STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 15 AP 1261 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

NAVDEEP S. BRAR,

Defendant-Appellant

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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.

Respectfully submitted,

NAVDEEP S. BRAR,
Defendant-Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES

I. THIS COURT SHOULD NOT PERMIT OFFICER WOOD TO CONTRIVE CONSENT BY STRIPPING THE WORDS "OF COURSE" FROM THE CONTEXT IN WHICH THEY CAN BE MORE FAIRLY UNDERSTOOD.

II. OFFICER WOOD EXTRACTED MR. BRAR'S ACQUIESCENCE WITH A MISLEADING INDICATION THAT HE DID NOT NEED A WARRANT TO HAVE A NURSE INVADE MR. BRAR'S BODY.

STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case because the provisions of Wis. Stat. (Rule) 809.22(a) do not apply; and due to the lack of clarity in the testimony, the briefs may prove incapable of fully presenting the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

On July 2, 2014, Officer Michael Wood, Middleton Police Department, arrested Appellant Navdeep Singh Brar for operating while intoxicated. (42:5.) Officer Wood transported Mr. Brar to the Middleton Police Department. (42:6.) Officer Wood read Mr. Brar the informing the accused form ("ITAF") required by Wis. Stat. § 343.305(4). (42:6.) After some discussion about the form, Officer Wood supposed that Mr. Brar consented to a blood test. (42:8.) Officer Wood then transported Mr. Brar to a hospital for a blood draw. (42:8.)

Charges Filed

On August 6, 2014, Respondent charged Mr. Brar by criminal complaint with (1) operating a motor vehicle while intoxicated, contrary to Wis. Stat. § 346.63(1)(a) and (2) 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 Mr. Brar's behalf. (39:1.)

Motion to Suppress

Mr. 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.) Mr. Brar submitted a written

response, asking the court to reconsider. (*Id.*) After discussion, the lower court agreed with Mr. Brar that an evidentiary hearing was necessitated and scheduled the matter accordingly. (41:9.)

Evidentiary Hearing

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 Mr. Brar's conversation with Officer Wood. (25:2.) Exhibit 2 contains the entirety of the conversation leading up to the moment Officer Wood subjectively assumed that he had obtained consent. (*Id.*)

On direct examination, Officer Wood testified that he read the ITAF to Mr. Brar. (42:6.) The form's ultimate question is, "Will you consent to an evidentiary chemical test of your blood?" (42:6–7.) Mr. 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 Mr. Brar's response, but badly stripped it of its context. (42:7.) Officer Wood said Mr. 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.) Mere seconds later, Mr. Brar "asked what type of test was going to be done." (42:14; 25:2.) Officer Wood replied, "A test of your blood." (*Id.*) Mr. 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 subjectively believed that he had obtained consent for the blood draw.[1] (42:20--21)

Officer Wood testified that after this conversation, he had no other indication of Mr. Brar's affirmative consent. (42:16.) Also,

[1] Of course, the test for the existence and voluntariness of consent is an objective standard.

only the audiovisual recording reflects the timing, manner, and inflections of the questions and answers between Mr. Brar and Officer Wood. (25:2.) Thus, Appellant respectfully invites this Court's attention to that recording. (*Id.*) The December 23 motion hearing transcript is, of course, incapable of demonstrating to this Court that aspect of the conversation. Officer Wood never testified to the ease or difficulty of his communication with Mr. Brar. However, the audiovisual recording clearly reflects Mr. Brar's very strong Indian accent. (*Id.*) At various points in the conversation, each required the other to clarify what he meant to convey. (*Id.*)

On cross-examination, Officer Wood agreed that Mr. 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 Mr. Brar continued to speak after he said "of course" – without any significant pauses. (*Id.*) Immediately thereafter, Mr. 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 Mr. 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 to than his natural recollection. (42:4–24.) Officer Wood filled in the "yes" on the ITAF on Mr. Brar's behalf "during [the same] general time frame" as the discussion regarding the search warrant. (42:21.)

Mr. Brar appears to comment that Officer Wood asked him "a complicated question." (25:2.) However, Officer Wood on cross-examination did not remember or know what exact words Mr. Brar had 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 then examined the officer. (42:22.) The lower court confirmed that in some OWI investigations, Officer Wood believed other subjects had refused chemical testing. (42:23.) Essentially, the lower court attempted to establish Officer Wood's ability to recognize the difference between "yes" and "no." (*Id.*)

However, the officer never testified that Mr. Brar said either "yes" or "no."[2]

The parties gave oral argument. (42:25–45.) Respondent argued, in the alternative, that, "by the nature of getting his license, [Mr. Brar] had consented to a test if he was arrested for OWI." (42:35.) That is, Respondent argued that the implied consent law implies actual consent.[3] Alternatively, the State argued that, "we're not in any way conceding the first part, that he didn't give an affirmative answer." (42:28.)

