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,

NAVDEEP S. BRAR,
Defendant-Appellant-Petitioner

TRACEY WOOD & ASSOCIATES
Attorneys for the
Defendant-Appellant-Petitioner
One South Pinckney Street, Suite 950
Madison, Wisconsin 53703
(608) 661-6300

BY: TRACEY A. WOOD
State Bar No. 1020766

SARAH SCHMEISER
State Bar No. 1037381

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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,

NAVDEEP S. BRAR,
Defendant-Appellant-Petitioner
TRACEY WOOD & ASSOCIATES
Attorneys for the
Defendant-Appellant-Petitioner
One South Pinckney Street, Suite 950
Madison, Wisconsin 53703
(608) 661-6300

BY: _____
TRACEY A. WOOD
State Bar No. 1020766

BY: _____
SARAH M. SCHMEISER
State Bar No.: 1037381

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 8073 words.

I also certify I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wisconsin Statutes section 809.19(12). That electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certification has been served upon both the court and all opposing parties.

Dated this _____ day of_____, 2017.

Signed,

_____
TRACEY A. WOOD
State Bar No. 1020766

APPENDIX 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 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 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.

I further 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 this _____day of _____, 2017.

Signed,

_____
TRACEY A. WOOD
State Bar No. 1020766

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