IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. SHAUNTREL BROWN, Defendant/Petitioner	No. S218993 Ct. App. No. D064641 (Trial Ct. No.: SCS264898)

PETITIONER'S OPENING BRIEF ON THE MERITS

The Honorable Ana Espana

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ISSUES PRESENTED

There are two issues in this case. First, are facts known only to a civilian 911 operator properly imputed to an officer in the field under the collective knowledge doctrine? Second, if an officer activates his overhead lights before approaching a driver in an already parked vehicle, is the contact a consensual encounter? Established case law has answered both questions in the negative. The Fourth District Court of Appeal disagreed by supporting a detention based upon the following facts:

At 10:30 at night, an unnamed tipster called 911 to report fighting in public; he overheard someone claim to have a loaded gun. The caller verified his address, but was unable to give descriptions of the participants because the disturbance was two houses to the north in the alley. He could not move closer without dropping the call from his wireless handset. He guessed from

the shadows and sounds at least four African-Americans were involved, and he believed they drove large American made cars.

Deputy Sheriff Josh Geasland received a fraction of the information: a fight disturbance at an address involving four subjects, "somebody may have said something about a loaded gun." He understood the address he received gave the location of the fight because the call was from an anonymous source. Deputy Geasland received no description of the suspects, no predictions they would leave, and heard nothing about a vehicle.

Deputy Geasland entered the alley about three minutes after the call and saw one person driving a car towards him from the given location. He asked the passing driver if he saw a fight, but the driver either ignored him or failed to hear him. Deputy Geasland then searched the length of the alley with negative results. He did not contact the occupants at the given address, but drove around the neighborhood. He saw the same vehicle that had passed him in the alley parked on the street with its brake lights on. Deputy Geasland pulled in behind the car and activated his overhead lights and contacted the driver, Mr. Brown. After Deputy Geasland asked Mr. Brown about a fight, he noticed Mr. Brown was intoxicated. Mr. Brown was arrested for driving under the influence of alcohol after being evaluated by another deputy. Mr. Brown challenged the detention in a motion to suppress. The trial court denied the motion, holding the deputy had a reasonable suspicion to detain because Mr. Brown was seen leaving the reported location of the fight. The Court of Appeals affirmed, but also added the initial encounter was consensual despite the deputy's use of his overhead lights. Petitioner petitioned this court for a review of those holdings.

STATEMENT OF THE CASE

Petitioner Shauntrel Brown was charged with felony driving under the influence of alcohol with three prior convictions and driving with greater than 0.08 gr% of alcohol with 3 prior convictions. (See Clerk's Transcript (C.T.) pp. 1-3.) He contested the detention that lead to the discovery of his intoxication by a motion to suppress. (C.T., pp. 43-48.) Following the denial of the motion, Mr. Brown pleaded guilty to the second court, admitted the three prior convictions, and received a sentence of 2 years in local prison. (C.T., pp. 97-101.)) Mr. Brown appealed the denial of suppression motion to the Fourth District Court of Appeal, Division One. On April 22, 2014, that Court affirmed the judgment in an unpublished opinion. On May 8, 2014 the Attorney General requested publication. On May 14, 2014 the Court of Appeal ordered the opinion to be certified for publication. On August 20, 2014, this Court granted review.

STATEMENT OF FACTS

A. Evidence Presented in the Trial Court

On May 26, 2013, at or close to 10:37 p.m., Deputy Geasland received a dispatch concerning a fight in Imperial Beach. (Reporter's Appeal Transcript Volume 2 (2R.T.), 10-11.) Although it was played for the court, a transcription of the dispatch tape had not admitted into evidence. Petitioner requested the record on appeal to be augmented with the 911 tape, the request was granted by the Court of Appeal on December 24, 2013. During the motion hearing the prosecution recited the relevant portion of the dispatch recording as follows: "415 Fight, I.B., 1169 Georgia, south of Coronado, North of Fern in the alleyway. Four subjects" (2R.T., 7.) "Somebody may have said something about a loaded gun." (2R.T., 8.) Deputy Geasland confirmed at the motion hearing that he only knew four or

more people were fighting in an alley and a loaded gun was possibly involved. (2R.T., 10-11.)

Deputy Geasland arrived at the south entrance of the alley 3 minutes after the call and noticed the headlights of a car approaching him. (2R.T., 11.) Seeing no evidence of a fight or any other people around, Deputy Geasland tried to yell at the driver as he passed him: "Hey! Did you see a fight? Anything about a fight?" (2R.T., 11.) Deputy Geasland received no response, and he thought the driver either did not hear him because his window was rolled up, or simply ignored his questions. (2R.T., 11, 12.) Deputy Geasland drove north and turned around in the alley, losing sight of the vehicle. (2R.T., 11.) Deputy Geasland testified that he had no information concerning the fight, had no description of those involved, and heard no mention of a car or anyone leaving in a car. He did not observe anyone fighting when he arrived. (2R.T., 21.) He believed the call was anonymous, so he never contacted the given address to investigate further. (2R.T., 22.)

