# LOST IN TRANSLATION: A COMMUNITY AT RISK.

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CASE STUDY: WHAT'S WRONG WITH ROGELIO?

When Rogelio was a teenager, he was in a horrible car accident.[1] He has large scars from a severe head injury that still affects him today, making it hard to remember things that people say. His leg was also badly damaged, causing his feet to point toward each other, and it is hard for him to walk or even stand. He explained all of this to Houston police officers in 2018 when they asked him to perform field sobriety tests, but they had trouble understanding him because he couldn't speak English. One of the policemen who spoke some Spanish attempted to translate Rogelio's statement to another officer who recorded the exchange on his body camera.

> *(Officer turns to camera.)* "Okay, so, we need to take into account, number one, he's been in an accident." *(Turns to Rogelio.)* "Uh, ¿cuándo el accidente?"
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> *(Rogelio.)* "Seis años."
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> *(Officer turns to camera.)* "Six years. He says his head kind of hurts, but—" *(Officer throws up his hands.)* "—just put that in your report or something, it's not really, I mean, I don't, I'm not a doctor, but his nystagmus was there. And his right leg, he says it kind of hurts from the accident, so, okay."

The officers proceeded with the tests, asking Rogelio to follow complex instructions for walking heel-to-toe and balancing on one leg. When he was unable to complete them, Rogelio was arrested and taken to jail. No information about his disabilities appeared in the arrest report.

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[1] All case studies included in this article describe defendants and cases that author Lenzi Sheible represented in Harris County criminal courts. All details were taken from personal recollections and notes of the attorney of record. The names of all individuals have been omitted or changed to maintain their anonymity.

## INTRODUCTION: THE CURE IS KILLING US.

Houston has a problem. For nearly two decades, it has ranked highest among major metropolitan areas for fatal crashes involving drugs and alcohol.[2] It's a challenge that Art Acevedo, the city's Chief of the Houston Police Department (HPD), has tried to attack head on. In 2019, he announced that HPD officers had already made 75% more driving while intoxicated (DWI) arrests in the first half of the year than in all of 2018.[3] "This is not indicative of more drunks on the road," Acevedo said. "This is we're working smarter … Every Houston Police officer is receiving additional training on DWI."[4]

As officers work to increase the number of DWI arrests, some of their methods have put the city's Spanish-speaking community at risk. Nearly one third of the Houston population speaks Spanish at home as their first or only language.[5] Though the city is about 54% Hispanic, that ethnicity is represented by only 25% of the police department.[6] Of those officers, the number who are actually fluent in Spanish is likely far less. Like Rogelio, many who interact with police find that even officers who know some Spanish are unable to communicate well with a native speaker. These members of the community can easily find themselves in the crosshairs of a system that looks for small clues of wrongdoing without seeing the full picture. For them, this language divide may cost their freedom.

### The trouble with translation.

Defense attorneys in Harris County likely deal with this language divide on a daily basis. But they may not be fully equipped with the legal arguments needed to successfully challenge the unlawful arrests of their Spanish-speaking clients. The following discussion focuses on the legal issues implicated when members of law enforcement who have limited Spanish proficiency encounter a defendant who is a native speaker. The aim is to examine case studies and applicable law to provide

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[2] Dug Begly & St. John Barned-Smith, *Out of Control. Houston's roads, drivers are country's most deadly*, HOUS. CHRON. (Jan. 4, 2020, 9:13 AM), https://www.houstonchronicle.com/local/article/Houston-s- roads-drivers-are-nation-s-most-12865072.php#.

[3] Natalie Weber, *HPD reports 75% increase in DWI arrests*, HOUS. CHRON. (updated July 1, 2019), https:// www.chron.com/news/houston-texas/houston/article/HPD-reports-75-increase-in-DWI-arrests- 14064498.php.

[4] *Id.*

[5] U.S. Census Bureau, https://www.census.gov/data/tables/2013/demo/2009-2013-lang-tables.html (select Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over for Core-Based Statistical Areas (CBSAs): 2009-2013, then select Houston-The Woodlands-Sugarland. [https://perma.cc/8BHW-E528].

[6] GOVERNING THE STATES AND LOCALITIES, DIVERSITY ON THE FORCE: WHERE POLICE DON'T MIRROR COMMUNITIES, A GOVERNING SPECIAL REPORT, 8 (Sept. 2015), [https://perma.cc/WA7P-RVL3].

analysis that can help practitioners mount a successful defense that addresses the issues that may have led to a wrongful arrest.

