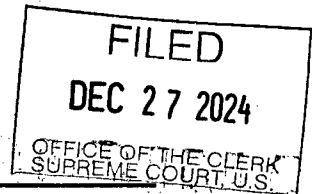


24-6273

No.



IN THE
SUPREME COURT OF THE UNITED STATES

DARREN R. REINER,
Petitioner

v.

STATE OF WISCONSIN,
Respondent

On Petition for Writ of Certiorari
to the Wisconsin Second District Court of Appeals

PETITION FOR WRIT OF CERTIORARI

DARREN R. REINER, Petitioner
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QUESTIONS PRESENTED

1. Not since *Brady v. Maryland*, 373 U.S. 83 (1963) has a case been so compelling and brought before the U.S. Supreme Court needing a federal court ruling, therefore, doesn't it make sense to make into a new federal law that civilians deserve the knowledge that police officers determining Probable Cause aren't themselves impaired as a novel federal legal precedent?

2. And speaking of *Brady*¹, whether a Wisconsin Circuit Court Judge completely abused it's power telling a defense attorney that "But the implication is something was withheld from him, that I'm not going to allow that, some indication withholding of evidence here...But I just want to avoid some implication that somebody is withholding evidence here.", (R130:59-60) and whether he, and the Wisconsin Appellate Court, who completely ignored the Petitioner's *Brady*² claim in it's Opinion/Decision (R131 *Appendix pages 4-12*) unconstitutionally denied the Petitioner Due Process violating the U.S. Constitutional 5th and 14th Amendments when a preponderance of exculpatory evidence was withheld?

¹ *Brady v. Maryland*, 373 U.S. 83 (1963)

² *Brady v. Maryland*, 373 U.S. 83 (1963)

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Other Authorities

CDC Centers for Disease Control and Prevention, Module: 3,
Page 8 of 28 March 31, 2020, <https://www.cdc.gov/niosh/work-hour-training-for-nurses/longhours/mod3/08.html>.....24

CDC Centers for Disease Control and Prevention, Page 8 of 48
April 1, 2020,
<https://cdc.gov/niosh/emres/longhourstraining/impaired.html>24

Cleveland Clinic: Sleep Deprivation, 8/11/22,
<https://www.my.clevelandclinic.org/health/diseases/23970-sleep-deprivation>24

John Hopkins Medicine: Health: Sleep Deprivation,
<http://www.hopkinsmedicine.org/health/conditions-and-diseases/sleep-deprivation>.....24

National Library of Medicine, National Center for Biotechnology
Information, Clinical Trial > Occup Environ Med. 2000 Oct;57(10):
649-55. Doi: 10.1136/oem.57.10.649: Moderate sleep deprivation
produces impairments in cognitive and motor performance equivalent
to legally prescribed levels of alcohol intoxication,
<https://www.pubmed.ncbi.nlm.nih.gov/10984335>
References: Drug Alcohol Rev. 1991;10(2):151-66 - PubMed Sleep.
1991 Dec;14(6):540-5 - PubMed, N Engl J Med. 1976
Mar 25;294(13):687-90 - PubMed Sleep. 1988 Feb;11(1):100-9
- PubMed, J Clin Epidemiol. 1992 Aug;45(8):821-5
- PubMed.....24-25

NIJ JOURNAL / ISSUE NO. 262 Sleep Deprivation:
What Does It Mean for Public Safety Officers?, Bryan Vila, Ph.D.,
<http://www.ojp.gov/pdffiles1/nij/225762>25

Police1>: How lack of sleep may cause deadly police errors,
Doug Wyllie, Aug 9, 2014, <http://www.police1.com/officer-safety/articles/how-lack-of-sleep-may-cause-deadly-police-errors-GBdplTo4dm1hhlZU>.....25

Sleep Foundation: How Lack of Sleep Impacts Cognitive Performance and Focus, July 18, 2023

<https://www.sleepfoundation.org/sleep-deprivation/lack-of-sleep-and-cognitive-impairment>,

References: Dawson, D., & Reid, K. (1997). Fatigue, alcohol and performance impairment. Nature, 388(6639), 235.

<https://www.nature.com/articles/40775>

References: Stepan, M.E., Altmann, E.M., & Fenn, K.M. (2020). Effects of total sleep deprivation on procedural placekeeping; More than just lapses of attention. Journal of experimental psychology. General, 149(4), 800—806

<https://www.pubmed.ncbi.nlm.nih.gov/31750712/>.....24

U.S. Constitution 5th Amendment.....2, 8, 23, 29

U.S. Constitution 14th Amendment.....2, 8, 23, 29, 32

PETITION FOR WRIT OF CERTIORARI

Petitioner Darren R. Reiner respectfully requests the issuance of a writ of certiorari to review the decision of the Wisconsin Court of Appeals, District II, in 2023AP001941-CR, filed on August 28, 2024 as a petition to review pursuant to Wis. Stat. § 808.10 was filed by the defendant-appellant-petitioner, Darren R. Reiner, with the Supreme Court of Wisconsin and ordered denied on November 12, 2024.

DECISION BELOW

On August 28, 2024 the Wisconsin Court of Appeals, District II affirmed the Wisconsin Waukesha County Circuit Court decision.

