When Language Is a Barrier to Justice

The non-English-speaking suspect's waiver of rights

By LINDA FRIEDMAN RAMIREZ, LESLIE NORI KAY, and KATHERINE WEBER

The criminal justice system faces an increasing challenge to accommodate non-English-speaking suspects, witnesses, and defendants without sacrificing due process. By the century's end, one out of five U.S. residents will come from a non-English-speaking or other-culture home. (National Center for Education Statistics, 1989.)

Language proficiency can be a pivotal issue in evaluating the voluntariness of consent to a warrantless search, the validity of a waiver of *Miranda* rights, and the voluntariness of an admission or confession. The vast majority of appellate courts consider the voluntariness of consent to a warrantless search to be a question of fact. They apply a "totality of the circumstances" test, taking into consideration such factors as age, education, intelligence, length of detention, the coerciveness of the police/suspect encounter, and the accused's knowledge of the right to refuse to consent. (*Schneckloth v. Bustamonte,* 745 U.S. 218 (1973).) For a waiver of the privilege against self-incrimination to be valid, it must be made voluntarily, knowingly, and intelligently. (*Miranda v. Arizona,* 384 U.S. 436, 444 (1966).)

These tests for determining voluntary consent and waiver necessitate highly individualized, fact-specific inquiries. Language barriers may prevent a suspect from knowingly and intelligently waiving *Miranda* rights and may counter an apparently voluntary statement or consent to a search.

Consent searches

The government's burden to show the voluntariness of a suspect's consent to a warrantless search is greater when a suspect does not speak or understand the English language. (*Kovach v. United States,* 53 F.2d 639 (6th Cir. 1931).) Whenever the voluntariness of an alleged consent to search is at issue, the language skills of both the arresting officer and the accused must be considered.

The vast numbers of consent search cases that involve language issues can be separated into cases in which the arresting officers were bilingual and cases in which monolingual officers tried to communicate with a non-English-speaking suspect in English or in a foreign language.

As a general rule, factors that invalidate a consent search when both the suspect and the police officer speak English as a native language will also invalidate a search when foreign-language issues are involved. Thus, consent searches preceded by illegal stops, illegal detention, or other illegal police conduct generally will be decided on grounds unrelated to language barriers. (See, e.g., *State of Florida v. Santamaria,* 464 So. 2d 197 (1985).)

When officer or detainee is bilingual

Should either the suspect or the arresting officer be bilingual, this may not have a damaging effect on the suspect's ability to consent. Most jurisdictions will uphold the consent as voluntary in such instances. For example, in *Garcia v. State of Florida,* 186 So. 2d 556 (1966), the police officer who requested permission to search spoke Spanish fluently and fully explained in that language Garcia's right to refuse to consent to a search.

Garcia was told by the officers present that they did not have a warrant to search and that they needed him to sign a consent form before they could look through his residence. The form was in English, and one officer translated it into Spanish. Garcia agreed to sign the form, and the search resulted in the officers locating stolen jewelry on his property.

Garcia later testified that he consented to the search out of fear, but the court, looking at the totality of the circumstances, gave more weight to the fact that the bilingual officer adequately informed the defendant of his rights. The court reasoned that because both the officer and Garcia spoke the same language, the fact that the consent was given in Spanish and not in English had no bearing on its validity.

When the suspect is bilingual, courts have tended to uphold consent as voluntary, regardless of whether the consent was communicated in English or the native language. In *State v. Kim,* 239 Mont. 189, 197 P.2d 512, 517 (1989), the bilingual defendant's sauna massage business was searched after she signed a consent form at the request of police officers. She agreed to sign the form after force was used to subdue one of her employees and she

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herself was handcuffed for a period of time. At the time she signed the consent form, she was seated, smoking a cigarette and drinking a pop.

The court upheld the consent as valid, noting that Kim was a U.S. citizen, owned several businesses in the United States, and had worked with sheriffs' and police departments as an interpreter. These facts supported the view that Kim understood that she was voluntarily consenting to a search of her business.

