STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2017 AP 000668

In the Matter of the Refusal of Hector Miguel Ortiz Martinez

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HECTOR MIGUEL ORTIZ MARTINEZ,

Defendant- Appellant.

BRIEF & APPENDIX OF DEFENDANT-APPELLANT

APPEAL FROM AN ORDER DATED APRIL 10, 2017,
IN THE CIRCUIT COURT OF MILWAUKEE COUNTY
The Honorable Jean Kies, Presiding
Trial Court Case No. 2016 TR 21383

Respectfully submitted:

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ISSUE PRESENTED

I. WHETHER A DEFENDANT WHO ALLEGES THAT NOTICE OF THE NATURE OF THE REFUSAL CHARGE AGAINST HIM AND HIS RIGHT TO CONTEST IT WERE NOT REASONABLY CONVEYED TO HIM, THEREBY CAUSING A TARDY REQUEST FOR A REFUSAL HEARING, IS MINIMALLY ENTITLED TO AN EVIDENTIARY HEARING TO DETERMINE WHETHER HE SHOULD NEVERTHELESS BE GRANTED A REFUSAL HEARING.

The trial court: answered No.

STATEMENT ON PUBLICATION

The appellant believes the Court's opinion in this case will meet the criteria for publication as it will clarify and develop the law surrounding reasonable provision of information under the Implied Consent Law and the competency of the circuit court to address those issues.

STATEMENT ON ORAL ARGUMENT

The appellant does not request oral argument insofar as he believes the briefs will sufficiently explicate the facts and law necessary for this Court to decide the issues presented.

STATEMENT OF THE CASE AND FACTS

This is an appeal from an order revoking the operating privileges of the defendant-appellant, Hector Ortiz Martinez, on the grounds the court lacked competency to give him an evidentiary hearing to determine whether he had received reasonable notice of the ten-day statutory period for requesting a refusal hearing under section 343.305(9), Stats. (R11; R12; App. A). This reasoning underlying that order, if correct, would signify that under no set of circumstances will a defendant ever be allowed an evidentiary hearing to explain why he was not given reasonable notice of a potential revocation, by default, of his operating privileges. More specifically, this appeal asks whether handing an English language Notice of Intent to Revoke form to a Spanish-speaking, English-illiterate accused, while telling him he can contest the charges against him simply be showing up on his court date, constitutes compliance, in every meaningful sense, with the dictates of the Implied Consent Law. More fundamentally, it asks whether a defendant should at least be given a meaningful forum to address that question.

Ortiz is a native Spanish-speaking, over-the-road truck driver who maintains a Milwaukee residence, although he spends relatively little time there. (R8-1). In fact, Ortiz is in Milwaukee for only short periods of time each year between long-distance hauls that he makes all over the country. (R8-1). In other words, Ortiz largely lives out of his truck. (R8-1). The 32-year-old Ortiz was in Milwaukee, however, on September 6, 2016, when he was arrested for Operating While Intoxicated-First Offense, though *not* while operating a commercial motor vehicle. (R8-1). It was eventually alleged in the charging

document - the Notice of Intent to Revoke Operating Privileges (NIROP) - that Ortiz was properly in custody, properly informed, and asked to submit to a chemical test, and unreasonably refused to do so. (R1).

Ortiz was released from custody with a few pieces of paperwork and verbally told when his initial court date was and instructed he just needed to ensure he was in court on that date if he wished to contest the charges. (R8-1-2). Unfortunately, Ortiz can only *speak* and *understand* a little English. (R8-1). He is functionally illiterate when it comes to the English language. (R8-1-2). While Ortiz was able to recognize dates on his paperwork (due to similarity in Spanish), he was unable to decipher anything else. (R8-2). Accordingly, he sought clarification upon his release and was told that if he wished to contest the charges against him, he need only be sure to be in court on his assigned court date, which was October 6, 2016. (R8-2). Unfortunately for Ortiz, October 6, 2016, was well past the ten-day deadline for requesting a refusal hearing.

