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STATE OF WISCONSIN
IN SUPREME COURT

Appellate Case No. 2022AP1754

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

JEFFREY D. KOSMOSKY,

Defendant-Appellant-Petitioner.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR CALUMET COUNTY, BRANCH I, THE HONORABLE JEFFREY S. FROEHLICH PRESIDING, TRIAL COURT CASE NO. 21-CT-27

PETITION FOR REVIEW OF DEFENDANT-APPELLANT-PETITIONER

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TABLE OF CONTENTS

STATEMENT OF THE ISSUE

WHETHER THE "TOTALITY OF THE CIRCUMSTANCES" TEST AS APPLIED TO INVESTIGATORY DETENTIONS HAS BEEN DILUTED, OR EVEN TRANSMOGRIFIED, TO THE POINT WHERE IT NO LONGER COMPLIES WITH THE FOURTH AMENDMENT'S OVERARCHING "REASONABLENESS" REQUIREMENT?

Circuit Court Answered: NOT APPLICABLE.

Court of Appeals Answered: The court of appeals, giving weight only to those facts which supported the detaining officer's decision, found that Mr. Kosmosky, when identifying facts which undercut the officer's conclusions regarding impairment, was engaged in "a 'divide-and-conquer analysis'" contrary to *United States v. Arvizu*, 435 U.S. 266 (2002), and concluded under the totality of the circumstances that a reasonable suspicion existed to enlarge the scope of his detention. P-App. at 105.

STATEMENT OF THE CASE

On April 1 2, 2021, Mr. Kosmosky was charged in Calumet County with Operating a Motor Vehicle While Under the Influence of an Intoxicant—Third Offense, contrary to Wis. Stat. § 346.63(1)(a), and Operating a Motor Vehicle with a Prohibited Alcohol Concentration—Third Offense, contrary to Wis. Stat. § 346.63(1)(b). R4.

After retaining counsel, Mr. Kosmosky filed, *inter alia*, a motion to suppress evidence on the ground that the arresting officer in the instant case, Deputy Parker Fuller of the Calumet County Sheriff's Office, observed insufficient additional factors to extend the scope of Mr. Kosmosky's initial detention for speeding to an investigation for an impaired driving violation. R17. An evidentiary hearing was held on Mr. Kosmosky's motion on April 21, 2022. R24.

At the evidentiary hearing, the State offered the testimony of a single witness, Deputy Fuller. R24 at pp. 4-34. At the conclusion of the hearing, the court ordered the parties to submit additional briefs. R24 at 36:14 to 37:9. Based upon the court's order, the parties filed their respective supplemental briefs. R25; R26.

Subsequently, the circuit court issued an oral decision at which it denied Mr. Kosmosky's motion, finding that because Deputy Fuller observed that Mr. Kosmosky was speeding, had "slow movements," was smoking a cigarette, admitted

to consuming "two beers," and had peculiar "posture," sufficient grounds existed to expand the scope of his initial detention. R49 at 4:15 to 7:14; P-App. at 112-17.

On September 26, 2022, Mr. Kosmosky entered a plea of no contest to the charge of operating with a prohibited alcohol concentration. R38, at p.1; P-App. at 110. Based upon his change of plea, the court found Mr. Kosmosky guilty. R38; P-App. at 110-11.

Mr. Kosmosky appealed the adverse judgment to the court of appeals by Notice of Appeal filed on September 9, 2022. R44. On March 29, 2023, the court of appeals issued its decision affirming the judgment of the circuit court. P-App. at 112-17. It is from that decision that Mr. Kosmosky now petitions this Court.

STATEMENT OF FACTS

On February 12, 2021, Mr. Kosmosky, was detained in the Village of Stockbridge by Deputy Parker Fuller of the Calumet County Sheriff's Office for operating his motor vehicle in excess of the posted speed limit. R24 at 7:7-13; R49 at 4:17-20; P-App. at 112.

Because Deputy Fuller did not observe Mr. Kosmosky weaving within or outside of his lane, nor did he observe any other erratic driving behavior, the deputy testified that Mr. Kosmosky's driving behavior was not "a factor in [his] asking him to perform field [sobriety] tests." R24 at 8:20-23; 19:23 to 20:6.