When officer and detainee are monolingual

Most reported cases involving consent searches and non-English-speaking defendants involve both detainees and law enforcement officers who have minimal proficiency in each other's language. The consent to a search is obtained by pantomime and sign language or by means of short sentences in English or in the foreign language.

In the absence of expert testimony on the language proficiency of the suspect or the arresting officers, the courts have enunciated a number of principles regarding how language proficiency affects an evaluation of voluntariness. The court in *U.S. v. Verduzco,* 996 F.2d 1220 (7th Cir. 1993), held that "a defendant does not have to have perfect command of the English language in order to give voluntary consent; it is enough that he understand English well enough to comprehend the situation." In *United States v. Alvarado,* 898 F.2d 987, 991 (5th Cir. 1990), the court held that "where there is sufficient conversation between the suspect and law enforcement officers to demonstrate that the suspect had an adequate understanding of English to fully comprehend the situation, a finding that consent was voluntary may be proper."

A finding of voluntary consent to a warrantless search was made in *U.S. v. Gutierrez-Mederos,* 965 F.2d 800, 803 (9th Cir. 1992), cert. denied, 113 S. Ct. 1315 (1993), supported by evidence that the troopers, questioning the suspect in English, never had to repeat their questions to get the suspect to respond. The same finding was made in *U.S. v. Corral,* 899 F.2d 991 (10th Cir. 1990), on the basis of evidence of the suspect's ability to relate the needed information in English.

In *U.S. v. Gallego-Zapata,* 630 F. Supp. 665 (D. Mass. 1986), an airport stop case, the defendant had been approached by two DEA agents at Logan Airport after getting off a flight from New York. When questioned about his airline ticket, Gallego responded in broken English, thus alerting the DEA agents that his English was limited. One of the agents pointed to his bag and asked, "Drogas? Drogas?" [Drugs? Drugs?], to which Gallego replied, "No. No." The agent then asked, "Is it OK for me to look? OK to look?" and Gallego said, "Sí, sí" [Yes, yes].

On finding no drugs when the bag was searched, the agents pointed to Gallego's jacket and asked, "Is it OK to look? OK to look?" and the detainee made no oral response. He merely shrugged his shoulders, turned his head, lifted his eyebrows, and nodded.

After finding that the request to search the bag and jacket followed an illegal detention, the court engaged in a highly fact-specific inquiry to determine whether the consent to the search was voluntary. The court gave great weight to the defendant's educational and cultural background as well as to his language limitations. He was twenty-two years old, had seven years of education in Colombia, and had been a truck driver.

The court found that the defendant's language skills in speaking and understanding English were "extremely limited." The court decided that the defendant's response to the agents' request to search his jacket—the nonverbal shrugging of his shoulders and the nodding of his head—were gestures of resignation and not indicative of voluntary consent to the search.

The Tenth Circuit also has held that a detainee's pantomime was not sufficient to indicate voluntary consent to a search. (*U.S. v. Benitez-Arreguin,* 973 F.2d 823 (10th Cir. 1992).) Benitez was detained in an Amtrak station by state narcotics agents who were stopping individuals who appeared to fit a "drug profile" as they arrived on the early morning train from Los Angeles.

The agents observed Benitez carrying two bags and placing a phone call in Spanish. The agents stopped Benitez and, after realizing that he did not speak English, continued to address him in English and made hand motions toward the bags. Benitez's response to the agents was to shrug his shoulders and hold his hands up as if to signify that he did not know anything.

Verduzco, supra, involved a request for consent to a search following a traffic stop on an interstate highway. In a familiar scenario, the state trooper told Verduzco that he was free to leave but then asked him if he would mind answering a few questions. The questioning that followed was in English, and the suspect's responses were in English.

Verduzco testified that he answered yes to all of the state trooper's questions even though he did not understand exactly what the officer was saying. The defendant's relatives testified that he never spoke English with family members and gave some examples of occasions when he had difficulty communicating with others. The district court found this testimony unpersuasive and held that Verduzco could speak and understand English well enough to understand what the officer was saying.

