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STATE OF WISCONSIN
IN SUPREME COURT

Appellate Case No. 2023AP838

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

BRYSON KEITH WILLIAMS,

Defendant-Appellant-Petitioner.

PETITION FROM A DECISION OF THE COURT OF APPEALS DATED AND ENTERED ON OCTOBER 4, 2023

APPEALED FROM AN ORDER OF JUDGMENT ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, BRANCH II, THE HONORABLE JENNIFER R. DOROW PRESIDING, TRIAL COURT CASE NO. 22-TR-2766

PETITION OF DEFENDANT-APPELLANT-PETITIONER

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STATEMENT OF THE ISSUE

WHETHER THE SELF-FASHIONED AND MISLEADING[1] STATEMENT MADE BY THE ARRESTING OFFICER TO MR. WILLIAMS **PRIOR TO** HIS RECITATION OF THE INFORMING THE ACCUSED FORM THAT "NOT EVERYTHING IN THE FORM WOULD APPLY TO HIM" ROSE TO THE LEVEL OF A SANCTIONABLE VIOLATION OF THE IMPLIED CONSENT LAW DESPITE THE OFFICER'S SUBSEQUENT ACCURATE RECITATION OF THE FORM?

> Trial Court Answered: NO. The circuit court concluded that, pursuant to *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 277, 542 N.W.2d 196 (Ct. App. 1995), *inter alia*, Mr. Williams was obligated to establish that he was actually harmed by the misleading information. R48 at p.50; D-App. at 110-12.

> Court of Appeals Answered: NO. The court of appeals applied the analysis suggested under *Quelle* to conclude that (1) since the additional information provided to Mr. Williams was not misleading, and (2) since Mr. Williams failed to submit evidence that his decision was, in fact, affected by the additional information, he failed to satisfy the *Quelle* test. P-App. at 105-07.

STATEMENT OF THE CASE

On April 27, 2022, Mr. Williams, was stopped and detained in the City of Waukesha by Officer Mark Pavlik of the Waukesha Police Department for allegedly obstructing traffic by parking his motor vehicle in a designated lane of travel. R48 at 5:23 to 6:18.

As a result of his contact with law enforcement, Mr. Williams was ultimately arrested for Operating a Motor Vehicle While Under the Influence of an Intoxicant, contrary to Wis. Stat. § 346.63(1)(a). R48 at 14:5-16. Because Mr. Williams also allegedly refused to consent to an implied consent test, he was additionally charged

[1] Mr. Williams, contrary to the court of appeals' assertion that the information provided by the officer was "evident" and therefore not "misleading," asserts that "misleading" is the correct appellation to describe the information because the court of appeals' position *assumes* "perfect knowledge." That is, the recipient of the information will share the same understanding of the law as the officer. Clearly, this is not the case when dealing with lay people of different acumen, experience, education, *etc*. *See* Section II., *infra*.

with Unlawfully Refusing to Submit to an Implied Consent Test, contrary to Wis. Stat. § 343.305(9)(a). R1; R48 at 14:17 to 15:13.

Mr. Williams timely requested a hearing on the lawfulness of his alleged refusal, however, for reasons unknown, the circuit court believed it had not received his request and ordered that his driver's license be revoked. R16. Upon being advised that Mr. Williams' operating privilege had been revoked for the refusal, his counsel filed a written request moving the court to set aside the erroneously entered Conviction Status Report and provided proof to the Court that a request for a refusal hearing had, in fact, timely been made. R19. Upon receipt of counsel's letter, the circuit court rescinded its order revoking Mr. Williams' operating privilege for the alleged refusal. R21 & R22.

Thereafter, Mr. Williams filed two motions regarding (1) the constitutionality of Wis. Stat. § 343.305 and (2) whether the self-fashioned and misleading statement the arresting officer provided him prior to the recitation of the Informing the Accused form constituted non-compliance with the Implied Consent Law and/or constituted a due process violation. R22 & R23, respectively. The latter motion was premised upon the fact that, before he read the Informing the Accused form [hereinafter "ITAF"], Officer Pavlik told Mr. Williams that "not everything on the form would apply to him." R48 at 35:9-13.

An evidentiary hearing was held on Mr. Williams' motions on May 10, 2023. R48. At the hearing, the State offered the testimony of a single witness, Officer Pavlik. R48 at pp. 4-43. At the conclusion of the hearing, the circuit court entertained extensive oral argument by the parties regarding the pretrial motion issues raised by Mr. Williams. R48 at pp. 44:12 to 57:16.

At the conclusion of the argument, with respect to his challenge premised upon the misleading information he received prior to the recitation of the Informing the Accused form, the court held that *Quelle*, 198 Wis. 2d 269, and *State v. Ludwigson*, 212 Wis. 2d 871, 569 N.W.2d 762 (Ct. App. 1997), controlled over *Washburn County v. Smith*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243, and therefore, Mr. Williams was required to establish that he was *actually* harmed by the unexplained, unqualified and self-fashioned information with which he was provided prior to the recitation of the form. R48 at 50:6-22; D-App. at 110-12. Thereafter, the clerk docketed the court's judgment against Mr. Williams on May

10, 2023, and the court rendered a formal order in accordance with its judgment. R47.

