

*YA LLEGO LA FREGADA*¹

LANGUAGE, CULTURE AND RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM

by
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Death and life are in the power of the tongue.
Proverbs 18:21

Representing a person accused of crime raises several concerns and issues. Representing non-citizen clients, or non-english-speaking clients, while raising similar concerns, requires special attention to some extra-legal and cultural aspects of the representation. Of particular importance is language and culture and how these concepts come into play in the defense of an individual. Oftentimes, these clients, even though everyone is seemingly communicating in a language they understand, have very little understanding of the abstract concepts that underpin our criminal justice system. Why?

The bedrock concepts of our criminal justice system (presumption of innocence, burden of proof, proof beyond a reasonable doubt, *Miranda* rights, waivers, consent, etc.) are foreign. Take the presumption of innocence, for example. A foreigner not educated in this criminal justice system may balk at the presumption and assume that his own knowledge of his guilt is sufficient.

This is a difficult burden to handle and it is ours alone. And, if *we* have a hard time communicating these concepts, how well do you think law enforcement agencies communicate and secure the defendant’s understanding of these concepts. Answer: Not well. So, what do we do?

When we undertake to represent a person whose culture is different from ours in our criminal justice system, we must be mindful of the roles that language and culture will play. But, we must also be mindful to not overlook the sometimes minute things that can impede our representation. Some of these same impediments are present at various stages of the case for

¹Translations

1. Here comes the difficult situation.
2. (Colloquial)—The sh*^ has hit the fan.

both the prosecution and the defense. Since we can only control our representation and exploit the deficiencies in the prosecution's case, let's start with what we can do to make the situation better.

STEP ONE: THE CULTURE YOU BRING TO YOUR CLIENT.

Like it or not, we bring our biases, prejudices, and cultural background to everything we do. This includes how we see the world and how we view other people. We assume a certain lawyer-culture in the work we do. While this may not be a bad thing, there are things that we do in the representation of our clients that can have adverse consequences to the representation.

- A. **WHAT YOU WEAR.** Your first interaction with your client helps create impressions that may or may last throughout the representation of the client. Consider this: Does your client's impression of you, his only savior, contingent on what he sees when you walk in? Does a person in a suit deserve a different impression than a person in something more casual. Consider this: The racial and ethnic disparity that some of our clients feel in the criminal justice system is the exact result of a feeling of inferiority or second-class status. Do you contribute to that feeling with the way you dress? Do you create a chasm between you and your client that is unintended?
- B. **YOUR CARD.** The very first thing that your client receives from you is often your business card. If you don't give a business card, what message is that sending to your client, especially when the other defendants in the jail have business card? Plus, what does a generic business card say? Your card conveys your class and their possession of it may convey that class among his fellow jailed inmates.
- C. **WHAT YOU SAY OR DON'T SAY.** If you are representing a client who speaks a language you do not speak, how are you going to communicate with this person? Does the client's impression of you differ if your words are filtered by a translator? Does the client get the impression that you don't care because you don't speak his language? As is often the case when we use interpreters, we often pay more attention to the interpreter than to the client. We tend to direct our conversation away from the client and to the interpreter. It is a surreal exchange that is beautifully re-created in *Harold & Kumar Escape from Guantanamo Bay*.
- D. **ACTIVE LISTENING.** The psychologist Carl Rogers helped develop the concept of active listening in an effort to improve doctor-patient communications and relationships. We could certainly learn many lessons from being able to give complete and undivided attention to the speaker (in this case, our client). For example, do you constantly write notes while your client is talking? Do you have to look down at your paper while you write? Remember the old saying, "I write things down so that I don't have to remember them." There is significant truth in

that phrase. Consider these ideas² to help in your active listening:

1. Use attentive body language (facial expressions, gestures, posture, eye contact, etc.);
2. Let the speaker have room to tell their story without unnecessary interruption utilizing infrequent, timely and considered questions, together with attentive silences; and
3. Restate the feeling and/or content with understanding and acceptance (paraphrase, summarize).

STEP TWO: UNDERSTANDING COP CULTURE

Cops are in a very unique position. Whatever their lives may have amounted to prior to becoming a cop goes out the window and now they are a member of an elite squad of crime busters. To assimilate to that particular cop culture requires cops to shed off what they once considered their humanity in lieu of a cop's mentality. This is not to suggest that the author is belittling or denigrating the work that cops do. Instead, the author is suggesting that cops have difficult jobs and their coping mechanisms require that they stay detached and neutral. We can all remember the old "Just the facts, mam" phraseology of the Dragnet days. The reason for that psychic stance is to ensure the cop's objectivity and to see the world without regard to the gray, opting for only the black and white. In assimilating to cop culture, certain things begin to happen to cops that permeate their entire world view. The observations below suggest what cops think about themselves and how we can exploit that training and assimilation in our cases.