Consent forms

In many jurisdictions, the suspect does not have to have knowledge of

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the right to refuse to consent to a warrantless search before a consent search will be upheld. Even so, a signed, written consent form in the defendant's native language tends to bolster the claim of voluntariness of consent. (*U.S. v. Gavira,* 775 F. Supp. 495 (D. R.I. 1991); *U.S. v. Suarez,* 694 F. Supp. 926, 939, aff'd, 885 F.2d 1574 (11th Cir. 1989).)

A consent form written in both English and the native language will tend to negate any inference that the defendant did not voluntarily consent to the search. (*United States v. Cortez,* 935 F.2d 135 (8th Cir. 1991); *U.S. v. Zapata-Tamallo,* 833 F.2d 25 (2d Cir. 1987).)

Custodial interrogation

Language-proficiency issues in the context of custodial interrogation usually revolve around the adequacy of the *Miranda* warnings and whether any waiver was valid. Language ability may also have a bearing on the voluntariness of the statements themselves.

The prosecution generally has the burden of proving by a preponderance of the evidence that the *Miranda* warnings were adequate and that the defendant's waiver of *Miranda* rights was voluntary, knowing, and intelligent. (*Colorado v. Connelly,* 479 U.S. 157 (1986).) Generally, if *Miranda* warnings are given in a language not understood by the suspect, a waiver of those rights will not be valid. (*U.S. v. Martinez,* 588 F.2d 1227, 1235 (9th Cir. 1978).)

Even though the courts tend to recognize that language barriers may inhibit a suspect's ability to knowingly and intelligently waive his or her *Miranda* rights, or may affect the adequacy of the warnings, a waiver may be valid if a suspect's rights were explained in his or her native language and the suspect claimed to understand such rights. (*United States v. Boon San Chong,* 829 F.2d 1572, 1574 (11th Cir. 1987).)

At least one court has held that there is no obligation to use a suspect's native language as long as the suspect has sufficient command of the language in which the warning was made to waive his or her rights intelligently and knowingly. (*Companeria v. Reid,* 891 F.2d 1014, 1020 (2d Cir. 1989).) Generally, if a suspect's statement is reduced to a written, signed form or to an audio recording, or if the *Miranda* warnings were provided to the suspect in a written form, a more persuasive case can be made for or against the language-barrier defense to waiver or adequacy of warnings.

Absent expert testimony, courts will examine a variety of factors when making a language-proficiency finding. In *Solis v. State of Wyoming,* 851 P.2d 1296, 1300 (1993), the court heard testimony from the defendant, from a bilingual probation officer who served as an interpreter when the defendant's statement was taken, and from the defendant's ex-girlfriend.

In addition, the court considered the defendant's prior contact with the criminal justice system, the length of time he had been in the United States, and the level of understanding he demonstrated when he encountered the police. The court ultimately was persuaded by the fact that the defendant indicated either physically or verbally that he understood each *Miranda* right after it had been read to him.

Mandatory interpreting

When *Miranda* warnings are delivered to a suspect who speaks limited English, law enforcement officers may be compelled by state statute to provide an interpreter. In

Defending Culture

Examples abound of cultural differences between an ethnic group and "mainstream America" that affect everything from a person's ability to understand *Miranda* rights to a defendant's demeanor at trial to mitigating factors for sentencing. In fact, the failure to raise a "cultural defense" may constitute ineffective assistance of counsel (*Mak v. Blodgett,* 754 F. Supp. 1490 (9th Cir. 1991)). Consider the following (taken from *Cultural Background Experts Explain Influences, Effects,* 6 Crim. Prac. Man. (BNA) 30–31 (1992)):

- A Navajo man is read his *Miranda* warnings during an investigation into his wife's death. He appears to understand the warnings and then admits to having murdered his wife. But the Navajo translation rendered the *Miranda* litany as "You have the duty to sit quietly and answer my questions."
- A Chinese immigrant, despondent over being abandoned by her husband, tries to kill herself and her child. The child dies, but she survives. Experts on transcultural psychology explain to the jury the differences between Western and Chinese beliefs in the afterlife. The mother believed that through death, she and her child would be reunited and she would be able to give him the care he did not get in this world.
- A man is charged with criminal mistreatment and assault after beating his 16-year-old son with a piece of wood during a confrontation over the boy's suspected gang involvement. He is acquitted after the jury hears expert testimony about the problems faced by a single black father living in a gang-infested neighborhood.

