No. 98-1993

IN THE SUPREME COURT OF THE UNITED STATES

THE STATE OF FLORIDA,
Petitioner,

v.

J.L., a Juvenile,
Respondent.

RESPONDENT'S BRIEF ON THE MERITS

Filed January 23, 2000

QUESTION PRESENTED

DOES THE MERE MENTION OF A FIREARM BY AN ANONYMOUS TIPSTER RAISE AN OTHERWISE UNRELIABLE TIP TO THE LEVEL OF REASONABLE SUSPICION?

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STATEMENT OF THE CASE AND FACTS

On October 13, 1995, Miami-Dade Police Officer Carmen Anderson seized and frisked the Respondent, J.L., based on an anonymous tip that a young black man in a "plaid-looking shirt," waiting at a bus stop, had a gun.

Anderson was the sole witness at the hearing on the Respondent's motion to suppress evidence. She testified that she and another officer, whose name she could not recall, were dispatched to the area of 183rd Street and Northwest 24th Avenue in Miami-Dade County, in response to information from an anonymous tipster. (J.A. 40). They arrived about six minutes after the dispatch. The record does not disclose when the tip was received, the identity of the person receiving it, or the length of time that elapsed between the receipt of the tip and the dispatch of Officr Anderson. (J.A. 41).

According to Anderson, the anonymous tipster said that there were "several black males" standing at a bus stop and "that the male with the gun had a plaid-looking shirt and he was a black male." (J.A. 40). The officer said the tipster "gave a description of each one," but she never told the court what that description was, or whether the people she found matched the descriptions given. (J.A. 40-41). The only testimony in this regard was as follows:

> Q. When you arrived on the scene, did you find the persons matching the description?
>
> A. As we approached the bus stop, we saw three black males, one of which was wearing a plaid-looking shirt.
>
> Q. What were the other two boys wearing?
>
> A. I believe one was wearing a tan polo shirt and another color top.

(J.A. 41). The state is inaccurate, then, when it says "Officer Anderson saw three black males . . . each of whom fit the description provided in the tip . . ." Pet. Brief on the Merits at 5, 9, 21. Anderson never said that anyone but J.L. matched the tipster's general description. (J.A. 42).

The tip did not provide details of the suspect's height or hairstyle. It included no approximate age, although Officer Anderson believed the tipster said the black males were "young." (J.A. 41).

When she arrived at the bus stop, Officer Anderson saw "three black males." Among them was J.L., who was wearing a "plaid-looking shirt." (J.A. 41-43). Nobody at the bus stop did anything to arouse Anderson's suspicions. (J.A. 42, 43). Indeed, the officer did not see any of them do anything other than "hang out" at the bus stop. (J.A. 42, 43).

Nevertheless, Officer Anderson accosted all three people, directed them to put their hands up, and began to frisk them. (J.A. 42, 45). As Officer Anderson frisked the Respondent, she saw a gun sticking out of his pocket. (J.A. 42). The officer explained that the gun became visible because the Respondent's shirt did not reach down to where the butt of the gun stuck out of his pocket. (J.A. 42).

The state presented no other evidence. No recording or verbatim transcript of the anonymous tip was introduced. The state offered no testimony concerning the time of day or the nature of the area. The record is also devoid of any evidence concerning the tipster. The state provided no evidence of the underlying facts concerning the tipster's basis of knowledge or motivation for calling. There is no indication in the record to suggest the police attempted to find out any of this information.

At the conclusion of the hearing, the trial court granted the Respondent's motion and ordered the gun suppressed. (J.A. 35). The State of Florida appealed, and the District Court of Appeal reversed, holding that police are entitled to stop and frisk a person whenever they confirm innocent details of an anonymous tip alleging possession of a gun. (J.A. 31-34).

The Supreme Court of Florida reversed, and again ordered the gun suppressed. The court reaffirmed that an anonymous tip, even one that provides only innocent details, can support a stop and frisk. (J.A. 5-8, 11-12). But the court expressly declined the state's "invitation to create a firearms or weapons exception" that would permit a stop and frisk whenever an anonymous tip alleged possession of a gun. (J.A. 1-2, 9-12). On the facts of this case, the court held that the "bare-boned anonymous tip," uncorroborated by independent police work, failed to provide reasonable suspicion justifying the forcible stop and frisk of the Respondent. (J.A. 8, 11).

SUMMARY OF THE ARGUMENT

Officer Anderson had no reason to trust the anonymous tipster when she stopped and frisked the Respondent. The state concedes that the officer's actions would have violated the Fourth Amendment, but for one thing: The mention of a firearm. According to the state, the use of the word "gun" exempted the tipster from the reliability analysis required by this Court's decisions in *Alabama v. White*, 496 U.S. 325, 328 (1990), and *Illinois v. Gates*, 462 U.S. 213, 238 (1983), and permitted the police to act with what would be less than reasonable suspicion in any other case. The issue before this Court is therefore stark: Does the Fourth Amendment requirement of reasonable suspicion based on reliable information disappear whenever an anonymous tipster alleges a gun?

The State of Florida's claim that it does is without support in this Court's stop and frisk jurisprudence. The Court has given police great discretion in the investigation of crime, but it has always required that a forcible seizure be justified either by specific facts known to the police, or reliable outside information. "Some tips, completely lacking in indicia of reliability . . . either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized." *Adams v. Williams*, 407 U.S. 143, 147 (1972). The fact that a tip mentions a gun simply does not demonstrate that the tip is reliable.

