ORIGINAL

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

JUAN ANTONIO OCHOA BARRAZA,
Petitioner/Appellant,

vs.

No. 34,245
Bernalillo County
District Court No. D-202-CV-2011-08965-LRA

STATE OF NEW MEXICO
TAXATION and REVENUE DEPARTMENT,
MOTOR VEHICLE DIVISION,
Respondent/Appellee.

Appeal from the District Court of the Second Judicial District
Bernalillo County
The Honorable Stan Whitaker, District Judge

RESPONDENT/APPELLEE'S ANSWER BRIEF

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REFERENCES TO THE RECORDING OF THE ADMINISTRATIVE HEARING

The administrative hearing before the Taxation and Revenue Department was electronically recorded. References to the CD will be to the hearing in minutes and seconds, CD __:__.

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Respondent/Appellee Taxation and Revenue Department, Motor Vehicle Division (MVD), respectfully submits its Answer Brief pursuant to Rule 12-210(B)(2) NMRA 2015. Petitioner/Appellant (Ochoa Barraza) mailed MVD a copy of his Brief in Chief on May 8, 2015. MVD's Answer Brief is timely filed.

REFERENCES TO THE RECORD

References to the record will be to the record proper, RP, and the Brief in Chief, BIC.

SUMMARY OF THE PROCEEDINGS

Ochoa Barraza filed a Notice of Appeal on September 6, 2011. **(RP 1-7)**. Ochoa Barraza appealed a decision rendered under the Implied Consent Act pursuant to NMSA 1978, § 66-8-112(H) (2003) and the provisions of Rule 1-074 NMRA 2011. Ochoa Barraza submitted his statement of issues on November 23, 2011. **(RP 42-49)**. MVD submitted its response on December 16, 2011 to which Ochoa Barraza filed a reply on December 27, 2011. **(RP 51-58, 59-62)**.

The district court dismissed Ochoa Barraza's appeal in an order filed on September 30, 2014. **(RP 68-70)**. The district court considered the matter in its original jurisdiction finding that Ochoa Barraza's due process claim was not one of the statutory grounds for an appeal from a hearing officer's decision rendered pursuant to the Implied Consent Act. The district court dismissed the case because it found that Ochoa Barraza's statement of issues and reply did not support

issuance of a writ of mandamus. Ochoa Barraza filed a Notice of Appeal to this Court on October 29, 2014 and he filed his docketing statement on December 4, 2014. The Court assigned the matter to the general calendar on January 22, 2015.

STATEMENT OF FACTS

Deputy Foster stopped Ochoa Barraza for failing to maintain his traffic lane, at one point causing another vehicle to move in order to avoid a possible collision. **(CD 02:00-03:22)**. Deputy Foster noticed that Ochoa Barraza had signs of intoxication. **(CD 03:48)**. Upon questioning from the deputy, Ochoa Barraza stated he was picking up a friend from downtown. **(CD 03:58)**. The deputy asked Ochoa Barraza if he had any alcohol to drink but could not recall Ochoa Barraza's response. **(CD 04:26-04:28)**. Deputy Foster requested a Spanish speaking officer. **(CD 04:00)**. Deputy Jareño arrived and started to translate what Deputy Foster was saying to Ochoa Barraza. **(CD 05:38-05:45)**. Deputy Foster testified that he believed Ochoa Barraza understood English and what was going on. Deputy Foster testified that during the field sobriety tests Ochoa Barraza would talk to him in English and that his responses made sense to what was going on and what he was being asked. **(CD 03:58-05:48, 09:45-09:51, 28:46).** For example, on the horizontal gaze nystagmus, Ochoa Barraza told Deputy Foster, in English, that he could not follow the stimulus because he needed his glasses. **(CD 06:25-06:40)**. Deputy Foster testified that during his interaction with Ochoa Barraza, Ochoa

Barraza stated that he graduated from the University of Texas at El Paso (UTEP). **(CD 14:30-14:39)**. Deputy Foster did not know if UTEP taught Spanish-only classes. **(CD 21:01-21:12)**.

