

IN THE SUPREME COURT OF OHIO

STATE OF OHIO)
)
 Appellant,) Supreme Court Case No. 2009-0330
)
 v.)
) ON APPEAL FROM THE COURT OF
 SCOTT A. SPEER) APPEALS, SIXTH APPELLATE
) DISTRICT, OTTAWA COUNTY, OHIO
 Appellee.) Case No. OT-07-046

**AMICI CURIAE BRIEF
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GREATER TOLEDO AND OHIO LEGAL RIGHTS SERVICE
IN SUPPORT OF APPELLANT**

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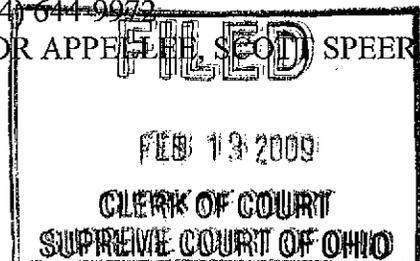


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**STATEMENTS OF IDENTITY AND INTERESTS OF AMICI CURIAE NATIONAL
ASSOCIATION OF THE DEAF, ABILITY CENTER OF GREATER TOLEDO
AND OHIO LEGAL RIGHTS SERVICE**

National Association of the Deaf (NAD) - National Association of the Deaf (NAD) was established in 1880 by deaf leaders who believed in the rights of the American deaf community to use sign language, to congregate on issues important to them, and to have their interests represented at the national level. Since 1976, the NAD Law and Advocacy Center has protected the legal rights of deaf and hard of hearing people through the courts. For more information, please visit www.nad.org.

The Ability Center of Greater Toledo ("Ability Center" or "ACT") - ACT is a nonprofit independent living center located in northwest Ohio, serving persons with disabilities and their families who reside or work throughout northwest Ohio and Southeast Michigan. As an independent living center, ACT is funded in part under provisions of the Rehabilitation Act of 1973, 29 U.S.C. 701 et seq., and is mandated to provide advocacy for individuals with disabilities, as well as other services necessary to enhance opportunities for independent living for persons with disabilities within their communities. These services routinely include peer counseling and advocacy in areas such as access to programs and services, employment, housing, education, transportation, health, and access to and participation in government programs. A board of trustees, more than half of whom are individuals with disabilities, controls the Ability Center. The Ability Center employs approximately thirty-five individuals, most of whom are individuals with disabilities. The agency's central offices are located in Sylvania, Ohio, with satellite offices located in both Port Clinton and Defiance, Ohio. According to recent estimates, ACT serves approximately 3000 individuals with disabilities and their families each year. Many

of these individuals, such as the juror at issue in this case, Mrs. Leow-Johannsen, either work or reside in Northwest Ohio.

Ohio Legal Rights Service (OLRS) – Ohio Legal Rights Service is an independent state agency designated by the Governor as the federally mandated protection and advocacy system for people with disabilities. *See* Ohio Rev. Code §5123.60; 42 U.S.C. §15041 et seq. As Ohio’s protection and advocacy agency, OLRS has litigated many issues involving the rights of people with disabilities including employment discrimination, access to the courts, civil commitment, community integration, and free, appropriate public education. *See, e.g., State v. White*, 118 Ohio St. 3d 12, 2008 Ohio 1623, 885 N.E. 2d 905 and *State v. Lott*, 97 Ohio St. 3d 303, 2002 Ohio 6625, 779 N.E. 2d 1011 (amicus curiae counsel in cases involving standard for assessment of mental retardation in capital cases); *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F. 3d 808 (6th Cir. 2002)(amicus curiae counsel in ADA Title II case involving access to court for hearing impaired individual); *Board of Education of Austintown Local School District v. Mahoning County Board of Mental Retardation and Developmental Disabilities*, 66 Ohio St. 3d 355, 613 N.E. 2d 167 (1993) (IDEA requires county school to serve children residing at developmental center); *Heller v. Doe by Doe*, 509 U.S. 312 (1993)(amicus curiae counsel for organizations of people with disabilities in case involving civil commitment rights of people with mental retardation); *Martin v. Voinovich*, 840 F. Supp. 1175 (S.D. Ohio 1993)(ADA Title II community integration case); *Cordrey v. Eukert*, 499 U.S. 938 (1991), *denying cert. Cordrey v. Eukert*, 917 F. 2d 1460 (6th Cir. 1990) (special education services for children who need an extended school year). Because of its work as Ohio’s protection and advocacy agency for people with disabilities, OLRS is familiar with the rights of deaf or hard of hearing persons to participate in the court process as jurors, witnesses or parties.

