O/a 9-5-89

IN THE SUPREME COURT OF FLORIDA

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BENOIT BALTHAZAR,	)	
Petitioner,	)	
vs.	)	CASE NO. 73,465
STATE OF FLORIDA,	)	
Respondent.	)	

PETITIONER'S INITIAL BRIEF ON THE; MERITS

RICHARD L. JORANDBY
Public Defender

LOUIS G. CARRES
Florida Bar No. 114460
Assistant Public Defender
15th Judicial Circuit
9th Floor Governmental Center
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

Counsel for Petitioner

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PRELIKINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the Fourth District Court of Appeal. He will be referred to as petitioner and by name in this brief.

All references to the record on appeal will be by the symbol "R" followed by tne appropriate page number in parentheses.

STATEMENT OF THE CASE

Petitioner, BENOIT BALTHAZAR, was indicted by a Palm Beach County Grana Jury on charges of first degree murder and robbery (R-2477). A trial jury returned verdicts of guilty as charged on both counts (R-2946-2948).

The court entered adjudications of guilt (R-2949). A sentence of life imprisonment with no parole for 25 years was imposed on the first degree murder conviction (R-2973). A guide-line sentence of six years imprisonment was imposed on the robbery conviction (R-2974-2975).

Petitioner Balthazar filed a pre-trial motion to suppress statement and confession on grounds of lack of a knowing and voluntary waiver, and in a supporting memorandum asserted that since petitioner was a person with a foreign native language, and cultural differences, that the state bore a heavier burden of proof to establish voluntariness of the custodian confession (R-2710). Citation was made to authority specifying a higher burden of proof on the state in cases of a foreigner who does not readily understand or speak English (R-2710).

The trial court denied the motion after hearing and expres-sly adhered to the preponderance standard rather than the higher clear and convincing standard for the state's proof of voluntar-iness (R-2714).

A motion for new trial was filed with a memorandum of law in support (R-2960-2961,2977-2980). The motion was denied (R-2983).

Notice of appeal was timely filed from entry of the judgments and sentences (H-2984).

On direct appeal the district court affirmed holding the state's burden to be a preponderance of the evidence on the voluntariness issue, and that although it was claimed that petitioner had limited understanding of English, the state need not meet the clear and convincing evidence standard.

This Court granted review on the merits May 10, 1989.

STATEMENT OF THE FACTS

A. The Motion to Suppress Hearing

Prior to trial it was established that Balthazar was arrested in Tavares in Lake County, Florida, on July 30, 1984, following the fatal shooting of Francis Thompson near Loxahatchee in Palm Beach County, Florida (R-71-74). Detective Hagan proceeded to Lake County where he questioned Balthazar on July 31, 1984, at approximately 6:30 p.m. (R-73-74). A tape recording was made of the statements (R-75-83). The detective knew that Balthazar was foreign, believing him to be either Jamaican or Haitian, but he had no other information regarding Balthazar's ability to speak English fluently (R-80). He testified that Balthazar appeared to understand what the officer was saying when the warnings were read, and "most of the time" the detective could understand (R-80-81). Balthazar spoke English in a different way than is usual and the officer could sometimes understand (R-81).

David Bortnick, a clinical psycnologist, conducted an interview with Balthazar at the Palm Beach County Jail (R-156). He administered a major psychological test and several subtests for intelligence and to find out (1)Balthazar's level of intellectual functioning as well as (2) his capacity to understand and respond to questions in English (R-156). He found a verbal IQ of 79, a non-verbal IQ of 60 and a full scale IQ of 70 (R-158). 97% or 98% of the general population has a higher level of functioning than the petitioner Balthazar (R-70). This score is in the lower limits of the borderline range (R-70).

