IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

Case No. 34,245

JUAN ANTONIO OCHOA BARRAZA,

Plaintiff-Appellee,

vs.

STATE OF NEW MEXICO TAXATION AND REVENUE DEPARTMENT, MOTOR VEHICLE DIVISION,

Defendant-Appellant

Appeal
from the Second Judicial District, Division II,
County of Bernalillo State of New Mexico,
No. D-101-CV-20118965
(The Honorable Stan Whitaker)

BRIEF IN CHIEF OF DEFENDANT-APPELLANT AND REQUEST FOR ORAL ARGUMENT

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REQUEST FOR ORAL ARGUMENT

Under NMRA 12-213 and12-214, Defendant-Appellant requests this matter be heard at oral argument. This case would be well served by oral argument because this seems to be a matter of first impression. Language issues for people dealing with law enforcement has significant civil rights implications because of the potential for people who do not speak English, who often are members of minority groups, may be treated much differently than native English speakers. Oral argument presents a unique and well-suited opportunity to address the issue of making sound law and guidance on this issue.

RECORDATION OF PROCEEDINGS AND CITATION TO THE RECORD

When citing to the record proper, counsel for Defendant-Appellant uses the numbers assigned by the trial court clerk in preparing the record for transmission to the Court of Appeals, e.g, "[RP 15.]" Undersigned used a Macintosh computer to listen to the audio record. The record of the administrative hearing in this case consists of an audio CD made by the

administrative hearing officer during the hearing. When citing to the audio record of the proceedings, undersigned refers to the audio as "CD" and then the time index on the audio CD at which the point the portion of the record being cited to was made, e.g. "[CD at 4:40]." The time index appears to be the time elapsed from the beginning of he hearing. For example CD at 4:40 would be four minutes and forty seconds into the hearing.

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STATEMENT OF FACTS AND PROCEEDINGS

Defendant-Appellant (hereinafter "Appellant" or "Defendant") brings this appeal from the Second Judicial District Court's Order Disposing of Administrative Appeal. [RP 73-75]. This appeal is based on an improper giving of the Implied Consent Advisory and the consequentially erroneous revocation of Appellant's driving privileges. This case began on March 26, 2011. [RP at 021]. Around 3:00 a.m., Appellant Juan Antonio Ochoa Barraza was traveling westbound on Paseo Del Norte, also known as NM 423, a state highway in Bernalillo County, New Mexico. [RP 0016]. At that same time, Bernalillo Country Deputy Sheriff Jason Foster was traveling a short distance behind Appellant. *Id.* Deputy Foster noticed that Appellant's vehicle failed to maintain its lane of traffic. *Id.* Foster also noticed that Appellant's vehicle was traveling between 50 and 60 miles per hour in a posted 60 mile per hour zone. *Id.* After observing this, Foster pulled Appellant over. *Id.*

Deputy Foster also smelled an odor of alcohol on Appellant, and saw that he had bloodshot watery eyes. *Id.* Deputy Foster noticed that Appellant's native language is Spanish. [CD at 4:40]. Deputy Foster did not know if Appellant spoke fluent English. [CD at 5:39]. After speaking to Appellant, Deputy Foster called for a Spanish-speaking deputy to assist in the investigation. [CD at 4:40]. Deputy Foster wanted to administer field sobriety tests, and to that end decided to have the

instructions for the tests given in Spanish. [RP at 16]. Deputy Jareno arrived to translate for Foster. *Id.* After the tests, Deputy Foster arrested Appellant for DWI. [RP at 17].

