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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 198

COSTANDINO ARGYRIS,

Appellant.

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PEOPLE,

Respondent,

-against-

No. 199

JOHN A. DISALVO,

Appellant.

-----

PEOPLE,

Respondent,

-against-

No. 210

ERIC R. JOHNSON,

Appellant.

-----

20 Eagle Street  
Albany, New York 12207  
October 21, 2014

1 Before:

2 CHIEF JUDGE JONATHAN LIPPMAN  
3 ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
4 ASSOCIATE JUDGE SUSAN PHILLIPS READ  
5 ASSOCIATE JUDGE ROBERT S. SMITH  
6 ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
7 ASSOCIATE JUDGE JENNY RIVERA  
8 ASSOCIATE JUDGE ABDUS-SALAAM

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1 CHIEF JUDGE LIPPMAN: 198, 199, 210.

2 MR. KARTAGENER: If I may be allowed three  
3 minutes to reply.

4 CHIEF JUDGE LIPPMAN: Three minutes, go  
5 ahead, counselor.

6 MR. KARTAGENER: Thank - - - thank you,  
7 Your Honor. May it please, the court my name is  
8 Steven Kartagener, and I represent the defendant-  
9 appellants in this case, Costandino Argyris and John  
10 A. DiSalvo.

11 Fourteen years ago, in Florida v. J.L., the  
12 Supreme Court of the United States created a bright-  
13 line rule designed to - - -

14 CHIEF JUDGE LIPPMAN: Is that still good  
15 law, counsel?

16 MR. KARTAGENER: Is - - - is?

17 CHIEF JUDGE LIPPMAN: Is that still the law  
18 in New York? Do we depend on - - - on that case?

19 MR. KARTAGENER: I would suggest that this  
20 court should adopt a rule that makes it clear that  
21 that is and should be the law of the State of New  
22 York.

23 JUDGE GRAFFEO: Isn't this fact pattern a  
24 bit different, though, than Florida v. J.L., because  
25 here you have a caller who is professing to have

1 actually contemporaneously viewed the gun.

2 MR. KARTAGENER: I - - - I think we have -  
3 - -

4 JUDGE GRAFFEO: Is - - - isn't that a bit  
5 different than the - - - than the Florida case?

6 MR. KARTAGENER: Not really that different  
7 for this reason: in - - - in - - - in this  
8 situation, we have - - - we are dealing with the fact  
9 that predictive information, which - - - which is an  
10 important component here, is not to be found - - - is  
11 not to be found - - -

12 JUDGE GRAFFEO: Well, I think that's my  
13 point, counsel, because there's a difference between  
14 a caller saying to the police, you know, there's - -  
15 - there's a red Mustang two blocks away and there's a  
16 gun in it, from a caller saying I saw someone place a  
17 gun in a red Mustang that's now, you know, two blocks  
18 - - - two blocks away.

19 MR. KARTAGENER: But I think if we - - -

20 JUDGE GRAFFEO: Isn't - - - isn't there a  
21 difference in the reliability factor of that  
22 information?

23 MR. KARTAGENER: I don't think, with  
24 respect to the reliability, there is a difference.  
25 And here's the reason why: you have in - - - in this

1 situation a - - - you have a reason - - - excuse me  
2 for a second. I'm having a little bit of a - - -

3 JUDGE GRAFFEO: Certainly.

4 CHIEF JUDGE LIPPMAN: Go ahead, take your  
5 time.

6 MR. KARTAGENER: Excuse me. What we're  
7 dealing with here - - - what - - - excuse me for  
8 that. What we're dealing with here is - - - thank  
9 you very much. What we're dealing with as a starting  
10 point, I believe, is that all 911 anonymous callers  
11 are deemed to be suspect. You can't accept at face  
12 value the fact that they're reliable merely because  
13 they've made a call that says I want to report a  
14 crime of some sort.

15 JUDGE GRAFFEO: Right.

16 MR. KARTAGENER: And I would submit that  
17 where they say not only do I want to report a crime,  
18 but I saw a gun. That's no more reliable than  
19 anything else they're saying until, I submit, there's  
20 some way to corroborate their reliability.

21 CHIEF JUDGE LIPPMAN: Which - - - which of  
22 our cases in New York say that?

23 MR. KARTAGENER: Excuse me?

24 CHIEF JUDGE LIPPMAN: Which of our cases in  
25 New York - - -

1 MR. KARTAGENER: I - - -

2 CHIEF JUDGE LIPPMAN: - - - support your

3 position? We understand you're citing Florida v.

4 J.L.; what - - - what - - - what of our cases are - -

5 -

6 MR. KARTAGENER: Well, there are two cases.

7 CHIEF JUDGE LIPPMAN: - - - are on the

8 point in terms of predictive behavior?

9 MR. KARTAGENER: There are two cases of  
10 this - - - from this court that specifically say this  
11 court and this state should follow Florida v. J.L.,  
12 which created the pre - - - the - - - the predictive  
13 information.

14 CHIEF JUDGE LIPPMAN: Which two cases now?

15 MR. KARTAGENER: Well, and those two cases  
16 are People v. Moore in 6 N.Y.2d - - -

17 CHIEF JUDGE LIPPMAN: Right.

18 MR. KARTAGENER: - - - and People v.

19 William II.

20 CHIEF JUDGE LIPPMAN: Right.

21 JUDGE SMITH: Of course, we - - - we have -  
22 - - we have to follow the Supreme Court's  
23 interpretation of the United States Constitution.

24 MR. KARTAGENER: Yes, you have to follow  
25 the - - -

1                   JUDGE SMITH: But have they - - - but have  
2 they cut back on it in Navarette now, and should we  
3 follow them if they have?

4                   MR. KARTAGENER: Well, yes, we have to  
5 follow the Supreme Court Fourth Amendment in - - - in  
6 - - - in the - - - in this - - - in this - - - in - -  
7 - in our jurisprudence, normally, but there is a  
8 very, very long-term and glorious record of this  
9 court relying upon the New York State Constitution.

10                  CHIEF JUDGE LIPPMAN: So New York is  
11 stricter in this regard, and Navarette is - - - is  
12 not something that we - - - your argument is we  
13 should not follow Navarette here?

14                  MR. KARTAGENER: Well, my - - - my argument  
15 here is - - -

16                  CHIEF JUDGE LIPPMAN: Or is Navarette  
17 controlling of your particular situation and if it  
18 is, you're arguing we should not follow it?

19                  MR. KARTAGENER: Well, Navarette - - - Nav  
20 - - - Navarette - - -

21                  CHIEF JUDGE LIPPMAN: Or that New York  
22 should follow its prior precedent?

23                  MR. KARTAGENER: Well, the - - - the thing  
24 with - - - with Navarette is this. Navarette is a  
25 decision of the Supreme Court in which the Supreme

1 Court used a totality of the circumstances test.  
2 That is something that has never really been viewed  
3 with favor by this court in dealing with search and  
4 seizures.

5 CHIEF JUDGE LIPPMAN: So under our state  
6 constitution we would not use the totality test?

7 MR. KARTAGENER: Und - - - under Article 1  
8 Section 12 of the New York State Constitution, we  
9 would urge this court to say, just as it said in a  
10 whole bunch of cases - - - and I can just point to  
11 some right now - - - People v. - - -

12 CHIEF JUDGE LIPPMAN: Go ahead, go ahead.

13 MR. KARTAGENER: People v. Garcia in the  
14 year 2012, People v. Weaver, I know a case that  
15 you're familiar with, Your Honor, going back more  
16 years, People v. Johnson, People v. Torres.

17 JUDGE PIGOTT: Let's assume we do that. In  
18 - - - in - - - in - - - in this case of Argyris and  
19 DiSalvo, what - - - what should have happened?

20 MR. KARTAGENER: What should have happened?  
21 What should have happened was that when there is a  
22 911 caller, 911 caller making a call and saying that  
23 there is - - - that - - - that there is a gun being  
24 placed in the rear of a particular vehicle and here's  
25 the license plate, under New York law and under

1 Florida v. J.L. before Navarette came down, there was  
2 - - - there could be no action taken by the police  
3 unless there was the ability to find predictive  
4 information that could be used to corroborate.

5 JUDGE READ: What would that be, for  
6 example?

7 MR. KARTAGENER: What would that be, for  
8 example?

9 JUDGE READ: What could that be? Yeah,  
10 what could that be, for example?

11 MR. KARTAGENER: If - - - if this was a  
12 legitimate informant trying to be a - - - a good  
13 citizen. He could have said I saw a gun being placed  
14 in the back of a vehicle, for which he gives a  
15 license plate number. But the license plate number  
16 and the make of the vehicle are evident to anybody  
17 standing on the street, so that doesn't give you any  
18 information that suggests this informant is - - -

19 JUDGE SMITH: If - - - but if he says the  
20 guy is going to - - - is - - - is going to the  
21 following address and the guy, in fact, goes there,  
22 that - - - then you'd be within Alabama v. - - -

23 MR. KARTAGENER: You were reading my mind,  
24 Your Honor. And that's what I was going to say. If  
25 the - - - if - - - if there's a statement the fellow

1           who just placed the gun in the trunk is going to be  
2           driving to this address in front of the bank and  
3           they're going to go in and rob it, the fact that - -  
4           -

5                        JUDGE RIVERA:   Okay, but - - - but in this  
6           case - - -

7                        JUDGE PIGOTT:   But let's - - - let's  
8           straighten that up and let's assume that that  
9           information's not there.   What should they have done  
10          then?   Just hung up?

11                      MR. KARTAGENER:   Not hang up.   What they -  
12          - - what they can do, in - - - in this case there was  
13          no pred - - - there was not a scintilla of predictive  
14          information.

15                      JUDGE PIGOTT:   So hang up.   Just say this  
16          is a crank call.   The fact that you saw a guy, two  
17          white bully guys with bullet proof vests and a gun  
18          getting in the - - - a Mustang with this license  
19          plate, that's a crank call.   Move on to the next one.  
20          There might be more important calls.

21                      MR. KARTAGENER:   Or - - - or the police can  
22          put it out over the police radio and police in the  
23          neighborhood can see if they observe the vehicle and  
24          perhaps follow it to see what they're doing.

25                      JUDGE RIVERA:   But if you - - -

1 JUDGE PIGOTT: What happened here?

2 MR. KARTAGENER: Excuse me?

3 JUDGE PIGOTT: What happened here?

4 MR. KARTAGENER: What happened here was the

5 - - -

6 JUDGE PIGOTT: They went and found the car.

7 They followed it, and they arrested them.

8 MR. KARTAGENER: Well, they - - - they

9 arrested him and then did a dangerous cutoff of the

10 vehicle.