Beverly Bell, a worker at the Washington Office on Haiti, an organization involved in Haitian information and relief work, testified to her knowledge of Balthazar's ability to function in the English language (R-173-175). The court permitted her to testify, although expressing some reservations regarding qualifications as an expert (R-191). She stated that she saw Balthazar many times at the Haitian shelter in Arlington, Virginia (R-193). Be indicated on numerous occasions that he understood things told him in English when in actuality it became clear that he did not understand (R-193-194). She stated that it is common for Haitians to fake an understanding of the English language when in fact they do not understand what is said to them (R-193-194).

She had listened to the tape recording of Balthazar's interrogation statement and she testified that it shows him to be answering questions, or appearing to understand a question, but not being able to in fact understand (R-195,200-201).

Roger Wright, a supervisor of the men's Haitian shelter in Arlington, Virginia, testified that he had many conversations with Balthazar in 1974 (R-230-231). He would take Balthazar and show him a specific job or task and explain it to him. Balthazar would say that he understood although it became obvious that Balthazar had not understood (R-231-232). In contrast, or other occasions when instructions were given by a secretary who spoke Balthazar's own language, these problems of understanding would normally be resolved (R-233-234). Mr. Wright was in contact with

Balthazar for approximately six weeks. During this time the problem of understanding directions in English was almost a daily problem (K-235).

Fritz Longchomb, program director at the Washington Center of Haiti testified to having received a degree in civil engineering in Haiti and also having received a degree in sociology (K-241). Be had studied at the University of Montreal and had completed advanced work at Georgetown University in Washington D.C. (K-242). He works mostly in educational work with Haitian refugees (H-242). He has worked as a translator in court (R-244).

Mr. Longchomb came in contact with Balthazar in June of 1984 when Balthazar was at the Greyhound Bus Station in Washington, D.C., having difficulty in arranging travel to Miami (R-255-256). He explained that Haitians in this country have what is called a "survival syndrome," meaning that they attempt to make their way by convincing people that they can speak English better than they are actually able to do (R-257). It is especially or more common among Haitian refugees to assert that they understand English better than they actually do (R-259).

Mr. Longchomb listened to the tape recorded statement and expressed his belief that Balthazar either misunderstood or did not fully understand several of the questions (R-263).

Tony Hobin, of the English department at Florida International University, who also teaches linguistics, testified at the hearing (R-285). He speaks basic Creole (H-287). He interviewed Balthazar at the jail and administered an oral examination

(R-289). The interview took approximately two hours (R-290). His examination was to determine Balthazar's comprehension of the spoken English language (K-291). He also evaluated the tape recording of the interrogation statement, and he prepared his own transcript of the tape (R-292-293).

Mr. Tobin stated that Balthazar would not be able to comprehend his constitutional rights because of the limitations of his understanding of the English language (R-311). He stated that mere repetition of those rights would not allow for Balthazar's comprehension *of* them (R-310). He also found that in several areas on the tape recording that Balthazar gave a response that was either incompatible or incorrect in regard to the question that had been asked (R-311).

Benoit Balthazar testified in his own behalf and stated that he had been born in Haiti 27 years ago (R-340). He had been in the United States 11 years (R-340). In the United States he had gone to school to learn English at a place known as Operation Concern in Boynton Beach (R-341). These lessons stopped in 1982 (R-342). **When** he went to Washington, D.C. he had a problem understanding English (R-342-343).

Mr. Balthazar specifically remembered the detective telling him about his rights (R-343). Certain words on the card were beyond his level of understanding, and the result was that he did not understand that he could refuse to talk to the police officer about the cause of the arrest (R-343-344). He stated that in Haiti a person arrested does have to talk to the police about suspected crimes (R-344).

