STATE OF WISCONSIN
IN SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 15AP1261

NAVDEEP S. BRAR,

Defendant-Appellant-Petitioner.

ON APPEAL FROM A FINAL ORDER ENTERED ON
APRIL 3, 2015 IN THE CIRCUIT COURT
FOR DANE COUNTY, BRANCH I,
THE HONORABLE JOHN W. MARKSON PRESIDING.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

Respectfully submitted,

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STATEMENT OF ISSUES

I. A NON-NATIVE ENGLISH SPEAKING DRIVER HAS NOT CONSENTED TO A BLOOD DRAW BY MAKING EITHER AN UNINTELLIGIBLE STATEMENT OR BY SAYING THE WORDS "OF COURSE" FOLLOWED BY A QUESTION AS TO WHETHER THE OFFICER NEEDED A WARRANT.

A. The words "of course" were never used.

B. Even if the words "of course" were used, those words do not establish consent.

II. BRAR'S CONSENT WAS INVOLUNTARILY OBTAINED BY OFFICER WOOD'S MISLEADING INDICATION THAT HE DID NOT NEED A WARRANT TO OBTAIN A SAMPLE OF BRAR'S BLOOD.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has indicated that both oral argument and publication are appropriate in this matter.

STATEMENT OF CASE

On July 2, 2014, Officer Michael Wood arrested Appellant-Petitioner Navdeep Singh Brar for operating while intoxicated. (42:5.) Officer Wood transported Brar to the Middleton Police Department. (42:6.) Officer Wood read Brar the Informing the Accused Form ("ITAF") required by Wis. Stat. §343.305(4). (42:6.) After some discussion about the form, Officer Wood concluded that Brar consented to a blood test. (42:8.) Officer Wood then transported Brar to a hospital for a blood draw, and the blood was subsequently drawn. (42:8.) On August 6, 2014, Respondent charged Brar by criminal complaint with operating a motor vehicle while intoxicated, contrary to Wis. Stat. §346.63(1)(a); and operating a motor vehicle with a prohibited alcohol concentration, contrary to Wis. Stat. §346.63(1)(b). (4:1–2.) The Dane County Circuit Court entered not guilty pleas on Brar's behalf. (39:1.)

Brar moved the court to suppress the results of his blood test for lack of consent. (19:1–2.) The lower court initially denied the motion without a hearing. (41:2.) Brar submitted a written response, asking the court to reconsider. (Id.) After discussion, the lower court agreed with Brar that an evidentiary hearing was required. (41:9.) On December 23, 2014, the parties appeared for an evidentiary hearing,

the Honorable John W. Markson presiding. (42:1.) Officer Wood was the State's only witness. (42:2.) The court received two exhibits. (*Id.*) First, the court received Exhibit 1 – the ITAF used in this case. (25:1.) Second, the court received Exhibit 2 – an audiovisual recording of Brar's conversation with Officer Wood. (25:2.) Exhibit 2 contains the entirety of the conversation leading up to the moment Officer Wood concluded that he had obtained consent. (Id.)

On direct examination, Officer Wood testified that he read the ITAF to Brar. (42:6.) The form's ultimate question is: "Will you submit to an evidentiary chemical test of your blood?" (42:6–7.) Brar asked for Officer Wood's advice about what he should do. (42:14.) Officer Wood properly declined to give legal advice and re-read a portion of the form. (25:2.) Officer Wood ended this partial re-reading by asking a slightly different version of the ultimate question on the ITAF and did not specify what type of chemical test he sought. (Id.) This second time, the officer asked, "Will you submit to the test – yes or no please?" (Id.)

Officer Wood testified to Brar's response, stating that Brar's response was, "Of course." (Id.) Respondent then played the audiovisual recording for the court. (42:14.) Officer Wood testified, "When asked if [Mr. Brar] would take the test or not, he says: Of

course, I don't want my license – and then it's hard to tell what he is saying, but I believe it was he does not want his license to be revoked." (Id.) Officer Wood could only clearly hear the word "license." (42:18.) Without a break, Brar asked, "what type of test was going to be done?" (42:14; 25:2.) Officer Wood replied, "a test of your blood." (Id.) Brar then asked whether Officer Wood needed a warrant for a blood test. (42:15.) Officer Wood replied in the negative by shaking his head. (Id.) This was the point at which Officer Wood concluded that he had obtained consent for the blood draw. (42:20-21)

Officer Wood testified that he had no other indication of Brar's affirmative consent. (42:16.) Also, only the audiovisual recording reflects the timing, manner, and inflections of the questions and answers between Brar and Officer Wood. (25:2.) Notably, the court reporter noted the CD as "unintelligible to reporter, unable to make record." (42:12-15.) A private court reporter was able to reconstruct a transcript. That was as follows:

> OFFICER WOOD: Will you submit to an evidentiary chemical test of your blood?
> MR. BRAR: (inaudible) testing.
> OFFICER WOOD: It's yes or not?
> MR. BRAR: No, it's (inaudible).
> OFFICER WOOD: It is. It's – the question in front of you is this, will you submit –

> MR. BRAR: No, I (inaudible) listening. I don't know the law. I don't know the law. No more elaborate. Tell me it's a violation.
> OFFICER WOOD: If you refuse to take any test that this agency requests, your operating privilege will be revoked and you'll be subject to other penalties. Will you take the test, yes or no, please?
> MR. BRAR: So I have no other option (inaudible).
> OFFICER WOOD: The situation is up to you.
> MR. BRAR: No, I'm asking you.
> OFFICER WOOD: I told you, the choice is up to you.
> MR. BRAR: Nobody read me these questions before in my life.
> OFFICER WOOD: Will you submit to the test, yes or no, please?
> MR. BRAR: (Inaudible) want my like (inaudible). Why read a complicated question? What kind of test you are going to do?
> OFFICER WOOD: A test of your blood.
> MR. BRAR: Why do you have to take a warrant for that, don't you?
> OFFICER WOOD: Take what, I'm sorry?
> MR. BRAR: A warrant.
> OFFICER WOOD: A warrant?
> MR. BRAR: Yeah. You need a warrant for that (inaudible). Without that (inaudible) offending, I don't know. (Inaudible) you know it. (Inaudible) challenging you.
> (Pause)
> MR. BRAR: May I? Talk to my lawyer.

(26:1-2 or 26:8-10).

The trial court adopted the officer's view of what Brar must have said, but disregarded all statements after the alleged "of course" phrase and disregarded the officer's admission that he did not believe he had consent until after Brar asked if the officer needed a warrant. (42: 21.) Because this recording is so important to this case, Appellant-Petitioner respectfully requests this Court listen to it. (Id.)

Officer Wood never testified to the ease or difficulty of his communication with Brar. However, the audiovisual recording clearly reflects Brar's very strong Indian accent. (Id.) At various points in the conversation, both the officer and Brar each required the other to clarify what the other meant to say. (Id.)

On cross-examination, Officer Wood agreed that Brar's sentence did not start and end with the words "of course." (42:19.) The officer admitted, "It's hard to understand him." (42:18.) He agreed that Brar continued to speak after he said "of course" – without any significant pauses. (Id.) Immediately thereafter, Brar asked what type of test it would be. (Id.) Officer Wood replied that it would be a blood test. (Id.) Officer Wood agreed that Brar then asked, "Don't you need a warrant for that?" (Id.) The officer shook his head "no" to indicate a warrant was not required. (42:15) On both direct and cross-examination, Officer Wood spent an appreciable period of time testifying to his interpretation of the recording as it was played in court, rather than his natural recollection. (42:4–24.) Officer Wood filled in the "yes" on the ITAF on Brar's behalf and printed the form "during [the same] general time frame" as the discussion regarding the search warrant. (42:21.)

Brar appears to comment that Officer Wood asked him "a complicated question." (25:2.) However, Officer Wood on cross-examination did not remember the exact words Brar used.

> Q: Would you agree that it sounds like he said, "of course that is a complicated question"?
> A: To me, "of course" that he states, is obvious. After that, to me, listening to the tape, I thought he states, he mumbles, then there is a pause, and then license, from there.
> …
> Q: Can you describe what you heard there?
> A: To me it sounds like he states "of course" and then I don't want …
> Q: I thought it said that was a complicated question. Would you say that was a fair interpretation?
> A: I thought I heard him say, "of course," and then "I don't want", and he mumbles, and then he trails off.

(42:18–19.)

The lower court adopted the State's argument that Brar's use of the phrase "of course" proved his consent to a blood draw. (42:47.) The lower court found the officer's testimony credible. (42:46.) The court wondered aloud: "[W]hat do we make of his reference to 'do you need a warrant for that' when he finds out, and it's affirmed, that he is going to be taken for a blood test? That is open to some interpretation, I grant that." (42:48.) The lower court concluded that the officer "did not need a warrant for that, because Brar had just consented." (42:49.)

The lower court then attempted to shield its ruling from appellate review by finding "as a matter of fact that Brar did give consent." (Id.) The court again said, "I do respectfully make the finding of fact that there was actual consent." (42:50.) The lower court brought up the point a third time at plea and sentencing. (43:15.) "I was trying to make a reasoned determination of whether he consented or not. But once I had done that, that's a factual determination. It's a determination that the court of appeals needs to defer to. They cannot substitute their interpretation of the evidence for mine." (Id.)

Brar moved the lower court to reconsider, submitting with the motion a professionally enhanced version of the audio from Exhibit 2. (26). The defense noted that it was still not possible to distinguish every word of what was said. (Id.) The court reporter marked several comments as unintelligible. However, the transcript sheds some light on the true character of the exchange. (Id.) The words "of course" appear nowhere in this transcript. (Id.) Neither Officer Wood nor Brar made himself clearly understood to the other. Each required clarification of certain things said by the other. (Id.) The motion to reconsider was denied. (42:50.)

On April 3, 2015, Brar entered a plea and filed a Notice of Intent to Pursue Postconviction Relief. (35:1; 34:2.) Judge Markson stayed penalties pending appeal. (43:17.) Brar then appealed from the lower court's order denying his motion to suppress. (37:2.)

The Court of Appeals affirmed the trial court, agreeing with the court that Brar voluntarily consented and, because he consented, no warrant was required. The Court's decision did not address Brar's argument that the trial court's finding that Brar consented was erroneous because the trial court relied only on the officer's memory. The officer relied upon his faulty memory of what Brar said when the tape showed that, in reality, Brar never said "of course" during his conversation with the officer. The Court of Appeals' decision did not indicate that the Court had listened to the tape to determine whether improper reliance was placed on the officer's testimony as opposed to the recording of Brar's actual statements. The Court of Appeals' decision also did not address Brar's contention that his inquiry about a warrant was part of an ongoing conversation about whether Brar should consent or not, and that any alleged consent could not have been given until after that conversation was complete.

Brar filed a Petition for Review to this Court, and this Court agreed to hear the case.