Deputy Jareño also testified that Mr. Ochoa Barraza would speak in both English and Spanish. **(CD 28:34-28:56)**. When asked to take the breath test, Ochoa Barraza, in English asked questions about why he was required to take the breath test and if it was because of his performance on the field sobriety tests. **(CD 31:24-32:21)**. Ochoa Barraza would speak in English to Deputy Foster and would speak in Spanish to Deputy Jareño. **(CD 05:48, 09:45-09:51)**.

Deputy Foster testified that when he asked Mr. Ochoa Barraza to take the breath test, Ochoa Barraza refused by stating 'no.' The deputy was speaking in English. Deputy Foster then informed Ochoa Barraza, in English, that his driving privileges would be revoked for one year for his refusal. Ochoa Barraza responded in English to Deputy Foster and confirmed in English that he would lose his driving privileges for once year. Deputy Foster then asked Ochoa Barraza, with that in mind, would he then agreed to take the test. Ochoa Barraza again refused. **(CD 12:58-14:20)**.

Ochoa Barraza argued to the hearing officer that the proposed revocation action should be rescinded because although there was evidence he spoke English, the evidence indicated he was more comfortable talking and understanding

Spanish. Ochoa Barraza claimed that because Deputy Jareño was present, due process required that he be informed of his rights and obligations under the Implied Consent Act in Spanish. **(CD 36:12-38:48)**. He stated that UTEP has many Mexican students and has classes in Spanish, but he acknowledged there was no evidence of those facts in the record. **(CD 39:16-39:35)**. Ochoa Barraza argued that the testimony about repeating what he was told demonstrated that he did not understand. **(CD 39:58-40:33)**.

The hearing officer considered the testimony and evidence and found that it demonstrated Ochoa Barraza understood English. Ochoa Barraza stated the consequences of his refusal in English (that he would lose his driving privileges for a year) and had not simply responded to Officer Foster's inquiry of understanding with a simple yes or no. The hearing officer found Ochoa Barraza understood what Deputy Foster requested when the deputy asked him to take the breath test. Because she found that Ochoa Barraza understood English and the consequence of refusing the test, she rejected Ochoa Barraza's argument that due process required that the Implied Consent advisory be given to him in Spanish. The hearing officer found that the evidence supported a finding that Ochoa Barraza refused to take the breath test after being informed his license could be revoked and that he understood the request and the consequence of not taking the breath test. **(RP 17-18)**.

On appeal to the district court, Ochoa Barraza argued that the hearing officer's decision should be reversed because the evidence did not demonstrate that he was properly informed of his rights and obligations under the Implied Consent Act. **(RP 46)**. He claimed that due process required Deputy Foster to have the Implied Consent warnings given to him in Spanish. Because he was not informed in Spanish, Ochoa Barraza alleged that there is insufficient evidence to demonstrate that he actually knew the consequences of his refusal. **(RP 47-49)**. MVD argued that the law imposed no such requirement. The evidence before the hearing officer showed that Ochoa Barraza understood what was being asked and the consequence if he did not take the breath test. **(RP 52-53, 56)**. Both MVD and Ochoa Barraza asserted that the district court was acting in its appellate capacity and the parties argued the matter under the appellate standard of review and burden of proof in Rule 1-074 NMRA 2011. **(RP 43-44)**.

The district court reviewed the record and appellate pleadings filed by Ochoa Barraza and MVD. The district court found that Ochoa Barraza's claim of a due process violation did not fall within the statutory grounds for an appeal from the hearing officer's decision. **(RP 68)**. Relying upon the decision in *Maso v. Tax. and Rev. Dept., MVD*, 2004-NMCA-025, 135 N.M. 152, *affirmed on other grounds by* 2004-NMSC-028, 136 N.M. 161, it construed Ochoa Barraza's appeal as a petition for writ of mandamus and reviewed the matter in its original

jurisdiction. The district court found that the evidence demonstrated Ochoa Barraza was able to understand and communicate in English. The facts included that Ochoa Barraza understand Deputy Foster's request to take the breath test and the consequence of his refusal to take the test. Under those facts, the district court held that a writ should not issue because Ochoa Barraza did not provide any authority to show there was a clear legal duty that the deputies inform of the Implied Consent advisory in Spanish. **(RP 69-70)**.