When Ortiz got home he decided to call and speak with the police again to confirm what he needed to do to contest the charges and, more urgently, to make sure he was legal to drive. (R8-2). As a commercial motor vehicle operator, he could ill afford to be driving a commercial motor vehicle without a valid license. Ortiz ended up speaking with a lieutenant who told him his driver's license was valid, and that as long as he went to court on the appointed date, he would avoid the loss of license that would otherwise be prompted by his non-appearance. (R8-2). Finally, Ortiz then called the DOT which also confirmed he was valid to drive. (R8-2). Satisfied that he had covered all the

bases, and resolving to be back in Milwaukee on October 6, 2016, for the initial appearance, Ortiz then left the state on September 8, 2016, for work purposes.[1] (R8-2).

Near the end of September, 2016, Ortiz was delivering a load and picking up another in California when his truck broke down and ended up in a garage for a few days for repair and servicing. (R8-2). Realizing that being stranded in California would impede his ability to be back in Milwaukee on October 6, 2016, Ortiz called the clerk of court for the Milwaukee County Circuit Court. (R8-3). Ortiz explained he had paperwork advising him to be in court on October 6, 2016, but that he was stranded in California. (R8-3). The clerk advised Ortiz he should mail in a written Not Guilty Plea for all of his cases, and that as long as they were received by the court before October 6, 2016, everything would be fine, and the court would simply schedule his cases for a later date. (R8-3). Ortiz decided to do precisely that, but rather than leave his fate in the hands of the U.S. Postal Service, resolved to have his brother, who resides year round in Milwaukee, write and hand-deliver the requisite letter to the clerk of courts. (R8-3).

[1]It is true, of course, that Ortiz remained valid to drive. Under section 343.305, Stats., his operating privileges could not be revoked for at least thirty days (if he did not request a hearing) and more likely significantly later (if he did), but then only if the court held a hearing on the permissible refusal hearing issues and resolved all of those issues against him.

Before doing so, however, Ortiz also decided to use the down time to look into possibly getting an attorney, and whether he could afford one, to help him with his case. (R8-2). It was while talking to an attorney about his case that Ortiz learned that mailing a not guilty plea would be insufficient for a refusal charge. (R8-2). Ortiz learned, during this same conversation, and for the first time, that he was supposed to write a letter specifically stating he wanted to challenge the refusal. (R8-2). This attorney also told Ortiz he was supposed to send this letter within 10 days of his arrest, which was also news to Ortiz. (R8-2). By this time, however, those ten days had already elapsed on September 20, 2016.[2]

By that measure, Ortiz's written request for a refusal hearing was filed ten days late, on September 30, 2016.[3] It could have been significantly longer than that, since Ortiz was in

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[2]The time frame for timely requesting a refusal hearing is referred to throughout this brief as "ten days" in length, as written on the NIROP. In fact, this author believes the actual time period is "fourteen days" due to the operation of section 801.15(1)(b), Stats., which excludes weekends and holidays for time periods less than eleven days. Here, the NIROP was dated September 6, 2016. Accordingly, the deadline for timely filing a request for a refusal hearing was likely September 20, 2016.

[3]The written request for a refusal hearing was delivered, *pro se,* on September 30, 2016. For reasons unknown, it was not date-stamped until October 3, 2016. The corresponding entry in CCAP, however, confirms that a letter from the defendant was received on September 30, 2016.

California when he discovered his predicament. (R8-2). However, after his conversations with the attorney and the court clerk, Ortiz immediately called his brother and asked him to hand-deliver two letters to the court the next day. (R8-3). Ortiz told his brother, who unlike Ortiz, can read and write some English, (but naturally, Ortiz spoke to his brother in Spanish), what the letters needed to say. (R8-3). In broken English, Ortiz's brother translated and wrote what Ortiz dictated and on September 30, 2016, hand-delivered two letters to the clerk of courts, one of which said:

> To whom it may concerns: (sic, throughout) My name is Hector Ortiz Martinez birthday 10-14-84 I am writing is this letter because I'm not guilty and I want to schedule a hearing please do not suspend my license I am a truck driver I did not know that I had to do this I'm out in California right know broken down please help helping I'm trying to everything right but I phone number is 813-373-9825 for refusal of penalize thank you so much God bless.