During his investigation, Deputy Foster noticed that Appellant understood and spoke some English. [RP at 17]. Because of this, Deputy Foster elected to read the implied consent advisory to Appellant in English and not Spanish. *Id.* Deputy Foster never asked Deputy Jareno, who was present, to translate. [CD at 18:15]. Deputy Jareno is originally from Chile and is bilingual, able to speak Spanish and English. In Deputy Jareno's view, Appellant was a native Spanish speaker. [CD at 29:00]. Moreover, Deputy Jareno did not think that Appellant spoke English on the same level as someone native to the United States. [CD at 29:00]. Jareno was in a position to read the implied consent advisory in Spanish. [CD at 30:40]. From Jareno's perspective, when Foster read the implied consent advisory, he did so in English and asked Appellant if he understood. Appellant then partially repeated what Foster said. *Id.* After Appellant repeated certain parts of the implied consent advisory in English to Deputy Foster, Appellant said "no," apparently in response to Deputy Foster's reading of the implied consent advisory. Deputy Foster considered this a refusal to take a chemical test. [CD at 12:50, 14:00].

An MVD driver's license revocation hearing was timely held on June 21, 2011. [RP at 0016]. At that hearing, Appellant argued that the revocation of his

driver's license should be rescinded. [RP at 0018]. In her August 18, 2011 decision, hearing officer Jane Kircher overruled all Appellant's arguments and sustained the revocation of his driver's license for at least one year. *Id.* A Petition for Review of the Administrative Decision was filed with the Second Judicial District Court on September 6, 2011. [RP at 001].

District Court Review

On November 23, 2011, Appellant filed a Statement of Appellate Issues in district court. [RP at 0042]. Appellee filed a response on December 16, 2011. [RP at 0051]. Appellant filed a reply brief on December 27, 2011. [RP at 0059]. The district court concluded as a matter of law that the reading of the implied consent advisory was lawful. The district court upheld the revocation on September 30, 2014. [RP at 68]. This appeal follows.

QUESTION PRESENTED

The government must give legal warnings, such as a Miranda warning, in a form reasonably calculated to be linguistically comprehensible to whomever the warning is addressed. The legal warnings of the implied consent advisory must be read to a motorist prior to the lawful administration of a breath test, and a driver's license revocation cannot stand based on a defective reading. Was the Implied Consent Advisory administered properly to a primarily Spanish-speaking motorist, when the advisory was given entirely in English despite the presence of an able translator?

No. The deputies knew that there was an English language barrier for Appellant. Because it would have been no problem at all for the deputies to give Appellant the warning in Spanish, the deputies should have done so. Consequently,

the English-only administration of the warning was insufficient, and the subsequent license revocation cannot stand.

Since the parties did not argue the district court's *sua sponte* position in its final order, that issue is addressed below.

Preservation of the Issue

The issue was raised and preserved by Appellant's objections at the administrative hearing, as evidenced in the audio from that hearing. [RP at 0067]. Appellant's Statement of Issues and reply brief in the district court also preserved the issue. [RP at 0042-0049, 0059-0062]. Preservation is also reflected in the MVD's Response to Appellant's Statement of Issues. [RP at 0051-0058]. Finally, preservation is also demonstrated in the district court's ruling and written decision. [RP at 0073-0075].

JURISDICTION

According to the court below, it exercised its original jurisdiction, as opposed to its appellate jurisdiction. [RP at 73-74]. Since the court below acted pursuant to its original jurisdiction, this Court's jurisdiction over this appeal is proper under NMRA Rule 12-201 (rather than under NMRA Rule 12-205 (a petition for a writ of certiorari)), and under article VI, section 2 of the New Mexico Constitution and NMSA 1978, section 39-3-7. It should be noted that the current version of NMRA Rule 12-205 provides for a thirty-day deadline to file a petition,

as opposed to the previous twenty-day deadline. *See Glynn v. State Taxation & Revenue Dep't, Motor Vehicle Div.*, 2011-NMCA-031, 149 N.M. 518, 521, 252 P.3d 742, 745, *overruled by Schuster v. State Dep't of Taxation & Revenue, Motor Vehicle Div.*, 2012-NMSC-025, 283 P.3d 288. *Glynn* noted that an appeal from a judgment reflecting the district court's exercise of its appellate jurisdiction under NMRA Rule 12–505 requires the appellant to file a petition for a writ of certiorari in the Court of Appeals. Unlike *Glynn*, at the time Appellant filed his notice of appeal, NMRA Rule 12–505(C) provided that a "petition for writ of certiorari shall be filed with the clerk of the Court of Appeals within twenty (30) days after entry of the final action by the district court." However, when a party appeals the district court's exercise of its original jurisdiction, the party must file a notice of appeal within thirty days of the district court's final order. NMRA Rule 12–201(A)(2).

