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Whither Reasonable Suspicion: The Supreme Court's Functional Abandonment of the Reasonableness Requirement for Fourth Amendment Seizures

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WHITHER REASONABLE SUSPICION: THE SUPREME COURT'S FUNCTIONAL ABANDONMENT OF THE REASONABLENESS REQUIREMENT FOR FOURTH AMENDMENT SEIZURES

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Introduction

Although the United States Supreme Court's approach to issues governing application of the probable cause requirement of the Fourth Amendment has mutated over the years, at least one aspect of its approach has remained constant. Before information leading to probable cause or its lesser iteration of reasonable suspicion is found to exist, the government must demonstrate in some meaningful way the reliability of the person providing the information or of the information itself.[1] Lacking such reliability, no search or seizure based on probable cause or reasonable suspicion is permitted.

In its recent decision in *Navarette v. California*,[2] the Court largely abandoned the requirement that this reliability be meaningful. It did so by holding that an anonymous 911 call without any impactful corroboration could supply the reasonable suspicion necessary to effect a seizure protected by the Fourth Amendment.[3] This abandonment significantly increases the ability of the government to deprive a person of his or her freedom in conducting a seizure. Now, such a seizure can be effected without the government demonstrating that the individual who provided the information justifying the seizure is worthy of belief in any manner that has traditionally been used by the Court to show reliability. In its effort to justify this approach to reliability, the Court in *Navarette* misinterpreted rather egregiously its previous holdings on reliability in similar cases, and then offered new arguments to buttress its decision. These new arguments are unpersuasive in their application to the facts of *Navarette* and, even more troubling, are at odds with the principles embodied in the Fourth Amendment.

Section I of this Article will examine the Supreme Court's foundational decisions regarding the requirements for the government to show probable cause and the lower standard of reasonable suspicion for less intrusive searches and seizures. Section II will focus on the Court's application of the reliability requirement for determining reasonable suspicion in the two cases that are directly

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1. *See* Illinois v. Gates, 462 U.S. 213, 230 (1983); Spinelli v. United States, 393 U.S. 410, 415–16 (1969); Aguilar v. Texas, 378 U.S. 108, 114 (1964).

2. 134 S. Ct. 1683 (2014).

3. *Id.* at 1686.

on point with the facts and legal issues raised in *Navarette*. Section III will explore the Court's holding in *Navarette*—examining the Court's misapplication of the principles of previous holdings and the flawed reasoning used to justify the reliability of an anonymous, uncorroborated 911 call. One of the methods offered by the Court to show reliability involved the application of arguably related hearsay exceptions. Accordingly, Section IV will assess the propriety of using evidentiary principles in reaching determinations of constitutional law. The Article will conclude with a suggested approach for determining reliability in cases that rely on the presence of reasonable suspicion to justify a seizure protected by the Fourth Amendment.

I. THE MEANING OF PROBABLE CAUSE AND REASONABLE SUSPICION

A. Probable Cause

In describing the information necessary to constitute probable cause—allowing the government to engage in searches or seizures consistent with the principles of the Fourth Amendment—the Supreme Court has consistently required the presence of two elements. First, either the person who provides the information or the information itself must be reliable.[4] Second, the government must establish a basis for the knowledge that the informant claims to possess.[5] While the Court's approach to the relationship between reliability and basis of knowledge has evolved, the Court has always required that some degree of both be present to establish probable cause.

Beginning with the Court's holdings in *Aguilar v. Texas*[6] and *Spinelli v. United States*,[7] the Court has examined two aspects of the information police must have in order to demonstrate the existence of probable cause to engage in a search or seizure. First, either the person providing the information about criminal activity or evidence of a crime (the informant) or the information itself must be shown to be reliable.[8] In other words, there must be some reason to trust that the information is truthful.[9] Second, the informant must have a basis for the knowledge he claims to possess.[10] Trustworthy though he may be, the government must establish how the informant knew what he claimed to know for probable cause to exist.[11]

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4. *See Gates*, 462 U.S. at 230; *Spinelli*, 393 U.S. at 415–16; *Aguilar*, 378 U.S. at 114.
5. *See Gates*, 462 U.S. at 230; *Aguilar*, 378 U.S. at 114.
6. 378 U.S. 108 (1964).
7. 393 U.S. 410 (1969).
8. *See Gates*, 462 U.S. at 230; *Spinelli*, 393 U.S. at 415–16; *Aguilar*, 378 U.S. at 114.
9. *See supra* note 1; *see also* Draper v. United States, 358 U.S. 307, 313 (1959) ("Probable cause exists where 'the facts and circumstances within their [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." (quoting Carroll v. United States, 267 U.S. 132, 162 (1925))).
10. *See Gates*, 462 U.S. at 230; *Aguilar*, 378 U.S. at 114.
11. *See Gates*, 462 U.S. at 230; *Aguilar*, 378 U.S. at 114.

Many courts have interpreted this two-prong approach, known as the *Aguilar/Spinelli* test, to require that each prong separately reach the level of more probable than not.[12] In establishing this approach to probable cause, the Court appeared to require that the aforementioned reliability and basis of knowledge prongs be demonstrated independently of one another.[13] A number of factors contribute to reliability, some of which were deemed more probative than others. One who takes an oath to the truth of what he is saying, such as the affiant in an application for a search or arrest warrant, is deemed reliable because more probably than not he is unlikely to subject himself to penalties for perjury by lying under oath.[14] If no oath is taken, such as in warrantless searches or seizures, or if the person with information leading to a warrant is not an affiant, reliability must be established by other means. For example, sufficient reliability can be established absent an oath by the informant where the affiant is a police officer and the person with the information providing the probable cause previously gave information to the police that proved to be correct.[15] If one who is deemed reliable through his or her status (e.g., a police officer) corroborates in some way the information provided by the informant, that too can show reliability.[16] The basis of knowledge prong is proven by either sensory perception,[17] such as by a statement that the informant saw the gun or smelled the marijuana, or by details showing that the informant has intimate knowledge of the whereabouts of evidence of a crime.[18]

Nineteen years after its decision in *Aguilar* and fourteen years after deciding *Spinelli*, the Court substantially refined its approach to the two-prong test in *Illinois v. Gates.*[19] In *Gates*, the Court made it easier for the police to satisfy the probable cause test by holding that judges should now employ a totality of the

12. That was, in fact, the view of the Illinois Supreme Court in *Illinois v. Gates*, 423 N.E.2d 887 (Ill. 1981), whose decision was reversed by the Supreme Court in *Illinois v. Gates*, 462 U.S. 213 (1983). *See also* Stanley v. Maryland, 313 A.2d. 847, 861 (Md. Ct. Spec. App. 1974) ("[T]he dual requirements represented by the 'two-pronged test' are 'analytically severable' and an 'overkill' on one prong will not carry over to make up for a deficit on the other prong.").

13. *See Gates*, 462 U.S. at 228 (describing how some courts have interpreted *Spinelli* as requiring that the source "satisfy each of the two independent requirements before it could be relied on").

14. *See* United States v. Hadaway, 681 F.2d 214, 218 (4th Cir. 1982) (considering relevant to the reliability of witness testimony the fact that "self-exposure to a perjury charge is unlikely"). In explaining this, one court wrote, "[t]he reason for the rule requiring independent corroboration of the informant's reliability disappears where the informant comes forward to give an eyewitness account regarding the crime under oath, and subjects himself to perjury if the information is false." United States v. Hunley, 567 F.2d 822, 827 (8th Cir. 1977).

15. *See* Adams v. Williams, 407 U.S. 143, 146 (1972); McCray v. Illinois, 386 U.S. 300, 303–04 (1967).

16. *See Gates*, 462 U.S. at 241–45.

17. *See* Spinelli v. United States, 393 U.S. 410, 425 (1969) (White, J., concurring).

18. *See id.* at 416 (explaining that the information received by an FBI source failed to meet the basis of knowledge prong because the informant did not state that he had personally seen the activity or engaged in the activity with the defendant).

19. *Gates*, 462 U.S. at 230.

circumstances approach.[20] Courts reviewing warrants for probable cause could throw all the information into one analytical pot and decide if there was a "substantial basis" for concluding that probable cause existed.[21] A weakness in either reliability or basis of knowledge could be compensated for by a strong showing in the other.[22] Among the advantages the Court asserted would result from this new approach was that police and courts could avoid the "rigid" analysis required by the *Aguilar/Spinelli* test.[23] Still, the decision suggested there must be some element of both reliability and basis of knowledge for probable cause to be present.[24]

The task now is to see how the Court's probable cause decisions concerning search or seizure have been applied in cases where a Fourth Amendment intrusion exists but is limited.

B. Reasonable Suspicion

Beginning with its landmark decision in *Terry v. Ohio*,[25] the Court has permitted law enforcement to engage in limited searches and seizures on a standard of proof less than probable cause. Referred to by a variety of names, including "articulable suspicion," "reasonable suspicion," and "individualized suspicion," the Court has been consistent in requiring some degree of both reliability and basis of knowledge, albeit less than is required to show probable cause.[26] This Section will examine the Court's holdings regarding the reliability that must be present to demonstrate the existence of reasonable suspicion.