The judge entered a written order denying the motion to suppress confession and admissions, and the supplemental motion to suppress, making the following findings (R-2714):

> 1) the Defendant was fully advised of his constitutional rights, as required by Miranda v. Arizona, 384 U.S. 436 (1966), before any interrogation;
>
> 2) the Defendant voluntarily, knowingly, and intelligently waived the exercise of his Miranda rights before interrogation began;
>
> 3) the Defendant said nothing during such interruption which this Court interprets as an exercise of any of his Miranda rights;
>
> 4) the State has met its burden of showing by a preponderance of the evidence that, under the totality of the circumstances surrounding the tape recorded interrogation in this case, the Defendant voluntarily made the statements and admissions in question and was neither coerced nor induced to make such statements or admissions.
>
> Therefore, it is
> ORDERED AND ADJUDGED that the Motion and the Supplemental Motion are denied.

The above order makes no finding concerning specifically the evidence of Balthazar's limitations in understanding the English language and no finding resolving the substantial evidence that he would not have been able to understand fully the warnings given in English nor the nature of the rights that he was purportedly waiving.

B. The Trial

Gary Byers of the Palm Beach County Sheriff's Office was patrolling the Loxahatchee zone on the 11:00 p.m. to 7:00 a.m. shift on July 30, 1984 (R-1802). At about 5:05 a.m. he saw a person walking west on State Road 80, also known as Southern

Boulevard, a route between West Palm Beach and Belle Glade (R-1802-1803). He pulled into a parking lot and shined his lights on the individual and asked if tne person was okay (R-1804-1805). The person asked for a ride to Belle Glade, but the officer was on patrol and told the person that he was unable to provide such a ride (H-1805). Petitioner stipulated that it was Benoit Balthazar that the witness had seen that morning (R-1800).

George Abbott testified that he worked for The Palm Beach Post, a newspaper, training as a distribution service representative on July **30,** 1984 (R-1835-1836). He was under the supervision of Mrs. Francis Thompson. On that morning he met her seven or eight miles west on Southern Boulevard from West Palm Beach (R-1837). That morning there were no carriers from some of the delivery routes, which meant that Abbott and Thompson had to deliver those routes (R-1838). Mrs. Thompson went to deliver a route while Mr. Abbott stayed at the warehouse to prepare the papers for another route (R-1838). They had planned for her to call and meet him at a place known as Gary's Midway where Mr. Abbott would bring the second route's papers (R-1840). She did not call, so he went to the Midway to see if she was there (R-1841). He left the warehouse at 5:50 a.m. and arrived at approximately 6:00 a.m. at Gary's Midway (R-1841-1842).

He saw her car parked in the parking lot, and he pulled his car abreast of her car (R-1842). They talked, and he got out to exchanqe the papers when a person came up and asked to be taken to Belle Glade (R-1844-1845). Mrs. Thompson told the person that

they could not take him to Belle Glade that they had some problems of their own because they had to get the papers out (R-1847). The person then turned and walked toward Southern Boulevard while Mr. Abbott and Mrs. Thompson exchanged papers (R-1848). The person then returned and sat in the driver's seat of Mr. Abbott's vehicle (H-1848). Mr. Abbott had left the car running (R-1849). Mr. Abbott went to the passenger's side window and told the person to get out of the car (R-1849). The person had a pistol which he pointed at the witness and said that he was going to take the car (R-1850). Mr. Abbott then backed away as Mrs. Thompson walked up on the driver's side, at which point the person swung around with the pistol and shot her (R-1853). She said something, Mr. Abbott could not recall what she said, her arms went up and she fell to the ground (R-1854-1855). He could not see if she had anything in her hands as her hands went up (R-1856).

Mr. Abbott then ran behind the nearby building and waited two or three minutes until he saw her dog out in the parking lot he then went and saw that she was lying on the ground, and Mr. Abbott used a phone booth to dial for emergency assistance (R-1856-1857). Mr. Abbott's vehicle was no longer in the parking lot (R-1857).

Petitioner stipulated to being the person in the parking lot that morning (R-1859-1860).

Mr. Abbott testified that he had no doubt that Balthazar was the person who did the shooting. Mr. Abbott's vehicle was returned to him by the Sheriff's Department a few days later (R-1861).