ARGUMENT

I. Standard of Review

On appeal from a hearing under NMSA 1978, section 66-8-112(H), "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." *Id.* Administrative decisions are reviewed for whether substantial evidence in the record, as a whole, supports the agency's decision. *State, Dep't of Transportation, Motor Vehicle Div. v. Romero*, 106 N.M. 657, 659,

748 P.2d 30 (Ct. App. 1987). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* Substantial evidence in an administrative agency review requires whole record review, not a review limited to those findings most favorable to the agency order. *Id.*

Constitutional and statutory interpretations, such as interpretations of the implied consent advisory and due process, are issues of law, which this Court reviews de novo. *State v. Duhon,* 2005–NMCA–120, ¶ 10, 138 N.M. 466, 469, 122 P.3d 50, 53.

I. The District Court Had Appellate Jurisdiction

The district court erred in basing its decision on an issue not raised in the administrative hearing nor argued or briefed on appeal to the district court. The court below construed Appellant's petition for review as a petition for mandamus because a due process claim does not fall under its appellate jurisdiction. [RP at 68]. The court held that Appellant was not prejudiced by the reading of the implied consent advisory even though that issue was never argued by the parties. The lack of prejudice was material to the court's determination to affirm the MVD. [RP at 0070]. In so ruling, the district court failed to follow precedent from this Court and the Supreme Court.

The arrest and contemporaneous police activity must be constitutional before the MVD may revoke a driver's license. The Supreme Court has held that "the

requirement in Section 66-8-112(E)(2)-(F)(2) that MVD find 'that the person was arrested' requires a finding that the arrest and police activity leading to the arrest were constitutional." *Schuster v. State Dep't of Taxation & Revenue, Motor Vehicle Div.*, 2012-NMSC-025, ¶ 19, 283 P.3d 288, 294. Moreover, the district court must review any appeal from the MVD's rulings in the court's appellate capacity. *Id.* at ¶ 22, 295. Generally, courts should not consider issues not raised below. *State v. Jade G.*, 2007–NMSC–010, ¶ 24, 141 N.M. 284, 291-92, 154 P.3d 659, 666-67 (acknowledging that as a general rule, propositions of law not raised in the trial court cannot be considered *sua sponte* by an appellate court). *See also State v. Chakerian*, No. 32,872, 2015 WL 178356, ¶ 25, __ P.3d __ (N.M. Ct. App. Jan. 14, 2015).

In *Chakerian*, the trial court found the defendant guilty of per se DWI. *Id.* In affirming the conviction on appeal, the district court noted that defendant's BAC test results were .12 and .11. The district court decided that to avoid a per se conviction, the defendant's independent tests "would have had to register nearly a third lower," and yet defendant "presented no evidence an independent test would have demonstrated an error of such magnitude." *Id.* at ¶ 6. Accordingly, the district court concluded that the defendant failed to demonstrate prejudice and therefore suppression was improper, regardless of whether defendant was afforded his right to an independent test. But there was no basis in the district court's record to

support the premise upon which its conclusions were reached. Thus the district court made findings of fact and conclusions of law without evidentiary support, while acting in its appellate capacity. This Court held that that was improper and itself a basis for reversal. *Id.* at ¶ 25, citing *Cadena v. Bernalillo Cnty. Bd. of Comm'rs,* 2006–NMCA–036, ¶¶ 3, 18, 139 N.M. 300, 131 P.3d 687 (concluding that the district court improperly acted outside its capacity as an appellate court by engaging in fact finding).