(R8-5). The other letter was similar in tone, content and sentiment, but did not specifically reference a "refusal." (R8-6).

Consequently, Ortiz did not know he had a ten day deadline for requesting a refusal hearing until after the ten days had already elapsed. (R8-3). Part of the reason is because he could not read the paperwork he had been given. (R8-1). More problematic, he had not been verbally informed of the ten day deadline by the police officers who processed him. (R8-3). Most

prejudicial of all, he had been disarmed by reports, from two different sources (both law enforcement and the court), that all he needed to do to contest the charges against him was to ensure he was in court to plea not guilty on October 6, 2016, his initial appearance. (R8-2). Later, he was told all he had to do was send a letter pleading not guilty to the charges before October 6, 2016, at which point he would receive a new court date. (R8-3). By the time an attorney disavowed him of that misinformation, it was too late.

Accordingly, Ortiz retained counsel who, on January 26, 2017, filed a "Motion to Perfect Statutory Right for Refusal Hearing." (R7). On March 3, 2017, the State filed a brief opposing the request. (R9). The State argued that due to issues of competency, Ortiz was not even entitled to a hearing on his motion because the court had lost competency to proceed. (*Id.*). A hearing was scheduled on the motion for April 10, 2017.

On that date, Ortiz appeared in person and was ready for an evidentiary hearing aimed at determining whether he was entitled to a refusal hearing under all of the foregoing circumstances. (R16). At the April 10, 2017, hearing, however, the circuit court ruled that it did not have competency to even allow Ortiz an evidentiary hearing on his motion. (R16). Consequently, no evidence was taken and on April 12, 2017, an order convicting Ortiz of the refusal was entered. (R11: R12). This appeal followed. (R15).

ARGUMENT

I. ORTIZ WAS MINIMALLY ENTITLED TO AN EVIDENTIARY HEARING TO DETERMINE WHETHER LANGUAGE BARRIERS AND MISINFORMATION FROM THE ISSUING OFFICER CONSPIRED TO RENDER INSUFFICIENT THE NOTICE HE WAS GIVEN REGARDING HIS RIGHTS TO CONTEST THE REFUSAL CHARGE.

The provision requiring those accused of violating the Implied Consent Law to be informed of the resultant charge is found in section 343.305(9)(a), Stats.:

> If a person refuses to take a test under sub. (3)(a), the law enforcement officer shall immediately prepare a notice of intent to revoke, by court order under sub. (10), the person's operating privilege. . . . **The officer shall issue a copy of the notice of intent to revoke the privilege to the person** and submit or mail a copy to the circuit court for the county in which the arrest under sub. (3)(a) . . . .

(Emphasis added). Section 343.305(9) goes on to require the accused be provided with a significant amount of additional information pertaining to the alleged Implied Consent violation. Notably, this information includes notice that to avoid a revocation of operating privileges by default, the accused must, within ten days, submit a written request for a refusal hearing.

Law enforcement complies with these statutory requirements by issuing the NIROP to those charged with a refusal. The information contained within the NIROP covers substantial ground. True to the statutory mandate, it contains a full explication of the factual basis for the charge. Section 343.305(9)(a)1., 2., and 3., Stats. It informs the accused of the limited issues that can be litigated during a refusal hearing, section 343.305(9)(a)5. a., b., and c., thereby allowing the accused to decide whether there is good reason to request a refusal hearing. It advises the accused that if it is determined the refusal was unreasonable, there will be a mandatory alcohol assessment and driver safety plan. Section 343.305(9)(a)6. Most importantly, it informs the accused that to avoid a default judgment mandating these serious consequences, a hearing must be requested in writing within ten days of receipt of the NIROP:

> [T]he person may request a hearing on the revocation within 10 days by mailing or delivering a written request to the court whose address is specified in the notice. If no request for a hearing is received within the 10-day period, the revocation period commences 30 days after the notice is issued.

Section 343.305(9)(a)4.

