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FOR PUBLICATION

**IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

**COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS,**

Plaintiff,

v.

DOMINGO L. DY,

Defendant.

Criminal No. 12-0061

**ORDER GRANTING DEFENDANT’S
MOTION TO SUPPRESS
STATEMENTS**

I. INTRODUCTION

THIS MATTER came for hearing on October 22, 2012, at 9:30 a.m. in Courtroom 223A. At the hearing, the parties presented evidence and arguments before the court regarding Defendant, Domingo L. Dy (“Defendant”)’s Motion to Suppress.¹ Assistant Attorney General Nicole D. Driscoll

¹The Court expressed its concern with what it considers to be a very late filing of Defendant’s motion to suppress, being filed only ten days prior to trial. The Court will amend its future pretrial orders to prevent such untimeliness from occurring again.

1 opposed the Motion for the Commonwealth. The court has considered the testimony and the oral and
2 written arguments of the parties and for good cause **GRANTS** the motion for the reasons set forth
3 below.

4 **II. FACTUAL AND PROCEDURAL BACKGROUND**

5 On March 22, 2012, Department of Public Safety (“DPS”) officers responded to a call regarding
6 sexual abuse of a minor. The mother of the minor reported that the previous evening, her children’s
7 babysitter’s husband had locked her daughter in the restroom with him and made her touch his penis.
8 At approximately 11:45 a.m. that same day, Defendant was arrested and booked into Department of
9 Corrections (“DOC”). At approximately 9:30 p.m. that night, Detective Jason Tarkong interviewed
10 Defendant.

11 Defendant claims Det. Tarkong did not read Defendant his rights or provide Defendant with
12 written advisement of his rights before this interview. Defendant claims at approximately 5:00 p.m. the
13 following day, Det. Tarkong presented Defendant with a written document purporting to be a written
14 statement from Defendant based on statements Defendant had allegedly given the day before. Defendant
15 claims Det. Tarkong quickly read the document out loud to Defendant and Defendant indicated that he
16 did not understand. Defendant claims he then attempted to read the document but still did not
17 understand much. Defendant claims he then agreed with Det. Tarkong that what was in the document
18 was his statement and signed and initialed the three-page document, which was backdated to the
19 previous day.

20 Defendant claims at some point later that day, a detective presented Defendant with a form
21 entitled “Your Constitutional Rights” and instructed Defendant to fill out the form. Defendant claims
22 he could not read the form because he did not have his reading glasses and told the detective he did not
23 understand, so the detective read the form out loud. Defendant claims the detective then instructed
24 Defendant to write his initials and sign the form and where the form asks “Knowing these rights, do you
25 want to talk to me without having a lawyer present?”, the detective wrote “yes” and told Defendant to
26 initial the statement. Defendant claims this document is also backdated to reflect the previous day’s date.
27 Counsels for Defendant submit that Defendant appears unable to comprehend complex English
28 vocabulary and is at best able to give affirmations or denials to simple questions in English.

1 The government claims Det. Tarkong verbally advised Defendant of his rights before the
2 interview by reading the “Your Constitutional Rights” form and, in response, Defendant agreed to speak
3 without an attorney present and signed off on his waiver of his rights. The government claims although
4 Defendant speaks English with an accent, Det. Tarkong had no problems communicating with Defendant
5 and that Defendant answered very detailed questions about the alleged events, as well as questions about
6 his background and schooling. The government claims Det. Tarkong typed out Defendant’s answers
7 as they spoke, Defendant never indicated he did not understand, that he needed an interpreter, or that
8 he needed his eyeglasses. The government claims that at the conclusion of the interview, Det. Tarkong
9 reviewed the written interview with Defendant, who signed and dated each page. The government
10 argues everything was done according to procedure and that no documents were ever backdated.

11 Det. Tarkong has been with DPS for 20 years and has been a detective for 17 of those years.
12 Det. Tarkong has an impeccable record with the force with no incidents of misconduct or dishonesty.
13 The interview of Defendant was not video or audio recorded. Det. Tarkong testified that it is not
14 standard procedure to video or audio record interviews.² Det. Tarkong also testified that while
15 interpreters are used during interviews where there appears to be a language barrier, he had no such
16 concerns during his interview of Defendant.

17 Defendant filed the current motion to suppress Defendant’s statements. A hearing was held and
18 the Court heard testimony from Det. Tarkong and Defendant.

