STATE OF WISCONSIN

SUPREME COURT

Case No. 2023AP1707

VILLAGE OF BUTLER,

Plaintiff-Respondent

v.

BRANDON J. HERNANDEZ,

Defendant-Appellant-Petitioner

PETITION FOR REVIEW

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PETITION FOR REVIEW

Brandon J. Hernandez, appellant, hereby petitions the Supreme Court of the State of Wisconsin, pursuant to Wis. Stat. § 808.10 and Wis. Stat. § (Rule) 809.62 to review the decision or order of the Court of Appeals, District II, in Village of Bulter v. Brandon J. Hernandez, case no. 23AP1707, filed on January 11, 2024.

ISSUE PRESENTED FOR REVIEW

1. Whether implied consent is actual consent sufficient for the Fourth Amendment
2. If implied consent is actual consent, then is the informing the accused form re-affirming that consent or withdrawing it?
3. Does the Fourth Amendment require consent to be freely and voluntarily given or unequivocally and specifically given?
4. Did the Court of Appeals incorrectly interpret the case law as it relates to Mr. Hernandez responding, "I guess, yes?"

On this record, there are four issues presented regarding whether Mr. Hernandez complied with the informing the accused statute. But the foundational question is how does implied consent fit within the framework of the Fourth Amendment.

STATEMENT OF CRITERIA FOR REVIEW

This Court should take this case for the following reasons: 1) A real and significant question of state constitutional law is presented; 2) A decision by this Court will help develop, clarify, and harmonize the law; the question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the Court.

Historically, this Court has analyzed the informing the accused statute within the context of the Fourth Amendment, specifically and focused on how an individual gives consent. However, the Fourth Amendment analysis used in determining whether consent was freely and voluntarily given is squarely at odds with how consent is given or taken away when it comes to the refusal statute.

Under the Fourth Amendment cases, for consent to be valid it must be freely and voluntarily given. *State v. Wantland*, 2014 WI 58, ¶ 23, 355 Wis. 2d 135, 848 N.W.2d 810 (citing *Bumper v. North Carolina*, 391 U.S. 543 (1968)). Once consent is given there is no requirement for a more explicit authorization. *Wantland* at ¶ 21. Essentially, what our case law states is that once a party gives free and voluntary consent the analysis turns to whether the party unequivocally and specifically withdrew their consent through words or conduct. There is no requirement under any of the Fourth Amendment cases that officers seek to re-affirm consent for a Fourth Amendment search once it is given.

However, the case law regarding the implied consent statute directly contradicts the Fourth Amendment analysis on consent. This Court in *State v. Wantland* stated that once consent is given there is no requirement of a more explicit authorization. 2014 WI 58, ¶21, 355 Wis.2d 135, 848 N.W.2d

810. Wisconsin drivers and those who drive on our roads are deemed to have given consent through our implied consent law. Our case law is clear that "implied or deemed consent is actual consent. Implied consent is not a lesser form of consent." *State v. Brar*, 2017 WI 73, ¶68, 376 Wis. 2d 685, 898 N.W. 2d 499. Because drivers have already given actual consent the Fourth Amendment case law requires no re-affirmation of consent. *Id*. Instead, it directs courts to move to the second prong as to whether or not consent has been unequivocally and specifically revoked. *See generally, State v. Wantland*, 2014 WI 58, ¶21, 355 Wis.2d 135, 848 N.W.2d 810. This is how the informing the accused form and responses should be analyzed.

As it currently stands, our case law interprets an affirmative response as either consenting or re-affirming consent even though consent has already been given. This is a contradiction to all other fourth amendment case law and needs to be remedied because the law currently leaves courts, people, and officers guessing to what the purpose of the implied consent statute are.