1. I didn't do it. While this verbiage is often associated with our clients, cops often utilize this tool to cast off any responsibility for any actions that may be viewed askance. The easiest defense to any charge is the simple denial of the accusation. Cops begin their "cya" routine by first suggesting that the thing at issue never happened. EXAMPLE: Cops often will try to get other cops to be their alibis to whatever charge is made. Their first defense is that it wasn't them or it didn't happen at all.
2. If I did it, it wasn't wrong. Eventually, cops begin to own a little responsibility for their actions by suggesting the action that they engaged in wasn't improper or wrong. Somehow, they convince themselves that there was nothing wrong in any conduct that they have engaged in. EXAMPLE: After admitting that an action was actually engaged by them, cops next fall on the defense that their conduct was permissible. You will often hear things like, "Our policy allows us to...." or "My commanders always said it was ok to...." They bring the whole culture of

²These tips come from an article I found online called Active Listening: More than just paying attention by Kathryn Robertson.

the police force to defend themselves.

3. If it was wrong to do the act, I was justified. Even if an officer admits that the conduct he engaged in was wrong, the officer will oftentimes suggest that he had legal justification to comport himself in the way he did. The justification often centers around intangible concerns like security or generalized fear of crime.
4. Why do you hate America? The last bastion for nitwits is the über reliance on patriotism and what is generally good for the country. There is no small dose of this phenomenon in just about all cops encounters. After all, they are trained to believe that they are protecting society even though society may not fully understand it.

These core principle of the cop culture help to frame the understanding of what cops bring to the table when they encounter your client. They are fearless, guiltless, never wrong, and never admit to being wrong. This air of supremacy intersects very negatively with your client’s often insatiable need to “cowboy up.”

STEP THREE: YOUR CLIENT’S CULTURE

Your non-native speakers as well as your non-citizen clients often have a very difficult time understanding the justice system they find themselves in. All too often, the stakes are very high while the client may not fully understand the ramifications of how the system works. Consider these cultural tough-spots:

- A. “But I know I am guilty.” Many times, our clients come into the American criminal justice system with their own set of expectations. The Mexican³ criminal justice system, for example, is not confrontational; instead, the system is controlled by a judge who gradually gathers evidence and information and then renders a verdict. Apparently there exists a presumption of guilt until the accused produces evidence to the contrary. Some defendants may see no need to be uncooperative when they believe their guilt is already presumed. In fact, if you are presumed guilty anything you say can only *help* you, right? The defendant’s goal is to bring the situation to quick closure and make their pitch for leniency. This stands in contrast to the American presumption of innocence.
- B. Right to remain silent. Many times, our clients don’t understand the right to remain silent. Remaining silent is sometimes the last thing they want to do. In fact, telling their story is tantamount to

³I have used “Mexican” for reference. You can just as easily substitute “European” or any other system with similar features.

their defense (lack of work, medical necessities, and other financial difficulties and hardship). As stated above, the Mexican and other systems thrive on statements given. A Mexican defendant in the American criminal justice system is just doing his part in the information gathering process, unaware that he stands a better chance at liberty if he were to *permanecerse callado*.

- C. Burden of Proof on Defendant. Tangentially related to the right to remain silent is the fact that these same defendants come from systems that place the burden of guilt/innocence on the defendant. Any defendant who comes to this system must unlearn what he has learned about justice in his country and learn a new form of justice, American style. By the time they get to understand this system, the State may have already taken significant advantage of the deficit our clients face in knowledge of the justice system here in the United States.
- D. No money for a lawyer. Still other non-citizen defendants who are poor have a belief that money buys a defense and since they have none no attorney will help them anyway. This belief is especially pervasive among the above-40's crowd. This writer once encountered a man who, after being explained what a motion to suppress was and its potential in his case, looked up at me and explained that the suppression course of action would be nice, but he had no money to pursue it.
- E. The signing frenzy and respect for authority. Many Mexican clients take great pride in their signatures. They take such pride that they don't mind signing any and all forms of paperwork that are placed in front of them. When this pride is coupled with even a mild respect for authority, disaster ensues. When told to sign, they sign. Never mind that they have just waived all their rights, consented to a full body cavity search, have consented to the searching of all of their belongings, and have consented to the taking of blood and other precious fluids⁴.