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20. *Id.* at 230–32, 238 ("[W]e conclude that it is wiser to abandon the 'two-pronged test' established by our decisions in *Aguilar* and *Spinelli*. In its place we reaffirm the totality of the circumstances analysis that traditionally has informed probable cause determinations.").

21. *See id.* at 246.

22. *Id*. at 233.

23. *See id*. at 230–31, 236.

24. The Court in *Gates* did not explicitly require the presence of both reliability and basis of knowledge in every case, but referred to the two factors as "highly relevant" in the probable cause determination. *Gates*, 462 U.S. at 230. The Court later referred to the approved totality of circumstances test as one "which permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip." *Id.* at 234. Cases decided by the Court after *Gates* that concerned whether the probable cause mandate of the Fourth Amendment was satisfied have required the existence of some degree of reliability. It is especially noteworthy that even when the Court has applied the lower probable cause standard of articulable suspicion, such as in *Alabama v. White*, 496 U.S. 325 (1990), *Florida v. J.L.*, 529 U.S. 266 (2000), and *Navarette v. California*, 134 S. Ct. 1683 (2014), the Court has required the presence of some reliability, regardless of the Court's ultimate determination as to the sufficiency of the reliability. Regarding the reliability and basis of knowledge factors, it is therefore safe to conclude, as one treatise declared, that "courts continue to rely upon the elaboration of these factors in earlier cases decided under the now-discarded *Aguilar* formula." WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 147 (4th ed. 2004). What was abandoned in *Gates* was not the requirement of showing reliability and basis of knowledge, but the need to show them independently of one another.

25. 392 U.S. 1 (1968).

26. *See, e.g.*, Florida v. J.L., 529 U.S. 266, 270–73 (2000); Alabama v. White, 496 U.S. 325, 328–31 (1990); *Terry*, 392 U.S. at 20–22.

In *Terry*, the Court created a new path to analyze government intrusions that implicated the Fourth Amendment but that were less substantial than full-blown searches and seizures. A Cleveland police officer observed John Terry walk back and forth in front of a jewelry store, repeatedly looking inside the store window, and then speaking quietly to another man standing nearby.[27] The officer, Martin McFadden, approached Terry and asked for his name.[28] Based on his professional experience, Officer McFadden suspected Terry was planning a robbery by "casing" the store.[29] When Terry "mumbled something" in response to McFadden's request for his name, Officer McFadden's suspicions were heightened. Fearing that Terry might have a gun, McFadden felt the pocket of Terry's overcoat, from which he recovered a gun.[30]

The issues in Terry had previously been framed around whether a suspect was "arrested" when stopped by the police; and, if the suspect was frisked for weapons, whether he had been "searched." Some had argued that such limited actions did not require the protections of the Fourth Amendment.[31] The Court in *Terry* explicitly rejected this argument, asserting that forcible stops not rising to the level of an "arrest" are still "seizures," and limited pat-downs are still "searches."[32] Thus, each action activated the protections of the Fourth Amendment.[33] Probable cause to arrest would have required that Terry more probably than not had committed a crime. Probable cause to search would hold the police to the same standard regarding the presence of contraband or evidence of a crime on Terry prior to the search that revealed the gun.[34]

The Court took a different approach entirely in holding that Officer McFadden's conduct did not constitute a violation of Terry's rights under the Fourth Amendment. It held that although Terry had been seized and then searched, thus implicating the Fourth Amendment, the seizure fell short of a traditional arrest and the pat-down of the outer layer of Terry's clothing fell short of a full-blown search.[35] By distinguishing between levels of intrusion, the Court permitted the police conduct, requiring a quantum of proof less than probable cause, which came

27. *Terry*, 392 U.S. at 5–6.
28. *Id.* at 6–7.
29. *Id.* at 6.
30. *Id.* at 5–7.
31. *See id.* at 16.
32. *Id.* at 16–17, 19.
33. *Id.*
34. *Cf.* Beck v. Ohio, 379 U.S. 89, 91 (1964); *see also* 5 AM. JUR. 2d Arrest § 9 (2016) ("Under the Fourth Amendment, the standard for arrest is probable cause, defined in terms of facts and circumstances sufficient to warrant a prudent man in believing that the suspect has committed or is committing an offense; this standard, like those for searches and seizures, represents a necessary accommodation between the individual's right to liberty and the state's duty to control crime.").
35. *See Terry*, 392 U.S. at 24–27.

to be known as reasonable suspicion.[36]

In the years since its decision in *Terry*, the Court has fleshed out the meaning of reasonable suspicion both through defining the term and by applying it to specific situations. The constant thread that runs through the Court's definition of reasonable suspicion is that it must be based on words or actions that lead a police officer to suspect criminal conduct by the target of the search or seizure.[37] This suspicion must not merely be a hunch, but instead must be based on objective facts and rational inferences that a police officer can articulate.[38] In applying these principles to factual situations since *Terry*, the Court has understandably borrowed from what it had established in previous cases regarding probable cause to search or seize. Thus, as it made clear with regards to probable cause, some degree of both reliability and basis of knowledge, albeit less, must be present to permit police officers to engage in the kind of limited searches and seizures identified in *Terry*.[39] While there has been much controversy over the amount of suspicious conduct required to establish an adequate basis of knowledge that criminal activity is afoot,[40] this Article will focus on the reliability prong of Fourth Amendment jurisprudence and the damage done to it by the *Navarette* decision.

II. THE SUPREME COURT'S APPROACH TO ASSESSING THE RELIABILITY OF ANONYMOUS INFORMANTS IN CASES OF LIMITED SEIZURES BEFORE *NAVARETTE*

In its decisions involving government intrusions that implicate the Fourth Amendment, the Court has always required that the information used to establish probable cause or reasonable suspicion contain elements of reliability.[41] That is, no matter how compelling or detailed the information is, it is insufficient to justify such an intrusion unless the information or the supplier of the information is

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36. The Court reasoned that because of the necessity for quick police action in these types of street encounters, the normal requirement of probable cause that attended the issuance of a warrant would not be reasonable here. *Id.* at 20–24.

37. *See, e.g.*, United States v. Cortez, 449 U.S. 411 (1981). In *Cortez*, the Court referred to the two requisite elements of reasonable suspicion: (1) the assessment must be based on objective facts taking into consideration all of the evidence an officer has prior to acting, including reasonable inferences he may draw; and (2) that this information leads to a "particularized suspicion" that the suspect is "engaged in wrongdoing." *Id.* at 418.

38. *See Terry*, 392 U.S. at 21–22.

39. *See* discussion *infra* Sections II.A, II.B, II.C.

40. *See, e.g.*, Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City "Stop and Frisk,"* 94 B.U. L. REV. 1495, 1535–50 (2014); *see also* Andrew Guthrie Ferguson & Damien Bernache, *The "High Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587 (2008) (discussing the amorphous concept of "high-crime areas" and their basis for establishing per se suspicious conduct therein). An example of a Supreme Court case demonstrating the uncertainty about how much of a basis of knowledge is sufficient to justify a limited seizure is *Illinois v. Wardlow*, 528 U.S. 119 (2000). In *Wardlow*, four justices dissented from the majority opinion's assertion that unprovoked flight in a high crime area was sufficient to demonstrate the presence of reasonable suspicion sufficient to justify a seizure. *Id.* at 126 (Stevens, J., dissenting).

41. *See* Illinois v. Gates, 462 U.S. 213, 230 (1983); Spinelli v. United States, 393 U.S. 410, 415–16 (1969); Aguilar v. Texas, 378 U.S. 108, 114 (1964).

trustworthy. Over the years, the Court has enumerated various methods through which the government can demonstrate that the information or the person supplying evidence of a crime or criminal activity is sufficiently reliable to permit the government to search or seize.[42]

Any assessment of the reliability factors enumerated by the Supreme Court must begin with the understanding that these factors do not have to demonstrate the reliability of the informant or his or her information beyond any doubt. Reliability is one of two factors that contribute to showing more probably than not that evidence will be found at a certain location for a search, and that the item seized in fact constitutes evidence of a crime.[43] To effect a full-blown seizure of an individual (that is, an arrest or an arrest equivalent), the required showing for the same degree of more probable than not is that a suspect has committed or is committing a crime. In order to engage in the limited search and seizure first enunciated by the Court in *Terry*, as discussed above, the police need to satisfy the lower standard of reasonable suspicion.[44] Accordingly, in assessing the seizure of the defendant in *Navarette*, we must analyze whether and to what extent reliability must be present in instances of limited seizures, and whether such reliability was present when Navarette and his car were seized.

Two cases decided by the Supreme Court stand as signposts of what constitutes sufficient reliability and, significantly, what does not, when it comes to determining the legality of a limited seizure of a person. The Court found the limited seizure in *Alabama v. White*[45] was justified by reasonable suspicion but referred to it as "a close case."[46] Until the decision in *Navarette*, *White* represented the minimum amount of information regarding the reliability of an informant that was necessary to provide reasonable suspicion. The later case of *Florida v. J.L.*[47] represents the type of fact pattern in which the Court found the level of reliability to be insufficient. Both cases dealt with anonymous informants providing tips through the telephone—the same type of informant at issue in *Navarette*. In assessing whether sufficient reliability is present to justify a limited seizure in *Navarette*, it is incumbent to determine whether the factors historically used by the Court to demonstrate reliability—the very factors used in *White* and *J.L.*—are present, or whether other factors in *Navarette* offer new ways of showing reliability.

