STATE OF WISCONSIN
IN SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Appeal No.: 2022AP800

DOUGLAS E. KOSCH,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

Respectfully submitted,

DOUGLAS E. KOSCH,
Defendant-Appellant-Petitioner

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PETITION FOR REVIEW

Petition for Supreme Court to review the decision of the Court of Appeals, District II, in the case of *City of Whitewater vs Douglas E. Kosch* filed on September 13, 2023, in which the Court of Appeals affirmed the judgment of conviction entered in the Circuit Court for Walworth County wherein Kosch was found guilty of operating while intoxicated and with unlawfully refusing to submit to a chemical test for intoxication after arrest.

ISSUES PRESENTED FOR REVIEW

Statement of the Issues

First, did law enforcement have reasonable suspicion to seize Kosch, probable cause to request a preliminary breath test, and probable cause to arrest Kosch without a warrant?

Second, did the trial court err in denying Kosch's motion to reconsider its ruling that the seizure of Kosch was supported by reasonable suspicion?

Third, is Wisconsin's implied consent statute facially unconstitutional, and unconstitutional as applied to the facts of Kosch's case, requiring dismissal of the refusal action?

Fourth, were the closing arguments of the Plaintiff at trial sufficiently prejudicial to warrant granting Kosch's motion for mistrial and dismissal with prejudice?

Fifth, was Kosch's refusal to submit to a breath alcohol test unreasonable?

Manner of Raising the Issues in the Comt of Appeals

This issue was raised in the Comt of Appeals by direct appeal to that comt from a final order of the Circuit Court for Walw01th County.

How the Court of Appeals Decided the Issues

The Court of Appeals held that: Law enforcement had reasonable suspicion to seize Kosch, probable cause to request a preliminary breath test, and probable cause to arrest. Kosch did not prove that Wisconsin's implied consent statute was unconstitutional beyond a reasonable doubt, facially or as applied to his case. The closing arguments of the plaintiff were not prejudicial and that any potential prejudice would have been harmless error. Kosch's refusal to submit to a breath alcohol test was unlawful.

CRITERIA FOR REVIEW

This Court should take this case for four main reasons. First, a real and significant question of both federal and state constitutional law is presented. Second, the decision by this Court will help develop, clarify, and ha1monize the law. The questions presented are novel, and their resolution will have statewide impact. Additionally, the questions presented are not factual in nature but are questions of law likely to recur unless resolved by this Court. Finally, the Court of Appeals' decision is in conflict with controlling opinions of the United States Supreme Court, the Wisconsin Supreme Court, and the Wisconsin Court of Appeals.

This case involves an unlawful stop, preliminary breath test (PBT), and arrest in violation of the Fourth Amendment to the U.S. Constitution. The Court of Appeals erroneously held that allegations of a nondescript "domestic incident" provided reasonable suspicion for the traffic stop, and that probable cause for a PBT and arrest existed based in part on defectively administered field sobriety tests (FSTs). That Court held that Kosch's refusal to submit to a PBT could support probable cause to arrest, despite U.S. Supreme Court and Supreme Court of Wisconsin precedent holding that a refusal to cooperate with a police investigation cannot be used to support a warrantless search or seizure.

Second, the Court of Appeals erroneously held that Wisconsin's implied consent statute was facially constitutional and as applied to the facts of Kosch's case. That Court stated that Kosch's main argument, that applies *Griffin v. California* to Wisconsin's implied statute, was an argument that would have to be brought before this Court. This Court should accept Kosch's case as it is uniquely situated to address an obvious conflict in impaired driving law, namely, why Wisconsin's implied consent law is permitted to prospectively threaten and actually punish individuals for exercising their constitutional rights.

Third, the Court of Appeals improperly held that the plaintiffs closing arguments were not improper or prejudicial. The plaintiffs attorney had argued that the jury should consider the statewide and nationwide impact of impaired driving, in terms of injuries and deaths caused, in reaching their verdict. If this ruling is permitted to stand, prosecutors across the state will argue that juries should weigh non-evidentiary considerations of crime prevention and deterrence in reaching their verdict in civil and criminal cases.

Finally, the Court of Appeals misapplied *State v. Baratka* in holding that Kosch's refusal was unlawful. Kosch stated to the arresting officer that he would not consent to a breath alcohol test "without a lawyer." Under *Baratka,* the arresting officer was required to inform Kosch that he had no right to counsel at that time. The Court of Appeals' unpublished decision contradicts decades old precedent and will be relied upon by courts in this state because it is citable if this Court does not reverse the ruling.

STATEMENT OF THE CASE AND FACTS

On September 7, 2019, Kosch was pulled over in the City of Whitewater, by Officer Jennifer Ludlum of the Whitewater Police Department, based on a report of a vehicle being involved in an alleged domestic incident.[1] Kosch performed FSTs, declined a PBT, was arrested for allegedly operating while under the influence (OWi), whereafter he declined to submit to a warrantless chemical test of his breath without an attomey.[2] Kosch was issued a citation for OWi and a notice of intent to revoke his operating privileges.[3] Kosch demanded a refusal hearing[4] and was subsequently found guilty of the OWi and refusal citations at a court trial in the Whitewater Municipal Court, on November 11, 2020.[5] Kosch appealed those judgments *de nova* to the Walworth County Circuit Court,[6] and those citations were consolidated into Walworth County Case Number 2020CV602.[7]