⁴This reference is veiled, but comes from the film *Dr. Strangelove or How I Learned to Stop Worrying and Love the Bomb* by Columbia TriStar ©1964

- F. Inversion of the Rule of Object Permanence⁵. Some of our clients believe that once said, a statement can never be erased, taken away, hidden, covered up, whited out, or any of the other euphemism we use to explain the importance of a motion to suppress. The process of explaining the power of a motion to suppress can be tedious. Many times it involves a willful suspension of disbelief on the part of our clients. Once an admission of guilt is launched into the universe, they find it very hard to understand how a simple request to take away their incriminating statement can achieve that very simple goal.

STEP FOUR: WHEN ALL THREE WORLDS COLLIDE

While we have to make significant strides for us to understand our clients and the various beliefs they bring to the fore, the State takes no such steps to actively listen or to empathize with the defendant. We can and should take advantage of the spatial and cerebral distance that the State unintentionally forges between itself and the defendant. For example, when the State secures confessions from our non-english-speaking clients, they tend to take significant shortcuts. If we are to challenge a statement made by our clients, our best place to start is in the area of knowing and intelligent waivers of *Miranda* rights. A waiver of one's *Miranda* rights must be done knowingly, intelligently, and voluntarily. *Edwards v. Arizona*, 451 U.S. 477 (1981). Attacking the waiver as not being knowingly or intelligently made is distinct from attacking a waiver as involuntary. Attacking the waiver as involuntary cannot be done without some form of police coercion. *Colorado v. Connelly*, 479 U.S. 157 (1986). However, attacking the knowing and intelligent aspect of the waiver is distinct and independent from the involuntariness prong. *Colorado v. Spring*, 479 U.S. 564 (1987). The requirement of a "knowing and intelligent" waiver implies a rational choice based upon some appreciation of the consequences of the decision. *Cooper v. Griffin*, 455 F.2d 1142 (5th Cir. 1972). So the issue becomes: Did your client appreciate the consequences of the decision to waive? The beauty of this exercise is that the standard is subjective (i.e., what did your client know or not know?)

I. CHALLENGING STATEMENTS MADE BY OUR CLIENTS⁶

- a. Was *Miranda* communicated in a fashion that provided the admonishments

⁵The rule of object permanence was observed and theorized by Jean Piaget (1896-1980) a Swiss psychologist who studied, among other things, child development. The rule describes a developmental ability to recognize that, just because you can't see something doesn't mean it's gone.

⁶As will be discussed later, whether a person's statement is actually their own is subject to wild-eyed interpretation.

correctly or mostly correctly? Remember, if the crux of *Miranda* is not communicated effectively, how on Earth can a person waive those very precious and few rights? Put another way, how can you exercise dominion over rights you don't know you have?

1. While it is true that a precise incantation of the warnings need not be given, their general gist must be communicated. *California v. Prysock*, 453 U.S. 355, 360-61 (1981).
2. Attack the general gist that was communicated. Do not assume that the agents know Spanish, no matter what their surnames.⁷
 - A. **Parlez vous espagnol?** Does the agent speak Spanish? If so, how much Spanish does the agent speak? How well does he speak it?
 - B. Is he a native speaker?
 - C. **A model student?** Where did he learn Spanish? Request school/academy records on this agent's language acquisition.
 - D. **A form by any other name.** . .Pay attention to knock-off forms that try to replicate *Miranda*.
 - E. **Bi-ddy, bi-ddy, bi-ddy...that's all folks!** Are there any speech patterns or idiosyncracies of the agent that may affect how he speaks (ie, stuttering, stammering, Spanglish, circumlocution, etc.)

⁷Making inquiry into a person's ability to speak Spanish, after they have communicated that they can in fact speak Spanish is tricky. This inquiry, if it reveals that the agent is deficient in his Spanish, is the legal equivalent of a castration. There is no way to re-attach the ability to speak Spanish, especially if it was never truly attached to begin with.