It is from the adverse decision of the circuit court that Mr. Williams appealed to the court of appeals by Notice of Appeal filed on May 11, 2023. R38. By decision filed on October 4, 2023, the court of appeals held that the circuit court's legal conclusions were sound and affirmed its judgment.

STATEMENT OF FACTS

On April 27, 2022, Officer Mark Pavlik of the Waukesha Police Department observed a vehicle stopped in the middle of traffic in a no parking zone. R48 at 5:23-25. Officer Pavlik noticed that it appeared the driver was asleep, so he activated his emergency lights and approached the driver. R48:6-3-12.

After approaching Mr. Williams, Officer Pavlik observed that he had an odor of intoxicants emanating from his person and that he had bloodshot eyes. R48 at 8:18-23. Based upon these observations, Officer Pavlik asked Mr. Williams to submit to a battery of field sobriety tests. R48 at 9:12-14. Mr. Williams performed the requested tests, apparently displaying sufficient indicia of impairment such that he was arrested for Operating a Motor Vehicle While Under the Influence of an Intoxicant. R48 at 14:5-16.

After securing Mr. Williams in the rear of his squad and transporting him to the hospital, Officer Pavlik read the ITAF to him. R48 at 14:20-22. Officer Pavlik read the contents of the form verbatim to Mr. Williams. However, immediately prior to reciting the information, he told Mr. Williams that "not everything on the form would apply to him," without further clarification or explanation as to which parts "would not apply." R48 at 14:20-24; 35:9-13. When asked whether he would consent to an evidentiary chemical test of his blood, Mr. Williams allegedly refused to submit to the test and he was additionally charged with Unlawfully Refusing to Submit to an Implied Consent Test. R1.

STANDARD OF REVIEW

The issue presented in this appeal is premised upon whether an undisputed set of facts rises to the level of establishing a violation of Mr. Williams'

constitutional due process rights. When assessing whether a particular set of facts satisfies a constitutional standard, this Court determines whether the circuit court's findings of historical fact are clearly erroneous, and then independently applies constitutional principles to those facts. *State v. Robinson*, 2010 WI 80, ¶ 22, 327 Wis. 2d 302, 786 N.W.2d 463.

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 substantial question of constitutional law because it involves both the statutory *and* constitutional due process rights of the accused, especially as it relates to a defendant's right to seek chemical testing on his or her own accord under the auspices of the individual's constitutional right to gather chemical test evidence in their defense. *See* Section III.A., *infra*.

Apart from the ITAF's implication on the constitutional right to gather evidence in one's defense, the form also serves to protect the constitutional due process concept of "notice" which comes in many guises. As an outgrowth of the Fifth Amendment, the concept of notice extends far beyond the four corners of a statutory right. Instead, it is a fundamental component of not only the Fifth Amendment, but the Fourteenth Amendment as well. *See United States v. Williams*, 553 U.S. 285, 304 (2007); *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966).

Because Mr. Williams contends that the foregoing rights were adversely impacted by the unqualified and misleading information the officer provided to him prior to the recitation of the ITAF, reason exists under § 809.62(1r)(a) to grant his petition.

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 what standard of review circuit courts should apply when a law enforcement officer, *prior to the recitation of the ITAF*, misleads an accused citizen with respect to the *due process* rights they enjoy under the implied consent statute. To date, the analyses which

have been undertaken have only involved procedural violations of the statute. There needs to be some direction—some standard—by which a distinction is made between mere "procedural violations" of the implied consent law and those which adversely impact upon the accused's due process rights.

A decision of this Court on the aforesaid point of law will have statewide impact as literally **thousands** of individuals are annually arrested in Wisconsin for operating while intoxicated violations. Cases of this ilk arise in **all** seventy-two Wisconsin counties. Circuit courts throughout the State **daily** render decisions on whether to grant motions regarding violations of the implied consent law. It is, perhaps apart only from reasonable suspicion and probable cause challenges, the *most* frequently raised issue in impaired-driving prosecutions. Clearly, § 809.62(1r)(c)2. is satisfied with respect to the issue presented in this Petition as having "statewide impact."

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

The question presented by Mr. Williams is likely to recur based upon the numbers alone given the frequency with which individuals are arrested for operating while intoxicated violations every year in this state. With **thousands** of arrests for impaired-driving offenses occurring annually in this state, and further, given that the information contained within the four corners of the Informing the Accused form is read to virtually every one of these drivers, there undoubtedly will be those cases in which a law enforcement officer elects to provide information to an accused apart from the form but which impacts upon the accused's due process rights. The gravity and pervasiveness of the issue raised herein compels review because of the very frequency with which it recurs daily throughout Wisconsin circuit courts. If no intervention is made by this Court to clarify the appropriate standard by which to analyze such due process questions, accused citizens will regularly be subjected to procedures which interfere with their statutory and constitutional rights.