ARGUMENT

This Court should reverse the Court of Appeals' decision and remand with instructions to the trial court to grant Mr. Brar's suppression motion for three reasons. First, Brar did not say "of course" to indicate his consent to a blood draw. Second, law enforcement officers cannot manufacture consent by divorcing certain words from their context. Brar's incidental use of the words "of course" (assuming this Court determines those words were even said) is insufficient to prove by clear and convincing evidence that he consented. Third, Officer Wood improperly obtained Brar's cooperation with the blood draw by misleading Brar into believing that a warrant would not be necessary.

At the outset, Appellant-Petitioner notes that this case has very little to do with the implied consent law. However, as Judge Blanchard observed in the ***Padley***[1] case, Wisconsin's implied consent law *can* be the vehicle by which a law enforcement officer obtains actual consent. ***Id***. at ¶25 ("[A]ctual consent to a blood draw is . . . a possible result of requiring the driver to choose whether to consent under the implied consent law.") Thus, contrary to the

[1] ***State v. Padley***, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867, review denied, 2014 WI 122, 855 N.W.2d 695

State's arguments in the court below, the implied consent law "does not mean that police may require a driver to submit to a blood draw." ***Id***. The issue is not whether Brar *withdrew* his consent. The issue is whether he *provided* his consent.

"Courts use two steps in reviewing a determination of voluntariness of consent to a search: whether there was consent, and whether it was voluntarily given." ***Id***. at ¶63. The State bears the burden of proving by clear and positive evidence the search was the result of a free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied. ***Id***. at ¶64.

Standard of review.

> Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact. *State v. Mitchell*, 167 Wis.2d 672, 684, 482 N.W.2d 364 (1992); *State v. Williams*, 2001 WI 21, ¶ 18, 241 Wis.2d 631, 623 N.W.2d 106. A finding of constitutional fact consists of the circuit court's findings of historical fact, which we review under the "clearly erroneous standard," and the application of these historical facts to constitutional principles, which we review de novo. *Id.*, ¶¶ 18–19.

State v. Popke, 317 Wis. 2d 118, 765 N.W.2d 569 (2009).

Moreover, trial courts cannot shield rulings from appellate review by characterizing legal conclusions as factual findings.

I. A NON-NATIVE ENGLISH SPEAKING DRIVER HAS NOT CONSENTED TO A BLOOD DRAW BY MAKING EITHER AN UNINTELLIGIBLE STATEMENT OR BY SAYING THE WORDS "OF COURSE" FOLLOWED BY A QUESTION AS TO WHETHER THE OFFICER NEEDED A WARRANT.

A. The words "of course" were never used.

Brar has continually disputed Officer Wood's belief that Brar said "of course…" when asked if he would submit to the blood draw. The circuit court adopted Officer Wood's version, but to the extent that version can even be characterized as a factual finding, those findings are clearly erroneous and not supported by the record. More importantly, a finding of consent can never be a factual finding.

Importantly, the court's own reporter did not hear the words "of course," nor did a separate court reporter who prepared a transcript of the audio at the request of the defense. (42:12-15; 26:4-10.) To conclude that words establishing an exception to the Fourth Amendment were uttered when no transcript establishes that to be the case, and when the officer was not even sure exactly what was said, is an erroneous conclusion.

The trial court reporter reported the entire audio of the exchange between Brar and the officer as "unintelligible to reporter, unable to make record." (42:12-15.)

The private court reporter reported the exchange as follows:

> OFFICER WOOD: Will you submit to an evidentiary chemical test of your blood?
> MR. BRAR: (inaudible) testing.
> OFFICER WOOD: It's yes or not?
> MR. BRAR: No, it's (inaudible).
> OFFICER WOOD: It is. It's – the question in front of you is this, will you submit –
> MR. BRAR: No, I (inaudible) listening. I don't know the law. I don't know the law. No more elaborate. Tell me it's a violation.
> OFFICER WOOD: If you refuse to take any test that this agency requests, your operating privilege will be revoked and you'll be subject to other penalties. Will you take the test, yes or no, please?
> MR. BRAR: So I have no other option (inaudible).
> OFFICER WOOD: The situation is up to you.
> MR. BRAR: No, I'm asking you.
> OFFICER WOOD: I told you, the choice is up to you.
> MR. BRAR: Nobody read me these questions before in my life.
> OFFICER WOOD: Will you submit to the test, yes or no, please?
> MR. BRAR: (Inaudible) want my like (inaudible). Why read a complicated question? What kind of test you are going to do?
> OFFICER WOOD: A test of your blood.
> MR. BRAR: Why do you have to take a warrant for that, don't you?
> OFFICER WOOD: Take what, I'm sorry?
> MR. BRAR: A warrant.
> OFFICER WOOD: A warrant?
> MR. BRAR: Yeah. You need a warrant for that (inaudible). Without that (inaudible) offending, I don't know. (Inaudible) you know it. (Inaudible) challenging you.
> (Pause)
> MR. BRAR: May I? Talk to my lawyer.

(26:8-10.)

Since the audio recording is part of the appellate record, this Court can draw its own conclusions as to whether Brar said "of

course." Because the recording establishes that Brar never said "of course," the circuit court's finding to the contrary is clearly erroneous, and no basis remains for the legal conclusion that Brar consented to a blood draw. Furthermore, the trial court's deference to the police officer's testimony as to what he was hearing in court when the tape was played. (42:4-24).

B. Even if the words "of course" were used, those words do not establish consent.

The Supreme Court has set forth an objective test for determining whether a person has consented to a Fourth Amendment search. ***Florida v. Jimeno***, 500 U.S. 248, 251, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991). That is: "[W]hat would the typical reasonable person have understood by the exchange between the officer and the suspect?" ***Id***. at 251. Again, this test embraces the totality of the circumstances–not just the one that is favorable to the government. ***Padley***, ***supra*** at ¶64. Here, a reasonable bystander would understand that Brar had not consented at the time he allegedly said the words "of course." Brar had questions about the type of test requested of him and about whether the officer would need a warrant. When one party in a negotiation is still asking questions and does not understand the terms, the deal is not done.

Standing alone, "of course" is an affirmative response. But Brar never used the words "of course" standing alone. If the words were used at all, they were immediately followed by more words. Officer Wood admitted on cross-examination that he could not really hear anything about a license being revoked after "of course." (42:18-19.) The officer testified: "I thought I heard him say, "of course," and then I don't want, and he mumbles, and then he trails off." (42:18-19.)

Thus, the officer clarified that Brar never said "of course, I don't want to lose my license." What he said, according to the officer, was "of course I don't want." (42: 14, 18, 19). If that was what Brar said, it would be more reasonable to interpret it as a rejection of the blood test. Any factual finding by the trial court to the contrary, as noted above, was clearly erroneous. Even if the version the officer testified to on direct was accurate, the subsequent words objectively and unmistakably altered the meaning of the antecedent "of course." One dictionary provides five distinct uses or meanings for the phrase "of course." Each conveys something different from the other.

> 1. Used for saying "yes" very definitely, in answer to a question.
> *"Do you know what I mean?" "Of course."*

2. Used for giving someone permission in a polite way.
"May I come in?" "Of course you may."

3. Used for agreeing or disagreeing with someone.
"They won't mind if we're a bit late." "Of course they will."

4. Used for saying something that you think someone probably already knows or will not be surprised about.
"I will, of course, make sure you're all kept fully informed."
"He found out in the end, of course."

5. Used when you have just realized something.
"Of course! Now I understand."

(http://www.macmillandictionary.com/us/dictionary/american/of-course) (Dec. 13, 2015) (numeration altered). Respondent argued below that this case falls under examples one (1) and two (2). Appellant-Petitioner argued that this case is most like example four (4). Even if Brar said something about not wanting to lose his license, that changes nothing in the consent analysis. No one wants to lose his or her license. Officer Wood presented Brar with a difficult choice, and Brar merely thought aloud about his options.

Wisconsin case law is replete with factual scenarios where a law enforcement officer reads the ITAF and is met by a confused driver with questions – and not by a simple "yes" or "no" response. *See, e.g.*, ***State v. Baratka***, 2002 WI App 288, 258 Wis. 2d 342, 654 N.W.2d 875 (analyzing a situation where a driver responded to the ITAF by saying "that he did not understand and requested an

attorney."); ***Cty. of Ozaukee v. Quelle***, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct.App.1995) *abrogated by* ***In re Smith***, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243, 274 (involving an officer who read the ITAF, where the driver "also read each paragraph to herself and questioned the officer about each paragraph.")

Brar, like the drivers in the above cases, asked follow up questions. He asked what type of test would be conducted. Apparently surprised when Officer Wood requested a blood test, Brar questioned whether Officer Wood needed a warrant for a blood test. He not only asked once as the officer testified to; he asked three times. (26.) The matter was not settled for Brar, and a reasonable bystander would not have understood it to be settled. Officer Wood was either subjectively satisfied or too impatient to explore the matter further. Accordingly, he printed the ITAF reflecting an affirmative response that Brar never provided. (25:1.) The form indicates that Brar said "yes." (Id.) Of course, that is not the case.

Cases from the Supreme Courts of the United States and Wisconsin are consistent in holding that the State's burden of proving consent by clear and convincing evidence "cannot be discharged by showing no more than acquiescence to a claim of lawful authority." ***Bumper v. North Carolina***, 391 U.S. 543, 549

(1968); ***State v. Johnson***, 2007 WI 32, 299 Wis. 2d 675, 687-88, 729 N.W.2d 182 (concluding that the defendant "merely acquiesced to the search" where the defendant indicated "that he wasn't going to do anything to stop" the police from searching). Brar need not revoke consent that he never provided. He need not physically resist. He was under arrest and had been told a warrant was not necessary. The State and courts below found that the lack of active protest meant there was consent, but the law requires no such thing. ***State v. Hobson***, 218 Wis. 2d 350, 577 N.W.2d 825 (1998). Regardless, Brar did challenge the officer's authority to perform the blood draw by demanding to know whether Officer Wood required a warrant for the intrusion. (42:18.)

The officer's testimony at the motion hearing provided negligible information this Court or the courts below would be unable to discern from listening to the recordings. Reliance on the officer's conclusions as to what was said was, thus, improper, as the tapes are the best evidence. The officer spent much of the motion hearing testifying to the recording's contents, rather than to his own natural recollection. (42:4–24.) The recoding reflects the reading of the ITAF. (25:2; 26:2.) The recording clearly reflects that Brar *never* used the words "of course" in isolation. (Id.) It is questionable

whether those words were actually used at all. That is an issue for the Court to decide upon listening to the audio.

Even if this Court credits Officer Wood's testimony entirely, only the following is known: Brar may have said "of course I don't want my license to be revoked," and he continued asking questions. When he said "of course I don't want my license to be revoked," Brar did not know whether he was being asked for a blood, breath, or urine test; he then asked more than once whether Officer Wood needed a warrant to take his blood. These facts demonstrate confusion and show Brar had not, in fact or in law, consented.