- F. **Stacking the deck, Part I.** Have the agent read the I-214 (the page usually containing the incantation of the *Miranda* rights) and see how he does. Spot ahead of time the words, if any, that the agent may be having trouble pronouncing. Asking him to read these words in Spanish is akin to asking to pronounce the word “shibboleth”⁸. If all turns out well, maybe you can paint the agent as linguistically challenged.
 - G. **Stacking the deck, Part II.** At any hearing or questioning, include a friendly court interpreter who will make comment on the agent’s ability to speak Spanish.
- b. Did your client know what he was waiving?
- 1. Educational Deficiencies
 - A. Have a psychologist test your client and his reading and learning abilities. The psychologist could help to explain how your client learns. That is, is he a reading learner or an anecdotal learner? Can he read? If so, how well? If he can’t read, does he exhibit any behavior that compensates for this deficiency? Does he appear to understand the written word?
 - B. Test your client’s mastery of his own language
 - 1. Counsel can use flash cards to test his client’s recognition of words in the *Miranda* warnings or the equivalent.
 - 2. On separate flash cards, counsel can list the actual words used in the so-called confession to determine whether the client recognizes them. Try to determine whose words are in your client’s so-called confession.
 - 3. Translate the words that the government used in the

⁸The word “shibboleth” is a term found in the Bible. It was a password used by the Gileadites to distinguish the fleeing Ephraimites, because the Ephraimites could not pronounce *sh*.

Then said they unto him, Say now Shibboleth:
and he said Sibboleth: for he could not frame to
pronounce it right. Then they took him, and slew
him at the passages of Jordan: and there fell at
that time of the Ephraimites forty and two
thousand. *Judges 12:6*

“confession” into Spanish on place them on flash cards and determine whether your client recognizes them.

4. Interview family members and gather anecdotes relating to your client’s ability to read and write.
 5. Interview cell mates and gather anecdotes relevant to your client’s reading and writing skills.
 6. Make sure your client isn’t caught reading the *New York Times* while in the pokie.
2. Physiological difficulties. Does your client stutter? Does he stammer? Does he have any nystagmus or other tic that might suggest brain dysfunction?
 3. Mental disease and retardation or other defect. Does your client suffer from mental disease? Is he retarded? Does he have any other form of cognitive impairment? You might want to consider testing your client’s intelligence quotient (IQ).
 4. Previous experience/interaction with the American criminal justice system. One of my clients once remarked in open court that, “This is not my first rodeo.” Courts have held that repeated trips to the “rodeo” might have the unintended result of actually teaching someone their rights so well that the rodeo-goer can’t later claim that he didn’t understand his rights. The moral of the story: Don’t go back to the rodeo unless you’re ready to step in some horse manure.
 5. Cop influences.
 - A. Consider the cops’ tone, emotion, volume, speed, pace, posture, and position.
 - B. Determine whether the cop placed an “x” where a signature or a set of initials should be. This might be of several things. The placement of an “x” might show that the cop recognizes your client’s deficiency or that the cop just doesn’t care. Either way, fodder.
 - C. Was your client asked to sign a multitude of forms that were presented with desert storm-like quickness? What type of forms were they? Were they immigration forms? Notice of forfeiture forms? Investigate whether this inundation of forms and concepts rendered your client bewildered and essentially overcame his will to give a damn.

- D. How quickly were signatures extracted from your client? When were these signatures affixed in relation to *Miranda* admonishments? Was there possible confusion from your client's end?

- 6. Client's intoxication whether voluntary or involuntary. Some intoxicants have a more detrimental effect on waiverism. For example, marijuana affects a person differently than cocaine or heroin. Consider contacting a drug counselor to help explain the effects of the drug on a person's ability to waive knowing and intelligently.

- c. What do the cops know about your client's cognitive abilities? No doubt the cops will want to state that your client understood what he was waiving because he acted in a way that demonstrated that he had dominion over the abstract concepts. They might say that your client appeared to read the rights. They might say that he signed without hesitation. They might say that he nodded his said in agreement when spoken to. Who cares? What do the cops know about your client's cognitive abilities anyway?
 - 1. Cops are not trained to recognize cognition in people. Their job is to overcome one's desire to remain silent. No single moment in their training teaches how to spot whether a person understands his rights.
 - 2. Cops are not trained on recognizing whether someone can read or write.
 - 3. Cops are not trained on being able to differentiate between idiot savants, retarded people, and geniuses.

