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IN THE SUPREME COURT  
FOR THE STATE OF WASHINGTON

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STATE OF WASHINGTON

*Respondent,*

v.

JOSE LUIS SOSA,

*Petitioner.*

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BRIEF AMICUS CURIAE OF  
WASHINGTON FOUNDATION FOR CRIMINAL JUSTICE

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## **I. IDENTITY AND INTEREST OF AMICUS**

The Washington Foundation for Criminal Justice (“WFCJ”) is a non-profit organization dedicated to educating criminal defense attorneys on representation of citizens accused of impaired driving crimes. Since 1983, the WFCJ has held an annual seminar to educate lawyers on pertinent issues related to the defense of citizens accused of DUI.

The WFCJ has an interest in ensuring that persons accused of DUI offenses receive a fair trial. In *State v. Sosa*,<sup>1</sup> the Court of Appeals, Division III, issued an opinion which, in part, holds that a person's refusal to submit to a warrantless pre-arrest portable breath test (PBT) is admissible evidence at trial under the purported authority of the Implied Consent Law and this Court's decision in *State v. Baird*.<sup>2</sup> The WFCJ contends this decision is clearly erroneous, violates Washington Constitution Art. I, §7, and threatens the concept of a fair trial in DUI prosecutions. The WFCJ asks this Court to accept review of Mr. Sosa's Petition for Review.

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<sup>1</sup> 198 Wn. App. 176, --- P.3d --- (2017).

<sup>2</sup> 187 Wn.2d 210, 386 P.3d 239 (2016).

## **II. ISSUES PRESENTED ON AMICUS**

1. Does Washington Constitution Art. I, §7 prohibit the State from offering as evidence at trial a person's refusal to consent to a warrantless pre-arrest search via portable breath alcohol testing?
2. Should this Court grant review in *Sosa* to review and reverse the clearly erroneous decision from the Court of Appeals?

## **III. STATEMENT OF THE CASE**

Mr. Sosa was convicted for Vehicular Assault. On appeal his appellate counsel raised an issue of ineffective assistance of counsel. Trial counsel failed to object to trial testimony that Mr. Sosa refused to submit to a pre-arrest portable breath test (PBT) offered to him at the hospital by a Washington State Patrol trooper.<sup>3</sup> According to the testimony,

"The portable breath test is something we use. It is certified on a yearly basis to maintain its accuracy. It is just a little device we can take to have them breathe into it. As long as you provide the right amount of air, it gives us a preliminary indication as to what the breath alcohol content in your body is. It is not certified to take the place of an official breath test or a blood toxicology results. It is simply another tool we use in the field that gives us an indication."<sup>4</sup>

Later, in closing rebuttal, the prosecutor highlighted Mr. Sosa's refusal to the jury.

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<sup>3</sup> VRP 2 pg. 172-173.

<sup>4</sup> VRP 2 pg. 173.

"And that's what I kept hearing over and over again throughout this case. Well, what if? Suppose. What about? That might be there. You know, the bogey monster might be under -- hiding under the bed. What if? What if? What if? You know, we don't -- we don't do that. We don't have to do that. We decide it based upon what we have. And all this, all these numbers, **and well, then why did he refuse the portable breath test at the hospital, Mr. Sosa?**"<sup>5</sup>

On appeal, counsel argued that trial counsel failed to challenge the PBT device and should have sought a *Frye*<sup>6</sup> hearing.<sup>7</sup> Neither party addressed whether PBT refusal evidence violated Art. I, §7.

Nevertheless, The Court of Appeals held that PBT refusal evidence was admissible under this Court's decision in *State v. Baird*.<sup>8</sup>

Under Washington's implied consent law, an individual has a choice to either submit to a PBT or permit evidence of refusal at trial. *Baird*, 187 Wn.2d at 226-28. 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. Defense counsel did not perform deficiently by failing to object to this evidence.<sup>9</sup>

Before this Court, Mr. Sosa has challenged the Court of Appeals' ruling and reliance on *Baird*.<sup>10</sup>

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<sup>5</sup> VRP 4 pg. 519-520. (Emphasis added).

<sup>6</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)

<sup>7</sup> Cite to briefs.

<sup>8</sup> *State v. Sosa*, 198 Wn. App. 176, 185 (2017).

<sup>9</sup> *Id.*

<sup>10</sup> Petition for Review, pgs. 19-20.