The tip in this case surely represents a low-water mark. It provides the bare minimum of information that would allow an officer to distinguish one person from another. The anonymous caller made no predictions, and the police made no effort to gather more information. The tipster did not even allege that a crime was being committed. The state's conclusion that this tip justified a forcible seizure can only be reached by substituting panic for *Terry*'s requirement of a reasoned suspicion based on facts.

To accept the state's position is to declare the Court's reliability requirement—and ultimately *Terry*'s reasonable suspicion standard—dead. It is but a short step from saying that gun possession eliminates the need for reliability to holding that drug possession, or drunken driving, must also be excused from the Fourth Amendment's reliability requirement. Some courts have already done just that. If one accepts the state's argument in this case, it is difficult to think of any anonymous tip that would still be subject to the reliability analysis imposed by this Court's decisions.

Police across the country receive anonymous information every day. When those tips merit further investigation, police have little trouble determining whether or not the tip justifies a stop or arrest. Officers may do this by questioning witnesses, observing suspects, seeking more information from the tipster, or any of a hundred other police techniques. They may not, however, decide to start frisking people whenever the word "gun" is used. To conclude otherwise would be contrary to the Fourth Amendment and the decisions of this Court.

ARGUMENT

THIS COURT MUST REJECT A FIREARMS EXCEPTION THAT WOULD PERMIT FORCIBLE STOPS AND FRISKS BASED ON TIPS "COMPLETELY LACKING IN INDICIA OF RELIABILITY."

The stop and frisk in this case were founded entirely on an anonymous tip and the verification of descriptive details easily observable by "any pilgrim on the roadway." *See Robinson v. State*, 556 So. 2d 450, 452 (Fla. App. 1990), *quoted* at J.A. 5. The State of Florida argues that this case presents the Court with an "opportunity to answer the question left open in *Alabama v. White*." That is, to what degree may police rely on anonymous tips when investigating allegations of gun possession? Pet. Brief on the Merits at 10. This question has already been answered by this Court's decisions. Unreliable, uncorroborated information cannot justify a forcible seizure.

In *Adams v. Williams*, 407 U.S. 143 (1972), police stopped the defendant based on a tip that he possessed both narcotics and a firearm. After analyzing the tipster's reliability (noting that he was known to the officer and had provided information in the past) and observing that the in-person tip would have subjected the informant to

immediate arrest had he lied, the Court concluded, "the information carried enough indicia of reliability to justify the officer's forcible stop of Williams." 407 U.S. at 147. Writing for the Court, Justice Rehnquist explained:

> Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized. But in some situations—for example, when the victim of a street crime seeks immediate police aid and gives a description of his assailant, or when a *credible* informant warns of a specific impending crime—the subtleties of the hearsay rule should not thwart an appropriate police response.

407 U.S. at 147 (emphasis added). This Court noted that "[t]his is a stronger case than obtains in the case of an anonymous telephone tip." 407 U.S. at 146.

A bare-bones anonymous tip, by itself, provides no basis to evaluate its reliability. In *Alabama v. White*, 496 U.S. 325 (1990), the Court held that an anonymous tip may become reliable enough to justify a seizure, but only when corroborated by police investigation, or where the content of the tip demonstrates a special familiarity with the suspect. The Court explained:

> The opinion in Gates recognized that an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity inasmuch as ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations and given that the veracity of persons supplying anonymous tips is "by hypothesis largely unknown, and unknowable." *Id.*, [462 U.S.] at 237. This is not to say that an anonymous caller could never provide the reasonable suspicion necessary for a Terry stop. But the tip in Gates was not an exception to the general rule, and the anonymous tip in this case is like the one in Gates: "[It] provides virtually nothing from which one might conclude that [the caller] is either honest or his information reliable; likewise, the [tip] gives absolutely no indication of the basis for the [caller's] predictions regarding [Vanessa White's] criminal activities." 462 U.S. at 227. By requiring "[s]omething more," as Gates did, *ibid.*, we merely apply what we said in Adams: "Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized," 407 U.S. at 147. Simply put, a tip such as this one, standing alone, would not " 'warrant a man of reasonable caution in the belief' that [a stop] was appropriate." Terry, *supra*, 392 U.S. at 22, quoting Carroll v. United States, 267 U.S. 132 (1925).

496 U.S. at 329.

The tip in this case lacks any indicia of reliability. Nothing in the tip showed it to be reliable, and the police lacked the "something more" required under *Illinois v. Gates*, 462 U.S. 213 (1983), and *White*. The tip described only the barest of details (race, gender, "young," location, and a clothing description so vague it did not even include the color of the only garment mentioned). As this Court explained in *White*, "a tip such as this one, standing alone," simply does not justify forcible police action. 496 U.S. at 329.

The State of Florida now asks this Court to adopt a *per se* rule that a bare-bones anonymous tip, standing alone, *does* warrant a person of reasonable caution in the belief that a stop is appropriate—so long as that tip men-

tions a gun. If accepted, the state's position would at best limit *White* to its facts, eliminating the reasonable suspicion standard for virtually all crimes. The state's approach would also relegate this Court's analyis in *Adams v. Williams* to the level of quaint dicta. If the state is right, Justice Rehnquist's careful analysis of the tipster's reliability was simply unnecessary.

The state's position must be rejected. "[A] conscientious assessment of the basis for crediting [anonymous] tips is required by the Fourth Amendment," *Gates*, 462 U.S. at 238, and the mere mention of the word "gun" does not make a tip any more reliable. The proposed rule would reduce the accountability of police and tipsters, encourage false tips, and unnecessarily intrude on citizens' Fourth Amendment rights.

A. The Police May Not Forcibly Seize A Person Without A Reasonable, Individualized Suspicion Based On The Totality Of The Circumstances.