11 JUDGE PIGOTT: That's a different issue.

12 If you don't like the way the cops are driving the

13 car, that's one thing. But the fact of the matter is

14 that everything that the caller said was true. And

15 it seemed like it was a pretty good description of

16 what could be a very dangerous situation. Let's

17 assume, for a minute, that these people were going

18 after someone's spouse. And we say well, that's not

19 quite enough. And then - - - and then someone's dead

20 and - - - and we say, you know, all he did was say it

21 was a guy with a gun in a Mustang and a license plate

22 and that wasn't enough for us.

23 MR. KARTAGENER: But if the police had

24 followed the - - - the - - - the vehicle that - - -

25 that was there, the Mustang with the license plate

1 number, and had followed it to see if it was going to  
2 go to some address and maybe do something when they  
3 were getting out of the car, the police could have  
4 gone over to them, exercised Level II of DeBour  
5 rather than Level III of DeBour, which this requires  
6 when you do - - - you force them to stop.

7 JUDGE RIVERA: So counsel - - - so counsel  
8 they - - - in this case they follow - - - or some of  
9 them, some of the officers, follow them around, say  
10 they're just kind of going around, going around. Is  
11 - - - is there anything that happens at any point in  
12 time, in this case, that's corroboration?

13 MR. KARTAGENER: In this case there was no  
14 corroboration because the police ended any ability to  
15 find some form of predictive information by - - -  
16 because they pulled over - - -

17 JUDGE RIVERA: Um-hum.

18 MR. KARTAGENER: - - - the vehicle,  
19 approached the car. First one officer with a gun  
20 drawn pointed at the occupants, then eight cops with  
21 guns drawn - - -

22 JUDGE RIVERA: So - - - so is your point  
23 that the person who pulled them over was the person  
24 who - - - who only knew about the anonymous tip as  
25 opposed to anything else that had gone before that?

1 MR. KARTAGENER: The person that pulled  
2 them over - - -

3 JUDGE RIVERA: Yes.

4 MR. KARTAGENER: - - - had heard on the  
5 police radio about this vehicle, saw the license  
6 plate.

7 JUDGE RIVERA: And that's all they had?

8 MR. KARTAGENER: And that's basically all  
9 they had.

10 JUDGE RIVERA: Because the - - - some of  
11 the other officers had something else, would you  
12 agree with that? They had followed them.

13 MR. KARTAGENER: Some officers - - -

14 JUDGE RIVERA: They - - - one had said pull  
15 over and then they divide. Right, the van goes one  
16 way, the car goes another way.

17 MR. KARTAGENER: But there was nothing  
18 inherently suspicious about that act. There was no  
19 indication - - -

20 JUDGE SMITH: Well, what I - - - what I - -  
21 - what I think Judge Rivera is getting at is do we  
22 have to view the - - - the reasonable suspicion here  
23 based on what Valles knew, the arresting officer,  
24 since he didn't know what all his fellow officers  
25 happened to know. If they had told him things, he

1 can rely on them. But - - - but - - - but aren't we  
2 limited to his knowledge for purposes of - - - of  
3 judg - - - of judging reasonable suspicion?

4 MR. KARTAGENER: I would say yes, that we  
5 are. But the point is it seems to me, based upon the  
6 readings of this court over the years, is that there  
7 are going to be times when, because of the pursuit of  
8 freedom and having a set of rules that protects the  
9 populace of this state - - -

10 JUDGE RIVERA: Counsel, would it be a  
11 different case if - - - if the officer - - - if an  
12 officer had heard the call, follows him, sees the  
13 car, sees the Mustang, sees the van. Follows them,  
14 sees them just driving around, driving around, asks  
15 them to pull over, and then sees them split. At that  
16 point could that officer have stopped them?

17 MR. KARTAGENER: Asks them to pull over and  
18 they split?

19 JUDGE RIVERA: Yes, correct.

20 MR. KARTAGENER: Yes, I would say they  
21 could. But - - - but if - - - I just want - - -

22 JUDGE SMITH: But except that - - - but  
23 except that you say he couldn't have asked them to  
24 pull over in the first place.

25 MR. KARTAGENER: That's correct, but if - -

1 - let's assume they're stopped at a light.

2 JUDGE SMITH: Um-hum.

3 MR. KARTAGENER: There's no one - - -  
4 there's nothing that says - - -

5 JUDGE RIVERA: But you say - - - say  
6 watching them drive around, drive around, perhaps  
7 aimlessly, you say that's still not enough to ask  
8 them to pull over?

9 MR. KARTAGENER: The point that I was going  
10 to make a few moments ago, and I'd like to make right  
11 now if I may, is - - - is this.

12 JUDGE RIVERA: As long as you get to the  
13 answer eventually, yes.

14 MR. KARTAGENER: And here's - - - well,  
15 here's an important answer, I think, for my argument.  
16 That is that when one looks at the history of this  
17 court in Article I Section 12, sometimes, instead of  
18 using a totality of the circumstances test where you  
19 - - - you - - - you're taking from this factor, this  
20 factor and it's - - - it's not always the clearest  
21 guidance for the courts of - - - of the jurisdiction,  
22 the totality of the circumstances test. That's why  
23 this court rejected it when Illinois v. Gates was  
24 decided and two important decisions of this court  
25 said we're going to stay with Aguilar-Spinelli and

1 get rid of Illinois v. - - -

2 JUDGE SMITH: Okay, in - - - in our - - -  
3 in our reasonable suspicion cases, though, we haven't  
4 been using Aguilar-Spinelli. We've been - - - we've  
5 been using what amounts to a totality of the  
6 circumstances test.

7 MR. KARTAGENER: Well, with all due  
8 respect, you've been using Aguilar-Spinelli and - - -

9 JUDGE SMITH: I'm talking about the  
10 reasonable suspicions.

11 MR. KARTAGENER: Oh, not reas - - -  
12 reasonable - - - with respect to reasonable  
13 suspicion, there are no cases in which Aguilar-  
14 Spinelli has ever been applied to the reasonable  
15 suspicion test. There's not one. And I submit  
16 there's a reason for it, and that's because Aguilar-  
17 Spinelli doesn't work when it comes to reasonable  
18 suspicion. But - - -

19 JUDGE ABDUS-SALAAM: Why doesn't it work  
20 when it comes to reasonable suspicion?

21 MR. KARTAGENER: Aguilar-Spinelli doesn't  
22 work when it comes to reasonable suspicion for this  
23 reason: Aguilar-Spinelli is a two-pronged test. One  
24 of the prongs is the reliability of the informant;  
25 the other is the reliability of the informant's

1 information. It's our position that an anonymous 911  
2 caller, who doesn't disclose himself and who's - - -  
3 and - - - and - - - and there's no question that the  
4 informant, the 911 caller, in this case is anonymous  
5 - - - that person can never be deemed to be reliable  
6 - - -

7 JUDGE ABDUS-SALAAM: Counsel, I - - -

8 MR. KARTAGENER: - - - and therefore, the  
9 test doesn't work.

10 JUDGE ABDUS-SALAAM: No, I get your point,  
11 counsel, that anonymity is a problem. But we have  
12 all these admonitions out here to the public if you  
13 see something, say something. And so when - - - when  
14 is it that we could ever rely under your theory on -  
15 - -

16 MR. KARTAGENER: Well, I - - - I think - -  
17 - I think - - -

18 JUDGE ABDUS-SALAAM: - - - anonymous  
19 callers?

20 MR. KARTAGENER: I - - - I think - - - all  
21 that - - - that people have to be told is if you see  
22 - - - see something say something and give your name  
23 to 911. That's all they - - -

24 JUDGE PIGOTT: One of the problems with  
25 that and - - - and has become a big deal in - - - in

1 the cities, is what they call snitches. And, you  
2 know, there's this big thing snitches get stitches.  
3 And - - - and there's whole communities that say, you  
4 know, if you snitch, you're dead. So - - - so what  
5 we're saying is you got the Scylla and Charybdis.  
6 You can either tell us who you are and - - - and  
7 we'll try to pursue the - - - the miscreant, or don't  
8 and we won't. So if you tell us who you are, you're  
9 going to be dead. If - - - if you don't tell us  
10 we're not going after them.

11 MR. KARTAGENER: I'm going to try to make  
12 this one point, if I may, because I've been trying  
13 three or four times now, and - - - and it addresses  
14 all of these questions. The history of this court  
15 says that - - - that you have to know - - - the  
16 history of this court says you have to know that  
17 there will be times - - - and we come up with these  
18 very good rulings relying on the state Constitution,  
19 when sometimes the guilty person walks away. But  
20 that's an approp - - -

21 JUDGE SMITH: And - - - and - - - and it's  
22 - - - it's worse than that. Sometimes - - -  
23 sometimes even more crimes get committed and people  
24 get killed. And we understand, to some degree that's  
25 - - - that's the price of freedom.

1 MR. KARTAGENER: Price of freedom.

2 JUDGE SMITH: But we're asking a narrower  
3 question, which is is it really a good idea to send  
4 the mes - - - the - - - the - - - the message to the  
5 public, if you want to call anonymously, don't  
6 bother; we're not interested?

7 MR. KARTAGENER: I think it is a good rule  
8 for this jurisdiction, for this state, to say that  
9 it's not going to take automatic police action based  
10 solely upon the uncorroborated statements of - - -

11 JUDGE SMITH: You - - - you - - - you - - -

12 JUDGE RIVERA: No, no, no, no. No, I - - -  
13 I'm sorry. Then I misunderstood your argument. I  
14 thought your argument was that, of course, you take  
15 the anonymous tip. And you're law enforcement. You  
16 decide what to do with that tip. And what you might  
17 do with that tip is follow until you get  
18 corroborative information to then act appropriately  
19 on the tip.

20 MR. KARTAGENER: That - - - that - - - that  
21 - - -

22 JUDGE RIVERA: Have I misunderstood your  
23 argument?

24 MR. KARTAGENER: No, that - - - no, that -  
25 - - that is essentially one of the things - - -

1 JUDGE RIVERA: All right.

2 MR. KARTAGENER: - - - that I said earlier  
3 today, and I stand by that. I do believe that is a  
4 valid statement. But with respect to this sign, you  
5 know, if you see something, say something, that's  
6 meant to deal with an age of terrorism and things  
7 like that where people are being advised if you see -  
8 - -

9 JUDGE ABDUS-SALAAM: Well, if you see - - -  
10 if you see four big guys wearing bulletproof vests  
11 putting a big gun in the back of a car followed by a  
12 van, what do you think people are thinking about  
13 that? That they're not up to, you know, great civic  
14 activities.

15 MR. KARTAGENER: Well, we - - - we - - - we  
16 don't - - - we don't know, from this record, what  
17 kind of gun we're even talking about, because they're  
18 just talking about a big gun.