Deputy Geasland felt if there had been a fight and if a gun had been involved, then the driver that passed him in the alley might have been involved, possessed a gun, or been injured. (2R.T., 11, 25.) Deputy Geasland drove around the area until he saw the same vehicle that passed him in the alley parked on Georgia Street with its brake lights on. (2R.T., 11-12.) He did not observe the vehicle commit any moving violations. (2R.T., 23.) Deputy Geasland activated his lights and pulled in behind the vehicle in order to see if the driver was involved in a fight, and to check on his welfare. (2R.T., 14, 17.) After obtaining Petitioner's driver's license, Deputy Geasland observed red watery eyes, mumbled speech, and the odor of an alcoholic beverage. (2R.T., 17.) Petitioner seemed flustered, "amped

up," and upon questioning, admitted that there had been a lot of "drama" in the alley. (2R.T., 18.) Deputy Geasland called for a traffic officer, Deputy Jackson, to complete the DUI evaluation. (2R.T., 19.)

There was some dispute as to whether Deputy Geasland recalled the events correctly. Deputy Geasland did not write a report until July 22, 2013[1], and appeared to have written his report in anticipation of the evidentiary hearing for the motion to suppress. (2R.T., 23.) Defense counsel offered Deputy Jackson's prior testimony from the Preliminary Hearing Transcript (P.H.T.) to impeach Deputy Geasland's recollection that the vehicle was already stopped before the police vehicle's lights were activated. (2R.T., 26.) According to the prior testimony, Deputy Jackson took a report from Deputy Geasland who had spotted a white Chevrolet Impala driving away from the scene, assumed the car had been involved, and initiated a traffic stop and then contacted the driver. (2R.T., 26; P.H.T., 6.) In response to the question: "Okay. As far as you know, they had responded to the scene to follow Mr. Brown's car that was leaving, is that your understanding?" (2R.T., 27; P.H.T. 15.) Deputy Jackson answered: "My understanding from Deputy Geasland is that as he is making a left turn to come into the alley, because the fight actually occurred in the alley behind Georgia—between 14th and Georgia—Imperial Beach has alleys everywhere—so they actually went down Fern. As he is making a left turn on Fern to come into the alley, Deputy Palencia is now driving in the other direction. So he turned around and stopped the vehicle as it was going northbound on Georgia." (2R.T., 27; P.H.T. 15.)

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[1] This is the same date of the Prosecution's Motion in Opposition. (C.T., 55.)

The court resolved the disputed testimony by confirming with Deputy Geasland that his activation of his overhead lights constituted a detention even if the suspect vehicle car was already stopped. (2R.T., 29.)

The trial court made a finding that Deputy Geasland's version of events was credible. (2R.T., 36.) The court opined that there was a reasonable suspicion to detain the defendant, "not only based upon the call and the tip about the fight, but after approaching the vehicle then seeing, sounded fairly immediately, symptoms of alcohol use." (2R.T., 38.)

The 911 tape was received into evidence, and the court referred to the timing of the officer's response: "And by the end of the 911 tape, which wasn't very long at all, less than 3 minutes about, I think that amount of time to respond, and you hear the police officer responding. There is a police car. And in the whole, I suspect that was Officer Geasland's car, because he was the only car—that I understand from his testimony—that responded to this fight call. So it was a very short time period of time from the call to his response."

Petitioner pleaded guilty immediately after the motion was denied. (2R.T., 38-44.)

1. Facts from the 911 Transcript. (911.)

Although the caller did not identify himself, the 911 Dispatcher was able to determine the caller's address as 1169 Georgia Street and verify it with the caller. (911, 2.) The caller was hesitant to say he could see the fighters because it was dark. (911, 2.) The caller states "One of them says, that hey, he had, it was, it was the gun was loaded." (911, 2.) The caller identified it as a male voice. (911, 3.) The caller stated that he could hear fighting and asked the operator if she could hear the screams. The 911 operator said she could hear it. (911, 3.) The 911 operator confirmed with

the caller that he heard one person say they had a gun and it was loaded. (911, 3.) The caller stated that a woman said "don't touch my boyfriend" and guessed that there were at least four or more participants. (911, 3.) The caller stated that there were a lot of cars parked in the alley, but no one sounded injured. (911, 3.) The caller stated the location of the fight was two houses north of his location. (911, 4.) He then said that somebody was getting in a car, but he could not identify the person. (911, 5.) The caller stated that he could not get a closer look without losing the reception on his wireless phone. (911, pp. 5-6.) The caller stated the fighters were "African American guys that drive one of those big ones." (911, 6.) He then stated no one got into a car, but cars were facing Fern Avenue. (911, 6.) The caller then said that the police have arrived. (911, 6.)

2. Facts from Exhibit's 1 and 2.

Exhibit 1 is a picture of the entrance of the alley. It is described as the entrance on Georgia Street. (2R.T., 16.) However, by Deputy Geasland's testimony of traveling north in the alley, it should be described as entrance to the alley from Fern Avenue. (2R.T., 11.)

Exhibit 2 is an overhead satellite view of the area. The alley is actually T-shaped, with additional entrances from Georgia Street on the west and 14th Street to the east bordering an apartment complex to the north. There approximately 27 parking spaces and about 24 garages visible in the photograph, with more than a dozen cars parked in the alley.