This is to say nothing of the lower court's attempt to shield its ruling from appellate review by mischaracterizing its legal conclusion as a finding of fact. Of course, the circuit court may make findings of fact as to the actual words said by Brar or Officer Wood; whether those statements amount to consent involves a conclusion of constitutional law, to which this Court need not defer. ***State v. Giebel***, 2006 WI App 239, ¶11, 297 Wis. 2d 446, 724 N.W.2d 402.

The risks of Brar being misled or misunderstood are heightened by the fact that English is not Brar's first language. There is no indication in the record that Officer Wood offered Brar access to an interpreter. Without an interpreter or a clear understanding of

what Brar was saying by his repeated use of the word "warrant," the State failed to meet its burden of showing an exception to the warrant requirement.

Recent decisions in the United States Supreme Court, this Court, and the Court of Appeals have underscored the need for warrants for blood tests. "[Blood tests] 'require piercing the skin' and extract a part of the subject's body." ***Birchfield v. North Dakota***, 579 U.S. ___, 136 S.Ct. 2160, 2178 (2016) quoting ***Skinner v. Railway Labor Executives' Assn.***, 489 U.S. 602, 625 (1989). In comparing blood tests to breath tests, the United States Supreme Court held "Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test." ***Birchfield***, ***supra*** at 2184. The case of as ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013) stressed the importance of warrants in the blood test scenario and prohibited routine reliance on exigency, as previously permitted in Wisconsin by ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993); see also ***State v. Foster***, 2014 WI 131, 856 N.W.2d 847, et al. ***Padley***, ***supra***, discussed the factors needed for a finding of voluntary consent and stressed that Courts must consider the personal circumstances of the defendant in determining whether consent was

actually given and whether it was voluntary. The Court of Appeals' decision here did not address ***Birchfield*** or other recent cases dealing with the caution needed when blood is being taken from a person without a warrant.

If Brar did say the words "of course," this statement is ambiguous at best–especially considering that Brar asked two questions immediately thereafter, without a break in the conversation. Specifically, Brar asked (1) what type of test Officer Wood was requesting and (2) whether Officer Wood needed a warrant for such a test. (42:14–15.) One reasonable interpretation of this conversation is, "It is obvious that I do not wish to lose my license." Yet another reasonable interpretation is that Brar said "of course I don't want a needle in my arm" or "of course you need a warrant." Whatever he was saying, there is no reasonable argument that was consent. A driver's expression of desire when faced with a difficult choice does not constitute an indication of the choice itself. At this point, Brar merely thought aloud and weighed his options before he asked two important follow-up questions.

Appellant-Petitioner offers the following analogous situation: A customer enters an electronics store and begins browsing for a television. A salesperson takes time explaining the units' features.

The salesperson and customer narrow their choices to a single unit, and the salesperson asks, "Would you like to buy this television now?" The customer replies, "Of course I want to replace my old television. What kind of warranty comes with it?" No deal is made at the time the customer says "of course." For one thing, the customer follows the words "of course" with an expression of desire. This means that the customer is not so much saying, "of course I will buy this television right now." Rather, the customer is confirming a fact being used to form a decision about the ultimate question. Moreover, the customer immediately follows up a statement with a question, indicating to any reasonable bystander that he has not yet consented to be bound to the obligation to pay for the television.

Similarly, in this case, Officer Wood read Brar the ITAF, which explained that Brar was required to choose one of two difficult options–consent and suffer the consequences or refuse and suffer the consequences. The officer used the form to explain the features of Wisconsin's implied consent law and asked the ultimate question: "Will you submit to an evidentiary chemical test of your blood?" After discussion, the officer asked the question slightly differently, asking "Will you submit to the test – yes or no please?" (25:2.) According to the officer, Brar said something like, "Of course

I don't want my license to be revoked. What kind of test is it?" (Id.) No consent occurred at the time Brar said "of course." For one thing, Brar followed the words "of course" with an expression of desire. This means that Brar was not so much saying "of course I will take your test" – he didn't even know what kind of test it would be. Rather, Brar was communicating the idea that "it's obvious that I don't want to lose my license." Moreover, Brar immediately followed up his statement with not one, but *two* questions, indicating to any reasonable bystander that he had not yet consented to the test– he had not yet made up his mind. Follow-up questions objectively indicate an ongoing decision-making process.

No break existed between the words "of course" and the rest of Brar's sentence. Respondent below attempted to construe those words as an independent statement of agreement in the court below. This is a disingenuous interpretation of the conversation that fails to consider the totality of the circumstances, as required by the Fourth Amendment. The State bears the burden of proving by "clear and positive evidence the search was the result of a free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied." (Id.) Even assuming *arguendo* that the words "of course" were consent, under the circumstances that consent was not

unequivocal. It was not specific. And those two words, when considered in the full context of the conversation, are not "clear and positive evidence . . . of a free, intelligent . . . consent." (Id.)

Moreover, the State must prove "specific" consent. (Id.) The test for consent is objective. However, at the time Officer Wood subjectively believed that Brar consented, he was still asking for clarification of what type of chemical test Officer Wood desired. After the supposed consent, Officer Wood needed to clarify that it would be a blood test. The State never argued that Brar unequivocally affirmed his consent at any point thereafter. Brar's consent was not specific because it was ostensibly obtained before he knew he was being asked to consent to a needle in his arm. He could not have specifically consented to that which he did not understand. Thus, the consent was unspecific, and it fails the test for objective consent. (Id.) Even if Brar consented, he did not consent to anything in particular. He lacked an understanding of what the officer requested. Thus, the State cannot prove specific and intelligent consent. (Id.)

The Court of Appeals' reliance on the fact Brar did not "fight" having his blood drawn as a factor establishing consent fails to recognize that mere acquiescence to police authority is not true

constitutional consent under ***Berkemer v. McCarty***, 468 U.S. 420 (1984). Wisconsin law requires peaceful submission to arrest or other seemingly valid requests by law enforcement officers. ***State v. Hobson***, 218 Wis. 2d 350, 577 N.W.2d 825 (1998). To suggest that Brar should have offered physical resistance, or even peacefully declined to cooperate, is to suggest that in order to exercise his constitutional right to be free from unreasonable searches, he must expose himself to criminal charges for resisting or obstructing an officer under Wis. Stat. § 946.41(1). This Court should not suggest that police obstruction or violent resistance are appropriate ways for citizens to respond to a law enforcement officer's request.

Brar was put into handcuffs, he was taken to the hospital, he was told the officer wanted his blood, and he was then told the officer could do all of this without a warrant; so, he submitted. That is not consent.

II. BRAR'S CONSENT WAS INVOLUNTARILY OBTAINED BY OFFICER WOOD'S MISLEADING INDICATION THAT HE DID NOT NEED A WARRANT TO OBTAIN A SAMPLE OF BRAR'S BLOOD.

"One factor very likely to produce a finding of no consent under the ***Schneckloth***[2] voluntariness test is an express or implied

[2] ***Schneckloth v. Bustamonte***, 412 U.S. 218 (1973).

false claim by the police that they can immediately proceed to make the search in any event." ***Wayne R. LaFave***, 4 *Search & Seizure* §8.2(a) (5th ed.). The Supreme Court stated in ***Bumper*** that the State's burden of proving consent by clear and convincing evidence "cannot be discharged by showing no more than acquiescence to a claim of lawful authority." ***Bumper v. North Carolina***, 391 U.S. 543, 549 (1968).

The "claim of lawful authority" referred to in ***Bumper*** need not involve mention of a search warrant. "It is enough, for example, that the police incorrectly assert that they have a right to make a warrantless search under the then existing circumstances." ***LaFave***, ***supra***, at § 8.2(a) n.35 (citing, *inter alia*, ***Orhorhaghe v. I.N.S.***, 38 F.3d 488 (9th Cir. 1994) (defendant's consent to search of his apartment not valid given agent's false "*statement at the doorway that the agents did not need a warrant*") (emphasis added); ***United States v. Molt***, 589 F.2d 1247 (3d Cir. 1978)(defendant's consent not valid where agents innocently but falsely told defendant federal statute authorized them to make warrantless inspection of defendant's business records); ***State v. Casal***, 410 So. 2d 152 (Fla. 1982) (consent to search of boat invalid where officer falsely asserted no warrant necessary); ***Cooper v. State***, 277 Ga. 282, 587

S.E.2d 605 (2003) (false statement by police to defendant that law requires him to submit to search even absent a warrant invalidates subsequent consent).

Here, Brar asked Officer Wood whether he needed a warrant to take Brar's blood. Up to that point, Officer Wood declined to offer Brar legal advice. He reread a portion of the ITAF and neither departed from nor elaborated upon its contents. But that caution ended when Brar asked him whether he needed a warrant for the blood draw. Officer Wood provided a legal opinion and responded in the negative by shaking his head. The lower court concluded that the officer "did not need a warrant for that, because Brar had just consented." (42:49.) As noted above, Brar never consented to a blood test. However, even if he did, the court's narrow interpretation of the exchange is not a commonsense evaluation of the conversation. When the entire exchange is a series of questions and statements of confusion—the mention of the word "warrant" cannot be ignored.

This Court recently amplified the importance and frequency of warrants in OWI cases. ***McNeely***, at 1568; ***State v. Kennedy***, 2014 WI 132, 359 Wis. 2d 454, 856 N.W.2d 834; ***State v. Foster***, 2014 WI 131, 360 Wis. 2d 12, 856 N.W.2d 847. The exigent circumstances

exception no longer applies in the majority of cases. ***McNeely, supra***. Post-***McNeely***, in most criminal cases, either (1) the subject consents or (2) the police must seek a search warrant. But when citizens speak of warrants with police, courts cannot impute knowledge of judicially created analytic frameworks. Ordinary people do not know that warrantless searches are *per se* unreasonable absent an exception to the warrant requirement. They do not have time to research Fourth Amendment case law prior to replying to an officer's questions. The test for analyzing consent-or-not issues is: "[W]hat would the typical reasonable person have understood by the exchange between the officer and the suspect?" ***Jimeno***, ***supra*** at 251.

Here, Brar asked whether the officer needed a warrant. The officer responded in the negative. Technically, it is true that a warrant is not required after a person consents to a search. However, the officer neglected to include that caveat at this point in the ongoing conversation. The officer's reply was misleading because it implied that the warrant requirement is not implicated at all in a blood test. The officer's answer was a half-truth that vitiated the voluntariness of any consent.

The Ninth Circuit, in determining voluntariness of consent,

> "[relied] to a greater extent this time on [the agent's] statement in the doorway that the agents did not need a warrant. This statement is *particularly significant* with respect to the determination whether [the defendant] allowed the agents into his apartment voluntarily, or whether he did so under 'duress or coercion, express or implied.'"