19 JUDGE RIVERA: Well - - - well, there never  
20 was a gun in the trunk, was there?

21 MR. KARTAGENER: And there never was, in  
22 fact.

23 JUDGE RIVERA: And they never said there  
24 was a bulletproof vest, did they?

25 MR. KARTAGENER: They never said there was

1 a bulletproof vest.

2 JUDGE RIVERA: Okay.

3 CHIEF JUDGE LIPPMAN: Okay, counselor.

4 MR. KARTAGENER: But - - -

5 CHIEF JUDGE LIPPMAN: We're going to - - -  
6 you'll have your rebuttal. Let's hear from your  
7 adversary.

8 MR. KARTAGENER: Thank you.

9 MS. ALDEA: May it please the court, my  
10 name is Donna Aldea, Barket, Marion, and I represent  
11 the People pro bono on this appeal. Your Honor, to  
12 follow up on that question, I maintain that if  
13 defendant is right, every one of those signs has to  
14 come down. And there's a wisdom to the ad campaign,  
15 which is reflected in Florida v. J.L. long before  
16 that: in Alabama v. White, in the Supreme Court's  
17 recent explanation in Navarette, and in this court's  
18 jurisprudence dating back to when it refused to adopt  
19 Illinois v. Gates and adhere to Aguilar-Spinelli.  
20 And the wisdom in that ad campaign are the words, "If  
21 you see something." Because reliability is given - -  
22 -

23 CHIEF JUDGE LIPPMAN: Yeah, but it does  
24 matter whether we know who you are, doesn't it?

25 MS. ALDEA: Well, Your Honor - - -

1 CHIEF JUDGE LIPPMAN: It does have some  
2 relevance.

3 MS. ALDEA: Of course it has relevance.  
4 And the relevance under the state Constitution, which  
5 I'm perfectly happy with adhering to or not as this  
6 court chooses. State Constitution is harder.

7 CHIEF JUDGE LIPPMAN: Assuming we stick  
8 with our precedents - - -

9 MS. ALDEA: Perfect.

10 CHIEF JUDGE LIPPMAN: - - - and let's  
11 assume that Navarette goes in a little different  
12 direction. Well, how does it affect this case?

13 MS. ALDEA: Well - - -

14 CHIEF JUDGE LIPPMAN: Our precedents, what  
15 should the police have done in this particular  
16 situation?

17 MS. ALDEA: They should have done what they  
18 did. Our precedent in this state has been adherence  
19 to Aguilar-Spinelli, and I need to clarify something.

20 CHIEF JUDGE LIPPMAN: Go ahead.

21 MS. ALDEA: It is true that Aguilar-  
22 Spinelli has never been applied to reasonable  
23 suspicion determinations. However, that's not  
24 because it's inapplicable. That's because it's the  
25 strictest test that has ever been construed or

1 conceived of by any court anywhere. You don't need  
2 to satisfy that really hard test of Aguilar-Spinelli  
3 for the lesser standard of reasonable suspicion  
4 rather than probable cause. Instead, less than  
5 Aguilar-Spinelli will do. What I'm telling this  
6 court, which is what I told the suppression court - -  
7 -

8 JUDGE SMITH: Is it a - - - is it a so-  
9 called "totality of the circumstances test" for  
10 reasonable suspicion?

11 MS. ALDEA: Correct, Your Honor. However,  
12 what I will acknowledge is in the context of  
13 anonymous tips, the standard has always been higher,  
14 and that's what J.L. really is about. J.L. is an  
15 acknowledgment that totality of the circumstances may  
16 be a little too lax when you have an anonymous tip.

17 JUDGE ABDUS-SALAAM: So are you talking  
18 about some variation of Aguilar-Spinelli?

19 MS. ALDEA: Yes, Your Honor. So what I'm  
20 talking about, I'm saying you can apply Aguilar-  
21 Spinelli itself. In fact, when you read Navarette,  
22 interestingly, it might as well have adhered to both  
23 prongs. Here's the rule of law going back to Judge  
24 Lippman's question about what the rule of law is in  
25 New York. The rule everywhere, not just in New York,

1 has always been that reliability of criminality, as  
2 opposed to just reliability of the person himself or  
3 of observations and descriptions, is satisfied by  
4 personal information, personal observation of  
5 criminality. Now what was lacking in Moore, what was  
6 lacking in Williams, what was lacking in J.L. - - -

7 JUDGE RIVERA: Yes, but at some point - - -  
8 at some point you have to be able to measure whether  
9 or not you can really trust a quote/unquote "personal  
10 observation." Because in an anonymous tip, I can  
11 just call up and say yeah, I saw the guy with the  
12 gun. You don't know me. You don't know my track  
13 record like a confidential informant. So you have no  
14 basis by which to measure, just in that statement,  
15 whether or not it's true, whether or not I'm just  
16 hoping that a cop will stop this person, who I don't  
17 like, and hassle them and maybe find a gun on them or  
18 maybe not.

19 MS. ALDEA: Well, so here's - - - there are  
20 two - - -

21 JUDGE RIVERA: Right.

22 MS. ALDEA: - - - answers to that question.

23 JUDGE RIVERA: Yes.

24 MS. ALDEA: I'm going to try to actually  
25 give both.

1 JUDGE RIVERA: Yes.

2 MS. ALDEA: The first answer to the  
3 question is actually you can, because here's - - -  
4 here's the way it works.

5 JUDGE RIVERA: Um-hum.

6 MS. ALDEA: Under Elwell, under DiFalco,  
7 these court's seminal decisions, what this court said  
8 is observation - - - so we have these two prongs,  
9 basis of knowledge and then veracity. Under the  
10 basis of knowledge prong, this court has said you can  
11 satisfy that in one of two ways: either by a report  
12 of personal observation, which is itself sufficient,  
13 or if that's lacking, then we need predictive  
14 information, we need corroboration of criminality.  
15 So, Judge Rivera, I'm sticking to the - - -

16 JUDGE SMITH: Okay, but the - - - the - - -  
17 the only reason you could - - - the - - - the only  
18 reason that you're allowed to self-report what you  
19 saw is this a veracity prong. You can - - - you can  
20 check out whether the guy's reliable.

21 MS. ALDEA: But the veracity prong, to  
22 satisfy it, has always been - - - and this is  
23 directly out of Elwell, is satisfied by details not  
24 necessarily indicative of criminality by details that  
25 do not contain predictive information. Here,

1           veracity is satisfied by observations of routes,  
2           mannerisms, the description of the people, the  
3           description of the car.

4                       But I want to get back to Judge Rivera's  
5           question, because there were two prongs to the  
6           answer. So here's - - - there's a logic as to why  
7           predictive information is only needed when basis of  
8           knowledge is lacking. And the court in J.L. said it.  
9           It's needed because it has to, by necessity, be one  
10          or the other. It cannot be both. They're mutually  
11          exclusive. For example, if I'm an individual citizen  
12          like this guy, a private citizen who's coming out of  
13          a house and sees something on the street, I can't  
14          possibly have predictive information. I don't know  
15          what the criminal's going to do. I don't know the  
16          criminal. I'm not a snitch; I'm not involved in the  
17          criminal behavior. I saw something. So in that  
18          case, I can't give you predictive information, but I  
19          can satisfy that test by saying I saw it.

20                      JUDGE RIVERA: Yes, I know.

21                      MS. ALDEA: On the other hand - - -

22                      JUDGE RIVERA: I understand what you're  
23          saying. You're collapsing these two. I get the  
24          point. But - - - but here's, I think, the - - - what  
25          I see as a problem to what you're arguing, which is

1 that's all fine and dandy when the person's doing  
2 exactly what you say. They - - - they're trying to  
3 call and say yes, that's what I saw. I want to give  
4 the police heads up.

5 But we are also concerned with the person  
6 who's malicious - - -

7 MS. ALDEA: But let me tell - - -

8 JUDGE RIVERA: - - - who's not doing that.  
9 Tho - - - that's what we're trying to protect  
10 against.

11 MS. ALDEA: Yes, Your Honor.

12 JUDGE RIVERA: So - - - so doesn't the law  
13 then say that, although the gentleman that you're  
14 referring to and the gentleman in this case, can make  
15 the call that you're saying - - - look, I saw  
16 something; it's like the sign says; I saw something,  
17 I say something, up to you what you want to do with  
18 it - - - isn't the law then okay, the cops now have -  
19 - - they can decide something to go on. They can  
20 pursue this to see is there's something corroborative  
21 there. Because he has given nothing more than just  
22 identification information that anybody on the street  
23 could give.

24 MS. ALDEA: Well - - -

25 JUDGE RIVERA: There's nothing that makes

1           that phone call unique or special, right?

2                   MS. ALDEA: Well, Your Honor, now I have  
3 three answers to the question.

4                   JUDGE RIVERA: Very good, go for it.

5                   MS. ALDEA: Going back to the second one  
6 was this: actually, when we look at the malevolent  
7 tipster, the private citizen on the street who  
8 doesn't have predictive information, who sees a  
9 random guy at a bus stop and describes what he's  
10 wearing has no incentive to frame the guy. You know  
11 who does have an incentive, someone who knows him who  
12 has an ax to grind.

13                   So actually, the test that my counsel is  
14 promulgating that Your Honor is talking about, if  
15 predictive information is sufficient, it doesn't weed  
16 out a malevolent tipster. To the contrary,  
17 predictive information would be possessed  
18 particularly by a malevolent tipster who has an ax to  
19 grind and who would say - - -

20                   JUDGE RIVERA: Of course that malevolent  
21 tipster - - -

22                   MS. ALDEA: - - - I know he's going there.

23                   JUDGE RIVERA: That malevolent tipster may  
24 not want to reveal themselves, because if they give  
25 you too much you know how they are, and they might be

1 worried about that.

2 MS. ALDEA: Well, Your Honor, that's a  
3 different story.

4 JUDGE RIVERA: So let's go to whatever was  
5 point three that you wanted to make.

6 MS. ALDEA: Well, the - - - well, the  
7 second point is that certainties are not required.  
8 We're not only talking - - - we're talking about  
9 probabilities for probable cause. We're talking  
10 about less than that for reasonable suspicion. So  
11 the law is not - - - constitutional law is never a  
12 prohibition. Constitutional law is a balance between  
13 two competing interests. And that balance is struck  
14 by weighing individual liberties on the one hand,  
15 applying this very-difficult-to-satisfy Aguilar-  
16 Spinelli test - - - which going back to Judge  
17 Lippman's question, only - - - you only need to  
18 satisfy both prongs when you do have anonymity.

