NO. 94369-9
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSE LUIS SOSA,

Appellant.

PETITION FOR REVIEW

STATE'S RESPONSE TO AMICUS CURIAE

Respectfully submitted:

by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

P.O. Box 5889
Pasco, Washington 99302
(509) 545-3543

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Page No.

Constitutions and Statutes

I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the conviction and sentence of the Appellant.

III. ISSUES

1. Where the amicus does not challenge the outcome of the appeal, but only dictum on a matter not litigated by either the Appellant or Respondent, is there cause for review under RAP 13.4(b)?
2. Has the amicus demonstrated that this dictum will have any impact on any other case?

IV. ARGUMENT

DICTUM, ACKNOWLEDGED TO BE "RELATIVELY MINOR IN THE CONTEXT OF THE [ ] APPEAL" DOES NOT SATISFY RAP 13.4(B).

The amicus Washington Foundation for Criminal Justice (WFCJ) requests review of what it characterizes as a holding touching on the portable breath test (PBT). Brief of Amicus Curiae (BAC) at 1 ("that a

person's refusal to submit to a warrantless pre-arrest portable breath test (PBT) is admissible evidence at trial"). In this appeal, the Defendant raised a single claim of error touching on the PBT. Appellant's Opening Brief (AOB) at 33-34 (arguing the necessity of a *Frye* hearing).

Trooper Jensen testified that he contacted the Defendant while he was in an emergency room bed being monitored by medical personnel. RP 168. The Defendant was quiet and said he was tired. RP 169. His speech was slurred and he smelled of alcohol. RP 169. His eyes were watery and bloodshot, "drooping to about half mast before snapping back open in a nodding off type of fashion." RP 170, 172. As he lay in bed, the Defendant was unresponsive when the trooper asked him to follow a pen tip with his eyes. RP 170-72. He was similarly unresponsive when the trooper asked if would do a PBT. RP 173.

On appeal, the Defendant argued that his attorney should have objected to testimony that the Defendant failed to respond to an invitation to take a PBT. AOB at 33-34. The Defendant argued that the testimony was inadmissible for the reason that there had been no *Frye* hearing on the validity of a PBT. *Id.* But no PBT result was offered into evidence. In fact, Trooper Jensen testified that the PBT would only have provided a preliminary indication and would not have taken the place of an official

breath test or blood toxicology results. RP 173. A blood draw was performed. RP 174.

The entire discussion of this matter in the opinion consists of a single paragraph.

> *PBT*
>
> Mr. Sosa claims his counsel was ineffective for failing to object to the admissibility of his PBT refusal when no *Frye* hearing was held to test the reliability of PBTs. We are unpersuaded. ***Because the State never obtained a PBT, there was no need to determine reliability***. Under Washington's implied consent law, an individual has a choice either to submit to a PBT or permit evidence of refusal at trial. *Baird*, 187 Wash.2d at 226-28, 386 P.3d 239. There is not a third option, dependent on the reliability of the PBT. Because Mr. Sosa opted not to participate in the PBT, the State was entitled to elicit evidence of his refusal to take the test. *Id.* at 229, 386 P.3d 239. Defense counsel did not perform deficiently by failing to object to this evidence.

State v. Sosa, 198 Wn. App. 176, 185, 393 P.3d 796, 801 (2017) (emphasis added). The court's holding is consistent with the State's argument that, where "no results existed, there could be no utility in a *Frye* hearing." Brief of Respondent (33859-2-III) at 12.

The Defendant did not file a Motion for Reconsideration. In the Petition for Review, the Defendant seeks review of two issues. The Defendant (1) requests the Court create a right to advisement of additional

breath testing, and (2) questions the effectiveness of counsel's assistance for not challenging the PBT evidence absent a *Frye* hearing.

However, WFCJ has only taken an interest in the second of these two issues. And WFCJ does not argue that a *Frye* hearing was required. WFCJ does not argue even that there was ineffective assistance of counsel. WFCJ's only complaint is with some language in the opinion, referencing *State v. Baird*, 187 Wn.2d 210, 386 P.3d 239 (2016), which is not dispositive of the outcome in this case. Neither party addressed *State v. Baird* or the admissibility of a refusal as a warrantless search. Insofar as the court of appeals' passing comment on *Baird* goes beyond the facts before it, this is an individual opinion not binding in subsequent cases as legal precedent.

The amicus complains that *Sosa* dictum may be interpreted as an extension[1] of *State v. Baird*, 187 Wn.2d 210, 386 P.3d 239 (2016). *Baird* held that a driver's refusal to take a breath test is admissible under RCW 46.20.308.

> We hold that the implied consent statute does not authorize a warrantless search, and a driver has no constitutional right to refuse a breath test because such a search falls under the search incident to arrest exception to the warrant

[1] Because *Baird* was a plurality decision that did not squarely address pre-arrest refusals, a fact pattern not before it, WFCJ cannot credibly claim the cases conflict. WFCJ's true concern is only that sloppy readers may interpret the dictum in *Sosa* to extend *Baird.*

> requirement. Further, although the implied consent statute gives a driver a statutory right to refuse the test, by exercising the privilege to drive, a driver consents to admitting that refusal to take the breath test into evidence. Accordingly, we hold that a driver's refusal is admissible as evidence of guilt under Washington's implied consent law.