STATEMENT OF FACTS AND OF THE CASE

On June 21, 2022, Mr. Hernandez was cited for refusal to take the test for intoxication after arrest by Officer Joseph Benson of the Village of Butler Police Department. Officer Benson initially conducted a traffic stop of Mr. Hernandez's vehicle for allegedly improper lane deviation, driving below the speed limit, and driving with his hazards on. Refusal Hr'g. at 7. Following standardized field sobriety tests and a preliminary breath test, Officer Benson arrested Mr. Hernandez on suspicion of Operating While Intoxicated (OWI). *Id*. at 8-10. Following the arrest, Officer Benson read the Informing the Accused (ITA) form to Mr. Hernandez. *Id*. at 10-11. After the first reading, Mr. Hernandez asked follow-up questions and Officer Benson read the ITA form to Mr. Hernandez again. *Id*. at 12. After the second reading, Mr. Hernandez repeatedly said "I guess, yes," when both officers asked if he would consent to an evidentiary test. *Id.* at 15. Officer Benson marked Mr. Hernandez as a refusal despite Mr. Hernandez repeatedly answering in the affirmative to the ITA form. *Id*. at 12.

Officer Benson marked Mr. Hernandez as refusing the evidentiary test because he felt that Mr. Hernandez was not being "sincere." *Id*. at 13. Officer Benson felt that Mr. Hernandez might change his mind, and this could impact the 3- hour time limit for conducting the evidentiary test. *Id.* at 13.

Mr. Hernandez filed a request for a refusal hearing on July 26, 2023. The refusal hearing took place on September 7, 2023. The trial court ruled that Mr. Hernandez unreasonably refused. On January 11, 2023, Mr. Hernandez filed his appellate brief. The Village of Bulter responded on March 12,

2024. Mr. Hernandez replied to the Village's response brief on March 26, 2024.

The Court of Appeals affirmed the decision on June 19, 2024. *Village of Butler v. Hernandez*, unpublished slip. Op, 2023AP1707, ¶1 (Wis. Ct. App. June. 19, 2024). The court of appeals held that the circuit court was correct in determining that Mr. Hernandez's conduct and words did not constitute voluntary consent and that he refused to submit to an evidentiary test. *Id*. at ¶18. The court of appeals, relying on *State v. Prado*, 2021 WI 64, 397 Wis. 2d 719, 960 N.W.2d 869. reasoned Mr. that by asking questions following the reading of the ITA form and answering "I guess, yes" Mr. Hernandez did not unequivocally and specifically give or reaffirm consent as required by the Fourth Amendment. *Id*. at ¶ 16.

Mr. Hernandez now petitions for this Court's review.

ARGUMENT

This Court Should grant review because clarification is essential to harmonize informing the accused case law.

A. Overview.

Under Wis. Stat. §343.305(2), anyone who drives on Wisconsin roadways is deemed to have given their consent to a chemical test of their breath, blood, or urine for the purposes of determining the presence of alcohol or restricted controlled substances. The Wisconsin legislature created the implied consent statute to "facilitate gathering evidence against drunk drivers." *State v. Marshall*, 2002 WI App 73, ¶13, 251 Wis. 2d 408, 642 N.W.2d 571. The statute and accompanying informing the accused (ITA) form gives drivers the choice of how to respond to an officer's request for a chemical test. The language used within both the form and statute attempts to persuade drivers to submit to a chemical test by attaching civil consequences if they refuse. *State v. Zielke*, 137 Wis. 2d 39, 46, 40 N.W.2d 427 (1987).

When challenged, the Wisconsin Supreme Court routinely analyzes the implied consent statute through the lens of the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution. Both Amendments protect the rights of the people against unreasonable search and seizures and dictate when state officials must utilize a warrant. Consent to a search is a well-established exception to the warrant requirement. *Florida v. Jimeno*, 500 U.S. 248, 250 111 S.Ct. 1801, 1803, 114 L.Ed.2d 297 (1991). Traditional Fourth Amendment case law, meaning not involving chemical testing for drunk driving, provides a clear framework regarding: (1) how an individual consents; (2)

how to analyze whether consent was voluntary; and (3) how an individual revokes consent for a search once given.

B. Whether implied consent is consent sufficient under the Fourth Amendment is unclear.

Wisconsin case law is contradictory as to whether this Court believes that implied consent, by itself, is sufficient for a Fourth Amendment search.

The United States Supreme Court in *Schneckloth v. Bustamonte*, describes what is required for consent under the Fourth Amendment. 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). *Schneckloth* holds that consent must be freely and voluntarily given, expressly rejecting the requirement that consent must be free, intelligent, unequivocal, and specific. *Id.* at 222, 235, and 241. In determining whether consent was voluntary, a court must look at the totality of the circumstances and determine if it was free from express or implied duress or coercion. *Id*. at 227-228.