The "touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). Reasonableness is "measured in objective terms by examining the totality of the circumstances," rather than by resorting to "bright-line rules" or "litmus-paper test[s]" *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

Under the Fourth Amendment, a reasonable search or seizure is generally one based on probable cause. *See, e.g., United States v. Ventresca*, 380 U.S. 102 (1965). However, in *Terry v. Ohio*, 392 U.S. 1 (1968), this Court carved out a narrow exception to the general rule, allowing police to make an investigatory stop where they reasonably believe the suspect has committed, is committing, or is about to commit a crime. The duration of the stop is limited to that necessary to conduct the investigation; any further detention requires a showing of probable cause.

To justify a *Terry* stop, police must possess specific, articulable facts that would " 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." 392 U.S. at 22; *see also United States v. Cortez*, 449 U.S. 411, 418-19 (1981) (citations omitted). Reasonable suspicion must be based on more than mere speculation. "Anything less [than particularized suspicion] would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulable hunches, a result this Court has consistently refused to sanction." *Terry*, 392 U.S. at 22; *see also Maryland v. Buie*, 494 U.S. 325, 332 (1990).

If the officer reasonably believes the suspect is armed and presently dangerous, and if after the stop the officer's fears are not allayed, he may frisk the suspect for weapons. 392 U.S. at 30. This Court specifically rejected the notion that the frisk is minimally intrusive:

> [I]t is simply fantastic to urge that such a procedure performed in public by a policeman while a citizen stands helplessly, perhaps facing a wall with hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and is not to be undertaken lightly.

392 U.S. at 16-17 (footnotes omitted). Thus, as with a stop, police must be able to point to specific, articulable facts to justify a frisk.

An officer must have reasonable suspicion for a stop "[b]efore he places a hand on the person of a citizen in search of anything." *Sibron v. New York*, 392 U.S. 40, 64 (1968). For this reason, the state's firearms exception to the particularized suspicion requirement for *Terry* stops

can find no support in this Court's protective search cases. The state argues that "a central theme, in developing any Fourth Amendment limitations on protective searches and seizures for weapons, is the protection of police officers and protection of the public in general." Pet. Brief on the Merits at 14. The cases cited by the state do not support its position in this case.

It is true that this Court has approved measures for officer safety, *see, e.g., Maryland v. Buie*, 494 U.S. 325 (1990); *Terry*, 392 U.S. 1 (1969), *but only where the officer has a right to make a forcible seizure.* In each of the cases relied upon by the state, Pet. Brief on the Merits at 14-16, the officer-safety concerns flowed from reasonable suspicion supporting a stop or probable cause for an arrest. *See Maryland v. Wilson*, 519 U.S. 408 (1997) (passenger in car already stopped by virtue of valid traffic stop); *Maryland v. Buie*, 494 U.S. 323 (1990) (arrest on valid warrant); *Michigan v. Long*, 463 U.S. 1032 (1983) (reasonable suspicion for stop *plus* reason to believe suspect dangerous); *New York v. Belton*, 453 U.S. 454 (1981) (probable cause for arrest); *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1979) ("In this case, unlike *Terry v. Ohio*, there is no question about the propriety of the initial restrictions on respondent's freedom of movement."); *Chimel v. California*, 395 U.S. 752 (1969) (arrest on valid warrant).

None of these cases support the claim that officer-safety concerns will justify an otherwise impermissible seizure. The constitutional predicate for the frisk lies in the reasonableness of the underlying stop:

> [I]f the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a forcible stop. . . . [T]he right to frisk depends upon the reasonableness of a forcible stop to investigate a suspected crime.

Terry, 392 U.S. at 32-33 (Harlan, J., concurring). The officer's privilege to make a frisk or protective sweep flows from the authority to make a seizure. "Officer safety" does not itself justify a stop for the purpose of making a search. Here, the police had no right to frisk because neither the tip nor the officer's observations provided reasonable suspicion justifying a forcible stop.

This Court has consistently declined to substitute a bright-line test for a case-by-case determination of the reasonableness of police action. *See, e.g., Robinette*, 519 U.S. 33, 39-40; *Maryland v. Buie*, 494 U.S. 325, 334 n.2 (1990); *Michigan v. Chesternut*, 486 U.S. 567, 572-73 (1988); *Florida v. Royer*, 460 U.S. 491, 506 (1983); *Ybarra v. Illinois*, 444 U.S. 85, 92-95 (1979); *see also Illinois v. Wardlow*, —— U.S. ——, 2000 WL 16325 (Jan. 12, 2000) (Stevens, J., concurring in part, dissenting in part).

In this case, the police observed no illegal or suspicious behavior; they saw only three young men standing at a bus stop.[1] *See Reid v. Georgia*, 448 U.S. 438, 441 (1980) (distinguishing between suspicious conduct and circumstances typical of a "very large category of presumably innocent travelers"). The basis for their forcible stop and frisk was solely the anonymous phone tip. As set forth below, the tip is plainly unreliable and therefore failed to establish reasonable suspicion.

Recognizing this failing, the state petitions for a firearms exception to the constitutional standard of reasonable suspicion. This proposed exception ineluctably lowers

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[1] The conduct here is thus patently distinguishable from that in *Illinois v. Wardlow*, —— U.S. ——, 2000 WL 16325 (Jan. 12, 2000).

that standard below a bare suspicion or hunch. The mere mention of a gun does not create reasonable suspicion where it is otherwise lacking under this Court's decisions. The state's position is a radical departure from this Court's jurisprudence.