B. Arguments and Holding on Appeal

On appeal, Mr. Brown argued his detention was not justified by the facts known to Deputy Geasland, who knew nothing about the origin of the call, only that it was an anonymous tip. Deputy Geasland could not

corroborate a fight in the alley, and Petitioner's mere presence in the alley would not lead to a reasonable suspicion of criminal activity. (See Mr. Brown's Opening Brief in the Court of Appeal, pp. 7-15.) The California Attorney General claimed the anonymous tip should have been relied upon because the mention of a possible gun created exigent circumstances, and thus Petitioner's location in the alley within minutes of the call provided enough corroboration to justify the detention. (See Respondent's Brief in the Court of Appeal (RB-DCA), pp. 5-9.) The People briefly argued that it was unclear if Deputy Geasland detained Mr. Brown, because the vehicle was already pulled over and thus there was no restraint on liberty. (RB-DCA, p. 6.) The People argued the intrusion upon Mr. Brown's liberty was minimal and tailored to the important government interest of ensuring public safety. (RB-DCA, p. 8.)

After reviewing the briefs and the record in the case, the Court of Appeal requested counsel file supplemental letter brief to respond to two questions: What effect did the opinion in *California v. Hodari D.* (1991) 499 U.S. 621 have on the question whether appellant was detained by the officer's action in activating the overhead emergency lights? Is the reasoning in *People v. Bailey* (1985) 176 Cal.App.3d 402, 405, still valid in light of *Hodari D.*?

Mr. Brown argued the United States Supreme Court held in *Brendlin v. California* (2007) 551 U.S. 249 that a person in a stopped car need not demonstrate a positive acquiescence to authority, but is detained merely by remaining at the scene. (See Appellant's Letter Brief (ALB), p. 3.) Mr. Brown then argued no California cases had overruled or challenged the reasoning in *Bailey* after the decision in *Hodari D.* Mr. Brown listed numerous out of state holdings that continued to uphold the reasoning in

Bailey, no reasonable person would feel free to leave once an officer has activated his overhead lights. (ALB, pp. 3-6.)

The People argued overhead lights did not convey a show of authority because Mr. Brown's vehicle had already stopped. Under a totality of the circumstances analysis, the lights merely conveyed the officer's presence and his desire to speak to the driver. The lights could serve multiple purposes: to illuminate the area, alert other officer's to his location, and alert passing motorists to an officer's presence in the street. (See Respondent's Letter Brief (RLB), pp. 2-3.) The People also argued that Mr. Brown did not demonstrate any submission to any show of police authority because he had no opportunity to flee. (RLB, pp 3-4.)

The unanimous opinion from the Court of Appeal held Mr. Brown was not detained because whether an officer activates overhead lights, high beams or spotlights, it merely conveys an officer's desire to speak to the driver. A citizen must show that he yielded to that show of authority before the encounter would be deemed a detention. (Typewritten Opinion of the App. Div., p.11, Exhibit A to the petition for review, hereafter cited as Exhibit A, p.11.)

The Court also held a responding deputy does not need to personally assess the reliability of the person who makes a 911 call. The call was entitled to greater weight than an anonymous tip because it reported potentially violent activity involving a firearm. The deputy was entitled to act on the dispatcher's information as reliable observations of a percipient witness. The deputy was justifiably suspicious and concerned Mr. Brown may have been injured or involved in the fight because Mr. Brown was leaving the exact location of the reported fight and failed to respond to the deputy's questions when he passed him. The deputy's suspicions were

heightened when he discovered Mr. Brown's car parked along the side of the road with its brake lights on, which gave him sufficient facts to support reasonable suspicion that criminal activity may be afoot. (Exhibit A, pp. 7-8.)

ARGUMENT AND AUTHORITIES

Deputy Geasland believed the call was based upon an anonymous tip. In contrast, the dispatch operator knew the call came in on a land line, confirmed the address with the caller, and could overhear some shouting. The dispatch operator learned that there was a woman involved, at least four African Americans, and a large American car was leaving the scene. Deputy Geasland had no information about a vehicle, and his only description of the participants was numerical, four subjects. Deputy Geasland made his decision on hunches. There might have been a fight, and if there was a fight, someone coming from that direction might have been involved.

The Court of Appeal refuses to base the totality of circumstances on what was known by the deputy when he decided to detain Petitioner, but dogmatically states the call was reliable as determined by the 911 operator and the reliability of the call is tempered by public safety concerns. This is in contrast to current California law which states fact known, but not communicated, by a civilian 911 operator should not be imputed to an officer in the field.

The Court of Appeal held Petitioner did not demonstrate that he yielded to the show of authority and therefore there was no detention, but no reasonable person sitting in a parked car would feel free to leave if a police cruiser pulled in behind him and activated his emergency lights. Law abiding citizens signal submission to a detention by simply remaining parked and waiting for the officer to approach. This begs the question: What must a

stopped person do to demonstrate a submission to the show of authority besides wait?

I.

DEPUTY GEASLAND RECEIVED NO FACTS THAT WOULD LEAD HIM TO REASONABLY SUSPECT MR. BROWN WAS INVOLVED IN CRIMINAL ACTIVITY.