STANDARD OF REVIEW

This Court reviews the hearing officer's decision under the same standard as the district court. *See Romero v. Rio Arriba County Commissioners*, 2007-NMCA-004, ¶ 12, 140 N.M. 848, 851-852 ("In reviewing a decision of an administrative agency, we apply the same statutorily-defined standard of review applied by the district court. *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n,* 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806.").

NMSA 1978, § 66-8-112(H) (2003) states that "[o]n review, it is for the court to determine only whether reasonable grounds exist for revocation or denial of the person's license or privilege to drive based on the record of the administrative proceeding." The Court conducts a whole record review to determine if there is substantial evidence for the hearing officer's factual findings. In reviewing the hearing officer's factual findings, the court must not reweigh the

evidence and substitute its opinion for that of the hearing officer. *Dept. of Transp., MVD v. Romero*, 1987-NMCA-151, ¶ 16, 106 N.M. 657, 660. The court reviews the factual findings to see if there is substantial evidence to support the hearing officer's findings. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Sunwest Bank v. Colucci*, 1994-NMSC-027, ¶ 8, 117 N.M. 373, 375.

When interpreting the pertinent statutory provisions of the Implied Consent Act, the Court conducts a *de novo* review. *Schuster v. State, Tax. and Rev. Dep't., MVD*, 2012-NMSC-025, ¶ 9, 283 P.3d 288, 292.

ARGUMENT

Ochoa Barraza argues that both the district court's decision and the hearing officer's decision should be reversed. He claims that the district court erred in exercising its original jurisdiction, rather than its appellate jurisdiction, and in doing so, it relied upon arguments and facts not contained in the record below which require reversal of its decision. Ochoa Barraza then alleges that MVD failed to show that he was appropriately told of the consequences of his refusal. Ochoa Barraza's arguments fail. While the district court incorrectly reviewed the matter in its original capacity, it based its decision upon the record and pleadings and did not rely upon any facts outside the record or arguments that were not made to it. There is substantial evidence in the record to support the hearing officer's

finding that Ochoa Barraza understood the consequence of refusing the breath test and that he still refused to take the breath test.

I. THE ARGUMENTS RAISED BY OCHOA BARRAZA BEFORE THE DISTRICT COURT WERE MATTERS INVOLVING THE DISTRICT COURT'S APPELLATE JURSIDICTION.

The district court found that Ochoa Barraza's due process argument required it to exercise its original jurisdiction. It relied upon the *Maso* decision. **(RP 68-69)**. The district court misconstrued the holding in *Maso*. The hearing officer had the statutory authority to consider whether Ochoa Barraza was able to understand Deputy Foster's request to take the breath test. In making its ruling, the district court reviewed and relied only upon the record of the administrative hearing and the parties' appellate pleadings. Ochoa Barraza fails to show that the district court's exercise of original jurisdiction created reversible error.

The issue in *Maso* was whether MVD lawfully denied a request for an Implied Consent hearing. Maso claimed his due process rights were violated when MVD denied his untimely request for an Implied Consent hearing pursuant to NMSA 1978, § 66-8-112(B) (2003). This Court took the opportunity to "clarify the correct approach for litigating due process claims that are beyond the scope of Motor Vehicles Division (MVD) license revocation hearings." *Maso* ¶ 2, 135 N.M. at 154. The Court held that in a license revocation proceeding, MVD can

only consider those issues enumerated under NMSA, 1978 § 66-8-112(E) (2003). *Id.* ¶ 9, 135 N.M. at 155. The hearing officer considers those issues and then is required to make findings on each issue. NMSA 1978, § 66-8-112(F) (2003).