Despite this framework from the United States Supreme Court, this Court has different holdings as to what implied consent is and what the Fourth Amendment requires. Compare, for example, the holding used in *State v. Brar*, with that used in *State v. Prado*. Working under the *Schneckloth* framework, this Court in *State v. Brar*, held that implied consent is consent sufficient for a Fourth Amendment search. 2017 WI 73, ¶22, 376 Wis. 2d 685, 898 N.W. 2d 499. The *Brar* court explicitly rejected the idea that implied consent is less sufficient consent given by other means. *Id*. at ¶ 20. And under *Brar*, once someone has driven on Wisconsin roads, they have consented to a Fourth Amendment search. *Id*. at ¶ 21. Then this Court in *State v. Prado*, without overruling *Brar*, held that implied or deemed consent is separate and distinct from actual

consent under the Fourth Amendment. 2021 WI 64, ¶ 48, 397 Wis. 2d 719, 960 N.W.2d 869. The *Prado* court seemingly disposes of *Schneckloth*, without ever addressing doing so, and instead determines that consent must now be unequivocal and specific, something that deemed consent cannot be. *Id*. at ¶ 46. The *Brar* court already found this standard goes against Supreme Court precedent. *Brar*, 2017 WI 73 at ¶27. *Brar*, found that *State v. Padley* was contrary to Supreme Court precedent because it used the same standard that *Prado* now holds; that the State must prove that consent be given freely, intelligently, unequivocally, and specifically, because this was contrary to Supreme Court precedent.

Clarification from this Court is essential. Our case law as it currently stands states that implied consent *is* actual consent and implied consent *is not* actual consent. And that consent must be and not be unequivocal and specific.

C. The standard used for the implied consent statute should be whether a driver unequivocally and specifically withdrew their consent.

The only way that *Brar*, *Prado*, and traditional Fourth Amendment cases can be read together is to hold that the ITA form is asking whether an individual is withdrawing their previously given implied consent.

First, if *Prado* was correct, that implied consent is not actual consent, then the implied consent statute becomes moot. The intent of the implied consent statute is to assist officers in dissipating evidence in OWI cases. The mechanism the legislature has chosen to do that is by essentially saying we have found voluntary consent for you because we know time is of the essence. However, if officers still need actual consent, then we could treat chemical tests of an individual's breath,

blood, or urine as a traditional Fourth Amendment search and simply ask individuals for consent to "search." If they were to say no, then officers would be required to get a warrant. The implied consent statute as interpreted under *Prado* places officers in this exact position as a traditional Fourth Amendment search. It does not get officers to a search any quicker than had they had no implied consent to begin with.

Second, if *Brar* was correct and implied consent is actual voluntary consent sufficient for the Fourth Amendment then the *Brar* court incorrectly found that once consent is given officers need to re-affirm that it is voluntary. Once there is determined to be valid consent then a search is constitutionally permissible. *Schneckloth v. Bustamonte,* 412 U.S. 218, 222, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). Once consent for a search is given, the Fourth Amendment does not require a more explicit authorization. *State v. Wantland*, 2014 WI 58, ¶21, 355 Wis. 2d 135, 848 N.W.2d 810. Because the Court found that *Brar* voluntarily consented through the implied consent statute no re-affirmation is necessary.

How *Brar*, *Prado*, and the traditional Fourth Amendment cases can be harmonized is to hold that the ITA form is asking if consent is being withdrawn instead of given.

The reading of *Brar*'s definition of implied consent to mean voluntary and actual consent sufficient for the Fourth Amendment fits the legislature's intent in creating the implied consent statute. If the legislature wants to assist officers in retrieving evidence more quickly, then officers need to be placed in a better position to receive that evidence than they would originally be in. Interpreting implied consent as actual consent is the clearest way to do so.

Next, *Brar*'s requirement that consent be freely and voluntarily given is supported by case law. As explained at length above, the Supreme Court clearly found that consent for Fourth Amendment searches is different than the constitutional amendments associated with a fair trial. See Generally *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). Wisconsin Supreme Court also uses this standard in *State v. Wantland*, "before consent may operate as a valid exception to the warrant requirement… it must have been freely and voluntarily given." 2014 WI 58, ¶23, 355 Wis.2d 135, 848 N.W.2d 810.