First, we will look at case law regarding the issues that arise when officers are not able to get a proper translation when dealing with Spanish-speaking suspects. This sometimes results in a suspect getting only partial or misleading instructions from the officer, leading to incriminating responses and arrest. Other times, the lack of understanding prevents officers from learning vital information about the suspect or their circumstances, resulting in a wrongful arrest. The reader will gain tools needed to distinguish similar cases from the unfavorable opinions in related case law, while using the reasoning to support a successful defense.

Then, we will examine the constitutional issues that are implicated when police officers detain a Spanish-speaking suspect in order to get a proper translation needed to continue their investigation. We will look at an actual case study of a defendant whom officers intended to detain, pending a translator, but whom they in fact arrested. Determining the moment of arrest in cases like these is vital to a Fourth Amendment[7] analysis because all evidence obtained after the arrest may be excluded if the Spanish-speaking defendant was arrested prematurely.

## ISSUE 1: SCRAMBLING FOR A TRANSLATOR.

The Houston Police Department has recognized the urgent need for more fluent Spanish translators on the force. In June 2018, Chief Acevedo announced the new Communicator on Patrol (C.O.P.) program.[8] Under this initiative, the department seeks volunteers who can speak fluent Spanish, Vietnamese, Korean, Chinese, Arabic or Urdu/Hindi to assist officers in community interactions, including writing tickets and conducting DWI arrests.[9]

Rogelio's story illustrates that there are still not enough effective translators to handle all of the Spanish-speaking DWI defendants in Harris County. Officers attempting to secure an arrest, upon finding that the defendant only speaks Spanish, do the best they can. As will become clear from Harris County anecdotes and from appellate case law alike, officers dive into an encounter with a rudimentary

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[7] U.S. CONST. AMEND. IV.

[8] Alex Green, *Bilingual? HPD recruiting volunteer translators to ride along with officers*, CW39 Houston (Updated: Jun 18, 2018 / 06:02 PM CDT), https://cw39.com/news/local/watch-live-hpd-launches-communicators-on-patrol-citizen-volunteer-program/ [https://perma.cc/NJZ7-V8HJ].

[9] Houston Police Dep't, Volunteer Initiatives Program, https://www.houstontx.gov/police/vip/communicators_on_patrol.htm [https://perma.cc/MG3A-8AAV].

knowledge of Spanish, at best, intending to give complex instructions, like the ones for the standardized field sobriety tests (SFSTs).

CASE STUDY: ALBERTO AND THE TOW GUY.

In 2018, Houston officers again found themselves in urgent need of a translator. A man named Alberto was looking for news of his brother when officers detained him in order to conduct SFSTs. No officer spoke Spanish, and Alberto did not speak English, so the field sobriety tests administered to Alberto were translated from English to Spanish by a tow truck driver. The video of the encounter showed that the tow truck driver's translation of the detailed instructions was not as precise as it would have been if the tow truck driver had been properly trained. As a result of Alberto's performance during the field sobriety tests, he was arrested and charged with driving while intoxicated.

Alberto's story illustrates the officers' focus on completing an arrest, even when a language barrier between the defendant and law enforcement made communication nearly impossible. Yet the introduction of an intermediary, pulled from the community seemingly at random, threatened the integrity of the arrest itself. In this case, the State recognized the error: Almost immediately after Alberto's motion to suppress was filed, his case was dismissed.

TRANSLATION AND THE LAW.

Texas DWI cases in which defendants contest the charges against them due to issues caused by a language barrier are scant. There are a few cases, however, that are instructive in analyzing whether a DWI investigation involving Spanish translation was properly handled. A leading case concerning this issue is *State v. Amaya*, in which a language barrier caused a police detective to take the suspect in search of an adequate translator.[10]

The detective noted that the Amaya spoke only Spanish, so she called for a Spanish-speaking officer, but she was told that none was available.[11] She then transported Amaya to the jail and was informed that "throughout the whole city and in the jail, we did not have a single Spanish-speaking employee."[12] Finally, the detective attempted to conduct a DWI interview to the best of her ability.[13]

[10] State v. Amaya, 221 S.W.3d 797, 798 (Tex. App.—Fort Worth 2007, pet. ref'd).
[11] *Id.*
[12] *Id.* at 798-99.
[13] *Id.* at 799.