Kosch filed a motion to suppress based on Fourth Amendment violations, which challenged reasonable suspicion for the traffic stop, probable cause for the PBT, and probable cause to arrest.[8] An

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[1] R. 88:4-5.
[2] R. 92:99.
[3] R. 5:1; R. 7:l.
[4] R. 8:1.
[5] R. 21.
[6] R. 3:1.
[7] R. 28:1-2.
[8] R. 37:1-16.

evidentiary hearing was held on Kosch's motion to suppress, on August 3, 2021.[9] Ludlum testified at this motion hearing as follows: She received a description of the vehicle (dark colored SUV) from dispatch or another officer, a motel employee pointed a vehicle out, and she did not obtain a license plate for the suspect vehicle.[10] She may have lost visual contact with the suspect SUV while running to her police cruiser to follow it, but eventually pulled the SUV over on Milwaukee Street in the parking lot of a ReMax.[11] She did not observe the driver of the SUV commit any traffic infractions prior to the traffic stop.[12] Kosch's speech was slurred, that Kosch stated that he had consumed two beers that day, and that based on these observations she had Kosch perform FSTs.[13] She observed 4 out of 6 clues on the Horizontal Gaze Nystagmus (HGN) test, 5 out of 8 clues on the Walk and Tum (WAT) test, and that Kosch put his foot down twice during the One Leg Stand (OLS) test.[14] She acknowledged that FSTs must be administered according to guidelines set by the National Highway Traffic Safety Administration (NHTSA), and that deviating from NHTSA guidelines may compromise the accuracy of the FSTs.[15]

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[9] **R.88:l.**
[10] **R. 88:5.**
[11] R. 88:13-14.
[12] R. 88:15.
[13] R. 88:8-8.
[14] R. 88:8-11.
[15] R. 88:16-17.

At the suppression hearing, Ludlum testified that her administration of FSTs to Kosch differed from her NHTSA training. During the HGN, Kosch was facing a police cruiser with flashing emergency lights at points, was told to tilt his head down, the speed of her checks for equal tracking, lack of smooth, pursuit, and distinct and sustained nystagmus at maximum deviation was substantially quicker than her NHTSA FST training.[16] On the WAT, Ludlum did not instruct Kosch to imagine a straight line, counted a clue of starting too soon even though she had not yet provided the corresponding instruction, and failed to instruct Kosch to watch his feet or count his steps out loud during the test.[17] On the OLS, Ludlum did not instruct Kosch to keep his legs straight while performing the test.[18] Kosch volunteered that he had diabetes and issues with his back, knees, ankles, and hips after the WAT, and Ludlum only followed up on this information after hearing Kosch mention it.[19] The trial court agreed that the evidence supporting the stop was scant, and that there were deficiencies with the administration of FSTs, but ultimately found reasonable suspicion to support the traffic stop, probable cause to request a PBT, and probable cause to arrest.[20]

[16] R. 88:16-36.
[17] R. 88:16-46.
[18] R. 88:46-49.
[19] R. 88:24, 46, 48.
[20] R. 88:59-70.

Kosch subsequently filed a motion to reconsider the trial court's ruling that there was reasonable suspicion for the stop,[21] as well as a motion to suppress and to declare Wisconsin's implied consent statute unconstitutional.[22] The Court set a briefing schedule, whereafter both parties submitted their arguments on the constitutional challenge in written form.[23] On March 29, 2022,[24] the trial court denied Kosch's motion to reconsider and the motion to declare Wisconsin's implied consent statute unconstitutional, and issued a written order entering this ruling on April 8, 2022.[25]

Kosch's case then proceeded to a jury trial on the OWI citation and to a court trial on the refusal matter.[26] The City presented Kosch's refusal to submit to the evidentiary breath test as evidence at trial, and argued to the jury that it was consciousness of guilt evidence. In the Plaintiffs rebuttal to defense counsel's closing argument, the plaintiffs attorney made the following closing argument to the jury:

> **The defense is suggesting that you should find the defendant not guilty, but you have to look at what that entails. OWis are a huge problem in our state and our country, causing injuries and deaths every single year.** Officer Ludlum did a fantastic job investigating this situation and ultimately placing the defendant, Douglas Kosch, under arrest for operating while under the influence. **Enforcement of operating under the influence is not complete until those who violate those laws are found guilty.** Therefore, I'm asking you - **I'm asking that you**

[21] R. 44:1-3.
[22] R. 45:1.
[23] R. 47:l.
[24] R. 90:1.
[25] R. 60:1.
[26] R. 91:l; R. 92:2.

> **complete that process and find the defendant, Douglas Kosch, guilty of operating under the influence.**[27]

Defense counsel objected to this closing argument and moved for a mistrial and dismissal with prejudice, on the grounds that the remarks commented on matters which were not in evidence, appealed to the jurors passions and sympathies, asked the jurors to assume the role of law enforcement, and that they were unfairly prejudicial.[28] The trial court acknowledged that some of the arguments made by the plaintiffs attorney were "problematic," that the argument that OWI enforcement is not complete until a finding of guilt was "an improper argument," and that the court was "troubled" by the City's statements in closing.[29] However, the trial court held that it provided curative instructions sufficient to mitigate any prejudice, and denied Kosch's motions for mistrial and dismissal with prejudice.[30]

Kosch was found guilty of the OWI by the jury, and Kosch's refusal was found to be unreasonable by the trial court.[31] The court ordered that Kosch's license be revoked, that he pay forfeiture and costs on the OWI citation, and that he be subject to an ignition interlock order on the refusal citation. A written order imposing the

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[27] R. 92:158-159.
[28] R. 92:172-174.
[29] R. 92:175-177.
[30] R. 92:177.

