

IN THE SUPREME COURT OF FLORIDA

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

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

The petitioner was the defendant in the trial court, and he was the appellant before the District Court of Appeal. He will be referred to as petitioner herein.

This brief is accompanied by a conformed copy of the decision below which is attached hereto.

STATEMENT OF THE CASE AND FACTS

The petitioner was convicted and took a direct appeal from his criminal conviction. The issue raised before the District Court of Appeal concerned the standard of proof to be utilized for determining voluntariness of an in-custody confession. The petitioner asserted below that his limited understanding of English required, in view of the fact that his rights were read to him in English only, that the state establish by a clear and convincing standard of proof the voluntariness of his confession before the court could admit same for consideration by the jury.

The district court ruled that the preponderance of the evidence standard, and not the clear and convincing evidence standard, would be utilized in determining the voluntariness of a confession regardless of the limited understanding of the English language by the accused. Although the district court agreed that the state's burden of proof was "a heavy one in such circumstances," the court held that the standard of proof did not change from a preponderance of the evidence standard to a clear and convincing one.

The petitioner timely filed his notice to invoke the discretionary jurisdiction of this Court to review the decision below concerning the standard of proof to be utilized in the trial courts for determining voluntariness of statements and confessions given by persons with a limited understanding of English when the warnings and waiver were executed in English only.

The opinion below fairly states the issue of the standard of proof "where the defendant is alleged to have a limited understanding of English." If the warnings had been given in the petitioner's native language, there would be no issue concerning petitioner's limited understanding of English insofar as the effectiveness of the warnings or waiver were concerned. Thus the opinion clearly rules that there is no greater standard for proof of voluntariness regardless of the accused's limited understanding of the English language.

It is asserted herein that there is direct and express conflict on this issue concerning the standard of proof necessary for the state to establish a voluntary waiver of constitutional rights for non-English speaking persons when the warnings and waiver are executed solely in English.

SUMMARY OF ARGUMENT

The question presented, based on conflict of decisions, is whether the same burden of proof should be applied for proof of voluntariness of Fourth and Fifth Amendment rights. The courts are in conflict as to whether the failure to provide an interpreter for a person with limited English speaking ability mandates a clear and convincing standard of proof.

The court below applied a preponderance burden on the state for waiver of Fifth and Sixth Amendment rights while other courts have required the clear and convincing level for waivers under similar circumstances of Fourth Amendment rights.

The Court should resolve this conflict.

ARGUMENT

WHETHER THERE IS DIRECT AND EXPRESS CONFLICT
CONCERNING THE STANDARD OF PROOF FOR EVALUATING
VOLUNTARINESS OF WAIVERS OF RIGHTS FOR NON-
ENGLISH SPEAKING PERSONS WHEN THE WAIVERS ARE
EXECUTED IN ENGLISH ONLY?

While this case involves the Fifth Amendment privilege against self-incrimination and the Sixth Amendment waiver of the right to counsel during questioning, the broader issue concerning waivers of constitutional rights including Fourth Amendment rights is directly presented. The petitioner asserted below that the standard of proof that devolves upon the state to prove a voluntary waiver of constitutional rights for a non-English speaking person, when the warnings and waiver are executed solely in English, is the clear and convincing standard. The district court ruled that the preponderance of evidence standard applied regardless of the English speaking ability of the accused.

This Court in McDole v. State, 283 So.2d 553 (Fla. 1973), adopted generally the preponderance standard of proof for the state to meet in proving voluntariness of a confession. The totality of the circumstances must be considered in making the determination. Id.

However, where there is evidence of either illegality of the actions of the officers relating to the waiver, or evidence of the youth, lack of education, substandard level of intelligence, or evidence of difficulty in communicating in English, the court in Acosta v. State, 519 So.2d 658 (Fla. 1st DCA 1988), held that the clear and convincing standard of proof for voluntariness must

be met by the state. The court noted in footnote 2 that when no police misconduct preceded the consent, the issue of voluntariness would normally be judged by the preponderance of the evidence standard. However, when special circumstances exist, such as policeman's conduct, the preponderance standard is inapplicable and the proof must reach the clear and convincing standard to establish a voluntary waiver of Fourth Amendment rights.

In Acosta the court considered the fact that the accused in that case had been in the country for only three years at the time of the seizure of articles and had difficulty in communicating in English. The court held that in such circumstances, under the facts of that case, it was obvious that the accused may not have understood the request for a waiver of rights and that compliance by a non-English speaking person, after a request for waiver given only in English, is not sufficient to show voluntariness when no interpreter had been utilized. Since no interpreter had been utilized, the clear and convincing standard was the required burden of proof under the circumstances. The court cited to Garcia v. State, 186 So.2d 556 (Fla. 3d DCA 1966), and to several federal court decisions.

It is submitted that the same burden of proof should be utilized in evaluating Fourth and Fifth Amendment waivers for admissibility of evidence obtained therefrom. It is also clear from the above decisions that a greater standard of proof is required where a non-English speaking person waives his Fourth Amendment rights, as the failure to communicate in the person's native tongue when limited ability in English is apparent to the

officer constitutes the equivalent of police misconduct. Whether or not it is police misconduct, per se, it is a significant circumstance tending to erode the validity of the compliance or consent given as a result of the English-only warning and waiver. Thus it is a special circumstance. When the police realize the arrestee has a limited ability to communicate in English it is equivalent to misconduct to extract a waiver of basic constitutional rights by an English-only exchange containing the warnings and the waiver of those rights.

Thus the issue presented is one on which there is express conflict concerning the standard of proof to be utilized in determining waivers of constitutional rights of persons having a limited ability to speak or understand English. It is requested that this Court consider the question of whether the mere preponderance of the evidence standard a sufficient burden of proof for the state to meet and establish involuntariness under such circumstances. Petitioner submits that it is not an adequate standard and that the decision below, setting a different standard for Fifth Amendment waivers, should be reviewed and quashed.

CONCLUSION

Wherefore, the petitioner submits that express and direct conflict concerning the standard of proof to be utilized by trial courts in determining waivers of constitutional rights has been shown in the decisions of the District Courts of Appeal. Petitioner submits the Court should grant review to determine whether a lesser standard of proof for non-English speaking persons is appropriate for waivers of Fifth Amendment rights than the standard that is applied for waivers of Fourth Amendment rights under the same circumstances.

It is requested that the Court grant review on the merits to consider whether the clear and convincing standard must be utilized by trial courts in determining voluntariness, and thus legal admissibility, of statements and confessions given by persons with a limited ability to speak and understand English when no interpreter is utilized in communicating the warnings or in executing the waiver.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by courier, to JOY B. SHEARER, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 3rd day of January, 1989.



LOUIS G. CARRES
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