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Oregon, for example, state law requires law enforcement officers to provide an interpreter "at the earliest possible time" and before interrogation or the taking of a statement begins. (Or. Rev. Stat. § 133.515 (1993).) Failure to provide an interpreter may result in the suppression of confessions and statements.

If written warnings are provided to a non-English-speaking suspect in his or her native language, it is crucial to evaluate the warnings for accuracy and completeness. In *U.S. v. Higareda-Santa Cruz,* 826 F. Supp. 355, 360 (D. Or. 1993), the Spanish *Miranda* card (which in any case had not been read to the defendant) contained numerous errors, including a statement implying that a defendant must be completely without money before he or she can obtain an appointed attorney.

In *U.S. v. Kim,* 803 F. Supp. 352 (D. Haw. 1992), the defendant submitted to the court a copy of his statement to the police on which he had circled all of the words that he did not understand. The court found that sufficient doubt had been cast on the overall accuracy of the statement to render it inadmissible at trial.

In *U.S. v. Fung and Chen,* 780 F. Supp. 115 (E.D. N.Y. 1992), the defendant was arrested pursuant to a warrant. As she was being driven to the post office for processing, the defendant was handed a card containing *Miranda* warnings in Chinese and asked to read the card aloud. The only agent present who spoke Chinese was driving. The court held that the defendant was not properly advised of her rights given her poor language skills, her lack of knowledge of the American legal system, and the stress of the situation, which likely interfered with her comprehension.

Anxiety and language proficiency

Because the courts tend to adopt the totality-of-the-circumstances approach to evaluating the voluntariness of a consent search or custodial interrogation, it is worthwhile to consider the effect of fright and anxiety on a person's comprehension of a second language.

Often a statement or a consent to a search is extracted after an arrest at gunpoint or while the patrol car's lights are flashing. The linguistics literature suggests that anxiety can have a major impact on second-language learning and comprehension. (Thomas Scovel, *The Effect of Affect on Foreign Language Learning: A Review of the Anxiety Research,* 28 Language Learning 129–42 (1978).) Expert testimony may be used to establish to what degree fright affected a suspect's ability to comprehend a second language.

Expert witnesses

The use of experts to overcome the government's proof of the voluntariness of consent to a search or proof of the waiver of *Miranda* rights is becoming increasingly common. Determining a person's level of language comprehension is a complex issue that requires careful consideration. In *United States v. Castrillon,* 716 F.2d 1279 (9th Cir. 1983), the court of appeals remanded a case concerning voluntary consent and a language barrier to the district court for specific factual determinations. The factual questions all centered on the defendant's comprehension of the Spanish spoken to him by detectives and the Spanish-language consent form he signed.

Experts can test language proficiency and evaluate the adequacy of written or oral consent forms and recitations of rights. Generally, the criteria for the admissibility of expert testimony in federal court are governed by Federal Rules of Evidence (FRE) 702 and 403 and by *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* ___ U.S. ___, 113 S. Ct. 2786 (1993). Any expert who will testify must examine the defendant personally, because the court can properly reject expert testimony when there has been no individualized evaluation. (*Gutierrez-Mederos, supra.*)

In *Higareda-Santa Cruz, supra,* a linguist personally tested a defendant's ability to understand English. The linguist testified that when she asked the defendant, "Do you mind if I search the car?" the defendant understood "something about looking in the car but he would not really get the whole idea of what it means to say 'Do you mind if . . . ?' " Because of his difficulty in understanding "if" clauses, the defendant could not understand the linguist's control question, "Well, if you go back to Mexico, will you have a right to visit your family in San Diego?" The linguist also testified that the defendant tended to indicate greater understanding than he actually had and that this was typical of people learning a second language. The court concluded that because his grasp of English was rudimentary, his consent to the search of his car was not voluntary.