- d. Did the cop fill in the gaps where your client mentioned nothing? Sometimes, cops, however intentionally or unintentionally, write out what they believe to be the gist of your client's statement. Does anyone remember the scene from *My Cousin Vinny* where the character asks, "I shot the clerk?" and the cop remembers, "I shot the clerk. I shot the clerk." This is an obvious difference in linguistics that makes a huge impact on the course of the case. Test whether the cop has done this in your case.
 - 1. Compare client's so-called confession to his mastery of his own language:
IS IT HIS STATEMENT?
 - A. Is it in his handwriting? A statement written in beautiful handwriting and in English when your client neither reads nor writes should send up a 100 x 200 foot red flag.
 - B. Was it allegedly dictated to an agent? Did the agent write the statement for your client? Did the memorialization happen

contemporaneously with the oral statement? Were there notes that were expounded upon or did the statement go down word for word?

- C. Was the statement read back to the defendant? If so, did he understand what the words meant? If the statement was read back to him, did he understand that he could make changes?
- D. Did it sound like a cop wrote the statement? Look for cop-speak.
 - 1. Time 2100 versus 9:00pm
 - 2. “I *then* did...and I *then*...”
 - 3. “I, Frank Morales”
 - 4. “I wrote this freely and voluntarily”
 - 5. “Nobody has threatened me...least of all these fine police officers.”
 - 6. “That’s all I have to say”

A COMMENT ON THE BURDEN OF PROOF:

While it is true that the government bears the burden of showing a knowing and intelligent waiver, your effort to establish your client’s lack of mastery of his own language could go a long way to disprove what the government presents. All they are likely to show is that your client seemed to understand, nodded, signed a couple of pages, and gave a statement. We should do the leg work to show that this litany means nothing except that our poor, uneducated client found himself in a position of impotence and did what he could to avoid further problems. If these actions were undertaken because the client did not fully understand his rights, and the nature and consequences of waiving his rights, we have a chance. If we don’t investigate fully the intersection of culture, poverty, lack of education, the criminal justice system and how it impacts on our clients’ recognition of his rights, we do nothing to properly represent him. It is often a difficult task to undertake, but the result is well worth the effort. HAPPY SUPPRESSING!

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

DEL RIO DIVISION

UNITED STATES OF AMERICA

§

§

A.

CAUSE NO. DR-99-735-WWJ

§

PEDRO ROBLES RAMIREZ

§

MOTION TO SUPPRESS STATEMENTS

TO THE HONORABLE WILLIAM WAYNE JUSTICE, SENIOR UNITED STATES
DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS:

NOW COMES the Defendant, Robles (“Robles” or “Defendant”) by and through his attorney of record, Frank Morales, Assistant Federal Public Defender, and pursuant to the Fifth Amendment to the United States Constitution and hereby requests that this Court enter an Order granting this Motion to Suppress Statements and in support thereof would show the following:

I.

Robles currently stands charged by indictment with possession with the intent to distribute marijuana.

II.

Defense counsel seeks to suppress the following:

1. Any and all statements unlawfully seized from Robles after his apprehension by government agents; and
2. Any and all other evidence obtained, directly or indirectly, as a result of any unlawfully seized statements.

Robles requests an order suppressing these statements on the following bases:

- I. Government agents failed to properly advise Robles of his rights pursuant to

Miranda v. Arizona, 384 U.S. 436 (1966).

2. Due to the Robles' mental condition, severe under-education, speech impediment, first interaction with the criminal justice system, the advisal of his rights by government agents and the manner in which government agents advised him of those rights, he did not knowingly and intelligently waive his rights pursuant to *Miranda*.
3. Due to the circumstances surrounding Robles' apprehension and interrogation, his mental condition at the time of the reading of his rights and the manner in which government agents presented those rights to him, he made no voluntary waiver of his rights pursuant to *Miranda*.
4. Due to the manner in which the agents interrogated Robles and his mental condition at the time of the interrogation, he made no voluntary statements.
5. Any statements provided by Robles were acquired in violation of the Vienna Convention on Consular Relations.

III.

Statement of Facts¹

On October 31, 1999, a large group of individuals was encountered approximately 11 miles west of Eagle Pass, Texas. Some were seen carrying bundles. As agents with the United States Border Patrol approached, the group scattered and dropped the bundles. Agents later

¹The following recitation of facts is gleaned from government discovery released on January 6, 2000. The recitation of facts in this section is not meant as a stipulation of facts; Robles reserves the right to change his position relating to the factual nature of this offense at trial and at any other stage of his prosecution.

found Robles hiding in some brush “close where the bundles were found.” At that time, Robles was taken into custody and taken to the Eagle Pass Border Patrol Station. While there, agents state that they read him his *Miranda* rights and that Robles gave a statement admitting participation in the scheme, as a result of questioning.

IV.