Turning to *Prado,* the Court found that the implied consent statute is designed to give drivers a choice. *State v. Prado,* 2021 WI 64, ¶23, 397 Wis. 2d 719, 960 N.W.2d 869. Because, unlike a search of a car or house, "a blood test is an intrusion beyond the body's surface that implicates interests in human dignity and privacy" *Id*. at ¶ 30. But because the other *Brar* holds that implied consent is consent the way to harmonize this with *Prado* is to give the option to withdraw consent. And *State v. Wantland* holds that the only way to withdraw consent is specifically and unequivocally. S*tate v. Wantland*, 2014 WI 58, 355 Wis. 2d 135, 848 N.W.2d 810

If we analyze the implied consent statute as giving officers consent to search but still maintaining legislative and bodily integrity of giving drivers a choice to unequivocally and specifically withdraw that consent the case law becomes harmonized.

D. The Court of Appeals in Mr. Hernandez's case demonstrates the discord in implied consent case law.

The Court of Appeals in Mr. Hernandez's case frames the questions presented before them as whether, at the time Mr.

Hernandez responded, "I guess, yes," was he reaffirming his previously given consent or revoking that consent when he was given the statutory opportunity to withdraw consent." *Village of Butler v. Hernandez*, unpublished slip. Op, 2023AP1707, ¶13 (Wis. Ct. App. June. 19, 2024).

The court of appeals to try and answer this two-part question relies on the analysis from both *Brar* and *Prado*. Those two cases, as they currently stand, directly contradict each other. It is not appropriate to use both cases to interpret the implied consent statute and whether someone consented.

The issues of trying to read the two cases together is evident in the court's analysis.

> "Where *Brar* has established that consent by conduct has already been given – a driver such as Hernandez must either reaffirm the previously given consent or revoke that consent by refusing to submit to the officer's request. And as is clear, "consent for the purposes of a Fourth Amendment search must be unequivocal and specific." *Id*. at 15.

The court of appeals fails to realize that they are simultaneously saying that consent has and has not been given by the implied consent statute. You cannot start an interpretation of an implied consent response without first determining whether you agree with *Brar* in that consent has been given or with *Prado* in that consent has not been given.

If the court of appeals followed the *Brar* analysis, Mr. Hernandez would be deemed to have freely and voluntarily consented by driving on Wisconsin roads. The *Brar* analysis would then turn you to ask whether that consent remained voluntary. The *Brar* court would also remind you that unequivocal and specific language is not required. So, because

Mr. Hernandez drove on Wisconsin roads and responded to the ITA for with "I guess, yes." The *Brar* court very likely would have found that he submitted to an evidentiary test of his blood.

If the court of appeals followed *Prado*, then Mr. Hernandez would not be deemed to have given consent merely by driving on the roads. We would then look at the totality of the circumstances as to whether he gave unequivocal and specific consent. We would renew our arguments by stating "I guess, yes. No, I said yes" is unequivocally consenting to the blood draw.

If the court of appeals wanted to determine whether Mr. Hernandez withdrew his consent. That would first mean that Mr. Hernandez did consent. And as directed in *State v. Wantland*, the next step is whether Mr. Hernandez unequivocally and specifically revoked his consent. This Court in *State v. Wantland* described "unequivocal acts or statements sufficient to constitute withdrawal of consent may include slamming the trunk of a car during a search, grabbing back the item searched from the officer, or shouting "no wait" before a search could be completed. 2014 WI 58, ¶34, 355 Wis. 2d 135, 848 N.W.2d 810. *Wantland*, held that "got a warrant for that" was not sufficient for a withdrawal of consent. *Id*. at ¶ 26. Mr. Hernandez's "I guess, yes" certainly would not count as an unequivocal withdrawal of consent that he has already given.

The Court of appeals failed in its responsibility to interpret the facts within the law and case provided to it. This is because what the rules are and what path the court should follow are completely muddled. Without further clarification from this Court there will be no uniformity in how the implied consent statute is being interpreted.

CONCLUSION

Mr. Hernandez respectfully requests that this Court grants review and clarify these issues.

Dated this 19th day of July, 2024

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of s. 809.19(8)(b) and (c) for a brief. The length of this brief is 3,625 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated and filed this 19th day of July, 2024
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