Deputy Geasland thought he was responding to an anonymous tip; he did not know the source of the call nor was he provided any description of suspects. Deputy Geasland was only told "415 Fight, I.B., 1169 Georgia, south of Coronado, North of Fern in the alleyway. Four subjects" (2R.T., 7.) "Somebody may have said something about a loaded gun." (2R.T., 8.) But the dispatcher failed to give the witness's phone number, failed to state the participants were African-American, and failed to mention large American vehicles were possibly involved. The dispatcher also confused the location of the fight with the tipster's address. When Deputy Geasland saw Mr. Brown driving from the area of the reported disturbance, he did not immediately pull him over because there was nothing suspicious about a man minding his own business while slowly driving down a heavy populated alley. Deputy Geasland did proceed down the length of the alley, but was unable to corroborate anything about the tip by his observations. He saw no signs of a fight, no blood, no shell casings, no fleeing suspects, and no concerned citizens. He heard no gunshots, and he smelled no gun smoke. Deputy Geasland did not contact anyone at the given address because he thought the call was anonymous. (R.T., 22.) This case should not have been decided based upon what was known by the 911 Operator, but by what was known by Deputy Geasland at the time he made is detention.

While the probable cause requirement for a warrant requires a "fair probability that contraband or evidence of a crime will be found," reasonable suspicion is less demanding and "can arise from information that is less reliable than that required to show probable cause." (*Alabama v. White* (1990) 496 U.S. 325, 330.) "Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors -- quantity and quality -- are considered in the totality of the circumstances . . . ." (*Id.*) "Thus, if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable." (*Id.*) Several factors can be used to determine the reliability of an informant's tip. First, a known informant's tip is thought to be more reliable than an anonymous informant's tip. (See *Florida v. J.L.*(2000) 529 U.S. 266 at p. 271; *Adams v. Williams* (1972) 407 U.S. 143, 146–47.) Second, an informant with a proven track record of reliability is considered more reliable than an unproven informant. (*See Adams,* 407 U.S. at 146-47.), Third, the informant's tip is considered more reliable if the informant reveals the basis of knowledge of the tip -- how the informant came to know the information. (See *Spinelli v. United States* (1969) 393 U.S. 410, 416.) A tip that provides detailed predictive information about future events that is corroborated by police observation may be considered reliable, even if the tip comes from an anonymous source. (See *White, supra*, 496 U.S. at 329-30; *Draper v. United States* (1959) 358 U.S. 307, 313.) Predictive information that reveals a detailed knowledge of an individual's intimate affairs is more reliable than predictive information that could be observed by the general public. (S*ee White, supra*, 496 U.S. at p. 332; *J.L., supra*, 529 U.S. at p. 272.) Self-verifying detail is considerably more valuable if it relates to

suspicious activities than if it relates to innocent activities. (See *Illinois v. Gates* (1983) 462 U.S. 213, 245.) It is also significant if the informant was an actual eyewitness; able to give an explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, which would entitle the tip to greater weight than might otherwise be the case. (*Illinois v. Gates, supra,* 462 U.S. at 234; *Navarette v. California* (2014) 134 S.Ct. 1683, 1689.)

In this case, the 911 call was traceable, but Deputy Geasland believed the caller to be anonymous, and no indications of reliability were provided by the dispatcher. Deputy Geasland could not believe the caller had a proven track record, and with no descriptions provided, there was nothing to indicate the tipster was an eyewitness. There was no description of the firearm, so there was no indication the tipster personally observed a weapon. In fact, the call suggested otherwise, that someone may have mentioned a firearm. The tipster did not predict any future events. In short, under the well-established criteria described above, there were no facts that would lead Deputy Geasland to believe the tip was reliable.

In *Alabama v. White, supra,* 496 U.S. at p. 332 the responding officers had far more corroborating facts than Deputy Geasland, and the Supreme Court labeled it as a "close case." Unlike the instant case, the responding officer had the full information because he received the tip directly from the unidentified caller, not second hand through an operator. The officer understood Vanessa White would be leaving apartment 235-C of the Lynwood Terrace Apartments at a particular time in a brown Plymouth Station wagon with the right taillight lens broken and would then drive to Dobey's Motel carrying an ounce of cocaine. The officer immediately responded, observing Ms. White leave building 235 at the described time,

enter the brown station wagon and drive a direct route towards Dobey's Motel. (*Id.* at 327.) The independent corroboration by the police of significant aspects of the informer's predictions imparted some degree of reliability to the other allegations made by the caller. (*Id.* at 332.) In this case, Deputy Geasland understood a fight between four undescribed individuals was ongoing and one of them mentioned a gun. Upon his arrival he saw no fight; only a person driving down the alley away from the location. There was no description of Mr. Brown. There was no corroboration of a fight. There was no predictive information about Mr. Brown relayed to Deputy Geasland. There was no description of the car Mr. Brown was driving made to Deputy Geasland. There was no predictive information. If *White* was a "close case," the instant case was not even on the map.

The Court of Appeal deemed the call to be reliable because the address of the caller could be established and the 911 operator could hear shouts from the alleged fight. (See Exhibit A, p. 7.) The Court seized upon Petitioners concession that the call appeared reliable to the operator, but ignored the rest of the factors relied upon in *White*. The Court of Appeal appeared to impute facts only known to the dispatch operator to Deputy Geasland:

> Brown argues that since the deputy did not personally hear the call the deputy could not personally assess the reliability of the informant, thus the deputy could not rely on it.
> Understandably Brown cites no authority for the proposition that an officer, acting on directions from a dispatcher, must personally assess the reliability of the person who made the original 911 report. (See Exhibit A, pp. 7-8.)