PEDRO ROBLES RAMIREZ

Robles is a 36-year old citizen of the Republic of Mexico. He speaks only Spanish. He suffers from a condition that triggers extreme stuttering when presented with stressful situations. This extreme stuttering and inability to communicate are quite marked. One even notes the very shaky and inscrutable manner in which Robles writes what purports to be his name. He can neither read nor write in any language. He functions at a very low mental level. Before this interaction with the criminal justice system, he has had no experience with the criminal justice system in any country, much less the United States.

V.

Summary of Argument

Government agents failed to properly and adequately explain the rights Robles has pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). *Miranda* warnings must reasonably convey the rights to the suspect. See *California v. Prysock*, 453 U.S. 355, 360-61 (1981). If there is a failure to properly convey the substance of the *Miranda* protection, the adequacy of a warning may be left wanting, resulting in a determination that the advisal was also inadequate.

In addition to this infirmity, a waiver of one’s rights pursuant to *Miranda* must be shown to be voluntary, knowing, and intelligent. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The government will be ill-equipped to show this

waiver. Robles could not knowingly, voluntarily, and intelligently waive his *Miranda* rights.

Additionally, a confession given where government agents made use of the defendant's mental state and mental condition may constitute subtle psychological persuasion which is constitutionally prohibited under the Due Process clause. *Colorado v. Connelly*, 479 U.S. 157, 164 (1986). In the case at bar, it appears as though Robles placed his initials on a sheet of paper purporting to be his own "written statement." The Government will not be able to prove that Robles voluntarily made any statement.

Finally, government agents failed to abide by the *Vienna Convention on Consular Relations*, *infra* in this case. Because of this failure, Robles was prejudiced by his own provision of an inculpatory statement. Suppression on this basis is required.

VI.

Legal Argument

GOVERNMENT AGENTS FAILED TO ADEQUATELY ADVISE ROBLES REGARDING HIS *MIRANDA* RIGHTS.

Miranda warnings must reasonably convey the rights to the suspect. *See California v. Prysock*, 453 U.S. 355, 361 (1981). The manner in which government agents presented the *Miranda* rights to Robles was done by way of the form entitled "Interrogatorio; Notificacion de Derechos Sus Derechos" (hereinafter referred to as "*Interrogatorio*"). This document is replete with various translation errors. The translation contained in the form attempts to track the language of the *Miranda* warnings. However, the resulting product neither adequately follows *Miranda* nor its equivalent. The disparity between the spirit of *Miranda* and the resulting translation in the *Interrogatorio* causes significant pause.

While it is true that a precise incantation of the *Miranda* warnings is not required, certain

problems relating to language and translation abide in this case if the translator does not take adequate opportunity to carefully translate *Miranda*. This concern is of paramount significance in light of the practice in this district and in this division in particular. Most criminal defendants that come through this division do not speak English. Their reliance on the written word presented to them takes on a new importance, especially in light their inexperience and new-found presence in our criminal justice system.

In particular, Robles understands only Spanish. He cannot read or write in any language. He has had no prior experience with the criminal justice system of the United States. Among other things, when government agents advised Robles, they used such confusing verbiage that he could not have understood that he had the right to end interrogation at any time. Thus, the warnings failed to convey reasonably his rights pursuant to *Miranda*. Because the translation of the *Miranda* warnings failed to adequately warn Robles of his rights, which led to its concomitant inadequate warning of the consequence of speaking at all, his statements should be suppressed.

VII.

Robles Made No Voluntary, Knowing and Intelligent Waiver of His *Miranda* Rights.

A defendant may waive his *Miranda* rights provided the waiver is made voluntarily, knowingly, and intelligently. *Miranda*, 384 U.S. at 475; *Moran v. Burbine*, 475 U.S. 412, 421 (1986). If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rest to the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *Miranda*, 384 U.S. at 475.

The *Moran* Court discussed two distinct dimensions for determining whether a waiver

was voluntary, knowingly and intelligently entered. *Moran*, 475 U.S. at 421. First, the waiver of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. *Id.* Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *Id.* In assessing the validity of a waiver of *Miranda* warnings, the Supreme Court applies a “totality of the circumstances” test. *Id.*

Limited intellectual ability and lack of familiarity with the criminal process factor into the determination of whether the suspect made a valid waiver. *Cooper v. Griffin*, 455 F.2d 1142, 1145 (5th Cir. 1972). Mental deficiency, age and lack of familiarity with the criminal process have been held to be important factors in determining whether a defendant validly waived his constitutional rights. *Id.* In *Cooper*, two defendants challenged the admissibility of their confessions on the grounds that their waiver of the *Miranda* warnings were not knowing and intelligent. *Id.* at 1143. The defendants were both retarded and fifteen and sixteen years of age respectively at the time of their confessions. *Id.* at 1144. They had no previous experience with the criminal justice process. *Id.* Both were taken to the police station for interrogation. *Id.* The Court held that the “requirement of ‘knowing and intelligent’ waiver implies a rational choice based upon some appreciation of the consequences of the decision. *Id.* at 1146.