State v. Reiner, 2023AP1941-CR (R131 *Appendix pages 4-12*)

The Court of Appeals decided the issues as follows:

- I. Reiner's position that the arresting officer did not have probable cause to administer a PBT to him or subsequently arrest him is founded in part upon his contention that the officer himself was "impaired with sleep deprivation" because, according to Reiner, the officer indicated in one of the traffic stop videos that he "only got like 4 hours of sleep, from like 10:00 to 2:30." This contention goes nowhere for the simple reason that Reiner fails to develop any argument based upon the law or the facts of record that the officer's ability to perform his duties during the traffic stop was at all compromised by his alleged lack of sleep. R131 *Id.* page 10 footnote 3
- II. The Appellate Court Opinion/Decision made no reference to Reiner's Brady³ claim⁴. R131 *Id.* pages 4-12

On November 12, 2024 the Supreme Court of Wisconsin denied the petition for review. State v. Reiner, L.C. # 2021CF499 (R134 *Id.* page 3)

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257 to review the final judgment of the Wisconsin Second District Court of Appeals.

The date on which the highest state court decided my case was November 12, 2024. A copy of that decision appears at Appendix page 3.

³ Brady v. Maryland, 373 U.S. 83 (1963)

⁴ When a party fails to respond to an argument in appellate briefing, that party may be found to have waived or conceded the issue. See: Charolais Breeding Ranches, Ltd. V. FPC Securities Corp., 90 Wis. 2d 97, 297 N.W.2d 493 (Ct. App. 1979)

CONSTITUTIONAL PROVISIONS AND LEGAL PRINCIPALS INVOLVED

The Due Process Clause of the Fifth Amendment to the Constitution provides procedural due process, which requires government officials to follow fair procedures before depriving a person of life, liberty, or property.

The Due Process Clause of the Fourteenth Amendment to the Constitution provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

At a jury trial hearing on March 7th & 8th 2023, the Defendant-Appellant, Darren R. Reiner, Reiner, herein, was found guilty of 3 offenses on the charges of operating a motor vehicle while under the influence of an intoxicant, failure to install an ignition interlock device, and operating a motor vehicle with a prohibited alcohol concentration. R86; R87; R88. *Appendix pages 13-15*. The Appellate Court Opinion/Decision Affirmed that decision. R131. *Id. pages 4-12*.

Reiner was originally charged with operating a motor vehicle while under the influence – 4th offense, failure to install an ignition interlock device, and operating with a prohibited alcohol concentration on March 26, 2021. R4. After the jury trial March 7 & 8, 2023, he was found guilty of all 3 counts. R86; R87; R88. *Id. pages 13-15*. The Court dismissed the operating a motor vehicle while under the influence of an intoxicant charge by operation of law.

Reiner originally filed a Motion to Suppress Evidence: Request for a Preliminary Breath Test Without Probable Cause, Warrantless Arrest Without Probable Cause. R22. A hearing on that motion was held on October 21, 2021. R34. The Court was in possession of police officer Body Cam videos Exhibit 1. R24. At the hearing, the Court (Court Official Brad D. Schimel) indicates, "...I should note for the record that this morning Mr. Pitzo (prosecutor Jack A. Pitzo, Pitzo, herein) did submit a flash drive.....So I viewed those. I did view those prior to the hearing." R24; R34:2. The portion of the motion dealing with determining if there was probable cause to request a preliminary breath test(PBT) and arrest is the first issue in this appeal. The only witness at the motion hearing was officer Nicholas Durni, Durni, herein. He had been employed at the time of hearing with the City of Brookfield Police Department as a patrol officer since January of 2019. R34:3. He testified that around 11:21 p.m. he observed a vehicle exceeding the speed limit and estimated it to be traveling about 60 miles per hour in a posted 50 miles per hour speed zone driving eastbound on Capitol Drive a quarter mile to half mile west of Lilly Road right before the speed limit dropped to 45 miles per hour as he was heading westbound on Capitol Drive, west of Lilly Road. R34:5. He then testified he conducted a U-turn and caught up to the vehicle just east of Lilly Road, but he didn't immediately attempt to stop the vehicle because he generally likes to run the license plate and the registered owner before he conducts a traffic stop to see who he is potentially dealing with. R34:6.

He then initiated a traffic stop. R34:7. He then, testified there was no tint on the back window and he had his bright take down lights and spotlight lighting up the vehicle and he observed the defendant multiple times adjusting his mirror and looking into the mirror back at him. R34:8. Reiner stopped on southbound I41, north of Burleigh Road. R34:7-8. Durni then observed Reiner bending over, reaching around the seats, cup his hand over his mouth and run his hands through his hair. R34:8. Durni then testified he was waiting for his backup officer and he was running the vehicle with the backup officer there and that the backup officer saw Reiner reaching around. R34:11. He approached the passenger side window and asked Reiner to roll it down further. He smelled a strong odor he believed to be of intoxicants. Durni said Reiner had glassy bloodshot eyes, slurring his speech. R34:12. He asked Reiner if he had been drinking, which Reiner said he did not have anything to drink. Reiner said he was coming from a buddy's house. While conducting a Department of Transportation check on Reiner, it indicated he possessed an 02 restriction. R34:13. He then requested that he perform field sobriety tests. R34:14. The first test was the horizontal gaze nystagmus (HGN). The Prosecutor asked Durni, "After performing that test of the six possible clues of impairment, how many did the defendant exhibit?" Durni responded, "Six." Durni also testified there were "multiple times where Reiner was squinting his eyes so it was almost hard to see the pupil as I was conducting the passes. So while conducting the test, I had multiple passes or more passes than are required of certain tests to gain the clues I was looking for." R34:16.

He then asked the defendant to do the walk and turn test, and he appeared to understand that test. He testified he observed two of eight clues. R34:17-18.