Upon making contact with Mr. Kosmosky, Deputy Fuller observed that Mr. Kosmosky was smoking a cigarette, had slow speech, had difficulty locating his insurance information, had bloodshot eyes, and admitted to consuming "two beers." R49 at 4:17 to 7:12; P-App. at 112-17. Based on these factors, the deputy directed Mr. Kosmosky to exit his vehicle to perform field sobriety tests in order to determine whether he was impaired. R24 at 20:3-6; 21:16-23. It was at this point in the encounter that Mr. Kosmosky, by pretrial motion, challenged that the scope of his detention was impermissibly enlarged. R17, at pp. 8-12.

In addition to the foregoing facts, additional relevant facts were adduced at the evidentiary hearing, including the following:

> Mr. Kosmosky "responded to [the deputy's squad] lights in a timely" and "prompt[]" manner. R24 at 20:7-11.
>
> There was "nothing unusual about the manner in which [Mr. Kosmosky] . . . parked on the side of the road." R24 at 20:14-16.

Mr. Kosmosky "did [not] have any difficulty producing his driver's license . . . ." R24 at 20:20-22.

Mr. Kosmosky "already had [his license] out" when Deputy Fuller approached his vehicle. R24 at 21:3-4.

Mr. Kosmosky exhibited no confusion or any other problems with his mentation. R24 at 21:10-15.

"[P]rior to having Mr. Kosmosky exit the vehicle to perform field sobriety tests," the deputy never "noticed an odor of alcohol coming from [Mr. Kosmosky] or the vehicle." R24 at 21:16-23.

Similarly, "prior to having Mr. Kosmosky exit the vehicle," Deputy Fuller did not observe "any problems with [Mr. Kosmosky's] physical mannerisms or movements while he was inside the truck." R24 at 24:19 to 25:1

STANDARD OF REVIEW

The issue presented in this Petition poses a novel question of constitutional law which, as yet, has not been examined by any court of supervisory jurisdiction in Wisconsin. Because it is premised upon an undisputed set of facts, the assessment of whether those facts satisfy a constitutional standard, as the Petitioner claims it should be applied, necessitates *de novo* review by this Court. *State v. Malone*, 2004 WI 108, ¶ 14, 274 Wis. 2d 540, 683 N.W.2d 1.

STATEMENT OF CRITERIA TO SUPPORT PETITION FOR REVIEW

1. Section 809.62(1r)(a): This Case Presents a Real and Significant Question of Constitutional Law.

This case presents a significant question of constitutional law because the refusal of the court of appeals to acknowledge that the *collective* innocent facts observed by Deputy Fuller made his inference of impairment less likely violates the Fourth Amendment's reasonableness standard. In an inexplicable twist of logic, the court of appeals undertook the very "divide-and-conquer" analysis—when disposing of the facts favorable to Mr. Kosmosky—which it accused him of erroneously doing. At some point under the Fourth Amendment's "totality of the circumstances" test, the compounding of "innocent facts" subverts a law enforcement officer's conclusions. Remarkably, however, there is no authority from any court of supervisory jurisdiction in Wisconsin which explains or expands upon this notion.

Mr. Kosmosky's claim centers about whether the overarching standard of reasonableness imposed by the Fourth Amendment requires innocent facts to be

afforded their due weight when that weight undermines a conclusion of wrongdoing rather than what seems to be the current practice, *i.e.*, assessing reasonable suspicion *based solely on incriminating facts*. This Petition affords the Court an opportunity to address how "innocent behavior" is to be evaluated in cases involving the Fourth Amendment's totality of the circumstances test, and therefore, substantially impacts upon a question of constitutional magnitude.

2. *Wis. Stat. § 809.62(1r)(c)2.: The Question Presented Is a Novel One Which Will Have Statewide Impact.*

There exist no decisions of this Court which directly address at what point inferences from innocent conduct in Fourth Amendment analysis become so overwhelming they render any conclusion regarding that wrongdoing untenable. There needs to be some direction, framework, or standard by which a circuit court is provided with the tools to put innocent facts in their proper perspective when determining whether there exists a reasonable suspicion to believe that a crime is afoot.

Moreover, a decision of this Court will have statewide impact as tens-of-thousands of individuals are annually arrested in Wisconsin for criminal violations. Cases which implicate the question Mr. Kosmosky raises arise in all seventy-two Wisconsin counties. Circuit courts throughout the State daily render decisions on pretrial motion issues which involve the "reasonable suspicion to detain" standard.