Until such time as this Court establishes a clear rule by which *pre-emptive* misleading and unqualified information—provided by law enforcement officers on their own under the rubric of the implied consent law—is examined, neither the court of appeals nor circuit courts will have a properly-defined yardstick by which to evaluate due process claims, and instead, will recurringly interpose the

misguided, and frankly erroneous, *Quelle* standard. This Court should, therefore, intervene to provide direction to courts throughout this State under § 809.62(1r)(c)3. lest this problem recur with remarkably high frequency.

4. Wis. Stat. § 809.62(1r)(d): The Court of Appeals' Decision Is in Conflict With Controlling Opinions of This Court.

As explained more fully below, the standard which the court of appeals applied to the due process issue presented is in conflict with the approach taken by this Court and the court of appeals when the question centers about *due process* concerns rather than mere procedural ones. More particularly, neither this Court nor the court of appeals has ever reviewed a due process related question arising under the implied consent statute from the perspective of the analysis suggested by the court in *Quelle*, 198 Wis. 2d 269. The *Quelle* test has been reserved for those situations in which there is a question of a law enforcement officer's compliance with the rigors of Wis. Stat. § 343.305(4). *Quelle*, 198 Wis. 2d at 281. *Quelle* has never been extended to circumstances in which the accused has alleged that the officer's conduct has interfered with his or her due process rights. Thus, to this extent, the court of appeals' approach in this matter conflicts with the accepted standards otherwise applied to due process questions arising under the implied consent statute (*see* Section II., *infra*) and for this reason, review of Mr. Williams' case is merited.

ARGUMENT

I. FRAMING THE ISSUE PRESENTED.

The instant petition involves a circumstance in which the court of appeals "missed the boat" by such a significant distance, its decision fell completely into the water. More particularly, the court of appeals applied a standard of review to the facts of Mr. Williams' case which is more suited to circumstances in which there is a question of whether a law enforcement officer has either (1) misread the ITAF or (2) provided extraneous information which is in conflict with, or contrary to, that which appears on the form itself.

Mr. Williams does *not* dispute that a *Quelle* analysis is appropriate if, for example, a law enforcement officer only advises an accused that "penalties" in *general* may be imposed for having a prohibited alcohol concentration rather than

listing them *specifically* as discussed in *Mequon v. Hess*, 158 Wis. 2d 500, 463 N.W.2d 687 (Ct. App. 1990)(decision issued prior to *Quelle* but illustrative of Mr. Williams' point); or when the ITAF refers to penalties which "may" be imposed instead of "will" be imposed as in *State v. Muente*, 159 Wis. 2d 279, 464 N.W.2d 230 (Ct. App. 1990) (decision issued prior to *Quelle* but illustrative of Mr. Williams' point); or when a law enforcement officer correctly recites the form, but after its recitation, attempts to place its cumbersome "legalese" into lay terms an accused can grasp, as in *State v. Ludwigson*, 212 Wis. 2d 871, 569 N.W.2d 762 (Ct. App. 1997).

What separates Mr. Williams' case from the foregoing instances are two significant considerations, namely (1) the misleading—"misleading" because it was unqualified and unexplained—information provided to him by Officer Pavlik came immediately *prior to* the recitation of the ITAF, and (2) the impact of the information extended well beyond mere "technical" or "procedural" issues, instead infecting certain *due process* aspects of the form. Thus framed, it is evident that the question before this Court is not as simple as the circuit court and court of appeals thought it.

II. THE PROBLEM INHERENT IN THE COURT OF APPEALS' DECISION.

For utterly inexplicable reasons, the court of appeals correctly framed the question presented by Mr. Williams in his appeal, but then immediately defaulted to adopting the *wrong* framework for review without ever considering his due process contentions. More specifically, the court of appeals stated:

> Williams's argument that he was improperly denied his **statutory and constitutional right to due process** turns on the adequacy of the information provided by Pavlik. To assess the adequacy of the information provided by a law enforcement officer under the implied consent law, this court applies the . . . three-prong inquiry [set forth in] *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 280, 542 N.W.2d 196 (Ct. App. 1995),

Slip Op. at p.5 (emphasis added); P-App. at 105. To be clear, **no case which has ever examined a *due process* related violation under the implied consent statute has ever applied the *Quelle* test**, and this was precisely the point of Mr. Williams' argument on appeal—an argument frustratingly ignored by the court of appeals.

See, *e.g.*, *State v. McCrossen*, 129 Wis. 2d 277, 385 N.W.2d 161 (1986); *see also*, *State v. Walstad*, 119 Wis. 2d 483, 351 N.W.2d 469 (1984); *State v. Ehlen*, 119 Wis. 2d 451, 351 N.W.2d 503 (1984); *State v. Disch*, 119 Wis. 2d 461, 351 N.W.2d 492 (1984); *State v. Renard*, 123 Wis. 2d 458, 367 N.W.2d 237 (Ct. App. 1985). It is befuddling that the court of appeals could correctly recognize that Mr. Williams' claim was one premised upon notions of statutory and constitutional due process yet apply what is otherwise known in common legal parlance as a "procedural violation" test to his contention.