B. An Anonymous Telephone Tip Cannot Justify A Forcible Seizure Unless It Is Shown To Be Reliable.

This Court has always viewed an anonymous telephone tip with mistrust. *See Adams v. Williams*, 407 U.S. at 146-47. However, as the Supreme Court of Florida recognized below, a *Terry* stop may be made on the basis of an anonymous tip, provided the tip is sufficiently corroborated by independent police work giving rise to the reasonable belief that the tip is correct.

In *Alabama v. White*, the Court explained that there are two factors in determining the reliability of an anonymous tip: 1) the tipster's relationship either to the suspect or the alleged crime and 2) the nature of the information contained in the tip.[2] 496 U.S. at 330.

Where the anonymous tipster possesses a special relationship with the suspect or the crime enabling him to know relevant, intimate details, police may rely on the trustworthiness of the tip. *Illinois v. Gates*, 462 U.S. at 237. That reliance is justified, for example, where the

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2 In *Adams v. Williams*, the Court qualified its approval of informant tips to initiate stops and frisks by noting that 1) the informant was personally known to the officer and had provided reliable information in the past; 2) the officer was alone late at night in a high-crime area; and 3) the informant could be punished under Connecticut law for giving a false police report.

See also Aguilar v. Texas, 378 U.S. 108 (1964) (testing the reliability of informant's tip for purposes of arrest or issuance of search warrant) *abrogated by Gates*, 462 U.S. at 238; 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.4(h) at 215 (3d ed. 1996).

tipster is a victim of, or an eyewitness to, a crime.[3] "Thus, if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion." *Alabama v. White*, 496 U.S. at 330.

The second factor concerns the nature of the information contained in the anonymous tip. Does the tip provide sufficient details to enable the officer to readily corroborate it? If the tip contains only general details of identification (such as gender, race, clothing or location), it fails to show a particularized knowledge of the alleged criminality and is therefore unreliable without additional police investigation. *See Alabama v. White*, 496 U.S. at 332; *Illinois v. Gates*, 462 U.S. at 245; *see also United States v. Roberson*, 90 F.3d 75 (3d Cir. 1996); *United States v. McLeroy*, 584 F.2d 746 (5th Cir. 1978); *cf. United States v. Kent*, 691 F.2d 1376 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983).[4]

Here, the tip provided no indication of a relationship between the tipster and the Respondent or why the tipster claimed there was a gun. In short, the tip provided no legitimizing context whatsoever, and thus it failed to indicate whether it was based on personal observation or mere speculation.

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3 Similarly, although not the case here, if the tipster is known to police and has provided reliable information in the past, an added degree of reliability exists. *See Adams v. Williams*, 407 U.S. 143 (1972); *Draper v. United States*, 358 U.S. 307 (1959).

4 One police officer estimated that 90% of the anonymous tips received in New York proved to be unfounded. *See* Vera Institute of Justice report entitled "Felony Arrests: Their Prosecution and Disposition in New York Courts, xi-xii (1977), cited in *People v. McLaurin*, 43 N.Y.2d 902, 904, 374 N.E.2d 614, 615, 403 N.Y.S.2d 720, 721 (1978) (Fuchsberg, J., dissenting).

In *Alabama v. White*, the Court rejected the idea that a tip could be considered reliable simply because it provided " 'easily obtained facts and conditions existing at the time of the tip.' " 496 U.S. at 332, *quoting Gates*, 462 U.S. at 245. Instead, the Court emphasized that the tip contained information (accurate predictions of future behavior) that "the general public would have no way of knowing" and that "demonstrated inside information—a special familiarity with [White]'s affairs." 496 U.S. at 332. Even with this information, the Court termed *White* a "close case." 496 U.S. at 332.

The tip in this case supplied police with only a general number ("several"), relative age ("young"),[5] race,[6] gender, clothing ("plaid-looking shirt"), and location. These facts are easily obtainable by someone lacking spe-

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5 Contrary to the state's representations, *see* Pet. Brief on the Merits at 21, there was no evidence that the officer knew that the Respondent was a juvenile. The only evidence in the trial court was Officer Anderson's testimony that she "believed" the tipster "stated they were young." (A-41).

6 It is significant to note the frequency with which suspects named by anonymous tipsters are African-American or Hispanic, a concern discussed by Brief of Congress of Racial Equality as Amicus Curiae on behalf of the Respondent.

Indeed, a recent report prepared by the Civil Rights Division of the New York Attorney General's Office concluded that "blacks were over six times more likely to be 'stopped' than whites in New York City, while Hispanics were over four times more likely to be 'stopped' than whites in New York City." New York City Police Department's "Stop and Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General at 95 (1999) <http://www.oag.state.ny.us/press/reports/stop_frisk/stp_frsk.pdf> ; *see also* Carol Steiker, *Second Thought About First Principles*, 107 HARV. L. REV. 820, 844 (1994) (noting pre- and post-Terry cases demonstrating racial considerations).

A majority of the caes cited by the state in support of a firearms exception involved anonymous tips of African-American males.

cial knowledge or intimacy with the suspects or crime. To accept as sufficient the mere corroboration of these innocuous, publicly observable facts, is to nullify the reasonable suspicion requirement. *See Alabama v. White*, 496 U.S. at 333 (Stevens, J., dissenting).

As the Supreme Court of Pennsylvania observed in *Commonwealth v. Hawkins*, 547 Pa. 652, 656, 692 A.2d 1068, 1070 (1997):

> If the police respond to an anonymous call that a particular person at a specified location is engaged in criminal activity, and upon arriving at the location see a person matching the description but nothing more, they have no certain knowledge except that the caller accurately described someone at a particular location. As the United States Supreme Court observed in Illinois v. Gates, the fact that a suspect resembles the anonymous caller's description does not corroborate allegations of criminal conduct, for anyone can describe a person who is standing in a particular location at the time of the anonymous call. Something more is needed to corroborate the caller's allegations of criminal conduct. *The fact that the subject of the call was alleged to be carrying a gun, of course, is merely another allegation, and it supplies no reliability where there was none before.*

(Emphasis added.)