He then asked him to perform the one leg stand test. Durni testified Reiner exhibited 3 of the 4 possible clues. He then formed the opinion he was under the influence and requested a preliminary breath test (PBT). Reiner did not undergo a preliminary breath test. R34:19.

The Court then asked Durni what factors he concluded gave him probable cause to arrest. He testified the initial speed, the time of day being 11:30 p.m. on a Friday night, which is a common time for drivers to be impaired, the length of time to stop, the behavior exhibited prior to the stop of adjusting his mirror, the behavior after the stop of cupping his hand, over his mouth. He then testified that if a defendant has an 02 restriction, and three priors and the results of standardized field sobriety test validates clues in all three tests, the 1998 San Diego study indicates there is an accuracy that the defendant is at or above a .08 blood alcohol content. R34:20-21.

On cross-examination, the officer stated the only violation he saw of the driving was the initial speeding 60 mph in the 50 mph zone and that there were no other driving erraticalities. R34:23-25. Attorney Craig M. Kuhary, Kuhary, herein asked Durni, "Did you observe any other traffic violations? Did you observe it weave within its lane?" Durni replied, "I did not." Kuhary asked Durni, "Did you observe it cross traffic lanes?" Durni replied, "I did not." Kuhary asked Durni, "Did you observe any other

behavior with the car aside from the fact that it did not stop immediately?" Durni replied, "No". R34:23. Kuhary asked Durni, "So the only violation that you observed during the period of time that you followed his vehicle was the initial speed violation back in Brookfield?" Durni replied, "Yes." Kuhary asked Durni, "So at the time you initially approached his vehicle, you didn't know whether or not he had any prior convictions?" Durni replied, "No". Kuhary asked Durni, "And you initially approached the vehicle and you testified that you observed an odor of intoxicants on his breath, you didn't know even at that time that he was under an 02 restriction?" Durni replied, "I did not." Kuhary asked Durni, "Now you asked Mr. Reiner for his license; correct?" Durni replied, "Correct.", Kuhary asked Durni, "He gave that to you?" Durni replied, "Yup." R34:24. Kuhary asked Durni, "If he would have had issues getting his license to you or any other documentation you may have requested, you would have noted that in your report; correct?" Durni replied, "Correct." Kuhary asked Durni, "You took his information, you went back, you ran his information and at that point you determined that he was under an 02 restriction; correct?" Durni replied, "Correct." Kuhary asked Durni, "I am asking for an answer as to whether or not you know that alcohol itself is an odorless colorless substance. It's a matter of record." Durni responded, "Okay. I can't - I can't answer that." R34:24-25, 28.

The officer admitted that the stop location on Highway 41 had a fair amount of traffic and that two other squads responded to this call. He also admitted he didn't recall if his take down light was still activated or

if the other squad cars had their lights on. He also admitted he had Reiner facing the front of his squad car, facing directly into oncoming heavy traffic on southbound 41. R34:34-36. He also testified minutes later he didn't recall this testimony. R34:36. He then admitted there was a lot of traffic noise and that 8 times Reiner or himself had asked a certain event to be repeated. R34:37.

The officer testified that during the walk and turn test that any more than a half inch gap between feet is a clue and that in his report there was an approximate one-half inch gap. R34:39-40.

The officer also testified that Reiner had slurred speech. R34:40.

On redirect, Pitzo testified to submitting an Exhibit 1 disk evidence that the Court reviewed prior to the hearing. The Court acknowledged that since (Court Official Brad D. Schimel) watched it, it should be part of the record. R34:41.

Kuhary then asked the Court to have an opportunity to brief the issue in response to the officer's testimony indicating he didn't know the full extent of the officer's training at the time he drafted the motion to suppress and that there were certain conditions not reflected in the officer's testimony that would be reflected in the video itself. R34:41-42. Pitzo then argued the briefing of the discrepancy between the video and officer testimony should be denied based on State v. Goss [Goff] and thanked the court for taking the time to view the video off the bench. R34:43-47.

The Court responded, "Viewing it off the bench gave me a

chance to look at it multiple times.”. The Court then asked Kuhary if he had a response. R34:47.

Kuhary responded that Reiner should have been moved to another test environment that “wouldn’t have been as chaotic” with an extensive noise level with “...squad lights, strobes, flashing in the background bouncing off reflective surfaces that are there.” Kuhary then argued the other two squads that responded clearly had their lights on in the video. He then said when you factor that in with facing oncoming traffic you could have put Reiner in any other position and had a fairer chance of getting accurate results. He then added all of the results of the field sobriety test in this environment should be discounted completely. Kuhary further said Reiner was within tolerance for the walk and turn and that shouldn’t have been a clue and that using their own counting method Reiner passed the walk and turn test and Kuhary takes issue with the environment in which Reiner was asked to perform the tests and that he didn’t have a fair shot at any of the field sobriety tests. Kuhary then indicated since there was a reference here under Goss [Goff], that there is case law cited that the mere odor of alcohol for an .02 restriction is not enough probable cause to request a PBT and that there is no indication the officer could tell solely on the odor of alcohol if Reiner was above or below .02. R34:47-51.

The Court stated the officer had a legal basis to conduct the stop for the speeding of 61 in a 50 zone. The Court stated the officer was right that there were plenty of places Reiner could have stopped and that when “...Mr. Reiner did finally pull over, it wasn’t any better than any other

place he passed...This was not by any means an extraordinarily dangerous situation.” R34:52-54. The Court, (Judge Brad D. Schimel), stated “I can’t make out on the HGN test, I can’t make out on the video whether there is nystagmus or not...I could not.” The Court then indicated they could see during the walk and turn test Reiner had his arm up for balance. The Court then added, “But it was really the one leg stand test that clinched it” ...“There is probable cause here”...“So I will find there was probable cause to place Mr. Reiner under arrest and to then take him to ask him to submit to an evidentiary chemical test. So I will deny the motion.” R34:56-58.