R. 92:147, 182.

aforementioned penalties was entered by the trial court on May 10, 2022.[32] Kosch appealed the denial of his motion to suppress and reconsider, constitutional challenge to the implied consent statute, the finding that his refusal was unreasonable, and the trial court's denial of his motion for mistrial and dismissal. The Court of Appeals affomed the circuit court's rulings. Kosch now petitions this Court.

[32] R. 75:l.

ARGUMENT

I. THE TRIAL COURT ERRED BY DENYING KOSCH'S MOTION TO SUPPRESS AND MOTION TO RECONSIDER

An order granting or denying a suppression motion presents a question of constitutional fact.[33] This is a mixed question of law and fact where challenges to the circuit court's findings of historical fact are reviewed under the clearly erroneous standard, and courts review independently the application of those facts to constitutional principles."[34] To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact.[35]

To conduct an investigative stop, the police must have "reasonable, articulable susp1c1on that criminal activity 1s afoot."[36] Reasonable suspicion must be founded on concrete, particularized facts warranting suspicion of a specific individual, not " 'inchoate and unparticularized suspicion[s] or hunch[es].'[37] Courts assess reasonable suspicion in light of the totality of the

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[33] *State v. Howes,* 2017 WI 18, ill 7, 373 Wis. 2d 468, 893 N.W.2d 812.
[34] *State v. Abbott,* 2020 WI App 25, ,i 10, 392 Wis. 2d 232, 242, 944 N.W.2d 8, 13. *State v. Scull,* 2015 WI 22, ,i 16,361 Wis. 2d 288,298,862 N.W.2d 562,566.
[35] *Koepsel/'s Olde Popcorn Wagons, I1 1c. v. Koepse/l's Festival Popcorn Wagons, Ltd.,* 2004 WI App 129, ,i 44,275 Wis. 2d 397,416,685 N.W.2d 853,862.
[36] *State v. Richey,* 2022 WI 106, ,i 9,405 Wis. 2d 132, 139.
[31] *Id.*

circumstances.[38] This Court has used the following factors in this determination: (1) the particularity of the description of the offender or the vehicle in which he fled; (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occmTed; (3) the number of persons about in that area; (4) the known or probable direction of the offender's flight; (5) observed activity by the particular person stopped; and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation.[39]

The evidence presented at the hearing was that Ludlum: (1) responded to a complaint at a motel for a "domestic incident between a male and a female," (2) that police were looking for a vehicle that was possibly leaving the area and that she observed the suspect vehicle leaving the area, (3) police dispatch or another officer provided a description of the suspect vehicle she had observed, and a motel employee pointed out a dark colored SUV in the parking lot. Ludlum followed the vehicle, observing no traffic violations, and pulled it over. No evidence was presented by the City at the hearing regarding the make, model, or license plate of the suspect vehicle or whether the police description of the suspect vehicle matched the

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[38] *Id.*

[39] *State v. Guzy,* 139 Wis. 2d 663, 676-77, 407 N.W.2d 548, 554 (1987).

motel employee's description. No evidence was presented at the hearing regarding a physical description of the suspect, who repo1ted the alleged incident to police, or what allegations formed the basis of the reported "domestic incident."

In situations where the plaintiff is relying on the collective knowledge of others to justify an officer's traffic stop, the plaintiff must prove the collective knowledge that supports the stop.[40] In *State v. Pickens,* the Court of Appeals held that this burden cannot be met by only providing the testimony of one officer that they relied on the unspecified knowledge of other officers.[41]Here, the City relied on the collective knowledge of other officers that there was an unspecified "domestic incident" as the sole justification for the stop, as Ludlum did not testify to observing any unlawful behavior by Kosch before stopping him. These conclusory assertions did not set forth any specific articulable facts for the court to apply the reasonable suspicion standard at the motion hearing. As in *Pickens,* collective knowledge of only conclusory allegations, that a pa1ticular vehicle is associated with an unspecified "domestic incident," is not sufficient to support reasonable suspicion of any illegal behavior.[42]

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[40] ***State*** *v.* ***Pickens,*** 2010 WI App 5, **,r** 13,323 Wis. 2d 226,235, 779 N.W.2d l, 5.
[41] *Id.*
[42] *Id.*

The Court of Appeals correctly held that the City failed to meet its burden of proving that the community caretaker exception justified the stop, but erred in concluding that the stop was justified based on reasonable suspicion. That Court improperly held that the use of the term "domestic incident" in a 9-1-1 call would strongly suggest some form of domestic abuse, even where no evidence was presented at the suppression hearing regarding: (1) who made the accusation, (2) what the accusation consisted of, and (3) whether police obtained any corroborative information prior to the stop.