Orhorhaghe v. I.N.S., ***supra*** (quoting ***Schneckloth***, 412 U.S. at 248). "It is well established that there can be no effective consent to a search or seizure if that consent follows a law enforcement officer's assertion of an independent right to engage in such conduct." ***Id***.

Officer Wood's statement that he '"didn't need a warrant' constituted just such an implied claim of a right to conduct the search." ***Id.*** at 501. By accompanying Officer Wood to the hospital for the blood draw, Brar "showed no more than acquiescence to a claim of lawful authority." ***Id***.

Finally, Appellant-Petitioner reiterates that which is obvious from the audiovisual recording. That is, English is not Brar's first language, and he speaks with a thick Indian accent. It is clear from the proceedings below that the trial court, the officer, the parties, and even a court reporter had trouble understanding much of Brar's speech. (42:25, Ex. 2; 26.) Where the defendant to be searched is a foreigner who does not readily speak and understand English, the government's burden is heavier. ***LaFave***, ***supra***, at §8.2(e) n.181

(quoting ***Restrepo v. State***, 438 So. 2d 76 (Fla.Dist.Ct.App.1983) (citing ***Kovach v. United States***, 53 F.2d 639 (6th Cir. 1931); ***United States v. Wai Lau***, 215 F. Supp. 684 (S.D.N.Y. 1963), ***aff'd***, 329 F.2d 310 (2d.Cir.1964)); *cf.* ***State v. Begicevic***, 2004 WI App 57, ¶13, 270 Wis. 2d 675, 678 N.W.2d 293.

The Court of Appeals found that Brar's argument that he was misled by Officer Wood fails because consent had already been given when Officer Wood told Brar no warrant was needed. That finding ignores the factual record, where the officer stated he had consent at the time he wrote "yes" on the ITAF, which was after Brar asked about getting a warrant. (42: 4-24). Moreover, the officer conceded that he considered all statements Brar made before deciding Brar consented—those included the questions about the warrant and the back-and-forth about whether Brar should submit. To say that no misinformation as to whether a warrant was required was given because there was consent is circular reasoning, as all statements must be considered in determining whether consent was given in the first place. Thus, to the extent this Court finds there was consent, that finding must be in spite of the fact that Brar asked if a warrant was required. The correct answer to his inquiry under the law should have been "a warrant is required unless you consent."

Then Brar should have been asked if he consented. As he never said "yes," the officer should have confirmed the answer or gotten a warrant to ensure this was not an illegal blood draw. As the ***Padley*** court noted:

> Consent is voluntary if it is given in the "absence of actual coercive, improper police practices designed to overcome the resistance of a defendant." *State v. Clappes*, 136 Wis.2d 222, 245, 401 N.W.2d 759 (1987)…However, as this court has explained, "[o]rderly submission to law enforcement officers who, in effect, incorrectly represent that they have the authority to search and seize property, is not knowing, intelligent and voluntary consent under the Fourth Amendment." *State v. Giebel*, 2006 WI App 239, ¶ 18, 297 Wis.2d 446, 724 N.W.2d 402…
>
> In making a determination regarding the voluntariness of consent, this court examines the totality of the circumstances, including the circumstances surrounding consent and the characteristics of the defendant. *State v. Artic*, 2010 WI 83, ¶¶ 32–33, 327 Wis.2d 392, 786 N.W.2d 430. The State "bears 'the burden of proving by clear and positive evidence the search was the result of a free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied.' " *State v. Johnson*, 177 Wis.2d 224, 233, 501 N.W.2d 876 (Ct.App.1993) (quoting *Gautreaux v. State*, 52 Wis.2d 489, 492, 190 N.W.2d 542 (1971)).

Id. at ¶62.

Both the trial court and the Court of Appeals' decision did not address the totality of the circumstances, which include the characteristics of Brar and the fact he does not speak English as his

primary language. No attempt was made by the officer to confirm Brar's level of comprehension or to ask Brar to clarify his statements that the officer could not comprehend. The State, therefore, did not meet its burden of establishing voluntariness.

Courts throughout our country are requiring the Government to fully prove its burden to show that any intrusive blood draw made without warrant was performed under a clear exception to the warrant requirement of the Constitution. In this case, the Constitution requires a finding that the State did not meet that burden, and the results of the blood test must be suppressed.

CONCLUSION

For the reasons stated in this Brief, Brar respectfully requests the Court of Appeals decision be reversed and this case be remanded to the trial court with an Order suppressing the results of the warrantless blood draw.

Dated at Madison, Wisconsin, _____, 2017.

Respectfully submitted,

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STATE OF WISCONSIN

IN SUPREME COURT

No. 2015AP1261-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NAVDEEP S. BRAR,

Defendant-Appellant-Petitioner.

ON APPEAL FROM A DECISION OF THE WISCONSIN COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION, ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE JOHN W. MARKSON PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has indicated that oral argument and publication are appropriate.

STATEMENT OF ISSUES

1. Did Brar consent to the blood test before arriving at the Middleton Police Department?

Neither the trial court nor the court of appeals specifically addressed this issue, but both courts ultimately determined that Brar consented to the test.

2. Did Brar submit to the blood test after being read the informing the accused form?

Both courts found that Brar consented to the test after being read the informing the accused form.[1]

3. Did the police mislead Brar into agreeing to take the test, by telling him that there was no need to get a search warrant for his blood?

Both courts answered no.

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[1] As will be argued below, Brar had already consented to the test and the issue was whether he would submit to the test or recant his earlier implied consent and face the ramifications of a refusal. So, the State submits that the trial court and court of appeals took a faulty tack but reached the right conclusion. This Court is not restrained to the lower court's reasoning in affirming or denying its order; instead it can affirm the order on different grounds. *State v. Smiter*, 2011 WI App 15, ¶ 9, 331 Wis. 2d 431, 793 N.W.2d 920.

STATEMENT OF CASE

On July 2, 2014, Brar was arrested by Middleton Police Officer, Michael Wood, for operating while intoxicated (OWI). (42:5.) Brar was charged in a criminal complaint with OWI third offense, contrary to Wis. Stat. § 346.63(1)(a), and operating a motor vehicle with a prohibited alcohol concentration, contrary to Wis. Stat § 346.63(1)(b). (4:1–2.)

Brar moved the court to suppress the results of his blood test, arguing that he did not consent to the test. (19:1–2.) The trial court initially denied the motion without a hearing. (41:2.) Brar moved the court to reconsider, and the trial court then agreed to an evidentiary hearing (41:8–9). On December 23, 2014, the parties appeared for an evidentiary hearing before the Honorable John W. Markson. (42:1.) The trial court, after hearing testimony, denied Brar's motion to suppress the blood evidence, finding that Brar consented to the blood test. (42:49–50.) Brar made a motion to reconsider to the trial court, and this motion was denied. (42:50.) On April 3, 2015, Brar entered a no contest plea and filed a Notice of Intent to pursue Post-Conviction Relief. (35:1; 34:2.) Judge Markson entered judgment of conviction and stayed penalties pending appeal. (43:17.) Brar then appealed, challenging the trial court's order denying his motion to suppress. (37.)

The Court of Appeals affirmed the trial court, finding that since Brar had consented to the blood test, no warrant was required. *State v. Brar*, No. 2015AP1261-CR, 2016 WL 3619367 (Wis. Ct. App. July 7, 2016) (unpublished). Brar then filed a petition for review to this Court, and this Court agreed to hear the case.

Statement of Facts

On July 2, 2014, at approximately 12:54 a.m., Officer Michael Wood, an eleven-year veteran with the Middleton Police Department, stopped Brar's vehicle. (42:4, 5.) Brar was ultimately arrested for OWI and taken to the Middleton Police Department, where Officer Wood read to him the Informing the Accused form (the Form). (42:5–6.) After being read the Form, and after asking some questions, lamenting his predicament and minimizing his culpability (25:2; 26:6-9), Brar responded in the affirmative by saying "of course" and making a statement about not wanting to have his license revoked (25:2; 42:7).[2] After this response, which Officer Wood took as an affirmative response, Brar asked Officer Wood what test would be involved and Wood told him it would be a blood test. (42:9.) Brar then asked Officer Wood if he needed a warrant for the blood test, and Wood shook his head no. (*Id.*)

From the time he assented to the test until the blood was drawn, Brar never hesitated or gave any resistance. (*Id.*) And at no time did Brar ever say that he would not agree to have his blood drawn. (*Id.*) Brar's blood was drawn and the results showed a blood alcohol level of .186. (4:2.)

SUMMARY OF ARGUMENT

This case involves both a conceptual and factual divide between the parties. As to the conceptual dispute, Brar analyzes the issue of his submission to the blood test within

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[2] Ex. 25:2 is missing visual footage of "Brar" saying "of course" but the audio file of Brar saying "of course" is clearly heard. So, it is difficult to pinpoint where this moment occurs in the recording. By use of a stopwatch, Brar saying "of course" occurs approximately three minutes and sixteen seconds after 1:37:30 a.m., or approximately 1:40:46 a.m.

the rubric of Fourth Amendment consent jurisprudence. Towards that end, Brar claims, "At the outset, Appellant-Petitioner notes that this case has very little to do with the implied consent law." (Brar's Br. 17.) The State disagrees. This is decidedly an implied consent case, and the core issue is not whether Brar consented to the test under a Fourth Amendment analysis, as he had already consented when he chose to drive. The key issue is whether Brar submitted, or refused the test within the statutory context of Wis. Stat. § 343.305.

The factual dispute concerns what Brar said in response to being read the Form. The State's position is that Brar said "of course" and words akin to not wanting to lose his license, as Officer Wood testified. Brar's position is that he did not say "of course" and he further argues that the moment where he supposedly made this statement is inaudible in the tape. He supports his contention by pointing out that both the court transcription and his privately retained transcriber marked his comment as "inaudible." (Brar's Br. 19.) The State disagrees that the tape is inaudible because the words "of course" can be clearly heard in the recording. The trial court made a finding of fact that Brar said "of course," and the court of appeals affirmed this determination.

As will be argued below, Brar consented to the evidentiary chemical test when he applied for his license and when he decided to drive. After his arrest, Brar was advised that he could submit to the test, or refuse and be punished for that refusal. Ultimately Brar, both by word and conduct, submitted to the test.

ARGUMENT

I. Brar had already consented to the blood draw prior to entering the Middleton Police Station to be read the Informing the Accused form.