Mr. Brown did cite authority. Established case law states that only circumstances known or apparent to the officer must include specific and

articulable facts causing him to suspect that: (1) some activity relating to crime has taken place or is occurring or about to occur; and (2) the person he intends to stop or detain is involved in that activity. (*In re Tony C.* (1978) 21 Cal.3d 888, 893.) "[W]hether a search is reasonable must be determined based upon the circumstances known to the officer when the search is conducted and is consistent with the primary purpose of the exclusionary rule—to deter police misconduct." (*People v. Sanders* (2003) 31 Cal.4th 318, 332.)

In his opening brief, Mr. Brown cited *People v. Jordan* (2004) 121 Cal.App.4th 544, 560 (*Jordan*), as authority to emphasis Deputy Geasland's evaluation of the facts, including their reliability, should have been evaluated to see if a detention was based upon a reasonable suspicion. According to *Jordan*, reviewing courts should constrain the analysis of what provides reasonable suspicion to detain to the information actually received by the officers in the field. (See *Jordan, supra,* 121 Cal.App.4th at 560, fn. 8.) The *Jordan* court relied upon persuasive authority as put forth by *U.S. v. Colon* (2d Cir. 2001) 250 F.3d 130 which held the application of the imputed knowledge doctrine requires that at some point along the line, some law enforcement official, or perhaps some agglomeration of such officials, must possess sufficient information to permit the conclusion that a search or arrest is justified. A civilian 911 operator does not meet those criteria. (*Colon* at p. 136.) The 911 Operator in this case was never qualified in the record to be anything but a civilian employee. The prosecution never established the operator's ability to determine the reliability of the call and never argued Deputy Geasland could rely upon her assessments of reliability. (2R.T., 5-6.)

Deputy Geasland claimed he saw Mr. Brown coming from "the exact address where the fight call came out." (R.T., 13.) Later, Deputy Geasland

stated the car was leaving from the same area. (R.T., 25.) But Deputy Geasland was not given the location of the fight. According to the 911 transcript the fight was two houses to the north of the caller. The dispatcher gave the address of the caller as the address of the fight, so the information provided to Deputy Geasland was not only incomplete, but misleading. Deputy Geasland did not reasonably believe Mr. Brown was ignoring him, because he admitted that his questions— shouted between passing cars without the windows down—were probably not heard. The trial court did not base its decision on these facts to support the detention. But the Court of Appeal, through its independent review of the facts, found that Deputy Brown's observation of Petitioner leaving the "exact location" of the fight, and failure to respond to the shouted questions provided a reasonable suspicion of criminal activity. (Exhibit A, 8.) Since Deputy Geasland did not see Petitioner leaving the exact address of the fight, the Court of Appeal should not have added any significance to the "exact location" analysis. Not only was the deputy wrong, there is no good faith exception for misinformation relayed by a police dispatcher. This was not a clerical error of the court; the mistake was wholly within the police department. "If police are collectively at fault for an inaccurate record that results in an unconstitutional search, then exclusion 'is consistent with the deterrence goal of the exclusionary rule.'" (See *People v. Willis* (2002) 28 Cal.4th 22, 48.) The Court of Appeal should not have factored in Mr. Brown's failure to respond to Deputy Geasland's shouted question without some evidence that Mr. Brown heard the question. If Mr. Brown looked at the officer or changed his expression, it would be more indicative of a refusal to answer. The Court of Appeal added irrelevant and mistaken facts into the totality of circumstances determination.

Mr. Brown was driving down the egress for parking in a densely populated block with his window rolled up. Since Mr. Brown and his vehicle did not match any description associated with the fight, there was nothing suspicious about him leaving a heavily populated beach town alley at 10:40 p.m. during a Memorial Day weekend.

A review of the facts in *Jordan* and *J.L.*, cases in which the court found no facts to justify a detention, demonstrates Deputy Geasland had even less facts in this case. In *Florida v. J.L.* (2000) 529 U.S. 266 (*J.L.*), the United States Supreme Court found an anonymous tip was not sufficiently corroborated by police before they detained the suspect. In *J.L.* the tip described a teenaged suspect who was standing on a street corner. The tip alleged the minor had a gun under his shirt. Police accosted the minor and frisked him without any information beyond the tip itself. (*J.L.* at p. 268.) The Supreme Court determined that the anonymous call, although it provided a great description of the suspect, provided no basis for the knowledge of the gun, and provided no predictive information the police could use to test the informant's knowledge or credibility. (*J.L.*, at p. 271.)

In *Jordan* an anonymous tipster made a 911 call to a police operator stating there was a man in the park with a concealed handgun. The tipster gave a detailed description of the suspect, the type of gun and the exact pocket the gun could be found, and stated the suspect was threatening to shoot people. (*Jordan* at pp. 548-549.) The dispatcher relayed the description of the man and his clothing, the fact that the gun was in his right front pocket, and his location. (*Jordan*. at 550.)