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42. *See supra* notes 15–18 and accompanying text.

43. *See Gates*, 462 U.S. at 230; *Spinelli*, 393 U.S. at 413; *Aguilar*, 378 U.S. at 114; *see also* Erica Goldberg, *Getting Beyond Intuition in the Probable Cause Inquiry*, 17 LEWIS & CLARK L. REV. 789, 800 (2013) (explaining that reliability is a factor in a totality assessment for determining probable cause).

44. *See supra* note 36 and accompanying text.

45. 496 U.S. 325 (1990).

46. *Id.* at 332.

47. 529 U.S. 266 (2000).

A. Alabama v. White

In *Alabama v. White*, an anonymous call detailed how a named woman would leave a particular building at a specified time, drive a brown car of a specified make and model that had a broken taillight, and head for a particular motel with an ounce of cocaine in a brown attaché case.[48] Officers responding to the call saw a woman leave the designated building and enter a car fitting the precise description from the call.[49] They followed her as she "drove the most direct route" to the motel and stopped her as she entered the road on which the motel was located.[50] In the car, they found a brown attaché case. After obtaining White's consent, they found marijuana in the attaché case and cocaine in her purse.[51]

In its analysis of the seizure of White in her car, the Court made clear that the factors used to determine the existence of reasonable suspicion for the limited seizure in that case were the same as those used to assess the requirement of probable cause for a full-blown seizure. Although these factors—reliability and basis of knowledge—need not be present to the same extent to justify limited seizures as full-blown ones, their presence is still required to demonstrate reasonable suspicion.[52] After observing that anonymous tips rarely establish the reliability of the information provided by the tipster,[53] the Court noted that the anonymous tip here was comparable to the one in *Illinois v. Gates* in that each "'provides virtually nothing from which one might conclude that [the caller] is either honest or his information reliable.'"[54] The Court compared the information that corroborated the tip in *Gates* to the information found in *White* and concluded that although the corroborating information in *Gates* was more detailed and complete, the corroboration in the instant case was still significant in what was predicted and verified by the police.[55] The police "significantly" corroborated that a woman would be leaving a specific building, getting into a specific car, and heading to a specific destination.[56] While some details of the informant's tip, such as the name of the woman, were not corroborated before the limited seizure—as was the case in *Gates*—the key factor was that the police could verify the accuracy of the informant's predictions about White's behavior.[57]

As in *Gates*, the *White* Court noted two factors related to the predictive character of the informant's call, which contributed to the informant's reliability. First,

48. 496 U.S. at 327.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 328–29.
53. *Id.* at 329.
54. *Id.* (quoting Illinois v. Gates, 462 U.S. 213, 227 (1983)).
55. *See id.* at 331–32.
56. *See id.*
57. *See id.* at 332.

"because an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity."[58] In referring to the other important factor relevant to the reliability of the tip, the *White* Court quoted *Gates* in noting that the tips in both cases "contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties not easily predicted."[59]

Therefore, it is the fact that the anonymous informant in *White* was able to predict the future movements of the suspect that the informant's tip was reliable—the informant did not merely provide information that any casual observer could have come by.[60] The Court emphasized the importance of this point by contrasting it with an informant's accurate description of a car parked outside a certain building: "[a]nyone" in the viewing area could have provided the information about the car and, therefore, such a statement adds little, if any, weight to whether the informer is believable or whether he or she is lying.[61]

B. Florida v. J.L.

It was precisely the fact that anyone in the viewing area could have observed a young black man wearing a plaid shirt at a particular bus stop—as described by an anonymous caller—that failed to establish the reliability of the phone tip in *Florida v. J.L.* In *J.L.*, the anonymous tipper claimed the young man was carrying a gun.[62] The fact that police officers corroborated the presence of a man matching the description and location of a man referred to by the tip did little to show that the

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58. *Id.* at 331.

59. *Id.* at 332.

60. The Court in *Spinelli* contrasted corroboration of the information provided to police in that case with that provided by the informant in *Draper v. United States*, 358 U.S. 307 (1959). While in *Spinelli* the police corroborated information that the Court characterized as "a meager report" that could have been merely "an offhand remark heard at a neighborhood bar," in *Draper* the informant was shown to be reliable because specific information he provided and activity he predicted turned out to be accurate. *See* Spinelli v. United States, 393 U.S. 410, 416–19 (1969).

61. *White*, 496 U.S. at 332. As the Court said in comparing the quality of the information regarding the mere sighting of the car with the predictive information about the suspect and her activities:

> Anyone could have 'predicted' that fact because it was a condition presumably existing at the time of the call. What was important was the caller's ability to predict respondent's *future behavior*, because it demonstrated inside information—a special familiarity with respondent's affairs. The general public would have had no way of knowing that respondent would shortly leave the building, get in the described car, and drive the most direct route to Dobey's Motel. Because only a small number of people are generally privy to an individual's itinerary, it is reasonable for police to believe that a person with access to such information is likely to also have access to reliable information about that individual's illegal activities . . . . When significant aspects of the caller's predictions were verified, there was reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop.

Id.

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

caller was reliable or had any real knowledge about the suspect or whether he was carrying a gun.[63] The Court also noted that the officers saw no firearm before seizing the suspect, nor did they observe any "threatening or otherwise unusual movements" that might have suggested the presence of a weapon.[64]

The Court in *J.L.* contrasted the case with *White* because the tip in *J.L.*, unlike the tip in *White*, "provided no predictive information and therefore left the police without means to test the informer's knowledge or credibility."[65] Accurately predicting the behavior or actions of another individual shows the informer has some intimate knowledge of that person, and the fact that the informer was credible about his predictions shows that he is more likely to be credible about other claims he makes about the person. In *White*, such a prediction was just enough to barely establish sufficient reliability to allow the police to engage in a limited seizure. The Court in *J.L.* reaffirmed that its determination of the informer's reliability in *White* was close, and referred to the *White* holding as "borderline."[66] Thus, it is clear that facts such as those in *White* constitute the bare minimum the government must show in order to establish the reasonable suspicion necessary to effect a limited seizure under the Fourth Amendment.

Given the Court's decision in *Navarette* regarding a driver claimed to be dangerous,[67] the Court's approach to another argument posed by the government in *J.L.* is worth noting. The government argued that—because of the dangerous situation created by a person carrying a firearm while standing with a group of people—the Court should relax its requirement of reasonable suspicion in dangerous situations.[68] The Court rejected this argument, noting that it would create a slippery slope that could negate the reasonable suspicion requirement in other potentially dangerous scenarios, such as where a tip alleges that a person is holding a large amount of illegal drugs.[69] However, the Court did not foreclose the possibility that it might relax the reasonable suspicion standard in a case of extreme danger, such as an allegation of a person carrying a bomb.[70] Although the Court noted the danger posed by armed criminals, it held that this was not the type of extreme danger that might reduce the need for reasonable suspicion.[71]

In *White* and *J.L.*, the Court established relatively clear and consistent guidelines for the reliability of the information that must be present for police to engage

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63. *See id.* at 272 ("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.").

64. *Id.* at 268.

65. *Id.* at 271.

66. *Id.* at 270–71.

67. Navarette v. California, 134 S. Ct. 1683, 1687 (2014); *see infra* notes 162–65 and accompanying text.

68. *See J.L.*, 529 U.S. at 272.

69. *See id.* at 272–73. The Court expressed a concern that police would have discretion to "frisk based on bare-boned tips about narcotics," based on the fact that "[s]everal Courts of Appeals have held it *per se* foreseeable for people carrying significant amounts of illegal drugs to be carrying guns as well." *Id.*

70. *See id.* at 273–74.

71. *See id.* at 272.

in a limited seizure. Adding to this clarity, the Court used the two cases to create borders for the amount of reliability necessary to show reasonable suspicion. It did so by asserting that the anonymous tip in *White* was just barely enough to meet this test for reliability, and that the tip in *J.L.* was not enough because it lacked the accurate predictive nature necessary to show that the informant was believable and knowledgeable. With these boundaries in mind, the task, then, is to see if the Court's holding in *Navarette* stayed true to its previous holdings, or whether it enumerated new factors regarding reliability necessary for a seizure that are consistent with the principles embodied in the Fourth Amendment. In fact, the *Navarette* Court did neither.

III. *NAVARETTE V. CALIFORNIA*

In analyzing the decision in *Navarette*, this Section will begin with a discussion of the Court's misapplication of the reliability factors upon which it based its decisions in both *White* and *J.L.* Next, the Section will assess the Court's use of reliability factors beyond those discussed in *White* and *J.L.*—factors that had been used by the Court in other contexts, and still others never before used to demonstrate reliability. None of these factors, when applied to the facts of *Navarette*, make out a convincing case for the presence of the type of reliability required to constitute reasonable suspicion for Fourth Amendment purposes.