To request a PBT, law enforcement must have "probable cause to believe" that the driver has committed an impaired driving offense.[43] The term "probable cause to believe," required to request a PBT, has been interpreted by this Court to require a lower standard of probable cause than the degree of probable cause required for a warrantless arrest.[44] Warrantless arrests are unlawful unless they are supported by probable cause.[45] Probable cause to arrest refers to that quantum of evidence within the officer's knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe

[43] *C11ty. of Jefferson v. Renz,* 231 Wis. 2d 293, 309, 603 N.W.2d 541, 548--49 (1999).
[44] *Id.* 320-321 (J. Abrahamson concurring).
[45] ***State** v. **Blatterman,*** 2015 WI 46, **,i,i** 33-35, 362 Wis. 2d 138, 164, 864 N.W.2d 26, 38.

that the defendant had committed an impaired driving offense.[46] In determining whether probable cause exists, courts examine the totality of the circumstances and consider whether the officer had "facts and circumstances within his or her knowledge sufficient to warrant a reasonable person to conclude that the defendant ... committed or [was] in the process of committing an offense."[47]

Based on Ludlum's deficient administration of PSTs to Kosch, the trial court and Court of Appeals should not have given any evidentiary weight to the PST results. Accordingly, the trial court's findings that 2 out of the 6 clues could be properly considered on the HGN, as well as the entirety of the WAT and OLS, and the Court of Appeals' findings that any of the PST results were probative of impairment, were clearly erroneous. With Ludlum's SPST observations accorded no evidentiary weight, there was not probable cause to believe that Kosch had committed any impaired driving offense, rendering the PBT request unlawful.[48]

Wisconsin case law which permits the use of PBT refusals to justify warrantless arrests is superseded by longstanding U.S. Supreme Court case law, as well as case law from this Court, that a

46 *Id.*
47 *Id.*
48 *See* ***Re11z,*** 231 Wis. 2d at 314.

refusal to cooperate with a police investigation cannot be used to support a search or seizure decision.[49] The Court of Appeals erroneously concluded that none of the cases cited by Kosch prohibited consideration of PBT refusals in determining the legality of an an-est. However, since a PBT is both a search and seizure, consideration of a PBT refusal in support of an an-est decision would violate the aforementioned precedent set by this Court and the U.S. Supreme Court. With the FST observations and PBT refusal excluded, probable cause to an-est did not exist. Therefore, the Court of Appeals erroneously affirmed the trial court's ruling denying Kosch's motion to suppress and to reconsider.

II. THE TRIAL COURT ERRED BY DENYING KOSCH'S MOTION TO DECLARE WISCONSIN'S IMPLIED CONSENT STATUTE UNCONSTITUTIONAL

Challenges to the constitutionality of a statute presents a question of law which receives *de nova* review.[50] Statutes are presumed to be constitutional, and the party challenging a statute as unconstitutional generally must prove that it is unconstitutional

[49] ***Fla. v. Bostick,*** 501 U.S. 429,437, 111 S. Ct. 2382, 2387-88, 115 L. Ed. 2d 389 (1991); ***LN.S.*** *v.* ***Delgado,*** 466 U.S. 210, 216-17, 104 S. Ct. 1758, 1762-63, 80 L. Ed. 2d 247 (1984); ***Fla.*** *v.* ***Royer,*** 460 U.S. 491,498, 103 S. Ct. 1319, 1324, 75 L. Ed. 2d 229 (1983); *State v. Griffith,* 2000 WI 72, ,r 52, 236 Wis. 2d 48, 69, 613 N.W.2d 72, 82.

[50] *Matter of Commitment of C.S.,* 2020 WI 33, ,r 13, 391 Wis. 2d 35, 44, 940 N.W.2d 875,879.

beyond a reasonable doubt.[51] To challenge a law as being unconstitutional on its face, the challenger must prove that the law cannot be enforced under any circumstances.[52] To challenge a law as being unconstitutional as applied to the facts of a case, the challenger must show that their constitutional rights were violated.[53] A court loses subject matter jurisdiction over proceedings where the underlying statute is found to be unconstitutional.[54]

Breath tests and blood draws are searches under the Fourth Amendment to the United States Constitution.[55] Searches without a warrant are presumptively unreasonable under the Fourth Amendment.[56] Voluntary consent is one "established and well-delineated exceptio[n]" to the warrant requirement.[57] Voluntary consent must be "' an essentially free and unconstrained choice,' not 'the product of duress or coercion, express or implied.'"[58] It is not

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[51] ***State*** *v.* ***Wood,*** 2010 Wl 17, 1115-17, 323 Wis. 2d 321,338, 780 N.W.2d 63, 71; *State v. Prado,* 2021 WI 64,1112-19, 397 Wis. 2d 719, 960N.W.2d 869,873.
[52] *Wood,* 323 Wis. 2d at 336.
[53] *Id.* at 337.
[54] *State ex rel. Ski11kis v. Treffert,* 90 Wis. 2d 528, 537, 280 N.W.2d 316, 320 (Ct. App. 1979).
[55] ***Birchfield*** *v.* ***North Dakota,*** 579 U.S. 438, 455, 136 S. Ct. 2160, 2173, 195 L. Ed. 2d 560 (2016); ***Schmerberv. California,*** 384 U.S. 757, 767-68, 86 S. Ct. 1826, 1834, 16 L. Ed. 2d 908 (1966).
[56] ***Arizona v. Gant,*** 556 U.S. 332,338, 129 S. Ct. 1710, 1716, 173 L. Ed. 2d 485 (2009).
[57] ***State*** *v.* ***Prado,*** 2020 WI App 42,1110-12, 393 Wis. 2d 526, 535, 947 N.W.2d 182, 186-87.
[58] ***State v. Blackman,*** 2017 Wl 77, **11** 56-59, 377 Wis. 2d 339, 362, 898 N.W.2d 774, 785.

enough to show mere "acquiescence to a claim of lawful authority."[59]

The test to determine voluntariness of consent is in practice an objective one, measured from the perspective of an objectively reasonable person in the accused's position, which examines the totality of the circumstances and reqmres consideration of an accused's constitutional right to refuse to provide voluntary consent.[60]

Wisconsin's implied consent statute requires that any driver arrested on suspicion of impaired driving must be advised of the following information by the arresting officer:[61]

> This law enforcement agency now wants to test one or more samples of your breath, blood or urine ... If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If **you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court** ...