The defendant-appellant then filed a Notice of Expert on March 30, 2022. R40.

The defendant-appellant then proceeded to jury trial March 7, 2023 and March 8, 2023. R129; R130.

The Court (Court Official Lloyd V. Carter) allowed a Daubert Motion Hearing on the second day of the jury trial, March 8, 2023. R130:9-20. On the second day of trial, during the defense case, the defense sought to have their expert witness, Dr. Ronald Henson, Henson, herein, testify that ethyl alcohol is odorless and that the body cam videos did not indicate slurred speech, that the officer improperly administered the HGN examination, that the videos did not show nystagmus prior to 45 degrees, that the officer did not check VGN, that the walk and turn (WAT) test did not show two clues, that the officer improperly conducted the one leg stand (OLS) test and that the blood vacutainers were under filled. He also

planned to testify that the Wisconsin State Crime Lab discovery requested was missing documentable items and processes regarding the blood draw evidence and when combining the state variables of the blood alcohol test results (plus or minus .011 g/100mL) and additional variables associated with the collection procedure and analysis of the blood samples obtained (\pm), it cannot be determined Reiner's BAC was .02 or greater at the time of driving. R82; R109. *Appendix pages 16-21.*

Pitzo asked the court if they would allow a Daubert challenge. The Court responded, "I will. I would like to do it on an expedited basis as best we can." R130:17-18. The Court then asked if Mr. Powers (attorney Mark Powers, Powers, herein) was prepared to call the witness. Powers responded that this issue be deemed waived and added, "...but I'm a little vexed as to why this has become the defense's problem at this point...". R130:18. The Court responded "It's the Court's problem, Mr. Powers." R130:18. The Court also indicated it hadn't had a chance to review the report of Dr. Henson dated August 30th of 2022 and to his knowledge he didn't know if it had been previously filed with the Court. The Court also indicated it will allow Dr. Henson's testimony and was going to allow the State to make foundational objections and allow objections the State believes exceeds the witness's area of expertise. R130:19.

Dr. Henson was then called to give witness testimony. Powers asked the expert about missing documentation. There was an Objection by the State and a Sidebar Conference. The State indicated that

everything that was in the lab's possession was given to Mr. Powers or prior counsel. The Court then asked Powers if the State didn't comply under Brady⁵ with exculpatory evidence. Powers said there is no documentation that exists from the med tech, phlebotomist, or the person in the video and he was asking if the expert should be allowed to opine on the volume of blood in the tubes based upon what he sees in the video. Pitzo responded that Mr. Powers is now making some discovery demand and repeated that everything in the State's possession has been turned over and there's been no communication from defense counsel that he's missing anything. Powers said there was no documentation how much volume of blood was in the tube. The Court responded that Powers can ask the expert what he reviewed, but the Court wants to avoid some implication that somebody is withholding evidence. "End of sidebar discussion."

R130:55-60.

During cross examination of Dr. Ronald Henson, Pitzo asked, "And so if somebody exhibited six out of a possible six clues on the HGN test, it's more likely than not that -- that the person's impaired, right?" R130:76-77. Dr. Henson responded, "...I can show you exactly why the HGN test is not reliable in this case." R130:77. Pitzo said, "I'm talking about generalities." R130:77. Henson replied, "...We can talk generalities, but the facts are about this case." R. 130:77. Pitzo responded, "I'm asking about generalities." R. 130:77. Henson testified, "Not with

⁵ Brady v. Maryland, 373 U.S. 83 (1963)

somebody that is very experienced, very knowledgeable and does it the way they're supposed to do it versus somebody like in this case when the HGN isn't very good and didn't do it correctly. And I can – If you want play the video, I can educate on those issues.” R130:77-78. Pitzo replied, “That’s okay, sir. And, again, I’m going to remind you just to answer the question that I’m asking you. So why don’t I go back --” R130:78. Henson replied, “And asked me about the reliability. It’s not reliable in this case.” R130:78. Pitzo replied, “Okay.” R130:78. Henson testified, “In generalities, consumption of alcohol in a generality. But it is not 100 percent reliable and definitely not reliable in this case because --”. R130:78.

The second issue in this appeal is the state misled the trial court and the jury and withheld discovery with clear reversible error. On the first day of trial, March 7, 2023 during cross examination of State lab expert Leah Macans, Macans, herein, Macans was asked if she knew that overfilling or underfilling tubes will result in incorrect blood-to-additive ratio. R. 129:239. Macans testified, “The ratio that there is – There is additive in the tube that is preservative and anticoagulant. If a tube was overfilled, the ratio would not be sufficient. It would be too dilute. If it would be underfilled, it would be over-preserved and overprotected from coagulation.” R. 129:239-240. Macans was asked again by Powers if she is aware to any manufacturer’s statements the possible effects of overfilling or underfilling tubes as it relates to blood/additive ratio. Macans testified, “Okay. If a tube is underfilled, it creates an open area where there wouldn’t

be any blood. So if a tube is underfilled, in my experience, it would be more likely that if ethanol was present and it was exposed potentially to heat, it would force the ethanol into the head space, therefore, decreasing the amount of ethanol in the blood sample that I would test. If it was overfilled, it would create less preservation. There would still be preservative in the sample. I've never studied the percentage of – if there was a less amount of preservative....". R129:241-242.