A. Applicable legal principles as to the implied consent statute.

The right to refuse to submit to chemical tests in the OWI context is a statutory privilege and not a constitutional right. *State v. Reitter*, 227 Wis. 2d 213, 239, 595 N.W.2d 646 (1999). A subject's right to refuse a blood-alcohol test is simply a matter of grace bestowed by the Legislature and not a constitutional right. *South Dakota v. Neville*, 459 U.S. 553, 565 (1983). There is no constitutional right to refuse a blood-alcohol test. *State v. Mallick*, 210 Wis. 2d 427, 433, 565 N.W.2d 245 (Ct. App. 1997). Wisconsin clearly does not recognize a driver's right to refuse consent; rather, the driver's choice is to in effect recant the consent he had previously given when he applied for his license or decided to drive. *State v. Albright*, 98 Wis. 2d 663, 671, 298 N.W.2d 196 (Ct. App. 1980); *State v. Wintlend*, 2002 WI App 314, ¶ 16, 258 Wis. 2d 875, 655 N.W.2d 745. A driver in Wisconsin has no right to refuse to take a chemical test; by implying consent the statute removes any right a driver has to refuse the test. *State v. Gibson*, 2001 WI App 71, ¶ 9, 242 Wis. 2d 267, 626 N.W.2d 73; *State v. Zielke*, 137 Wis. 2d 39, 48, 403 N.W.2d 427 (1987).

The Wisconsin Legislature enacted the implied consent statute to facilitate the collection of evidence and not to enhance the rights of alleged drunk drivers. *Reitter*, 227 Wis. 2d at 223–25. The implied consent law was designed to secure convictions, and thus the statute should be interpreted liberally to accomplish this purpose. *Id.*; *State v. Crandall*, 133 Wis. 2d 251, 258, 394 N.W.2d 905 (1986). The purpose of

the implied consent law is to combat drunk driving by making it easier to collect evidence against accused drivers. *State v. Piddington*, 2001 WI 24, ¶ 17, 241 Wis. 2d 754, 623 N.W.2d 528. The legislative purpose of the implied consent law is to obtain blood-alcohol content to secure convictions; to facilitate the identification of drunken drivers and their removal from the highways. *Village of Elm Grove v. Brefka*, 2013 WI 54, ¶¶ 30–31, 348 Wis. 2d 282, 832 N.W.2d 121.

B. The theory behind the implied consent law.

Wisconsin has long interpreted the implied consent statute as a tool for identifying drunk drivers and to facilitate their prosecutions. Accordingly, the statute is to be interpreted liberally to fulfill this purpose. The underpinning for the statute is that any person who "drives or operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or more tests of his or her breath, blood or urine." Wis. Stat. § 343.305(2).

While the statute suggests the consent occurs when a person decides to drive the car, Wisconsin case law has typically opined that the consent occurs when the subject applied for a driver's license. *See State v. Neitzel*, 95 Wis. 2d 191, 193, 289 N.W.2d 828 (1980); *Reitter*, 227 Wis. 2d at 225.[3] It does not really matter whether the implied consent occurs when the subject applies for his driver's license or when he decided to drive on the date he was arrested; either way, the driver consented before the Form phase of the investigation. The bargain had already been struck: a person enjoys the privilege of being allowed to drive in Wisconsin in exchange

[3] It makes sense to include the choice to drive as a moment of implied consent, to insure the statute's applicability to out-of-state drivers, and those drivers who never procured a driver's license.

for submitting to a chemical test, or refusing and being penalized for that refusal.

The subject's decision to place himself within the orbit of the implied consent statute is a voluntary choice. He can choose to get a license or not, to drive or not, and for whichever decision is made, the State will not impose a penalty. This consent is consistent with Fourth Amendment requirements, though the consent is implied and not expressed. So, at the time of the Form stage of the proceedings, the question is no longer whether the defendant is consenting to the test, but rather whether the subject will submit to the test he previously agreed to take, or recant his consent and face the adverse consequences of a refusal.

C. The informing-the-accused environment is not a level playing field, and nor is it intended to be.

Brar imports Fourth Amendment consent principles into the Form phase of the OWI investigation. Brar writes, "The Supreme Court has set forth an objective test for determining whether a person has consented to a Fourth Amendment search" (Brar's Br. 21), and he asserts that "[c]ases from the Supreme Courts of the United States and Wisconsin are consistent in holding that the State's burden of proving consent by clear and convincing evidence 'cannot be discharged by showing no more than acquiescence to a claim of lawful authority.'" (Brar's Br. 24.) Brar's reliance on Fourth Amendment jurisprudence is misplaced. Brar had already consented to the chemical test before the Form phase, and that implied consent was not prodded by duress or coercion. This implied consent passes Fourth Amendment muster.

Brar incorporates Fourth Amendment principles into the Form phase of the investigation, but this phase, initiated

after Brar had already implied his consent to the test, implicates no Fourth Amendment safeguards. For examples, Wisconsin cases have consistently upheld the sanctions imposed on drivers who refuse the test, though the imposition of adverse ramifications for refusing consent is an anathema to Fourth Amendment consent principles. And this Court has written, "the determination of whether the law enforcement officer reasonably conveyed the implied consent warnings is based upon the objective conduct of [the] officer, *rather than upon the comprehension of the accused driver*." *Piddington*, 241 Wis. 2d 754, ¶ 21 (emphasis added). Prioritizing an officer's objective conduct over a subject's understanding is a non-starter in a Fourth Amendment consent analysis. Moreover, there is an extensive body of case law holding that the essence of Fourth Amendment consent is the citizen's constitutional right to deny permission for the intrusion, and yet there is an equally consistent line of cases holding that under the implied consent law a person has no constitutional right to refuse the test. So if Brar is correct, and Fourth Amendment consent principles govern the Form phase of the investigation, the prior case law on this issue would be obliterated leaving an impotent statute in its wake.

To be sure, a subject has a choice after being read the Form. But it is a Hobson's choice: take the test and produce evidence, or refuse and be punished for doing so. *See Wintlend*, 258 Wis. 2d 875, ¶ 19. The presence of this choice does not transform the Form stage of the proceeding into a new attempt to solicit Fourth Amendment consent. The time for negotiation, for asking for permission, is over. It is time for "yes or no," and either choice can benefit the State and potentially hurt the subject. This is not Fourth Amendment consent terrain; it is the statutory world of implied consent, a world the subject has entered through his own behavior. The injection of Fourth Amendment consent principles into the Form phase of the implied consent statute contradicts

Wisconsin and U.S. Supreme Court cases dealing with the law and would severely undermine the statute's critical role in combating the national problem of drunken driving.

D. Neither *Missouri v. McNeely* nor *Birchfield v. North Dakota* represents a sea change in implied consent law.

The long-established law on implied consent is not altered by *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), or *Birchfield v. North Dakota*, 579 U.S.___, 136 S. Ct. 2160 (2016).

McNeely is not an implied consent case. Although the facts of *McNeely* involved a refusal to take a chemical test, its rule of law, while adding significantly to Fourth Amendment jurisprudence, does not implicate implied consent law. The core holding in *McNeely* is that though alcohol dissipates somewhat quickly in the blood stream, this fact does not create an automatic exigent circumstance justifying the blood's warrantless seizure. The repercussion of this holding was significant, dramatically reducing the number of forced warrantless blood draws and overruling long-standing cases such as this Court's holding in *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993). But while as a practical matter, the *McNeely* ruling will frequently arise in the OWI arrest situation when a defendant refuses a blood test, the rule does not invalidate the procedure that prompted the refusal.

In an OWI context, there are either two or three steps pertinent to the collection of chemical test evidence, and *McNeely* implicates only the third. Step 1 is the implied consent that occurred either when the defendant applied for his driver's license, or chose to drive. Step 2 is the reading of the Form culminating in the yes or no question: will the

defendant submit to the test or recant his earlier given consent and face the consequences? If the defendant submits, the process is complete after two steps and the blood is drawn pursuant to the implied consent and the subsequent submission. If the defendant refuses, the State can impose the adverse consequences of that refusal, such as the revocation of license and other administrative penalties, and the ability to comment on the refusal at trial.

If the defendant refuses, a third step emerges, the phase for collecting the evidence the defendant refused to give. If the State wants a chemical test after the refusal, it obtains the evidence in conformity with the Fourth Amendment. *McNeely* then comes into play, requiring in most instances a search warrant before the blood can be seized. *McNeely* impacts only that third step. *McNeely* has no impact on the implied consent statute itself.

This reading of *McNeely* is not conjecture; the holding makes clear its support of implied consent statutory schemes:

> As an initial matter, States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution.

McNeely, 133 S. Ct. at 1566 (citation omitted).

Three years after *McNeely*, the U.S. Supreme Court revisited the blood draw issue in *Birchfield*. Unlike *McNeely*, *Birchfield* is an implied consent case, but it also does not affect Wisconsin's statutory implied consent law. *Birchfield* examined the issue of whether a person can be jailed for refusing a chemical test. The Court looked at the Fourth Amendment options available to the State in the event a defendant refuses. The Court opined that the State could search the breath incident to arrest, but would need a warrant to search blood. Thus, in cases where a subject refused a breath test, the imposition of a jail sentence as part of the penalty would be permissible, but incarceration would be impermissible for a refusal to submit to a blood test. *See Birchfield*, 136 S. Ct. at 2186.

Birchfield's disallowance of criminal penalties for a refusal to give blood has no impact on our implied consent statute, which does not criminalize refusals, be it for breath or blood. *Birchfield* writes approvingly of implied consent statutes that trigger administrative sanctions in the event of a refusal:

> Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, *and nothing we say here should be read to cast doubt on them*.

Birchfield, 136 S. Ct. at 2185 (emphasis added) (citations omitted).

And by endorsing a statute that criminalizes a breath test refusal, *Birchfield* further supports the State's contention that Fourth Amendment consent law is inapplicable during the Form stage of the proceedings: Fourth Amendment

consent principles cannot coexist with a statutory stage where a refusal can prompt a jail sentence.

E. *State v. Padley* should not be authority to overrule all pre-existing Wisconsin and federal case law dealing with implied consent statutes.

Brar also turns to *State v. Padley*, 2014 WI App 65, 354 Wis. 2d. 545, 849 N.W.2d 867, to argue that recent case law has fundamentally altered established implied consent law. It has not.

In *Padley*, the court of appeals rejected a claim that Wis. Stat. § 343.305(3)(ar)2., which authorizes officers to request a sample from a person who operated a motor vehicle that is involved in an accident that caused death, great bodily harm, or substantial bodily harm, is unconstitutional. *Padley*, 354 Wis. 2d 545, ¶¶ 10, 48, 54, 60. The court paused in its analysis of the case to address what it perceived to be confusion among the parties regarding the implied consent law. *Id.* ¶ 37. First, the court properly noted that when a person submits to a blood draw, he is not giving implied consent. *Id.* ¶ 38. The State agrees, for as argued above, the implied consent is given when the subject applies for the driver's license or when he chooses to drive. Second, the *Padley* court, again properly, noted that when a person refuses the test, he will have to accept the consequences of that choice. *Id.*

Third, and unfortunately, the *Padley* court tried to distinguish between implied consent when the person chose to drive, and what it termed *actual consent*, when the person decides to take the test. *Id.* ¶ 39. It is doubtful that the *Padley* court wanted its phrasing of "actual consent" for the "yes or no" stage after the reading of the Form to revolutionize how the implied consent law is to be interpreted, and to overrule

every Wisconsin and federal case that preceded it. It is far more likely that by "actual consent" the *Padley* court meant the choice the defendant makes in real time, and not by implication in an earlier time. But the term "actual consent" is confusing because it suggests the applicability of Fourth Amendment consent principles in the Form phase. And the use of the word "actual" suggests that this consent is more significant than the implied consent that triggered the application of the statute in the first place.