State v. Baird, 187 Wn.2d at 214. WFCJ notes that the rationale of these four justices, justifying the breath test as a search incident to arrest, applied only to the refusal of a breath test requested post-arrest. BAC at 6. The breath test in the instant case was requested pre-arrest. RP 92 (arrest was made after the ER observations and after a search warrant was obtained for blood).

However, *Baird* was a plurality decision. Two other concurring justices held that refusal of a pre-arrest breath test would also be admissible.

> I write separately to emphasize that a breath test, after reasonable suspicion of driving under the influence (DUI) has been established, is a limited and reasonable search; therefore, admitting evidence of a person's refusal has no constitutional implications. Wash. Const. art. I, sec. 7; U.S. Const. amend. IV. As the United States Supreme Court recently reaffirmed, "A breath test does not 'implicat[e] significant privacy concerns.' " *Birchfield v. North Dakota*, —— U.S. ——, 136 S.Ct. 2160, 2178, 195 L.Ed.2d 560 (2016) (alteration in original) (quoting *Skinner v. Ry. Labor Execs. Ass'n,* 489 U.S. 602, 626, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989)).
> ....

> The search is reasonable under the Fourth Amendment because (1) society is not willing to recognize an expectation of privacy in a reasonably suspicious driver's breath and (2) a breath test is a minor imposition that is limited solely to collecting information to calculate the alcohol content of the breather's blood. The limited use of a breath test after arrest does not contravene the safeguards that protect the privacy rights of drivers under the Washington Constitution. With this understanding, I join the lead opinion in saying that a driver's refusal to take a breath test is admissible as evidence of guilt.

State v. Baird, 187 Wn.2d 210, 229–30, 232, 386 P.3d 239, 249-50 (2016) (Gonzalez, J., concurring).

WFCJ readily acknowledges that the issue is "relatively minor in the context of the *Sosa* appeal." BAC at 8. It is not dispositive of the outcome of the appeal. This is the kind of objection that should have been addressed in a motion for consideration. It is not the proper concern of a petition for review. Because the court of appeals' decision does not rely on the challenged language, dicta cannot here or anyplace be said to render an opinion in conflict with another, to be a significant legal question, or to be an issue of substantial public interest. BAC at 9 (citing RAP 13.4(b)(1), (3),and (4)).

WFCJ complains that this dictum will impact thousands of DUI cases. BAC at 8. This is not possible. Not only do courts have the ability to recognize dictum, but WFCJ cannot show that prosecutors are relying

upon *Baird* as a basis to admit PBT refusals. In fact, WFCJ readily admits that the State did not argue this here. BAC at 3 ("Neither party addressed" *Baird*). The issue litigated was whether a *Frye* hearing was conducted, not whether *Baird* applied.

Where the dictum is not positive of the outcome on appeal, where other matters are dispositive of the outcome, where the issue has not been raised or briefed by the parties, this case is not the vehicle for review of a collateral matter.

V. CONCLUSION

Where no RAP 13.4(b) consideration exists, the State respectfully requests this Court deny the petition.

DATED: July 6, 2016.

Respectfully submitted:

Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

Ryan Robertson ryan@robertsonlawseattle.com Kristina Nichols Kristina@ewalaw.com admin@ewalaw.com Laura Chuang laurachuang@gmail.com	A copy of this brief was sent via email by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED July 7, 2017, Pasco, WA **Original filed at the Supreme Court, Temple of Justice, P.O. Box 40929, Olympia, WA 98504-0929 - supreme@courts.wa.gov**

July 07, 2017 - 3:11 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	94369-9
Appellate Court Case Title:	State of Washington v. Jose Luis Sosa
Superior Court Case Number:	14-1-00071-2

The following documents have been uploaded:

- 943699_Briefs_20170707150917SC169502_1281.pdf
  This File Contains:
  Briefs - Respondents
  The Original File Name was 943699 RESP TO AMICUS_corrected no.pdf
- 943699_Motion_20170707150917SC169502_2936.pdf
  This File Contains:
  Motion 1 - Extend Time to File
  The Original File Name was 943699 MOT EXT TIME.pdf

A copy of the uploaded files will be sent to:

- Admin@ewalaw.com
- Kristina@ewalaw.com
- jnagle@co.walla-walla.wa.us
- laurachuang@gmail.com
- ryan@robertsonlawseattle.com

Comments:

COVER PAGE OF BRIEF HAS BEEN CORRECTED AS TO CAUSE NUMBER

Sender Name: Teresa Chen - Email: tchen@co.franklin.wa.us
Address:
PO BOX 5889
PASCO, WA, 99302-5801
Phone: 509-545-3543

Note: The Filing Id is 20170707150917SC169502