On the second day of trial on March 8, 2023 during cross examination of Reiner, Pitzo asked, "Oh, okay. So in roughly ten minutes since this officer pulled you over, and you've drank this mystery substance, you have gone from sober, because you have to be while you're driving, to now I'm feeling drunk in that ten minutes?". R130:33. Powers objected indicating, "That's a mischaracterization in every sense of the word." R130:34. The Court overruled. Pitzo finished his question, "Sure. So you testified earlier that you didn't feel anything while you were driving and when you started drinking this mystery substance, but now after a few short field sobriety tests when you're bargaining with the officer to take you home, now you're starting to feel it in that short time?" R130:34. Reiner testified, "Possibly." Pitzo asked, "Possibly or yes? Because you just told the jury that you were." Reiner replied, "Yes." Pitzo asked, "Okay. So now you're sure?" Reiner testified, "It was a long time ago." Pitzo asked, "Okay. Now, do you remember kind of telling the officers, guys, guys, I'm going to lose my job? Do you remember that?" Reiner replied, "I don't remember that, but I'm not saying I didn't say that. I don't remember it."

Pitzo replied, "Okay. I can play it for you, sir. I'm gonna – I'm gonna go to – I'm going to play about two minutes of the video from about 12:35 to probably 14:45." R130:34-35. Powers objected as to no foundation. The Court called a sidebar. Powers argued portions of that video had not been previously played for the jury and that cross examination shouldn't be allowed on video we've heard nothing about. The Court overruled the objection indicating cross examination is pretty broad and this interaction with Reiner and law enforcement officer was relevant. The sidebar ended and the Court said for the record the objection is overruled. R130:35-36.

During closing arguments, Mr. Pitzo stated to the jury, "Is he falling down drunk? No." R130:124. After the jury trial, Reiner was found guilty of all 3 counts. R86; R87; R88. *Appendix pages 13-15*. The Court dismissed the operating a motor vehicle while under the influence of an intoxicant charge by operation of law.

The defendant-appellant filed a Notice of Intent to Pursue Postconviction Relief. R94. He then filed a Petition for Sentence Adjustment and Motion for Postconviction Relief and/or Appeal, which references the fact that Body Cam videos show officer Durni admitting to having only 4 hours of sleep prior to his work shift. R24; R122; R101. *Id. pages 43-45*. The Court then denied this motion/request based upon the filing, "finding that there are insufficient grounds stated to warrant a finding of new information to support sentence modification or resentencing and that the interest of justice do not support the relief requested." R102. *Id. page 46*.

The defendant-appellant then filed a Notice of Appeal to the Appellate Court. R111; R115. The lower court then filed a record with The Appellate Court. R124. The Appellate Court then filed an Affirmation Opinion/Decision on August 28, 2024. R131. *Appendix pages 4-12.* Reiner filed his Petition for Review to the Wisconsin Supreme Court dated September 3, 2024, which was acknowledged. R132. The Supreme Court of Wisconsin denied this request. *Id page 3.*

REASONS FOR GRANTING THE WRIT

This Court should grant review because the issue described above presents a novel question of constitutional law that the Federal Circuit has not previously considered. Resolution of this issue by the U. S. Supreme Court is necessary to provide guidance to the lower courts and law enforcement regarding the sleep requirements and non-impairment protections that traffic law enforcement officials must observe in attempting to determine civilian probable cause.

The Court should grant review because Reiner provided a preponderance of evidence that the State withheld exculpatory crime lab evidence requested by Reiner's expert witness in this case with clear reversible error that the Appellate Court completely ignored and failed to address in its Opinion/Decision.⁶ R131 *Appendix pages 4-12*

⁶ When a party fails to respond to an argument in appellate briefing, that party may be found to have waived or conceded the issue. See: *Charolais Breeding Ranches, Ltd. V. FPC Securities Corp.*, 90 Wis. 2d 97, 297 N.W.2d 493 (Ct. App. 1979)

I. THERE WAS NO PROBABLE CAUSE TO REQUEST A PRELIMINARY BREATH TEST AND ARREST AS THE OFFICER WAS IMPAIRED WHILE ON TRAFFIC DUTY.

The Affirmed Opinion/Decision R131:4-5 ¶10 (*Appendix pages 7-8*) indicates “An order granting or denying a motion to suppress evidence presents a question of constitutional fact, which requires a two-step analysis on appellate review.” “First, we review the circuit court’s findings of historical fact under a Deferential standard, upholding them unless they are clearly erroneous. Second, we independently apply constitutional principles to those facts...Whether the undisputed facts satisfy the probable cause standard is a question of law we review de novo.” The Affirmed Opinion/Decision R131:5 ¶11 (*Id. page 8*) adds “Probable cause is “based on probabilities; and, as a result, the facts faced by the officer ‘need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility...but not a probability.” The Affirmed Opinion/Decision R131:5 ¶12 (*Id. page 8*) indicates “Here, at the time the officer asked Reiner to submit to a PBT, the officer had far more than the requisite probable cause to make the arrest.”

Neither Brief of Respondent or the Affirmed Opinion/Decision R131 (Id. pages 4-12) deny the fact that the cop admits to having had only 4 hours of sleep and that the cop indicating he had only 4 hours of sleep prior to his shift means he was impaired with the equivalent of a 0.05% BAC based on numerous sources provided and should not have been driving. Id. pages 22-42. Ignoring this fact is a violation of U.S.