The Court upheld the district court's decision finding that even though the district court indicated it was exercising its appellate capacity, it thoroughly considered the parties arguments. *Maso* ¶ 15, 135 N.M. at 156. In making its ruling, this Court stated that "it makes no sense to view the district court's opinion and order as the result of an on-record appeal when there was no proceeding below and therefore no record from which to appeal..." *Id.*

Unlike *Maso*, this case involves a fully developed record from the proceeding below. Also, unlike *Maso*, Ochoa Barraza raised an issue that is one specifically listed in the statute. NMSA 1978, § 66-8-112(E)(4)(b) (2003) provides one of the issues before the hearing officer is whether "the law enforcement officer advised that the failure to submit to a test could result in revocation of the person's privilege to drive." The hearing officer is required to make a finding on whether "the person refused to submit to the test upon request of the law enforcement officer after the law enforcement officer advised him that his failure to submit to the test could result in the revocation of his privilege to drive." NMSA 1978, § 66-8-112(F)(4)(b) (2003).

The hearing officer had the authority to consider Ochoa Barraza's due process argument about whether he was properly advised of the consequence of refusing the breath test and then refused to take the test. The hearing officer's authority to consider whether Ochoa Barraza was properly informed and then refused is similar to the issue of the hearing officer's authority to consider whether a person was properly arrested. In *Schuster* ¶¶ 18-19, 283 P.3d at 294, our Supreme Court held that the term "arrest" in Section 66-8-1112(F)(2) implicitly meant that the person was constitutionally arrested and that the hearing officer had authority to consider arguments concerning the constitutionality of the stop and arrest.

Like the hearing officer in *Schuster*, the hearing officer in Ochoa Barraza's case had the authority to consider his constitutional argument on whether he was properly advised that his refusal to take the breath test could result in the revocation of his driving privileges. Refusing to submit to chemical testing under the Implied Consent Act is more than a person saying "no" when the officer requests a chemical test. For instance, a person can refuse by actions, not words. *See State v. Vaughn*, 2005-NMCA-076, ¶ 40, 137 N.M. 674, 686 (holding that defendant's action in only providing one breath sample was a refusal to submit to the breath test); *Fugere v. State, Tax and Rev Dept., MVD*, 1995-NMCA-040, ¶ 20,

120 N.M. 29, 35 (driver's conditional consent to take breath test on machine designated by driver held to be a refusal to submit to the breath test).

The hearing officer exercised her authority to consider and rule upon the issues under the Implied Consent Act which included Ochoa Barraza's argument that he was not properly advised – did not understand – the consequence of withdrawing his consent to take the breath test. The hearing officer did not act outside the scope of her authority and, consequently, any district court review of her decision would be in its appellate capacity.

Ochoa Barraza attempts to argue that the district court's exercise of its original jurisdiction then resulted in the court relying upon facts outside the record and arguments that were not made below. **(BIC 8)**. At the district court level, Ochoa Barraza argued that the deputies were required to read the Implied Consent advisory to him in Spanish because his native language was Spanish. **(RP 48-49)**. What was notably missing from Ochoa Barraza's arguments to the hearing officer and to the district court was any claim that he did not understand that his refusal to take the breath test would result in the revocation of his driving privileges. Ochoa Barraza merely argued that the evidence presented to the hearing officer could be interpreted to show that he did not understand what he was being told. **(CD 39:58-40:34)**.

Unlike the district court in *Maso*, the district court in this case had a record to review and it considered that record, the arguments made by Ochoa Barraza and MVD and it reviewed both parties' appellate pleadings. **(RP 69)**. It did not rely upon facts or arguments that were not raised below. The hearing officer rejected Ochoa Barraza's argument that due process required he be told in Spanish of his rights and obligations under the Implied Consent Act. **(RP 18)**. The hearing officer made factual findings, including that Ochoa Barraza understood English, understood Deputy Foster's request and the consequence of not taking the breath test. In making her findings and reaching her decision, the hearing officer specifically found that there was no due process violation because the evidence demonstrated Ochoa Barraza understood he was being asked to take a breath test and if he refused his license would be revoked. **(RP 17-18)**. Put another way, Ochoa Barraza failed to show any prejudice, such as the inability to understand what was being told, by not having the information given to him in Spanish.