Fred Brodsky, who was employed with Mrs. Thompson, identified a photograph of her as the deceased victim (R-1898-1901).

Richard Christmas, a Palm Beach County paramedic, gave emergency aid to Mrs. Thompson in the parking lot of Gary's Midway (R-1903-1905). He observed a gun lying on the ground near Mrs. Thompson (R-1908). A helicopter was called to take her to the Good Samaritan Hospital wnere she died some time later (R-1905-1906,1917-1918).

Dr. Hobin, Associate Medical Examiner, performed an autopsy. He found that Mrs. Thompson suffered a gunshot wound to the head (R-1919-1921).

Gregory Richter, crime scene investigator, compared latent prints sent from bake County where Mr. Abbott's car was recovered. Balthazar's thumbprint matched a latent print from the inside left top door window of Mr. Abbott's vehicle (R-1962-1963).

Robin Wilson, a cashier at an Amoco station in Mr. Plymouth in Lake County, Florida, stated that about 11:00 p.m. on July 30, 1984, a car came in with a lot of items piled in the back seat (R-1966-1969). The man pumped gas but tried to use a New York Public Assistance card, which was not a card that the station accepted to pay (R-1968-1971). She could not understand the man's effort to use the card (R-1970-1971).

Lake County Sheriff's Officer Charles Russell was dispatched to the Amoco station (R-1972-1973). He identified the petitioner Balthazar as a man who gave a New York Public Assistance card as payment for the gasoline (R-1970-1971). The officer ran the tag number from the vehicle through the dispatcher and was informed that the vehicle had been stolen (R-1976-1977). He arrested petitioner for the vehicle theft (R-1977). He found a firearm and Mr. Abbott's checkbook in the vehicle (R-1978-1979).

Palm Beach County Sheriff's Officer Thomas Hogan testified to questioning Balthazar after the arrest in Lake County, Florida (R-1991-1996). Petitioner renewed his objection to the introduction of the statement and preserved his prior objections to use of the statement as evidence (R-2013-2014).

The tape recording of Balthazar's post-arrest statement was played to the jury (R-2014-2055). In the statement Balthazar admitted walking toward Belle Glade and asking for a ride (R-2030). He said a man asked for help taking some newspapers out to the car, and that he then went and sat inside the person's car and asked for a ride (R-2030). The man said yes that he could take the car, but the woman came up with a gun pointed at him at which point Balthazar pulled a firearm and shot in the air (R-2030-2031). He said the woman either leaned or fell and the man drove off (R-2031). Balthazar went to Ft. Lauderdale, but he could not remember where he had gotten the car so he kept driving and driving and driving (R-2032). He later thought that his friend in Ft. Lauderdale had loaned him the car (R-2034).

Balthazar said that before the shooting the woman had told him that he was not going anywhere or she would blow his head off, and Balthazar said he had his hand on the gun "for some reason" (R-2037). Balthazar said he thought he shot in the air and doesn't know if the woman ran, but he thought that she and the man who were in the parking lot both ran together (R-1237-1238). Baltnazar had thought the man in the parking lot was a Mexican man that he knew nained Renauldo (R-2039).

Deputy Hogan stated that the firearm found next to the victim in the parking lot belonged to Mrs. Thompson (R-2069). During cross-examination at trial the petitioner attempted to question the officer concerning whether the officer would have taken special safeguards to see that the person understood his rights if the officer had known that the person had the educational level of understanding of a six-year old (R-2093-2095). The trial court sustained the objection but heard a proffer of the testimony that the officer would have taken special safeguards if he had known that the person he was preparing to question had only the educational level in English of a six-year old (R-2094-2095). After the proffer the trial court again denied use of the proffer as evidence before the jury (R-2103).

