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DISTRICT I

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Appeal No. 2017 AP 000668

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**In the Matter of the Refusal of Hector Ortiz-Martinez:**

**STATE OF WISCONSIN,**

Plaintiff-Respondent,

v.

**HECTOR MIGUEL ORTIZ MARTINEZ,**

Defendant- Appellant.

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**REPLY BRIEF OF DEFENDANT-APPELLANT**

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**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**

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Respectfully submitted:

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## Overview

In his brief-in-chief, Ortiz correctly asserted that it is undisputed, *inter alia*, that he is illiterate in English. The State now accuses Ortiz of making this, and "a variety of factual assertions, that are not supported by the record . . . ." (Response Brief, p. 2, fn 2). With all due respect, there is nothing in the record to dispute these facts. On the contrary, because the State blocked Ortiz from an evidentiary hearing to develop the underlying facts, his affidavit remains as the only source of facts for deciding the issue on appeal. Accordingly, these facts should be taken as true for purposes of deciding the legal issue before this Court. *Cf. Morgan v. Pennsylvania General Insurance Co.*, 87 Wis.2d 723, 731, 275 N.W.2d 660 (1979).

## ARGUMENT

### **I. AN UNMINDFUL APPLICATION OF *VILLAGE OF ELM GROVE V. BREFKA*, 2013 WI 54, 348 WIS. 2D. 282, 821 N.W.2D. 121, DOES NOT RESOLVE THIS CASE.**

Completely ignoring Ortiz's detailed analysis of why the blind application of *Village of Elm Grove v. Brefka*, 2013 WI 54, 348 Wis. 2d. 282, 821 N.W.2d. 121, does not resolve the issue on appeal, the State simply cites *Brefka* and argues it is dispositive. According to the State, this Court need only superficially juxtapose the date on which the Notice of Intent to Revoke Operating Privileges (NIROP) was issued (September 6, 2016) and the date on which Ortiz requested a refusal hearing (September 30, 2016), and because more than ten days separate

the two, conclude the circuit court had no competency to even take evidence on the adequacy of the notice, given all of the circumstances. (Response Brief, pp. 4-6).

Consistent with this approach, the State simply ignores all the facts causing Ortiz's delay in requesting a refusal hearing, including how law enforcement contributed to it:

There is no issue related to notice in the present case. Ortiz Martinez was served with a valid Notice of Intent to Revoke Operating Privilege. He was provided notice of his opportunity to contest the refusal by requesting a refusal hearing within ten days. However, Ortiz Martinez submitted his written request for a hearing after the time limit had expired. **The very fact that Ortiz Martinez filed a written request in English for a refusal hearing along with all of his notice paperwork demonstrates that he was provided notice and understood the requirements.** He simply failed to comply with the ten-day time limit. For that reason, the circuit court was without competency to hear his request for a refusal hearing.

(Response Brief, pp. 4-5)(emphasis added; citations omitted). Ortiz has already explicated how he managed to file a written request for a refusal hearing in broken English. Rather than showing he "understood the requirements," that document only tends to corroborate his position that he did not, and that he was

disarmed by law enforcement into believing he need only appear in court on October 6, 2016, to contest the refusal charge.<sup>1</sup>

Tellingly, the State does not address that in *Brefka*, the basis for the tardy request for a refusal hearing was the defendant's own "excusable neglect," while the basis here involves misleading statements by law enforcement. It ignores the fact that "excusable neglect" was inextricably woven into the very fabric of the *Brefka* decision. And while it cites *In re Refusal of Bentdahl*, 2013 WI 106, 351 Wis. 2d 739, 840 N.W.2d 704, it refuses to address that *Bentdahl* acknowledged 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.**" *Bentdahl*, at ¶34. (Emphasis added).

Nor is the State willing to engage in a discussion of case law that is instructive on the issue before the Court. In a single paragraph, it cavalierly dismisses the idea that either *State v. Piddington*, 2001 WI 24, 241 Wis. 2d 754, 623 N.W.2d 528 or *State v. Begicevic*, 2004 WI App 57, 270 Wis. 2d 675, 678 N.W.2d 293, are worth consideration by this Court. (Response Brief, p. 5). As Ortiz explained in his brief-in-chief, however, there are significant parallels between the issue examined by *Piddington* and *Begicevic*, and the issue in this case. Both involve the application of a subsection of 343.305, Stats. Both involve statutory mandates for the provision of information to

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<sup>1</sup>It is interesting, though most likely sheer coincidence, that Ortiz's first court date was exactly 30 days after he was issued the NIROP.

an OWI accused. Both advise of the consequences of a refusal. It is section 343.305(9), however, which uniquely advises what defenses are available and how to secure the right to pursue them.

In a particularly peculiar passage, the State cites *State v. McMaster*, 206 Wis. 2d 30, 49, 556 N.W.2d 673 (1996), and argues the refusal notice process is "functionally identical" to the "administrative suspension" process under sections 343.305(7) and (8), Stats. (Response Brief, p. 5). Ortiz fails to see how this argument is relevant to the issue before the Court. *McMaster* did not address any issue germane to this appeal, but instead, addressed issues pertaining to double jeopardy. Moreover, an administrative suspension is much less severe than a refusal revocation. Unlike a refusal revocation, a driver so affected is immediately eligible for an occupational license and does not face the mandatory installation of a Ignition Interlock Device.

Finally, the State seems to imply that by exercising his right to challenge the factual and legal issues in this case, Ortiz will somehow escape the requisite length of revocation he supposedly should endure. (Response Brief, pp. 5-6). To this end, the State argues Ortiz's revocation should have commenced on October 6, 2016, and run one year from that date, but did not actually begin until April 10, 2017. It then goes on to suggest that "[a] person who fails to request a refusal hearing [i.e., Ortiz] will receive a lesser penalty than a person who makes a timely request." (Response Brief, p. 6).

This argument is without merit, and is based on a faulty characterization of the procedural history of this case, and a misunderstanding of how Ortiz's revocation, if ultimately deemed appropriate, would be implemented. Indeed, Ortiz did not file a motion to perfect his right to a refusal hearing until January 26, 2017. Consequently, that a revocation of his operating privileges did not commence on October 6, 2016, cannot be attributed to any action Ortiz took or did not take, but instead, is the product of the State's failure to request as much. Moreover, if a one year revocation is ultimately deemed to be appropriate in this case, Ortiz will serve every day of it. His appeal in this case will in no way shorten the length of the underlying revocation in this case if, after given the reasonable opportunity to contest it, it is affirmed.

#### **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 17th day of November, 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 1,188 words.

Dated this 17th day of November, 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 reply brief 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 17th day of November, 2017.

\_\_\_\_\_  
/s/ Rex Anderegg  
Rex Anderegg