The lower court adopted the State's argument that Mr. Brar's incidental 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

[2] The implicit theory behind these questions was that Officer Wood knows the difference between consent and refusal. The theory was that had he believed that Mr. Brar refused, he would have followed the procedure for a refusal. Officer Wood did not follow the procedure for a refusal; therefore, Mr. Brar consented. Deciding about consent *vel non* involves a legal conclusion. But it the courts' job to draw legal conclusions, rather than Officer Wood's.

[3] *But see* ***State v. Padley***, 2014 WI App 65, ¶ 25, 354 Wis. 2d 545, 849 N.W.2d 867 ("'Implied consent' is not an intuitive or plainly descriptive term with respect to how the implied consent law works. On occasion in the past we have seen the term 'implied consent' used inappropriately to refer to the consent a driver gives to a blood draw at the time a law enforcement officer requires that driver to decide whether to give consent.").

open to some interpretation, I grant that." (42:48.) The lower court concluded that the officer "did not need a warrant for that, because Mr. Brar had just consented." (42:49.) The court declined to rule on the State's alternative argument that consent existed because Mr. Brar impliedly consented when he obtained a driver's license.

The lower court then attempted to shield its ruling from appellate review by finding "as a matter of fact that Mr. 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."[4] (*Id*.)

Motion to Reconsider

Mr. Brar moved the lower court to reconsider. (26:1.) He attached professionally enhanced audio from Exhibit 2. (26:2.) The defense acknowledged that it was still not possible to distinguish

[4] Of course, trial courts may find facts about what they believe was said; however, whether those statements amount to consent involves a conclusion of law. ***State v. Giebel***, 2006 WI App 239, ¶ 11, 297 Wis. 2d 446, 724 N.W.2d 402.

every word of what was said. (*Id.*) However, Appellant had a transcript of the enhanced recording prepared. (26:5–14.) 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 Mr. Brar made himself very clearly understood to the other. Each required clarification of certain things said by the other. (*Id.*)

Plea and Sentencing

On April 3, 2015, Mr. 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.)

Mr. Brar now appeals from the lower court's order denying his motion to suppress. (37:2.)

ARGUMENT

This Court should reverse the lower court's order denying Mr. Brar's motion to suppress for two reasons. First, police cannot manufacture consent by divorcing words helpful to law enforcement goals from the totality of surrounding circumstances. Mr. Brar's incidental use of the words "of course" (assuming this Court determines those words were even said) did not prove consent by clear and convincing evidence. Second, Officer Wood improperly obtained Mr. Brar's cooperation in the blood draw with a misleading indication that a warrant would be unnecessary.

At the outset, Appellant notes that this case has very little to do with the implied consent law. However, Judge Blanchard properly observed in the ***Padley*** case that, so far as the Constitution goes, 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 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 Mr.

Brar *withdrew* his consent. The issue is, of course, whether he *provided* his consent.

"Courts use two steps in reviewing a determination of voluntariness of consent to a search." ***Id.*** at ¶ 63. The first issue is whether there was actual consent. ***Id.*** The second issue is whether the consent was voluntarily given." ***Id.*** 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. Appellant addresses these two issues in turn.

Standard of review.

This Court will examine the circuit court's findings of fact under the clearly erroneous standard. ***State v. Padley***, 2014 WI App 65, ¶ 65, 354 Wis. 2d 545, 849 N.W.2d 867. Thus, this Court will generally defer to the lower court's credibility determinations. ***Padley***, 2014 WI App 65 at ¶ 65. However, this Court owes no deference to the lower court's legal conclusions. ***Id.*** Thus, this Court reviews *de novo* the issue of whether the facts amount to constitutional consent. ***Id.*** Trial courts cannot shield rulings from appellate review by characterizing legal conclusions as factual findings.

I.
THIS COURT SHOULD NOT PERMIT OFFICER WOOD TO CONTRIVE CONSENT BY STRIPPING THE WORDS "OF COURSE" FROM THE CONTEXT IN WHICH THEY CAN BE MORE FAIRLY UNDERSTOOD.