The state rested (R-2118). Petitioner moved for entry of a judgment of acquittal on the ground that no premeditation or felony murder had been shown (R-2119-2115). The motion was denied (R-2130). Petitioner then asked for the court to rule that the evidence was insufficient to establish premeditation and for the court to thus dismiss the premeditation alternative of

tne first degree murder charge on the ground that the state's evidence eliminated premeditation, but the trial court denied the motion (R-2130).

The defendant called Robert Levitt, an M.D., who was declared an expert in clinical neuropsychology (R-2203,2212). Dr. Levitt conducted a neuropsychological examination of Benoit Balthazar at the jail on January 17, 1986 (R-2013-2014). The exam took four hours (H-2013). Balthazar scored on the various tests as would be expected of an American school-child of six years and six months of age (H-2224). Dr. Levitt specifically tested for an ability to speak the English language, and tested for linguistic and non-linguistic intellectual ability and achievement (R-2221-2222). On the test involving the ability to speak the language Balthazar scored 65 to 70, which was in the mildly defective range (R-2224-2225). In the test of understanding English words when used together Balthazar scored a 40 (R-2225-2227). Dr. Levitt stated that Balthazar does better in language expression than in language comprehension using the English language (R-2225-2227). Dr. Levitt also stated that expertise was needed to see and understand the difference between Balthazar's ability to speak the English language and his ability to comprehend the spoken English language (K-2230).

The witnesses who testified at the suppression hearing, Mr. Longchomb, Ms. Bell and Mr. Wright, all repeated their testimony concerning their association with Balthazar in Virginia and to Balthazar's indications of an ability to understand the spoken English language when in fact he did not have much ability to

understand the spoken English language (R-2131-2146,2250-2264, 2269-2271). These witnesses all concurred that petitioner, as is common with Haitians generally in this country, makes an effort to indicate he understands English when in fact his understanding is quite limited (K-2152-2153). Mr. Longchomb specifically stated that petitioner's actions would show that he could not understand words spoken in English although he would not readily admit it (K-2152-2153).

Petitioner also called F.I.U. visiting professor in linguistics Tometro Hopkins (R-2274-2275). He was declared an expert in linguistics, in English and in Creole (R-2277). He interviewed the petitioner for comprehension of English and spent 30 hours studying the tape recording of the in-custody statement (R-2278-2280). Professor Hopkins stated that on the tape recording Balthazar's answers were incompatible with the questions on numerous occasions (R-2284). He stated that Balthazar had an inability to understand complex structures of English (R-2286). He specifically testified that Balthazar would have difficulty understanding his rights when they were read to him (R-2288).

Both parties then rested (R-2293). Motion for judgment of acquittal was renewed and denied (R-2294).

During jury deliberations the court permitted the jury to take the tape recording of the Statement into the jury room and to play it as they desired (K-2254). Objection on the ground that the jury would thus be able to consider portions of the tape

recorded statement out of context, and that this procedure would risk the jury focusing on isolated portions of the statement out of context of the entire statement was denied (R-2254-2260).

The jury returned verdicts of guilty on both counts as charged (R-2462). The trial court adjudicated guilt and imposed a sentence of life imprisonment, w th a 25 year statutory minimum, on the first degree murder conviction and imposed a guidelines sentence of six years imprisonment on the robbery conviction (R-2973-2974). Notice of appeal was timely filed from entry of the judgments and sentences (R-2984). The convictions were affirmed on direct appeal, and this Court granted review of the petition raising the issue of standard of proof necessary to prove voluntariness of waivers for persons whose native language is other than English.

SUMMARY OF ARGUMENT

This case presents the question whether the heavier burden of proof that pertains to the state's burden of proving a voluntary waiver applies when a suspect is deficient in ability to understand English and when the warnings are given only in English.

This Court in Denehy v. State, infra, indicated that the preponderance burden is normally applicable but indicated that when special circumstances are present the greater standard of clear and convincing proof may be required.