A. *The Court's Misuse of the Reliability Factors from* White *and* J.L.

Responding to an anonymous 911 call that the driver of a specified truck had run the caller's car off the road, an officer of the California Highway Patrol located the truck and apparently followed it for five minutes.[72] He then stopped the truck and was joined by a second officer.[73] Both officers smelled marijuana, which led them to search the vehicle.[74] The officers recovered thirty pounds of marijuana.[75] When the case arrived to the Supreme Court, the issue was whether the limited seizure of Navarette and his truck was predicated on the presence of reasonable suspicion of criminal activity, as required by the Fourth Amendment and the Court's decisions since *Terry v. Ohio*.[76] Critical to this determination was whether the information possessed by police prior to the stop was reliable—the same question that was before the Court in both *White* and *J.L.*

As in those two previous cases, the information came to the police via an anonymous telephone call. It is undisputed that where informants do not identify themselves, the information they provide bears a lower level of reliability.[77] Such

72. Navarette v. California, 134 S. Ct. 1683, 1686–87 (2014).
73. *Id.*
74. *Id.*
75. *Id.* at 1687.
76. *Id.*
77. *See* Alabama v. White, 496 U.S. 325, 328–29 (1990); Illinois v. Gates, 462 U.S. 213, 227 (1983).

informants assume no risk if they are lying, and there is nothing about them or their status in the community that lends support to their credibility. In order for an anonymous call to lead to reasonable suspicion, the government must provide additional means by which the information in the call can be determined to be reliable. For informants whose identity is entirely unknown, this can take the form of observations by the police or others of details provided by the informant that prove the accuracy of at least some of the informant's claims.[78] It was the police corroboration of such details, or the lack thereof, that led to the respective decisions in *White* and *J.L.*

In analyzing whether the anonymous tip in *Navarette* is sufficiently reliable to meet the test for establishing reasonable suspicion of criminal activity, we must consider first whether the relevant factors enumerated by the Court in *White* and *J.L.* are present. The *White* Court found reliability because the anonymous tip was corroborated by police observations. Specifically, the Court noted that since these observations had proven the informant to be reliable on certain details, he was likely reliable on his central statement that White was transporting drugs.[79] In so noting, the Court observed that the details about which the informant was correct were the kinds of things likely to be known only by those with intimate knowledge of the suspect's activities, and not merely what could be seen by a casual observer.[80] In *Navarette*, the only information in the anonymous tip corroborated by police observations was the presence of the car described by the informant along the road traveled by both. Of course anyone on that road, including those with no knowledge of any suspicious activity by Navarette, could have described the same car while looking at it.[81] In fact, the suspicious activity described by the anonymous tip—the dangerous driving—was not observed by the patrol car officers as they watched Navarette drive for five minutes before pulling his truck over.[82] While the police's failure to observe dangerous driving does not absolutely negate the informant's claim, it certainly does nothing to strengthen its reliabil-

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78. *See White*, 496 U.S. at 330–32; *Gates*, 462 U.S. at 241–45.

79. *See White*, 496 U.S. at 331.

80. *Id.* at 332.

81. As Justice Scalia observed in his dissent in *Navarette*:

> Here the Court makes a big deal of the fact that the tipster was dead right about the fact that a silver Ford F-150 truck (license plate 8D94925) was traveling south on Highway 1 somewhere near mile marker 88. But everyone in the world who saw the car would have that knowledge, and anyone who wanted the car stopped would have to provide that information. Unlike the situation in *White*, that generally available knowledge in no way makes it plausible that the tipster saw the car run someone off the road.

Navarette v. California, 134 S. Ct. 1683, 1693 (2014) (Scalia, J., dissenting). In referring to such easily obtained facts, the Court in *White* wrote that "[t]he fact that the officers found a car precisely matching the caller's description in front of the 235 building is an example of the former. Anyone could have 'predicted' that fact because it was a condition presumably existing at the time of the call." *White*, 496 U.S. at 332.

82. *Navarette*, 134 S. Ct. at 1691.

ity.[83] The tip in *Navarette* is far more similar to that in *J.L.*, which the Court deemed lacking in the reliability needed to justify a limited seizure. As in *Navarette*, the corroborated tip in *J.L.* described what anyone standing on the street could have seen—a black man in a plaid shirt standing on the corner.[84]

The second aspect of reliability with respect to the tip in *White*, somewhat related to the first, was the ability of the informant to correctly predict specific details of White's future activities.[85] The police verified the informant's claims that a woman matching White's description would leave a specific building, get into a specific car, and travel to a specific location.[86] These predictions, when shown to be correct, added a significant element to the credibility of the informant. The presence and absence of this predictive element was a key factor in both *White* and *J.L.*, respectively. In *Navarette*, the anonymous tip did not include a prediction of the suspect's future activity—unless inferentially one considers a claim of dangerous driving to be predictive of future bad driving. Even so, however, such a "prediction" was not verified by the police, whose observations of Navarette's driving contained no allegation of recklessness or carelessness.[87]

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83. In *Terry v. Ohio*, the Court made clear that had Terry done something to dispel the original suspicions created by his apparently "casing" the store for a planned robbery, the justification for seizing him or, in that case, for the continuation of the seizure would disappear. *See* 392 U.S. 1, 28 (1968). In his *Navarette* dissent, Justice Scalia argued that not only was reasonable suspicion not present from the anonymous tip, but also that the allegations in the tip were largely dispelled by the lack of any suspicious driving or other behavior by Navarette. 134 S. Ct. at 1696 (Scalia, J., dissenting). The majority opinion responded to this point by arguing that drunk drivers have the ability and inclination to drive safely once they observe a police car following them. *See id.* at 1691. To this point, Justice Scalia responded:

> Whether a drunk driver drives drunkenly, the Court seems to think, is up to him. That is not how I understand the influence of alcohol. I subscribe to the more traditional view that the dangers of intoxicated driving are the intoxicant's impairing effects on the body—effects that no mere act of the will can resist . . . . Consistent with this view, I take it as a fundamental premise of our intoxicated-driving laws that a driver soused enough to swerve once can be expected to swerve again—and soon. If he does not, and if the only evidence of his first episode of irregular driving is a mere inference from an uncorroborated, vague, and nameless tip, then the Fourth Amendment requires that he be left alone.

Id. at 1697 (Scalia, J., dissenting). Accepting the Court's view on this point requires a belief that Navarette was driving intoxicated and apparently was so intoxicated that he "ran the reporting party off the roadway" as the police report stated. *Id.* at 1687. If "ran off" can be interpreted to mean Navarette deliberately forced the informant's car off the road, he must have been infuriated to an extreme level, no doubt fueled by his alcohol intake. If it was not intentional, he must have been driving beyond recklessly. Either way, it seems unlikely that he could drive for five minutes—what Justice Scalia referred to as a "*long* time," *id.* at 1696 (Scalia, J., dissenting)—without displaying any of the obvious signs given off by intoxicated drivers or the less overt ones recognized by trained police officers.

84. See *supra* notes 62–71 and accompanying text.

85. See *supra* note 60 and accompanying text.

86. *See supra* note 60 and accompanying text.

87. *See Navarette*, 134 S. Ct. at 1691 (indicating "the absence of additional suspicious conduct" after Navarette's vehicle was first spotted by a police officer).

B. The Presence or Absence of Other Reliability Factors

The final tasks in determining whether the anonymous tip in *Navarette* was sufficiently reliable to create reasonable suspicion are to consider: (1) the existence of reliability factors not present in *White* or *J.L.* but that played a role in previous cases; or (2) other factors never previously identified by the Court that could make the tip reliable. This analysis must begin with the *Navarette* decision itself. The majority opinion enumerated several such ways in which it claimed the reliability of the anonymous tip was established.

1. The Claim by the Anonymous Informant That She Saw the Suspect Engage in Criminal Activity

First, the Court referred to the fact that, unlike in *White* and *J.L.*, the *Navarette* informant claimed to have directly seen the suspect engage in suspicious activity (that is, running her off the road, an apparent sign of his intoxicated driving), which contributed to the reliability of the tip.[88] This claim relates more to the second prong for showing the existence of a basis of knowledge. There is some support for the notion that a greater basis of knowledge on the part of an informant, as indicated by a sensory observation, also contributes to the reliability of the tip. In *Illinois v. Gates*, the Court spoke specifically to this point in determining that a greater basis of knowledge can compensate for a lesser amount of reliability.[89] But as *Gates* implied, and decisions of the Court since *Gates* have demonstrated, there still must be at least some aspects of reliability notwithstanding the strength of the basis of knowledge.[90]

Would the anonymous informant in *J.L.*, for example, have been any more trustworthy had he said he *saw* the gun in the waist of the black man with the plaid shirt on the corner than he was by just having reported the facts without stating that he observed them? How about if the informant added that he saw the suspect take a clear bag of cocaine and put it in his right front pocket and heard the suspect offer some to the person standing next to him? Probable cause and reasonable suspicion require a basis for concluding that the person providing the information leading to a search or seizure protected by the Fourth Amendment is credible. It is no more difficult for a person to make up three details than it is to make up one. Unless there is corroboration of claims made by an anonymous informant, or some other means of demonstrating the informant's reliability, an informant who merely adds additional details does not become more believable. If there are other means to prove an informant's reliability, then additional details could show that the

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88. *See id.* at 1689.

89. Illinois v. Gates, 462 U.S. 213, 233–34 (1983) ("[A] deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.").

90. *See supra* note 24.

informant had a solid basis of knowledge. Uncorroborated details alone, however, cannot show that she was sufficiently reliable to deprive a suspect of his freedom through a seizure.

