STATE OF WISCONSIN
IN SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs. Appeal No.: 15 AP 1261-CR

NAVDEEP S. BRAR,

Defendant-Appellant-Petitioner

PETITION FOR REVIEW

Respectfully submitted,

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Defendant-Appellant-Petitioner

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PETITION FOR REVIEW

Petition for Supreme Court to review the decision of the Court of Appeals, District IV, in the case of State of Wisconsin vs. Navdeep S. Brar, filed on July 7, 2016, in which the Court of Appeals affirmed the decision of the Dane County Circuit Court denying the defendant-appellant's suppression motion.

ISSUES PRESENTED FOR REVIEW

I. STATEMENT OF THE ISSUES

A. Whether consent justified the warrantless blood draw.

B. Whether the State proved consent to be voluntary.

II. MANNER OF RAISING THESE ISSUES IN THE COURT OF APPEALS

This issue was raised in the Court of Appeals by direct appeal to that Court from a final order of the Circuit Court for Dane County.

III. HOW THE COURT OF APPEALS DECIDED THESE ISSUES

The Court of Appeals held that the record supported the trial court finding that Brar consented even though that consent was based upon the police officer telling Brar he did not need a warrant and the fact that Brar did not "fight" against having his blood drawn. (p.6 Court of Appeals' decision). Furthermore, the Court of Appeals found that such consent was not involuntary even if that consent was given because the officer stated he did not need a warrant to take the blood.

CRITERIA FOR REVIEW

This Court should take this case for four main reasons. First, a real and significant question of both federal and state constitutional law is presented. What constitutes consent to a blood draw is an important issue that has arisen in the wake of cases such as Missouri v. McNeely, 133 S. Ct. 1552 (2013); State v. Foster, 2014 WI 131, 360 Wis. 2d 12, 856 N.W.2d 847; and the newest United States Supreme Court decision of Birchfield v. North Dakota, 579 U.S. ___ (2016). No longer may police simply take blood without a warrant. There must be full constitutional consent or consent through the implied consent law. This case is about what constitutes full constitutional consent. Second, the decision by this Court will help develop, clarify and harmonize the law. The case calls for the application of new doctrine rather than the application of well-settled principles to the situation in question in the wake of the aforementioned cases. The questions presented are novel, and their resolution will have statewide impact. Additionally, the questions presented are not factual in nature but are questions of law of the type likely to recur unless resolved by this Court. Finally, the Court of Appeals' decision is in conflict with controlling opinions of the United States Supreme Court in Bumper v. North Carolina, 391 U.S.

543, 549 (1968); Birchfield, supra, and McNeely, supra, as well as the Wisconsin Supreme Court decision of Foster, supra. Finally, this decision conflicts with the Court of Appeals State v. Padley decision 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867, review denied, 2014 WI 122, 855 N.W.2d 695.

STATEMENT OF THE CASE AND FACTS

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 supposed that Brar consented to a blood test. (42:8.) Officer Wood then transported Brar to a hospital for a blood draw. (42:8.)

Charges Filed

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.)

Motion to Suppress

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 necessitated. (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 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 Brar. (42:6.) The form's ultimate question is, "Will you consent 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, but badly stripped it of its context. (42:7.) Officer Wood said 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, 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 subjectively believed that he had obtained consent for the blood draw. (42:20--21)

Officer Wood testified that after this conversation, 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.) Thus, Appellant-Petitioner 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 Brar. However, the audiovisual recording clearly reflects Brar's very strong Indian accent. (*Id.*) At various points in the conversation, the officer and Brar each required the other to clarify what he meant to convey. (*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 to than his natural recollection. (42:4–24.) Officer Wood filled in the "yes" on the ITAF on Brar's behalf

"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 or know what exact words 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 adopted the State's argument that 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 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*.)

Motion to Reconsider

Brar moved the lower court to reconsider. (26:1.) He attached professionally enhanced audio from Exhibit 2. (26:2.) The defense noted that it was still not possible to distinguish every word of what was said. (*Id.*) However, Appellant-Petitioner 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 Brar made himself clearly understood to the other. Each required clarification of certain things said by the other. (*Id.*)

Plea and Sentencing

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' decision did not address Brar's argument that the trial court finding that Brar consented was clearly erroneous because the trial court relied upon the officer, who relied upon his faulty memory of what Brar said. In reality, Brar never said "of course" during his conversation with the officer as shown by the transcript and as can be heard by the tape. The Court of Appeals was asked to listen to the tape to determine whether proper reliance was based on the officer's testimony as opposed to the actual statements of Brar, but the Court of Appeals' decision does not state that the tape was listened to nor the transcript considered. Thus, the Court of Appeals found Judge Markson's findings supported by the record and further found that because Judge Markson found there was

consent, that consent could not be invalidated by the officer indicating no warrant was required, as no warrant is required if there is consent. The Court of Appeals' decision did not address the argument that Brar's inquiry about a warrant was part and parcel of the conversation that led the officer to determine consent was given; thus, the alleged consent was not given until after the conversation was done.