19 CHIEF JUDGE LIPPMAN: How does the - - -  
20 but how does - - - how does the - - -

21 MS. ALDEA: Because a private citizen who's  
22 identified doesn't have to.

23 CHIEF JUDGE LIPPMAN: How does the balance  
24 sit in these particular set of circumstances?

25 MS. ALDEA: Now, here - - -

1                   CHIEF JUDGE LIPPMAN:  What's the balance  
2                   here?

3                   MS. ALDEA:  The balance here works out even  
4                   better.  Because - - - and this is going to answer  
5                   three to Judge Rivera's question, as well.  Here we  
6                   not only have the situation where we have both the  
7                   basis of knowledge satisfied by personal observation  
8                   and veracity satisfied by observation of details not  
9                   indicative of criminality; more than that we have the  
10                  call in evidence.

11                  And that is crucial, because just like the  
12                  Supreme Court reasoned in Navarette and just like  
13                  this court has reasoned in prior cases, when you have  
14                  a citizen who remains on the scene, he's still  
15                  anonymous.  He can't be found.  He can't be  
16                  prosecuted.  But he's presumed reliable because you  
17                  can listen to his reliability.

18                  Aguilar-Spinelli - - - and this whole rule  
19                  is really a hearsay prohibition, that's what is - - -  
20                  is at the root of this when you look at the history  
21                  of these rules.  Hearsay is inherently unreliable.  
22                  If you don't know the source of it, it's even more  
23                  unreliable.  Here we had the call.  So when we  
24                  listened to it, we know that the caller was credible.  
25                  We know this from a number of things.  He des - - -

1 describes contemporaneously what he observed. The  
2 criminal activity that he describes is unconcealed.  
3 It's a gun on an open street. He describes details  
4 about license plates, mannerisms. You can hear in  
5 his voice that this guy is not only excited, he is  
6 scared. And I urge this court to listen to that tape  
7 because he says oh, no, the guy with the gun. I - -  
8 - I didn't see what they were wearing. The guy with  
9 the gun saw that I saw him, so I ducked into my car  
10 and played stupid. Those are traditional indicia  
11 that imbue regular hearsay with reliability.

12 JUDGE SMITH: You - - - you would say that  
13 we should - - -

14 MS. ALDEA: And Navarette relied on it.

15 JUDGE SMITH: And you would say that we  
16 should - - - basically, we - - - we are allowed to  
17 consider this case as though the arresting officer  
18 had heard the tape, because - - - because the - - -  
19 the 911 operator did?

20 MS. ALDEA: Correct, Your Honor.

21 JUDGE SMITH: Okay, but isn't it also true  
22 that we're limited to what the arresting officer knew  
23 either at first or secondhand? We can't rely on the  
24 aimless driving, the car - - - the - - - the  
25 splitting up of the - - - the van?

1 MS. ALDEA: No, Your Honor. That's not  
2 correct. And the reason for that, it wasn't briefed;  
3 it's not really an issue before this court. But as  
4 background, there's a fellow officer rule. And the  
5 fellow officer rule - - -

6 JUDGE SMITH: The fellow - - - the fellow  
7 officer rule applies when you haven't even spoken to  
8 your fellow officer?

9 MS. ALDEA: Well, Your - - -

10 JUDGE SMITH: You have no idea what he  
11 knows?

12 MS. ALDEA: Yes, Your Honor, it applies  
13 because there's a directive to stop the car. And so  
14 when you go after the fact and look at the  
15 information that was possessed by the police  
16 department, the information includes, or extends, to  
17 what all of the officers at the scene knew.

18 JUDGE SMITH: Got a - - - you got a case  
19 that says this?

20 MS. ALDEA: I didn't brief it, so I don't  
21 have the case now at the tip of my fingers. I can't  
22 think of the case.

23 JUDGE SMITH: The - - - the Chief might  
24 give you permission.

25 MS. ALDEA: But it is - - - okay.

1                   JUDGE PIGOTT: You're saying the fellow  
2 officer rule includes the dispatch from headquarters  
3 to all cars?

4                   MS. ALDEA: It does, Your Honor. And in  
5 this case, in fact, what I would say is that  
6 actually, the report that went over the radio  
7 contained the salient details, as well, that there  
8 was a guy with a car, the observation of criminality,  
9 all of that. But reliability gets assessed after the  
10 fact, in a sense. Probable cause or reasonable  
11 suspicion is established - - - this - - - this  
12 actually is a broader principle, and I really do need  
13 to address this.

14                   One of the flaws in the reasoning that my -  
15 - - my esteemed adversary takes before this court,  
16 and in some of the questions here, too, is that there  
17 is a difference between whether information is  
18 sufficiently reliable for the police to act upon it  
19 and what level of suspicion it confers. So it's not  
20 correct to say, as Judge Rivera's questions were  
21 suggesting before, that an anonymous tip can only  
22 ever give you a Level II right of inquiry.

23                   The question of whether the information is  
24 sufficiently reliable to act upon traditionally is  
25 gauged under the hardest test by Aguilar-Spinelli or

1 by totality of the circumstances under Illinois v.  
2 Gates or something like that. The question of what  
3 action you can take depends on the content of the  
4 information. So once you determine it's reliable for  
5 the police to act on it, if the police are saying - -  
6 - if the caller says I saw a waistband bulge, well,  
7 that's not the same as the caller saying I saw a gun,  
8 which may not be the same as the caller saying I saw  
9 a bomb and the time on it was thirty seconds. So the  
10 content of the information matters. And I'm not  
11 making this up.

12 In fact, Navarette - - - actually, it's  
13 interesting. I don't agree with most of Judge  
14 Scalia's dissent, but I do agree with the portion  
15 where he actually breaks down the analysis, as did  
16 the majority, into those two separate issues. First  
17 we look to is the information sufficiently reliable  
18 because it contains basis of knowledge and  
19 corroboration of other details, sufficient  
20 description.

21 The second prong is okay, it's sufficiently  
22 reliable, which means the police don't have to hang  
23 up, as Judge Pigott said. They can take action. The  
24 level of intrusion, which under this court, under the  
25 state Constitution, is governed by DeBour, is

1 dictated, not by the reliability. We're done with  
2 that. We've already crossed that prong to allow the  
3 police action. The level of the intrusion is  
4 dictated by the content of the information, because a  
5 police officer who sees a bulge doesn't take the same  
6 action as a police officer who sees a gun.

7 JUDGE RIVERA: But - - - but - - - but,  
8 counsel, I - - - I still - - - I still don't see - -  
9 - as I understand your argument, you're saying that  
10 someone could call up and even say I saw Jenny Rivera  
11 with a gun walking down the street towards the  
12 courthouse, and they can just stop me.

13 MS. ALDEA: Correct.

14 JUDGE RIVERA: They won't say who they are.  
15 They won't say anything else.

16 MS. ALDEA: Correct, because - - - but - -  
17 - but again, my point is this: when you look at the  
18 rule that this - - - this court's going to create, I  
19 absolutely completely understand your concern about  
20 the malevolent tipster. It is - - -

21 CHIEF JUDGE LIPPMAN: Counselor, do we have  
22 to - - -

23 MS. ALDEA: I can't - - - I can't eliminate  
24 it.

25 CHIEF JUDGE LIPPMAN: Counselor, we have to

1 create a rule here? You don't - - -

2 MS. ALDEA: No.

3 CHIEF JUDGE LIPPMAN: You've already said  
4 you don't need Navarette. We're talking about our  
5 basic precedents. Do we have to create a rule or is  
6 it clear? And it's - - - it's clear that - - - that  
7 the situation that Judge Rivera just asked you.

8 MS. ALDEA: It's - - -

9 CHIEF JUDGE LIPPMAN: It's clear they - - -  
10 they see it walking down the street, gun - - - great,  
11 we stop you?

12 MS. ALDEA: Correct, it's - - -

13 CHIEF JUDGE LIPPMAN: That's our present  
14 under our - - - our precedents, putting aside  
15 Navarette, based on Florida v. J.L. and then the  
16 things that followed, that's the rule?

17 MS. ALDEA: Well - - - well, Florida v.  
18 J.L. is a Supreme Court case, so there's something  
19 odd about saying - - -

20 CHIEF JUDGE LIPPMAN: Yes, but then we have  
21 our cases - - -

22 MS. ALDEA: Right.

23 CHIEF JUDGE LIPPMAN: - - - that follow  
24 that, William II, et cetera, right?

25 MS. ALDEA: Well, actually - - - yeah, no,

1           actually our cases don't follow that. Our cases  
2           precede it. So Elwell, which is the case that sets  
3           this up - - -

4                       CHIEF JUDGE LIPPMAN: Right.

5                       MS. ALDEA: - - - into basis knowledge,  
6           DiFalco, which sets this up - - -

7                       CHIEF JUDGE LIPPMAN: Right.

8                       MS. ALDEA: - - - these are cases that  
9           precede Florida v. J.L. and Moore and Williams. What  
10          I'd say on Moore and William - - -

11                      CHIEF JUDGE LIPPMAN: And William - - -  
12          William II and White and all of those cases.

13                      MS. ALDEA: Yes, so you don't need to  
14          change the law. In fact, I think all of the law is  
15          actually consistent on this point. In Florida v.  
16          J.L., the Supreme Court came back a little bit from  
17          Illinois v. Gates. My point has always been this:  
18          Florida v. J.L. is not an inconsistent rule. If I  
19          can satisfy that, I can satisfy anything else,  
20          because there's never been a tougher test. And my  
21          point on Moore and Williams and J.L. is - - -

22                      CHIEF JUDGE LIPPMAN: Yeah.

23                      MS. ALDEA: - - - you necessarily have to  
24          interpret that broad language - - - and I acknowledge  
25          the court said an anonymous tip standing alone can

1 never be sufficient to furnish reas - - - reasonable  
2 suspicion in the absence of predictive information.  
3 True, but that case is by necessity limited to the  
4 facts before this court, because otherwise this court  
5 overruled Elwell and overruled DiFalco and overruled  
6 all of Aguilar-Spinelli by finding that the basis of  
7 knowledge prong is not satisfied by personal  
8 observation. And in Navarette again - - -

9 CHIEF JUDGE LIPPMAN: It - - - we couldn't  
10 have done that, right?

11 MS. ALDEA: No, Your Honor. You - - - you  
12 didn't do it, because if you had, then you would have  
13 had to have said that that's what's going on. So,  
14 again, going back to Judge Rivera's question - - -

15 JUDGE RIVERA: Basis of knowledge - - -  
16 basis - - - basis of knowledge because you have some  
17 reason to be able to measure whether or not this is a  
18 true statement as opposed to - - -

19 MS. ALDEA: No, Your Honor.

20 JUDGE RIVERA: I - - - I won't even say  
21 malicious, someone who's just wrong.

22 MS. ALDEA: Correct, Your Honor.

23 JUDGE RIVERA: They thought it was a gun  
24 but it was my umbrella.

25 MS. ALDEA: Your Honor, the - - - the - - -

1           there - - - you can never eliminate the risk that  
2           there may be probable cause or police intrusion based  
3           on a mistake. You can nev - - - whether you have an  
4           anonymous caller or not. You can never eliminate the  
5           risk that a malevolent caller might target you. But  
6           what I'm saying is defendant's version of what the  
7           test should be, which really is a sea change in the  
8           law, is not going to address Your Honor's concerns.