It is undisputed that Ortiz was given a copy of the NIROP applicable to his refusal case, containing all of this important and applicable information. It is also undisputed the NIROP given Ortiz was in English and that he is illiterate in that language. Finally, it is also undisputed, at least at this stage of

the proceedings, that law enforcement advised Ortiz he need only appear at the initial appearance and plead Not Guilty to contest the charges that had been issued against him. No distinction was made between the OWI and the Refusal charges.

Here, the circuit court accepted the State's argument, based on *Village of Elm Grove v. Brefka,* 2013 WI 54, 348 Wis. 2d. 282, 821 N.W.2d. 121, that it had lost competency to even allow Ortiz a hearing on the circumstances surrounding the issuance of the NIROP:

> The court looks to the guidance of [section 343.305(9)(a)4., Stats.] That statute says the person may request a hearing on the revocation within ten days by mailing or delivering a written request to the Court whose address is specified in the notice. If not request for a hearing is received within the ten-day period, the revocation period commences 30 days after the notice is issued. In this particular case Mr. Ortiz Martinez was Ortiz arrested on September 6, 2016. . . . He did not submit a written request for a refusal hearing until September 30, 2016 although today the defense makes arguments which are legitimate . . . about his ability to use English and to communicate and understand the gravity of what's happening. This Court is without jurisdiction to address those arguments because he did not comply with the statutory requirement that a hearing on the revocation be requested within ten days by

> mailing or delivering that written request to the Court.

(R16-7-8).[4]

As a general matter, the question of whether a circuit court loses competency to act is one of law, and therefore, one this Court will review without deference to determinations of lower courts. *In Interest of Kywanda F.,* 200 Wis. 2d 26, 31, 546 N.W.2d 440 (1996). Like the court below in this case, *Brefka* also addressed the "competency" question in the context of a refusal charge under section 343.305, Stats. In the case of *Brefka,* however, the context for the defendant's effort to revive his right to a refusal hearing, despite his tardy request, was his own excusable neglect. Against that backdrop, *Brefka* ruled that:

> We conclude that the circuit court is without competency to hear Brefka's request to extend the ten-day time limit set forth in Wis. Stat. § 343.305(9)(a)4. and (10)(a). The ten-day time limit is a mandatory requirement that may not be extended due to excusable neglect. Because the

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[4]The court believed its decision was compelled, in part, by the fact the written request Ortiz eventually filed was *in English,* from which it surmised Ortiz "had some concept, some understanding," of his situation. (R16-9). Ortiz's affidavit, however, revealed the process by which his brother had reduced to writing, in broken English, the words Ortiz had spoken to him in Spanish, (R8), though Ortiz was not permitted to remind the court of these facts to avoid that negative inference. (R16-10).

> mandatory ten-day time limit is central to the statutory scheme, the circuit court lacked competency to hear Brefka's request to extend it.

Id. at ¶4. That "excusable neglect" had been the basis for the request was part and parcel of the *Brefka* decision. There are 24 discreet references to the phrase "excusable neglect" in the *Brefka* opinion, including one that defines it. *Id.* at fn 12. Indeed, the Wisconsin supreme court subsequently confirmed that "*Brefka* [had] considered **the narrow question** of whether a defendant could extend the ten-day time limit to request a refusal hearing **due to excusable neglect** . . . . " *In re Refusal of Bentdahl*, 2013 WI 106, ¶34, 351 Wis. 2d 739, 840 N.W.2d 704 (emphasis added).

The basis for the request in this case was and is materially different. Ortiz was not asking the circuit court to excuse his neglect. On the contrary, Ortiz was asking the court to examine, *inter alia,* how he had been misled by the officer's gratuitous remarks about only needing, to contest the charges against him, to appear on the assigned date and plead not guilty. Ortiz sought a determination of the reasonableness of doing nothing more than giving him an English language NIROP, and whether the officer knew, or should have known, Ortiz could not read English. *Brefka* did not rule that a circuit court may not give a defendant an evidentiary hearing to address such issues. On the contrary, it noted noncompliance with a mandatory statute does not always translate into a loss of competency. *Id.* at ¶17, *citing State v. Bollig*, 222 Wis. 2d 558, 566, 587 N.W.2d 908 (Ct. App. 1998), and *Kywanda F.*, 200 Wis. 2d 26, 33, 546 N.W.2d 440 (1996)(court does not lose competency to act by

failing to inform juvenile alleged delinquent of statutory right to judicial substitution).