She later testified that she could speak Spanish "a little bit . . . enough to do basic communications and to do some sobriety tests."[14]

The detective conducted a horizontal gaze nystagmus test (HGN), then proceeded with a breath test after provided Amaya with a written copy of the required statutory warnings in Spanish.[15] The detective later stated that she encouraged him to follow along with his Spanish copy while she read the warnings out loud in English, and that she believed Amaya understood what he was reading because she repeatedly said to him, "¿Comprende?" to which he responded, "Sí."[16]

Amaya later argued in a motion to suppress evidence that he had not been properly warned of the consequences of giving a breath test because the statutory warning was read to him in English and not Spanish.[17] The trial court granted the motion, concluding that "because the statutory warning was not read in the Spanish language and we do not know whether or not the Defendant could read the Spanish warning sheet, we have no way of knowing if the Defendant understood, or at least substantially understood what the officer was telling him."[18]

The appellate court disagreed. Because the trial court could "find no indication" either that the defendant understood or did not understand, the appellate court concluded that the defendant did not meet his burden to prove that he did not understand.[19] Thus, the appellate court reversed the order granting the motion to suppress.[20]

At first glance, the reasoning in *Amaya* seems to encourage officers with questionable Spanish skills to do their best to complete the arrest. However, there is at least one helpful part of this case that could lend hope to the practitioner seeking to suppress evidence stemming from an improper translation. Since the holding of the case was that "no indication" in the facts of a misunderstanding failed to show that a breath test was involuntary, then the court may have found for the defendant if there had been some "indication" from the defense that defendant did not understand the statutory

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[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.* at 798.
[18] *Id.*
[19] *Id.* at 802.
[20] *Id.*

warnings. The court seems to say that the facts in *Amaya* could go either way. The defense just needed to provide some evidence to tip the court in the right direction.

In *Grifaldo v. State*, the Fourteenth Court of Appeals in Houston held that, like *Amaya*, a defendant's motion to suppress evidence for a lack of understanding an officer's English instructions was properly overruled.[21] Although the court acknowledged that the defendant's primary language was Spanish, it found that he understood some English.[22] The court noted that when the officer requested, in English, that the defendant remove his hat, the defendant complied.[23] The officer attempted to explain the SFSTs in Spanish, although she later testified that she felt the defendant "understood her instructions better in English than Spanish."[24] She believed the defendant understood her because he asked questions and nodded his head in agreement.[25] The officer physically demonstrated the tests while giving a verbal explanation, and the court found that the video showed that the defendant understood how to perform the tests.[26] Thus, the trial court did not abuse its discretion in overruling appellant's motion to suppress.[27]

*Grifaldo* speaks to a common fallacy found in these court cases: The defendant seems to understand some English; ergo, he can sufficiently understand the SFSTs and statutory warnings. This is not necessarily the case, however, due to the fact that these instructions are significantly more complex than the officer's request for a suspect to remove his hat. Though Grifaldo took off his hat when instructed, the facts are silent as to whether the officer may have gestured to his own hat, the defendant's hat, or made any kind of accompanying motions to assist with such a simple communication.

*Grifaldo* also notes that the officer "believed the defendant understood her instructions better in English than Spanish." The implication here seems to be that the defendant could speak English well and Spanish less well. Conversely—and more likely—the defendant could have had a much harder time understanding the officer's Spanish because her use of the language was incompetent.

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[21] Grifaldo v. State, No. C14-92-01131-CR, 1993 Tex. App. LEXIS 2026 (Tex. App.—Houston [14th Dist.] July 15, 1993, pet. ref'd) (unpublished op.).
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*

*Grifaldo* also shows another oft-mentioned phenomenon. The officer testified that she believed the defendant understood her because he nodded his head in agreement. This can be seen in *Amaya* as well, when the detective repeatedly asked, "¿Comprende?" to which the defendant said, "Sí." But continually asking someone if they understand is not a reliable indicator of understanding. The only other option would be, "No," which would require the officer to repeat herself, leading to the same result—incomprehensibility—as before.

In the Austin Court of Appeals, at least one defendant had better luck.[28] In *Hernandez*, the officer administering SFSTs and the statutory warnings "worked in Laredo for five years before coming to New Braunfels and consider[ed] himself to be fluent in Spanish."[29] Yet the officer admitted that "he spoke to [the defendant] in 'Tex-Mex,' which he learned informally," and that he did not ask for help from other officers who might have been more fluent in Spanish.[30] The officer used English when he did not know the Spanish words, and he admitted that his translations "may not have been '100 percent correct.'"[31]

Thus, when the officer brought the defendant back to the station, he was unable to find a Spanish translation of the statutory warnings, so he "read an English-written form to [the defendant], translating it into Spanish."[32] But the defense said that the officer's translation of the statutory warnings was incorrect, arguing that the officer said, "You have the right to remain silent and not say anything," and then, "But you can also talk to us."[33]

The defendant testified through an interpreter that he could understand English but not speak it, and that he could read "a little bit of English" but not "complex legal forms" like the English statutory warning form the officer used.[34] He further testified that he "didn't understand a lot of" the officer's translations.[35]