THIS IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST

This is a case of public and great general interest because the holding in *State v. Speer*, 6th Dist. No. OT-07-046, 2008 Ohio 6947, will have the effect of discouraging trial courts from including deaf or hard of hearing jurors in the judicial process.

The Court should accept jurisdiction to consider whether, at the time that defendant raised the challenge for cause, the trial court abused its discretion in refusing to excuse for cause a juror with a hearing impairment. The Court should narrowly define the issue to prevent second guessing the trial judge based on circumstances that occurred well after the challenge for cause was made, and to which the defendant failed to raise any objection or to renew his challenge for cause. To do otherwise would risk encouraging courts to dismiss jurors with hearing impairments for cause even where no basis exists to believe at the time the challenge is raised that the juror cannot fully participate as a juror and afford the defendant a fair trial.

STATEMENT OF THE CASE AND FACTS

The case arises from the criminal conviction of Scott A. Speer. The following statement of facts concerns juror Ms. Leow-Johannsen. During jury selection, Ms. Leow-Johannsen revealed that she read lips in order to know what was being said. Ms. Leow-Johannsen is hard of hearing. (Jury Trial Transcript, p. 185-186). Counsel for the defendant requested that the juror be dismissed "for cause." The trial court denied the defendant's motion for dismissal of Ms. Leow-Johannsen for cause. The defendant did not use one of its four preemptory challenges on Ms. Leow-Johannsen. (Dec. 17, 2007 Court Order and Opinion, p. 7).

During the voir dire, the trial court asked Ms. Leow-Johannsen, in regards to her being hard of hearing, "Will that affect you in this case?" to which she replied, "No." (Tr., p. 65). Furthermore, counsel for the State asked Ms. Leow-Johannsen, "Is there any other assistance that the Court could give you in understanding what is going on, someone who does sign language?"

to which Ms. Leow-Johannsen replied “I read lips.” (Tr., p. 145). Finally, counsel for the defendant asked Ms. Leow-Johannsen about what accommodations could be used to observe evidence in the form of an audio communication; she stated “type it down for me.” (Tr., p. 155.).

During the trial, the judge accommodated Ms. Leow-Johannsen by moving her in the jury box so she could sit immediately next to the witness chair. (Dec. 17, 2007, Court Order and Opinion, p. 7.) To ensure that Ms. Leow-Johannsen understood testimony, the witnesses and both counsel faced her during the trial. When the witness and counsel did not face Ms. Leow-Johannsen, she simply reminded them that they must face her, in which case the individuals promptly complied. (Id.). The final accommodation made for Ms. Leow-Johannsen involved the 911 audio recording of a call made by defendant Speer on the night in question from aboard his boat. In order to understand the audio recording, Ms. Leow-Johannsen sat next to the court reporter to read the “real time display” of the trial transcript. (Tr., p. 197). At no point during the trial and at no point during the 911 tape presentation did the defendant’s counsel object or express concern that Ms. Leow-Johannsen could not understand or appreciate the testimony.

ARGUMENTS IN SUPPORT OF THE STATE OF OHIO

Proposition No. 1: A juror with a hearing impairment should not be dismissed for cause based on that hearing impairment unless there is evidence at the time the challenge for cause is made that the juror cannot fully participate as a juror and afford the defendant a fair trial.

In *Powers v. Ohio*, the United States Supreme Court recognized the importance of jury service stating that it “is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life.”

Powers v. Ohio (1991), 499 U.S. 400, 402, 111 S.Ct. 1364, 113 L.Ed.2d 411. Furthermore, the Court has emphasized that “[j]ury service is a duty as well as a privilege of citizenship.” *Thiel v.*

Southern Pacific Co.(1946), 328 U.S. 217, 224, 66.S.Ct. 984, 90 L.Ed. 1181. Such a privilege and duty should not be taken away from citizens lightly.