The circuit court in this case should have allowed Ortiz a hearing to determine whether, under the peculiar circumstances of this case, the officer reasonably complied with the dictates of the implied consent law. It is true the officer issued the NIROP to Ortiz, and that this is what the statute commands him to do. Nevertheless, it is also true that in *State v. Piddington*, 2001 WI 24, 241 Wis. 2d 754, 623 N.W.2d 528, the Wisconsin supreme court recognized that mere perfunctory compliance (there, reading the Informing the Accused Form to a deaf person) does not necessarily constitute reasonable compliance. Instead, the implied consent law mandates, minimally, "substantial compliance." *Piddington* at ¶32. Substantial compliance will suffice if it is "actual compliance in respect to the substance essential to every reasonable objective of the statute." *Id.*, *citing State v. Muente*, 159 Wis. 2d 279, 281, 464 N.W.2d 230. Without an evidentiary hearing, the substantial compliance question in this case could not reasonably be answered.

Piddington is instructive because, like this case, the court was confronted with the issue of conveying information, under the Implied Consent Law (hereinafter, "ICL") to an individual who could not reasonably have been expected to understand the information using the normal manner of providing it. *Piddington,* which addressed *reading* the Informing the Accused Form (hereinafter, "ITAF") to a functionally deaf individual, concluded the reasonable objective of section 343.305(4) is to inform the accused of the implied consent warnings. *Id.* In

addressing whether the method used in that case reasonably conveyed the information, *Piddington* deemed *Miranda* cases to be instructive, albeit different in that they involve testimonial utterances, whereas there are no rights an OWI suspect can or must knowingly and intelligently waive before chemical testing. Here, by contrast, failing to reasonably convey the NIROP information deprives the suspect of a knowing and intelligent waiver of his right to contest the charge. *Piddington* at ¶20.

Nevertheless, *Piddington did* draw some legal standards from *Miranda* cases:

> As in *Miranda*-type cases, the State has the burden of proof of showing, by a preponderance of the evidence, that the methods used would reasonably convey the implied consent warnings. Also, in the implied consent setting, as well as in the Miranda setting, the onus is upon the law enforcement officer to reasonably convey the implied consent warnings.

Piddington at ¶22, *citing State v. Santiago,* 206 Wis. 2d 3, 19, 556 N.W.2d 687 (1996). Failing to allow a defendant an evidentiary hearing for an issue where the onus would be on law enforcement, and the burden of proof on the State, is particularly concerning.

Piddington's examination of the issue was conducted with an eye toward the ICL's very purpose:

> The purpose of Wis. Stat. § 343.305(4) to inform an accused driver, is fulfilled, rather than undermined, if the law enforcement officer must use reasonable methods that reasonably convey the implied consent warnings, in consideration of circumstances facing him or her. This interpretation ensures that an accused driver is properly advised under the implied consent law, without raising the specter of subjective confusion. Accordingly, we find that the legislature intended that law enforcement officers inform accused drivers of the implied consent warnings, and that duty is met by using those methods which are reasonable and reasonably convey those warnings under the circumstances at the time of the arrest.

Piddington at ¶23.

A lengthy review of legislative history confirmed the existence of such a duty. *Id.* at ¶¶24-27. *Piddington* observed that:

> Just as the text should facilitate the driver's receipt of the warnings, **the methods employed to deliver those warnings should not unreasonably obstruct their comprehension.**

Id. at ¶27. (Emphasis added). That observation resonates in this case where the method employed to deliver the NIROP - assurance that just appearing in court would be sufficient to

contest the refusal charge - unreasonably obstructed how Ortiz would comprehend, or attempt to comprehend, the NIROP's information.