The *Jordan* court noted that the 911 operator did not ask the informant how he obtained the information. The dispatcher also failed to inform the officers of more specific facts that would have enabled them to

assign more reliability to the tip. For instance, the description of the suspect could have included that he was bald, light-skinned, and in his late 30's. This could have assured the officers that they were observing the correct suspect. The dispatcher failed to include allegations that the suspect had been threatening to shoot people, which would have added exigency to the call and lessoned the need for more reliability. The dispatcher failed to mention a detailed description of the gun: "small, like a .22, .25" which would imply the tipster had actually seen the gun. (*Jordan* pp. 560, 564, fn. 8.) As described above, the court refused to include those reliability factors because a proper analysis relates only to the facts actually known by the officer who detained the suspect. (*Id.*) The *Jordan* Court held the facts known by the officer were indistinguishable from those facts known by the officers in *Florida v. J.L.*, but they acknowledged the call had the potential for being more reliable because it the call came through the 911 system and was recorded. (*Jordan* at 563.)

The police who responded in *J.L.* and *Jordan* had much more reliable information than Deputy Geasland had in the present case. The police in *J.L.* and *Jordan* received information from an actual eye-witness with a detailed description of the suspect and his clothing. They were able to confirm the existence of the suspects at the scene. Deputy Geasland was given a somewhat accurate location of a fight, but no descriptions of the participants—only that it involved at least four individuals. He was unable to confirm a fight and did not see any pedestrians. The police in *J.L.* and *Jordan* were told that a specifically dressed black male had a gun in his pocket. Deputy Geasland was told somebody may have said something about a loaded gun. Despite the 911 operator's belief the tipster could be identified, and belief she heard screaming associated with a disturbance, it

did not help Deputy Geasland in his analysis as to the reliability of the tip. He had far less information than in *Jordan* and *J.L.*— there was not enough information to justify Mr. Brown's detention.

II.

THERE WAS NO GRAVE AND IMMEDIATE RISK TO THE PUBLIC.

In this case, the possibility of a gun was overheard, but there were no reports of anyone seeing a gun, using a gun, brandishing a gun, or pointing a gun. The dispatcher carefully choose her words: "Somebody may have said something about a loaded gun." (R.T., 8.) The Court Appeal held the call was entitled to greater weight because it reported potential violent activity involving a firearm. (Exhibit A, p. 8.) A proper analysis would recognize the callout was for a "415 Fight." This is a disturbance of the peace call: "Any person who unlawfully fights in a public place or challenges another person in a public place to fight." (See Pen. Code, § 415(1).) This is such a minor misdemeanor, that it can be reduced to a non-criminal infraction. (See Pen. Code, §§ 17(d), 19.8.) Disturbing the peace hardly compares to a callout for a serious or violent felony. A more accurate description would be that the officer received a disturbance of the peace call in which a gun may have been mentioned but never seen.

The "totality of the circumstances" analysis includes a public safety factor: a greater threat to public safety can justify a detention when the tip is less reliable. The United States Supreme Court acknowledged that exigent circumstances, such as a report of someone carrying a bomb, might justify a stop and search "even without a showing of reliability." (*J.L., supra,* 529 U.S. at pp. 273.) But the *J.L.* Court rejected the notion that there should be an "automatic firearm exception to our established reliability analysis." (*Id.*at

p. 272.) This Court analyzed the *J.L.* decision and adopted the holdings of other jurisdictions to conclude that under exigent circumstances with public safety concerns reasonable suspicion can arise from less reliable information than required for probable cause, including an anonymous tip. (*Wells, supra,* 38 Cal.4th at p. 1083; *People v. Dolly, supra* (2007) 40 Cal.4th 458, 463.) "[A] citizen's tip may itself create a reasonable suspicion sufficient to justify a temporary vehicle stop or detention, especially if the circumstances are deemed exigent by reason of possible reckless driving or similar threats to public safety." (*Wells, supra,* 38 Cal.4th at p. 1083; *Dolly, supra* 40 Cal.4th at p. 464.) A report of a possibly intoxicated driver weaving all over the roadway posed "a far more grave and immediate risk to the public than a report of mere passive gun possession." (*Wells, supra,* 38 Cal.4th at p. 1087.)

When there are public safety concerns, detentions are upheld when a responding officer is able to rapidly confirm details about a tip that included relatively precise and accurate descriptions given by the tipster regarding the vehicle type, color, location, and direction of travel. The officer's confirmation of these details enhances the reliability of the tip and decreases the risk of harassment by a prank caller. (*Wells, supra,* 38 Cal.4th at p. 1088.) This public safety analysis was reinforced in *Dolly* when the suspect actually pointed a revolver at the caller, which was deemed far more serious than the simple possession of a gun in *J.L.*(*Dolly, supra,* 40 Cal.4th at p. 465.) The *Dolly* court agreed that there was no comparable public safety concern in *Jordan* because the responding officers only suspected the defendant of having a concealed handgun. (*Dolly,* p. 470.)

In this case, the caller did not see a gun, and did not hear anyone being threatened with a gun. This is a far cry from the facts in *Dolly*, where the caller himself had received the threat and saw the gun. (*Dolly*, p. 465.) In

Dolly the tipster-victim provided a firsthand, contemporaneous description of the crime, as well as an accurate and complete description of the perpetrator and his location; the details of which were confirmed within minutes by the police when they arrived. (*Dolly* at p. 468.) Whereas in *J.L.* the informant "neither explained how he knew about the [concealed] gun nor supplied any basis for believing he had inside information" (*J.L.*, *supra*, 529 U.S. at p. 271.)