The mere conclusion by an unknown tipster that an individual is carrying a gun, without any corroboration, "is but a bald and unilluminating assertion of suspicion that is entitled to no weight." *Spinelli v. United States*, 393 U.S. 410, 414 (1969) (concerning inadequacy of affiant's allegation that Spinelli was a known "gambler") *abrogated by Gates*, 462 U.S. at 238. *See also* Comment, *Police Power to Stop and Frisk*, 86 HARV. L. REV. 171, 181 n.35 (1972).

The ability to predict future behavior is one of the most significant legitimizing features of a tip. If the tip predicts future behavior or events, those predictions can be easily corroborated by police and the tip gains reliability.[7] This is particularly important in the case of an anonymous tipster. *Alabama v. White*, 496 U.S. at 332; *see also Illinois v. Gates*, 462 U.S. at 245; *United States v. Kent*, 696 F.2d 1376, 1379; 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.4(h) at 214. Again, the anonymous tip in this case relayed no predictive information whatsoever.

A police officer's hunch will not justify a *Terry* stop, even though the officer presumably acts with the best of intentions. *See Terry v. Ohio*, 392 U.S. 1, 22 (1968); *Sibron v. New York*, 392 U.S. 40, 64 (1968). There is no way of knowing whether an anonymous telephone tip is based on a hunch, hearsay, or speculation. *See Alabama v. White*, 496 U.S. at 329 (tipsters "generally do not provide extensive recitations of the basis of their everyday observations"); *Gates*, 462 U.S. at 237. Nor will a tip establish whether the tipster is motivated by anything other than malice. *See, e.g., White*, 496 U.S. at 333 (Stevens, J., dissenting). It is difficult to understand, then, why this Court should adopt a rule that will treat anonymous tips as presumptively *more* reliable than the hunches of experienced police officers. Under the state's approach, Officer Anderson could not have stopped the Respondent at the direction of a fellow officer who had a good-faith hunch, *see United States v. Hensley*, 469 U.S. 221 (1985),[8] but she could act on the word of an

[7] *See, e.g., Draper v. United States*, 358 U.S. 307 (1959).

[8] In *Hensley*, the Court concluded that a police officer could make a *Terry* stop based on a bulletin from another department, so long as the bulletin was originally "issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense." 469 U.S. at 232.

unknown prankster. If this Court adopts the proposed firearms exception, an officer who suspects a person of possessing a firearm would be well advised to simply call in an anonymous tip and avoid scrutiny of the basis for her suspicions.[9]

C. The Allegation That A Person Is Carrying A Firearm Does Not Justify An Exception To The Rule Of *Terry v. Ohio* And *Alabama v. White*.

The state seeks an exception to *White* whenever 1) the anonymous tipster alleges that the suspect is carrying a firearm and 2) the police verify publicly observable descriptive details. In support of its position, it offers twenty state and federal cases that purportedly represent the "majority view."[10] *See* Pet. for Writ of Cert. at 9.

These cases do not carry the weight assigned to them by the state. One of the cases is a drug case, and the reference to anonymous tips and firearms appears only in dicta.[11] Most of the remaining cases involve circumstances or factors that provide objective, independent proof of the reliability and accuracy of the tip:

[9] Police fabrication has been cited as a major problem in New York, Los Angeles, Atlanta, New Orleans, Detroit, Minneapolis and Philadelphia. *See* Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233 (1998); Joe Metcalfe, Recent Development, *Anonymous Tips, Investigatory Stops and Inarticulate Hunches—Alabama v. White*, 110 S.Ct. 2412, 26 HARV. C.R.-C.L. L. REV. 219 (1991).

[10] *United States v. Clipper*, 973 F.2d 944 (D.C. Cir. 1992); *cert. denied*, 506 U.S. 1070 (1993) and *United States v. McClinnhan*, 660 F.2d 500 (D.C. Cir. 1981) are representative of the firearms exception pressed by the state.

[11] *See United States v. Roberson*, 90 F.3d 75, at 81 n.4 (3d Cir. 1996).

- The subjects made furtive movements upon the approach of the police.[12]
- The informants, through face-to-face encounters with police, related their personal observations of the subjects' gun possession.[13]
- The officer knew the subject was known to carry a gun and had been in trouble before.[14]
- The car from which a gun was seized was stationed in an unusual position in a parking lot coupled with its darkly tinted windows.[15]
- Dispatcher records at a hearing confirmed police had received two calls from two separate citizen informants indicating eyewitness observation of the subject's gun possession.[16]

A review of these decisions demonstrates that they would be precisely the same under a correct application of the "totality of circumstances" approach. Contrary to the state's claim, *see* Pet. for Writ of Cert. at 9, the decisional law of New Jersey, New York, and Hawaii does not endorse a firearms exception.

12 *See United States v. Gibson*, 64 F.3d 617 (11th Cir. 1995) (while turning to face police, subject reached behind his back with both hands); *United States v. DeBerry*, 76 F.3d 884 (7th Cir. 1996) (subject took several steps backward, turned slightly to side and moved his hands as if he might be about to draw a gun); *People v. Smithers*, 83 Ill. 2d 430, 415 N.E.2d 327, 47 Ill. Dec. 322 (1980) (subject suddenly reversed direction and walked toward tavern's rear exist); *State v. Sharpless*, 314 N.J. Super. 440, 715 A.2d 333 (subject took his right hand out of his pocket and started to walk away), *cert. denied*, 157 N.J. 542, 724 A.2d 802 (1998).