ARGUMENT

This Court should reverse the lower court's order denying 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. 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 Brar's cooperation in the blood draw with a misleading indication that a warrant would be unnecessary.

At the outset, Appellant-Petitioner 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 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.

This Court will examine the circuit court's findings of fact under the clearly erroneous standard. Padley, supra at ¶65. Thus, this Court will generally defer to the lower court's credibility determinations. Padley, supra at ¶65. However, this Court owes no deference to the lower court's legal conclusions. Id. 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.

Recent decisions in the United States Supreme Court, this Court, and the Court of Appeals have underscored the need for warrants in the absence of an exception to the warrant requirement in the Constitution for blood tests. "[Blood tests] 'require piercing the skin' and extract a part of the subject's body." Birchfield, supra at 2178 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 McNeely, supra stressed the importance of warrants in the blood test scenario and not simple reliance on the old exigency finding in State v. Bohling, 173 Wis. 2d 529, 494 N.W.2d 399 (1993); Padley, supra, discussed the factors needed for a finding of voluntary consent and stressed that courts must not simply find facts in favor of the State, but all personal circumstances must be considered in determining whether consent was actually given and whether it was voluntary.

This case is not about implied consent. It is about what constitutes true constitutional consent and whether a police officer's conclusion that a person whose first language is not English consented because the officer thought he heard the words "of course" in between a long discussion between the officer and Brar is enough to avoid the warrant requirement of the Constitution in a blood test case.

Significantly, the back-and-forth conversation between 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.) Importantly, even the officer conceded that he concluded that there was consent only after Brar asked about a warrant. Although the issue of whether consent was given involuntarily is addressed in the next section, it is worth noting here that the trial court's finding that consent was given was based in part upon the fact that Brar suggested the officer needed a warrant prior to the officer deciding. When a person suggests a warrant is required for a blood draw, it makes no sense to say that is true consent.

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 Brar ever said "Yes." (42:1–25.) The audiovisual recording similarly contains no indication that Brar ever gave a definite and unequivocal "yes" answer. (25:2.) The State never contended that it did. The officer noted he thought he had consent after Brar said "of course" "and made statements." (42:7) The officer decided he had consent even after Brar questioned whether the officer needed a warrant to draw his blood. The Court of Appeals' decision again did not address this point.

This Court's consent determination embraces the totality of the circumstances. Id. Thus, the inquiry does not end after Brar's incidental use of the words "of course." Those words can mean a number of things. Officer Wood testified, "When asked if [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 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 Brar asked immediately thereafter, without a break in the conversation. Specifically, 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 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, 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, 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?" Florida, supra at 251. Again, this test embraces the totality of the circumstances–not just those favorable to the government. Padley, supra at ¶64. Here, a reasonable bystander would understand

that Brar had neither consented nor refused at the time he allegedly said the words "of course." 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-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 said "of course." For one thing, the customer followed 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 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 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 consent 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.) 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 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, 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 and not-yet-made decision.

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–the only possible moment urged by the State–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 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. 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

No consent occurred at the time Brar made incidental use of the words "of course." He continued to ask questions of Officer Wood. 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 Brar said "of course"– the time during which he discussed Officer Wood's obligation to seek a warrant.

Appellant-Petitioner 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 Brar consented is clearly erroneous and must be set aside in light of all of the above. The lower court found that 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 Brar said to be true, ignoring the remainder of the totality of the circumstances, as

required by all consent case law. However, the recording, as well as the other context of the conversation, shows no actual consent. Furthermore, the Court of Appeals' reliance on the fact Brar did not "fight" having his blood drawn as a factor establishing consent is in error, as mere acquiescence to police authority is not true constitutional consent under Berkemer, supra. Had Brar fought, he would have potentially faced an obstruction charge. He was told the officer did not need a warrant, and the officer wanted his blood; so he submitted. That is not consent.