The court of appeals failed to recognize that both *Quelle*, 198 Wis. 2d 269 and *Ludwigson*, 212 Wis. 2d 871, upon which it also relied, were dealing with factual scenarios altogether distinguishable from Mr. Williams'. More specifically, the *Quelle* court examined a circumstance in which the law enforcement officer "attempt[ed] to explain the form" to the defendant after it was read, while the *Ludwigson* court addressed a situation in which the officer also "attempted to explain the [Informing the Accused] form to Ludwigson in 'lay terms'" after it was read. *Quelle*, 198 Wis. 2d at 274, *Ludwigson*, 212 Wis. 2d at 874.

The *Quelle* and *Ludwigson* circumstances are distinguishable because correct information had first been provided to each defendant and neither defendant was left to decide ***on their own*** which portions of the information provided to them "applied" versus which did not. In this case, *from the first instance*, Mr. Williams was only given a vague, nebulous, and wholly unqualified statement which left him to his own devices about what was supposed to be relevant to him. At least in *Ludwigson* all the officer did was to use "lay terms" to elucidate what some of the more complex legal concepts on the Informing the Accused form meant—which is also what the officer in *Quelle* did by "attempt[ing] to explain the form." Officer Pavlik offered Mr. Williams no such explanations in the instant matter, thereby exacerbating the problem created by his self-fashioned and unqualified statement.

Frankly, the only part of the *Quelle* decision which bears any relevance to Mr. Williams' case is when the court discusses how the decision in *State v. Geraldson*, 176 Wis. 2d 487, 500 N.W.2d 415 (Ct. App. 1993), was *appropriately* reached. *Quelle*, 198 Wis. 2d at 278. *Geraldson* is far more akin to Mr. Williams' circumstances because Geraldson had "not [been] fully informed of the respective consequences" relative to him. *Quelle*, 198 Wis. 2d at 278. The officer's actions in this case were far more egregious than those in *Geraldson* because Mr. Williams

was left to flounder on his own with respect to trying to decide which information provided to him "applied" versus which information did not. All Mr. Williams knew *before* the ITAF was read was that some things the officer was about to tell him were *not* applicable to him while other things would be. As a lay person, thrust into a stressful set of circumstances, there is no mechanism by which any court can be certain that Mr. Williams could accurately divine which information was applicable to him versus which was not.

The court of appeals aggravated this problem by failing to acknowledge that every human being is different. Contrary to the court of appeals rather arrogant and dismissive observation that Officer Pavlik's "statement was nothing more than an observation that was evident from the form," individuals do not share the same mind, have the same experiences, nor possess equivalent levels of education. Slip Op. at p.6; P-App. at 106. Given that each person is unique, if the officer's conduct in this case is sanctioned, who can say that the next person, the next dozen or hundred people, who are told "some of this will apply to you, some of it will not," will interpret the ITAF in the same way each time, recognizing with absolute legal perfection what they *should* take away from the form versus what they *should not*. Ultimately, Mr. Williams was left twisting in the wind to guess as to which portions of the information were going to "apply" to him and which were not. The timing of Officer Pavlik's statement *cannot* be divorced from its content.

Another reason to reject the court of appeals' *Quelle* analysis is its factual distinction from Mr. Williams' case. *Quelle* involved a circumstance in which the defendant "assert[ed] that she was subjectively confused by the officer's conduct" when he provided information to her which was "in essence inconsistent with what the law is . . . ." *Quelle*, 198 Wis. 2d at 273-75. She contended that under *Village of Oregon v. Bryant*, 188 Wis. 2d 680, 525 N.W.2d 635 (1994), Wisconsin formally recognized a "subjective confusion" defense. *Quelle*, 198 Wis. 2d at 273. On this question, the *Quelle* court rejected the defendant's "subjective confusion" approach. *Id*. at 280. Mr. Williams' is not proffering a "subjective confusion" approach, but rather, his contention rests within the fact that the misleading information provided to him went unqualified and unexplained, which is *not* similar to the circumstances underlying the *Quelle* decision.

More specifically, no *prejudicial* information was delivered to Quelle *prior to* the officer's recitation of the form (as is the case here), and more importantly, the

misinformation came in response to questions which Quelle herself was asking, *i.e.*, its genesis was not in actions taken by the officer, but rather, was the result of Quelle's own confusion and questioning about the information provided to her.

Another problem with the court of appeals reliance on *Quelle* is that *Quelle* does not exist in a vacuum. That is, *Washburn County v. Smith*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243, a Wisconsin **Supreme** Court decision issued **subsequent** to the *Quelle* decision, **expressly** modified the *Quelle* test.