3. *Wis. Stat. § 809.62(1r)(c)2.: The Question Presented Is Likely to Recur Unless This Court Intervenes.*

The question presented by Mr. Kosmosky is likely to recur based upon mere numbers alone as noted above. With tens-of-thousands of arrests for criminal offenses occurring annually in this state, there undoubtedly will be those cases in which defense attorneys raise pretrial challenges to "reasonable suspicion." The gravity and pervasiveness of the issue compels review because of the very frequency with which it recurs daily throughout Wisconsin circuit courts and courts of appeal. If no intervention is made to address definitively the weight to be given inferences from "innocent behavior," the justice system will go on repeatedly abusing notions of Fourth Amendment reasonableness.

Until such time as this Court establishes a clear standard by which innocent conduct can reasonably be construed to undercut an inference of criminality, neither the court of appeals nor circuit courts will have a properly-defined yardstick by which to evaluate Fourth Amendment claims. This Court should, therefore, intervene to provide direction to courts throughout this State under § 809.62(1r)(c)2. lest this problem recur with high frequency.

ARGUMENT

I. THE "TOTALITY OF THE CIRCUMSTANCES" TEST HAS NOT REASONABLY BEEN APPLIED IN THE INSTANT CASE.

A. The Issue on Appeal & the Fourth Amendment in General.

In its most basic incarnation, Mr. Kosmosky's case is about balance. It is about whether the "totality of the circumstances" which ostensibly justify a detention should be measured solely by examining the Fourth Amendment's scale of reasonableness from one side of the scale alone, or whether constitutional reasonableness is achieved by measuring how both sides of the scale balance against one other. Mr. Kosmosky proffers that it is the latter approach which is the one compelled by the Fourth Amendment's reasonableness standard.

As a starting point, the Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.[1] As the Wisconsin Supreme Court noted in *State v. Boggess*, 115 Wis. 2d 443, 340 N.W.2d 516 (1983), "[t]he basic purpose of this prohibition is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Id.* at 448-49; *see also Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

Both federal and state courts have consistently held that "[c]onstitutional provisions for the security of persons and property should be **liberally construed**." *Mapp v. Ohio*, 367 U.S. 643, 647 (1961)(emphasis added), citing *Boyd v. United States*, 116 U.S. 616, 635 (1886).

> A close and literal construction deprives [these protections] of half their efficacy, and leads to gradual depreciation of the right [to be free from unreasonable searches and seizures], as if it consisted more in sound than in substance. **It is the**

[1]The Wisconsin Constitution provides coextensive protections against unreasonable searches and seizures under Article I, § 11. Wisconsin courts interpret the protections granted by Article 1, § 11 of Wisconsin's Constitution identically to those afforded by the Fourth Amendment. *See State v. Kramer*, 2009 WI 14, ¶ 18, 315 Wis. 2d 414, 759 N.W.2d 598; *State v. Phillips*, 218 Wis. 2d 180, ¶ 21, 577 N.W.2d 794 (1998).

> **duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.**

Schneckloth v. Bustamonte, 412 U.S. 218, 229 (1973)(emphasis added). The Supreme Court has consistently repeated that the Fourth Amendment "guaranties are to be liberally construed to prevent impairment of the protection extended." *Grau v. United States*, 287 U.S. 124, 127. The High Court has also admonished that "all owe the duty of vigilance for [the Fourth Amendment's] effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted." *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931). Ultimately, "the Fourth Amendment . . . should be liberally construed in favor of the individual." *Sgro v. United States*, 287 U.S. 206, 210 (1932).

Even under a specific totality of the circumstances test (which is what is involved in the instant case, *see* Section I.B., *infra*), there remains an overarching standard which is applicable to all cases that implicate the Fourth Amendment. More particularly, when assessing whether the conduct of law enforcement officers is constitutional under the Fourth Amendment, "the 'touchstone of the Fourth Amendment is reasonableness.'" *Ohio v. Robinette*, 519 U.S. 33, 39 (1996), quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). "Whether a search and seizure under the Fourth Amendment is reasonable depends upon the facts and circumstances of each case." *Cooper v. California*, 386 U.S. 58, 59 (1967). Employing "reasonableness" as the overarching standard means that the actions taken by a law enforcement officer must be those which "warrant a man of reasonable caution" under the circumstances to proceed as they did. *State v. Welsh,* 108 Wis. 2d 319, 330, 321 N.W.2d 245 (1982)(quotation marks and citations omitted); *Henry v. United States,* 361 U.S. 98 (1959); *Carroll v. United States*, 267 U.S. 132 (1925).