The "heavier burden" referred to in the cases should now be resolved to mean a higher, but not unreasonable burden of proof. The clear and convincing standard is the next higher burden to the preponderance standard. The clear and convincing standard is the adopted burden where special circumstances equivalent to the language barrier, such as other presumptively tainting factors, exist. It is requested that the Court rule that the clear and convincing standard is the standard that must be applied in this circumstance as well.

ARGUMENT

POINT ON APPEAL

WHETHER THE CLEAR AND CONVINCING STANDARD OF PROOF IS REQUIRED FOR WAIVER OF RIGHTS WHEN THE MIRANDA WARNING IS GIVEN IN ENGLISH TO A NON-NATIVE ENGLISH SPEAKING PERSON WHO IS SHOWN TO RAVE A LIMITED ABILITY TO UNDERSTAND SPOKEN ENGLISH?

As shown by the Statement of the Facts, the evidence in this case has substantial support for a conclusion that the petitioner Balthazar had a limited ability to understand the English warnings he was yiven pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), prior to the taking of his in-custody confession. This Court in McDole v. State, 283 So.2d 553 (Fla. 1973), adopted the preponderance of the evidence standard to be applied generally where voluntariness of a confession is at issue. In Denehy v. State, 400 So.2d 1216 (Fla. 1980), at 1217, this Court indicated that the preponderance standard applied "under normal circumstances" where the voluntariness of a consent to search is involved.

This Court cited to McDole in its Denehy decision, thus linking the standard for waiver of rights standard under the Fourth and Fifth Amendments. Petitioner submits the same standard should apply regardless of whether the waiver is for the giving of a statement while in custody or for a search. Utilization of the same standard is consistent with the approach taken by the Eleventh Circuit Court of Appeals in Smith v. Zant, 855 F.2d 712 (11th Cir. 1988), where at 716, the Court indicated that

in Miranda the Court applied the Johnson v. Zerbst, 304 U.S. 458 (1938), standard to a waiver of Miranda rights. Thus the United States Supreme Court has indicated that the waiver of these basic constitutional rights should be governed by similar standards for determination of voluntariness.

Petitioner acknowledges that the preponderance of the evidence standard is normally, in ordinary circumstances, the proper standard as this Court adopted in McDole. However, where special circumstances exist the convincing evidence standard must be utilized in order to obtain an accurate resolution of the question whether the waiver is voluntary. Several special circumstances have been set forth in the case decisions as requiring the clear and convincing burden to be met. These include the circumstance where an accused is shown to have a limited ability to understand the waiver or the warnings. Most prominently, is the situation where a suspect is not a native English speaking person, and where the Miranda warnings are given solely in English. There, the clear and convincing standard has been held to be a necessary and proper standard for a trial court to utilize in determining whether the statement is voluntary and thus admissible or involuntary and thus inadmissible. In State v. Santamaria, 464 So.2d 197 (Fla. 3d DCA 1985), in footnote 1, the court stated:

> It should be emphasized, also, that the state bears an even heavier burden of proof on the voluntariness issue when the defendant is a foreigner or non-English speaking person.

The court cited to Restrepo v. State, 438 So.2d 76 (Fla. 3d DCA 1983), where at 77, the District Court held that voluntariness of consent must be determined by examining the totality of the circumstances, including such factors as the education and intelligence and knowledge of the accused. An important element is whether the person is a foreigner who does not readily speak or understand English. In such event the court in Restrepo held, at 78, that the burden on the government to show a voluntary consent in such circumstance is heavier. To like effect is Rosell v. State, 433 So.2d 1260 (Fla. 1st DCA 1983), where at 1262-1263, and in footnote 1, the District Court noted that the burden on the state to show a voluntary waiver of rights is heavier where the person involved is illiterate or a foreigner not readily conversant in the English language, and where the waiver of rights or warnings are given solely in English.