Significantly, the back-and-forth of questions and answers between Mr. Brar and Officer Wood did not cease at the point the officer subjectively believed that he received consent. The audio of the conversation shows a great deal of confusion on Brar's part. It can be assumed the officer subjectively believed he had consent at the point at which the officer printed the ITAF. (42:15.) The only handwriting on the ITAF is from Officer Wood. (25:1.) The other fields were generated electronically and entered by Officer Wood. (*Id.*) In the ITAF's field for "defendant response," Officer Wood entered, "Yes." (*Id.*) But the officer never testified that Mr. Brar ever said "Yes." (42:1–25.) The audiovisual recording similarly contains no indication that Mr. Brar ever gave a definite and unequivocal "yes" answer. (25:2.) The State never contended that it did. The State argued that the one point at which Mr. Brar provided consent was when he said "of course," again divorcing that comment from the totality of the conversation, the discussion that came after it, and even the rest of the sentence from which the State plucked the

remark. (42:26.) The officer himself noted he thought he had consent after Brar said "of course" "and made statements". (42:7) Thus, the officer decided he had consent even after Brar was questioning whether the officer needed a warrant.

This Court's consent determination embraces the totality of the circumstances. ***Id.*** Thus, Respondent must not be allowed to urge this Court to cover its ears after Mr. Brar's incidental use of the words "of course." Those words can mean a number of things. 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." (42:14.) Even assuming that Mr. Brar said, "Of course I don't want my license to be revoked," this does not indicate clear and convincing evidence of "unequivocal and specific consent." ***Id.*** The statement is ambiguous at best – especially when considered with the following two questions, which Mr. Brar asked immediately thereafter, without a break in the conversation. Specifically, Mr. Brar asked (1) what *type* of test Officer Wood was requesting and (2) whether Wood needed a warrant for such a test. (42:14–15.) One reasonable interpretation of those words is, "It is obvious that I do not wish to lose my license." Had Mr. Brar said

"Of course I don't want a needle in my arm," the officer could not have characterized that as a refusal. A driver's expression of desire when faced with a difficult choice does not constitute an indication of the choice itself. At this point, Mr. Brar merely thought aloud and weighed his options before he asked two important follow-up questions.

The Supreme Court has set forth an objective test for determining the scope of a person's consent to a Fourth Amendment search. ***Florida v. Jimeno***, 500 U.S. 248, 251 (1991). That is: "[W]hat would the typical reasonable person have understood by the exchange between the officer and the suspect?" ***Jimeno***, 500 U.S. at 251. Again, this test embraces the totality of the circumstances – not just those favorable to the government. ***Padley***, 2014 WI App 65 at ¶ 64. Here, a reasonable bystander would understand that Mr. Brar had neither consented nor refused at the time he allegedly said the words "of course." Mr. Brar had questions about the type of test requested of him. He had questions about whether the officer would need a warrant. Where a person continues to have questions, the deal is not done.

Appellant offers the following analogous situation. A customer enters an electronics store and begins browsing for a television. A salesperson takes some time explaining the units' respective 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 said "of course." For one thing, the customer followed the words "of course" with an expression of desire. This means that the customer did not so much say, "of course I will buy this television right now." Rather, the customer is saying "it's obvious that I want this thing" and weighing his options. Moreover, the customer immediately followed up a statement with a question, indicating to any reasonable bystander that he had not yet consented to be bound to the obligation to pay for the television.

Similarly, in this case, Officer Wood read Mr. Brar the ITAF, which explained that Mr. 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 consent to an evidentiary chemical test of your

blood?" After some discussion, the officer asked the question slightly differently, asking "Will you submit to the test – yes or no please?" (25:2.) Mr. Brar said something to the effect of, "Of course I don't want my license to be revoked. What kind of test is it?" (*Id.*) No consent occurred at the time Mr. Brar said "of course." For one thing, Mr. Brar followed the words "of course" with an expression of desire. This means that Mr. Brar is not so much saying "of course I will take your test" – he didn't even know what kind of test it would be. Rather, Mr. Brar was communicating the idea that "it's obvious that I don't want to lose my license." Moreover, Mr. 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 and not-yet-made decision.

No break existed between the words "of course" and the rest of Mr. Brar's sentence. Respondent 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 Mr. Brar consented – the only possible moment urged by the State – Mr. Brar still needed 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 so much as argued that Mr. Brar unequivocally affirmed his consent at any point thereafter. Mr. 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. Thus, the consent was unspecific. Thus, it fails the test for objective consent. ***Id.*** Even if Mr. 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 blood test results should have been suppressed in the trial court.

No consent occurred at the time Mr. Brar made incidental use of the words "of course." He continued to ask questions of Officer Wood. Mr. Brar asked more than once whether Officer Wood needed a search warrant to stick a needle into his arm and take his blood. *A fortiori*, no consent occurred at any point after Mr. Brar said "of course" – the time during which he discussed Officer Wood's obligation to seek a warrant.