13 *See Johnson v. State*, 50 Md. App. 584, 439 A.2d 607 (1982) and *State v. Franklin*, 41 Wash. App. 409, 704 P.2d 666 (1985) (known informant).

14 *See State v. Hasenbank*, 425 A.2d 1330 (Me. 1981).

15 *See United States v. Bold*, 19 F.3d 99 (2nd Cir. 1994).

16 *See State v. Williams*, 251 N.J. Super. 617, 598 A.2d 1258 (1991).

In *State v. Goree*, —— A.2d ——, 2000 WL 19771 (N.J. Super. Ct. App. Div. Jan. 13, 2000), the anonymous tip related that a black male in a green and purple jeep possessed a gun at a specified location in a drug area. The police located a jeep matching the description one block away, and found the defendant (a black man whom the officer had previously seen driving the jeep) in a bar on the same street. Citing the Supreme Court of Florida's decision in *J.L.*, the New Jersey appellate court explicitly rejected a firearms exception to *Terry*:

> The informant in Adams v. Williams, told the officer "that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist, early in the morning in a high-crime area of Bridgeport, Connecticut." And the commentators seem to agree that Adams v. Williams was about the closest case of this type in which the government could prevail. See discussion 4 LaFave, Search and Seizure, § 9.4 (h) at 213, 230 (3rd ed. 1996) . . . In Alabama v. White, also termed a "close call" by Justice White, the tipster predicted certain "future behavior" by the suspect which police corroborated, to an extent, independently of the tipster. We have nothing like that predictive corroboration in the case before us.
>
> * * *
>
> *We decline to embrace a "man with a gun exception" to the rule of individualized reasonable suspicion to "stop and frisk." As Justice White said in Alabama v. White: "Simply put, a[n] [uncorroborated anonymous] tip such as this one, standing alone, would not warrant a man of reasonable caution in the belief that a stop was appropriate . . ."*

State v. Goree, 2000 WL 19771 (citations omitted) (emphasis added).

Likewise, New York courts have repeatedly rejected a firearms exception to the reasonable suspicion standard. *See People v. De Bour*, 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976) (anonymous tip that black man with red shirt possessed gun insufficient); *People v. Stephens*, 139 A.D.2d 412, 526 N.Y.S.2d 467 (1988); *People v. Bond*, 116 A.D.2d 28, 499 N.Y.S.2d 724 (1986). In *People v. Gray*, 154 A.D.2d 301, 546 N.Y.S.2d 844 (N.Y.A.D. 1 Dept. 1989), the court observed:

> It is well established that an anonymous tip which provides a general description and specifies a location of a "man with a gun" does not, without more, constitute a reasonable suspicion to stop and frisk anyone who may happen to meet the description. *Such tips "are of the weakest sort since no one can be held accountable if the information is in fact false . . . and there is no way to assure . . . that the information was communicated and received accurately and was believable."* For this reason, information anonymously conveyed will generally warrant no more than the exercise of common-law right of inquiry.

154 A.D.2d at 302, 546 N.Y.S.2d at 846 (citations omitted) (emphasis added).

In *State v. Temple*, 65 Haw. 261, 650 P.2d 1358 (1982), the Supreme Court of Hawaii held that police were not authorized to stop and search a particular car based upon an anonymous informant's telephone tip that she had seen a handgun in the same car's glove compartment that day. The Court concluded that the anonymous telephone call "failed to rise above the level of unsubstantiated and conclusory hearsay." 65 Haw. at 271, 650 P.2d at 1364.

The Supreme Judicial Court of Massachusetts likewise rejected a firearms exception in *Commonwealth v. Alvarado*, 423 Mass. 266, 667 N.E.2d 856 (1996). The anonymous telephone caller there had reported seeing a handgun wrapped in a towel inside a car, and related seeing the car at a specific location with several Hispanic subjects inside. The police verified only the tip's innocuous details. Invalidating the stop, the Massachusetts supreme court held:

> . . . we are reluctant to relax our established rule that the report of the carrying of a firearm is not, standing alone, a basis for having a reasonable suspicion of criminal activity.
>
> * * *
>
> "Anyone can telephone the police for any reason. Thus, some specificity of nonobvious facts which show familiarity with the suspect or specific facts which predict behavior is central to reasonable suspicion. By using objective criteria, the risk of arbitrary action and abusive practices by police is diminished."
>
> * * *
>
> Our cases have not yet declared reasonable suspicion warranted simply on a report of gun possession just because this country has problems with the unlawful use of guns.

Alvarado, 423 Mass. at 271, 272, 273, 667 N.E.2d at 860, 861 (citations omitted).

In *Commonwealth v. Jackson*, 548 Pa. 484, 698 A.2d 571 (1997), the police received an anonymous telephone tip that a man in a green jacket was carrying a gun at a certain location, and the only detail the police corroborated was that Jackson was at the described location in a green jacket. The Supreme Court of Pennsylvania held that the details of the tip combined with the police

corroboration of it failed to satisfy the reasonable suspicion standard. The court refused to endorse a gun exception to the *Terry* requirement for reasonable suspicion.

> The Commonwealth contends, however, that the degree of danger to the police and the public from armed criminals is so great that if an anonymous caller provides a physical description of the individual, an accurate location and an allegation that the individual is armed, a Terry stop is justified. That argument will not withstand constitutional scrutiny. *The danger to the police and public from firearms was already factored into the balance when the requirement of reasonable suspicion was articulated in Terry. To adopt the position that the Commonwealth urges is in reality to overrule Terry in favor of a lower standard of protection under the state and federal constitutions . . .*

548 Pa. at 492, 698 A.2d at 575 (footnote omitted). *Accord, Commonwealth v. Hawkins*, 547 Pa. 652, 692 A.2d 1068 (1997).