In our case the legal matters at issue are procedurally similar to those in *Schuster* because the underlying constitutional or unconstitutional conduct of the police being reviewed in our case is Due Process as in *Schuster* it was Reasonable Suspicion and Pretext. The matter at bar is also similar to *Chakerian* in that the district court, *sua sponte*, ruled on a basis not raised by the parties nor relied upon by the hearing officer. For these reasons, the district court's analysis below was flawed in a similar manner as *Chakerian*. *Id.* at ¶ 26.

Procedurally, the district court disposed of this matter improperly. The district court's holding, therefore, should be reversed.

III. The Department Failed to Properly Demonstrate an Appropriate Reading of the Implied Consent Advisory.

Deputy Foster's implied consent advisory warnings were alarmingly deficient, and therefore unlawful. Appellant's "refusal" to submit to a chemical test

is thus an invalid basis upon which to revoke his driving privileges. The revocation should therefore be reversed.

New Mexico motorists are presumed to have given consent to have their blood, breath, or both, tested for the presence of drugs and/or alcohol. *See* NMSA 1978, §§ 66-8-105 through 66-8-112. Law enforcement shall administer to all individuals arrested for DWI the implied consent advisory warnings before attempting to administer a chemical test upon them. *State v. Jones*, 1998-NMCA-076, ¶¶ 16-21, 125 N.M. 556, 561-62, 964 P.2d 117, 122-23. Certain portions of the advisory are essential and must be communicated to the arrestee, including the right to a reasonable opportunity for an independent test. *Id.* at ¶ 19, 561, 122. The reading of the advisory is mandatory and there is no need to show prejudice if the police fail to administer it. Moreover, NMSA 1978, section 66-8-109 mandates that this information is to be communicated by the police to the arrestee.

Regarding the language used to administer the advisory, there is no case in New Mexico that has directly addressed this issue. However, certain New Mexico cases dealing with such language issues are instructive and, in certain respects, analogous. One such case was *Maso v. State Taxation and Revenue Dept., Motor Vehicle Div.*, 2004-NMSC-028, 136 N.M. 161, 96 P.3d 286. The issue there was whether the notice of revocation, which was issued by the MVD in English and intended to serve, in part, as a notice of how to obtain an administrative hearing to

contest a license revocation, was adequate for a Spanish speaker. The *Maso* appellant failed to preserve his due process argument under the New Mexico State Constitution. *Id.* at ¶¶ 5-8, 163-64, 288-89. Nevertheless, failure to provide a notice of revocation in Spanish was held to satisfy due process under the federal constitution. *Id.* at ¶ 14, 166, 291. The Supreme Court reasoned that because a motorist has ten days to have the notice of revocation translated, this is adequate time to prevent any harm from the language barrier. *Id.*

Language barrier issues also arise in the context of *Miranda* warnings. A written and oral *Miranda* warning was held to be adequate in *State v. Castillo-Sanchez*, 1999-NMCA-085, ¶ 14, 127 N.M. 540, 984 P.2d 787. The state constitution was not addressed. *Id.* at ¶ 20- 21, 792-93, 545-46. In *State v. Gutierrez*, 2011-NMSC-024, 150 N.M. 232, 258 P.3d 1024, a bilingual sixteen year-old child was administered *Miranda* rights in English, and this was held to be valid for admitting a subsequent confession. The case turned on an expert's determination that the child knew English. Moreover, during the interrogation the child never indicated that he did not understand English. *Id.* at ¶ 16.

In *State v. Bravo*, 2006-NMCA-019, 139 N.M. 93, 128 P.3d 1070, the defendant was given *Miranda* warnings in Spanish, both orally and in writing. *Id.* at ¶¶ 15-17, 97-98, 1074-75. This was because Spanish was the defendant's primary language, though she was at least somewhat bilingual. The Court of

Appeals held that the warnings were sufficient because using English only with a person that uses Spanish as a primary language could increase the potential for ambiguity in the advisory. *Id.* at ¶ 17, 87, 1074, *quoting Davis v. U.S.*, 512 U.S. 452, 460.