Constitutional 5th & 14th Amendment Due Process and this should take precedent and supersede the “two-step analysis” of appellate review and this does not make for a “reasonable officer”. **Reiner believes he has exposed an epidemic of epic proportions; that being that many traffic cops are impaired when out on traffic duty.** If the Motion to Suppress was granted there would have been no trial and all 3 charges would have been dismissed. This petition is requesting the U. S. Supreme Court make into law that all traffic cops prior to their shift sign a ledger certifying they have had at least 7 hours sleep the night prior and they submit to a UDT (urine drug test) and pass prior to being allowed on traffic duty. The public deserves the knowledge that law enforcement determining probable cause aren’t themselves impaired. If it is discovered at any point subsequent to any arrest that the traffic cop involved did have less than 7 hours sleep, or was under the influence, any “probable cause” determination must be dismissed. **This law should be called the “Reiner Rule”.** No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without *due process* of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The web cam videos show Durni saying, “...I only got like 4 hours of sleep, from like 10:00 to 2:30...then from 2:30 til 6:00 until I left I just stared at the clock.” R24 Exhibit 1 and R122 Exhibit 1, OAWI_NBD_P7_Transport @ T06:58:26Z. Due to having only 4 hours sleep, Durni was impaired with sleep deprivation and should not have been

driving and made various observation and reporting errors. Numerous articles and sources have reported sleep deprivation is an impairment. The Centers for Disease Control and Prevention (CDC) indicates in an article dated March 31, 2020, "Impairments due to sleep deprivation are similar to impairments due to alcohol intoxication!" and "Being awake for 17 hours is similar to having a BAC of 0.05%. Being awake for 24 hours is similar to having a BAC of 0.10%." *Appendix page 22*. In another article dated April 1, 2020, the CDC indicates, "Impaired performance from lack of sleep mimics alcohol intoxication." *Id. page 23*.

Sleepfoundation reports, "For people with sleep deprivation, insomnia, sleep apnea, or other conditions that prevent them from getting adequate rest, short-term daytime cognitive impairment is common." and "The cognitive impacts of poor sleep can also create safety risks, including drowsy driving.", in an article dated July 18, 2023. *Id. pages 37-42*.

Cleveland Clinic reports, "Sleep deprivation is when you aren't getting enough, or you aren't getting good, quality sleep. When it's severe or happens over an extended period, it can cause very disruptive symptoms that interfere with even the most routine activities.", in an article dated August 11, 2022. *Id. page 24*. A John Hopkins Medicine article indicates, "Sleep deprivation means you're not getting enough sleep. For most adults, the amount of sleep needed for best health is 7 to 8 hours each night." *Id. 25-27*. Dr. A.M. Williamson for the National Library of Medicine reports, "Moderate sleep deprivation produces impairments in cognitive and motor performance equivalent to legally prescribed levels of alcohol

intoxication.”, in an article from October 2000. *Appendix page 28*. In a Police1 article dated August 9, 2014, Doug Wyllie stated, “How lack of sleep may cause deadly police errors”, and “Officers frequently suffer from high levels of fatigue due to lack of sleep, unusual shift schedules, and long hours awake. Fatigue impairs a person’s mental functioning, especially in areas such as decision-making, reaction time, and memory.” *Id. pages 35-36*. In the NIJ Journal, Issue No. 262, Bryan Vila, Ph. D wrote an article titled, “Sleep Deprivation: What Does it Mean for Public Safety Officers?” In this article Dr. Vila states, “Sleep deprivation is dangerous. Research shows that being awake for 19 hours produces impairments comparable to having a blood alcohol concentration of .05 percent. Being awake for 24 hours is comparable to having a blood alcohol concentration of roughly .10 percent.” Bryan Vila served as a law enforcement officer for 17 years. *Id. pages 29-34*.

Also, Durni made 9 key errors as a result of his sleep deprived impairment as evidenced by the transcripts or exhibits as cited and referenced Reiner Br 10, 13, 17, 24-26, 34:

1. Ran the license plate twice, before and during the stop. R34:6,11.
2. Testified he likes to run the plate before the stop to see “who I am potentially dealing with”, yet he called a “possible 55” when the registered owner of the vehicle has an impeccable driving record. R34:6, R24, R129.
3. During cross-examination at the Motion Hearing Durni didn’t recall if squad lights were on yet clearly visibly in the videos. R34:34-36, R24, R122.
4. Testified he didn’t immediately attempt to stop the vehicle to run the plate -contradicting his testimony that it took Reiner a long time to stop. R34:6, 20-21.

5. Patted Reiner down for sharp objects and then immediately after asked Reiner if he had any sharp objects on him. R24, R122.
6. Reiner admitted to drinking from a bottle in the car while pulled over, yet Durni didn't secure it. R24, R122, R34.
7. Conducted all field sobriety tests wrong. R82⁷, R24, R122, R130:77.
8. Testified he detected the strong odor of intoxicants, yet intoxicants/alcohol, scientifically has no odor. R34:24-25, 28.
9. Testified he had Reiner facing oncoming heavy traffic during the stop and then minutes later Durni didn't recall his testimony. R34:34-36.

The videos and report of expert witness Dr. Ronald Henson, do not support the evidence of "glassy and bloodshot eyes", or "slurring...speech", or six out of six possible horizontal gaze nystagmus clues (HGN). R24; R82⁸; R122. *Appendix pages 48-49*. The Court (Court Official Brad D. Schimel) even confirms non-evidence of any horizontal gaze nystagmus clues, "...I can't make out on the HGN test, I can't make out on the video whether there is nystagmus or not...I could not.", R34:56. Furthermore, Henson reports, "The officer states that he checked for nystagmus prior to 45 degrees, however, the video shows this did not occur." R82⁹. *Id. page 49*. Henson also reports that Durni conducted all of the Standardized Field Sobriety Tests (SFST) wrong. R82¹⁰. *Id. pages 47-51*. He also reported during cross examination by the State,

⁷ Beron Consulting (Dr. Ronald Henson) updated his report from 8/30/22 on March 2, 2023 (Appendix pages 47-51). Why this expert report was not filed with the Court is unknown.