The importance of jury duty is reflected not only in enabling people to contribute to their communities, but also in the penalties for non-participation. In Ohio, jury duty is an important civic requirement and failure to participate in jury duty, without a valid excuse, can lead to contempt of court and fines. *See* Ohio Rev. Code § 2313.29. *See also State v. Brunt* (M.C. 1977), 53 Ohio Misc. 1, 371 N.E.2d 852 (holding in contempt and fining a juror who failed to appear for a criminal action). Other jurisdictions provide even harsher penalties. For example, under Federal law, failure to attend jury service without good cause can ultimately lead to imprisonment. *See* 28 U.S.C. § 1866(g) (stating penalties of fines, community service and imprisonment “not for more than three days” for “noncompliance with a [jury] summons”).

Finally, the United States Supreme Court has emphasized that juries should encompass an appropriate cross-section [of] the communities in which they serve. *See generally, Taylor v. Louisiana* (1975), 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 290. Individuals with disabilities are an important segment of American society and they should be included in these cross-sections as well.¹

1. Americans with Disabilities Act and Rehabilitation Act require inclusion of people with disabilities in the judicial process

The express purpose of the Americans with Disabilities Act (ADA) is to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1). Title II of the ADA prohibits state and local courts,

¹ Approximately one-fifth of all Americans have a disability according to the Census Bureau. *See Disabilities Affect One-Fifth of All Americans*, CENSUS BRIEF, December 1997, <http://www.census.gov/prod/3/97pubs/cenbr975.pdf> (last visited February 2, 2009).

as public entities, from discriminating against jurors who are hard of hearing. 42 U.S.C. § 12131(1).²

Title II of the ADA states: “Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. The Rehabilitation Act uses similar language to prohibit discrimination by recipients of federal funds.³ 29 U.S.C. § 794. The courts of the State of Ohio are public entities pursuant to Title II because “public entity” includes any state or local government, and “any department, agency, special purpose district, or other instrumentality of a State or of a local government.” 42 U.S.C. § 12131(1)(A) and (B).

In addition, Ms. Leow-Johannsen is a “qualified individual with a disability.” Title II of the ADA defines a qualified person with a disability as one who “with or without reasonable modifications to rules, policies, or practices, communication barriers... or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” 42 U.S.C. § 12131(2). During the voir dire, the trial court asked Ms. Leow-Johannsen if she required a sign language interpreter, to which she responded “I read lips.” (Tr., p. 145). Subsequently, and without

² Ohio discrimination statutes parallel the ADA. *See, e.g.* Ohio Civil Rights Act, R.C. §4112.01(A)(13); R.C. § 4112.02.

³ The Rehabilitation Act provides: “No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...” 29 U.S.C. § 794(a).

objection of defense counsel, the trial court provided Ms. Leow-Johannsen with a transcript as a reasonable accommodation for the 911 call. (Tr., p. 145).

Ms. Leow-Johannsen met all the qualifications for a juror in Ohio, and the trial court properly accommodated her and refused to dismiss her for cause. The United States Supreme Court has held that “satisfactory jury service” must meet the constitutional requirements of a fair trial. *See In Re Murchison* (1955), 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 Many jurors have less than perfect hearing abilities, and, as a result, courts have held that a hard of hearing juror does not render a trial constitutionally unfair to a defendant. *United States v. Dempsey* (C.A.10, 1987), 830 F.2d 1084 at 1088; *New York v. Guzman* (NY 1990), 555 N.E.2d 259, 76 N.Y.2d 1.

2. The Ohio Rules of Superintendence for the Courts of Ohio mandate inclusion of people with disabilities in judicial process

The Ohio Rules of Superintendence for the Courts of Ohio maintain that it is “vitaly important” that the legal system not refuse the opportunity to serve on a jury to those who desire to do so. Ohio Sup. R., Appendix B. Commentary to Standard 1. Additionally, the Ohio Rules require that the courts make reasonable modifications for jurors who are hard of hearing. Ohio Sup. R., Appendix B. Commentary to Standard 1.