The Wisconsin Court of Appeals faced a situation where the officer did not translate from English in *Wisconsin v. Begicevic*, 2004 WI App 57, 678 N.W.2d 293 (Wis. Ct. App. 2004), 270 Wis.2d 675. Facing a language communication difficulty, the officer did not make any effort to have her dispatcher find an interpreter to translate after defendant had asked her if she spoke German. *Id.* at ¶ 18, 300, 689.When the officer brought the defendant to the police department, she was met by another officer who had monitored her calls over dispatch and volunteered to help translate because he had five years of schooling in German. The German-speaking officer testified that the defendant spoke broken German and that, when defendant was communicating, "hand motions were used too. [Begicevic] insinuated the type of words, and mostly it was his native tongue. [Bosnian]" *Id.* At the station, the arresting officer did not make any effort to locate a fluent German interpreter, nor a Bosnian interpreter. *Id.* The Wisconsin Court held that the officer's lack of effort was unreasonable. *Id.* at ¶ 20.

Here, Deputy Foster requested a Spanish-speaking deputy after making contact with Appellant. [CD at 4:40]. The Appellant stated to Deputy Foster in

English during the field tests that he needed his glasses. [CD at 6:30]. Deputy Foster read the implied consent advisory to Appellant in English. [CD at 12:50]. Deputy Foster asked in English if Appellant understood and, according to Deputy Foster, Appellant "reiterated" what he was told by Deputy Foster by repeating portions of the implied consent advisory back to Deputy Foster in English. [CD at 14:00].

During cross-examination, Deputy Foster admitted that he does not speak Spanish. He did not even know the translation for "no," which is arguably common knowledge in this state. [CD at 15:40]. Deputy Foster also stated that the implied consent advisory was administered exclusively in English, and that no Spanish translation was attempted. [CD at 17:18]. Deputy Foster also stated that there exist hand-held cards from which the Spanish version could be read. *Id.* Deputy Foster also testified that Spanish-speaking Deputy Jareno was present during the reading of the implied consent advisory, and that Deputy Foster did not feel the need to have Deputy Jareno translate because Appellant answered in English. [CD at 18:15]. Deputy Jareno never volunteered to translate. *Id.* During the alleged "refusal" portion of the warning, Appellant began to repeat portions of the advisory when Deputy Foster apparently interrupted him when Foster said, "yeah with that in mind, do you still with to be tested." *Id.*

Deputy Foster, from the totality of his investigation, thought Appellant's native language was Spanish. [CD at 19:45]. Deputy Foster did not know if Appellant spoke English as well as one who has lived in this country for his entire life. *Id.* Deputy Foster agreed that he and Deputy Jareno had the opportunity to read to Appellant the implied consent advisory in Spanish. Deputy Foster also stated that he attended the University of Texas at El Paso, but yet had no idea if classes there were in Spanish. [CD at 20:55]. Deputy Foster's basis for believing that Appellant understood the implied consent advisory in English was because Appellant was "repeating the implied consent in his words." *Id.*

Deputy Jareno also stated that he understood that Appellant was from Mexico. [CD at 28:00]. Appellant spoke to Deputy Jareno in Spanish. *Id.* Deputy Jareno noted that Appellant used Spanish when talking to him, but then using English when talking to Deputy Foster. *Id.* In Deputy Jareno's opinion, who, again, speaks Spanish, Appellant was a native Spanish speaker. [CD at 29:00]. Deputy Jareno did not think that Appellant spoke English as well as someone native to the United States. [CD at 29:00]. Deputy Jareno stated that Deputy Foster never asked him to translate the implied consent advisory into Spanish. Deputy Jareno also pointed out the fact that police officers have access to printed cards bearing the Spanish translation of the implied consent advisory. [CD at 29:50]. Deputy Jareno was in a position to read the implied consent advisory in Spanish. [CD at 30:40].

Deputy Jareno observed Deputy Foster read the implied consent advisory in English. Deputy Jareno also observed Deputy Foster ask Appellant if Appellant understood Deputy Foster. Appellant then partially repeated what Deputy Foster had said. *Id.*

Appellant told Deputy Foster that Appellant spoke Spanish, which caused Foster to call Jareno to translate. [CD at 4:40)] These facts distinguish our case from *Gutierrez*. In *Gutierrez,* defendant did not indicate he had a problem with English. An expert also determined that defendant was fluent in English. Appellant here is not fluent in English by any means.