Ochoa Barraza fails to show any basis for reversing the district court's decision. The district court did not consider any new facts or arguments. It relied strictly upon the record and the pleadings submitted to it. *See In re Estate of Heeter,* 1992-NMCA-032, ¶ 23, 113 N.M. 691, 695 ("On appeal, error will not be corrected if it will not change the result."); *Westland Dev. Co. v. Romero*, 1994-NMCA-021, 117 N.M. 292, 293 ("An appellate court will affirm a lower court's

ruling if right for any reason."). Ochoa Barraza did not show below, and he does not explain to this court, how there is a due process or equal protection violation when the evidence demonstrates that he sufficiently understood English and knew what Deputy Foster was requesting and the consequence of not taking the breath test as requested. Even if this Court finds that the district court committed error when exercising its original jurisdiction, the correct remedy would be to remand the matter, not reverse the district court's decision as requested by Ochoa Barraza.

II. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE HEARING OFFICER'S FINDING THAT OCHOA BARRAZA REFUSED TO SUBMIT TO A CHEMICAL TEST AFTER BEING INFORMED OF THE CONSEQUENCE OF HIS REFUSAL.

Ochoa Barraza argues that he was not properly read the Implied Consent advisory. First, he claims that he was not told about his right to an independent test. Then he claims that the advisory was insufficient because he was not read it in Spanish. In making his argument, he ignores the hearing officer's factual findings and asks this Court to reweigh the evidence. *See Hernandez v. Mead Foods, Inc.*, 1986-NMCA-020, ¶ 16, 104 N.M. 67, 71 (district court reviews administrative decision to see if substantial evidence supports the administrative decision, not if there is substantial evidence to support the opposite result).

Ochoa Barraza argues that he was not informed about his right to an independent test. **(BIC 9)**. He was so informed, but because he refused chemical

testing, this issue is irrelevant. NMSA 1978, § 66-8-109(B) (1993) only requires that a person who is tested be informed about the right to an independent test. Section 66-8-109(B) also states that the independent test is "in addition to any test performed at the direction of a law enforcement officer." Ochoa Barraza would have this Court ignore that phrase. The phrase demonstrates the legislature's intent that the purpose of the independent test is to provide a driver with his own test to challenge the one administered by the deputy. Ochoa Barraza's argument would cause this language to become surplusage. *See Vaughn v. State Tax. and Rev. Dep't*, 1982-NMCA-112, ¶ 15, 98 N.M. 362, 365-66 (statute to be construed so that no part is rendered superfluous). Had the legislature wanted Section 66-8-109(B) to apply to anyone so arrested, the statute would so state.

Ochoa Barraza then asserts that the Implied Consent advisory told to him by Deputy Foster was insufficient because it was not given to him in Spanish. In support of his argument, Ochoa Barraza relies upon series of cases dealing with the sufficiency of *Miranda* warnings. **(BIC 10-11)**. The cases relied upon by Ochoa Barraza are not on point. Those cases address the waiver of a constitutional right, not a person withdrawing consent. Those cases also fail to address what is required when the officer has determined that the person understands and speaks English and there is no evidence that the person lacked understanding.