This Court has held that an action is "reasonable" under the Fourth Amendment "'as long as the circumstances, viewed objectively, justify [the] action.'" *State v. Howes*, 2017 WI 18, ¶ 21, 373 Wis. 2d 468, 893 N.W.2d 812 (emphasis added), citing *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (2006), quoting *Scott v. United States*, 436 U.S. 128, 138 (1978).

B. The Constitutional Test Specifically at Issue.

Mr. Kosmosky's case involves an underlying question of whether the scope of his initial detention for a speeding violation was permissibly enlarged to include an investigation for an impaired driving offense. The appropriate measure of whether an investigatory detention is constitutionally reasonable is an objective test

which examines the totality of the circumstances.

> The test is an objective test. Law enforcement officers may only infringe on the individual's interest to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed a crime. An inchoate and unparticularized suspicion or 'hunch'. . . will not suffice.

State v. Guzy, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987)(internal quotations omitted); *United States v. Pavelski,* 789 F.2d 485, 489 (7th Cir. 1986).

> When determining if the standard of reasonable suspicion [is] met, those facts known to the officer **must be considered together** as a totality of the circumstances. *State v. Richardson*, 156 Wis. 2d 128, 139-40, 456 N.W.2d 830 (1990).

State v. Powers, 2004 WI App. 143, ¶ 7, 275 Wis. 2d 456, 685 N.W.2d 869 (emphasis added).

Once a person is detained for Fourth Amendment purposes, *State v. Betow*, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999), holds that the person's detention may not be enlarged beyond its original purpose unless new facts come to light which justify an enlargement of the detention. *Id.* at 93-95. *Betow* held that once a driver is stopped for a traffic violation, he or she may not be detained for purposes apart from those which justified the initial stop unless additional observations are made which give rise to a reasonable inference that other violations have been committed. *Id.* More particularly, the *Betow* court noted:

> The key is the "reasonable relationship" between the detention and the reasons for which the stop was made. If such an "articulable suspicion" exists, the person may be temporarily stopped and detained to allow the officer to "investigate the circumstances that provoke suspicion," as long as "the stop and inquiry [are] reasonably related in scope to the justification for their initiation." If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun. The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop.

Id. at 94-95 (quotations in original), citing *Berkemer v. McCarty*, 468 U.S. 420, 439 (1975).

C. The State of the Law as It Relates to "Innocent Facts."

As it stands, courts throughout the country and in Wisconsin recognize that "innocent facts" may together conspire to provide an experienced law enforcement officer with additional reason to believe that a violation of the law is afoot *despite* their purely innocent explanation. *See, e.g., United States v. Arvizu*, 435 U.S. 266 (2002); *State v. Colstad*, 2003 WI App 25, 260 Wis. 2d 406, 659 N.W.2d 394. What these cases do *not* address, however, is what happens when those purely innocent facts are not only "innocent" of themselves, but additionally, *contradict* or *undercut* the conclusions to be drawn from the alleged inculpating facts?

Under the current state of practice, courts regularly abandon any consideration of the contradicting facts in favor of *solely examining the inculpating ones* in order to determine whether a reasonable suspicion exists to detain an individual. This practice is ostensibly based upon the notion that law enforcement officers are not obligated to consider or account for innocent explanations for the observations they make under the totality of the circumstances. *See Colstad*, 2003 WI App 25. Employing this method of analysis, it generally does not matter to the reviewing court that contradicting facts exist, rather, it is only important that whatever inculpating facts are present, those facts rise to the level of establishing a reasonable suspicion.