#### **IV. ARGUMENT**

**1. Does Washington Constitution Art. I, §7 prohibit the State from offering as evidence at trial a person's refusal to consent to a pre-arrest search via breath alcohol testing?**

The Court of Appeals' decision is clearly erroneous for three reasons: (1) The Implied Consent Law does not apply to a pre-arrest PBT; (2) a PBT is a search which must be supported by a warrant or a recognized exception; and (3) this Court's decision in *Baird* never addressed pre-arrest portable breath testing. For these reasons, the WFCJ advocates for review.

**A. The Implied Consent Law neither addresses nor applies to a pre-arrest portable breath alcohol test.**

According to RCW 46.20.308, motor vehicle drivers have consented to a test of their breath upon arrest where reasonable grounds exist to believe he or she had been driving while under the influence of intoxicating liquor. (Emphasis added) Consent, however, is subject to the provisions of RCW 46.61.506.

RCW 46.61.506 requires the State Toxicologist to approve breath testing instruments for use and approve methodology. Accordingly, the toxicologist has approved certain breath alcohol instruments; such as the Datamaster and Draeger, for such use. See WAC 446-16-020. Most notably, the toxicologist excludes PBT instruments from application to the



Implied Consent Law. See WAC 448-15-020(2).<sup>11</sup> Instead, portable breath testing is approved for the limited purpose of determining probable cause to support an arrest or issuance of a search warrant. See WAC 448-15-020(1).

By its terms, the Implied Consent Law authorizes warrantless breath alcohol testing on certain approved instruments post-arrest. It does not authorize any warrantless pre-arrest testing. The Court of Appeals clearly erred by relying upon the Implied Consent Law in its decision.<sup>12</sup>

**B. This Court recognizes breath alcohol testing is a search under Washington Constitution Art. I, §7, and may only be authorized with a warrant or a recognized exception to the warrant requirement.**

A majority of Justices on this Court have held that a breath test is a search under Washington Constitution Article I, §7.<sup>13</sup> This Court presumes a warrantless search violates Art. I, §7, and the State must establish a narrowly drawn exception to the warrant requirement applies.<sup>14</sup> This Court

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<sup>11</sup> This preliminary breath test is voluntary, and participation in it does not constitute compliance with the implied consent statute (RCW 46.20.308).

<sup>12</sup> It should also be noted there is no record in the case that an implied consent warning was ever read or provided to Mr. Sosa. VRP 2 pg. 164-176.

<sup>13</sup> See *State v. Baird*, supra. Lead Opinion at 218; authored by Justice Madsen and joined by Justices Johnson, Owens, and Wiggins; and Dissenting Opinion at 232; authored by Justice McCloud and joined by Justices Fairhurst and Stevens.

<sup>14</sup> *Baird*, supra. Lead Opinion at 218; Dissenting Opinion at 233.

also agrees that where an exception does not support a warrantless search, a person's refusal to consent to the search may not be used at trial.<sup>15</sup>

While this Court's *Baird* decision was fractured into three distinct opinions with no clear majority, it was clear that *Baird* addressed post-arrest breath alcohol testing.<sup>16</sup> Under the Lead Opinion, four Justices held that a warrantless post-arrest breath test was a valid "search incident to arrest, making refusal evidence admissible."<sup>17</sup> In a Concurring Opinion, two Justices agreed in the result that refusal evidence was admissible, but held a post-arrest breath test was a reasonable search under the Fourth Amendment and therefore failed to raise any constitutional implications.<sup>18</sup> "When there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds."<sup>19</sup>

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<sup>15</sup> See *Baird*, supra. Lead Opinion, at 226; "Because refusal is ambiguous, courts have found it unfair to allow a jury to infer guilt from refusal, particularly when such refusal involves the exercise of a constitutional right." Citing *State v. Gauthier*, 174 Wn. App. 257, 264, 298 P.3d 126 (2013); Dissenting Opinion, at 237; "[T]he United States Supreme Court has consistently held that people have a *constitutional* right to refuse to consent to such an unconstitutional warrantless search. *Camara v. Mun. Court*, 387 U.S. 523, 540, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). Our court has said the same thing. *State v. Jones*, 168 Wn.2d 713, 725, 230 P.3d 576 (2010)."

<sup>16</sup> *Baird*, at 215.