Padley cannot properly be read as establishing that only "actual consent" at the time the officer requests a sample can authorize the taking of a sample for testing. That interpretation would be contrary to the plain language of the implied consent statute, which provides that "[a]ny person who . . . operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or more tests of his or her breath, blood or urine . . . when requested to do so by a law enforcement officer." Wis. Stat. § 343.305(2). The court in *Padley* could not have intended to interpret the implied consent law in a manner that is inconsistent with the language of the statute, and with this Court's interpretation of the law.

Nor can *Padley* be read as the creation of two consents for two different purposes; the first being the implied consent to make a difficult choice if arrested, and the second the actual consent to take the test. The application for a driver's license, the decision to drive, is not a dress rehearsal for the real event, the "actual consent" moment. Rather, the moment of license application or driving is the defining moment, the moment the person consents to the test. The fact that this consent is implied does not vitiate its significance. And no matter how one tries to make *Padley*'s use of the term "actual consent" fit under the statute, it cannot be used as a justification for imputing Fourth Amendment consent

principles to the defendant's response to the reading of the Form without severely uprooting all the case law that preceded it.

Dicta in a court of appeals opinion approving an expansion in the scope of the implied consent law should not be the launching pad for an assault on the statute's long perceived purpose and interpretation. Yet, Brar does just that, relying on *Padley* and asserting, "The issue is not whether Brar *withdrew* his consent. The issue is whether he *provided* his consent." (Brar's Br. 18.) All of the case law that preceded *Padley*, and the plain meaning of the statute, point to the exact opposite premise. At the time Brar entered the police station, the issue was not whether he would grant consent, but whether he would recant the consent he had already given and face the harsh consequences of a refusal.

This Court and the United States Supreme Court have consistently endorsed penalties imposed on people who refuse, and have categorically stated that there is no constitutional right to refuse. The Form is not called the consent form,[4] the word consent is never used in the Form except to mention the implied consent statute at the beginning, and the Form's language does not remotely suggest an environment for giving "actual consent" within the Fourth Amendment meaning of the term.

So, for all the reasons argued above, Brar had given his implied consent to a chemical test before entering the police station.

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[4] *See* Justice Gableman's concurrence in *State v. Howes*, 2017 WI 18, ¶ 65, noting that the Form is a notice of the consequences of a refusal and not a request for consent.

II. Brar submitted to the blood test.

As argued above, Brar had already consented to the blood test when he arrived at the Middleton Police Department. This does not end our inquiry, because the issue remains whether Brar recanted that consent or submitted to the test. This issue's resolution is significant, since if Brar did recant his consent and refuse the test, the State, pursuant to *McNeely*, would have needed a search warrant for the blood. So, if Brar is deemed to have refused the test, the evidence the warrantless blood draw generated must be suppressed. Conversely, if Brar submitted to the test, there was no need to get a search warrant and the blood evidence is admissible.

A. Standard of review and applicable law.

An order granting or denying a motion to suppress evidence is a question of constitutional fact. *State v. Robinson*, 2010 WI 80, ¶ 22, 327 Wis. 2d 302, 786 N.W.2d 463. The circuit court's findings of evidentiary or historical fact are not to be overturned unless they are clearly erroneous. *State v. Richter*, 2000 WI 58, ¶ 26, 235 Wis. 2d 524, 612 N.W.2d 29. The application of these facts to constitutional principles are reviewed de novo. *State v. Williams*, 2001 WI 21, ¶¶ 18–19, 241 Wis. 2d 631, 623 N.W.2d 106.

The determination as to whether a person gives consent is a matter of historical fact, and thus this Court will uphold the trial court's finding on the issue, unless it is against the great weight and clear preponderance of the evidence. *State v. Phillips*, 218 Wis. 2d 180, 196–97, 577 N.W.2d 794 (1998).[5]

[5] The State recognizes that it is citing the standard of review as it relates to consent and not to whether a person submits or refuses to a chemical test after being read the Form. But if the finding of consent is a factual one, certainly a finding of submission or refusal is one as well.

The application of facts to the implied consent statute is a question of law that is reviewed de novo. *State v. Rydeski*, 214 Wis. 2d. 101, 106, 571 N.W.2d 417 (Ct. App. 1997).

Once the Form has been properly read to the subject, the person must promptly submit or refuse to submit to the requested step. *Id.* at 109. After the reading of the Form, the obligation is on the accused to take the test promptly or to refuse it promptly. *Neitzel*, 95 Wis. 2d at 205.

B. Brar said "of course," and then words to the effect of "I don't want to lose my license" in response to the reading of the Informing the Accused form.

There is a factual dispute between the parties as to whether Brar said "of course" in response to Officer Wood's request for a yes or no answer as to taking the chemical test. Brar insists that he did not say this, pointing out that both the court reporter and his own private recorder categorized his response as "inaudible." (Brar's Br. 19–21.) But the recording in the record solves the mystery: there is no doubt from the recording that Brar said "of course." And Officer Wood testified that he heard Brar say "of course" (42:7), and the trial court, which listened to the video, heard Brar say "of course." (42:47). It cannot be reasonably argued, in light of the audio recording in the record, that Brar did not say "of course." The audio is a bit garbled as to what Brar said after clearly saying "of course," but Officer Wood testified that Brar said something similar to not wanting his license revoked. (42:7.) The trial court found that after clearly hearing "of course," Brar's voice sort of trailed on but what could be made out seemed consistent with Officer Wood's recollection. (42:47.)

Brar did not testify at the motion hearing as to what he said. The trial court was in the proper position to listen to Officer Wood's testimony and evaluate his credibility, and the trial court listened to the recording. The trial court properly concluded that Brar said "of course" and then words akin to not wanting to lose his license. This fact finding is not clearly erroneous and should not be disturbed by this Court.

C. Brar's responses and actions were sufficient to establish that he chose to submit to the test.

Although Brar vigorously challenges the fact finding that he said "of course," he argues that, even if he did say "of course," his words did not constitute consent. But, as argued above, that is not the issue. The issue is not whether Brar consented to the test at the police station, but it is whether he recanted his earlier implied consent.

Brar did not recant his consent. The events that transpired from Brar's perceived submission till the time the blood was drawn show that. Brar never said he did not want the test; he made no verbal expression or exhibited any conduct protesting the test. The trial court properly noted this as part of its ultimate holding that Brar submitted to the test. (42:48.)

Brar argues that compliance is not the equivalent of consent. Again, Brar errs by imputing Fourth Amendment consent law into the analysis of whether he submitted or refused under the implied consent statutory framework: "Brar need not revoke consent that he never provided. He need not physically resist." (Brar's Br. 25.) The problem with this reasoning is, as argued above, Brar *had already consented* and, while his physical restraint was admirable, he

had plenty of opportunity to voice his resistance, or in any other number of ways demonstrate that he did not wish to submit and did want to refuse the test. And this he did not do.

Brar tries to equate the reading of the Form with the onset of a negotiation; a give and take between suspect and the police to see if they can reach a bargain. To illustrate this point, Brar offers an analogy: a customer entering a store to buy a television, who, when asked if he wished to purchase a set, says "Of course I want to replace my old television." (Brar's Br. 28–29.) This hypothetical badly misses the mark. To put the analogy in the proper implied consent law framework, Brar would have already purchased the TV, used it, and now is being asked to pay for it.

Brar claims that, even if Officer Wood felt he was submitting to the test, the matter was not settled for him. (Brar's Br. 24.) Brar then reasons that Officer Wood was either subjectively satisfied or too impatient to explore the matter further. (Brar's Br. 24.) A police officer's subjective perception as to whether a subject is submitting or refusing the chemical test is important, though not determinative. Often times the police officer is dealing with an intoxicated and frazzled subject. The officer has to do the best he can to interpret the subject's wishes, as the Form calls for two responses, yes or no; there is no third allowed response for ambiguous reflections. In this case, there was enough in Brar's words indicating submission, and his behavior subsequent to this determination confirmed Officer Wood's judgment.

Officer Wood's patience with Brar is notable. The recording shows an officer trying his best to handle Brar's questions and lamentations, and to firmly but fairly encourage Brar to make his Hobson's choice. Indeed, Brar was

perilously close to refusing the test, not by his words per se, but by his delaying tactics. This Court has held that conduct that is uncooperative or otherwise prevents the officer from getting the test can be viewed as a refusal, even if the defendant says that he does not want to refuse the test. *Reitter*, 227 Wis. 2d at 234–37. The *Reitter* court refers to this sustained unresponsiveness as a constructive refusal. *Id.* at 237. And *Neitzel* and *Rydeski* hold that it is the accused's responsibility to give a prompt yes or no response to the question posed after the reading of the Form. *See Neitzel*, 95 Wis. 2d at 205; *Rydeski*, 214 Wis. 2d at 109. So, Officer Wood was more than patient with Brar. Brar felt he was in a tough spot; at one point just a little before saying "of course," he lamented that there were no other options but yes or no, and the consequences of each answer. But it was a self-induced predicament.

Brar argues that even if he did consent, "he did not consent to anything in particular. He lacked an understanding of what the officer requested."[6] (Brar's Br. 31.) This is yet another reason that Fourth Amendment consent principles do not apply in the Form stage of the proceedings. In many instances, a full and complete understanding of the process can be prohibited by intoxication. This Court recognized this in *Piddington* when it emphasized that the important issue was the objective conduct of the officer in trying to communicate the Form, and not the defendant's actual understanding. *Piddington*, 241 Wis. 2d 754, ¶ 21. But Brar's questions and comments did not suggest confusion as to what was going on; rather, they consistently showed a wish not be in the situation.

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[6] Brar had two prior convictions for OWI, and another case pending from an OWI arrest in Sauk County, a little more than a month before this arrest. (4:1–3, 6.) It is questionable that Brar was as confused or as uneducated about the process as he now claims.

Brar makes much of the fact that English is not his native tongue and his speech is heavily accented. But neither Officer Wood's testimony nor the recording show that Brar and Officer Wood could not effectively communicate with each other. Brar, while not always direct in his responses, showed an understanding of what Wood was saying; he complained about his lack of options, about portions of the Form that he did not think applied to him, asked for leniency, and in all manner acted as though there was no language barrier prohibiting communication. (25:2.)

