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IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

AUG 9 1989

CLERK, SUPREME COURT

By \_\_\_\_\_  
Deputy Clerk

BEMOIT BALTHAZAR,

Petitioner,

vs .

CASE NO. 73,465

STATE OF FLORIDA,

Respondent.

\_\_\_\_\_ /

PETITIONER'S REPLY BRIEF ON THE MERITS

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### SUMMARY OF ARGUMENT

The respondent has contended in its brief that petitioner did not seek the application of a clear and convincing standard of proof in the trial court. The petitioner will show in the argument portion of this reply brief that he did urge the trial court to use the clear and convincing standard as the specific heavier standard of proof that is applicable in cases of waiver of rights of non-English speaking persons when their rights are read to them solely in anguish.

Secondly, the petitioner will urge, contrary to respondent's position, that this stricter burden of proof is necessary in order for the interests of justice, including the goal of reliability of evidence, to be fully met in such cases. Petitioner argues that this stricter burden of proof is appropriate because the language barrier is a special circumstance that justifies use of the clear and convincing standard of proof for the state to prove voluntariness for an in-custody waiver of either Fourth or Fifth Amendment rights.

ARGUMENT

ISSUE PRESENTED

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 HAVE A LIMITED ABILITY TO UNDERSTAND SPOKEN ENGLISH?

The respondent has contended that petitioner did not argue that the trial court should apply the "clear and convincing" standard of proof in the trial court. Respondent has referred to a page in the record where petitioner set forth in his memorandum the general law regarding determination of voluntariness of confessions. The reference given by respondent is where the general law is stated at the beginning of the memorandum (R-2708). In his general statement of the law in the memorandum, petitioner set forth the law regarding presumptions against waiver, the burden being on the state to prove a voluntary waiver, and the general law that a combination of factors may render a statement involuntary (R-2708).

After this general statement of the law, the petitioner discussed the specific facts of the case. Petitioner showed that he had some, but an incomplete and often outwardly misleading, ability to understand English. Petitioner then cited numerous appellate decisions.

At the conclusion of this argument in the memorandum of law (the same memorandum the respondent has referred to), petitioner showed that language and cultural differences have been held to be significant in the voluntariness determination, and petitioner further showed that it has "consistently been held that the

prosecution's burden to show voluntary consent is heavier" when the case involves "a foreigner who does not readily understand English." (R-2710).

Petitioner at this point in his memorandum cited two cases holding that the clear and convincing evidence standard must be used to determine the voluntariness of a waiver when the suspect lacks fluency in the English language. Petitioner cited to Rosell v. State, 433 So.2d 1260 (Fla. 1st DCA 1983), and to Kovach v. United States, 53 F.2d 639 (6th Cir. 1931).

These and other cases cited by petitioner in the trial court show that petitioner did not mislead the trial court regarding the burden of proof. Nor did petitioner waive the requirement that the trial court apply correct law in determining voluntariness of his statement. Petitioner asserted that these cases held the state to a higher standard of proof, and these cases do hold the state to a higher standard of proof—namely the clear and convincing standard rather than the preponderance standard when a person lacks a fluent ability to understand and speak the English language.

Thus this issue was raised below, and it was specifically decided by the district court of appeal in its decision. Therefore, petitioner believes it is properly before the Court for resolution in this case. In any event, if the law has been stated otherwise, the trial court would have been powerless to change the standard unless the trial court found that the cases did make an exception. Petitioner submits that the cases have made an exception where the arrestee is shown to lack fluency in

English. In any event, this issue is one on which there is conflict among the district courts of appeal, and decisions of this Court, regarding whether the standard is the clear and convincing standard for voluntariness of a waiver of Fourth and Fifth Amendment rights.

It has been held in numerous cases that a waiver of Fourth Amendment rights must be demonstrated by the state, where no warrant is involved, to a clear and convincing standard of proof where there is a language barrier between the individual and the law enforcement officers. (See, initial brief of petitioner.)

Brewer v. State, 386 So.2d 232 (Fla. 1980), emphasized that the voluntariness determination must be determined from the totality of circumstances, including such factors as the age, the education, the intelligence and knowledge of the suspect. When there is a factor, such as police overreaching or misconduct, which may affect the validity of a waiver, the state must meet the higher "clear and convincing" evidence standard. Elsleger v. State, 503 So.2d 1367 (Fla. 4th DCA 1987).

It has been stated in case after case that the state bears a heavier burden when the suspect is not readily fluent in the English language, or when cultural differences may affect the knowing and voluntary nature of a waiver of rights or a consent to search. Respondent does not disagree that a heavier burden is involved. (Page 12 of Brief of Respondent). The petitioner takes the position that this heavier burden is one which must be reflected in a defined standard of proof, otherwise the "heavier burden" is vague and difficult to identify or apply.

Since the clear and convincing standard is the identified and appropriate heavier burden to apply when special circumstances exist which may affect the voluntariness of the waiver, it is the standard petitioner believes should be applied in all cases where a non-English speaking person, or a person shown to have a significant lack in fluency in the English language, is advised of his or her rights solely in English and either gives a waiver solely in English or gives a statement through an interrogation conducted solely in English.