<sup>17</sup> *Baird*, at 222.

<sup>18</sup> *Baird*, at 229.

<sup>19</sup> *Davidson v. Hensen*, 135 Wn.2d 112, 128, 954 P.2d 1327 (1998).

Even if one were to conclude that a majority of Justices in *Baird* held that a warrantless breath alcohol test, performed post-arrest, was a valid search incident to arrest, there would be no justification for relying on *Baird* here. Under the Washington Constitution, a lawful custodial arrest supported by probable cause to arrest is a constitutional prerequisite to any search incident to arrest.<sup>20</sup> It is the arrest, not probable cause to arrest, that constitutes the necessary authority of law for a search incident to arrest.<sup>21</sup> “It states the obvious to observe that where a person is not under arrest there can be no search incident hereto.”<sup>22</sup> In *Sosa*, no testimony was provided to indicate Mr. Sosa was ever placed under full custodial arrest prior to the request to submit to the PBT.<sup>23</sup> *Baird* is simply inapplicable to the present case.

The request to Mr. Sosa to submit to a PBT occurred prior to any arrest. As a search, it is incumbent upon the State to establish an exception to the warrant requirement. Lacking any, it was clearly erroneous for the Court of Appeals to hold that Mr. Sosa's refusal evidence was admissible under either the Implied Consent Law, *Baird*, or Art. I, §7.

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<sup>20</sup> *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007).

<sup>21</sup> *State v. O'Neill*, 148 Wn.2d 564, 585, 62 P.3d 489 (2003).

<sup>22</sup> *O'Neill*, supra.

<sup>23</sup> VRP 2 pg. 164-176.

**2. Should this Court grant review in *Sosa* to review and reverse the clearly erroneous decision from the Court of Appeals?**

While the PBT issue was relatively minor in the context of the *Sosa* appeal, the ramifications stemming from the Court of Appeals' decision will be profound. This Court must consider the impact this decision will have on thousands of DUI cases,<sup>24</sup> and the inherent difficulty which exists to challenge the decision under traditional appellate rules.

Mr. *Sosa* was convicted of a felony. Upon conviction his direct appeal rights provided him direct access to the Court of Appeals. RAP 2.2(a)(1).

Individuals convicted of DUI do not have direct access to the Court of Appeals. These individuals must first appeal to the superior court. RALJ 2.2(a)(1). If a conviction is affirmed, the individual must seek discretionary review to the Court of Appeals. RAP 2.3(d). This process takes more time, costs more money, and provides less certainty the issue will be addressed by an appellate court.

In the meantime, thousands of DUI cases will be litigated and *Sosa* holds that a refusal to submit to a warrantless pre-arrest search (portable

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<sup>24</sup> 24,425 DUI charges were filed in Washington State in 2016. See [www.courts.wa.gov/caseload](http://www.courts.wa.gov/caseload) - Annual Caseload report for 2016; Courts of Limited Jurisdiction.

breath test) is admissible evidence at trial. This decision is incompatible with the statute, case, and constitutional provision relied on by the Court of Appeals. Yet, it is also controlling authority on the issue. This will only lead to confusion in the lower courts. This Court has a duty to clarify this clear error of law. The WFCJ joins with Petitioner asking this Court to grant review to address this erroneous decision.

#### **V. CONCLUSION**

For the reasons herein provided the WFCJ asks that this Court grant Mr. Sosa's Petition for Review. Review appears appropriate under RAP 13.4(b)(1), (3), and (4).

Respectfully submitted the 13th day of June, 2017.

A handwritten signature in black ink, appearing to read 'R. Robertson', written over a horizontal line.

Ryan B. Robertson, WSBA #28245

IN THE SUPREME COURT  
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,            )       No. 94369-9  
Respondent,                        )         
  )       DECLARATION OF  
v.                                     )       SERVICE  
  )         
JOSE LUIS SOSA,                 )         
Petitioner.                        )       

\*\*\*\*\*

I certify that on June 13, 2017, I served a copy of the foregoing amicus brief submitted by the Washington Foundation for Criminal Justice, via email, to the following individuals:

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I swear under penalty of perjury under the laws of the State of Washington the foregoing is true and correct.



\_\_\_\_\_  
Ryan B. Robertson  
WSBA #28245

June 13, 2017

\_\_\_\_\_  
Signed in Seattle, WA on this date