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A Census Update

According to a new report by the Census Bureau, the population of minorities in the United States is expected to grow rapidly over the next twenty-five years. By 2020, immigration and rapid population growth are expected to make people of Hispanic descent the nation's largest minority, totaling 51.2 million, or 15.7% of the population, up from 9.7% in 1993. African Americans will be the second-largest minority at 13.9%, up from 12.5%. Asians and Pacific Islanders will see significant growth, rising from 3.4% to 6.9%. American Indians will increase their share of the population from 8/10 of 1% to 9/10 of 1%. (*Americans in 2020: Less White, More Southern,* New York Times at A7 (Apr. 22, 1994).)

Meeting in August.

Finally, I would like to address the oft-repeated comment by many professionals in the criminal justice system that goes something like this: "By the time the problem gets to us [police, prosecutors, defenders, judges, correctional officials], it's too late." I submit that there is plenty that can be done to ensure that people are treated fairly and with dignity, that racism in the application of criminal justice policy is diminished if not eliminated, and that short- and long-term strategies designed to reduce and prevent crime are implemented. I am confident that in assuming leadership of the Section, **E. Michael McCann** will continue to lead us on the road to justice.

Language Barrier

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Tests of language ability

No language test has been designed solely for the purpose of assessing a person's ability to consent to a search voluntarily or to waive *Miranda* rights intelligently. There are a number of tests, however, that evaluate English-language proficiency and are effective for evaluating language proficiency in the voluntary-consent context. Some of these tests are discussed in J. Charles Alderson, Karl J. Krahnke, and Charles W. Stansfield, eds., *Reviews of English Language Proficiency Tests* (Teachers of English to Speakers of Other Languages, 1987).

A widely used English assessment test is the Basic English Skills Test, or BEST. The test is considered highly reliable because the items are based on tasks required for everyday life. The test reliably and accurately assesses the language skills of low-level speakers. The norming sample consisted of sizable groups of native speakers of Vietnamese, Hmong, Lao, Cambodian, Chinese, Spanish, Polish, Romanian, and other languages.

The BEST evaluates listening comprehension, speaking, reading, and writing. It consists of two sections: a core section (49 items) and a literacy skills section (70 items). The core section of the test provides examinees with live oral stimuli, pictures, and writing on a one-to-one basis with the examiner. The literacy skills section gives students oral as well as written directions.

Examinees respond by speaking, pointing, and writing in the core section, but only by marking or writing in the literacy skills section. The subparts are scored separately, and there is a global score for pronunciation. A reading and writing score is used to determine whether the examinee is literate enough to proceed to the literacy skills section.

The BEST was designed for newly arrived Southeast Asian refugees in adult education programs, but it also can be used effectively with students from a wide variety of cultural and linguistic backgrounds who have lived in the United States for longer periods of time.

The challenge

The language proficiency of a non-English-speaking or multilingual detainee during interrogation or when requesting consent to a search can be a crucial factor in the "voluntariness" equation. An evaluation by a linguistics expert frequently is necessary to establish an individual's language limitations.

Keep in mind that language limitations may be only one aspect of a larger cultural barrier to the comprehension of rights when consent to a search, waiver of rights, or admissions are sought. An understanding of the cultural background of the defendant also is essential to reaching a conclusion about the voluntariness of consent and waiver. **CJ**

Indigent Defense Crisis

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Federal anti–drug abuse grants. Federal funds are now available to state and local indigent defense programs under the Drug Control and Systems Improvement Formula Grant Program set up by the Anti–Drug Abuse Act of 1988. These funds originally were available only for law enforcement activities, including police, prosecution, and drug interdiction efforts. As a result of a 1990 amendment to the Omnibus Crime Control and Safe Streets Act of 1968, funds now are available for indigent defense programs as well.

In fiscal year 1991, twenty-nine states received such funds for indigent defense. The funds typically are awarded to augment defender staff for drug cases and to implement case-management systems and training programs.

To receive the federal funds, a defender agency must contact its state planning agency (SPA). The SPA is required to create a statewide plan for the expenditure of federal dollars. The plan is submitted to the DOJ's Bureau of Justice Assistance. The bureau reviews the state plans and authorizes funds to the respective SPAs. In turn, each state's SPA