The Ohio Rules list exceptions to the state’s eligibility requirements for jury services. Being hard of hearing is not one of them. (Ohio Sup. R., Appendix B. Standard 4). The Ohio Rules state that eligible people may be excused if “their ability to receive and evaluate information is so impaired that they are unable to perform their duties as jurors.” Ohio Sup. R., Appendix B. Standard 6. B. That could not be said of Ms. Leow-Johannsen. She had the ability to lip read, and she made every effort to understand what was being said in the courtroom.

In Ohio (and contrary to the Sixth District's holding) the Tenth District Court of Appeals properly applied the Rules of Superintendence in recognizing that deaf or hard of hearing jurors can fairly try a case, perceive evidence and judge witness demeanor. In *Burke v. Schaffner* (1996), 114 Ohio App. 3d 655, 683 N.E.2d 861, the trial judge excused a deaf juror because an interpreter was not available. The trial judge also expressed concerns about the juror's ability to assess witness demeanor and participate in group deliberations, among other things. The Tenth District Court of Appeals specifically held these other concerns were not valid: "Our review of the voir dire transcript reveals that, while the trial court did indeed express these concerns, which concerns we are not prepared to sanction as legitimate challenges for cause, the court's decision to excuse the juror was ultimately based upon the unavailability of an interpreter to assist the juror. Since the trial court did not act unreasonably or arbitrarily, we cannot say that the court abused its discretion." *Burke*, 114 Ohio App. 3d at 660 (emphasis added).

3. Other jurisdictions have upheld inclusion of individuals with disabilities in the judicial process

Courts in other jurisdictions have held that hard of hearing individuals, who do not use interpreters, are qualified to serve as jurors.⁴ See, e.g., *State v. Dugar*, 93-718 (La.App. 3 Cir. 10/5/94), 643 So.2d 870, 881 (stating that the trial judge did not err in allowing a juror who was hard of hearing from serving on the jury so long as he raised his hand if he could not hear something at trial); *Ford v. State* (Ga.App.2008), 658 S.E.2d 428, 289 Ga.App. 865 (stating that

⁴ While in *Burke*, a challenge for cause was sustained because of the *unavailability* of an interpreter to accommodate a hard of hearing individual, Ms. Leow-Johnannsen did not need an interpreter since she stated that she could read lips to supplement her comprehension. (Jury Trial Transcript, p 185-186). See also, *State v. Marcham* (Ariz.App. 1988), 770 P.2d 356, 160 Ariz. 52, 55 ("Given the expressed legislative intent in this state to eliminate discrimination based on handicaps... it would be anomalous for this court to reverse the defendant's conviction because of a deaf person who utilized an interpreter at trial was seated on a jury.").

the court did not err in allowing a hard of hearing juror to remain because the “juror's difficulty was mostly in one ear, and the court offered amplified headphones to the juror if he were to be selected... [and] he also responded to almost all questions asked of him with no apparent difficulty”); *State v. O'Neal* (Mo. 1986), 718 S.W.2d 498, 502, *cert. den.* 480 U.S. 926 (1987) (“[T]he judge questioned the venire person and was satisfied that the hearing problem would not interfere with the venire person's ability to sit as a juror.”). *See also, Woodard v. Commonwealth* (Ky. 2004), 147 S.W.3d 63, 69 (stating that a deaf individual should not be disqualified solely because he or she is deaf, rather the “decision turns on whether or not the deaf juror was able to properly perform her duties.”).

Still other courts have emphasized that demeanor and tone are not “a necessary part or superior method of assessing credibility.” *Guzman*, 76 N.Y.2d at 6. In *New York v. Guzman*, the New York Court of Appeals held: “Each juror is expected to bring to the courtroom his or her own method of sorting fact and fiction—the same method the juror relies on in conducting everyday affairs.” *Id.* A deaf or hard of hearing juror will bring to the courtroom the ability to sort information based on “that juror’s experience” which “has been to make such determinations without vocal clues.” *Id.* “Nothing but speculation suggests that this [experience is a] disadvantage.” *Id.* *See also Dempsey*, 830 F.2d at 1088 (emphasizing that while a deaf juror was reduced in her “ability to judge demeanor... her other senses were fully operative [and] [m]any jurors have somewhat less than perfect hearing or vision, or have other limitations on their ability to assimilate or evaluate testimony and evidence”).