Next, the Court in *Navarette* suggested that the tipster was reliable because the police confirmed the existence of the specific truck described on the same road it was originally observed on.[91] As indicated above, however, this corroboration was of a fact that any driver on the road could have seen and thus, as in *J.L.*, should be no indicator of reliability.[92]

2. The "Contemporaneousness" of the Call to the Incident

The Court asserted that the contemporaneousness of the call to the observation of the criminal event was significant to the caller's reliability.[93] The Court compared this form of reliability with two exceptions to the rule barring hearsay testimony in trials.[94] Those exceptions, known generally as the "excited utterance"[95] and "present sense impression" exceptions to the rule against hearsay,[96] are premised on similar but somewhat analytically different premises. In analyzing the requirements for application of those hearsay exceptions and the purposes behind them, it is doubtful that either of those exceptions should be applied to the anonymous call in *Navarette*.

In evidence law, statements about an event made soon after perceiving that event are considered especially trustworthy because the "substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misinterpretation."[97] This is the rationale for the "present sense impression" exception to the hearsay rule. An "excited utterance" is a "statement relating to a startling event or condition, made while the declarant was under the stress of the excitement that it caused."[98] It is the relative immediacy of the statement to the event and the event's startling nature that support the reliability of an excited utterance and allow hearsay statements into evidence.[99]

The Court's conclusion in *Navarette* that the anonymous call would fall within the present sense impression or excited utterance hearsay exceptions is debatable. A lapse of time defeats the use of the present sense impression exception because it is the contemporaneity of the statement to the event that establishes the statement's

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91. *Navarette*, 134 S. Ct. at 1689.
92. *See supra* notes 65–66 and accompanying text.
93. *Navarette*, 134 S. Ct. at 1689.
94. *Id.*
95. FED. R. EVID. 803(2).
96. FED. R. EVID. 803(1).
97. *Navarette*, 134 S. Ct. at 1689 (quoting FED. R. EVID. 803(1) advisory committee's note).
98. FED. R. EVID. 803(2).
99. *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 63 (2004) (citing People v. Farrell, 34 P.3d 401, 407 (Colo. 2001)).

trustworthiness.[100] If time allows for reflective thought, intrinsic trustworthiness is lost and the basis for the present sense impression exception vanishes.[101] In the words of one treatise on the Federal Rules of Evidence, the present sense impression has a strict time requirement and should be "employed to admit statements uttered during the course of the event or transaction or seconds after the event or transaction."[102] Regarding the application of the present sense impression and excited utterance exceptions to the time lapse between when the informant in *Navarette* claimed her car was forced off the road and her 911 call, Justice Scalia correctly observed:

> It is the immediacy that gives to the statement some credibility . . . There is no such immediacy here. The declarant had time to observe the license number of the offending vehicle, 8D94925 (a difficult task if she was forced off the road and the vehicle was speeding away), to bring her car to a halt, to copy down the observed license number (presumably), and (if she was using her own cell phone) to dial a call to the police from the stopped car. Plenty of time to dissemble or embellish.[103]

While a lapse of time can defeat the application of the excited utterance exception, courts have generally admitted hearsay statements uttered with more time between the event and the statement than when applying the present sense impression exception.[104] That is because the stress of excitement caused by the event, which forms the basis for the trustworthiness of the statement, can continue for a period of time beyond the strict contemporaneity limit of a present sense impression. Still though, the declarant has to be shown to be under "the stress of the excitement" when she utters the hearsay statement.[105] This stress can be shown by the "nature of the event . . . the appearance, behavior, or condition of the speaker . . . [or] the nature or contents of the statement."[106]

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100. *See* FED. R. EVID. 803(1) advisory committee's note; *see also* GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY, AND AUTHORITY 474 (2007) ("The principle underlying the hearsay exception contained in Rule 803(1) is the assumption that statements of perception, describing the event and uttered in close temporal proximity to the event, bear a high degree of trustworthiness.").

101. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 915 (1995); United States v. Poliodore, 690 F.3d 705, 720 (5th Cir. 2012); United States v. Lentz, 282 F. Supp. 2d. 399, 413 (E.D. Va. 2002).

102. WEISSENBERGER & DUANE, *supra* note 100, at 474; *see also id.* at 474 n.14 (citing Quick, *Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4)*, 6 WAYNE L. REV. 204, 210 (1960), for the statement that, "[e]ven the argument that . . . spontaneity . . . is a reasonable guaranty of sincerity has been questioned because psychological studies indicate that the time interval required to assure lack of conscious or unconscious fabrication is measured in stopwatch time intervals rather than in minutes").

103. Navarette v. California 134 S. Ct. 1683, 1694 (2014) (Scalia, J., dissenting).

104. *See, e.g.*, United States v. Tocco, 135 F.3d 116, 127 (2d Cir. 1998) (indicating that strict contemporaneity is not required for application of the excited utterance exception).

105. MUELLER & KIRKPATRICK, *supra* note 101, at 916.

106. *Id.* at 918–19.

In *Navarette*, we know nothing of the speaker's appearance or condition. There is no mention of her voice indicating stress or excitement when she made the 911 call. The statement itself, given the precise nature of some of it, does little to show this stress. What remains, then, is the nature of the event itself. Admittedly, being forced off the road can create this kind of stress. In determining whether the stress caused by the excitement of the event should give rise to the excited utterance exception, one evidence treatise describes a key issue to be whether "[t]he stimulus leaves the speaker momentarily incapable of fabrication."[107] It is fair to ask how likely it is that the caller in *Navarette* was incapable of fabricating aspects of an event that she observed approximately five minutes before making the 911 call.[108]

Two other factors have traditionally played a role in the decision of whether to admit a hearsay statement under the excited utterance exception. First, while not a requirement for use of the exception, "[i]n the majority of cases, the occurrence of the startling event is established by evidence independent of the declarant's statement, such as the testimony of other witnesses or circumstantial evidence showing an unusual event occurred."[109] In *Navarette*, there is no evidence, other than the call itself, of the caller's car being driven off the road by the defendant. Second, there is a difference in the nature and quality of hearsay statements when the declarant is not only unavailable, but also unidentified. While also not an absolute bar to admission of the statement, as one court has written, "unlike unavailability which is immaterial to admission under [Federal] Rule [of Evidence] 803, the unidentifiability of the declarant is germane to the admissibility determination. A party seeking to introduce such a statement carries a burden heavier than where the declarant is identified to demonstrate the statement's circumstantial trustworthiness."[110] Among other issues, where the declarant is not unidentified, it becomes more difficult to show that the declarant has not had the time or inclination to fabricate a statement.[111] The identity of the caller in *Navarette* was at no time known by another party involved in the case.

Whatever decision is made regarding the application of hearsay exceptions to the statement of an anonymous informant, such a decision should merely be the beginning of a discussion about whether the statements permit a seizure otherwise

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107. *Id.* at 916. This determination is crucial because, as the Supreme Court held in *Idaho v. Wright*, 497 U.S. 805, 820 (1990), "[t]he basis for 'excited utterance' exception, for example, is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy."

108. *See Navarette*, 134 S. Ct. at 1687.

109. WEISSENBERGER & DUANE, *supra* note 100, at 479. The reason for that is because otherwise, "[t]he judge would reason in a circle if, being bound by the hearsay rule, he nevertheless considered the statement for the purpose of establishing the very fact which is the condition precedent to his original consideration of that statement." CAL. LAW REVISION COMM'N, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE: ARTICLE VIII: HEARSAY EVIDENCE 468 (1962).

110. Miller v. Keating, 754 F.2d 507, 510 (3d Cir. 1985).

111. *See id.*

protected by the Fourth Amendment. Courts should also consider the core question of whether the use of evidence principles makes sense when applied to constitutional protections.[112]

3. 911 Reporting

The *Navarette* majority found additional support for the veracity of the anonymous call in the 911 emergency system itself.[113] The Court told us that: (1) these calls are recorded and can be used to identify, through voice recognition and later verification, the identity of the caller; (2) cellular carriers must relay the caller's number to 911 dispatchers; and (3) callers cannot block their caller ID information.[114] The Court concluded, "a false tipster would think twice before using such a system."[115] These claims, while meritorious to a degree, fall flat when considering the majority's other claim regarding the tip itself—that it was either a present sense impression or an excited utterance, both of which require spontaneity and the absence of opportunity to reflect upon the event.[116]

The majority attempted to have its proverbial cake and eat it too. On one hand, and in support of the anonymous tip's veracity, the Court cited the fact that the caller reported the incident "soon after" it occurred, and that the caller was still excited by the events.[117] On the other hand, the Court claimed a 911 caller "would think twice before using such a system."[118] These conclusions cannot coexist: the caller either reported the event as it was happening (or with substantial contemporaneity) as to satisfy the hearsay exception requirements, or the caller had sufficient time to consider the implications of making a 911 call. Finding one of these rationales to be true removes the possibility of the other.

Furthermore, the Court assumed that the general public knows the various technological features of the 911 emergency system. The Court pointed to various FCC regulations regarding recording requirements imposed on 911 operators, but failed to identify how these requirements are made known to the general public.[119] Presumably, the caller who had insufficient time to fabricate a story had sufficient time to contemplate the aforementioned FCC regulations.

a. How Reliable is the 911 System at Determining the Identity of an Anonymous Caller?