D. The Correct Approach.

It is Mr. Kosmosky's contention that ignoring facts which are of a kind that undermine an officer's conclusion of wrongdoing is not constitutionally *reasonable* as the Fourth Amendment requires. It is the equivalent of an emergency room physician concluding that a patient needs to have an appendectomy because she observes that the individual suffers from sudden and severe abdominal pain—evidence of an inflamed appendix—but ignores the fact that the individual was brought to the hospital immediately after a Carolina Reaper pepper eating contest. Clearly, the latter "innocent fact" *contradicts* the physician's initial conclusion, but if it was not to be given any weight—as is the current practice of courts throughout this state when evaluating reasonable suspicion—the patient better be prepared to needlessly "go under the knife." Such an approach is contrary to the Supreme

Court's admonishment that the proper reasonable suspicion inquiry necessitates a consideration of "**all** the circumstances surrounding the encounter" between the officer and the citizen. *Florida v. Bostick*, 501 U.S. 429, 439 (1991)(emphasis added).

An example of innocent facts which can permissibly give rise to an inculpating inference can be found in *Arvizu*, 435 U.S. 266. In *Arvizu*, a border patrol agent elected to detain the vehicle Arvizu was driving because he received information that it may have been attempting to avoid a border control checkpoint and that when he located the vehicle, the driver "appeared stiff and his posture very rigid." *Id* at 269-70. Additionally, the border patrol agent noted that of the five people in the vehicle, three were children who, after he had been following the vehicle, waved at him "in an abnormal pattern." *Id.* at 271. Arvizu's vehicle was ultimately searched with his consent, whereupon over 100 pounds of marijuana was discovered along with nearly $ 100,000 worth of cash. *Id.* at 272.

Arvizu challenged whether a reasonable suspicion existed to detain his vehicle on the ground that the agent's observations were of purely innocent conduct. *Id.* The Federal District Court for Arizona denied Arvizu's motion and he appealed to the Ninth Circuit which reversed the district court. *Id.* The Supreme Court granted *certiorari*, and reversed the decision of the Ninth Circuit, holding that the assessment of whether a reasonable suspicion exists to detain someone under the Fourth Amendment does not require law enforcement officers to "rule out the possibility of innocent conduct." *Id.* at 277-78.

While the *Arvizu* Court recognized that it was error to conclude that facts which are "readily susceptible to an innocent explanation [are] entitled to 'no weight'" in the context of *supporting* an inference of wrongdoing, Mr. Kosmosky posits that the "flip side of the coin" should also be true, namely: innocent facts which *undercut* an inference of wrongdoing should be factored into a totality of the circumstances analysis. *Arvizu*, 534 U.S. at 274. If innocent facts are only considered when they *support* an inference of wrongdoing, then it is Mr. Kosmosky's position that such an approach is constitutionally unreasonable and is contrary to the *Bostick* Court's notion that "**all** the circumstances surrounding the encounter" be considered.

The "innocent facts" of Mr. Kosmosky's case are different from the facts of *Arvizu* in a very distinct and important way. More specifically, the innocent facts in *Arvizu* did **not** undermine the conclusion that he was attempting to avoid a border checkpoint. Unlike *Arvizu*, in Mr. Kosmosky's case, the innocent facts actually *contradict* a conclusion that he was impaired by consuming intoxicants.

For example, the question in any impaired driving case is whether it objectively appears to a law enforcement officer that the detained person is "less able to exercise the clear judgment and steady hand necessary to safely operate a motor vehicle." *See* Wis. JI-2663 to JI-2668 (Rev. 2015). As discussed below, several of the observations made by Deputy Fuller in the instant matter were not merely "innocent" like those in *Arvizu*, but when taken together, *undercut* the inference the deputy ostensibly drew about whether he was, in fact, impaired.

Before examining the facts of Mr. Kosmosky's case specifically, his proposition of law—that the totality of the circumstances test must give due weight to those facts which undermine an inference of culpability—should first be grounded in some authority. Two cases which come tantalizingly close to making Mr. Kosmosky's point in this regard are *Reid v. Georgia*, 448 U.S. 438 (1980), and *United States v. Jerez*, 108 F.3d 684 (7th Cir. 1997).

The *Jerez* case involved a circumstance in which two deputies from the Milwaukee County Sheriff's Office Drug Enforcement Unit observed a two-door vehicle with a Florida license plate parked outside of a hotel near General Mitchell International Field. *Jerez*, 108 F.3d at 686. The deputies were trained to look for "target vehicles" from "source states" which typically were vans or two-door automobiles. *Id.* Florida was considered a source state, and the vehicle which was owned by Mr. Jerez was a two-door Honda Prelude. *Id.* Given the hotel's proximity to the airport and the interstate—and the fact that the deputies learned that Mr. Jerez' travelling companion had a prior conviction on his record for smuggling "contraband" into the Dade County Jail—their suspicions were raised. *Id.* They attempted to gain consensual entry into Jerez' hotel room, and after several minutes of pounding on his door and shining a flashlight through his window, they were allowed in. *Id.* at 687. Ultimately, cocaine was found in Mr. Jerez' and his roommate's possession and they were charged with possession with intent to deliver. *Id.* at 687-88.