There is no right – constitutional or statutory – to refuse to submit to chemical testing under the Implied Consent Act. New Mexico enacted the Implied Consent Act, NMSA 1978, §§ 66-8-105 through 112 (2005), in an effort to combat drunk driving. "Each of the 50 states have enacted Implied Consent Laws providing that one who operates a motor vehicle within the state is deemed to have given consent to a chemical test to determine alcoholic content of his breath, blood, or urine. One purpose is to deter driving while intoxicated. Another purpose is to aid in discovering and removing from the highways the intoxicated driver." *In re McCain*, 1973-NMSC-023, ¶ 9, 84 N.M. 657, 660. NMSA 1978, § 66-8-107(A) (2005) provides that all motorists have impliedly given their consent to provide a breath or blood test. Paragraph A states:

> Any person who operates a motor vehicle within this state shall be deemed to have given consent, subject to the provisions of the Implied Consent Act, to chemical tests of his breath or blood or both, approved by the scientific laboratory division of the department of health pursuant to the provisions of Section 24-1-22 NMSA 1978 as determined by a law enforcement officer, or for the purpose of determining the drug or alcohol content of his blood if arrested for any offense arising out of the acts alleged to have been committed while the person was driving a motor vehicle while under the influence of an intoxicating liquor or drug.

See also City of Rio Rancho v. Mazzei, 2010-NMCA-054, ¶ 24, 148 N.M. 553, 557 ("The provisions of New Mexico's Implied Consent Act essentially declare that

any person who operates a motor vehicle in New Mexico and is arrested under suspicion of DWI is deemed, by law, to have consented to chemical tests of his or her breath or blood, or both, to determine the drug or alcohol content.").

New Mexico declined to adopt the holding in *Schmerber v. California,* 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), allowing for the state to forcibly take a blood sample, and instead, provided that a person can withdraw his consent to take the blood or breath test. "The person may refuse to take the test, but such refusal is ground for revocation of the person's driver's license." *Bierner v. Tax. and Rev. Dept., MVD*, 1992-NMCA-036, ¶ 4, 113 N.M. 696, 696.

The consent a driver gives as a condition of driving in New Mexico is that he will submit to chemical testing. Because New Mexico does not wants its officers to force a person to submit to chemical testing, a person can decline testing – withdraw consent – but, in return, New Mexico will withdraw – revoke – the license or privilege to drive. Imposing a due process requirement to have an officer give the Implied Consent advisory in a motorist's native language when the evidence shows that the driver has a sufficient understanding of English to comprehend questions and instructions turns the legal basis of the Implied Consent Act on its head. This interpretation would make the withdrawal of consent a constitutionally protected right rather than an option provided under the statute. Currently a driver who elects this option loses the license or privilege to

drive in New Mexico. It is not the purpose of the Implied Consent Act to bestow greater privileges than those specifically articulated within the Act.

The Implied Consent Act is designed to obtain evidence and remove an intoxicated driver from the roadway. To persuade a motorist to obey the consent given, the withdrawal of the consent results in a revocation of the license. *See People v. Johnson*, 197 Ill.2d 478, 487, 758 N.E.2d 805, 811 ("warnings required by the implied-consent statute are not meant to enable an 'informed choice.' In fact, the warnings benefit the State, not the motorists. Specifically, warnings are an evidence-gathering tool for the State. The threat of an extended suspension for motorists who refuse the test motivates individuals to take the test so that the State may gain objective evidence of intoxication.").

Ochoa Barraza's reliance on a Wisconsin case dealing with its Implied Consent advisory is also not on point for the facts in his case. **(BIC 11)**. As Ochoa Barraza points out, in *Wisconsin v. Begicevic*, 2004 WI App 57, ¶¶ 9, 17-19, 678 N.W.2d 293, 297, 299-300, there was extensive evidence that the defendant did not understand English sufficiently to know what he was being asked during the initial investigation, during the field sobriety tests or that he understood the Informing the Accused form when he took the breath test. Those are not the facts in this case.

Ochoa Barraza's argument that he was not adequately advised of his refusal because he was not told in his native language is simply a hypothetical situation that encourages this Court to ignore or reweigh the hearing officer's factual findings. *See State ex rel. King v. B&B Inv. Group, Inc.*, 2014-NMSC-024, ¶ 12, 329 P.3d 658, 665 (reaffirming that substantial evidence review is whether facts support the decision reached, not whether opposite conclusion could be reached). Ochoa Barraza did not produce any evidence at the administrative hearing to demonstrate that he did not understand English, what Deputy Foster meant when he requested the breath test or that he did not understand the consequence of refusing that test.