The majority first asserted that since a 911 call "can be recorded," a victim can later attempt to "identify the false tipster's voice and subject him to prosecu-

112. See *infra* Section IV.
113. *Navarette*, 134 S. Ct. at 1689.
114. *Id.* at 1689–90.
115. *Id.* at 1690.
116. *See supra* notes 97–106 and accompanying text.
117. *See Navarette*, 134 S. Ct. at 1689.
118. *Id.* at 1690.
119. *See id.*

tion."[120] This assertion makes the following three assumptions. First, that the call is indeed recorded.[121] Second, assuming the call was recorded, that the recording is preserved for later review. Third, assuming the call was recorded and preserved, the victim or suspect who is the subject of the call is given an opportunity to listen to the recording and challenge its veracity. In *Navarette*, we are not told whether the call itself was recorded or simply transcribed, whether the recording—if it existed—was preserved, or whether the suspect was permitted to listen to the recording and attack its veracity.[122]

Even assuming, *arguendo*, that all 911 calls are recorded, there is no universal guarantee that these recordings will be preserved for later follow-up and analysis. It thus follows that simply because a 911 call is recorded does not mean that—as the majority argues—a victim will have the opportunity to later challenge the tip. Further, the damage is already done as far as eroding any Fourth Amendment protection. Even if the subject of an anonymous tip can later attack the tip's veracity, the subject's liberty has already been infringed upon at the moment she was seized by the police. The Court's rationale here, as with its use of evidentiary rules to justify a seizure,[123] appears to describe an admissibility issue rather than a predicate to a Fourth Amendment search and seizure. In other words, holding that a recorded 911 call could later be challenged in court is irrelevant for the purposes of preventing the initial Fourth Amendment intrusion. Once the Fourth Amendment is implicated by the seizure resulting from the anonymous 911 call, a determination that the seizure was improper does not undo the restriction on liberty created by that seizure.

The Court asserts as additional indicia of the veracity of a 911 caller factors such as cell phone number reporting, cell tower data, and the inability of callers to block caller ID information.[124] Research shows, however, that the vast majority of 911 calls made from wireless phones are delivered without adequate information to locate the caller.[125] Regarding cellular tower data, extensive research exists calling into serious question the reliability of such data for the purposes of actually determining the location of the caller.[126] Unlike calls made from a landline,

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120. *Id.*

121. *See id.* (noting that these calls "can" be recorded, not that they *are* or *must be*).

122. *See id.* at 1686–87, 1688–90 (describing the facts of the case, but without providing any information as to the caller's knowledge of the call being recorded).

123. *See supra* notes 97–106 and accompanying text.

124. *See Navarette*, 134 S. Ct. at 1690.

125. *See, e.g.*, Jon Brodkin, *9 Out of 10 Wireless 911 Calls in DC Don't Provide Accurate Location Info*, ARS TECHNICA (July 10, 2014, 5:05 PM), http://arstechnica.com/business/2014/07/9-out-of-10-wireless-911-calls-in-dc-dont-provide-accurate-location-info.

126. *See* Leonard Deutchman, *The Case For Making Cell Phone Tracking Data Available At Trial*, 29 CRIM. JUST. 22, 26 (2015) (noting that location tracking via cell tower data "is not the most reliable method"); Brodkin, *supra* note 125; Tom Farley & Mark van der Hoek, *Cellular Telephone Basics*, PRIVATE LINE (Jan. 1, 2006, 8:55 PM), http://www.privateline.com/mt_cellbasics/ (explaining that cell tower data can be especially misleading when attempting to pinpoint the location of a caller).

wireless calls are routed and rerouted through numerous switches and towers, based on cellular traffic and availability, and cannot provide enough information to locate—even in an approximate sense—the location of the call.[127]

b. Assuming Identity Can be Determined, the Government Must Still Demonstrate that the Caller Was Aware, or Should Have Been Aware, of the Recording and Its Consequences in Determining Identity

Most importantly, for the majority's assertions about 911 calls to be valid, the caller must know or have constructive knowledge that all of these factors (recording, number data, and ability to later listen and challenge) exist. If the informant is unaware of these factors, motivation not to fabricate due to any potential consequences vanishes.

In his dissent in *Navarette*, Justice Scalia directly applied the factors above to the significance of the informant's anonymity. Regarding the advancements in 911 technology and regulations, Justice Scalia asserted that it is not the reality or mere existence of these facts, but the "'tipster's *belief* in anonymity'" that controls her behavior.[128] The facts in *Navarette* lend support to the conclusion that the caller wished to remain anonymous. The caller did not provide her name to the dispatcher, nor did she volunteer to be interviewed, make a statement to police, or later identify the truck as the one that allegedly ran her off the road.[129] This all speaks to her *belief* that her 911 call was indeed anonymous. In sum, with respect to reliability, there is no functional difference between an anonymous and uncorroborated 911 call and an ordinary anonymous tip or accusation. Thus, such a 911 call cannot by itself provide the reliability necessary to establish reasonable suspicion as required to justify a seizure under the Fourth Amendment.

IV. THE ROLE OF EVIDENTIARY PRINCIPLES IN THE DETERMINATION OF FOURTH AMENDMENT RIGHTS

In determining the reliability of an anonymous tip for the purposes of satisfying the Fourth Amendment, using language and standards that encompass hearsay exceptions has an understandable appeal. Notwithstanding the general rule disallowing out-of-court statements offered to prove the truth of an asserted matter,[130] it is the reliability of these hearsay statements that undergirds the exceptions that allow most of them into evidence.[131] Since an essential component to establish probable cause, or articulable suspicion to engage in a seizure, is the reliability of

127. *See* Farley & van der Hoek, *supra* note 126.

128. *See Navarette*, 134 S. Ct. at 1694 (Scalia, J., dissenting) (quoting Brief for National Association of Criminal Defense Lawyers et al. at 10, *Navarette*, 134 S. Ct. 1683).

129. *See id.* at 1686–87.

130. FED. R. EVID. 801, 802.

131. *See, e.g.*, United States v. Hieng, 679 F.3d 1131, 1142 (9th Cir. 2012) (noting that "reliability is the touchstone of all the hearsay exceptions"); Richard D. Friedman, *Toward A Partial Economic Game-Theoretical*

the informant or the information provided, why not just incorporate the relevant evidence rules into Fourth Amendment jurisprudence? This is precisely what the Court did in *Navarette* when it asserted that the anonymous 911 was both an excited utterance and a present sense impression.[132] While the application of evidence law is not illogical, a closer look at the principles embodied in that law shows that its application to Fourth Amendment jurisprudence is flawed.

Before evidentiary exceptions permitting the use of certain hearsay statements in a criminal trial are allowed to play a key role in determining whether a seizure is justified under the Fourth Amendment, some important questions need to be asked. First, is there something in the process of using the hearsay statement at trial that is different than the process of using it in the Fourth Amendment context? Second, if such a difference does exist, is that difference significant? Third, is there anything the Court has dealt with in related areas of law to inform whether or not hearsay statement exceptions should legitimize seizures?

A. Comparing the Processes by Which Hearsay Statements Are Used in Trials with Their Use in Authorizing Fourth Amendment Seizures

Prior to the admission of a hearsay statement in a criminal trial, an opposing party may object that the statement is inadmissible under the hearsay exceptions—requiring a ruling from the judge before the statement is used in court.[133] If the objection is successful, no prejudice has accrued from the mere uttering of the statement.[134] Contrast that with a hearsay statement used to justify depriving a person of his or her freedom, such as the one used by police to compel Navarette to pull his car over and submit to questioning.[135] No such objection is available before the seizure has occurred, and, therefore, no judicial approval is necessary to effect it. Of course, seizures without warrants—and therefore without prior judicial approval—occur regularly and are often valid.[136] The point here is that what occurs when a person is seized differs from the process of merely obtaining a statement to be used in court.

Analysis of Hearsay, 76 MINN. L. REV. 723, 724 (1992) ("The categorical exceptions [to the hearsay rule] are based principally on the perceived trustworthiness of the statements fitting within them.").

132. *See Navarette*, 134 S. Ct. at 1689–90.

133. *See* FED. R. EVID. 104(a) ("The court must decide any preliminary question about whether . . . evidence is admissible.").

134. This is because the jury will not have heard the hearsay statement if the party opposing its admission makes a timely objection that is sustained.

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

136. *See, e.g.*, Barbara C. Salken, *Balancing Exigency and Privacy in Warrantless Searches To Prevent Destruction Of Evidence: The Need For a* Rule, 17 PACE L. REV. 37, 86–87 (1997) (explaining that the Supreme Court routinely permits warrantless vehicle searches and searches involving exigent circumstances). For example, in 2014 over 45,000 people in New York City were stopped by the police without warrants. *See Stop-and-Frisk Data*, N.Y. CIVIL LIBERTIES UNION, http://www.nyclu.org/content/stop-and-frisk-data (last visited Feb. 17, 2016). While perhaps not all of those stopped would have been designated as seized, many, of course, were, including no doubt the 8000 or so not found to be "totally innocent." *See id.*

The significance of this distinction is clear. Aside from the vital deprivation of freedom that accompanies every seizure,[137] a lawful seizure often permits the police to engage in other Fourth Amendment-implicated law enforcement techniques. If a suspect is lawfully detained, the police may seize any evidence of a crime they see in plain view[138] or, as was the case in *Navarette*, police may use their sense of smell to create the additional probable cause necessary to search a vehicle.[139] An especially common policing technique used when seizing a vehicle is to request permission to search the vehicle.[140] As a suspect does not have to be informed of the right to withhold consent,[141] many suspects consent to such searches, even knowing there is contraband present.[142] Therefore, when comparing the process by which hearsay statements are admitted into evidence in criminal trials with the parallel process for their use in satisfying the Fourth Amendment, the difference in the degree of intrusion or prejudice to the individual is significant.