Smith involved a circumstance in which the defendant's license was revoked for allegedly refusing to submit to an implied consent test. *Smith*, 2008 WI 23, ¶ 1. Smith argued he did not improperly refuse to submit to a chemical test because the arresting officer made two misstatements to him regarding the penalties he would incur for refusing to submit to a chemical test. *Id*. ¶ 38.

In analyzing the facts before it, the *Smith* court acknowledged that the officer "complied fully with Wis. Stat. § 343.305(4)" when he read the Informing the Accused form. *Id*. ¶ 53. The court did not, however, end its analysis there, but rather, examined the appropriateness of applying the three-pronged *Quelle* test to the facts before it. *Id*. ¶¶ 56-58. Smith urged the court to adopt the approach suggested by the court in *State v. Schirmang*, 210 Wis. 2d 324, 565 N.W.2d 225 (Ct. App. 1997), while the State relied upon *Ludwigson*, 212 Wis. 2d 871, for its recommended approach. *Id*. ¶ 58.

In approaching Smith's contention that the *Schirmang* holding should control in his case, the Wisconsin Supreme Court observed:

> The *Schirmang* court of appeals interpreted *Wilke* as holding that an officer necessarily fails to substantially comply with Wis. Stat. § 343.305(4) whenever the officer misstates penalties that would actually affect the driver given the driver's record. *Schirmang's* characterization of *Wilke* is not an accurate statement of the *Wilke* holding. The *Wilke* case involved a law enforcement officer's failure to give the defendant one component of the statutorily required information (relating to penalties), and the *Wilke* court of appeals rested its decision on this fact. According to *Wilke*, if the circuit court determines that the officer failed to inform the accused in compliance with the statute, the circuit court "'shall order that no action be taken on the operating privilege on account of the person's refusal to take the test in question.' Sec. 343.305(9)(d)." **The *Wilke* opinion says nothing about misstatements of penalties that would actually affect the driver**.

Smith, 2008 WI 23, ¶ 63 (emphasis added). The *Smith* court continued that the "*Schirmang* court of appeals was correct . . . to rely upon *Wilke*," however, it was not correct because the *Quelle* test had been satisfied, rather, it was correct because the officer failed to give the defendant the statutorily required information. *Smith*, 2008 WI 23, ¶ 64. Based upon this understanding, the *Smith* court withdrew that portion of the *Quelle* test requiring "actual harm" to be established by a defendant in a circumstance where the defendant has not been given the statutorily required information. *Id*.

The *Smith* court then continued by explaining how the holding in *Ludwigson* squared with its decision to withdraw the "actual harm" prong of the *Quelle* test. *Smith*, 2008 WI 23, ¶¶ 67-71. The *Smith* court noted that in *Ludwigson*, the officer accurately provided the information contained in § 343.305(4), and Ludwigson failed to carry the day by establishing that the misinformation he received from the officer *after* the correct recitation of the form affected his ability to make an informed choice about submitting to testing. *Id*. ¶ 71.

Ultimately, the *Smith* court held that when law enforcement officers fail to provide statutorily required information to the accused, the person's operating privilege may not be revoked. *Id*. ¶ 71. If, however, accurate information is provided which is subsequently tainted by officer-induced misinformation, then the *Quelle* test remains "good law," and the accused must demonstrate actual harm. *Id*.

It is Mr. Williams' contention that applying the *Smith* court's logic to the circumstances of his case yields but one result, namely: the *Wilke* "no nexus" standard applies rather than the *Ludwigson* test. Mr. Williams bases his contention on the fact that the misleading, unqualified information provided to him by Officer Pavlik makes his case far more akin to a circumstance in which there has been a failure on the part of the officer to provide the statutorily required information than it does to one in which the information is accurately provided, but then subsequently tainted by misinformation since the accused is left to his own devices to try and infer—from very complex information—which portions of the information just provided apply to him and which do not. This is no different than leaving out information altogether because the law enforcement officer can never be certain that the accused—*in his own mind*—is interpreting the form as the *officer intended* it to

be interpreted. Certainly, the legislature did not intend to "leave it up to the subject" to decide what information was relevant and what information was not.

By telling Mr. Williams *prior to* the recitation of the Informing the Accused form that "not all" of the *statutorily mandated* information would "apply" to him, Officer Pavlik is effectively misreading the form, *i.e.*, misadvising him in the *Smith-Wilke* sense. More particularly, Officer Pavlik's unqualified statement is the functional equivalent of his leaving out a clause, sentence, or even an entire paragraph of the ITAF during its recitation. Just as there is no mechanism by which the accused can ascertain whether all of the information has been provided to him if a portion of the form is "skipped" by the officer during its reading, so too there is no mechanism by which an accused can determine which parts of the form are supposed "to apply" to him versus those which were not intended "to apply." There is no distinction in this difference.

Contrary to the appellate court's belief that an antiseptic recitation of the Informing the Accused form somehow magically acts to disinfect any misleading or unqualified statements which may have preceded it, common sense dictates otherwise, and Mr. Williams' point in this regard is best made by analogy.