9                         CHIEF JUDGE LIPPMAN: Yeah, but the point  
10           is - - - the point is, counsel, any call is not  
11           enough, right? There's got to be some rules. It's  
12           not just someone, anyone, whoever in the world it is,  
13           sees her with the gun or the umbrella and that's  
14           enough. You can stop. It's where do you draw the  
15           line. So it can't just be the simple answer, I  
16           think, to Judge Rivera's question, which is yeah,  
17           anyone who calls and says you have - - - great, we're  
18           going to stop. There's got to be some kind of  
19           standards, and that's what you're trying to lay out.  
20           But it's not any caller, anytime, stop everybody.  
21           Clearly that's not the rule.

22                         MS. ALDEA: I agree with Your Honor.

23                         CHIEF JUDGE LIPPMAN: Okay.

24                         MS. ALDEA: And the rule of law, the  
25           Appellate Division actually said it.

1 CHIEF JUDGE LIPPMAN: Okay.

2 MS. ALDEA: It is if you don't apply  
3 Aguilar-Spinelli, the lesser rule is what the  
4 Appellate Division said. And this echoes Jeffery and  
5 Moss, which are Fourth Department cases. The rule is  
6 a contemporaneous observation of unconcealed criminal  
7 activity is itself sufficient to furnish reasonable  
8 suspicion.

9 JUDGE SMITH: Is it - - - is it practical?

10 MS. ALDEA: And that's exactly what we  
11 have.

12 JUDGE SMITH: Is - - - is it practical to  
13 tell police to follow that rule? To - - - to - - -  
14 are all the police in all the towns in New York going  
15 to learn that if you have - - - that - - - that you  
16 can arre - - - that if - - - if the anonymous call  
17 has contemporaneous information of unconcealed  
18 criminal activity, you can stop the guy and otherwise  
19 you can't?

20 MS. ALDEA: Well, I would say it's not that  
21 otherwise you can't. It's that when you have  
22 contemporaneous observation of unconcealed criminal  
23 activity that's described, you certainly can.

24 JUDGE SMITH: I mean I'm worried - - - I'm  
25 worried a little more about the general problem. If

1 I'm - - - you know, I'm - - - I'm an ordinary working  
2 cop in some town in New York, and I want to know when  
3 I can - - - yeah, when I can arrest someone based on  
4 an anonymous tip. What - - - what - - - you're my  
5 lawyer. Tell me.

6 MS. ALDEA: Well, what I would tell you is  
7 this, is with respect to an arrest, if you satisfy  
8 both prongs of Aguilar-Spinelli, then you can get an  
9 arrest warrant. Which is why I said, in this case,  
10 if this had been brought before a judge in a - - - in  
11 a - - - a warrant, in the context of a search warrant  
12 or an arrest warrant, and I had satisfied basis of  
13 knowledge by personal observation and corroboration  
14 of details not indicative of criminality for  
15 veracity, which I do here, then a warrant would  
16 issue, which would actually authorize probable cause.  
17 So my point is when we're talking about what guidance  
18 do we give the cop on the street, the bottom line is  
19 if you've got probable cause, you've got less.  
20 That's guidance one. Guidance two is you need to act  
21 reasonably.

22 And the bottom line is the officers have an  
23 obligation to investigate a report of a man with the  
24 gun. This court said so in Benjamin. It is not  
25 reasonable for them to hang up on the phone on a

1 private citizen who clearly, from the content of the  
2 tape that goes before the suppression court, saw  
3 something and said something. It is not only  
4 unreasonable. It is impermissible. And it would be  
5 detrimental to our society to enact that kind of  
6 rule.

7 CHIEF JUDGE LIPPMAN: Okay, counselor.  
8 Thanks, counselor.

9 MS. ALDEA: Thank you.

10 CHIEF JUDGE LIPPMAN: Rebuttal, counsel?

11 MR. KARTAGENER: First of all, with respect  
12 to the issue that you raised, Justice - - - Judge  
13 Lippman, about not having any caller any time, it's  
14 got to have some structure. The police need some  
15 guidance. Even - - - just - - - just - - - I want to  
16 just want to address the Navarette case. Navarette  
17 does not provide that type of guidance. What does is  
18 the type of bright-line rule that was established in  
19 Florida v. J.L. and the cases that I gave you before:  
20 Garcia, Weaver, Johnson, Torres, Griminger, all New  
21 York States cases under the New York Constitution.

22 JUDGE SMITH: Your - - - and your - - -  
23 your bright-line rule is - - - is you can't stop  
24 someone on an anonymous tip unless the anonymous tip  
25 provided predictive information?

1                   MR. KARTAGENER: This court said that in  
2 Moore and in William II. It said that because it  
3 was, you know, following Florida v. J.L. But that  
4 has been the law for fourteen years. It - - -

5                   JUDGE ABDUS-SALAAM: But if you don't have  
6 an informant who knows what's going to happen next,  
7 how are you going to get that predictive information  
8 unless the police do what you suggested, which is to  
9 follow this - - - you know, these people who  
10 allegedly are nefarious. And if they get made as  
11 cops, then they're not going to do whatever they're  
12 supposed to do. They'll probably wait and then later  
13 do it. Cops can't follow them forever. So what - -  
14 - what would you suggest?

15                   MR. KARTAGENER: And it may be - - - and it  
16 may be that there will be cases where someone who's  
17 got a gun in the car is able to drive away from the  
18 scene because the police were not authorized - - -

19                   CHIEF JUDGE LIPPMAN: What - - - but what  
20 strikes the right balance that your adversary was  
21 talking about? How do you - - - how do you allow  
22 efforts to stop crime or stop bad people from doing  
23 bad things and yet not trample on people's rights?

24                   MR. KARTAGENER: Well, I - - -

25                   CHIEF JUDGE LIPPMAN: What's - - - what's -

1 - - what's the balance in our test? I asked the same  
2 question to your adversary. What's the balance here?

3 MR. KARTAGENER: I - - - I think that - - -  
4 I go with the old saying: if it ain't broke - - - if  
5 it ain't broke, don't fix it. There is, for fourteen  
6 years, a history of using Florida v. J.L. where there  
7 is the requirement of at least some - - - at least  
8 some predictive information that based - - -

9 CHIEF JUDGE LIPPMAN: And here? And here?

10 MR. KARTAGENER: There was not - - -

11 CHIEF JUDGE LIPPMAN: Predictive  
12 information?

13 MR. KARTAGENER: - - - a scintilla of  
14 predictive information.

15 JUDGE PIGOTT: Let's - - - let's - - -  
16 let's do a hypothetical where there's a parade  
17 downtown Rochester and somebody makes an anonymous  
18 call and says I just saw a student with a knapsack  
19 put it down by a streetlight, and he walked away.

20 MR. KARTAGENER: Okay.

21 JUDGE PIGOTT: Hang up on that one, right?  
22 There's no predictive - - -

23 MR. KARTAGENER: No, you call the pol - - -  
24 the - - - you - - - you - - - the police would go  
25 over - - -

1 JUDGE PIGOTT: He - - - that's who he  
2 called - - - he - - - he called them.

3 MR. KARTAGENER: - - - if he walked away  
4 and there's a bomb lying - - - I'm sorry, Judge.

5 JUDGE PIGOTT: Well, that's what you don't  
6 know. But there's no predictive information, is  
7 there?

8 MR. KARTAGENER: But there's been something  
9 that's been abandoned there and the cops would have a  
10 right to take it under the emergency doctrine, I  
11 would suppose.

12 JUDGE SMITH: Your point is they - - - your  
13 point is they can check out the knapsack. They just  
14 can't stop the kid?

15 MR. KARTAGENER: And - - - and if they - -  
16 - and if they detain him just for a moment while they  
17 look inside the knapsack and if there is a bomb, then  
18 I think that they can arrest him.

19 JUDGE RIVERA: Well - - - or they could go  
20 over. They - - - they see - - - actually see the  
21 knapsack, and before they get to it, the - - - the  
22 kid is walking away. They could ask him to stop.

23 MR. KARTAGENER: Right.

24 JUDGE RIVERA: Maybe something happens in  
25 that moment that raises this to a different DeBour

1 level.

2 MR. KARTAGENER: Well - - -

3 JUDGE PIGOTT: So the police ought to  
4 pursue that, much like they did in these cases?

5 MR. KARTAGENER: What I'm saying is what  
6 the cops can't do, I believe under New York State  
7 Law, is pull somebody over with guns a-blazing and -  
8 - - well, not being fired but pointed from a lot of  
9 different directions when they're - - - when it's all  
10 dependent upon the anonymous word of somebody who we  
11 don't know who they are, we don't know what they've  
12 seen. It could be somebody who's either malevolent  
13 or wrong.

14 JUDGE RIVERA: Again - - - again - - -

15 MR. KARTAGENER: Or wrong.

16 JUDGE RIVERA: You say the problem is that  
17 the officer who actually stopped them only knows the  
18 tip, doesn't know anything else that has gone on.

19 MR. KARTAGENER: And when - - - and when  
20 you look at his examination in the record - - -

21 JUDGE RIVERA: Yes, can you respond to - -  
22 - to counsel's point that the - - - the dispatch is  
23 enough to get the fellow officer rule to apply?

24 MR. KARTAGENER: I - - - I - - -

25 JUDGE RIVERA: Because she says you can

1           rely on this other information that other officers  
2           knew.

3                         MR. KARTAGENER:  I - - - they can - - - it  
4           can be used to seize.  But then under People v. Lipka  
5           you have to be able to justify - - - in other words,  
6           under the fellow officer's rule, as I understand it -  
7           - -

8                         JUDGE RIVERA:  Um-hum.

9                         MR. KARTAGENER:  - - - it can be used - - -  
10          and that's right, we haven't briefed it here.  But it  
11          can be used to take action, the fellow officer's  
12          rule.  But then afterwards you have to be able to  
13          sustain the basis upon which the police officer  
14          acted.

15                        JUDGE SMITH:  Yeah, but I guess my - - - my  
16          question of Ms. Aldea was can you rely on - - - on  
17          something your fellow officer has never told you?  I  
18          mean I understand that if he - - - if he - - - if he  
19          comes - - -

20                        MR. KARTAGENER:  I think the answer's not,  
21          Judge.

22                        JUDGE SMITH:  - - - to the conclusion, then  
23          - - - then - - - then the basis for - - - you get the  
24          benefit of his basis for knowledge.