If a driver refuses to provide consent to a chemical test after being properly read the implied consent warnings, such evidence may be introduced against the accused at a trial as consciousness of guilt evidence.[62] Wisconsin's implied consent law authorizes officers who have lawfully arrested an accused for impaired driving, to offer the

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[59] ***State v. Reed,*** 2018 WI 109, **11** 57-60, 384 Wis. 2d 469,491,920 N.W.2d 56, 66-67.
[60] ***State*** *v.* ***Luebeck,*** 2006 WI App 87, 1111-14, 292 Wis. 2d 748, 757-58, 715 N.W.2d 639, 643-44; ***United States*** *v.* ***Drayton,*** 536 U.S. 194, 206-07, 122 S. Ct. 2105, 2113-14, 153 L. Ed. 2d 242 (2002).
[61] Wis. Stat.§ 343.305(4).
[62] ***State v. Crandall,*** 133 Wis. 2d 251,257, 394 N.W.2d 905,907 (1986).

driver the following choices: (1) give consent to a breath or blood alcohol test, or (2) refuse the request for chemical testing and suffer the legal penalties including the revocation of their driving privileges, the imposition of an ignition interlock order, and the evidentiary consequence of their refusal being used at an OWI trial as consciousness of guilt evidence.[63] The Wisconsin Court of Appeals has held: "when this choice is offered under statutorily specified circumstances that pass constitutional muster, choosing the first option is voluntary consent."[64] This means that Wisconsin's implied consent statute punishes an accused for exercising their constitutional right to refuse to provide voluntary consent to a wanantless search.

The privilege against self-incrimination and conesponding right to remain silent are constitutional rights guaranteed by both art. I, sec. 8, Wis. Const.,[65] and by the U.S. Const., amend. V, which is made applicable to the states by reason of the due process clause of the Fourteenth Amendment.[66] The Self-Incrimination Clause to the Fifth Amendment of the United States Constitution provides that "[n]o person ... shall be compelled in any criminal case to be a

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[63] ***State** v. **Padley,*** 2014 WI App 65, **,i** 27, 354 Wis. 2d 545, 565, 849 N.W.2d 867, 876, *overruled by* ***State** v. **Brar,*** 2017 WI 73, **,i** 27, 376 Wis. 2d 685, 702, 898 N.W.2d 499, 508; ***Prado,*** 397 Wis. 2d at 960.

[64] *Id*

[65] Wis. Const. rut. I, § 8(1).

[66] ***State v. Marks,*** 194 Wis. 2d 79, 89,533 N.W.2d 730, 732 (1995); ***State** v. **Hall,*** 207 Wis. 2d 54, 67--68, 557 N.W.2d 778, 783 (1997).

witness against himself."[67] The privilege may be invoked whenever "a witness has a real and appreciable apprehension that the information requested could be used against him in a criminal proceeding."[68] This Court has held that a person is entitled to the protection of the Fifth Amendment right to remain silent prior to arrest and in non-custodial interrogations, and that it is constitutional error for the prosecution to comment on a non-testifying criminal defendant's silence at trial.[69]

A refusal need not be verbal under the statute, and may be inferred from the conduct of the accused.[70] Any conduct that is "uncooperative" or conduct that "prevents an officer from obtaining" an evidentiary chemical test is legally deemed a refusal.[71] A refusal occurs anytime an accused fails to "promptly submit" to chemical testing after being properly informed of their rights under the statute.[72] Given this statutory scheme, and the case law interpreting the implied consent statute, an accused invoking their right to remain silent and standing mute would legally result in a refusal because it would constitute uncooperative conduct which prevents an officer from

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[67] U.S. Const. amend. V.
[68] ***Matter of Grant,*** 83 Wis. 2d 77, 81,264 N.W.2d 587,590 (1978).
[69] ***State v. Fencl,*** 109 Wis. 2d 224, 237-38, 325 N.W.2d 703, 711-12 (1982).
[10] ***State v. Reitter,*** 227 Wis. 2d 213, 234--35, 595 N.W.2d 646, 656-57 (1999).
[11] *Id.*
[72] ***State v. Rydeski,*** 214 Wis. 2d 101, 109, 571 N.W.2d 417,420 (Ct. App. 1997).

obtaining a chemical test and a failure to promptly submit.[73] Wisconsin's implied consent law therefore prospectively threatens to punish criminal defendants for exercising their right to remain silent when an officer asks them if they will submit to a chemical test.

On its face, Wisconsin's implied consent law prospectively threatens to punish people for exercising their Fourth Amendment right to refuse to provide voluntary consent, and their Fifth Amendment right to remain silent without penalty in criminal cases. Wisconsin courts have recently commented that civil penalties and evidentiary consequences are permissible for violations of the implied consent statute.[74] However, no Wisconsin court has addressed whether the rule from the U.S. Supreme Court decision in *Griffin v. California* has been rendered applicable to the implied consent statute as a result of recent U.S. Supreme Court impaired driving decisions.