Our case is also distinguishable from *Castillo-Sanchez* and *Gutierrez* because the defendants there were given verbal and written warnings in Spanish. Here, Appellant was given the implied consent advisory in English and English only. The evidence is clear that Spanish is Appellant's primary language. [CD at 29:00, 29:50]. Whereas the appellant in *Maso* had ten days to translate an English document into Spanish, Appellant here was forced to make instant decisions after administration of warnings that he did not fully understand.

Deputy Foster knew or should have known that Appellant was proficient in Spanish rather than English. Deputy Jareno had ample opportunity to administer the implied consent advisory in Spanish but yet did so in English. Consequently, the advisory was defective. Without adequate advisory there is no valid basis to

revoke Appellant's driving privileges on the basis of refusal to submit to a chemical test

Similar to *Begicevic*, Appellant only spoke some English while his primary language was not English. In both cases the officer had the opportunity to translate the implied consent advisory, yet here Deputy Jareno and Appellant could have easily spoken fluent Spanish to each other, whereas in *Begicevic* the translation to Bosnian, though ideal, was not feasible.

This would be a different case if Deputy Foster had asked for, but never obtained a translator or had attempted to read the written Spanish implied consent advisory to Appellant if no translator was available. These efforts would have been reasonable efforts on the part of the police. But Deputy Foster, despite having Deputy Jareno present to translate the Implied Consent advisory he arbitrarily decided that it was adequate to read the Advisory in English.

The conduct of the officers would put any non-English speaker at a disadvantage. Allowing the revocation to stand in this case, under these circumstances, would essentially empower police officers and the MVD to make the decision whether a non-English speaker merits an implied consent warning in English. Thus there would be little reason to administer the advisory in any other language. Neither the aforementioned authorities nor Article II, Section 18 of the New Mexico Constitution would permit such a result. Article II, Section 18

provides protection in these situations, particularly because of the diverse languages historically spoken in New Mexico.

CONCLUSION

Appellant therefore moves this Court to answer in the affirmative that the New Mexico State Constitution affords protection to Appellant under these circumstances. Appellant further moves this Court to find that the district court erred when it denied relief from the revocation of Appellant's driver's license.

WHEREFORE, Appellant respectfully requests that this Court:

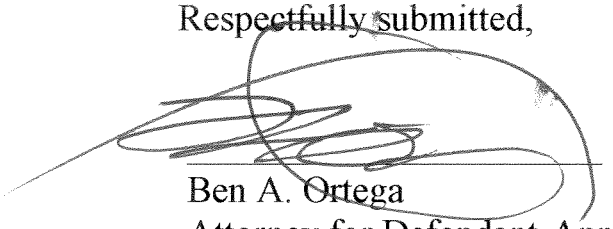
1. Find that the court below erred in sustaining the revocation.

2. Find that the administrative hearing officer erred in revoking Appellant's driving privileges.

3. Reverse both the court below and the MVD hearing officer.

4. Order all other relief that this Court deems just and proper.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This certifies that on this 8th day of May, 2015, a true and correct copy of the foregoing Interlocutory Appeal was placed in the United States Mail, first class-postage prepaid, addressed to:

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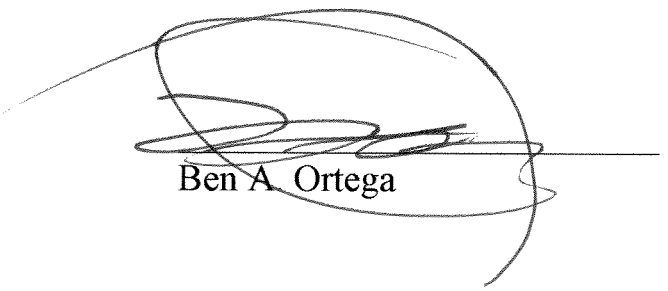

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