B. The Relevance of the Court's Sixth Amendment Holdings

When a court attempts to graft evidentiary principles onto constitutional doctrine, it should consider the relevance of factors that the Supreme Court has decided are important to protecting other constitutional rights. In *Crawford v.*

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137. *See* United States v. Jacobsen, 466 U.S. 109, 113 n.5 (1984) (describing a "seizure" of a person as "meaningful interference, however brief, with an individual's freedom of movement").

138. Consider:

> The plain view doctrine authorizes seizure of illegal or evidentiary items visible to a police officer whose access to the object has some prior Fourth Amendment justification and who has probable cause to suspect that the item is connected with criminal activity . . . The plain view doctrine is grounded on the proposition that once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost; the owner may retain the incidents of title and possession but not privacy.

Illinois v. Andreas, 463 U.S. 765, 771 (1983) (internal citations omitted).

139. *See, e.g.*, United States v. Johns, 469 U.S. 478, 482 (1985) (finding probable cause to search a vehicle when customs officers "detected the distinct odor of marijuana"); United States v. Haley, 669 F.2d 201, 203 (4th Cir. 1982) ("Sufficient probable cause arises when the officer smells marijuana inside the vehicle.").

140. *See Consent Searches*, AMS. FOR EFFECTIVE LAW ENF'T, http://www.aele.org/consent.html (last visited Dec. 26, 2015) (noting that during a traffic stop police officers will often "request a consent to search the driver's vehicle").

141. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973) (providing that "the government need not establish [] knowledge [of the right to refuse consent] as the sine qua non of an effective consent").

142. *See, e.g.*, United States v. Sandoval-Vasquez, 435 F.3d 739, 744–45 (7th Cir. 2006) (finding consent to search was voluntary where, in addition to other circumstances, defendant helped agents locate drugs and directed them to another location where drugs might be located); United States v. Todhunter, 297 F.3d 886, 891 (9th Cir. 2002) (finding consent voluntary where defendant acknowledged the presence of a loaded firearm and contraband, and pointed to areas in the cabin where police would find them); United States v. Hernandez, 279 F.3d 302, 307–08 (5th Cir. 2002) (finding consent to search voluntary where defendant likely knew contraband would be found but initially claimed she did not know of any in her suitcase); United States v. Hathcock, 103 F.3d 715, 720 (8th Cir. 1997) (finding consent to search duffel bag voluntary where suspect believed officers would inevitably detect illegal substances inside); United States v. Crespo, 834 F.2d 267, 271–72 (2d Cir. 1987) (finding consent to search apartment voluntary where suspect likely believed agents would not find drugs hidden inside).

Washington, the Supreme Court decided that the Sixth Amendment right of confrontation may be violated even when there has been compliance with the rules of evidence.[143] Specifically, the Court in *Crawford* held that the fact that a hearsay statement falls into one of the enumerated exceptions of either state evidence law or the Federal Rules of Evidence does not immunize it from the strictures of the Sixth Amendment.[144] What makes some hearsay statements violative of the Sixth Amendment is that they are deemed to be testimonial.[145] That is, the statement is made for the purpose of establishing or furthering a criminal prosecution, and is usually made to a law enforcement officer or someone in a similar position.[146] That definition of testimonial would seem to apply to the anonymous 911 call in *Navarette*.[147]

In *Crawford*, the Court discussed the importance of the right of confrontation and specifically how it protected criminal defendants when the evidence at issue is testimonial in nature.[148] More generally, however, one reason why testimonial evidence is not permitted even if it falls under an established hearsay exception is that statements of an accusatory nature are more open to false motives.[149] In other words, they are less trustworthy than non-testimonial statements made to friends or relatives, or during casual conversation.[150]

When the Supreme Court held in *Davis v. Washington* that a 911 call was not testimonial, it did so because the caller was reporting "an ongoing emergency."[151] The caller was being beaten at the moment of the call and,[152] therefore, was probably calling to seek help rather than with an eye towards prosecution.[153] This made the call less likely to be fabricated.[154] Conversely, any emergency in

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143. Crawford v. Washington, 541 U.S. 36, 36 (2004).

144. *See id.* at 61, 68–69.

145. *See id.* ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'").

146. *See id.* at 51–53.

147. The 911 call in *Navarette* was made to a law enforcement agency, and the call was made with the purpose of providing authorities with information to pursue a criminal investigation of the alleged offending vehicle and its occupants. *See* 134 S. Ct. 1683, 1690 (2014).

148. *Crawford*, 541 U.S. at 60–63.

149. *See* George Fisher, *The Crawford Debacle*, 113 MICH. L. REV. FIRST IMPRESSIONS 17, 27 (2014) ("[W]hen crime witnesses speak (and officers question) 'with an eye toward trial,' they have an incentive to lie (and elicit lies). This explanation, rooted in testimonial hearsay's unreliability, makes good sense.").

150. *See id*. (suggesting that crime witnesses questioned in anticipation of a trial have an incentive to lie, and their testimonial statements are therefore less trustworthy than statements made without the prospect of criminal prosecution attached).

151. Davis v. Washington, 547 U.S. 813, 827–28 (2006).

152. *See id.* at 817.

153. *See id.* at 817–18. In fact, when police arrived, they observed the caller's "shaken state" with "'fresh injuries on her forearm and face.'" *Id.* at 818. This behavior is not indicative of someone strategically calling 911 with an eye toward trial. Rather, this caller apparently feared for her life at the moment of the call.

154. *See id.* at 817–18. In *Michigan v. Bryant*, 562 U.S. 344, 361 (2011), the Court described the "existence of an ongoing emergency" versus "proving past events potentially relevant to later criminal prosecution" as

Navarette was clearly over when the 911 call was made, and, in fact, the caller had not even seen the suspect's car for five minutes.[155]

While the protections embodied in the Sixth Amendment right to confrontation have a different purpose than those contained in the Fourth Amendment's protections from unreasonable searches and seizures, it is interesting to note that the ongoing emergency that made the 911 call trustworthy in *Davis* was not present when the caller in *Navarette* dialed 911. More fundamentally, whether the period of time between the event and the statement in *Davis* fell within the excited utterance and present sense impression exceptions to hearsay was a determination separate from whether the statement was testimonial and, therefore, of constitutional significance. Different principles become relevant when applying a constitutional right than do when applying an evidentiary rule, even if the underlying evidence is the same in both scenarios and the justifications appear similar. In its attempt to apply the present sense and excited utterance exceptions to the anonymous call in *Navarette*, the Court should have at least assessed the significance of this distinction.

C. The Relationship between the Evidence and the Constitutional Protection

Even more basic in the determination of whether to admit evidence into a criminal trial when challenged by a constitutional protection is the relationship between the use of the evidence and the core values behind a constitutional protection. In *Crawford* and the line of cases that have followed, the Court has repeatedly emphasized that the introduction of evidence deemed testimonial, without the ability of the defendant to cross-examine the declarant, destroys the purposes behind the Sixth Amendment guarantee of confrontation.[156] Similarly, the use of information that bears no meaningful indicia of reliability defeats the Fourth Amendment's requirement that probable cause or reasonable suspicion be present before the government intrudes upon a person's freedom.[157] As indicated previously, there are exceptions to this Fourth Amendment requirement that have

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important considerations in determining the primary purpose of an interrogation, which bears on whether a statement is testimonial. "[T]he idea [is] that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination." *Id.*

155. *See* Navarette v. California, 134 S. Ct. 1683, 1687 (2014).

156. *See* Crawford v. Washington, 541 U.S. 36, 61 (2004); *see also* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 305 (2009) (finding a violation of the defendant's Sixth Amendment right to confrontation when the court admitted certificates noting the quantity of cocaine found without allowing the defendant to cross-examine the affiants); Giles v. California, 554 U.S. 353, 366, 373–76 (2008) ("The Sixth Amendment seeks fairness indeed—but seeks it through very specific means (one of which is confrontation) that were the trial rights of Englishmen.").