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[28] Hernandez v. State, No. 03-02-00489-CR, 2003 Tex. App. LEXIS 8246 (Tex. App.—Austin Sept. 25, 2003, no pet.) (unpublished op.).
[29] *Id.* at *3.
[30] *Id.* at *4.
[31] *Id.*
[32] *Id.* at *3.
[33] *Id.* at *5.
[34] *Id.* at *9.
[35] *Id.*

The appellate court found that the evidence was sufficient to raise an issue as to the voluntariness of the defendant's statement.[36] Thus, failure to include a jury instruction on voluntariness was an error.[37]

LESS THAN A LITTLE BIT ADEQUATE.

One reason *Hernandez* may have had a more favorable result that *Amaya* is because it was at a different procedural posture from the other cases. Rather than win a motion to suppress, the defendant in *Hernandez* only needed to present evidence sufficient to raise an issue regarding voluntariness in order to get the relief he wanted: a jury instruction. The appellate court in *Hernandez* had no trouble finding that the evidence raised such an issue.[38]

But even though *Hernandez* is at a different procedural posture from the rest of the cases, it is still instructive. It deals with an unfortunately typical situation: a person who learned Spanish informally believes they are capable of accurately translating the SFSTs and the statutory warnings. Even Latino police officers who are not native Spanish speakers can fall into this category. It is the "try your best" mentality that keeps coming up because the police department is using the resources it already has, even if those resources are deficient.

These cases illustrate the extent to which officers will go to obtain an arrest, even when there is no means of getting an adequate translation. On one end of the spectrum of qualified translation is the officer in *Hernandez* who spoke only "Tex-Mex" that he learned informally. The court held that there was an issue as to whether the defendant's admissions were voluntary.

With *Amaya*, however, the court found that the translating officer who spoke "a little bit" of Spanish was qualified enough to complete a DWI arrest and investigation. Thus, the court's ruling—that the trial court properly overruled the motion to suppress—was less favorable to the defendant. And in *Grifaldo*, in which the officer probably knew more Spanish than in *Amaya*, the court similarly found that the trial court did not abuse its discretion in overruling the motion to suppress.

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[36] *Id.* at *9.
[37] *Id.* at *10.
[38] However, note that a defendant will not get a jury instruction relating to a language barrier if there is no evidence of a language barrier in the record. *See* Ramirez v. State, No. 02-14-00386-CR, 2015 Tex. App. LEXIS 4489 (Tex. App.—Fort Worth Apr. 30, 2015, pet. ref'd) (unpublished op.).

The practitioner, therefore, must locate a client's case closer to the *Hernandez* end of the spectrum. By employing the facts to characterize a translator's efforts as wholly ineffective "Tex-Mex", they are more likely to be seen as something less than the "little bit" of Spanish which was found adequate in *Amaya*, and far less than "some Spanish" as seen in *Grifaldo*. The more qualified the translator in the eyes of the appellate court, the more likely the court will rule against defendants' challenges to their arrests.

## ISSUE 2: HAULING THEM BACK TO THE STATION.

Though wrongful arrests can occur as a result of a mistake in translation, they can also happen when officers try to get a more accurate one. An officer intending to merely bring a suspect to a better translator at the police station may end up completing an arrest in the process. When that arrest happens too early in the investigation—before SFSTs or even before an interview—the arrest may not be supported by probable cause. And if probable cause has not been developed before the suspect is taken into custody, any evidence obtained as a result of the arrest may be suppressed.

The constitutional framework used to determine when an arrest legally begins will be familiar to criminal lawyers. For that reason, not much time will be spent detailing Fourth Amendment[39] case law. Instead, this section focuses on the case study of Eduardo, a defendant who was taken back to the station for a translator before any meaningful DWI investigation could be completed. The analysis here centers on the factors that determined the point at which Eduardo was taken into custody. A factor not examined in Eduardo's story—the content of the statutory warnings—is included at the end of the section.

### CASE STUDY: EDUARDO'S LONG NIGHT.

Eduardo was pulled over in 2018 for driving without headlights. During the traffic stop, it was immediately apparent to both officers that he spoke only Spanish. They noted bloodshot eyes and an odor of alcohol emitting from Eduardo's vehicle. They did not feel comfortable administering field sobriety tests since neither of the officers spoke Spanish, so they requested for a Spanish-speaking member of a DWI unit to come to the scene. While they waited, however, the officers attempted to question Eduardo anyway, despite the obvious language barrier. By the time the Spanish-speaking

[39] *Supra* note 7.

officer had arrived, the first two thought that Eduardo had confessed to a DWI as a result of their English questioning.