25                        MR. KARTAGENER:  I don't think he can.  If

1 - - - if he's never been told.

2 JUDGE SMITH: And - - - and you also were  
3 going to - - - you don't have a case right with you  
4 because you didn't brief it.

5 MR. KARTAGENER: Correct, Your Honor.

6 JUDGE SMITH: But maybe there is one.

7 MR. KARTAGENER: But there is one thing I'd  
8 like to say that I think is relevant to the argument  
9 that we've had today, and I think important. And  
10 then I'll sit down.

11 CHIEF JUDGE LIPPMAN: Finish, very good.  
12 Last point, counselor. Go ahead.

13 MR. KARTAGENER: All right, here's the  
14 point. If you accept this argument that is being put  
15 forward by the People about how by saying - - - by  
16 the anonymous informant saying I saw a gun, that  
17 somehow makes him reliable, then what you're doing is  
18 making it possible for this person who may be  
19 malevolent or may be angry or whatever, you're giving  
20 them the opportunity to self-validate their own  
21 reliability because they're basing the claim, this  
22 inherently suspect person, upon their own thinking.

23 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank  
24 you both. Appreciate it.

25 MR. KARTAGENER: Thank you, Your Honor.

1 CHIEF JUDGE LIPPMAN: 210, People v.  
2 Johnson?

3 MR. FIANDACH: Good afternoon. May it  
4 please the court, Edward Fiandach for the appellant,  
5 Eric Johnson. I'm at the low end of the spectrum of  
6 what's been talked about here. The major issue I  
7 think we have to recognize is I don't have an  
8 anonymous tip at all. Four or five days after the  
9 911 call was made, the deputy that stopped my client  
10 took a supporting deposition from the 911 caller.

11 JUDGE ABDUS-SALAAM: Counsel, before you go  
12 on, is that in the record?

13 MR. FIANDACH: Yeah, it's at record page  
14 66.

15 JUDGE ABDUS-SALAAM: But it's - - - it's a  
16 record for here, but was it presented to the courts  
17 below? I don't remember it being in your leave  
18 application.

19 MR. FIANDACH: It was never presented to  
20 the court below.

21 JUDGE ABDUS-SALAAM: Yeah, and it wasn't in  
22 your leave application either, was it?

23 MR. FIANDACH: Exactly, in the court below  
24 it is a totally anonymous tip.

25 JUDGE ABDUS-SALAAM: So can we deal with it

1 here? I mean this - - - it has to be an anonymous  
2 tip here, doesn't it?

3 MR. FIANDACH: It - - - it is an anonymous  
4 tip here. As you're looking at this case, this is an  
5 anonymous tip. But this is an anonymous tip of the  
6 very lowest caliber. This - - -

7 CHIEF JUDGE LIPPMAN: Yeah, but what  
8 happened here is the - - - the - - - the police see  
9 what - - - what conduct that's happening from this  
10 person that they're following. They see the - - -  
11 the - - - the bad turn or whatever it is.

12 MR. FIANDACH: It was - - -

13 CHIEF JUDGE LIPPMAN: Doesn't that make  
14 this case a different - - -

15 MR. FIANDACH: It was described as a hasty  
16 or wide right-hand turn.

17 CHIEF JUDGE LIPPMAN: Right, so - - - so  
18 isn't that important that the - - - the officer saw  
19 that?

20 MR. FIANDACH: This officer could not act  
21 upon that hasty or wide right turn.

22 CHIEF JUDGE LIPPMAN: Why not?

23 MR. FIANDACH: Because he was acting - - -  
24 he was 1.8 miles outside of his jurisdiction.

25 JUDGE READ: Well, yeah, but he saw it.

1 MR. FIANDACH: He saw it.

2 JUDGE READ: And that's unimportant?

3 MR. FIANDACH: But he - - - he did not have  
4 the authority to detain the motorist for the hasty or  
5 the wide right turn.

6 JUDGE READ: That's - - -

7 JUDGE PIGOTT: Is that the strength of your  
8 argument? Is that - - - that jurisdictional thing is  
9 the - - - is the key here?

10 MR. FIANDACH: The jurisdictional thing I  
11 think is the key on the hasty or the wide right turn.  
12 Now you can look at the hasty - - -

13 CHIEF JUDGE LIPPMAN: Counselor, let me  
14 interrupt you for one second. Do you want any  
15 rebuttal time?

16 MR. FIANDACH: One minute.

17 CHIEF JUDGE LIPPMAN: One minute, keep  
18 going. Answer Judge Pigott, go ahead.

19 MR. FIANDACH: The - - - the issue about  
20 the hasty or wide right turn is it's not indicative  
21 of any form of criminality.

22 JUDGE PIGOTT: Okay, that's - - - all  
23 right, so we're out of - - - we're away from  
24 jurisdiction for - - -

25 MR. FIANDACH: Right, it's not indicative

1 of criminality. Now I - - -

2 JUDGE ABDUS-SALAAM: But on the violation  
3 itself, you're saying that the statute - - - there's  
4 a statute that prevented the officer from stopping  
5 this person because it was not in his jurisdiction?

6 MR. FIANDACH: Correct, he - - -

7 JUDGE ABDUS-SALAAM: And - - -

8 MR. FIANDACH: He only had jurisdiction to  
9 arrest the appellant for a crim - - - for criminal  
10 activity. And the hasty or wide right turn doesn't  
11 constitute criminal activity.

12 CHIEF JUDGE LIPPMAN: Doesn't it tell him  
13 anything, though?

14 MR. FIANDACH: It's - - - it's a wide  
15 right-hand turn. It's something that the - - - I'm  
16 sure this officer observed.

17 CHIEF JUDGE LIPPMAN: Totally innocuous  
18 thing?

19 MR. FIANDACH: Totally innocuous.

20 JUDGE ABDUS-SALAAM: And - - - and - - -  
21 and what - - - what's the basis? Just the statute,  
22 if he had violated the statute and gone ahead and  
23 stopped the person, even though it wasn't in his  
24 jurisdiction, would we be - - - would we still be  
25 talking about suppressing this?

1 MR. FIANDACH: Well, you wouldn't be able  
2 to prosecute him for the hasty or wide - - -

3 JUDGE PIGOTT: Suppose he had a sticker on  
4 his back window.

5 MR. FIANDACH: Pardon?

6 JUDGE PIGOTT: Never mind.

7 MR. FIANDACH: I know. You wouldn't be  
8 able to - - - to prosecute him for the hasty or wide  
9 right turn, because it would have had to have been  
10 dismissed on - - - on - - - as a result of the deputy  
11 not having jurisdiction and being outside his  
12 jurisdiction.

13 JUDGE SMITH: And I - - - I - - - I realize  
14 this hasn't been briefed, but isn't there a problem  
15 that even if they - - - yeah, suppose - - - suppose  
16 this officer had made a - - - had made a stop based  
17 on the wide right turn, which was, what, a vio - - -  
18 a traffic violation or something.

19 MR. FIANDACH: Right.

20 JUDGE SMITH: And he was wrong. He's not  
21 allowed to do that. Aren't there cases that say I  
22 don't care if he was wrong; if it's only a  
23 jurisdictional problem, you don't suppress the  
24 evidence?

25 MR. FIANDACH: I - - - I guess I'm not

1 understanding the question.

2 JUDGE SMITH: Okay, it's one thing to say  
3 that he's not entitled to make the stop under a  
4 statute. He didn't violate the Fourth Amendment by  
5 making that stop. He just violated the statute that  
6 says he can't - - - he has to stick to Yates County  
7 and can't go into Ontario County. Is a violation of  
8 that statute reason to suppress evidence?

9 MR. FIANDACH: I would respectfully  
10 disagree that he didn't violate the Fourth Amendment,  
11 because he did not have a - - - he did not have a  
12 justifiable basis to stop that motor vehicle.  
13 Because he was acting - - -

14 JUDGE SMITH: Well - - - well, yeah, I  
15 guess what I'm saying is he had to base it - - -  
16 there's nothing in the Constitution that says you  
17 can't stop a motor vehicle for a violation. In fact,  
18 they - - - people do it all the time.

19 MR. FIANDACH: Right.

20 JUDGE SMITH: That's - - - it's - - - it's  
21 - - - it's an indoor - - - seems to be a - - - a  
22 major industry in New York is stopping automobiles  
23 for violations.

24 MR. FIANDACH: Correct.

25 JUDGE SMITH: The Constitution doesn't say

1           you can't do that. Does the fact that a statute says  
2           it make it a Fourth Amendment violation?

3                   MR. FIANDACH: Well, what we've really done  
4           here is we've elevated - - - it - - - we've elevated  
5           that wide right-hand turn to a DeBour Level III.  
6           He's actually detained the individual.

7                   JUDGE SMITH: Yeah, but - - - but actually  
8           - - -

9                   MR. FIANDACH: He has seized the  
10          individual.

11                  JUDGE SMITH: But - - - but there are cases  
12          where we have allowed a DeBour Level III, a stop,  
13          based on things like a nontransparent sticker on the  
14          back of a car.

15                  MR. FIANDACH: Correct, but that would - -  
16          - that would be with - - - with a pol - - - with an  
17          officer who had the authority to execute that stop.  
18          At this point in time, he's no more than a private  
19          citizen attempting to - - - to - - - to do this.

20                  JUDGE GRAFFEO: So it doesn't matt - - -

21                  JUDGE PIGOTT: If we did that - - - and  
22          part of the 911 call was that there was a sick or  
23          intoxicated driver, right, if the officer was  
24          concerned, if - - - if her concern was that this man  
25          or this driver may be sick or intoxicated, could she

1 stop him?

2 MR. FIANDACH: You're saying if the officer  
3 had concern that he was sick or intoxicated, but then  
4 we have to get - - - then we get back to the whole  
5 issue of whether or not he should be entitled to do  
6 that based upon this anonymous tip.

7 JUDGE PIGOTT: Right, that's kind of what I  
8 was - - -

9 MR. FIANDACH: I mean, this anonymous tip  
10 is so innocuous. This is - - - this is the type of  
11 anonymous tip that you really have to be - - -

12 CHIEF JUDGE LIPPMAN: Well, what about the  
13 tip with the turn together, still innocuous?

14 JUDGE READ: That doesn't corroborate it?

15 MR. FIANDACH: Yeah, I believe it is,  
16 because a wide right-hand turn, we can go out here  
17 today, we can wait - - - sit at any intersection. We  
18 could see wide right-hand turns, wide left-hand  
19 turns.

