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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

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,

_____

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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,

_____

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APPENDIX TABLE OF CONTENTS