In *Griffin v. California,* the U.S. Supreme Court held that a prosecutor's comment on a defendant's refusal to testify violated the Fifth Amendment privilege against self-incrimination.[75] *Griffin* further held that courts are prohibited by the Fifth Amendment from

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[73] *Id.; Reitter,* 227 Wis. 2d at 234-35; *State v. Neitzel,* 95 Wis. 2d 191,205,289 N.W.2d 828, 835 (1980).
[74] ***State*** *v.* ***Levanduski,*** 2020 WI App 53, ,r 14, 393 Wis. 2d 674, 684-85, 948 N.W.2d 411,417; ***State*** *v.* ***Forrett,*** 2022 **WI** 37, ,r 8,401 Wis. 2d 678, 686-87 n. 5, 974 N.W.2d 422, 426.
[15] ***Griffin,*** 380 U.S. at 614-15.

imposing "penalt[ies] for exerc1smg a constitutional privilege,"[76] including the right to remain silent.[77] Where the prosecutor asks the trier of fact to draw an adverse inference from a defendant's silence in a criminal case, *Griffin* holds that the privilege against compulsory self-incrimination is violated.[78]

The U.S. Supreme court held in 1983, in *South Dakota v. Neville,* that the rule from *Griffin* did not apply to implied consent laws on the grounds that there was no constitutional right to refuse to consent to a blood alcohol test.[79] Since *Neville,* the U.S. Supreme Court has held that blood and breath alcohol tests are searches under the Fourth Amendment.[80] That comt has consistently held that a person always has the right to refuse to provide voluntary consent to a warrantless government search and seizure, including after the decision in *Neville.*[81] In *Birchfield v. North Dakota,* that court held

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[76] *Id.* at 614 ("It is a penalty imposed by comis for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.").
[77] ***Portuondo** v. **Agard,*** 529 U.S. 61, 69, 120 S. Ct. 1119, 1125, 146 L. Ed. 2d 47 (2000).
[78] ***United States** v. **Robinson,*** 485 U.S. 25, 32, 108 S. Ct. 864, 868-69, 99 L. Ed. 2d 23 (1988); ***State** v. **Denson,*** 2011 W170, 1150-56, 335 Wis. 2d 681, 701-02, 799 N.W.2d 831, 841-42.
[79] *S. Dakota v. Neville,* 459 U.S. 553,560 n.10, 103 S. Ct. 916, 920-21, 74 L. Ed. 2d 748 (1983).
[80] ***Skinner** v. **Ry. Lab. Executives' Ass'11,*** 489 U.S. 602, 616-17, 109 S. Ct. 1402, 1412-13, 103 L. Ed. 2d 639 (1989); ***Missouri v. McNeely,*** 569 U.S. 141, 148, 133 S. Ct. 1552, 1558, 185 L. Ed. 2d 696 (2013); ***Birchfield,*** 579 U.S. at 455.
[81] ***Royer,*** 460 U.S. at 498; ***Bostick,*** 50I U.S. at 437; ***Ohio** v. **Robinette,*** 519 U.S. 33, 39-40, 117 S. Ct. 417,421, 136 L. Ed. 2d 347 (1996); ***Georgia** v. **Randolph,*** 547 U.S. 103, 114-16, 126 S. Ct. 1515, 1523-24, 164 L. Ed. 2d 208 (2006).

that it is unconstitutional to impose criminal penalties for refusing a warrantless blood alcohol test.[82] *Birchfield* established that there is a constitutional right to refuse to consent to a blood alcohol test.

This Court stated in *State* v. *Dalton* that *Neville's* prior rationale that there was no constitutional right to refuse a blood alcohol test had been "superseded" by *Missouri* v. *McNeely* and *Birchfield.*[83] Given this sea change in Fourth Amendment impaired driving law, *Neville's* rationale for holding *Griffin* inapplicable to implied consent laws no longer exists. The *Griffin* rule now applies to Wisconsin's implied consent statute, meaning that it is unconstitutional for the implied consent statute to punish an accused with civil penalties and evidentiary consequences for asserting their Fourth Amendment right to refuse to provide voluntary consent to a search and their Fifth Amendment right to remain silent. Wisconsin's implied consent law prospectively threatens to punish an accused for exercising either right, making it unconstitutional on its face beyond a reasonable doubt. Wisconsin's implied consent statute is also unconstitutional as applied to the facts of Kosch's case because he was punished with the imposition of civil penalties and evidentiary consequences for exercising his Fourth

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[82] ***Birchfield,*** 579 U.S. at 441-42.

[83] ***State*** *v.* ***Dalton,*** 2018 **WI** 85, iJ 61,383 Wis. 2d 147, 173 n. 10,914 N.W.2d 120, 132 *("Neville* was decided *pre-McNeely* and *pre-Birchfield* … [b]oth cases analyze breath and blood tests as Fourth Amendment searches and appear to supersede the statement from the Fifth Amendment *Neville* case ... ").

Amendment right to refuse to provide voluntary consent to Ludlum's request to submit to a warrantless breath alcohol test.

The Court of Appeals held that Kosch's argument, that *Griffin* is applicable to implied consent laws, is properly an argument before this Court. This Court should accept Kosch's case in order to address a clear and obvious conflict in impaired driving law. The U.S. and Wisconsin constitutions provide no "OWI case exception" to the general rule that a person may not be threatened with punishment or otherwise punished for exercising constitutionally guaranteed rights.