20 JUDGE GRAFFEO: Do you know it's - - - it's  
21 not unusual for motorists to perhaps call the police,  
22 especially now that cars have, you know, hands-free  
23 calling.

24 MR. FIANDACH: Sure.

25 JUDGE GRAFFEO: To say I'm on the Thruway.

1           There's a car really weaving in and out of lanes  
2           here.

3                         MR. FIANDACH:   Right.

4                         JUDGE GRAFFEO:   You know, I don't know if  
5           the guy is having a heart attack or what's going on,  
6           but - - - or - - - or a truck, you know, keeps  
7           weaving off the road.  Are the police to ignore those  
8           calls?

9                         MR. FIANDACH:   Certainly not, Justice  
10          Grafteo.  What they're really supposed to do at this  
11          point in - - -

12                        JUDGE GRAFFEO:   Tell me what they can - - -  
13          can do with that.

14                        MR. FIANDACH:   They're to - - -

15                        JUDGE GRAFFEO:   Can they do anything with  
16          that?

17                        MS. ALDEA:   - - - locate the vehicle,  
18          follow the vehicle, and then look for - - - look for  
19          some confirming evidence that, in fact, this person  
20          is having a heart attack, he's intoxicated.  He's - -  
21          - wait to see the vehicle cross a - - - cross a fog  
22          line or cross the dotted line.

23                        JUDGE SMITH:   If the - - - if the officer  
24          sees the vehicle weaving, then he can stop it?

25                        MR. FIANDACH:   Correct.

1                   JUDGE SMITH: But - - - but if - - - but if  
2 by the time the officer gets there, the - - - the  
3 vehicle has righted itself and seems to be driving  
4 normally, all he can do is follow. He can't stop it?

5                   MR. FIANDACH: He could only follow it and  
6 - - - and not stop because you have - - - you have no  
7 - - - you have no indication that the information  
8 that had been provided to that police officer, be it  
9 sick or intoxicated or weaving or heart attack or  
10 what have you, is either reliable or that there's any  
11 basis for it. And what we really go - - -

12                   JUDGE SMITH: We've been - - - we've been  
13 worried a lot about the mal - - - malevolent tipster  
14 - - -

15                   MR. FIANDACH: Right.

16                   JUDGE SMITH: - - - the person who gets  
17 somebody in trouble. Isn't it - - - wouldn't it be  
18 very unusual for one driver on the road to call in  
19 the car in front of him out of spite? I understand  
20 you might, you know, if it's your ex-boyfriend or the  
21 - - - or the next-door neighbor you hate, you can get  
22 - - - you get some malevolent calls. But what kind  
23 of driver - - - how - - - how often does it happen  
24 that a driver says just for the fun of it, I'm going  
25 to call up and give the license number of the car in

1 front of me and tell me he's weaving?

2 MR. FIANDACH: I wouldn't know. I wouldn't  
3 know.

4 JUDGE SMITH: And I mean I guess what I'm  
5 saying is we should - - - shouldn't - - - should our  
6 rules be tailored to take account of the fact that  
7 this kind of tip, though you say it's so weak, is  
8 actually quite unlikely to be a made-up, spiteful  
9 tip. It - - - it was so unspiteful she didn't even  
10 say he was drunk. She said drunk or sick.

11 MR. FIANDACH: I - - - I would go to higher  
12 authority myself and just point to Justice Scalia.  
13 In his dissent in Navarette, he - - - he was  
14 concerned about that. He was concerned about that  
15 malevolent tipster. I mean it could be an ex-wife.  
16 In this - - - this person's case it could be an ex-  
17 patient or something, sees the car, has a grudge.

18 JUDGE ABDUS-SALAAM: What about - - -

19 JUDGE SMITH: In - - - in - - - in  
20 Navarette it would have been an ex-wife who planted a  
21 GPS in the car, but I suppose it's probable.

22 MR. FIANDACH: Well, it's - - -

23 JUDGE ABDUS-SALAAM: Well, I - - - I'd like  
24 to take you to Judge - - - Justice Roberts in  
25 Navarette when he says, you know, an anonymous caller

1           says somebody's got a bomb in the car. Is the - - -  
2           are the police supposed to wait before they throw the  
3           bomb out of the car before they stop them?

4                   MR. FIANDACH: But there - - - there are -  
5           - - are levels of emergency, which I think would - -  
6           - would - - - and definitely in the rule that you - -  
7           - you establish, if you choose to establish a rule.  
8           The - - - there are levels of emergencies that should  
9           be - - - there should be a level of adaptability  
10          here. Clearly, if - - - if it's - - - if it's an  
11          issue of a bomb, I would have to concede that, you  
12          know, perhaps the police officers may be permitted to  
13          go further than they are with simply a sick or  
14          intoxicated motorist.

15                   JUDGE RIVERA: But a sick or intoxicated  
16          motorist could certainly hit someone. You obviously  
17          could kill someone, if not yourself, also.

18                   MR. FIANDACH: He could, but in this  
19          situation we do have to remember that - - - that he  
20          had been followed for a period of time. And the  
21          police officer observed - - - observed nothing aside  
22          from the wide - - - hasty or wide right turn.

23                   CHIEF JUDGE LIPPMAN: Okay, counselor.

24          Thanks.

25                   MR. FIANDACH: Thank you, Judge.

1 CHIEF JUDGE LIPPMAN: Counselor?

2 MR. TAYLOR: May it please the court, Jeff  
3 Taylor with my co-counsel, Robert Jeffries, on behalf  
4 of the respondent. We would respectfully submit that  
5 when Deputy Cunningham was making the stop here,  
6 well, he could not - - - and to answer your  
7 questions, he could not issue traffic tickets for the  
8 wide - - - for the wide right turn and for failing to  
9 signal timely. He could not issue traffic tickets in  
10 Ontario County, because he was a Yates County deputy.  
11 So he had no authority to issue traffic violations.  
12 However, Deputy Cunningham testified that he was  
13 investigating a crime, and the crime was driving  
14 while intoxicated.

15 CHIEF JUDGE LIPPMAN: Well, your adversary  
16 says, though, that the wide turn is totally  
17 innocuous.

18 MR. TAYLOR: I don't think - - -

19 CHIEF JUDGE LIPPMAN: Why - - - that it's  
20 not some obvious, you know, terrible thing that  
21 you're weaving between the line. It's a little bit  
22 wide turn. Is that - - - what's your view of that?

23 MR. TAYLOR: I do not think it's innocuous,  
24 Your Honor. Deputy Cunn - - -

25 CHIEF JUDGE LIPPMAN: Why not?

1 MR. TAYLOR: Because Deputy Cunningham  
2 testified in this instance that the vehicle was  
3 turning from Route 21 in the Town of Naples. And  
4 when it was making a right-hand turn onto - - - onto  
5 Tobey Road, it went - - - it was going westbound, and  
6 it went into the eastbound lane of traffic, fully.

7 JUDGE ABDUS-SALAAM: It was late at night,  
8 wasn't it, counsel? Couldn't the driver just have  
9 had a problem seeing exactly? It was pretty late,  
10 wasn't it?

11 MR. TAYLOR: But - - - but - - - but when  
12 the vehicle goes into the eastbound lane, that  
13 doesn't mean the deputy doesn't have authority to  
14 stop and inquire.

15 JUDGE ABDUS-SALAAM: How wide is the - - -  
16 is the roadway? I mean, you know, could have been  
17 just a couple of inches into the eastbound lane.  
18 Didn't have to be right into eastbound lane to right  
19 itself, right?

20 MR. TAYLOR: I think his testimony was that  
21 the vehicle was going west on Tobey Road - - - or on  
22 Route 21, and it went into the eastbound lane. So  
23 it's in the oncoming lane of traffic when that  
24 occurs. So he has a good faith basis to stop the  
25 vehicle, setting aside the 911 call, as well, when he

1 sees that - - - the vehicle not make its turn signal  
2 in a timely manner and also fully go into the  
3 eastbound lane. He's going in another lane of  
4 traffic.

5 JUDGE RIVERA: So - - - so - - -

6 JUDGE ABDUS-SALAAM: You make a lot about  
7 the turn signal, but they - - - he did put on the  
8 turn signal. I - - - I couldn't understand why you  
9 and town court thought that was two violations and  
10 not just one.

11 MR. TAYLOR: Well, even if it was just the  
12 one violation, going into the other lane of traffic,  
13 it is something that Deputy Cunningham sees, as well.  
14 So he testifies to it, as well - - - as well. He  
15 indicated the traffic signal went on at the last  
16 moment, so - - -

17 JUDGE PIGOTT: That seems to be standard.

18 JUDGE READ: Yeah.

19 JUDGE PIGOTT: In fact, I'm - - - I'm - - -  
20 usually people are signaling what they're doing, not  
21 what they're going to do.

22 MR. TAYLOR: I - - - I wouldn't disagree  
23 with you, Your Honor, at all. But in - - - in this  
24 instance the - - -

25 JUDGE RIVERA: But you're saying so because

1 of the tip, when he sees this turn and - - - and it's  
2 into the, as you say, this oncoming traffic lane,  
3 that suggests to him this is not just merely who's  
4 just weaving a little bit off, it's a little bit late  
5 at night, but perhaps he's intoxicated or sick. And  
6 that's - - - that's what concerned him?

7 MR. TAYLOR: And the tip, Your Honor, which  
8 you're speaking of is the anonymous caller - - -

9 JUDGE RIVERA: Yes, yes.

10 MR. TAYLOR: - - - in this instance, who  
11 described a particular vehicle, a blue BMW, that was  
12 on a particular road, Route 2 - - - 245 traveling  
13 southbound. And then Deputy Cunningham, doing his  
14 job, finds that vehicle about eight minutes later  
15 when he travels southbound, as well. And what does  
16 he see when he comes to the intersection of Route 245  
17 and 21? He sees a blue BMW with a particular license  
18 plate of F-G-B-5-6-7-5, and it matches to a T what  
19 that anonymous caller had reported.

20 Now at that point in time, the deputy's  
21 outside of his county. He's not in Yates County;  
22 he's now in Ontario County. But he still has  
23 evidence that it was described as a sick or  
24 intoxicated driver. He then does the further good  
25 things of corroborating what the tip had provided the

1 911 caller. He follows that vehicle for a period of  
2 time, and then he sees the traffic violation,  
3 including, as we've discussed, going into the  
4 eastbound lane instead of staying in the right - - -  
5 instead of staying in the westbound lane. So here,  
6 Deputy Cunningham did all the things that a good  
7 officer is supposed to do.

8 JUDGE RIVERA: With - - - without the tip  
9 could he have stopped him?

10 MR. TAYLOR: Without the tip, yes. I do  
11 think - - - or no, without the tip, he would have  
12 then seen just one or two traffic violations. He  
13 himself, Deputy Cunningham, in Ontario County could  
14 not have stopped the vehicle for just traffic  
15 violations, because he was outside of his  
16 jurisdiction.