Piddington then went on to conduct the individualized examination of facts and circumstances that Ortiz should have been given in this case:

> Despite his ability to communicate with Piddington, the trooper made reasonable efforts to obtain a sign-language interpreter. He contacted his dispatch, who informed him that no one was available. But an officer who was conversational in sign language was located at the point in time when it was most helpful; namely, to convey the implied consent warnings. The Madison police officer met the trooper and Piddington at the hospital, and was informed by Piddington that he could speech-read and read, and had graduated from high school. The trooper had attempted to read the warnings using an Informing the Accused form until Piddington told him that he could not follow his lips by speech-reading. The Madison police officer then read the warnings to Piddington without objection. Piddington himself read them, and without asking for clarification or explanation, initialed each paragraph, as instructed, in order to show his understanding. . . . As the circuit court determined, the trooper performed a commendable job with his various

> attempts at accommodating and communicating with Piddington.

Id. at ¶¶31-32. It was at this juncture that *Piddington* held, as noted above, that the ICL requires only substantial compliance, which suffices provided it is actual compliance with respect to the substance essential to every reasonable objective of the statute, which again, is to adequately inform the accused.

This objective, and the standard to which it gives rise, should be no less applicable where the NIROP, rather than the ITAF, is in play. There are compelling parallels. *Piddington* addresses the informational requirements under section 343.305(4), Stats., which informs the accused of the circumstances surrounding the decision to submit to chemical testing. This case addresses the informational requirements under a closely related section - 343.305(9) - which informs the accused of the circumstances surrounding the decision to contest the refusal charge. Both sections advise that the consequence of a refusal is a revocation. Only section 343.305(9), however, advises what defenses are available and how to preserve the right to pursue them.[5]

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[5]In deciding this case, this Court should be vigilant to what appears to be an emerging double standard. When interpreting a statute pertaining to the revocation of a defendant's operating privileges, *Brefka* rightly viewed the statute as mandatory. and thus adhered to a strict construction of the mandate. When interpreting a statute pertaining to the defendant's right to receive information, however, *Piddington* found "substantial compliance," generally not available where a statute is mandatory, to be sufficient. *Id.* Since the

Under a reasonable reading of *Brefka* and *Piddington*, an evidentiary hearing should have been conducted to determine whether the officer used "those methods which are reasonable and reasonably convey [the information] under the circumstances at the time of [the defendant's release]." *Id.* at ¶23. Only with an evidentiary hearing could the court determine whether the information in the NIROP was reasonably conveyed to Ortiz, under the peculiar circumstances attendant to his release from custody, which when the document is normally delivered. One relevant factor that comes into play in this case is the absence of any exigency surrounding the provision of the NIROP, which makes it different from the ITAF:

> That a law enforcement officer must use reasonable methods to convey the implied consent warnings does not mean the officer must take extraordinary, or even impracticable measures to convey the implied consent warnings.

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idea of "substantial compliance" originated in *Midwest Mut. Ins. Co. v. Nicolazzi*, 138 Wis. 2d 192, 200, 405 N.W.2d 732 (Ct. App. 1987), it should be noted that under *Nicolazzi*'s reasoning, the operative provisions of section 343.305 would be mandatory, rather than directory. The provisions germane to this appeal, in particular, are punitive, and belong to a private individual whose "own rights depend upon his own compliance with statutory directions, so that there is no one to blame but himself for the loss of those rights by a failure to comply." *Id.* at 199. *Nicolazzi also* reasoned that losing the "opportunity to defend," precisely what is at stake in this case, is punitive and thus favors viewing the statute as mandatory, requiring strict compliance.

> **Reasonableness under the circumstances also requires consideration of the fact that alcohol dissipates from the blood over time, particularly after the subject has stopped drinking.**

Piddington at 28 (emphasis added), *citing, inter alia, State v. Bohling*, 173 Wis. 2d 529, 533, 494 N.W.2d 399 (1993). No clock is ticking when the suspect is to be reasonably informed as to the charge he is facing and how to contest it.[6]

Nor is the ubiquitous intent of the ICL - " to facilitate the gathering of evidence against drunk drivers in order to remove them from the state's highway," *State v. Zielke*, 137 Wis. 2d 39, 46, 403 N.W.2d 427 (1987) - fairly promoted by the inflexible competency bar erected in this case, as was more fairly the case in *Piddington*:

> The State cannot be expected to wait indefinitely to obtain an interpreter and risk losing evidence of intoxication. Such would defeat, rather than advance [the intent of the implied consent law].