When the new officer had arrived at the scene, he said that his Spanish was "not perfect." Moreover, he did not know how to administer the standardized field sobriety tests either in Spanish or in English. The three officers discussed their plan of action. They finally decided to "detain" Eduardo and take him down to the station for field sobriety tests, based on the "original PC [probable cause]" of driving without headlights. The officers handcuffed Eduardo and placed him in the back of a patrol vehicle.

The officers began the process of taking Eduardo to the station. They called for a tow truck to impound his vehicle and began discussing whether the tow slip should indicate a "prisoner" vehicle or not. The Spanish-speaking officer advised against it. "They're gonna think he's already under arrest," he said. After deciding not to call an assistant district attorney, they called a sergeant and asked if they could label Eduardo's car as "other" rather than "prisoner." Based on their description of the situation, the sergeant instructed them to label the vehicle as a "prisoner" tow.

Poised before the computer in his police cruiser, the first arresting officer began to question Eduardo, who was handcuffed in the back seat. These questions were not directly related to the DWI investigation. Instead, the officer asked about Eduardo's phone number, marital status, employment status, emergency contact, citizenship status, tattoos, and health status—standard questions asked by police when booking a prisoner.

Officers towed Eduardo's vehicle and transported him to a police station 20 miles away. Regarding this decision, one officer stated in his sworn affidavit, "We concluded that it was best to detain the Defendant under suspicion of driving while intoxicated and take him to Southeast Intox and have a DWI technician perform the necessary tests." After field sobriety tests were performed and a breath test administered at the station, Eduardo was taken to jail and charged with DWI.

AN ARREST IN DISGUISE.

At first glance, Eduardo's situation may not seem egregious. Certainly, if there are no Spanish-speaking officers at a scene, it is only natural to want to take the defendant to a place where his language needs can be served. The problem, however, is that when a police officer takes control of

the person's body and physically moves them to another location, the officer may be placing them into custody.

The Texas Court of Criminal Appeals has found four general situations that may constitute custody: "(1) when the suspect is physically deprived of his freedom of action in any significant way, (2) when a law enforcement officer tells the suspect that he cannot leave, (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, and (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave."[40]

Eduardo's situation easily fits within at least one definition of custody as described in *Dowthitt*. In other words, Eduardo's "detention" was actually an arrest in disguise.

RIDING IN A PATROL CAR: The involuntary nature of Eduardo's ride in the patrol car weighs in favor of custody. In *Ervin*, a case out of the First Court of Appeals, a defendant who was driven to the station in a patrol car was determined to not be in custody.[41] But the defendant in *Ervin* had "voluntarily agreed" to go to the police station in the patrol car, was not held against her will, and was not handcuffed.[42] According to the officer, the defendant in *Ervin* "could simply have asked the patrol officer to let her out of the car."[43]

In Eduardo's case, he clearly did not have the option of simply asking the officers to let him go free. Riding in a patrol car while in handcuffs meant that Eduardo was being physically deprived of his freedom of action, because he was unable to get out of the car and go home. Eduardo's freedom of movement was also significantly restricted. He was completely unable to move—except in the direction in which law enforcement officials wished to take him.

HAVING HIS VEHICLE TOWED: Eduardo would have reasonably believed he was in custody because his vehicle was towed without his consent. In *Ervin*, the defendant's car was towed by the

[40] Dowthitt v. State, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996).
[41] Ervin v. State, 333 S.W.3d 187, 206 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd).
[42] *Id.*
[43] *Id.*

police.[44] But the defendant in *Ervin* "voluntarily consented to having her car towed."[45] She was found to not have been taken into custody.[46]

In this case, Eduardo did not give any consent whatsoever for his vehicle to be towed. Towing Eduardo's vehicle physically restrained him from taking action—specifically, the action of simply going home. This also clearly restrained his freedom of movement, because law enforcement had disabled Eduardo's car and seized it from him.

OFFICERS' INTENT TO ARREST: The subjective intent of an officer to arrest is irrelevant to the custody inquiry "unless that intent is somehow communicated or otherwise manifested to the suspect."[47] The officers' intent to arrest Eduardo was clearly communicated to him in this case.

First, it must be noted that the officers who initially stopped Eduardo had absolutely no ability to verbally communicate with him. While they each attempted to use some Spanish words, they acknowledged to each other that their efforts were ineffective. This is why they decided to call for Spanish-speaking backup. But when the backup arrived, he admitted that his Spanish was "not perfect" and that Eduardo needed to be brought to an adequate translator at a police station. Thus, the officers' intent to arrest Eduardo was "communicated or otherwise manifested" through means other than direct statements.