Similarly, courts have also ruled that people who are blind, like people who are deaf, should have the opportunity to serve on juries, and the courts should provide these jurors with reasonable accommodations so they can perform their civic duty. *See Galloway v. Sup. Court of*

D.C. (D. D.C. 1993), 816 F.Supp 12 (“[E]ven if the individual does not initially appear to be ‘otherwise qualified’ [under the Rehabilitation Act], it must still be determined whether reasonable accommodation would make the individual otherwise qualified”) (citations omitted)). For example, courts have refused to dismiss jurors with vision impairment for cause when the courts believe that reasonable accommodations will allow them to perform their duties appropriately. *See, e.g., Browning v. State*, 2006 OK CR 8, 134 P.3d 816, 830 (rejecting the defendant’s claim of error to excuse a juror for cause, who “had no peripheral vision and had lost a significant amount of her forward vision” but “could see close up and would be able to see from the front of the jury box.”). Thus, like Ms. Leow-Johannsen’s request to have the parties face her so she could read their lips, jurors with other physical disabilities have not been dismissed for cause and have sat on juries with reasonable accommodation. *See id.*⁵

CONCLUSION

Jury service is an important civic duty and responsibility for all citizens. Ohio and federal law support inclusion of people who are deaf and hard of hearing in jury service.

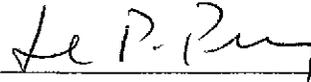
This Court should accept jurisdiction because the Sixth District Court of Appeals erred by reversing the defendant’s conviction solely because one of the jurors who tried the case was

⁵ Finally, people who are deaf can serve not only as jurors, but as judges. Judge Richard S. Brown of Wisconsin’s District II Court is almost completely deaf, yet he is serving on the bench. *See* Brown Will Present at ABA Conference, Third Branch, Spring 2006, at 12, available at <http://www.wicourts.gov/news/thirdbranch/docs/-spring06.pdf> (last visited Jan. 27, 2009); Jack Zemlicka, *Interview with Judge Richard S. Brown, Wisconsin Court of Appeals. (Case overview)*, WISCONSIN LAW JOURNAL, March 3, 2008. Judge Brown uses computer-assisted-real-time (CART) machines to read what is being stated in his courtroom, which allows him to read in real time what the court reporter is typing. *See* Jack Zemlicka, *Interview with Judge Richard S. Brown, Wisconsin Court of Appeals. (Case overview)*, WISCONSIN LAW JOURNAL, March 3, 2008. There are judges who are blind in the United States as well. *See e.g. Galloway v. Sup. Court of D.C.*, 816 F. Supp. 12 (1993) (discussing Judge Davis Norman, a judge on the D.C. Superior Court who is blind and who has “presided over numerous trials where he was the sole trier of fact and had to assess the credibility of the witnesses before him and evaluate the documentation and physical evidence”).

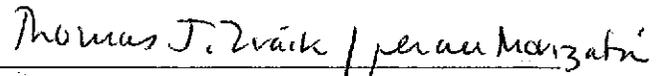
hard of hearing. The trial judge correctly seated this juror because there was no evidence at the time the challenge for cause was made that she could not fully participate as a juror and afford the defendant a fair trial, and defense counsel made no further objections during the trial.

Dated: February 12, 2009

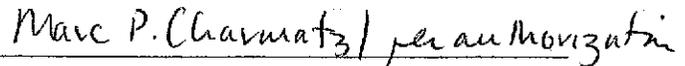
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⁶ Attorneys for Amici gratefully acknowledge the support and work of the following students from the University Of Maryland School Of Law: Daniel Papuchis, David Nolte, and Noah Isserman.

CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of Amici Curiae Brief of National Association Of The Deaf, Ability Center Of Greater Toledo And Ohio Legal Rights Service In Support Of Petitioner, via regular U.S. mail on this 13th day of February, 2009, to the following:

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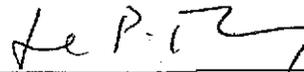
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