For a heavier burden to apply, a greater standard of proof is necessary. Where special factual circumstances precede the waiver, for example, where an unlawful detention precedes the waiver, it is held that the mere giving of the warnings is insufficient and a higher standard of proof must be met for the state to prove a voluntary waiver. See Alvarez v. State, 515 So.2d 286 (Fla. 4th DCA 1987), where this distinction was explained, 515 So.2d at 288:

> Absent any improper police conduct prior to securing an alleged consent, the consent issue should be determined by the greater weight of the evidence presented to the trial court. However, consent purportedly obtained after prior illegal action by the police, such as an invalid detention or arrest or illegal search, must be particularly scrutinized, because such

police action presumptively taints and renders involuntary any consent subsequently obtained. Norman v. State, 379 So.2d 643,646-47 (Fla. 1980); Bailey v. State, 319 So.2d 22,28 (Fla. 1975). Logically, the closer the connection between a consent and any improper conduct by the police, the less likely a consent will be found to be freely and voluntarily given, as opposed to being the natural consequence of the police misconduct. This court has described the state's burden in the case of antecedent police misconduct, as a requirement to prove consent by clear and convincing evidence. Cf. Elsleger v. State, 503 So.2d 1367 (Fla. 4th DCA 1987).

The nature of the consent to waive either Fourth or Fifth Amendment constitutional rights has two distinct dimensions. Smith v. Zant, supra at 716, quoting Moran v. Burbine, 475 U.S. 412 (1986). The first is that the relinquishment of the right must be voluntary. This means that it was the product of a free and deliberate choice rather than by intimidation or coercion or deception.

The second dimension is that the waiver must be made with full awareness. This awareness includes the nature of the right being abandoned and awareness of the consequences of the decision to abandon the right. Smith v Zant, supra at 716, quoting Moran v. Burbine, supra.

A determination of the second question, the awareness of the nature of the right and the consequences of abandoning it, must include review of the particular facts and circumstances involved in the waiver "including the background, experience and conduct of the accused." Smith v. Zant, supra at 716, quoting Johnson v. Zerbst, supra, 304 U.S. at 464.

Evidence of the mental state of the suspect at the time of the waiver is relevant to the voluntariness question concerning the ability to know the nature of the right and to willingly waive it. Terry v. State, 467 So.2d 761 (Fla. 4th DCA 1985), at 765. To be admissible a statement must be the product of both a rational intellect and a free will. Bush v. State, 461 So.2d 936, at 939 (Fla. 1984).

When a suspect is shown to have a disorder or cognitive disability, the court deciding the voluntariness issue must determine that the state has proven that the totality of the Circumstances demonstrate an understanding and free will waiver. Fields v. State, 402 So.2d 47 (Fla. 1st DCA 1981). In Fields it was shown by expert testimony that the suspect would have had trouble understanding the Miranda rights as they had been read to him. In the concurring opinion of Judge Smith in Fields, the view was expressed that a free and voluntary response to police interrogation is not sufficient under such circumstances to show a waiver where other evidence indicates a lack of understanding of the full rights.

Since there is no "all-inclusive test, no precise rule of thumb" for determining whether a statement is voluntary and admissible, Wagner v. United States, 110 F.2d 595, at 596 (5th Cir. 1940), courts must determine the issue based upon all pertinent circumstances surrounding the giving of the statement. Bouza v. State, 491 So.2d 323, at 324 (Fla. 3d DCA 1986). This determination of voluntariness "depends upon comprehension of the

circumstances surrounding the giving of the confession." Bouza v. State, supra at 324. The Bouza court relied expressly on Crane v. Kentucky, 476 U.S. ____, 106 S.Ct. 2142 (1986).

Petitioner requests this Court to find that the use of English in giving the warnings to a suspect who is shown to have limited ability to understand the warnings given in English, is a special circumstance requires application of the clear and convincing standard of proof on the part of the state to establish voluntariness and admissibility of a subsequently given statement or confession. This circumstance is equivalent to those in which the clear and convincing standard is required. For example, an invalid detention or arrest or illegal search presumptively taints and renders involuntary any consent or confession obtained as a result. Use of police illegality or misconduct, requires the state to meet the clear and convincing evidence standard. Alvarez v. State, supra, and other cases cited above establish this distinction.