Assume, *arguendo*, prior to reading a suspect his *Miranda* rights, a law enforcement officer informs them that "I'm going to read you some information, but you should know that in most cases, even if you have an attorney and remain silent, the defendant is still found guilty." If the officer thereafter recites the *Miranda* rights verbatim, the prefatory information—while **wholly accurate** because the majority of defendants are, in fact, convicted even if represented by counsel—is clearly going to make the accused second guess whether it is "worth it" to remain silent or request the assistance of counsel. There is no reasonable universe in which any court, acting in accordance with the common law, is going to find that the officer's initial, unadorned qualification satisfies the rigors imposed by *Miranda*. It is no stretch to liken the recitation of the Informing the Accused form to the *Miranda* warnings either since this Court has already done so. *See Quelle*, 198 Wis. 2d at 276 ("[w]e first observe that the warnings provided drivers under the implied consent law are analogous to those employed in *Miranda*-type cases").

The point of the foregoing is simple: without clarifying for a lay person which portions of the information he is about to be read "do" or "do not" apply to

him leaves the individual awash in a sea of confusion because there is no basis upon which to reasonably believe he has sufficient legal acumen to determine precisely what the officer meant. This is, in two words, "common sense."

The court of appeals opined that it was "evident" which information on the ITAF applied to Mr. Williams and which did not. Slip Op. at 6; P-App. 106. Here, however, is what the court of appeals conveniently overlooked: the Informing the Accused form contains *far more* information than that relating to accidents and injuries. For example, it relates information about two alternative forms of testing apart from the officer's primary test, *i.e.*, an alternate test the accused can obtain from the arresting agency at its expense and an additional test the accused can seek on their own accord. How, precisely, is it that the court of appeals can confidently—or correctly—assert that every person arrested for an impaired driving offense is going to understand or appreciate that, in the face of just being told that "not all of the information is going to apply to them," they still enjoy the right to exercise both of these rights and that this is not one of the things which "doesn't apply?"

Every individual being requested to submit to an implied consent test is unique. They have different levels of education. They have different experiences with the law. They have varying degrees of English comprehension. They are nervous to varying degrees. *Etc.* These, and other factors, combine in almost innumerable ways when it comes to the accused's ability to *read the mind* of the law enforcement officer to discern what he or she meant by "not all" of the information applying—and that is the correct characterization, namely "read the mind" of the officer. Clearly, the officer has an understanding or impression of what he or she believes will apply to the accused, but why should the accused be left guessing as to what is in the officer's mind when being provided with the complex and detailed information in the Informing the Accused form, especially when faced with what is arguably the *most* impactful decision they are going to make regarding their case?

III. FAILING TO PROPERLY ADVISE THE ACCUSED OF WHICH PARTS OF THE INFORMING THE ACCUSED FORM "DO NOT APPLY" TO HIM IMPERMISSIBLY INTERFERES WITH THE DUE PROCESS RIGHTS OF THE ACCUSED.

A. The Implied Consent Law Conveys Information to an Accused Which Implicates Several Due Process Rights.

Under Wisconsin's Implied Consent Law, an individual is deemed to have given their implied consent to a blood, breath, or urine test when requested by a law enforcement officer after having been arrested on suspicion of committing an impaired driving related offense. Wis. Stat. § 343.305(3)(a) (2021-22). Before a law enforcement officer may request a test under § 343.305(3)(a), however, the officer is first obligated to provide the suspect with certain information. Wis. Stat. § 343.305(4) (2021-22). This information is set forth in the Informing the Accused form.

It cannot be gainsaid that the Informing the Accused form relates a significant amount of information to a suspected drunk driver regarding their rights and responsibilities. Much of this information is not merely "procedural" in nature, but relates to certain due process rights the accused possesses.

For example, it is well-settled in Wisconsin that "a driver has a 'right' not to take the chemical test designated by the officer." *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 277, 542 N.W.2d 196 (Ct. App. 1995); *accord, State v. Schirmang*, 210 Wis. 2d 325, 565 N.W.2d 225 (Ct. App. 1997); *State v. Sutton*, 177 Wis. 2d 709, 714-15, 503 N.W.2d 326 (Ct. App. 1993)(accused entitled to make an informed choice about submitting to chemical testing). The ITAF plainly provides information in this regard by expressly advising the suspect of their choice to refuse testing and accept the consequences of that decision or to submit to the requested test.

Additionally, the ITAF advises the suspect of their statutory due process right to an alternate test and their constitutional due process right to an additional test. Under Wisconsin's Implied Consent Law, after submitting to the primary test requested by law enforcement, a suspected drunk driver is entitled either to request an alternative chemical test the arresting agency is prepared to administer or obtain an additional test for which the suspect may make his or her own arrangements. Wis. Stat. § 343.305(5)(a) (2021-22). A long-standing litany of common law decisions of both the Wisconsin Court of Appeals and Supreme Court has held that the accused's right to alternative testing is a guarantee of statutory due process. *See, e.g., State v. McCrossen*, 129 Wis. 2d 277, 385 N.W.2d 161 (1986); *accord, State*

v. Walstad, 119 Wis. 2d 483, 351 N.W.2d 469 (1984); *State v. Ehlen*, 119 Wis. 2d 451, 351 N.W.2d 503 (1984); *State v. Disch*, 119 Wis. 2d 461, 351 N.W.2d 492 (1984); *State v. Renard*, 123 Wis. 2d 458, 367 N.W.2d 237 (Ct. App. 1985).