17 JUDGE RIVERA: He'd have no reason to  
18 follow him.

19 MR. TAYLOR: But he did have a reason to  
20 follow him. That's why he also contacted - - -

21 JUDGE RIVERA: No, I'm saying he wouldn't  
22 have had a reason to follow him without the tip,  
23 right? Because at the time that he saw him, he  
24 didn't see him doing anything that violated the VTL  
25 or anything else, right?

1                   MR. TAYLOR: Except the - - - except the  
2                   traff - - - under your hypothetical, he would have  
3                   only see the traffic violations, for which he could  
4                   not have issued traffic tickets.

5                   JUDGE SMITH: Suppose he had - - - suppose  
6                   he had only the tip and not the right turn. Could he  
7                   stop - - - not the wide turn, could he stop him?

8                   MR. TAYLOR: I think that even with just  
9                   the tip, I think Deputy Cunningham, in this instance,  
10                  had a ri - - - had an ability to inquire and to  
11                  follow the vehicle for a period of time. Because  
12                  what he has here is - - -

13                  JUDGE SMITH: Follow, I'm not questioning  
14                  that. Did he have - - - did he have the - - - the -  
15                  - - the right to pull the driver over?

16                  MR. TAYLOR: I think he does in this  
17                  instance, because it's a particularly described  
18                  vehicle, blue BMW on a particular highway. He finds  
19                  it within eight minutes and the key thing is here  
20                  it's described as a sick or intoxicated driver. And  
21                  Deputy Cunningham testified that he was then  
22                  investigating the crime of driving while intoxicated.

23                  JUDGE PIGOTT: So if - - - if somebody  
24                  calls and says I'm following a car and I think the  
25                  driver's drunk, can - - - can a - - - can - - - can

1 that person be pulled over just on that statement?

2 MR. TAYLOR: I don't know if that's quite  
3 enough, because you don't a description, Your Honor,  
4 in your example of - - -

5 JUDGE PIGOTT: Right, even describe the  
6 car. All right, so now you've got a blue BMW. But  
7 so far it's staying in its lane, it's within the  
8 speed limit, it's doing what it's supposed to do, but  
9 somebody said that person is drunk.

10 MR. TAYLOR: The additional factors here,  
11 though, include a description of where the vehicle's  
12 going from and coming from.

13 JUDGE PIGOTT: I know I'm cutting back.  
14 I'm cutting back on it and trying to get a more  
15 general rule. Would - - - would - - - can a police  
16 officer stop someone solely on an - - - on a - - - on  
17 an anonymous tip that they think the driver's drunk -  
18 - - that they saw a blue BMW and they think the  
19 driver's drunk?

20 MR. TAYLOR: If the information from the  
21 911 call is corroborated by the officer that he sees  
22 a particular vehicle with a particular make and model  
23 - - -

24 JUDGE PIGOTT: Um-hum.

25 MR. TAYLOR: - - - on a particular

1 direction - - - and it's also contemporaneous, which  
2 is what happened here - - -

3 JUDGE PIGOTT: Right.

4 MR. TAYLOR: - - - because it's within  
5 about eight minutes later. I think the officer does  
6 have the ability to stop the vehicle. The worst  
7 that's going to happen in this instance - - - and  
8 it's happened to all of us; and I'm looking at the  
9 human factor - - - the worst that's going to happen  
10 here is the driver's going to be let go. That's all  
11 that's going to happen.

12 And when you have a concern, Your Honor,  
13 about the people that are making the malevolent  
14 calls, there's a - - - a vehicle by - - - or there's  
15 a manner by which people that make the malevolent  
16 calls can be prosecuted for falsely reporting an  
17 incident - - - or falsely reporting an incident. So  
18 there are consequences to the people make the - - -  
19 the malevolent calls. They can be prosecuted for a  
20 misdemeanor of falsely reporting an incident. They  
21 could even perhaps be charged with obstructing  
22 governmental administration. So there is some  
23 consequence to people if they make the false report  
24 or if it's malevolent in some instance. But in this  
25 - - - in the record here - - -

1                   JUDGE RIVERA: They may not know that you  
2 can track them, though.

3                   MR. TAYLOR: Excuse me?

4                   JUDGE RIVERA: They may not know you can  
5 track them.

6                   MR. TAYLOR: They may not know, but - - -  
7 they may not know you can track them. That was  
8 brought up in Navarette v. California - - -

9                   JUDGE RIVERA: Yes, yes.

10                  MR. TAYLOR: - - - as well.

11                  JUDGE RIVERA: Yes.

12                  MR. TAYLOR: With the technology it's hard  
13 to ignore it now. With the technology we have now,  
14 people know that calls to 911 are being recorded and  
15 traced, as well. And I would - - -

16                  JUDGE ABDUS-SALAAM: So what - - - I'm - -  
17 - I'm a little troubled by this particular report,  
18 because at least in Navarette you had a caller who  
19 said I was run off the road by this driver. In this  
20 case, all you have is you have ambivalence. I don't  
21 know whether this driver is drunk or sick. So, you  
22 know, there - - - there seems to be a little bit less  
23 here - - - a lot less here than in - - - even in  
24 Navarette.

25                  MR. TAYLOR: Actually, there's more here

1 than in Navarette, Your Honor, because in Navarette  
2 the - - - the facts in that case, they did not find a  
3 traffic violation. The vehicle was followed in  
4 Navarette v. California for about five minutes and  
5 there were no traffic violations, but the police  
6 officer still stopped the vehicle. And here, what  
7 kind of particularly - - - particularity do we want  
8 the 911 caller to - - - to describe? She indicated a  
9 sick or intoxicated driver. It could have been  
10 either or both or neither. But the officer then does  
11 - - -

12 JUDGE ABDUS-SALAAM: But she didn't  
13 describe - - - or the person who called didn't  
14 describe what they saw. Was - - - was the car  
15 weaving in and out of traffic, was it, you know,  
16 speeding? There was nothing other than I believe  
17 there is a car - - - there is a car with a sick or  
18 intoxicated driver; nothing else.

19 MR. TAYLOR: There was much more. There  
20 was a license plate; there was the make and model of  
21 the car.

22 JUDGE ABDUS-SALAAM: I mean besides the - -  
23 - the description of the car. There was no - - -  
24 there was no description of the activity which led to  
25 the conclusion that the driver's either sick or

1           intoxicated. That's what I'm asking.

2                   MR. TAYLOR: Yeah, but these kind of calls,  
3           Your Honor, made - - - are being made right now where  
4           the police are responding to these kind of  
5           dispatches. And the kind - - - type of calls that  
6           are being made, they don't always have all the full -  
7           - - further particulars. But when you combine it  
8           here with what the deputy saw - - - it's borne out,  
9           too, in the record, too. And - - - but it's - - -  
10          it's - - - it's not part of the argument here in the  
11          sense that her statement is part of the record, and  
12          she indicated what she saw when she called in this  
13          particular 911 call.

14                   JUDGE ABDUS-SALAAM: Was there something  
15          more than what you said?

16                   MR. TAYLOR: She described - - - yeah, she  
17          described that the vehicle was going into on - - - or  
18          was crossing the double - - - was crossing the white  
19          and the yellow lines. That's in her statement, which  
20          is in the record. And there's an argument here that  
21          perhaps that witness should have been called, as  
22          well.

23                   JUDGE ABDUS-SALAAM: But that - - - but  
24          that's the problem that I pointed out to your  
25          adversary. That was not part of - - - that wasn't

1 part of the record below. It was only here.

2 MR. TAYLOR: Well - - -

3 JUDGE ABDUS-SALAAM: That - - - that only  
4 came out here, right?

5 MR. TAYLOR: Under - - - under this court's  
6 decision in People v. Parris, we're not required to  
7 put - - - to call each witness that potentially might  
8 be a trial witness, for example, at a later time.  
9 For reasonable cause we have to call the witnesses  
10 that are going to set forth the good-faith basis for  
11 the deputy doing - - -

12 JUDGE ABDUS-SALAAM: Even her affidavit, or  
13 whatever she gave, was not before the trial court,  
14 was it?

15 MR. TAYLOR: It was not. But then we still  
16 had the officer that saw those traffic violations and  
17 it was corroborated by what he saw. Thank you, Your  
18 Honors.

19 CHIEF JUDGE LIPPMAN: Okay, thanks,  
20 counselor.

21 Rebuttal, counselor?

22 MR. FIANDACH: Yeah, a couple of points,  
23 number one, if we're looking at the - - - the  
24 situation of - - - of whether this - - - we're here  
25 talking about Aguilar-Spinelli because that - - -

1 that witness wasn't presented at the hearing. That  
2 witness clearly could have been presented at the  
3 hearing, and failure to do that has got us into this  
4 situation where now the - - - the People are calling  
5 for an abrogation of the Aguilar-Spinelli test.

6 I find it very interesting that my noble  
7 adversary says that he could not stop him for the  
8 traffic violation on its own, because, in essence,  
9 what does that do? That takes us to the tip, and now  
10 we have to look at the tip. And what do we have in  
11 the tip? We have a sick or intoxicated motorist,  
12 uncorroborated, no reliability, no - - - no showing  
13 of a basis for that tip. That's all we have. So if  
14 - - - if he agrees that he just could not have  
15 stopped him for the traffic violation alone, we have  
16 to look at the level of this tip. We have to look at  
17 how lil - - - little was contained in there. We have  
18 to look at the possibility of malevolent use of - - -  
19 of the - - - of the 911 system. There - - - I - - -

20 I like Just - - - Just - - - Justice  
21 Pigott's question about, you know, I think the  
22 driver's drunk. In that case, yes, but there was no  
23 corroboration observed by Deputy - - - by - - - by  
24 Deputy Cunningham, and I would further point out that  
25 the findings of fact below merely said hasty or wide

1 right turn. Below the court - - - trial court did  
2 not find that he nearly went into the other lane or  
3 crossed any pavement markings or anything like that.  
4 The findings of fact below were simply that it was a  
5 hasty or wide right turn. And that was it.

6 CHIEF JUDGE LIPPMAN: Okay, counselor.

7 MR. FIANDACH: Okay, thank you.

8 CHIEF JUDGE LIPPMAN: Thank you, appreciate  
9 it.

10 MR. FIANDACH: Yep, thank you.

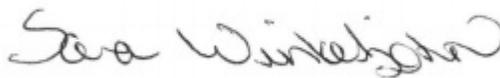
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Costandino Argyris, No. 198, and People v. John A. DiSalvo, No. 199, and People v. Eric R. Johnson, No. 210 were prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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