⁸ Beron Consulting (Dr. Ronald Henson) updated his report from 8/30/22 on March 2, 2023 (Appendix pages 47-51). Why this expert report was not filed with the Court is unknown.

⁹ Beron Consulting (Dr. Ronald Henson) updated his report from 8/30/22 on March 2, 2023 (Appendix pages 47-51). Why this expert report was not filed with the Court is unknown.

¹⁰ Beron Consulting (Dr. Ronald Henson) updated his report from 8/30/22 on March 2, 2023 (Appendix pages 47-51). Why this expert report was not filed with the Court is unknown.

that the HGN test was not performed correctly and is not reliable in this case. R130:76-78.

During testimony at the Motion to Suppress Hearing, Durni indicated, "...I did smell the odor of intoxicants on him." (R34:15) and during cross examination he indicated, "Someone who drinks alcohol exhibits a specific odor of intoxicants." R34:27. During cross examination Kuhary asked Durni, "I am asking for an answer as to whether or not you know that alcohol itself is an odorless colorless substance. It's a matter of record." Durni responded, "Okay. I can't – I can't answer that." R34:23-25:28. The expert Dr. Ronald Henson's report also indicates ethyl alcohol is odorless. R:82¹¹. *Appendix page 48*. Other than the reported initial speeding 60 mph in a 50 mph zone Officer Durni testified there were no other driving erraticalities and no issues when requesting Reiner's drivers license. R34:23-25:28. Also, the videos show Durni did not mention to Reiner he could smell an odor until after he ran Reiner's drivers license. R24; R122. Given alcohol (ethyl or ethanol) and/or intoxicants is odorless, it is unclear what, if anything, the officer claimed to smell.

On the web cam video Durni asks Reiner, "You drinking that DayQuil there?" Reiner replied, "Yeah", Durni responded, "Yeah, OK." However, Durni never secured the bottle. Thus, it is unclear, the contents of the bottle that was drank from when pulled over.

¹¹ Beron Consulting (Dr. Ronald Henson) updated his report from 8/30/22 on March 2, 2023 (Appendix pages 47-51). Why this expert report was not filed with the Court is unknown.

R24 Exhibit 1 and R122 Exhibit 1, OAWI_NBD_P1_Traffic_Stop @
T04:27:19Z.

The videos do not show evidence of any clues on the field sobriety test other than possibly the one leg test (OLT). However, this was after facing on-coming traffic lights, police lights and having an HGN test conducted for twice normal time period and standing on a gravel road with strong winds blowing and, while stopped, possibly consuming alcohol from a bottle labeled DayQuil. R24; R122.

Thus, the Court erred in finding the officer had probable cause to request the PBT or probable cause to arrest. Therefore, the Court also erred in denying the motion to brief the issue in response to the officer's testimony by Kuhary raised in the Motion Hearing, as well as the Motion to Suppress. R34:41-42:58. The Court's own admission was, "...Mr. Reiner did finally pull over, it wasn't any better than any other place he passed...This was not by any means an extraordinarily dangerous situation." R34:52-54. However, Kuhary wasn't arguing that the test environment was "dangerous", he was arguing it was "chaotic" with an extensive noise level. R34:47-51. The officer was impaired admittantly having 4 hours of sleep prior to his work shift. This is a situation where a sleep deprived rookie cop made numerous mistakes and errors as evidenced by his own testimony, the videos, Court Official Brad D. Schimel and Dr. Ronald Henson and therefore, there was no probable cause to submit to a PBT and no probable cause to arrest as per Wis. Stat. §343.303. At the hearing, Judge Schimel indicated he viewed and looked at the flash drive

prior to the hearing “off bench” multiple times. R24; R34:2, 41, 47.

Although, he looked, he sure didn’t “see” everything. The Appellate Court Opinion/Decision R131 ¶13 (*Appendix page 9*) references *State v. Goss*. However, as indicated in Reiner’s Reply Brief 6, a sleep deprived impaired cop with the equivalent of an 0.05% BAC does not make for a “reasonable police officer” and violates U.S. Constitutional 5th and 14th Amendments of Due Process. The Supreme Court should overturn this case as it is further flawed as alcohol scientifically is odorless.

As a side note it could also be considered to make into law that judges who issue warrants for blood draws must validate/prove that they are not also impaired when issuing these as many times they are awoken on short-hour sleep (less than 8 hours) and whose to say they weren’t drinking, or impaired prior to issuing such warrant. It could be further considered to make into law that it is illegal to issue blood draw warrants unless the traffic stop involves property damage or bodily injury or physical harm.

II. THE STATE MISLED THE TRIAL COURT AND THE JURY AND WITHHELD EXCULPATORY EVIDENCE DURING DISCOVERY.

The Appellate Court Opinion/Decision R131 (*Appendix pages 618-627*) makes no reference to this Brady¹² Argument of Reiner which is in both Reiner Brief (original) 17, 32 and Reiner Reply Brief 9, 12.