For example, in *McCrossen*, 129 Wis. 2d 277, the supreme court addressed the defendant's contention that the charges against her had to be dismissed because her constitutional right to access potentially exculpatory evidence was violated due to the arresting agency's failure to provide him with an alternate chemical test. *Id.* at 286. The *McCrossen* court took great pains to emphasize that it was examining the defendant's claim on that very narrow ground, *i.e.*, whether her *constitutional* rights were violated and therefore warranted *dismissal* of the charges against her. *Id.* In concluding that dismissal was not warranted because access to alternative testing was not constitutionally mandated, the court held that the right to an alternate test was nevertheless a guarantee of *statutory* due process and that suppression of the primary test, rather than dismissal of the underlying charges, was the appropriate remedy for violating this right. *Id.* at 287.

In *Walstad*, a predecessor case to *McCrossen*, the Wisconsin Supreme Court examined whether the destruction of a breath ampoule violated a defendant's due process right to access potentially exculpatory evidence. *Id.* at 483-84. The court found that the destruction of the ampoule did not violate Walstad's rights as he framed them on appeal because an accused's right to alternative testing afforded him the necessary due process protections. The *Walstad* court stated:

> In Wisconsin, the right to a second test is protected by statutory law, and it is, we believe, an assurance of constitutional due process. The second test affords the defendant the opportunity to scrutinize and verify or impeach the results of the breathalyzer test administered by enforcement authorities. Additionally, the legislation requires that an apprehended driver be advised of the absolute right to a second test. **This is a legislatively conferred right which we will strictly protect.**

Walstad, 119 Wis. 2d at 527 (emphasis added).

The foregoing concept that the right to access alternative testing is a measure of due process was likewise no stranger to the court of appeals in *Renard*. In *Renard*, the defendant was taken to a hospital after an accident, and while there, he was placed under arrest for operating while intoxicated. *Id.* at 459. Renard asked

whether he could take a breath test instead, but the arresting officer persuaded him to submit to a blood test since they were already at the hospital. *Id*. After submitting to the blood test, the arresting officer left the hospital without making further inquiry of Renard as to whether he still desired to have a breath test. *Id*. The court of appeals found that the arresting officer "had a *duty* before leaving to make an inquiry" of Renard regarding whether he wanted the alternate test. *Id*. at 461. The *Renard* court premised this duty upon the fact that the right to access the alternate test was a measure of statutory due process, and that the violation of this right warranted suppression of the State's primary test result. *Id.*

In other cases, such as *Ehlen* and *Disch*, the Wisconsin Supreme Court repeatedly emphasized that the right to an alternative test is an "internal safeguard of due process." *Ehlen*, 119 Wis. 2d at 457; *Disch*, 119 Wis. 2d at 479-80.

Beyond the statutory due process right to gather alternative test evidence is the ITAF's advisement to the accused that they also enjoy a *constitutional* right to procure evidence in their defense. It is a well-settled and long-standing principle of Fourteenth Amendment jurisprudence that a defendant has the right to gather evidence on his or her behalf. *See generally, State v. Schaefer*, 2008 WI 25, ¶ 63, 308 Wis. 2d 279, 746 N.W.2d 457, citing *Washington v. Texas*, 388 U.S. 14, 16-17 (1967). This principle is precisely what is protected by informing the accused in an operating while intoxicated case that he or she may arrange *for their own test* completely independent of the government's test *regardless of whether the person submits to an implied consent test*. Access to such evidence is an integral part of an accused being able to present a defense on his or her behalf.

The United States Supreme Court held in *Taylor v. Illinois*, 484 U.S. 400 (1988), that an accused has the right to present evidence on his or her behalf. *Id.* at 410. This same principle also found expression in other Supreme Court cases which addressed the extent of the accused's right to present a defense. *See, e.g.*, *Rock v. Arkansa*¸483 U.S. 44 (1987); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *United States v. Scheffer*, 523 U.S. 303 (1998). As the *Chambers* Court observed, the right of an accused to "due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers*, 410 U.S. at 294. Thus, to this extent, the ITAF serves yet another aspect of constitutional due process.

Further, in a fashion akin to the *Miranda* warnings, the ITAF also advises a person who chooses to refuse chemical testing that the fact of refusal can be used against them in court, although this use of the refusal evidence is now somewhat limited under cases like *State v. Forrett*, 2021 WI App 31, 398 Wis. 2d 371, 961 N.W.2d 132, *aff'd* 2022 WI 37, 401 Wis. 2d 678, 974 N.W.2d 422, *State v. Dalton*, 2018 WI 85, 383 Wis. 2d 147, 914 N.W.2d 120, and *State v. Banks*, 2010 WI App 107, 328 Wis. 2d 766, 790 N.W.2d 526.