However, the officers' intent was also communicated to Eduardo directly through words as well as actions. Eduardo was pulled over, motioned to exit the car, handcuffed, and placed in the back of a patrol vehicle. While there, Eduardo was asked a variety of questions that had nothing to do with any further investigation. Instead, they were short, demographic questions asked of any defendant being booked into the system subsequent to an arrest. Eduardo's car was towed. These actions were taken without adequate explanation or consent. Moreover, three or more officers were discussing and gesturing toward Eduardo at any time, none of which Defendant could understand. Any reasonable person in Eduardo's position would understand from the officers' manifestations that the officers intended to arrest him.

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[44] 333 S.W.3d at 207.
[45] *Id.*
[46] *Id.*
[47] *Dowthitt*, 931 S.W.2d at 254.

The judge in this case ended up granting the motion to suppress the evidence collected at the time that Eduardo was stopped by officers, holding that he was effectively placed into custody at the scene and not just detained. The court found that there was no probable cause to have arrested Eduardo at that time. All the evidence subsequent to the arrest was suppressed, including the SFST's and the breath test results. The case against Eduardo was dismissed.

## FORM DIC-24S[48]

One aspect of the custody inquiry that did not come up in Eduardo's case relates to the DIC-24. The DIC-24[49] is a form promulgated by the Texas Department of Public Safety to assist law enforcement in complying with the Transportation Code. In accordance with the Transportation Code, the DIC-24 explains what rights a defendant has when a breath or blood sample is being requested of him. The DIC-24 has been translated into a Spanish version, known as the DIC-24S.

The DIC-24, entitled, "STATUTORY WARNING," begins with the phrase, "You are under arrest[.]" It then gives the statutory warnings from the Transportation Code. The DIC-24S, entitled, "ADVERTENCIA ESTATUTARIA," likewise provides the statutory information. However, where the English version of the form begins with, "You are under arrest," the Spanish version begins with, "Queda usted detenido[.]"

"Detenido" translates to "detained," whereas "arrestado" translates to "arrested."[50] There is therefore a potential for confusion when a Spanish-speaking defendant is presented with the DIC-

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[48] Texas Dep't Public Safety, Peace Officer DWI Statutory Warning – Spanish, Rev. 9/11, https://www.dps.texas.gov/internetforms/Forms/DIC-24S.pdf [https://perma.cc/KB2S-4JF8].

[49] Texas Dep't Public Safety, Peace Officer DWI Statutory Warning, Rev. 9/11. https://www.dps.texas.gov/internetforms/Forms/DIC-24.pdf [https://perma.cc/685A-64U2].

[50] WILLIAM C. HARVEY, SPANISH FOR LAW ENFORCEMENT PERSONNEL 211 (Barron's Educational Series 1996); In the same way, Puerto Rican courts, which are part of the American legal system but whose official language is Spanish, routinely use "detenido" and "arrestado" as distinguished from one another. For example, Puerto Rican courts use phrases like, "[N]o había motivo alguna para **detener** el vehículo; tampoco para **arrestar** los ocupantes" (There was no reason to **detain** the vehicle, nor to **arrest** the occupants). Pueblo v. Serrano, Serra, 99 TSPR 62 (1999). Or, "Por eso, ella declaró, además, que la **detención** la hizo no para **arrestar**, sino para investigar" (Therefore, she stated, in addition, that the **detention** was made not to **arrest**, but to investigate). Puerto Rico v. Montalvo Dominguez, No. A SC 2005 G 0841, 2007 WL 710328 (T.C.A. Jan. 19, 2007). Finally, "El concepto sujeto a responder no significa necesariamente un **arresto**. Una persona está **detenida** o sujeta a responder cuando está obligada a contestar" (The concept of "held to answer" does not necessarily mean an **arrest**. A person is **detained** or held to answer when he is obligated to respond). *Pueblo v. Gonzalez Rodriguez,* No. DVI2003G0060, 2003 WL 23335432 (T.C.A. Oct. 20, 2003). The U.S. District Court in Puerto Rico has also translated "arresto" to "arrest." Tejada Batista v. Fuentes Agostini, 87 F. Supp. 2d 72, 75 (D.P.R. 2000).

24S. On the one hand, law enforcement officers may be treating the defendant as if he is under arrest. Yet on the other hand, the officer is reading an official form stating that the defendant is merely being detained.