Officer Wood acted properly in determining that when he heard Brar say "of course" and words akin to not wanting to lose his license, Brar was submitting to the test. Again, Officer Wood made the best judgment he could under the circumstances. If a police officer will recognize only clear and coherent expressions of submission or refusal before checking the box, he will often be quite frustrated because intoxicated people in the stressful OWI arrest environment are not often clear and coherent. So in a situation such as Brar's, where he was not combative nor argumentative, but was indecisive and evasive, Officer Wood was prudent to exercise some patience, and he was fair when he concluded that Brar's "of course" statement tipped the balance towards submission. Indeed, within the Hobson's choice, submission is the better option for the driver, because submission to the test means that the penalties for a refusal cannot be administered, but a refusal results in penalties and the test results can still be obtained with a warrant.

Brar argues that what he said after the "of course" statement shows he was not consenting. Leaving aside that the question is not whether he is consenting but rather whether he is recanting, his subsequent statements as to what type of test the officer was going to request fit in with a

submission conclusion. They certainly do not fit in with a refusal, and again there are only two possible options; submission or refusal. And asking if the officer needs a warrant for the blood test fits in more with a post submission exchange than a refusal query.

Brar submitted to the blood test, both in words and conduct. He continued to submit throughout the process. Since Brar submitted, there was no need to get a search warrant under *McNeely*.

III. Officer Wood did not mislead Brar when he indicated that he did not need a search warrant for the blood test.

Brar also complains that Officer Wood misled him by saying he did not need a search warrant for the blood test. But Officer Wood's statement was correct in the context of their conversation.

After making the "of course"statement, Brar asked what test would be involved, and after being told it was blood, he asked if Officer Wood needed a warrant. Officer Wood shook his head no. Brar argues that this unfairly misled him and Officer Wood should have said, "a warrant is required unless you consent." But that answer would have been misleading because Brar was not being asked to consent to the blood test; he had already done so before the Form phase began. In a vacuum, if Brar was actually entitled to a full explanation of all laws possibly implicated by a decision to submit or recant, a complete answer would have been, "I do not need a warrant unless you wish to recant your earlier implied consent, refuse the test, and subject yourself to all the penalties which follow." But Brar had already submitted, and

therefore it was a truthful response to say that no warrant was necessary.

Brar argues that Officer Wood did not believe that he submitted to the test until the discussion about the need for a warrant. Brar scolds the court of appeals for finding that Brar had already consented[7] before he was told that no warrant was needed, as Brar argues this finding contradicts the record. (Brar's Br. 37.) Brar is incorrect. The record supports a finding that it was the "of course" statement that triggered Officer Wood's determination that Brar was submitting to the test he had previously consented to take.

The following exchange at the motion hearing illustrates this point:

> Q. So where it says, "yes," as the defendant's response on the exhibit, did I hear you correctly that was in reference to the language you just referenced where he said something like, "Of course, I don't want my license revoked," or something of that nature?
>
> A. Correct.
>
> Q. Okay. And that's what you took as an affirmative response?
>
> A. Yes.

(42:7–8.)

---

[7] Both the trial court and the court of appeals used the term consent to characterize Brar's response to the Form. While, as argued throughout this brief, this is not the technically correct word to use, both courts in finding Brar consented would surely also have concluded that Brar did not recant his implied consent to take the test.

Then shortly thereafter Officer Wood testified,

> A. After his response that I took to be "yes," he did ask what type of test would be completed, and I informed him again that it was blood. *He then did ask if a warrant was needed for this, and I believe that I shook my head no to answer his question to him*.

(42:9 (emphasis added).)

Brar does not reference the above testimony, which completely supports the court of appeals conclusions. Instead, he points to this exchange during Officer Wood's cross examination:

> A. After he told me "of course" and made statements, that's when I would have gone ahead and answered "yes" on the form and printed it out.
>
> Q. And that was immediately after he asked, don't you need a warrant for that?
>
> A. About the same time, yes, during that general time frame.

(42:20–21; Brar's Br. 12.)

Somehow Brar characterizes the above exchange as Officer Wood's admission that he did not believe he had consent until after Brar asked if the officer needed a warrant. (Brar's Br. 12.) It is true that both Brar's submission and his follow-up question about warrants were in the same relevant time frame. But Officer Wood's testimony during cross examination was not a retreat as to what he testified to earlier, that he viewed the "of course" statement as an affirmative response. The trial court found, and the court of

appeals agreed, that Officer Wood believed that Brar had assented to the test before he was told there was no need to get a search warrant. Those fact findings are not clearly erroneous. Brar was not misinformed, and he was not misled.

The rest of Brar's arguments on the warrant issue deal with Fourth Amendment consent case law, and are inapplicable in the implied consent statutory context. As there is no allegation that Officer Wood did not properly exercise his obligations in reading the Form to Brar, there was no need to get a search warrant, and the evidence the warrantless blood draw was properly deemed admissible.

Brar concludes his brief by correctly pointing out the national trend towards requiring the government to obtain search warrants for blood draws. *McNeely* eloquently describes the intrusiveness of a blood test; puncturing the skin with a needle is serious business. But so too is drunk driving, and our implied consent statute has been a long-established tool in combating this evil on society. A drunk driver is the scariest of offenders, as he invites everybody he shares the highway with into his dangerous orbit. The destruction and carnage caused yearly by drunk drivers is global in its scope and indiscriminate in its impact. It seems a very small price to pay, considering the privilege it is to drive, to have one's consent to a chemical test implied in the event an officer has probable cause to make an arrest for drunk driving. And if the driver submits to the test after being read the Form, there is no Wisconsin or federal precedent holding that a search warrant is required.[8]

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[8] In *Birchfield v. North Dakota*, 579 U.S.___, 136 S. Ct. 2160 (2016), the Court explored a suggestion offered by Justice Sotomayor, in her dissent that a search warrant be required for BAC testing in every case. After considering this proposition the Court properly

Brar consented to the chemical test prior to being arrested, by deciding to drive. After Officer Wood read Brar the Form, Brar submitted to the test by both words and conduct. Thus, the warrantless blood draw was lawful pursuant to Brar's implied consent, which he did not recant.

CONCLUSION

For all the foregoing reasons, this Court should affirm both the trial court and the court of appeals.

Dated this 13th day of March, 2017.

Respectfully submitted,

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noted that such a rule would swamp the courts and this substantial burden would be shouldered with no commensurate benefit. *Birchfield*, 136 S. Ct. at 2180–82.

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,145 words.

Dated this 13th day of March, 2017.

_____
DAVID H. PERLMAN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 13th day of March, 2017.

_____
DAVID H. PERLMAN
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STATE OF WISCONSIN
IN SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 15AP1261

NAVDEEP S. BRAR,

Defendant-Appellant-Petitioner.

ON APPEAL FROM A FINAL ORDER ENTERED ON
APRIL 3, 2015 IN THE CIRCUIT COURT
FOR DANE COUNTY, BRANCH I,
THE HONORABLE JOHN W. MARKSON PRESIDING.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

Respectfully submitted,

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ARGUMENT

I. BRAR DID NOT CONSENT TO THE BLOOD DRAW.

A. Respondent may not raise new arguments in this Court.

Much of the State's brief is an attempt to ask this Court to hold that the Fourth Amendment to the United States Constitution does not apply at the "Form" stage of implied consent cases. (Resp.Br.p.7) The State also argues ***State v. Padley***, 2014 WI App. 65, 354 Wis. 2d. 545, 849 N.W.2d 867 was wrong. The State failed to raise these issues in either the trial court or in the Court of Appeals.

An issue not previously raised in the trial court but raised for the first time on appeal is forfeited. ***Brown County v. H&SS Dept.***, 103 Wis. 2d 37, 42, 307 N.W.2d 247 (1981). Thus, Brar respectfully requests this Court not permit these arguments to be made in this Court, where Brar has had no notice they would be raised at this stage. It would be impossible to do a proper survey of all caselaw related to these issues in a reply brief with severe word count limitations.

B. Respondent cites no case holding that the implied consent law overrides constitutional consent.

The State argues the Fourth Amendment is not implicated in implied consent cases where an arrestee is choosing whether to submit to a test or suffer refusal consequences. These are two different issues, however—constitutional and implied consent. There is the implied consent statute §343.305, and there is constitutional consent under the Fourth Amendment. It is true that police are permitted to ask for an evidentiary test of breath, blood, or urine upon arrest for OMVWI in Wisconsin. It is also true that an arrestee has a choice whether to submit to testing or suffer the consequences of a refusal to submit; however, that does not mean that actual constitutional consent is not required in an implied consent law case. The State cites no cases indicating otherwise.

The implied consent law allows the State the advantages of automatic admissibility of the test results under Wis. Stat. §885.235 and of the benefits of using a refusal as consciousness of guilt at trial. However, an individual retains the right to have any alleged consent reviewed under constitutional analysis. This issue was discussed in the case of ***People v. Mason***, Cal.App.5th Supp. 11 (Cal.Sup.Ct.2016).

In ***Mason***, the officer told Mason she was required to submit to a chemical test. The Court found that was misleading because the Constitution permitted her to not agree to a search but suffer revocation consequences if she did not agree. Although not binding in this Court, the case is helpful for persuasive authority. The Court in ***Mason*** stated:

> To recap, we have concluded that advance "deemed" consent under the implied consent law cannot be considered actual Fourth Amendment consent…

Id. at 12.

The Court noted that although constitutional consent may sometimes be presumed in situations like a probation search, that does not apply in the implied consent case. Consent given under the implied consent law is actual consent. ***Id.*** at 7. Such consent may be implied in fact and inferred from conduct and words but may not be implied in law. The Court noted:

> ["implied consent" is a misnomer in this context. As we have acknowledged, consent sufficient to sustain a search may be "implied" in fact as well as explicit, but it is nonetheless *actual* consent, "implied" only in the sense that it is manifested by conduct rather than words.

Id. at 8.

Thus, notwithstanding the implied consent law, Mason still had the right to consent or not under the Fourth Amendment. Brar

similarly was entitled to the same rights under the Fourth Amendment.

In ***State v. Brooks***, 838 N.W.2d 563 (Minn.2013), a case addressing whether an implied consent law warrantless blood draw violated the Fourth Amendment, the Court held:

> For a search to fall under the consent exception, the State must show by a preponderance of the evidence that the defendant freely and voluntarily consented. *State v. Diede*, 795 N.W.2d 836, 846 (Minn.2011)…An individual does not consent, however, simply by acquiescing to a claim of lawful authority. *Bumper v. North Carolina*, 391 U.S. 543, 548–49, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968).

Id. at 568. Thus, there is a difference between implied consent and constitutional consent.