Mr. Jerez challenged, *inter alia*, whether the deputies had a reasonable suspicion to believe that he was engaged in a criminal enterprise. *Id.* at 688. The federal district court concluded that the deputies had a reasonable suspicion to believe that a crime was afoot, and it denied his motion. *Id.* Jerez appealed, and the Seventh Circuit Court of Appeals reversed the decision of the district court, holding that the facts articulated by the deputies, standing alone, were insufficient to support a reasonable suspicion and that even when taken together, "describe a large number of 'presumably innocent travelers, ...'" *Id.* at 694, quoting *Reid*, 448 U.S. at 441.

In reaching its holding, the *Jerez* court relied on *Reid*, noting that:

> Although several innocent facts may, when considered together, add up to reasonable suspicion, *Sokolow*, 490 U.S. at 9-10, the particular facts articulated in this case do not. Instead, we find the factors in this case to be analogous to those the Supreme Court considered in *Reid v. Georgia*, 448 U.S. 438, 65 L. Ed. 2d 890, 100 S. Ct. 2752 (1980). In Reid, a DEA agent stopped the defendant in the Atlanta Airport because the defendant's characteristics and actions fit the "drug courier profile": (1) The defendant arrived from Fort Lauderdale, a city the agent knew to be a principal source of cocaine; (2) He arrived early in the morning, when law enforcement activity is diminished; (3) He and his companion appeared to be concealing that the two were traveling together; and (4) He and his companion had no luggage except for their shoulder bags. *Id.* at 440-41. The Supreme Court concluded that "the agent could not, as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances." *Id.* at 441. The only fact that related to the individuals' conduct, the Court found, was that the defendant preceded his companion and occasionally looked backward at him. The Court found that the other circumstances describe a large number of "presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure." *Id.* In this case, the facts known to the deputies were less suspicious than the ones found insufficient as a matter of law in Reid. Even in combination, the articulated characteristics could be ascribed generally to innocent travelers.

Jerez, 108 F.3d at 693-94 (citations omitted in part).

Jerez and *Reid* are akin to Mr. Kosmosky's circumstances in that much of his behavior is wholly innocent in nature as was the behavior of the defendants in *Jerez* and *Reid*. Where Mr. Kosminsky's case departs from *Jerez* and *Reid* in a meaningful way is that many of the facts examined in those cases are "neutral," whereas the innocent facts in Mr. Kosmosky's case are *exculpating*. That is, with

respect to *Jerez*, there is nothing either incriminating or exculpating about being from Florida, owning a two-door vehicle, and taking a hotel room near an airport, and similarly with respect to *Reid*, there is nothing either incriminating or exculpating about arriving at an airport early in the morning, carrying only a shoulder bag, or (again) arriving from Florida.

Comparatively, however, if a suspicion exists that a person is under the influence of an intoxicant, but that person: (1) has no difficulty producing his driver's license; (2) is engaged in an activity (smoking) which nearly one-in-five people in Wisconsin engage; (3) exhibits no confusion or problems with his mentation; (4) displays no problems with his physical mannerisms or movements while seated in his vehicle; and (5) has no odor of intoxicants emanating from either his person or his vehicle, then these facts, unlike the "neutral" facts examined in *Jerez* and *Reid*, can no longer be considered merely "neutral," but instead become *counter-indicative* of impairment by alcohol. In this sense, they are far more impactful and powerful than purely "innocent" facts.

Proof of the greater weight to be afforded "non-neutral" innocent facts can be offered by way of further clarification. It is a long-standing part of the common stock of knowledge that alcohol affects *both* fine and gross motor skills, yet Mr. Kosmosky had no problem producing his driver's license or had any problems with his mannerisms while he was seated in his vehicle. It is also well known that alcohol does not discriminate, *i.e.*, it affects both a person's ability to balance and coordinate their movements just as it *also* affects their ability to think clearly. Nevertheless, Mr. Kosmosky never displayed any problems with his ability to engage the deputy in conversation or to follow the instructions given him. Likewise, alcohol is known to have a distinct odor. Despite this fact, the deputy observed *no* odor emanating from either Mr. Kosmosky or his vehicle. Just as it is not inculpating to be from Florida because millions of people are from Florida, so too it is not inculpating to smoke a cigarette because millions of people across this country do so daily.