¹² Brady v. Maryland, 373 U.S. 83 (1963)

In Reiner Brief 31-32, Reiner indicated, “The Defendant Demand for Discovery also states “Any and all physical evidence that the state intends to offer in evidence at the trial, Wis. Stat. §971.23(1)(g), as well as all other physical evidence within the possession, custody, or control of the state or its investigative agencies or agents.” R11:2:10. In an email dated September 15, 2022 Jack Pitzo emailed Kyle Anderson of the DOJ for the following items (R109) (*Appendix pages 19-21*):

1. Provide any Telephone Conversation Records maintained by the Lab for Mr. Reiner.
2. Provide chain of custody report for Mr. Reiner
3. Provide a copy of the completed volatile worksheet and/or notes (documentation) for Mr. Reiner.
4. Identify the condition and volume of the blood in each vacutainer when they arrived at the lab.
5. Produce all records showing the protocols, methodologies, and analytical procedures that were used during the analysis of Defendant’s blood, to assure the sample was not contaminated by ethanol producing micro-organisms.
6. Provide a copy of the chromatograms for the test runs for the blood alcohol analysis related to Mr. Reiner’s sample testing.

These 6 items were never provided to the Defendant, or any of his attorneys, or his expert witness, Dr. Ronald Henson as requested. R82; R109. *Id. pages 16-21*. The Defendant Demand for Discovery also states “Any exculpatory evidence, Wis. Stat. §971.23(1)(h), including but not limited to the following, “All evidence and other information that would tend to negate the guilt of the defendant, including laboratory reports, hospital records or reports, police reports, or any other information within the state’s possession, knowledge, or control. *Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Harris*, 2004 WI 64, 272 Wis. 2d 80, 680 N.W.2d 737;

State v. Ruiz, 118 Wis. 2d 177, 347 N.W.2d 352 (1984); Nelson v. State, 59 Wis. 2d 474, 208 N.W.2d 410 (1973).” R11:2:11a.”

In Reiner’s Reply Brief 9-10, Reiner indicates “At the time of trial, Reiner was not aware of the email exchange between attorney Jorge Fragoso, Pitzo, Macans and Kyle Anderson of the DOJ now recorded as R109 (*Appendix pages 19-21*) as referenced in Reiner’s Br. 29 confirms that exculpatory evidence within the possession, custody, or control of the state or its investigative agencies or agents was requested, but not provided to the Defense and/or Reiner’s expert witness and that Pitzo *lied* when he testified, “Any indication that we haven’t turned something over is completely improper...Everything that is in the State’s possession and everything...that’s in the lab’s possession, that has been given to Mr. Powers or prior counsel. And again, I’ve attempted to speak to Mr. Powers about this report (R82) many, many times and have been completely ignored.” R130:5657. The email exchange R109 (*Id. pages 19-21*) shows Pitzo also lied about not receiving Reiner’s expert report R82 (*Id. pages 16-18*) as Jorge Fragoso emailed it on 9/15/22. Reiner Br. 32 referencing R82; R109 of the 6 items requested from the state crime lab not received were exculpatory and suppressed by the State would appear more willful than inadvertent showing prejudice. They are material and exculpatory because Reiner’s expert requested them and would tend to negate the guilt of the defendant. There is no clear evidence that the blood analysis R80 is accurate, or that it is indeed Reiner’s blood, based on the missing documents. Strickler v. Greene, 527 U.S. 263 (1999) supports this and

completely dismisses Flynn Br. 22-23 case citations. This clearly violates Wis. Stat. §971.23(1)(g) and Wis. Stat. §971.23(1)(h). Reiner Br. 31.

Also, this *lie* by Pitzo about not receiving Reiner's expert report R82 (*Appendix pages 16-18*) and this other lie by Pitzo "Any indication that we haven't turned something over is completely improper...", resulted in the missing documents from this report R82 (*Id. pages 16-18*) not being allowed to be mentioned. Reiner Br. 18 indicates, "The Court responded that Powers can ask the expert what he reviewed, but the Court wants to avoid some implication that somebody is withholding evidence. "End of sidebar discussion." R130:56-60. This part of the report not being read in evidence at trial violates Wis Stat. §907.07 and Brady¹³ as the Supreme Court held that the prosecution's suppression of evidence violated the Due Process Clause of the U.S. Constitutional 14th Amendment.

¹³ Brady v. Maryland, 373 U.S. 83 (1963)

CONCLUSION

These errors were not harmless, and the jury found Reiner guilty on all 3 counts (R86; R87; R88) (*Id. pages 13-15*) due to:

1. Not having the knowledge that Durni was impaired with sleep deprivation prior to his shift, therefore believed he was credible.
2. Having the knowledge that Reiner has prior DUIs
3. Not aware of the State lying about not handing over 6 exculpatory material documents requested by Reiner's expert Dr. Ronald Henson and not receiving Reiner's expert report which limited expert testimony, allowing objections that should have been decided by the trier of fact, and allowing only certain testimony if foundational during cross-examination,
4. Not aware the state withheld material exculpatory evidence, therefore believed Macan's testimony that Reiner's blood alcohol ratio was 0.153
5. Not aware Macan's testimony was inaccurate that underfilling vials would artificially lower the actual blood alcohol ratio.

For the reasons stated in Reiner Brief, and in Reiner Reply Brief, this Petitioner for a Writ of Certiorari should be granted in hopes this U. S. Supreme Court reverse both the decision denying his suppression motion and his guilty convictions at trial.

Dated at Milwaukee, Wisconsin, December 22, 2024.

Respectfully submitted,

A rectangular box containing a handwritten signature in cursive script, which appears to read "Darren Reiner".

DARREN R. REINER,
Petitioner