In the case at bar, government agents arrested Robles at approximately 2 A.M. He sat in custody alone until 7:30 A.M. The questioning took place at the Immigration and Naturalization Service, at the same location where countless individuals from Mexico are voluntarily returned to their home country. Robles is a citizen of The Republic of Mexico and speaks only Spanish. His manner of speech is incredibly broken because of an extreme stuttering condition that causes counsel significant pause in communication with his client. One easily notes that Robles does

not even understand some basic terms in his own Spanish language. Robles cannot read or write in any language.

With this mental and intellectual backdrop, it appears that government agents, from 7:30 A.M. to 7:45 A.M., in a period of merely fifteen minutes, read Robles his rights, read him a waiver of those rights, took a “written” statement from him² (the statement is written entirely in English), obtained background information to fill in the boilerplate on the “written” statement form, and read all the additional disclaimers and warnings from the “written” statement form. Government agents presented Robles with, at times, confusing renditions of his rights. They presented those rights in a rapid-fire manner without concern for whether he had any understanding of those rights. Robles functions at a severely low intellectual level. He may even suffer from some organic mental illness as indicated by his severe stuttering, which causes his eyes to roll back in his head and also causes facial contortions. It appears from the discovery tendered to the defense that the agents did nothing to determine whether Robles understood anything that he signed or was told. Under these circumstances, he could not have knowingly and intelligently waived his rights.

VIII.

ROBLES DID NOT PROVIDE GOVERNMENT AGENTS WITH A VOLUNTARY STATEMENT

²It is very important to note that a report from Drug Enforcement Administration Special Agent Fernando Jemente states that Robles provided the Government with a written statement. However, counsel for the defense became extremely concerned, since Robles could not read or write in any language. Further, counsel for the defense compared writing from Agent Jemente and the writing that was in Robles’ so-called written confession and the writing appeared identical. When questioned about this apparent anomaly, Assistant United States Attorney Reid concedes that the statement was not written by Robles but by Agent Jemente, *contrary* to Jemente’s own report.

Admission of an involuntary statement as evidence against a person accused of a criminal offense violates the rights of that person to be free from self-incrimination and to due process of law as guaranteed by the Fifth Amendment to the United States Constitution. *Oregon v. Elstad*, 470 U.S. 298, 304 (1985). The government has the burden of proving the voluntariness of the statements made by the Accused that it seeks to admit. *Colorado v. Connelly*, 497 U.S. 157, 168-69 (1968). The Court determines the issue of voluntariness under the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). There is a presumption against waiver of *Miranda* rights. *North Carolina v. Butler*, 441 U.S. 369, 373 (1966). The particular facts and circumstances, including the background, experience and conduct of the accused determine the validity of the waiver. *North Carolina v. Butler*, 441 U.S. at 373 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

The United States Supreme Court has repeatedly recognized that a confession by a person of limited intelligence is more likely to be involuntary. *See, e.g., Sims v. Georgia*, 389 U.S. 404, 407 (1967); *Fikes v. Alabama*, 352 U.S. 191, 196 (1957). In *Sims*, the Supreme Court held that despite police giving of warnings, a person's low mental capacity, coupled with other circumstances renders the giving of the rights of little significance. *Sims*, 389 U.S. at 407. In *Fikes*, the Supreme Court made special mention of the defendant's mental capacity, among other things, to hold that his confession was involuntary. *Fikes*, 352 U.S. at 196-97. Furthermore, limited mental ability and unfamiliarity with the criminal process are factors which weigh heavily against the voluntariness of a confession. *Cooper v. Griffin*, 455 F.2d 1142, 1145 (5th Cir. 1972).

The critical element in determining whether a confession/statement was involuntarily given is the element of police overreaching. *Colorado v. Connelly*, 479 U.S. 157, 163-64 (1986).

Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law. *Id.* at 164. In *Connelly*, a mentally ill individual approached the police and began speaking about how he had murdered someone and how he wanted to talk about it. *Id.* at 160. Police immediately advised Connelly of his rights and Connelly wanted to continue speaking with them. *Id.* The Supreme Court held that the confession given by Connelly was admissible, since the police had not engaged in any coercive conduct. *Id.* at 167. While *Connelly* dealt with the due process clause contained in the Fourteenth Amendment, as applicable to the states, the same due process arguments abide with respect to actions of the federal government in this context.

In the case at bar, the case agent in charge of this case has written in his report that Robles provided a written statement to law enforcement authorities. Decidedly concerned about the veracity of that statement, since Robles is illiterate in all languages, counsel for the defense spoke to counsel for the government. Defense counsel advised government counsel that the so-called written statement given by Robles looked like Special Agent Jemente's writing. Government counsel acknowledged and conceded that this was the case. See Footnote 2.

In the case at bar, agents with the Drug Enforcement Administration essentially wrote Robles' so-called statement for him and held that statement out as Robles' own statement. It appears as though Agent Jemente wrote the statement himself and then had Robles affix his initials at the end of the statement. This practice is anathema to the Constitution. Agent Jemente and the Drug Enforcement Administration overreached in violation of *Colorado v. Connelly*. Agent Jemente wrote out the statement he wanted. This statement conveniently inculpates Robles, and stands as the *only* form of proof against Robles for the current charges. Official coercion is the linchpin undergirding the Fifth Amendment. *Id.* at 170.

From all outward appearances, law enforcement officers overreached and took advantage of Robles' intellectual capacity in securing his "written" statement. It appears that the same hasty zeal that befell agents in explaining Robles' rights, assuring that he understood his rights, and assuring that he appreciated the consequences of any waiver, also overcame the constitutional requirement that his so-called confession be voluntary. In this case, government agents, through their own behavior, conducted a rapid-fire admonishment of rights and took a "written" statement in English from an illiterate Spanish-speaking Mexican citizen who possess very limited intellectual capabilities. What was apparently lost in this scenario was the agents' determination of whether Robles truly understood what was befalling him. Robles could not have understood the momentous and dire result of his having placed his crooked and disjointed initials on a sheet of paper. Under all of the circumstances, Robles did not make a voluntary statement.

IX.

THE VIENNA CONVENTION ON CONSULAR RELATIONS REQUIRES SUPPRESSION.

The *Vienna Convention on Consular Relations* is an international treaty that is, and at the time of Robles' interrogation was, binding on the United States. Under Article VI, Clause 2 of the United States Constitution, this treaty is the Supreme Law of the Land, binding on the federal government and each state, including Texas. Article 36 of the Vienna Convention on Consular Relations accords each accused the right to communicate with his consulate, to have the consulate informed of his detention, and to have the consulate arrange for his legal representation. Article 36, 21 U.S.T. 77. These must be accorded the accused without delay as soon as he is detained. *Id.*

From discovery disclosed by the Government to date, it appears that, at no time prior to,

during, or after interrogating him, nor at any time while he was being detained, did any federal agent or officer inform Robles of his rights under the Vienna Convention. During this time that Robles was not afforded his rights under the Vienna Convention, he allegedly gave a statement to authorities which inculpates him in the current offense. Because of the seizure of said statements, Robles was prejudiced by the failure of agents to present him with his rights pursuant to the Vienna Convention. Any statements made by Robles were taken in violation of the Vienna Convention and in violation of Article VI of the United States Constitution, and are therefore inadmissible. Said statements and all additional evidence obtained as a result of these violations must be suppressed.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Robles requests suppression of any and all statements illegally seized from him by the government.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing instrument on William T. Reid, IV on this the 18th day of January, 2000 by hand-delivery to his office, located at 111 E. Broadway, Suite A-306, Del Rio, Texas, 78840.

FRANK MORALES
Assistant Federal Public Defender

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

DEL RIO DIVISION

UNITED STATES OF AMERICA

§

§

B.

CAUSE NO. DR-99-735-WWJ

§

PEDRO ROBLES RAMIREZ

§

ORDER

On this day came on to be considered Defendant's Motion to Suppress. After having adduced evidence thereon, the Court is of the opinion that said motion shall be, and is hereby, **GRANTED.**

IT IS ORDERED that all statements given by Defendant shall be, and are hereby, **SUPPRESSED.**

SIGNED on this the _____ day of _____, 2000.

WILLIAM WAYNE JUSTICE
Senior United States District Judge