The possible mistranslation is significant because courts have held that whether an officer tells a suspect that he is under arrest factors heavily in an analysis of whether the suspect was, in fact, arrested. Thus, for example, an officer who stated to a defendant, "Richard, you're not under arrest right now. You're just being detained until we figure out what's going on," was held to have not arrested the defendant.[51] The Fourteenth Court of Appeals found that there was no custody, even though the defendant had been handcuffed and was standing next to the officer in the street.[52]

A defendant in an implied-consent, DWI case argued that, although he consented to give a specimen, his consent was involuntary because it was obtained prior to his arrest.[53] Though the Eastland Court of Appeals affirmed the conviction, the court noted that other courts "have held that an officer's reading of the DIC-24 form's 'you are under arrest' statement resulted in the suspect being under arrest at the point the statement was made to the suspect."[54]

Notably, the court went on to say:

> There is no evidence that Officer Key told [the defendant] that he was not under arrest or that he was free to leave. We conclude that a reasonable person in [the defendant's] position would not have believed that he was free to leave after being told that he was under arrest but, instead, would have believed that his freedom of movement was restrained to the degree associated with a formal arrest.[55]

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[51] Ortiz v. State, 421 S.W.3d 887, 889 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd).
[52] *Id.*
[53] Chavez v. State, No. 11-14-00034-CR, 2016 Tex. App. LEXIS 1421 at *8 (Tex. App.—Eastland Feb. 11, 2016, no pet.) (mem. op.).
[54] *Id.* at *10 (citing Washburn v. State, 235 S.W.3d 346, 352-53 (Tex. App.—Texarkana 2007, no pet.); Nottingham v. State, 908 S.W.2d 585, 587-88 (Tex. App.—Austin 1995, no pet.); Bell v. State, 881 S.W.2d 794, 799-800 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd); State v. Williams, 814 S.W.2d 256, 259 (Tex. App.—Austin 1991), *aff'd*, 832 S.W.2d 52 (Tex. Crim. App. 1992).
[55] *Id.*

The Eastland Court of Appeals' emphasis on the officer's statements (or lack thereof) is reflected in the appeals cases it cited from around the state, including from the Texarkana, Austin, and Houston Courts of Appeals.

Thus, because the DIC-24 begins with the phrase, "You are under arrest," the fact that an English version of the DIC-24 form was read to a person is "a significant factor" in determining whether the person is under arrest.[56] While the officer may consider the language of the DIC-24 form a "mere formality," a reasonable person would not believe that he was free to leave after being told by a police officer that he was under arrest.[57] *Id.* Accordingly, by analogy, a reasonable person *would* believe he was free to leave after being explicitly told by a police officer that he was *not* under arrest.

DETENTION OR ARREST?

When an encounter between an officer and a Spanish-speaking suspect who cannot understand each other leads to something resembling detention or arrest, Fourth Amendment[58] issues are likely to come into play. The factors seen in Eduardo's story are common to many investigations of this type. First, Eduardo was handcuffed, placed in the back of the patrol car, and driven away from the scene. Second, Eduardo's vehicle was towed without his consent. And third, the officer's actions clearly manifested their subjective intent to arrest him. Taken together, these three factors form the core of a defensive strategy that highlights how a suspect, brought back to the station for a translation, was arrested long before probable cause could have been reached.

A fourth factor from the case law consists of whether the officer actually told the suspect that he was under arrest, as opposed to merely being detained. The statutory warnings housed in the DIC-24 have already been found to be crucial to a determination of whether the officer was placing the suspect into custody. An officer providing the statutory warnings in English places a suspect under arrest as soon as the warnings begin. It appears to be an open question whether the same effect can be given to the Spanish-language warnings.

When Spanish-speaking defendants are brought back to the station before the investigation is completed, the focus should be on when custody attached and what evidence of intoxication was

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[56] Washburn v. State, 235 S.W.3d 346, 352 (Tex. App.—Texarkana 2007, no pet.).
[57] *Id.*
[58] *Supra* note 7.

gathered before that point. Only then can it be determined whether the arrest was constitutionally permissible.

## POTENTIAL FIXES

Houston-area police departments can look to other jurisdictions for long-term solutions to the communication barrier between officers and Spanish-speaking communities. The Oklahoma City Police Department provides one model of how to navigate the issue of translation.[59] That police department has a bilingual unit with certified speakers of Spanish, Vietnamese, and American Sign Language.[60] To join the unit, each officer takes a proficiency test and receives incentive pay based on their level of fluency.[61] The officers are then dispatched by a coordinator to the investigations that need them the most.[62]

The commander of the bilingual unit, Captain Paco Balderamma, has explained how this program is an improvement over the previous system. "We used to just say, 'Hey, who speaks Spanish,' and hope someone would raise their hand and help. Now we have a dedicated unit with teams of officers that are always on call."[63]

Captain Balderamma's words are well-taken in the Houston area, where officers like the backup officer in Eduardo's case can respond to a call for a Spanish-speaking DWI with Spanish that is actually insufficient to conduct the investigation.[64] There, the Houston Police Department relied on the informal self-assessment of an officer who characterized his own Spanish as "not perfect" without any objective determination of his skill. The Oklahoma City model takes questions of self-assessment out of the equation by imposing limitations on who is qualified to help.