This Court indicated in Denehy v. State, supra, that the preponderance standard applies only under ordinary circumstances. The circumstance of a foreigner not readily fluent in the English language, or shown to have a limited ability to understand spoken English, being asked to waive basic constitutional rights given solely in English is confronted with a circumstance that is not ordinary. Most suspects are spoken to and advised of their rights in English, which is usually the native language of the suspect. In order to equally apply the requirement of voluntariness, it is necessary for the state to bear a specific

higher standard of proof, otherwise the special circumstances which inhibit a rational understanding and a free will waiver will be excluded from any meaningful test to ensure voluntariness.

It is important that a higher standard of proof apply in order to ensure equality in such circumstances in the determination of voluntariness of waivers of rights. Without recognition of this special circumstance as one which necessitates use of the clear and convincing standard the risk is great that waivers will be accepted where they are mere submission to apparent police authority. Cf. State v. Jerome, 14 F.L.W. 912 (Fla. 4th DCA April 12, 1989), which expressly states that a consent is not voluntary where made only in submission to apparent police authority. The court held in Jerome that an inquiry into the voluntariness of a consent to search must include all of the surrounding circumstances, including the conduct of police officers and "the ability of the particular defendant to understand and rationally respond" to the request for a waiver. 14 F.L.W. at 913.

This Court indicated in Denehy, that where factors were not present such as coercion, prolonged detention or threat to obtain a warrant, or repeated requests for consent a preponderance burden was proper. This Court left open the requirement of a greater standard of proof where the special listed circumstances were present. Since the use of force, or coercion is not the only hallmark of an involuntary confession, Wainwright v. LaSalle, 414 F.2d 1235 (5th Cir. 1969), the duty of the courts to

fashion an effective procedure to determine when a waiver is knowing, with full understanding, is of equal importance to the duty to reject forced confessions.

The choice of whether to remain silent, or to speak, while in custody after an arrest has great significance. An accused after arrest, and after being given Miranda warnings, is faced with three distinct choices. First, if guilty a confession may be given which if knowing and voluntary is fully admissible. Second, the accused may given an exonerating statement which, if true, may aid in his release or, if false, may be disproved by the state thus indicating his guilt. The third choice, which takes no such risks, is the choice of silence. By that choice the defendant makes the state bear the full burden of proof; he takes none of it upon himself to establish a defense or alibi, and unlike an "exonerating" statement gives the state no quarter to insinuate guilt or to allow a jury to do so. The state may obtain no aid from this choice.

The use of procedural requirements to adequately protect this important choice from ignorant, or compelled waiver, where a language barrier is the traditional method by which individual rights have been protected and preserved. Justice Franfurter said in McNabb v. United States, 318 U.S. 332, at 347 (1943):

> The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law.

The "heavier burden" referred to in the cases should now be resolved to mean a higher, but not unreasonable burden of proof. The clear and convincing standard is the next higher burden to the preponderance standard. The clear and convincing stanuard is the adopted burden where special circumstances equivalent to the language barrier, such as other presumptively tainting factors, exist. It is requested that the Court rule that the clear and convincing standard is the standard that must be applied in this circumstance as well.

CONCLUSION

Wherefore, the Court is requested to quash the decision below and remand with instructions that the cause be reversed and remanded for use of the clear and convincing burden of proof in determining voluntariness of the confession in this case.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender

LOUIS G. CARRES
Florida Bar No. 114460
Assistant Public Defender
15th Judicial Circuit of Florida
The Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by courier, to JAMES CARNEY, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Reach, Florida 33401, this 9th day of June, 1989.

LOUIS G. CARRES
Assistant Public Defender