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

"One factor very likely to produce a finding of no consent under the Schneckloth[1] 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, supra 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."

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 give legal advice. He reread a portion of the ITAF and neither departed

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

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 stated 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.

The Supreme 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; Foster, supra. 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?" Florida, supra at 251. Here, 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 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, 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, supra ¶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.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 State failed to prove, "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, 2014 WI App 65 at ¶64.

The courts below failed to address the lack of any pause between "of course" and the rest of the sentence, Brar's follow-up questions, Brar's vocal inflection, and the fact that English is not Brar's first language. Thus, more care need be taken to ensure his rights are protected. See: Begicevic, supra.

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. Officer Wood's assertion that he did not need a warrant to take Brar's blood vitiated the voluntariness of any consent.

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.)

A. 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, supra at 251. 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. Where a person continues to have questions, the deal is not done.

Brar allegedly said "of course" and then unintelligible words followed without any pause after the words "of course." (25:2.) Had Brar simply said "of course," left it at that, and then made a *second and separate* statement about his license, he would have provided the affirmative reply that he did *not* provide in this case.

Standing alone, "of course" is an affirmative response. Brar never used the words "of course" standing alone. He followed them with more words, assuming the words "of course" were even spoken. The officer admitted that he could not really hear anything about a license being revoked after those words on cross-examination. (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". That is more accurately described as a declination of the test. Any factual finding by the trial court to the contrary 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 police 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 that this case falls under examples one (1) and two (2). Appellant 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 unsettled for Brar, and it would be unsettled for the reasonable bystander. 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 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, supra at 549; 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 unnecessary. The State and courts below found that the lack of active protest meant there was consent, but the law requires no such thing. 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. Interestingly, it wasn't until Brar mentioned a warrant, that the officer wrote "Yes" that Brar would submit to the blood test. (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 recording 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 a Court to decide upon listening to the audio.

Even if this Court credits Officer Wood's testimony entirely, then only the following is known: Brar may have said "Of course I don't want my license to be revoked;" he continued asking questions; at the time he said "of course I don't want my license to be revoked," he 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 amount to confusion and show Brar's expectation of privacy.

This is to say nothing of the lower court's attempt to shield its ruling from appellate review by finding "as a matter of fact that Mr. Brar did give consent." (42:49.) 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.*) 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, to which this Court

need not defer. State v. Giebel, 2006 WI App 239, ¶11, 297 Wis. 2d 446, 724 N.W.2d 402.

Officer Wood misled Brar by telling him he did not need a warrant to draw blood. As stated above, Brar never consented to a blood test. However, even if he did, the lower 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 is especially true when English is not Brar's first language, and nowhere in the record is there an offer by police to allow him to have 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.

Granted, it is true that warrants are not required where a person consents to a search. However, Officer Wood failed to include that caveat in the ongoing conversation. Officer Wood's reply was misleading because it suggested that the warrant requirement is not implicated at all in a blood test. The answer vitiated the voluntariness of any consent. "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*." Schneckloth, supra at 248 (emphasis added).

The Court of Appeals found that this argument fails because consent was already given. 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. Moreover, the officer conceded that he considered all statements Brar made before deciding he had consent--those included the statement 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 because 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 consent finding must be in spite of the fact that Brar asked if a warrant was required. The correct answer 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.' " **885 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 his level of understanding or even what he specifically said. The State, therefore, did not meet its burden of establishing voluntariness.

As noted above, 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 a case such as this, where even the trial court noted it was a close call, the Constitution requires a finding the State did not meet that burden. Without consent, no exception to the warrant requirement permitted this search; thus, the results of that test must be suppressed.

CONCLUSION

For the reasons stated in this Petition, this Court should accept this case and reverse the decision of the Court of Appeals.

Dated: June 25, 2016 at Madison, Wisconsin.

Respectfully submitted,

NAVDEEP S. BRAR,
Defendant-Appellant-Petitioner

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BY: _____
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CERTIFICATION

I certify that this petition conforms to the rules contained in s. 809.62 for a petition 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 petition is 7,822 words.

Dated: June 25, 2016.

Signed,

_____

TRACEY A. WOOD
State Bar No. 1020766

CERTIFICATION

I certify that the text of the electronic copy of the Petition for Review, which was filed pursuant to Wis. Stat. Ann. § 809.62 (West), is identical to the text of the paper copy of the petition.

Dated: June 25, 2016.

Signed,

_____

TRACEY A. WOOD
State Bar No. 1020766

APPENDIX TABLE OF CONTENTS