III. THE TRIAL COURT ERRED IN DENYING KOSCH'S MOTION FOR A MISTRIAL BASED ON IMPROPER CLOSING ARGUMENTS BY THE PLAINTIFF

Prosecutorial misconduct occurs where a prosecutor makes references at trial to inadmissible evidence or to facts not in evidence.[84] A trial court's ruling regarding an objection to closing arguments will be affirmed unless there has been a misuse of discretion which is likely to have affected the jury's verdict.[85] A circuit court's exercise of discretion in ordering a mistrial is accorded a level of deference that varies depending on the particular facts of the case. Regardless of the level of deference to be applied, an appellate

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[84] ***State v. Albright,*** 98 Wis. 2d 663, 676-78, 298 N.W.2d 196, 204 (Ct. App. 1980).

[85]***State v. Neuser,*** 191 Wis. 2d 131,136, 528N.W.2d49, 51 (Ct. App. 1995).

court must, at a minimum, satisfy itself that the circuit court exercised sound discretion in ordering a mistrial.[86] Because Kosch's mistrial motion was made on the basis of overreaching by the plaintiff, an appellate court would give the trial court's ruling strict scrutiny.[87] To survive strict scrutiny, Wisconsin's implied consent statute "must be nan-owly tailored to advance a compelling state interest."[88]

Here the City argued four main ideas to the jury in rebuttal: (1) consider what a finding of not guilty "entails" or means for society, (2) OWI causes deaths and injuries all over our state and country, (3) enforcement ofOWI laws is not complete until those an-ested for OWI are found guilty and convicted, (4) you the jury need to complete this process of OWI enforcement by finding Kosch guilty of OWL No evidence was presented at trial regarding deaths or injuries caused by OWI, whether in Wisconsin or nationwide, or how securing convictions after OWI an-ests furthers the goals of OWI enforcement and deten-ence. These closing remarks were improper because the amounted to commentary on, and an argument for the jury to base their verdict on, matters which were not in evidence.[89]

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[86] ***State*** *v.* ***Seefeldt,*** 2003 WI 47, ,r 13,261 Wis. 2d 383,393,661 N.W.2d 822,827.
[87] ***State v. Bunch,*** 191 Wis. 2d 501,507,529 N.W.2d 923,925 (Ct. App. 1995).
[88] *State v. Roundtree,* 2021 WI l, ,r 27, 395 Wis. 2d 94, 105, 952 N.W.2d 765, 770, cert. denied, 142 S. Ct. 100,211 L. Ed. 2d 27 (2021).
[89] *Neuser,* 191 Wis. 2d at 142.

The City impliedly argued that a verdict of not guilty would have consequences for society as a whole, and tethered this argument to another statement about how OWI causes deaths and injuries all over our state and country.[90] This boils down to a thinly veiled argument that if juries fail to convict people accused of OWI, in this case Kosch, that OWI offenders will be undeterred and more people would be injured and killed by impaired drivers all across the country. This was an improper and blatant appeal to the emotions, passions, and sympathies of the jury. The prejudice from these comments was compounded further when the City essentially asked the jury to step into the shoes of officers in OWI enforcement, by "completing that process" which Ludlum had started by stopping and arresting Kosch.

Kosch was entitled to a trial based on the evidence of record, "unaffected by the statement of extrinsic facts or extraneous considerations."[91] This Court stated over a century ago that an attorney arguing based on facts not in evidence:

> [T]ries his case upon unsworn statements and vilification, instead of evidence, and he obtains a verdict, if at all, based, in pait at least, upon that which is not evidence, and which has no proper place in the trial.[92]

Wisconsin law permits dismissal of a civil action as a sanction for misconduct where a plaintiff has acted in bad faith or committed

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[90] R. 92:158-159.
[91] ***Scott v. State,*** 91 Wis. 552, 65 N.W. 61, 63 (1895).
[92] *Sullivan v. Co/li11s,* 107 Wis. 291, 83 N.W. 310, 313 (1900).

egregious acts of misconduct, which is shown when a plaintiff engages in "a conscious attempt to affect the outcome of the litigation or a flagrant, knowing disregard of the judicial process."[93] Despite the instructions of the trial court regarding closing arguments, the plaintiff knowingly and egregiously undermined these orders by telling the jury to convict Kosch in order to deter future OWis. The plaintiffs closing remarks in their totality demonstrated a conscious attempt to affect the outcome of the trial where the City's case on the OWI was weak. Kosch has demonstrated that this misconduct rose to the level of bad faith warranting a sanction including dismissal with prejudice, and the trial court erred in failing to grant dismissal or a mistrial.[94]

Contrary to the Court of Appeals' holding, the relationship between guilty verdicts and crime deterrence and statistics on injuries and deaths caused by OWis are not a matter of"common knowledge, observation[n] and experience in the affairs of life." Further, the curative instructions of the trial court did not address the improper argument to reach a guilty verdict to deter future OWis, only the remarks about deaths and injuries caused by OWis.