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[6]*Piddington*'s reliance on *Bohling* is noteworthy because *Bohling* was abrogated by *Missouri v. McNeely,* 569 U.S. 141 (2013), and precisely because of *Bohling*'s erroneous belief that a blanket rule (read "competency") could be used to deprive a suspect of an individualized determination of her rights under the totality of the circumstances pertaining to her case.

Piddington at 28. Given the relative infrequency of the circumstances *sub judice,* application of that public policy here would go too far, by shamelessly seeking default judgments precisely in those few cases where doing so would be fundamentally unfair.

Finally, because this case presents language issues, it should be noted this Court has examined the effect of *Piddington* on OWI suspects who neither understand nor read the English language. In *State v. Begicevic*, 2004 WI App 57, 270 Wis. 2d 675, 678 N.W.2d 293, the defendant, arrested for OWI, was of Bosnian heritage and, while fluent in Croatian and conversive in German, had very little understanding of the English language. Nevertheless, the arresting officer made no efforts to locate an interpreter, but instead, merely read the ITAF in English to the defendant.

Begicevic concluded this effort was insufficient, particularly since two hours of the three-hour window for taking a chemical test under section 885.235, Stats., remained at the time the form was read. *Begicevic* held that accordingly, the test should be stripped of its automatic admissibility stating:

> The breath test was administered within one hour of Begicevic's arrest; the officer still had two hours in which an effort could have been made to locate an interpreter. *See State v. Bohling,* 173 Wis.2d 529, 533, 494 N.W.2d 399 (1993); *see also* Wis. Stat. §885.235(1g) (blood test result is automatically admissible if blood is taken within three hours of the stop). Under the circumstances,

> there was not an immediate concern that the evidentiary value of a breath test would be compromised by waiting up to two hours while an effort was made to contact an interpreter.

Begicevic, 2004 WI App at ¶¶23 and 28, *citing Piddington,* 241 Wis .2d 754, ¶34. Once again, no such exigency existed here, though that would be just one of several factors at a hearing focused on the objective conduct of the officer, given the totality of the circumstances confronting her, rather than the comprehension of the accused driver. *Piddington* at ¶21.

The Wisconsin supreme court has not foreclosed the type of inquiry Ortiz sought in this case. If anything, it has foreseen and recognized its legitimacy, at least as an expected inquiry. In *Bentdahl*, which addressed the court's competency to reopen and dismiss a refusal conviction, the supreme court stated:

> We do recognize, however, that factual circumstances distinct from those at issue today may arise, which make a request for a refusal hearing within the ten-day time limit or entry of a plea of guilty impossible. We do not decide what the discretionary authority of the circuit court would be under such circumstances.

Bentdahl at fn 10.

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, Ortiz respectfully requests this Court vacate the refusal conviction and revocation, and remand to the circuit court with directions that it conduct an evidentiary hearing to determine whether Ortiz should be able to perfect his right to a refusal hearing.

Dated this 11th day of September, 2017.

/s/ Rex Anderegg
REX R. ANDEREGG
Attorney for the Defendant-Appellant

CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, minimum 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 4,956 words.

Dated this 11th day of September, 2017.

/s/ Rex Anderegg
REX R. ANDEREGG

CERTIFICATION OF APPENDIX

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 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; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

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

Dated this 11th day of September, 2017.

/s/ Rex Anderegg
REX R. ANDEREGG

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that I have submitted an electronic copy of the brief-in-chief and appendix, if available electronically, in *State of Wisconsin v. Hector Ortiz Martinez,* Appeal No. 2017 AP 000668, which complies with the requirements of s. 809.19 (12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 11th day of September, 2017.

/s/ Rex Anderegg
Rex Anderegg