On appeal, Mr. Kosmosky expressly advocated for an approach which asked the court of appeals to go beyond what is the common practice in this state, namely examining only inculpating facts without regard to exculpating ones. Despite his plea in this regard, the court of appeals did precisely what the circuit court did: it iterated the inculpating facts and, contrary to the *Arvizu* Court's warning about adopting a "divide-and-conquer" analysis, picked apart each of Mr. Kosmosky's

countervailing factual assertions individually *without* appreciating them ***in their whole context*** as Mr. Kosmosky urged. Mr. Kosmosky urged the court of appeals to consider that not all facts are "created equally"—or should be *weighted* equally—when it comes to assessing whether a reasonable suspicion exists to believe that a violation of the law is afoot. Mr. Kosmosky's point being that the *weight* to be afforded Deputy Fuller's observations is considerably diminished when considered ***in context as part of the whole.*** Inculpating facts cannot be dissevered from those facts which tend to lessen their value in the context of whether a reasonable suspicion exists. Just as the emergency room physician would not be acting reasonably by failing to consider the appendectomy patient's activity immediately prior to her arrival at the hospital, so too it violates the Fourth Amendment's reasonableness requirement to ignore facts in a reasonable suspicion calculus which undercut the weight to be afforded the inculpating ones.

Mr. Kosmosky is asking this Court to clarify the totality of the circumstances test as it applies to the word "totality" itself and to the weight to be afforded innocent facts which impact upon that "totality." A tribunal which approached Mr. Kosmosky's point in this regard was the Texas Court of Criminal Appeals in *Cassias v. State*, 719 S.W.2d 585 (1986), albeit in the context of reviewing an affidavit in support of a search warrant. The *Cassias* court stated that when "'the pieces' . . . do not 'fit neatly together' to provide a substantial basis to support . . . [reasonable suspicion]" because they "are too disjointed and imprecise," a seizure cannot be justified. *Id.* at 589 (citations omitted). Mr. Kosmosky merely wishes this Court to recognize what the *Cassias* court did but to do so in the context of his case, *i.e.*, when "disjointed" facts, such as a lack of odor of intoxicants and unimpaired mentation, do not "fit neatly together" with other allegedly inculpating facts.

In Wisconsin, this Court held in *State v. Waldner*, 206 Wis. 2d 51, 556 N.W.2d 681 (1996), that:

> We look to the totality of the facts taken together. **The building blocks of fact accumulate.** And as they accumulate, reasonable inferences about the cumulative effect can be drawn. In essence, a point is reached where the sum of the whole is greater than the sum of its individual parts.

Id. at 58 (emphasis added). Notably, the court's observation that "[t]he building blocks of fact accumulate" makes no mention about what happens when those

building blocks include facts which undercut, or make *less* likely, the conclusion to which other facts may point. Mr. Kosmosky is asking this Court to clarify to what extent the *Waldner* standard should be influenced not merely by innocent facts, but by innocent facts which weigh *against* the conclusion one might draw from those facts which are inculpating. This is reason enough for this Court to grant review as Mr. Kosmosky petitions.

E. Specific Problems with the Court of Appeals' Decision.

While it is generally true that this Court's function is not to act as an error-correcting court when the error is premised upon the facts of a particular case rather than the law, nevertheless, it remains highly relevant to Mr. Kosmosky's Petition to advise this Court of the manner in which the court of appeals drifted from the actual circumstances of his case because it tends only to strengthen his position regarding the abuse which the totality of the circumstances test has suffered.

In support of its holding, the court of appeals made much of the fact that Mr. Kosmosky had difficulty locating his insurance information. P-App at 102. The actual record, however, reflects that Deputy Fuller admitted that there was no delay in Mr. Kosmosky's searching for proof of insurance when asked to do so. R24 at 23:9-13. Additionally, Deputy Fuller testified that when Mr. Kosmosky could not find a physical insurance card within the passenger compartment of the vehicle, he informed him that proof of insurance "would be on his phone, ..." R24 at 23:14-17. Before searching his phone for proof of insurance, Mr. Kosmosky "grabbed his wallet . . . to look in his wallet, . . ." presumably for his insurance card. R24 at 24:1-6.

