the high indicia of reliability possessed by the anonymous tip alleging drunk driving renders the majority of investigative traffic stops in response to anonymous tips alleging drunk driving reasonable under the Fourth Amendment. Furthermore, as consistently announced by the Court, there is a legitimate State interest in ridding public roads of drunk drivers.[265] Thus, although the majority position's reasoning is flawed, the bulk of the tips are constitutional.[266]

If all of these factors do not come together in a given situation, however, the investigative stop based solely upon an anonymous tip alleging drunk driving is on much shakier footing. While close cases may be such that the investigative stop can be constitutionally upheld due to social policy,[267] other cases will come out in favor of disallowing such stops—that is the nature of a totality of the circumstances test. A continuum is thus created—the majority of investigative stops, even without prior independent police corroboration, are reasonable; some stops, which occur in situations that do not contain all of the above-mentioned factors are unreasonable; and finally, stops that occur in situations that are "close calls" can be upheld as reasonable due to social policy forwarded by the Court.

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265. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990) ("No one can seriously dispute . . . the State's interest in eradicating [drunk driving."]); Mackey v. Montrym, 443 U.S. 1, 17 (1979) ("States surely have [an] interest in removing drunken drivers from their highways . . . .").

266. *See, e.g.*, *Wheat*, 278 F.3d at 724; *Bloomingdale,* 842 A.2d. at 1213; *Prendergast*, 83 P.3d at 715-16; *Walshire*, 634 N.W.2d at 625-26; *Lubiejewski*, 729 N.E.2d at 290; *Miller*, 510 N.W.2d at 639; *Golotta*, 837 A.2d at 361; *Scholl*, 684 N.W.2d at 84; *Boyea*, 765 A.2d at 863; *Rutzinski*, 623 N.W.2d at 519; *McChesney*, 988 P.2d at 1072.

267. *See infra* Part IV.D.

D. Stops That Fall in the Middle of the Continuum Should Be Upheld Due to Social Policy

As demonstrated *supra*, the typical tip alleging drunk driving contains factors that give a boost in reliability, helping to give rise to reasonable suspicion sufficient to justify an investigative stop based solely on such a tip. But not all tips alleging drunk driving contain all of the discussed factors. This can make a given situation a much closer call. Despite this, the social policy against drunk driving that has been forwarded by the Court in several decisions helps to tip the scale in the "close call" situation in favor of a given investigative stop being constitutionally justifiable.

The Court has consistently upheld questionable state laws in the face of conflicting individual rights when drunk driving has been at issue.[268] This has ranged from allowing implied consent laws,[269] where the State reserves the right to summarily suspend a drunk driver's license without affording the drunk driver any meaningful opportunity to be heard prior to the deprivation, to allowing sobriety checkpoint stops, which grant the police the power to stop a vehicle without any individualized suspicion.[270] The only reasonable explanation for this controversial line of cases is that the Court was allowing the policy in favor of ridding public roads of drunk drivers to outweigh other concerns.

Policy is certainly not controlling. It is, however, persuasive in cases that could go either way. Thus, even though a given situation does not include all of the previously discussed reliability factors, when a situation falls in the middle of the anonymous tip continuum, a court considering an investigative stop based solely upon an anonymous tip alleging drunk driving can and should uphold the stop due to social policy.

V. Conclusion

Whether an anonymous tip alleging drunk driving provides a responding officer with reasonable suspicion sufficient to justify an investigative traffic stop under the Fourth Amendment, absent prior independent corroboration by the officer of the criminal allegations made in the tip, is a highly divisive

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268. *See Sitz,* 496 U.S. at 447 (upholding sobriety checkpoint stop in the face of the Fourth and Fourteenth Amendments); South Dakota v. Neville, 459 U.S. 553, 554, 564 (1983) (upholding an implied consent law in the face of the Fifth Amendment); *Montrym*, 443 U.S. at 3-4, 19 (upholding an implied consent law in the face of the Fourteenth Amendment).

269. *See* South *Neville*, 459 U.S. at 554; *Montrym*, 443 U.S. at 3.

270. *See Sitz*, 496 U.S. at 456 (Brennan, J., dissenting).

issue. While the majority of courts that have considered the issue have held that the anonymous tip alone is sufficient to justify such stops, the minority position is that absent independent police corroboration, an anonymous tip, by itself, is not enough to justify an investigative traffic stop under the Fourth Amendment.

Although incorrect in couching its holding in dicta, the majority position is correct in that the bulk of investigative stops based solely upon anonymous tips alleging drunk driving are reasonable under the Fourth Amendment. The low level of invasiveness posed by the investigative traffic stop in response to the anonymous tip alleging drunk driving sets a low threshold in terms of indicia of reliability required of an anonymous tip under the totality of the circumstances test. The anonymous tip alleging drunk driving typically possesses relatively high indicia of reliability because of several factors. Some factors are always present in the situation: (1) anonymous tips are no longer truly "anonymous;" and (2) erratic driving is a readily observable criminal action. While these factors alone will usually not be enough, when other factors are present in a given situation, the investigative stop in response to an anonymous tip alleging drunk driving will typically be reasonable under the Fourth Amendment, even without prior independent corroboration. These factors include: (1) when a tip comes from a firsthand observer; and (2) when a tip points an otherwise clueless responding officer to the accused in a short amount of time.

Admittedly, not all investigative stops based solely upon anonymous tips alleging drunk driving are constitutional under the Fourth Amendment. When all of these factors come together in a given situation, however, the low threshold required by the invasiveness of the investigative traffic stop is more than met. This, combined with the governmental interest in ridding roads of drunk drivers, makes the bulk of investigative traffic stops based solely on anonymous tips alleging drunk driving reasonable under the Fourth Amendment. Because of this, the majority of the time, the alleged drunk driver should not be granted "one free swerve" prior to police being able to pull the accused over for a quick check.

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