157. *See* Alabama v. White, 496 U.S. 325, 328 (1990) (noting the Court's precedent that Fourth Amendment requirements are satisfied when police forcibly stop a suspect based on information that provides sufficient indicia of reliability).

nothing to do with the reliability of anonymous informants.[158] When anonymous informants form the justification for a search or seizure, however, the Court has consistently required some indication that the informant or the information is reliable.[159] This is hardly surprising because, as Justice Kennedy noted in *J.L.*, "[i]f the telephone call is truly anonymous, the informant has not placed his credibility at risk and can lie with impunity. The reviewing court cannot judge the credibility of the informant and the risk of fabrication becomes unacceptable."[160] This is because an officer's suspicion of criminal activity cannot be reasonable if based upon informants or information not shown to be reliable.[161]

In *J.L.*, the Court distinguished situations in which an informant's lack of reliability would not necessarily bar the use of his statement to justify a seizure.[162] This distinction was critical to longstanding, core issues involving the Fourth Amendment. In rejecting the argument that the standard of reliability to demonstrate reasonable suspicion should be relaxed or eliminated because of the inherent dangers of guns, the Court noted that an automatic firearm exception "would rove too far."[163] Such a relaxation of reliability standards "would enable any person seeking to harass another to set in motion an intrusive embarrassing search of the targeted person simply by placing an anonymous call reporting the target's carriage of an unlawful gun."[164] That is precisely the danger risked by permitting an anonymous call, such as the one in *Navarette*, to justify the deprivation of one's freedom. Without the presence of reliability indicia discussed in *J.L.* or *White*, or any other real means of showing the informant was trustworthy, anonymous tips should not form the basis of a search or seizure. However, the Court explicitly left open the possibility that—notwithstanding the lack of such reliability—a search and seizure might be permitted where the danger presented in the anonymous tip was especially great, such as that a person was carrying a bomb; or that the danger occurred in a place where the suspect has a diminished expectation of Fourth Amendment privacy, such as at an airport or school.[165] Clearly, an anonymous tip that a driver forced the informant off the road at least ten minutes before the

158. *See, e.g.*, Samson v. California, 547 U.S. 843 (2006) (searching and seizing parolees); Bd. of Educ. v. Earls, 536 U.S. 822 (2002) (drug testing school students who participate in extracurricular activities); Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (seizing drivers at sobriety checkpoints); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (Border Patrol agents policing areas sufficiently close to the United States-Mexico border); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent searches).

159. *See, e.g.*, *White*, 496 U.S. at 330 (describing anonymous tips as requiring "more information . . . to establish the requisite quantum of suspicion than would be required if the tip were more reliable").

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

161. *See id.* at 270 (explaining that, absent corroboration or other indicia of reliability, bare tips from purely anonymous informants do not support reasonable suspicion).

162. *Id.* at 270–71.

163. *Id.* at 272.

164. *Id.*

165. *See id.* at 273–74.

suspect's car is seized[166] does not equate with the danger of a bomb, especially when the officer follows the car for five minutes and notes no danger to be present in the driving.[167]

When properly applied, such an analysis conforms to longstanding exigency exceptions to Fourth Amendment. In other words, when the danger is great and the police need to act quickly, they may do so even where they do not possess the normal degree of suspicion or a warrant.[168] Considering both the Fourth Amendment's exigency exception and the *J.L.* rule would form a reasonable basis upon which to determine when to relax the reliability standard for anonymous calls. Such a situation was clearly not present in *Navarette*. To substitute hearsay exceptions that are concerned with the rules of evidence for core Fourth Amendment principles—as was done by the Court in *Navarette*—is a mistake and should be abandoned.

CONCLUSION

This Article has pointed out the failings of the Supreme Court's recent approach to the manner by which the government must establish reliability in order to conduct a search or seizure. The Court's opinion in *Navarette v. California* is deeply flawed, both in the means it used to show the seizure was reliable, and in its application of those means to the facts of the case. The *Navarette* opinion either misinterpreted or misapplied the two previous cases dealing with reliability for limited seizures. The anonymous informant in *Navarette* was substantially less reliable than the one in *Alabama v. White*, a case acknowledged by the Court to possess the minimum degree of reliability needed to establish the reasonable suspicion of criminal activity required for such a seizure.[169]

Instead, when considering the criteria for reliability that had been used by the Court until *Navarette*, the *Navarette* informant was remarkably similar to the informant in *Florida v. J.L.*, whose reliability was deemed insufficient to satisfy the Fourth Amendment.[170] As in *J.L.*, the informant in *Navarette* never predicted future actions of the suspect that proved to be accurate.[171] It was precisely the accurate predictions in *White* that the Court found crucial in its determination that the informant there was reliable.[172] As in *J.L.*, the *Navarette* informant merely

166. *See* Navarette v. California, 134 S. Ct. 1683, 1686 (2014).

167. *See id.* at 1687.

168. *See* Kentucky v. King, 131 S. Ct. 1849, 1853 (2011) (describing an exigency exception to the Fourth Amendment warrant requirement). In *Bing* ex rel. *Bing v. City of Whitehall*, 456 F.3d 555, 564–65 (6th Cir. 2006), the court applied the exigency doctrine to allow a warrantless entry into Bing's house because of the danger that existed based on the report of shots fired and the belief that Bing was homicidal.

169. *See supra* notes 48–61 and accompanying text.

170. *See supra* notes 62–66 and accompanying text.

171. *See supra* notes 81–84 and accompanying text.

172. *See supra* notes 55–57 and accompanying text.

reported observations that anyone present could have made.[173] A key difference is that in *J.L.* there was nothing that tended to make the informant's claims less likely to be accurate,[174] whereas in *Navarette* the officer's observations of the suspect driving safely did just that.[175]

Attempts by the majority in *Navarette* to defend its holding by creating new methods of establishing reliability are equally flawed. Arguing that the hearsay exceptions of present sense impression and excited utterance would apply to the statement of the anonymous informant is problematic on several fronts. First, it is debatable whether the exceptions even apply in this case.[176] The time interval between the triggering event (the informant's claim she was forced off the road) and her statement to the police should negate the use of the present sense impression exception.[177] While that time interval by itself would likely not invalidate the use of the excited utterance exception,[178] the fact that there is no evidence that the informant was under the stress of the triggering event when she made her statement is significant. Other factors about the call in *Navarette* raise questions about whether this hearsay statement would be admissible based on the excited utterance exception. Specifically, the informant was not just unavailable but also unidentified, her claims about the suspect's dangerous driving were entirely uncorroborated, and her call provided specific details suggesting her emotional state was far from excited.[179]

The more fundamental problem with using the hearsay exceptions as the *Navarette* Court did is the undefended application of evidence law to constitutional doctrine. In fact, the process by which the statements are used is quite different when attempting to admit a hearsay statement at trial than when using it to authorize a seizure. No prejudice occurs to a party objecting to the admission of a hearsay statement at a criminal trial unless and until a judge determines that it meets both evidentiary and Sixth Amendment requirements.[180] On the other hand, the use of a hearsay statement to justify a warrantless seizure deprives a person of his or her freedom without any prior authorization by a court.[181] This does not mean the police must obtain judicial authorization before executing certain seizures, but it does point to the need for using different criteria in assessing such seizures, taking into account differences in processes and purposes.

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173. *See* Navarette v. California, 134 S. Ct. 1683, 1686–87 (2014); Florida v. J.L., 529 U.S. 266, 269–71 (2000).

174. *See supra* notes 63–64 and accompanying text.

175. *See supra* note 83 and accompanying text.

176. *See supra* notes 93–99 and accompanying text.

177. *See supra* notes 100–06 and accompanying text.

178. *See supra* note 104 and accompanying text.

179. *See supra* notes 104–08 and accompanying text.

180. See *supra* Section IV.A.

181. *See supra* notes 137–42 and accompanying text.

Finally, the *Navarette* Court's argument that the use of the 911 system contributes to the reliability of the caller is flawed both in its application to the facts of the case itself and in its general understanding of the 911 system. Emergency 911 systems only sometimes record calls, only sometimes preserve the calls they record, and only sometimes can detect the identity or location of a caller.[182] In *Navarette* itself, the caller was never identified.[183] Assuming, *arguendo*, that the police can detect and use 911 calls as the Court maintains, the use of those calls to establish reliability rests upon an assumption that, again, is generally unsound and specifically inapplicable to the facts of *Navarette*. Neither research studies nor logic suggests that 911 callers are aware that their identity can be discovered.[184] Why would some insist on anonymity, as the caller in *Navarette* did, if they believed the police could discover their identity from the call itself? The caller in *Navarette* took no action before, during, or after the call to suggest she either wished to be identified or thought she could be.[185]

In order to protect fundamental principles embodied in the probable cause and reasonable suspicion requirements of the Fourth Amendment, the Supreme Court must establish clear and logical guidelines to determine the reliability of informants. Such guidelines should proceed from certain basic tenets. As the Court has repeatedly held, anonymous informants provide the least reliable means of obtaining information. Such informants put nothing at risk when they withhold their identity, and there are no facts to assess whether they are the sort of people who ought to be believed. To accept such informants as being reliable, there must be significant additions to their reliability. One such addition occurs when an informant accurately predicts a suspect's future actions.[186] Another addition occurs when an informant possesses information about the suspect that is both correct and unknown to the general public.[187] Other means of adding to an anonymous informant's reliability, such as advances in technology—which could include accurate methods of tracking a suspect's location or identity—should be available to the police, but only if those means are realistic in achieving greater informant reliability and do not threaten the values embodied in the Fourth Amendment.

182. *See supra* notes 125–28 and accompanying text.

183. Navarette v. California, 134 S. Ct. 1683, 1688 (2014) (treating the tip as anonymous, thus implying that the caller was never identified).

184. *See supra* notes 125–27 and accompanying text.

185. *See supra* note 129 and accompanying text.

186. *See, e.g.*, Alabama v. White, 496 U.S. 325, 332 (1990).

187. *See id.*