Moreover, previous Wisconsin cases have noted that constitutional protections apply in the implied consent law context. As an example, the Court found that police who administer a test under the implied consent statute are not required to advise defendants about ***Miranda v. Arizona***, 384 U.S. 436 (1966) not because there are no constitutional protections in the implied consent law but because a request to submit to a test is not a testimonial utterance. ***State v. Bunders***, 68 Wis. 2d 129, 133, 227 N.W.2d 727 (1975). This Court noted in ***State v. Neitzel***, 95 Wis. 2d 191, 289 N.W.2d 828 (1980) that the right to counsel does not apply to a

decision to consent or refuse because this is not testimonial evidence and does not impact the Fifth Amendment, but an individual does not lose that constitutional right.

Notably, in ***State v. Foster***, 2014 WI 131, 856 N.W.2d 847, 852 et al., this Court upheld a nonconsensual blood draw under the good faith doctrine but noted "Foster refused to consent to the draw." This Court did not say "Foster recanted the previously given consent given when choosing to drive." Thus, this Court assumed consent to submit to a test is separate from presumed consent under the implied consent law.

The State can impose sanctions on those who refuse, but arrestees are still protected by the Fourth Amendment.

C. Padley is the law.

Recognizing that ***Padley*** is still good law, the State criticizes that decision. Although not directly advocating for this Court to overturn ***Padley***, the State asserts that the Court of Appeals was wrong in that case.

The ***Padley*** Court stated:

> It is incorrect to say that a driver who consents to a blood draw after receiving the advisement contained in the "Informing the Accused" form has given "implied consent." If a driver consents under that circumstance, that consent is actual consent, not implied consent. If the driver refuses to consent, he or she thereby withdraws

> "implied consent" and accepts the consequences of that choice.

Id. at 570. The Court noted:

> [the implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether the driver will give or decline to give *actual* consent to a blood draw when put to the choice between consent or automatic sanctions. Framed in the terms of "implied consent," choosing the "yes" option affirms the driver's implied consent and constitutes actual consent for the blood draw. Choosing the "no" option acts to withdraw the driver's implied consent and establishes that the driver does not give actual consent.

Id. at 571.

Padley is the law and dictates the result on this issue unless this Court overturns it. Brar respectfully urges this Court to not do so and to decide this case based upon what the parties argued and briefed—whether Brar consented and whether that consent was specific, knowing, and voluntary.

D. Birchfield establishes that the Fourth Amendment applies to the consent analysis.

The State recognizes that ***Birchfield v. North Dakota***, 136 S.Ct. 2160 (2016) is an implied consent law case but argues that even though the United States Supreme Court clearly held that a warrant would be required for a blood draw in the absence of an exception to the warrant requirement, that the case does not apply to

Wisconsin's implied consent law. This Court is bound by decisions of the United States Supreme Court, however.

In ***Birchfield***, the Court drew a distinction between searches of breath and searches of blood, finding that warrantless breath tests do not violate the Fourth Amendment because the intrusion into the body is negligible. The Court found: "The same cannot be said about blood tests. They "require piercing the skin" and extract a part of the subject's body, *Skinner, supra,* at 625, 109 S.Ct. 1402 and thus are significantly more intrusive than blowing into a tube." ***Id.*** at 2164.

The Court stated:

> [We conclude that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. The impact of breath tests on privacy is slight…We reach a different conclusion with respect to blood tests. Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test.

Id. at 2184.

The ***Birchfield*** Court noted the Fourth Amendment does apply to blood tests in the drunk driving context. It did not hold that the implied consent law trumps the Fourth Amendment. The Court, in response to the argument that the implied consent law permitted

criminal consequences to refusal of blood tests because one is deemed to have consented by virtue of driving, stated:

> Having concluded that the search incident to arrest doctrine does not justify the warrantless taking of a blood sample, we must address respondents' alternative argument that such tests are justified based on the driver's legally implied consent to submit to them. It is well established that a search is reasonable when the subject *consents*, *e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)…(emphasis added)

Id. at 2185. Thus, the Court stated that such a search is legal if an arrestee "consents." Constitutional consent is separate from implied consent.

The Court noted that there are consequences to refusal, but that does not take away from the point there must actually be consent for the blood draw to be legal. It is the State's heavy burden to establish that was such consent.

Importantly, and directly in response to the State's argument that the implied consent law overrides the Fourth Amendment, the United States Supreme Court stated: "There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." ***Id.*** at 2185. Thus, implied consent law is not the same as true constitutional consent. A decision to drive does not eviscerate constitutional rights.

As the ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013) court stated: "To be sure, "States [may] choos[e] to protect privacy beyond the level that the Fourth Amendment requires." *Virginia v. Moore*, 553 U.S. 164, 171, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008)." ***Id.*** at 1567. States may offer more privacy than required by the Constitution but never less. Thus, Brar respectfully requests this Court determine whether he gave constitutional consent.

II. BRAR DID NOT SAY "YES."

A. The recording is impossible to decipher.

The State argues the words "of course" can be heard in the recording. Two court reporters did not so hear. (42:12-15;26) Moreover, throughout the recording and prior to the alleged words "of course," Brar says "no" a few times. Prior to where the officer thought Brar said "of course," Brar also said "No, I…." The officer according to the transcript then says "It is. It's—the question in front of you is this, will you submit--" Brar again says "no, I…listening I don't know the law. I don't know the law. No more elaborate…." The officer then says the penalties for refusal and Brar questions whether he has another option. The officer says, "The situation is up to you." Brar says "No, I'm asking you." The officer says, "I told you, the choice is up to you." The transcript does not say "of course"

but shows Brar asking what type of test and the officer saying it would be a blood test. Brar then asks about a warrant three times. (26:4-6)

Brar concedes that different people can hear this audio differently. The original court reporter found all inaudible. (42:12-15) The State asserts the words "of course" were used at 3 minutes 16 secs. Listening to the audio recording (Ex.25:2), Brar starts speaking at 14 seconds. Even if the words "of course" were used, they were prefaced by multiple "no's" at the following times: 3:01, 3:07-8; 3:15, 3:36, 3:38, 3:45. Then, at about 3:50, the officer thought Brar said "of course" and then some other things and then something about a license. The private court reporter thought Brar said "(Inaudible) want my like (inaudible). Why read a complicated question? What kind of test you are going to do?" (26:5) Later at 4:09, 4:12, and 4:17, Brar asks about a warrant. (26:6) Importantly, the officer at 9:12 in the tape said "So we have to go—I have to give you a blood test so we have to go down to—we go to St. Mary's for those. So right now I'll take you to this blood test and then we'll go from there…" (26:8) Brar was given no chance to object at that point because the officer told Brar he was getting a blood test.

The officer wrote that Brar said "yes" on the Informing the Accused form (ITAF) (42:Ex1), but that was untrue. He never said "yes." The officer felt he had consent at the time he wrote "yes" on the ITAF after Brar asked about a warrant, and the officer conceded he considered all statements Brar made before deciding Brar consented. (42:4-24)

Again, even if the officer was correct, and the trial court was correct in deferring to the officer's recollection, Brar said "of course I don't want." (42:18,19) That is not "of course" followed by a period as if that was the end of the sentence. The phrase "of course" cannot be separated from the "no's," the questions indicating Brar did not understand, the "I don't want," and the warrant demands. The officer testified "I thought I heard him say 'of course,' and then I don't want, and he mumbles, and then he trails off." (42:18-19) Even the officer did not claim Brar simply said "of course." The officer's own version is not "yes" or an affirmative response when the entire sentence is considered.

It is not necessary for this Court to determine whether ***Padley*** was right or whether constitutional consent is separate from implied consent if it decides whether Brar actually said "yes" as the officer

wrote on the form or gave a clear affirmative response. He did not, and the officer should have gotten a warrant.

The State notes how conduct like what Brar exhibited has been deemed a refusal by courts. In ***State v. Reitter***, 227 Wis. 2d 213, 237, 595 N.W.2d 646 (1999), the Court held that Reitter refused even though he never said, "no." *See also* ***State v. Rydeski***, 214 Wis. 2d 101, 571 N.W.2d 417 (Ct. App. 1997) (uncooperative conduct may constitute a refusal). If this was a refusal, suppression for failing to get a warrant is appropriate as the State notes. (Resp.Br.p.15)

Thus, if the conduct of Brar was uncooperative, the officer incorrectly noted Brar said "yes" to a blood test; and a warrant was required for the blood draw.

B. Any consent was involuntary.

The State does not address the factors as to the voluntariness analysis, as it argues that analysis is irrelevant because consent was given when Brar drove. Arguably, the State has conceded the consent was involuntary if this Court concludes the State needs to prove Brar constitutionally consented at the point he was asked to submit to a blood draw.

The State dismisses the fact that Brar is not a native English speaker, although the officer noted he had problems understanding

Brar. (42:18) When an officer does not understand the person from whom he is requesting a blood draw, either full clarification needs to be made, an interpreter offered, or a warrant should be gotten.

This Court has previously noted the importance of reasonably conveying information under the implied consent law to a person who may not understand words the same as the average person. *See* ***State v. Piddington***, 2001 WI 24, 241 Wis. 2d 754, 623 N.W.2d 528; ***State v. Begicevic***, 2004 WI App 57, ¶13, 270 Wis. 2d 675, 678 N.W.2d 293. In ***Piddington***, this Court noted the trooper made a "commendable" effort at using sign language, speech reading, and the Informing the Accused form to make sure Piddington understood. That did not happen here, nor was an interpreter offered as suggested in ***Begicevic***.

Thus, even if the standard is whether previous consent was withdrawn as the State asserts, that occurred at the time Brar repeatedly asked about a warrant. It is clear that the alleged affirmative response was also given before Brar knew it was a blood test the officer was seeking. (42:14) Certainly if one gives consent and then demands a warrant, testing should stop until a warrant is gotten. That was not done here. Instead, a warrantless blood draw was done on a person who did not consent. Additionally, if there was

consent, that consent was not knowing, voluntary, and specific. Given that the blood draw was done in mere acquiescence to police authority and after the officer told Brar no warrant was needed even after being asked three times, it was not voluntary. ***Bumper v. North Carolina***, 391 U.S. 543, 549 (1968); ***Schneckloth v. Bustamonte***, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The State bears the burden of "proving by clear and positive evidence the search was the result of a free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied" ***Padley*** at 582. The State did not meet its burden here.

CONCLUSION

For the reasons stated in this reply brief and the petitioner's original brief, Brar respectfully requests the Court of Appeals' decision be reversed and this case be remanded to the trial court with an Order suppressing the results of the warrantless blood draw.

Dated at Madison, Wisconsin, March 23, 2017.

Respectfully submitted,

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CERTIFICATION

I certify that this reply brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a reply brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,972 words.

I further certify that the text of the electronic copy of the reply brief is identical to the text of the paper copy of the reply brief.

Dated: March 23, 2017.

Signed,

_____

TRACEY A. WOOD
State Bar No. 1020766

CERTIFICATION

I certify that this appendix conforms to the rules contained in s. 809.19(13) for an appendix, and the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

Dated: March 23, 2017.

Signed,

_____

TRACEY A. WOOD
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