Beyond the fact that the court of appeals baldly asserted that Mr. Kosmosky's "difficulty" in producing his insurance card was proof of impairment, the foregoing helps to establish Mr. Kosmosky's point about the "weight" to be given facts in the "context" of the circumstances. It is a far different thing for somebody to hand a law enforcement officer a credit card in lieu of an insurance card or to fumble with documents in their vehicle because their fine-motor skills are impaired than it is simply to have difficulty actually locating a slip of paper among all of the papers one may keep in their vehicle.

Additionally, the court below also treated Mr. Kosmosky smoking a cigarette as an inculpating fact based upon Deputy Fuller's experience that people often use a cigarette to disguise the odor of intoxicants. P-App at 106-07. Once more, however, this betrays that the court of appeals has transmogrified the totality of the circumstances test into something which ignores the *weight* to be given a particular fact by treating everything which is seemingly inculpating equally. More specifically, the court of appeals failed to recognize that "conduct typical of a broad category of innocent people [such as smoking] provides a **weak basis for suspicion**." *United States v. Johnson*, 171 F.3d 601, 603 (8th Cir. 1999)(emphasis added), quoting *United States v. Weaver*, 966 F.2d 391, 394 (8th Cir. 1992), *cert. denied*, 506 U.S. 1040 (1992). Despite being a "weak basis," the court of appeals held Mr. Kosmosky's smoking out almost as an "automatically" inculpating fact without due regard to the recognition that such facts are weak.

Similarly, while the court of appeals correctly treated speeding as a factor which may permissibly be considered as evidence of potential impairment, it did not do so in the *context* of the fact that the record admitted of no other poor driving behavior on Mr. Kosmosky's part—such as weaving within his lane, swerving across lanes, obstructing traffic, or otherwise erratically operating his vehicle—as the "typical" impaired driving related cases so often involve. P-App at 105. This is precisely why Deputy Fuller testified that Mr. Kosmosky's driving behavior was *not* "a factor in [his] asking him to perform field [sobriety] tests." R24 at 8:20-23; 19:23 to 20:6. Once more, this speaks to Mr. Kosmosky's point about why this Court needs to intervene to make a clear and unequivocal statement to courts below that the facts which are part of the totality of the circumstances test fall on a *spectrum* which requires them to be given a particular weight *in context*. Formulaically speaking, if this Court continues to allow lower courts simply to find that "A = B = C = D" is always true because every fact is the same, then it will be leaving defendants "in the wind" when the true facts are better represented by "a = B = c = d." There are circumstances in which "A + B + C + D" may at first blush appear to rise to the level of establishing a reasonable suspicion, but if given their actual weight in context, *i.e.*, "a + B + c + d," they fall short of the mark.

CONCLUSION

Because the totality of the circumstances test, as applied both to Mr. Kosmosky and to cases in general throughout Wisconsin, has devolved to the point

where circuit courts are weighing only those facts which tend to support an inference of wrongdoing without considering other evidence which mitigates against such a conclusion, Mr. Kosmosky petitions this Court to intervene and further elaborate on what the appropriate standard of review ought to be.

Dated this 17th day of April, 2023.

Respectfully submitted:
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CERTIFICATION OF BRIEF

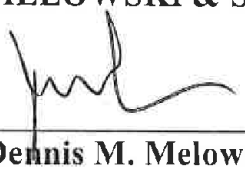
I hereby certify that this Petition conforms to the rule set forth in Wis. Stat. § 809.62(4) requiring conformity with § 809.19(8)(b), (bm), and (8g) for a Petition for Review. The length of this Petition is 6,692 words.

CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains: (1) a Table of Contents; (2) the findings and opinion of the court of appeals; (3) the findings and opinion of the trial court; (4) relevant trial court record entries; and (5) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues. I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 17th day of April, 2023.

MELOWSKI & SINGH, LLC



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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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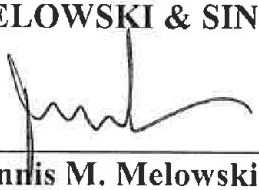

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