19 **III. LEGAL STANDARD**

20 “Due process requirements exist to prevent fundamental unfairness in the use of evidence against
21 the accused.” *CNMI v. Mattao*, 2008 MP ¶7 (citing *Colorado v. Connelly*, 479 U.S. 157, 167 (1986)).
22 The Fifth Amendment of the U.S. Constitution and the CNMI Constitution protect the accused against
23 self-incrimination and the inherently coercive environment of custodial interrogation. *Id.*; *see also* U.S.
24 Const. amend. V; NMI Const. Art. I § 5. The purpose of a motion to suppress evidence is to “remove
25 involuntary confessions from consideration, as well as other evidence in a criminal trial that is secured

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27 ²The Court does not understand why DPS cannot utilize a simple tape recorder or other device to record
28 interrogations, which would provide documentation of a suspect’s language proficiency.

1 coercively or in an otherwise illegal manner.” *Commonwealth v. Campbell*, 4 N.M.I. 11, 14 n.1 (1993).

2
3 In assessing the voluntariness of a confession, the government has the burden of proving, based
4 on the totality of the circumstances, that the defendant intelligently, knowingly, and voluntarily waived
5 his or her procedural due process rights. *Commonwealth v. Ramangmau*, 4 N.M.I. 227, ¶ 17 (1995);
6 *see also Commonwealth v. Cabrera*, 4 N.M.I. 240 (1995). Factors considered include the characteristics
7 of the defendant and the details of custodial interrogation, such as whether the accused was properly
8 advised of his rights, whether the accused had an opportunity to confer with counsel, the method and
9 style of questioning, whether any threats or promises were made, the length of the interrogation, the
10 accused’s mental and physical condition, the education of the accused, and the accused’s experience with
11 law enforcement and the criminal justice system. *Commonwealth v. Mendiola*, 976 F.2d 475 (9th Cir.
12 1997); *see also Ramangmau* at ¶ 22. “In the absence of coercive police activity, a confession will not
13 be deemed involuntary.” *Ramangmau* at ¶ 24, citing *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).
14 The government must meet its burden of showing the waiver was voluntary by a preponderance of the
15 evidence. *Connelly*, 479 U.S. at 168. “Only if the totality of the circumstances surrounding the
16 interrogation reveals both an uncoerced choice and the requisite level of comprehension” can a court
17 properly conclude that *Miranda* rights have been waived. *Morane v. Burbine*, 475 U.S. 412, 421 (1986)
18 (citing *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)); *North Carolina v. Butler*, 441 U.S. 369, 374-75
19 (1979). A waiver must be made “with a full awareness of both the nature of the right being abandoned
20 and the consequences of the decision to abandon it.” *Morane* at 421.

21 **IV. DISCUSSION**

22 Defendant argues that because of his limited English-speaking ability, the reading of the “Your
23 Constitutional Rights” form to him in English, as well as his own reading of the form, was ineffective.
24 The government contends that the fact that Defendant was able to carry on a 40-minute conversation
25 in English, and was able to provide detailed answers regarding questions about his background,
26 schooling, and specific details of the events of March 21, 2012, show that Defendant is able to effectively
27 comprehend and converse in English.

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This Court found Det. Tarkong to be an extremely credible witness and harbors no doubt that proper procedure was followed in his interview of Defendant. Further, this Court found no evidence to dispute the detective’s testimony or to support Defendant’s contentions that he was not advised of his rights until the day following the interview or that the typewritten statement and the rights advisement form were backdated. Testimony further established that no such backdating occurred and that Defendant was advised of his rights in a timely manner. The Court further finds that no coercion was present in the Detective’s interrogation. Under the circumstances, however, there appears to be a lack of communication due to Defendant’s limited English proficiency. Defendant’s testimony and demeanor on the witness stand demonstrated that he may possess the ability to communicate in what is referred to as “broken English”, which may be adequate for casual conversation, but inadequate for more technical discussions. The waiver of *Miranda* rights necessarily entails the usage of complex legal language that even native English speakers may have trouble comprehending.

Det. Tarkong’s assessment of Defendant’s English proficiency was based on his training and years of experience in communicating with individuals with limited English-speaking capabilities in his line of work. Notwithstanding Det. Tarkong’s able assessment based on these attributes, the Court feels it necessary to heighten the standards under which DPS operates, with respect to interrogating suspects with limited English-speaking capabilities, in order to ensure full compliance with certain due process and equal protection requirements.

Over the past few decades, there has been a continuing trend recognizing those with Limited English Proficiency, known as “LEP”, and their partial or complete exclusion from full participation in court proceedings. Allowing individuals to proceed through the system of justice without a complete comprehension of the proceedings because of a language barrier is inconsistent with concepts of due process and equal protection. Equal protection requires such persons be placed in the same position as similarly situated persons who have no language barrier. Under the circumstances, therefore, this Court finds Defendant lacked the comprehension required to waive his *Miranda* rights.

1 **V. CONCLUSION**

2 Consistent with the foregoing opinion, Defendant's Motion to Suppress Statements is
3 **GRANTED.**

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5 **So ORDERED** this 23rd day of October, 2012.

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7 /s/ _____

8 David A. Wiseman, Associate Judge
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