Deputy Geasland had driven down the alley and saw no signs of a fight: no wounded, no weapons, no shell casings, no odor of gunpowder, no blood, no screams, no crying, and no one fleeing the area. Deputy Geasland speculated that Mr. Brown had been involved in the fight, and had a hunch that he possessed a gun. (R.T. pp. 11,13,14, 25) He then conjured up the possibility that Petitioner might have been injured, but he gave no articulable facts of why he would think so. (R.T., 14, 25.) Deputy Geasland did not see anything unusual about the driver when he first saw him: no look of fear or anguish, no nervousness, no wincing in pain, no furtive movements, no fleeing, and most importantly, no calls for help. Deputy Geasland saw nothing unusual about the vehicle when he pulled up behind it: it was not stopped in the middle of the street, it had not rolled up upon the curb, and the driver was not slumped down in his seat. There was nothing to indicate any exigent circumstances which justified a detention of Mr. Brown.

III.

MR. BROWN WAS DETAINED WHEN DEPUTY GEASLAND ACTIVATED HIS OVERHEAD LIGHTS.

In 1968, in *Terry v. Ohio,* the United States Supreme Court stated a person is seized "when an officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." (*Terry v. Ohio* (1968) 392 U.S. 1, 19 n. 16.) Later, the Court clarified that a seizure occurs "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. (See *United States v. Mendenhall* (1980) 446 U.S. 544, 554; *INS v. Delgado* (1984) 466 U.S. 210, 215.) In California, a detention occurs any time an officer activates his emergency lights. "A reasonable person to whom the red light from a vehicle is directed would be expected to recognize the signal to stop or otherwise be available to the officer. Any reasonable person in a similar situation would expect that if he drove off, the officer would respond by following with red light on and siren." (See *People v. Bailey* (1985) 176 Cal.App.3d 402, 405 (*Bailey*); accord, *People v. Perez* (1989) 211 Cal.App.3d 1492, 1495.) In *Bailey*, an officer pulled in behind a parked car in a parking lot. He smelled marijuana as he approached the car, so he requested, and received, consent to search the car. (*Bailey, supra*, 176 Cal.App.3d at p. 404.)

The Court of Appeal relied upon the Supreme Court's decision in *California v. Hodari D.* (1991) 499 U.S. 621 (*Hodari D.*). In that case, police officers wearing jackets which displayed the word "police" approached a group of young males. (*Id.* at p. 622.) Upon seeing the approaching officers, the group moved away. Police called out to the group that they were police officers and demanded the young men to stop.

Notwithstanding the officer's clear showing of authority and their demands that the group stop, Hodari D. took flight. Police gave chase and just prior to being tackled by a police officer, Hodari D. jettisoned a package containing narcotics. (*Id.* at pp. 622-623.) The Supreme Court concluded that a seizure under the Fourth Amendment only occurs when a person is physically prevented from leaving, or when the person yields to a showing of police authority. (*Hodari D., supra,* at pp. 626-629.) The Court of Appeal concluded in this case that Mr. Brown did nothing to yield to the police authority, and was not seized until after Deputy Geasland observed his intoxication.

Petitioner respectfully disagrees. Applying *Mendenhall*, Petitioner was seized when the deputy activated his emergency lights. This was a show of authority because it communicated to any reasonable person that Petitioner was not free to leave.

According to the United States Supreme Court reasoning in *Brendlin v. California* (2007) 551 U.S. 249, Mr. Brown was detained. In *Brendlin* a passenger in a car stopped by the police wanted to challenge the reason for the stop. The prosecution argued he was not detained because, unlike the driver, he had no ability to submit to the deputy's show of authority. The Supreme Court held "a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away. Here, Brendlin had no effective way to signal submission while the car was still moving on the roadway, but once it came to a stop he could, and apparently did, submit by staying inside." (See *Brendlin v. California* (2007) 551 U.S. 249 at pp. 261-62.)

The Fourth District Court of Appeal apparently found *Brendlin* irrelevant to this case, choosing instead to agree with the dissent in *Bailey*

which noted there was no evidence Mr. Bailey yielded to the show of authority as he was already stopped without any reference to police action. (*Bailey, supra*, 176 Cal.App.3d at pp. 407–408, (dis. opn. of Agliano, J.).) The lower court also chose to expand the reasoning of the Sixth District Court of Appeal in *People v. Perez* (1989) 211 Cal.App.3d 1492, 1495-1496 in which the court observed: "Unlike *Bailey,* the officer here did not activate the vehicle's emergency lights; rather, he turned on the high beams and spotlights only. These differences are substantial because the conduct of the officer here did not manifest police authority to the degree leading a reasonable person to conclude he was not free to leave. While the use of high beams and spotlights might cause a reasonable person to feel himself the object of official scrutiny, such scrutiny does not amount to a detention." (*Id.* at p. 1496.) The Fourth District Court of Appeal then concluded there was no material difference between a police car activating red lights or a police car directing high beams and spotlights to a stopped car. "In both cases there is an apparent showing of police presence and police interest in the occupants of the stopped vehicle. In both instances there is a clear likelihood that police will give chase if the person drives off." (Exhibit A, p. 11.)