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[93] ***Schultz*** *v.* ***Sykes,*** 2001 WI App 255, 14, 248 Wis. 2d 746, 766, 638 N.W.2d 604, 612-13.
[94] *See id.*

An error is harmless only when the State can prove "'beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error."'[95] Courts determine whether an error is harmless by assessing the probable impact of the erroneously admitted evidence on the minds of an average jury, by asking "whether there is 'a reasonable possibility that the evidence complained of might have contributed to the conviction.'"[96]

Analyzing the applicable factors shows that the prosecutor's comments constituted plain error which was not harmless:[97]

> **Frequency of the error:** The objectionable argument occutTed once, just prior to the jury being released for deliberations.
> **Importance of the erroneously admitted evidence:** The objectionable argument asked the jury to consider the societal hmm of OWls, and deterrence of future OWls, in rendering their verdict.
> **Presence or absence of evidence corroborating or contradicting the erroneously admitted evidence:** No other evidence at trial was presented regarding OW1 injury and death statistics or of the relationship between convictions and crime deterrence.
> **Does the en·oneously admitted evidence duplicate untainted evidence:** the comments did not duplicate untainted admissible evidence. They introduced otherwise irrelevant, inadmissible, and prejudicial evidence. They also introduced an ultimatum providing a false perception of consequences to the jury if they acquitted Kosch.
> **Nature of the defense:** The Defense argued that Kosch was not impaired, and that the City had failed to meet its burden of proof.
> **Nature of the state's case:** The City argued that the FST results, breath test refusal, and other evidence proved that Kosch drove while impaired.
> **Strength of the state's case:** The strength of the City's case was weak in that the City was unable to present evidence of any poor driving, reliable FST results, or any chemical test result.

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[95] ***Jorgensen,*** 310 Wis. 2d at 153-56.
[96] ***State v. Billings,*** 110 Wis. 2d 661,667,329 N.W.2d 192, 195 (1983).
[97] ***Jorgensen,*** 310 Wis. 2d at 153-56.

Absent the improper remarks, there exists a reasonable probability that Kosch would have been found not guilty of OWI.

IV. THE TRIAL COURT ERRED IN FINDING KOSCH'S REFUSAL UNREASONABLE

Application of the implied consent statute to an undisputed set of facts, reconciling constitutional considerations of due process and equal protection with the requirements of the implied consent statute, are questions of law that are reviewed independently. To the extent the circuit court's decision involves findings of evidentiary or historical facts, those findings will not be overturned unless they are clearly erroneous.[98]

Kosch's challenges to the legality of the traffic stop and the PBT request are defenses to the refusal.[99] Further, the trial court and Court of Appeals erred by holding that Kosch's statement that he would not consent to a breath test without a lawyer constituted a legal refusal. In *State* v. *Baratka,* the Court of Appeals interpreted a prior decision of this Court in *State* v. *Reitter* and held that repeated requests for an attorney "can amount to a refusal as long as the officer informs the driver that there is no right to an attorney at that point."[100]

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[98] *State v. Baratka,* 2002 WI App 288,17,258 Wis. 2d 342, 346-47, 654 N.W.2d 875,877.
[99] *111 re Refusal of A11ag110s,* 2012 WI 64, 14,341 Wis. 2d 576, 580-81, 815 N.W.2d 675,677.
[100] *Baratka,* 258 Wis. 2d at 349-50.

In *Reitter,* Reitter was warned several times that his conduct and insistence on waiting for a lawyer would be construed as a refusal. His belligerence, coupled with his failing to submit to the test after repeated chances to take the test and warnings by police that his conduct was going to be considered a refusal was finally deemed a refusal.[101] In the case at bar, Kosch stated that he would not take a breath alcohol test "without a lawyer," but was given no second chance and was not told that he had no right to an attorney at that stage of the proceedings.[102] *Baratka* required Ludlum to advise Kosch that he had no right to an attorney before his conditional answer could constitute a legal refusal, and she did not. For those reasons, Kosch's refusal was lawful, should not have been admissible at the OWI trial, and the Court of Appeals ened in holding that *Baratka* did not require police to provide additional advisements when a refusal was conditioned on having an attorney present based on *Reitter.*

Baratka cited *Reitter* directly after it stated that "[r]epeated requests for an attorney can amount to a refusal as long as the officer informs the driver that there is no right to an attorney at that point."[103]

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[101] ***Reitter,*** 227 Wis. 2d at 218-22

wz R. 92:99.

[103] ***Baratka,*** 258 Wis. 2d at 349-50 (citing ***Reitter,*** 227 Wis.2d at 235).

Therefore, under *Baratka,* Kosch's statements would not constitute a legal refusal and the Court of Appeals holding violates *Baratka.*

CONCLUSION

For the reasons stated in this Petition, this Court should accept this case and reverse the decision of the Court of Appeals.

Dated at Middleton, Wisconsin, October 10, 2023.

Respectfully submitted,

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Defendant-Appellant-Petitioner

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CERTIFICATION

I certify that this petition conforms to the rules contained in s. 809.62 for a petition produced using the following font:

> Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text.

The length of this petition is 7,998 words.

Dated: October 10, 2023.

Signed,

Electronically signed by Brendan P. Delany
BRENDAN P. DELANY
State Bar No.: 1113318

CERTIFICATION

I certify that the text of the electronic copy of the Petition for Review, which was filed pursuant to Wis. Stat§ 809.62, is identical to the text of the paper copy of the petition.

Dated: October I0, 2023.

Signed,

Electronically signed by Brendan P. Delany
BRENDAN P. DELANY
State Bar No.: 1113318

CERTIFICATION

I certify that this appendix conforms to the rules contained in s. 809.19(13) for an appendix, and the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

Dated: October 10, 2023.

Signed,

Electronically signed by Brendan P. Delany
BRENDAN P. DELANY
State Bar No.: 1113318

STATE OF WISCONSIN
IN SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Appeal No.: 2022AP800

DOUGLAS E. KOSCH,

Defendant-Appellant-Petitioner.

APPENDIX OF DEFENDANT-APPELLANT

PETITION FOR REVIEW

Respectfully submitted,

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