Petitioner also takes the position that the purpose of the rule setting a stricter standard for voluntariness serves not only to deter oppressive police conduct but also serves the purpose of excluding unreliable evidence. In waivers of Fourth Amendment rights, for example, a unreliable waiver of rights requires exclusion both because of an effort to deter invalid searches as well as to protect the citizen from the use of evidence obtained through an uninformed or involuntary waiver of search and seizure rights contained in the Fourth Amendment and in Article I, Section 12 of the Florida Constitution. Regarding statements obtained through interrogation, the interest is both to deter law enforcement procedures that overbear the right of a suspect not to give evidence against himself, and additionally to insure that evidence obtained and used from the mouth of the suspect is reliable in its genuineness. Statements of an accused, when in the nature of a confession of material facts, have a profound affect upon juries. Lee v. Illinois, 476 U.S. 530 (1986). The interest of the Constitution in excluding coerced

confessions is in important part to insure that unreliable evidence is not used to obtain convictions. See, Stein v. New York, 346 U.S. 156, 192 (1953), in which it was stated that reliance on a coerced statement must vitiate a conviction because such a statement combines the persuasiveness and apparent conclusiveness of the evidence with what long judicial experience shows to be illusory and often deceptive evidence. See also, Malloy v. Hogan, 378 U.S. 1 (1964), discussing this concern. Although history has advanced beyond a primary concern with torture as a method of obtaining statements from suspects, the involuntary statement that is not a true free-will offering lacks the testimonial trustworthiness required for reliance of a criminal judgment in judicial proceedings. See, Wagner v. United States, 110 F.2d 595 (5th Cir. 1940), at 596 explaining that while sometimes differently stated, the principle underlying the rule of exclusion of involuntary confessions is a concern for testimonial trustworthiness.

The present case involves a question whether the reading of the Miranda rights in English served to fully inform Mr. Balthazar and, secondly, the voluntariness issue (as distinguished from the mere procedural issue surrounding the warnings) of whether Mr. Balthazar was able, in light of the cultural and language differences, to understand and voluntarily decide to give a free-will statement. If not, the statement was in response to apparent authority and lacked the trustworthiness of an uncompelled statement. See, Hunter v. State, 518 So.2d 304 (Fla.

4th DCA 1987), and Schneckloth v. Bustamonte, 412 U.S. 216 (1973), discussing the differences between compliance with apparent authority and a voluntary waiver of rights.

Thus, in conclusion the petitioner submits that the substantial interest of the state in both compliance with the rules designed to protect the accused from overreaching tactics on the part of law enforcement officers, as well as the requirement that actual and true voluntariness underlie all waivers of rights in order to insure the integrity of the evidence obtained as well as to respect the specific rights in the constitution, necessitate a special concern when a language and cultural barrier is shown to be a significant circumstance surrounding the understanding nature and voluntary nature of any waiver of Fourth or Fifth Amendment rights. See Acosta v. State, 519 So.2d 658 (Fla. 1st DCA 1988), discussing the requirement that a greater burden devolves upon the state to prove voluntariness in cases involving foreigners who do not readily understand English as well as in the cases of persons who may be illiterate, or otherwise handicapped in an ability to give a free-will and knowing waiver. The clear and convincing standard is more important in the confession, or interrogation, context because the reliability and accuracy of the statement itself is involved concerning the evidence to be admitted or excluded.

In the present case there is a substantial question, as shown by the conflicting evidence, as to whether the petitioner understood all of the questions and whether his answers were in response to the questions actually asked. Thus not only the

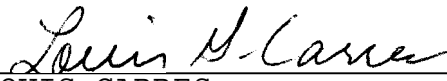
waiver but the substance of the evidence obtained following the waiver requires a defined and identifiable higher standard of proof in these situations in order to protect the integrity of both the waiver and the evidence. Thus petitioner disagrees with respondent regarding the concerns that attend this issue. We believe that it is both the voluntariness of the waiver as well as the reliability of the evidence itself that come into play and should be considered in resolving the issue of what the appropriate standard should be and whether the language barrier is a sufficient special circumstance to justify use of the greater standard of proof in the trial courts when a significant language impediment is shown to have existed at the time the waiver, or statement, was obtained. Therefore the Court should quash the decision below because the language barrier is a special circumstance, as this Court indicated in Denehy v. State, 400 So.2d 1216 (Fla. 1980) might warrant use of the clear and convincing standard, rather than the preponderance standard used in ordinary circumstances, for a trial court to determine whether a knowing and voluntary waiver was given under all of the circumstances.

CONCLUSION

Wherefore, petitioner respectfully requests the Court to quash the decision below and to remand for the trial court for a new trial following a determination of the voluntariness of petitioner's in-custody statement by the trial court utilizing the clear and convincing evidence standard.

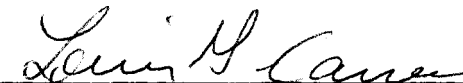
Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished to JAMES J. CARNEY, Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, Florida, by courier, this 7<sup>th</sup> day of AUGUST, 1989.

  
\_\_\_\_\_  
Of Counsel.