The lower court therefore appears to have rejected binding authority from the United States Supreme Court while expanding the holdings of persuasive authority in order to abolish a long established rule that clearly informs citizens as to when they are detained. The opinion fails to define what steps are required to demonstrate a submission to authority. Instead, the court appears to categorize the deputy's encounter with the driver as an unavoidable consensual encounter. If the driver moves, he violates a failure to yield statute. If the driver remains he is not detained - yet. When would

the driver be detained? Would it be after the deputy poses questions about his activities? Would it be after the deputy asks for a license? Would it be after the deputy asks and obtains permission to search the car? None of those requests constitute a detention as long a person feels free to break the encounter. (See *United States v. Drayton* (2002) 536 U.S. 194.) So exactly when would the driver feel free to break the encounter?

There have been no cases overruling or even challenging *Bailey* in this jurisdiction. However, well after *Hodari D.* was decided, other jurisdictions have continued to rely on the reasoning in *Bailey*. (See *State v. Burgess* (1995) 163 Vt. 259, 261, 657 A.2d 202; *Hammons v. State* (1997) 327 Ark. 520, 528, 940 S.W.2d 424; *Lawson v. State* (Md. Ct. Spec. App. 1998) 120 Md.App. 610, 617-18, 707 A.2d 947, 951; *State v. Donahue* (1999) 251 Conn. 636, 643, 742 A.2d 775; *Wallace v. Com.*(2000) 32 Va.App. 497, 528 S.E.2d 739; *State v. Gonzalez* (Tenn.Crim.App.2000) 52 S.W.3d 90, 97; *People v. Cash* (Ill. App. Ct. 2009) 396 Ill.App.3d 931, 946-47 [922 N.E.2d 1103, 1114]; *State v. Willoughby* (2009) 147 Idaho 482, 489 [211 P.3d 91, 98]; *People v. Laake* (2004) 348 Ill.App.3d 346, 284 Ill.Dec. 203, 809 N.E.2d 769, 772.)

Other jurisdictions have applied a totality of circumstances test which gives great weight to the activation of emergency lights as an indication that a reasonable person would not feel free to leave, but merely activating amber warning lights might not indicate a detention if the driver needed assistance. (See *State v. Baldonado* (1992), 115 N.M. 106, 110, 847 P.2d 751; *U.S. v. Dockter* (8th Cir. 1995) 58 F.3d 1284, 1287; *State v. Morris* (2003) 276 Kan. 11, 24 [72 P.3d 570, 579]; *Commonwealth of Pennsylvania v. Krisko* (2005) 884 A.2d 296, 300–01; *State v. Williams* (Tenn. 2006) 185 S.W.3d 311, 318; *Smith v. State* (Fla. Dist. Ct. App. 2012) 87 So.3d 84, 88.) There is one case

in which the facts demonstrated a juvenile did not perceive the emergency lights because he was rolling a marijuana "blunt" as the officer approached. (See *G.M. v. State* (Fla. 2009) 19 So.3d 973, 983.)

Not one of these cases invalidated the reasoning in *Bailey* based upon the Supreme Court's rulings in *Hodari D.* Petitioner maintains that he submitted to the show of authority by simply remaining at the scene. He was detained when the overhead lights were activated and he remained where he was. By contrast, the lower court's ruling disagrees with the many cases from multiple jurisdictions that have relied on *Bailey* and its progeny as well as *Brendlin* and *Perez.*

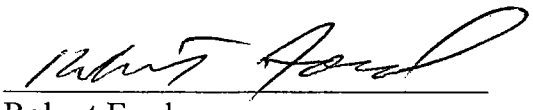
CONCLUSION

The trial court and the Court of Appeal erred in finding a reasonable suspicion to detain Mr. Brown in this case. The tip concerning a loaded gun was unreliable. There was no evidence of a fight or the presence of a gun, much less evidence that was confirmed by Deputy Geasland. The effect of the Court of Appeal's opinion is a Sub silentio overruling of 30 years' worth of precedent—a parked motorist is detained as soon as an officer activates his overhead lights. The Court of Appeals misinterpreted *Hodari D.* by requiring a driver to actively acquiesce to a detention instead of simply remaining at the scene. Petitioner respectfully requests this Court reverse the judgment and remand this case with instructions to grant the Penal Code section 1538.5 motion, and any other remedies deemed appropriate.

Dated: November 3, 2014

Respectfully submitted,

RANDY MIZE, Chief Deputy
Office of the Primary Public Defender

By: 

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CERTIFICATE OF WORD COUNT

I, Robert Ford, hereby certify that based on the software in the word processor program, the word count for this document is 7,853 words.

Dated: 11-3-14

By: _____
Robert Ford
Deputy Public Defender

PROOF OF SERVICE

CASE NAME: People v. Shauntrel Brown
Ct. of App. - 4th DCA/Div. 1 No. D064641
Trial Ct. No.: SCS264898

I, the undersigned, say: I am a citizen of the United States and a resident of the County of San Diego, State of California. I am over the age of 18 years and not a party to the within action. My office address is 450 "B" St., Ste. 900, San Diego, California 92101.

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SHAUNTREL BROWN
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I declare under penalty of perjury that the foregoing is true and correct.

Executed this 3rd day of November 2014, at San Diego, California.

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