The Implied Consent Act gives MVD the authority to revoke the license or privilege to drive when a person withdraws his consent to submit to chemical testing under NMSA 1978, § 66-8-111(B) (2005). Paragraph B states:

> The department, upon receipt of a statement signed under penalty of perjury from a law enforcement officer stating the officer's reasonable grounds to believe the arrested person had been driving a motor vehicle within this state while under the influence of intoxicating liquor or drug and that, upon his request, the person refused to submit to a chemical test after being advised that failure to submit could result in revocation of his privilege to drive, shall revoke the person's New Mexico driver's license or any nonresident operating privilege for a period of one year or until all conditions for license reinstatement are met, whichever is later.

In New Mexico, a refusal is a question of fact and the definition of what constitutes a refusal has been articulated in two different cases, *Dept. of Transp., MVD v. Romero*, 1987-NMCA-151, 106 N.M. 657 and *Fugere v. State, Tax and Rev Dept., MVD*, 1995-NMCA-040, 120 N.M. 29. The *Fugere* case adopted the definition of a refusal first enunciated in *Romero*.

> In *Romero*, we noted that we have never decided what constitutes refusal under the Act and observed that according to *Black's Law Dictionary* 1282 (6th ed. 1990), " '[r]efusal' " means " '[t]he declination of a request or demand, or the omission to comply with some requirement of law, as the result of a positive intention to disobey.' " *Romero*, 106 N.M. at 659, 748 P.2d at 32.

Fugere ¶ 15, 120 N.M. at 34. The Court held "[i]f the motorist refuses to take the test designated by the officer, then the director of the MVD can revoke the motorist's driver's license for one year. Section 66-8-111(B)." *Id.* ¶ 9, 120 N.M. at 33.

The facts adopted by the hearing officer demonstrated that Ochoa Barraza understood English. He understood and responded appropriately to questions from Deputy Foster throughout the entire incident. Specifically, the evidence presented to the hearing officer indicated Ochoa Barraza was asked to take a breath test and that when he refused he was informed his driving privileges could be revoked for his refusal to submit. Deputy Foster then asked Ochoa Barraza that now knowing of the consequence of his refusal, would he take the breath test. He refused by

stating "no." Ochoa Barraza did not provide any evidence that he did not understand.

The Implied Consent Act, *Fugere* and *Romero* all clearly state that MVD has authority to revoke Ochoa Barraza's driving privileges if he refused to take the test designated by Deputy Foster after being informed that his driving privileges could be revoked. The evidence presented to the hearing officer demonstrated that Ochoa Barraza understood what was being asked, was properly informed, understood the consequence of his refusal and still refused to submit to the breath test. The hearing officer's decision, finding that Ochoa Barraza understood English and refused after being informed of the consequence of his refusal, is in accord with the law and supported by substantial evidence in the record. *See Landavazo v. Sanchez*, 1990-NMSC-114, ¶ 7, 111 N.M. 137, 138 ("Evidence is substantial even if it barely tips the scales in favor of the party bearing the burden of proof.").

CONCLUSION AND RELIEF REQUESTED

The district court's exercise of its original jurisdiction is not reversible error. It only relied upon the record below and the parties' appellate pleadings. The district court correctly and lawfully concluded that there was no due process violation in this matter. The facts demonstrated that Ochoa Barraza understood English and under those facts, due process does not mandate that he be told of the Implied Consent warnings in his native language.

The facts and the law support the district court's decision. MVD respectfully requests that its decision be affirmed.

MVD respectfully requests that the Court affirm the hearing officer's decision. The decision of the hearing officer is supported by substantial evidence, it is in accord with the law, and is neither arbitrary nor capricious.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify I mailed a true and correct copy of the Answer Brief this 25th day of June, 2015, to:

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