An additional benefit of the Oklahoma City program is that the bilingual unit is not all housed in the same place. Rather, bilingual officers are deployed to the scene. Implementing this system in

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[59] Eleanor Klibanoff, *Ideas worth stealing: Recruiting bilingual police officers*, WHYY (NPR Affiliate) (Feb. 15, 2016), https://whyy.org/articles/ideas-worth-stealing-recruiting-bilingual-police-officers/ [https://perma.cc/DA9M-FTDA].
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *See* "Issue 2"

the Houston area would minimize some of the Fourth Amendment[65] concerns discussed in this article. Defendants would not have to be taken back to the station for a translator and arrested in the process. Instead, translators could be dispatched to wherever the defendants are. Moving Spanish interrogations away from the stations, where Fourth Amendment[66] issues of arrest and detention often come into play, would greatly improve accuracy and confidence in arrests.

Development and training of police officers need not be the only area in which Houston-area police departments seek to improve. For example, HPD could see immediate improvement in both community engagement and quality of arrests by revitalizing their C.O.P. program. Instead of relying on volunteer translators to donate their time to work side-by-side with officers in dangerous situations, the department should be recruiting paid contractors from target communities. These could be high-school–educated adults hired for part-time four-hour shifts at a reasonable hourly rate, provided that they can pass a language proficiency exam and complete field safety training.

One way in which the Texas Department of Public Safety could provide assistance in this arena would be to revise the DIC-24S form. Rather than say that the defendant is "detenido," the form could say that the defendant is "arrestado." This would bring more clarity to all DWI arrests statewide.

These solutions are not comprehensive, but they are a start. In short, in order to effect a long-term solution to the problem of miscommunications between officers and suspects, departments must invest in fundamentally changing their relationship with Spanish-speakers as a whole.

## CONCLUSION: THE CASE FOR CLARITY.

As police departments in the Houston area bring their resources to bear in battling an ongoing epidemic of DWI fatalities, they can cause unintended harm to vulnerable members of the community, including Spanish-speaking suspects like Rogelio.[67]

Law enforcement agencies that are ill-equipped to handle DWI encounters with suspects who speak only Spanish are compromising best practices to address the urgent need. Interactions between law enforcement and suspects are often translated inaccurately by those who are only somewhat

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[65] *Supra* note 7.
[66] *Id.*
[67] *See*, "Case study: What's wrong with Rogelio?"

proficient in Spanish, at best. Alternatively, suspects are brought back to the station for what is presumed to be a more competent translation. But this action may cause an arrest to begin long before probable cause has been met.

Criminal defense practitioners can benefit from an examination of case studies and case law regarding translation in the DWI context. Defendants from Harris County courts provide helpful examples of the ways in which this problem is encountered in the real world. Appellate cases detail how defendants argued that they did not receive adequate translation during their DWI investigation. General Fourth Amendment case law guides an analysis of whether a DWI suspect brought to the station for translation has been legally taken into custody—a crucial question that will have to be answered as part of a suppression argument.

An examination of the relevant cases shows that what constitutes an adequate translation is still a matter of unsettled law. Determination of this question will turn on the specific facts of each case. However, the strongest arguments with which to challenge an investigation or arrest for a Spanish-speaking DWI defendant will be those which cast the translation as severely inadequate.

Looking at Fourth Amendment case law, it becomes apparent that some of the tactics used by Houston-area police officers may give rise to constitutional violations. A Spanish-speaking defendant who has been taken to the station with the aim of obtaining a qualified translator may be shown to have been taken into custody for Fourth Amendment purposes. Attorneys who are able to draw an analogy between the facts of their case and the relevant case law may find instances where officers have stepped into territory resembling an arrest before they were even capable of gathering enough information for probable cause.

Houston-area legal practitioners are no strangers to the challenges that Spanish-speaking defendants face when they encounter law enforcement. Still, defense attorneys might wrongly assume that evidence collected during inherently inadequate investigations is unimpeachable. Lawyers armed with the relevant case law as well as a determination to glean facts that point to violations of rights in the name of expediency will be rewarded by favorable pleas and dismissals.