Finally, the form also satisfies a due process "notice" component by advising the accused that if they have a chemical test result above the legal limit, their operating privilege will be subject to administrative suspension. *See generally*, *Thomas v. Fiedler*, 884 F.2d 990 (7th Cir. 1989). The concept of constitutional "notice" is an outgrowth of the Due Process Clause of the Fifth Amendment. *United States v. Williams*, 553 U.S. 285, 304 (2007). It is a concept that is driven by notions of fair play. *See, e.g., Connally v. General Construction Company*, 269 U.S. 385, 391 (1926). Because deprivations of life or liberty may result from the failure to satisfy the concept of notice as protected by the Fifth Amendment, the Supreme Court has held that the Fourteenth Amendment is implicated in such challenges as well. *See generally, Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966).

In summary, a broad brush may not be swept across the information contained within the four corners of the Informing the Accused form, painting all of it the same color. It is this notion, that the Informing the Accused implicates *multiple* due process rights, which is at issue in Mr. Williams' case because if an officer tells a suspect, prior to reading the form, that "not all of this will apply," the person is at a loss to distinguish between merely procedural information versus due process information when attempting to figure out precisely what it is the officer means.

B. Remedy for Interfering with an Accused's Due Process Rights.

The Informing the Accused form was deliberately designed to keep the Implied Consent Law in strict line with all aspects of the requirements of due process. *See generally*, *Fiedler*, 884 F.2d 990. This is where the problem lies when a law enforcement officer informs a suspect *prior to reading the* Informing the Accused form that not all of the information is going to apply to him, the absence of any further direction makes it impossible for the lay person to know which parts

in particular of the form "do not apply." Because aspects of the information concern due process rights, as described above, the officer is impermissibly interfering with the accused's statutory and constitutional due process rights. How or why should the suspect believe that information concerning the use of a refusal against him in court is or is not one of the things which does "not apply"? How should the accused determine whether the information relating to his exercising the right to refuse will or will not result in the refusal being used against him in court, or that "other penalties" will be imposed? Should the accused be expected to know that the officer may have meant that the individual was entitled to the alternate test but that the right to the additional constitutional test was not applicable?

Simply put, there is no reasonable method by which any court can divine what portions of a highly technical form a lay suspect can reasonably conclude would (versus would not) apply to him—and it should not have to. The far easier and fairer standard to administer in situations where an officer provides erroneous information which affects a suspect's due process rights is to send a clear message to law enforcement: Do *not* provide information to the suspect above and beyond the Informing the Accused form or any alleged refusal on the part of the accused will be dismissed. It is only through the vehicle of dismissal that: (1) law enforcement officers will curtail future conduct which is not prescribed by statute or common law; (2) will adequately safeguard the due process rights of the accused; and (3) will be compliant with the prevailing standard set forth in *Washburn County v. Smith*.

After all, it is not unprecedent for courts of supervisory jurisdiction to impose penalties against the government under the Implied Consent Law when there has been an impermissible interference with the accused's right to be provided with accurate information. The erroneous iteration of the law is often sufficient to invoke sanctions. *See, e.g., State v. Wilke*, 152 Wis. 2d 243, 448 N.W.2d 13 (Ct. App. 1989)(sanctions imposed even though "there was no apparent link between" the misinformation and the decision to refuse); *County of Eau Claire v. Resler*, 151 Wis. 2d 645, 446 N.W.2d 72 (Ct. App. 1989)(loss of presumptions applied when "information concerning penalties" is not properly given); *Schirmang*, 210 Wis. 2d 324 (defendant not required to demonstrate how misstatement of applicable penalties affected his decision regarding taking the test), *overruled on other grounds, Smith*, 2008 WI 23 (*Wilke* "no nexus" analysis applies when statutorily required information not provided); *see also*, *State v. Blackman*, 2017 WI 77, 377

Wis. 2d 339, 898 N.W.2d 774 (suppression is the remedy for erroneously advising suspect regarding consequences of refusing to submit to chemical test regardless of actual effect on accused's decision).

CONCLUSION

Because Officer Pavlik provided misleading and unqualified information to Mr. Williams prior to the recitation of the Informing the Accused form, the charge of Unlawfully Refusing to Submit to an Implied Consent Test pending against Mr. Williams should have been dismissed based upon the fact that the unqualified statements made by the officer rose beyond the mere level of a procedural violation of the implied consent statute, but rather, affected Mr. Williams' substantial due process rights. The court of appeals was in error when it failed to account for this significant difference.

Dated this 13th day of October, 2023.

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CERTIFICATION OF LENGTH

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13-point type and the length of the brief is 7,268 words.

I also certify that filed as a separate document is an appendix that complies with Wis. Stat. § 809.19(2)(a).

Finally, I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

Dated this 13th day of October, 2023.

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