Written by **Jack Kenny** on October 22, 2009

Roberts Blasts “Free Swerve” for Drunk Drivers

The refusal of the U.S. Supreme Court to consider an appeal by the state of Virginia may result in more deaths caused by drunk drivers, Chief Justice John Roberts warned on October 20. Roberts, joined by Justice Antonin Scalia, issued a strongly worded dissent from the court’s decision not to hear an appeal of a Virginia Supreme Court ruling that Roberts said gives drunk drivers "one free swerve" before a police officer may make an investigative stop.

The 2005 Virginia case involved a motorist in Richmond who was followed by a city police officer after the department received an anonymous tip that the driver was intoxicated. The officer approached the vehicle after the driver pulled over to the side of the road and stopped. He reported a strong odor of alcohol on the driver’s breath and testified that the suspect was watery-eyed and his speech was slurred. The driver, Joseph A. Moses Harris, Jr., was convicted in the Circuit Court of Richmond of feloniously operating a motor vehicle under the influence of alcohol. He was twice convicted previously of similar offenses.

The court denied a motion by Harris to suppress the evidence of his intoxication on the grounds that there was no reasonable suspicion to justify the police investigation, which, his attorney argued, constituted a violation of Harris’s Fourth Amendment protection against "unreasonable searches and seizures." His appeal to have the conviction overturned on that basis was denied by the state’s Court of Appeals. But in a 4-3 ruling last October 31, the state’s Supreme Court held that the anonymous tip, together with the officer’s observations prior to making the stop, did not constitute a "reasonable suspicion" sufficient to justify the investigation. The court overturned the conviction, based on the Fourth Amendment appeal. In writing for the court majority, Chief Justice S. Bernard Goodwyn noted that the officer, Claude M. Picard, Jr. of the Richmond Police Department, at no time saw the car swerve, indicating that the motorist may have been intoxicated.

The decision, said Roberts, "commands that police officers following a driver reported to be drunk do nothing until they see the driver actually do something unsafe on the road-by which time it may be too late." Roberts said 13,000 people die in alcohol-related accidents every year, an average of one every 40 minutes.

"The stakes are high," he wrote. "The effect of the rule below will be to grant drunk drivers one free

swerve before they can be legally pulled over by police. It will be difficult for an officer to explain to the family of a motorist killed by that swerve that the police had a tip that the driver was drunk, but they were powerless to pull him over, even for a quick check."

Roberts said a majority of courts have held that making investigatory stops of suspected drunk motorists based on anonymous tips does not violate the drivers' Fourth Amendment rights. The Associated Press reports that courts in Wyoming, Massachusetts, and Connecticut have made rulings similar to Virginia's, requiring that police must actually see a violation before stopping a motorist based on an anonymous tip. The Chief Justice pointed out that a number of states have programs encouraging citizens to anonymously report drunk drivers, citing the "Drunkbusters Hotline" in New Mexico and the "Report Every Drunk Driver Immediately, or REDDI program operating in several states. Rulings like Virginia's will likely undermine such efforts, he said.

While acknowledging that the officer did not personally witness the motorist violating any traffic laws, Roberts said once Picard stopped to investigate he found Harris "reeked of alcohol, his speech was slurred, he almost fell over when trying to exit the car and he failed the sobriety tests the officer administered on the scene." But the Virginia high court overturned the conviction because the officer had not observed Harris driving dangerously before making the stop. "I am not sure the Fourth Amendment requires such independent corroboration before the police can act, at least in the context of anonymous tips reporting drunk driving," Roberts wrote. The court majority gave no reason for declining to review the case, the Associated Press said. Given the volume of appeals that come to the U.S. Supreme Court the justices accept roughly one out of 100.

Along with three of his colleagues, Virginia's Chief Justice held that, given the unknown reliability of an anonymous tip, the officer needed more corroboration than he had to justify the investigative stop. The informant had given police Harris's name, described the shirt he was wearing, the make and the color of the vehicle and the location and the direction in which it was traveling. The informant also provided a partial description of the license plate number. The information proved to be accurate, but the tipster did not report any evidence to support the suspicion that Harris was driving drunk.

"The informant provided information available to any observer, whether a concerned citizen, prankster or someone with a grudge against Harris," wrote Goodwyn. Officer Picard said the motorist braked to slow down at an intersection where he had the right of way and braked again a full 50 feet before an intersection with a traffic light. After stopping for a red light, he proceeded through the intersection, then pulled over to the side of the road and stopped. Goodwyn characterized the driver's actions "unusual" rather than erratic or suspicious and found it to be insufficient grounds for the officer to stop and question the driver.

"Although limited in purpose and length of detention, an investigative traffic stop constitutes a seizure within the meaning of the Fourth Amendment, " Goodwyn wrote. While a police officer may stop a citizen on "reasonable articulable suspicion" of criminal activity, the Chief Justice said, "the crime of driving drunk is not readily observable unless the suspected driver operates his or her vehicle in some fashion objectively indicating that the driver is intoxicated; such conduct must be observed before an investigatory stop is justified."

But Justice Cynthia D. Kinser, joined by two of her colleagues, argued in dissent that the court majority had focused too narrowly on the officer's observations. "The defendant's driving behavior alone did not need to provide reasonable articulable suspicion," Kinser wrote. "The question is whether it corroborated the informant's assertion of criminal activity." The dissent noted a previous decision by

the Virginia high court, holding that "in contrast to the report of an individual in possession of a gun, an anonymous report of an erratic or drunk driver on the highway presents a qualitatively different level of danger, and concomitantly a greater urgency for prompt action." The court went on to say that "a drunk driver is not at all unlike a ‘bomb’ and a mobile one at that."

Harris’s lawyer argued that the U.S. Supreme Court should let the Virginia ruling stand because "society’s reasonable expectation of privacy requires some facts to support the tipster’s allegation that the driver was intoxicated." But Roberts, deploring the "dangerous consequences of this rule," argued that "police should have every legitimate tool at their disposal for getting drunk drivers off the road. I would grant certiorari to determine if this is one of them."