Far from taking a radical position, Florida stands in good company in rejecting the firearms exception to the reasonable suspicion standard, and finds support in jurisdictions around the country.

D. The State's Proposal Would Make *Alabama v. White* The Exception, Rather Than The Rule.

The firearms exception proposed by the state would swallow this Court's search and seizure jurisprudence. The state readily admits that "the general rule" (that is, the one established by this Court's precedents) would not permit a forcible seizure where publicly observable details of a description are "corroborated." But, the state claims, the "great risk of harm to the public" posed by the alleged possession of a firearm takes gun tips outside

the "general rule." *See* Pet. Brief on the Merits at 11-12. If applied here, the state's approach, substituting "great risk of harm to the public" for reliability whenever a gun is mentioned, will predictably be used to legitimate anonymous tips about nearly all potentially criminal conduct. Several courts have already applied the firearms exception reasoning to anonymous tips involving drug sales and drunken driving. *See, e.g., State v. Williams*, 225 Wis. 2d 159, 591 N.W.2d 823 (1999), and *State v. Lamb*, 720 A.2d 1101 (Vt. 1998), discussed below. Ultimately, the state's approach would legitimize searches and seizures based on any bare-boned tip alleging potentially dangerous circumstances.

A firearms exception would necessarily extend to anonymous tips alleging robbery. In *Terry*, this Court held that it was reasonable for an officer to assume robbery suspects were armed. 392 U.S. 28; *see also Russell v. State*, 415 So. 2d 797 (Fla. App. 1982) (stop for suspicion of robbery justified frisk, even though based on report of *strong-arm* robbery); *United States* ex rel. *Richardson v. Rundle*, 461 F.2d 860, 863-64 (3d Cir. 1972) ("Unless one were to believe that Philadelphia robbers usually accomplished their ends by blandishment rather than by the use of weapons one must conclude that the officer could reasonably infer petitioner might be armed."). Under the firearms exception then, a bare-bones anonymous tip alleging that a man in a plaid-looking shirt at a particular location was about to commit a robbery would justify a forcible stop and frisk upon confirmation of the innocent description.

This same reasoning has been applied to stops and frisks for allegations of burglary, *see United States v. Crittendon*, 883 F.2d 326 (4th Cir. 1989), rape, *see People v. Shackelford*, 37 Colo. App. 317, 546 P.2d 964 (1976), and even credit card fraud, *see United States*

v. Edwards, 53 F.3d 616 (3d Cir. 1995). Presumably, tips concerning these crimes would also fall under the "firearms exception."

Even drug cases would be encompassed by the proposed "gun" exception. The state suggests that the tip in this case would be insufficient only if it related to "possession of narcotics or other nonthreatening contraband." *See* Pet. Brief on the Merits at 18 n.9. But courts have held that police may presume armed those they suspect of drug crimes. *See United States v. Sinclair*, 983 F.2d 598 (4th Cir. 1993); *United States v. Salazar*, 945 F.2d 47, 51 (2d Cir. 1991) (frisk permitted because police "know narcotics dealers frequently carry weapons"); *Abraham v. State*, 962 P.2d 647 (Okl. Crim. App. 1998) (police could conclude suspect was armed because "the offense reported was an offer to sell drugs"). The state's proposed exception to *Alabama v. White* would surely swallow the rule.[17]

The rationale offered for the firearms exception would apply to most serious felonies, even without the assumption that people involved in certain crimes are likely to

17 The "seize first, ask questions later" approach advocated by the state has a direct impact on the lives of innocent Americans. In a recent report, the New York Attorney General cites the example of Jean Davis, a 54-year-old African-American health-care worker. As she walked home one night, a man approached her from behind and grabbed her around the neck. When Ms. Davis screamed for help, her attacker informed her he was a police officer. He dragged her to a car and frisked her. Later, the officer explained that the police had received a call that someone had purchased drugs in the area. He had seized her because she fit the general description of the alleged purchaser. The New York City Police Department's "Stop and Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General, 78-79 (1999) <http://www.oag.state.ny.us/press/reports/stop—frisk/stp—frsk.pdf>.

be armed. If a firearm tip poses such "great risk of harm to the public" that this Court's opinion in *Alabama v. White* should not apply, then why not tips involving other serious crimes? Surely, an anonymous tip that someone is about to commit a robbery, a burglary, or an aggravated assault involves at least as great a risk of harm to the public as one alleging the mere peaceful possession of a firearm. Just as surely, it will not be long before the state argues that a "firearms exception" implies a general "dangerous crime" exception.

There is no need to speculate on the mischief the proposed firearms exception would work. Courts have already relied on gun-exception cases like *United States v. Clipper*, 973 F.2d 944 (D.C. Cir. 1992) and *United States v. McClinnhan*, 660 F.2d 500 (D.C. Cir. 1981) to justify stops based on anonymous tips regarding drug-dealing and drunken driving, even where only innocent details of description were corroborated. In *State v. Williams*, 225 Wis. 2d 159, 591 N.W.2d 823 (1999), the Supreme Court of Wisconsin approved a stop and frisk based on an anonymous tip alleging that a man in a car was selling drugs. The police conducted no independent investigation. Instead, with weapons drawn, the officers ordered two men out of the car and frisked them for weapons. 225 Wis. 2d at 165-66; 591 N.W.2d at 826-27. The court reasoned that the officers faced the same "unappealing choice" presented by gun tips. 225 Wis. 2d at 179, 591 N.W.2d at 832. In response to the defendant's argument that cases like *Clipper*, relied upon by the court, had involved firearms tips, not drugs, the court explained:

> The distinction is one of degree only. Drug dealing is a dangerous activity, and we have previously recognized that where drugs are involved, guns are

> probably involved as well. It is unreasonable to conclude that drug dealing poses no danger to the community—it is not a non-violent crime—and when deciding whether to make a stop, the possible danger the subject of a tip poses to the community is necessarily one of an officer's considerations.