Appellant also notes that to the extent that a consent issue can be resolved by a finding of fact – without any conclusion of law – the lower court's factual finding that Mr. Brar consented is clearly erroneous and must be set aside in light of all of the above. The lower court found that Mr. Brar's incidental use of the words "of course" constituted actual consent. In so finding, the trial court simply took the officer's testimony as to what Mr. Brar said to be true, ignoring the remainder of the totality of the circumstances, as required by all consent case law. However, the actual recording, as well as the other context of the conversation, shows no actual consent.

Therefore, Mr. Brar respectfully asks this Court to reverse the lower court's order denying the motion to suppress.

II.
OFFICER WOOD EXTRACTED MR. BRAR'S ACQUIESCENCE WITH A MISLEADING INDICATION THAT HE DID NOT NEED A WARRANT TO HAVE A NURSE INVADE MR. BRAR'S BODY.

"One factor very likely to produce a finding of no consent under the ***Schneckloth***[5] voluntariness test is an express or implied 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 v. North Carolina*** 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." 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

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

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, Mr. Brar asked Officer Wood whether he needed a warrant to take Mr. Brar's blood. Up to that point, Officer Wood declined to give legal advice. He reread a portion of the ITAF and neither departed from nor elaborated upon its contents. But that caution ended when Mr. 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 Mr. Brar had just consented." (42:49.) As stated above, Mr. 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.

The Supreme Court recently amplified the importance and frequency of warrants in OWI cases. ***Missouri v. McNeely***, 133 S.Ct. 1552, 1568 (2013); ***State v. Kennedy***, 359 Wis. 2d 454, 856 N.W.2d 834 (2014). The exigent circumstances exception no longer applies in the majority of cases. 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 simultaneously converse with law enforcement and consult a broad knowledge of Fourth Amendment case law. 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***, 500 U.S. at 251. Here, Mr. Brar asked whether the officer needed a warrant. The officer responded in

the negative. Granted, it is true that warrants are not required where 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, 38 F.3d at 500 (quoting ***Bustamonte***, 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, Mr. Brar "showed no more than acquiescence to a claim of lawful authority." ***Id.***

Finally, Appellant reiterates that which is obvious from the audiovisual recording. That is, Mr. Brar is a foreigner 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. In such a case, consent to dispense with the warrant requirement may never been assumed. The State bears the burden of proving specific and intelligent consent by clear, convincing, and positive evidence. ***Padley***, 2014 WI App at ¶ 65. The State must prove something much more than mere acquiescence to law enforcement authority. The State must prove "knowing, intelligent, and voluntary consent." ***Id.*** at ¶ 62. Thus, the existence of potentially probative but unproven evidence, among the totality of the relevant circumstances, inures to the State's detriment. That is the nature of burdens of proof. 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. 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))); *cf.* ***State v. Begicevic***, 2004 WI App 57, ¶ 13, 678 N.W.2d 293.

The State failed to prove, "by clear and positive evidence the search was the result of a [1] free, [2] intelligent, [3] unequivocal and [4] specific consent [5] without any duress or coercion, actual or

implied." ***Padley***, 2014 WI App 65 at ¶ 64 (numeration added). Therefore, Mr. Brar respectfully asks this Court to reverse the order denying his motion to suppress.

CONCLUSION

This Court should reverse the lower court's order denying Mr. Brar's motion to suppress for two reasons. First, police cannot manufacture consent by divorcing words helpful to their goals from the totality of surrounding circumstances. Mr. Brar's alleged incidental use of the words "of course" did not prove consent by clear and convincing evidence. Second, Officer Wood improperly obtained Mr. Brar's cooperation in the blood draw with a misleading indication that a warrant would be unnecessary.

Police officers have the important job of ensuring that a person has actually consented before dispensing with the warrant requirement. The conversation in this case was wholly ambiguous and confusing. Here, the only safe answers would have been (1) to obtain a "yes" or "no" answer from Mr. Brar or (2) to get a warrant. That is what the Constitution requires.

The remaining evidence would be insufficient for conviction. Therefore, this Court should reverse the lower court's order denying

Mr. Brar's motion to suppress, as well as his conviction, and remand for further proceedings.

Dated at Madison, Wisconsin, September 1, 2015.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a 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 5898 words.

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

Dated: September 1, 2015.

Signed,

BY: _____
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_____
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CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;
(2) the findings or opinion of the circuit court;
(3) a copy of any unpublished opinion cited under s. 809.23 (3)(a) or (b) and;
(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: September 1, 2015.

Signed,

BY: _____
ADAM P. NERO
State Bar No. 1097720

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TRACEY A. WOOD
State Bar No. 1020766

TABLE OF CONTENTS