225 Wis. 2d at 180, 591 N.W.2d at 832 (citation omitted).

Other courts have taken precisely the same approach in approving drunken-driver stops based on uncorroborated anonymous tips. For instance, in *State v. Lamb*, 720 A.2d 1101 (Vt. 1998), the Supreme Court of Vermont distinguished *Alabama v. White*, saying:

> [T]he circumstances here created an element of urgency that was not present in White. The reported offense in White, possession of an ounce of cocaine, posed no imminent threat of harm to the suspect or to the general public requiring an immediate police response. The alleged offense here, driving while intoxicated, presented a substantial and immediate risk of death or serious injury to both the driver and anyone unlucky enough to get in his way.

720 A.2d at 1104. Citing *Clipper* and *McClinnhan*, the court concluded: "The principle of these deadly-weapons cases—that the gravity of the risk of harm must be considered in evaluating the reasonableness of the investigatory stop—applies with equal force to intoxicated driving." 720 A.2d at 1105; *accord State v. Littlefield*, 677 A.2d 1055 (Me. 1996); *State v. Tucker*, 19 Kan. App. 2d 920, 878 P.2d 855 (1994); *State v. Markus*, 478 N.W2.d 405 (Iowa Ct. App. 1991).

These cases demonstrate that the alleged possession of a firearm does not create an emergency that would warrant a departure from the "general rule." Gun tips, like

most tips the police investigate, may involve crime, and the investigation of crime is of course a serious matter. It was with this in mind that the Court decided *Terry*, *Adams v. Williams*, and *Alabama v. White*. The firearms exception urged by the state is unworkable, and will inevitably yield the "firearm-drugs-felony-DUI-serious crime" exception to the Fourth Amendment.

The proposed firearms exception would also allow stops without the necessity of an allegation of illegal conduct. The state would permit *Terry* stops based on tips like the one in this case, so long as the tipster "states that a person is carrying a concealed firearm." Pet. Brief on the Merits at 10. Florida, like many states, allows residents to carry concealed firearms with a proper license. *See* § 790.06, (Fla. Stat. 1997), cited in the opinion on review at J.A. 11.[18] Moreover, as noted by the decision below, Florida law permits juveniles to possess firearms under certain circumstances. *See* § 790.22, Fla. Stat. (1997).

The state offers no reason why the police should be entitled to assume that all those who carry firearms do so illegally. Yet, far from being troubled by the thought that a *Terry* stop would be justified by suspicion of *legal* behavior, the state actually argues that the firearms exception is *justified* by the fact that concealed firearms possession is legal in 42 states and the District of Columbia. *See* Pet. Brief on the Merits at 17-18.

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[18] Though the Respondent was under 18 and, therefore, had a more limited right to carry firearms, nothing in the record suggests that Officer Anderson was aware of his minority before the seizure. When asked if the tipster said the "young black males" were juveniles, Anderson merely replied "I believe they stated they were young." (J.A. 41). The State's suggestion that Officer Anderson knew the Respondent to be under 18 is not supported by the record. *See* Pet. Brief on the Merits at 21.

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E. This Court Has Never Recognized An Exception To The Reasonable Suspicion Standard Absent A Showing Of Actual And Immediate Danger.

In *Ybarra v. Illinois*, 444 U.S. 85 (1979), this Court held that absent evidence of an actual danger to police or others, police may not use a general search warrant to justify the search of people present at the crime scene. Based on allegations related by a known, proven-reliable informant, Illinois Bureau of Investigations agents obtained a search warrant authorizing the search of a particular tavern and bartender for heroin. Once inside the tavern, agents twice frisked Ybarra, a patron standing by a pinball machine near the bar. On the second frisk, they removed from his pants pocket a cigarette pack containing heroin. 444 U.S. at 88-89.

The Court held that the frisk violated the Fourth Amendment. Ybarra had not made any furtive or threatening movements and the agents had no reason to suspect him of criminality or an inclination to assault them. 444 U.S. at 91-94. Thus, there was no showing of dangerousness to justify the frisk.

Ybarra demonstrates that in order to justify a police frisk, the officer must reasonably believe the suspect presents an actual and immediate danger. This Court has repeatedly rejected the government's efforts to substitute the presumption of danger for an actual and immediate one.

Similar concerns arise when police respond to emergencies; here, as in *Ybarra*, immediacy of the danger is the cornerstone of the emergency doctrine. *See also* Edward G. Mascolo, *The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment*, 22 BUFF. L. REV. 419 (1972).

CONCLUSION

When the Court first defined what has come to be called the reasonable suspicion standard, it observed:

> Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.

Terry v. Ohio, 392 U.S. at 22. Since then, the Court has held that a tip like the one in this case simply does not provide a reasonable suspicion. *See Alabama v. White; Adams v. Williams.* The State of Florida now asks the Court to permit forcible seizures based on "something less" when gun possession is alleged. The answer to the state's claim was given in *White*, and in *Terry* before it: It is a result this Court must refuse to sanction.

The judgment of the Supreme Court of Florida must be affirmed.

Respectfully submitted,

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