

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

**BRIEF IN SUPPORT OF APPELLANT OF AMICI CURIAE
 NATIONAL ASSOCIATION OF THE DEAF, ABILITY CENTER OF
 GREATER TOLEDO, OHIO ASSOCIATION OF THE DEAF, COMMUNICATION
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 OHIO LEGAL RIGHTS SERVICE**

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FILED
 AUG 03 2009
 CLERK OF COURT
 SUPREME COURT OF OHIO

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

National Association of the Deaf:

The National Association of the Deaf (NAD) is the nation's premier civil rights organization of, by and for deaf and hard of hearing individuals in the United States of America. Established in 1880, the NAD was shaped by deaf leaders who believed in the right of the American deaf community to use sign language, to congregate on issues important to it, and to have its interests represented at the national level.

The NAD Law and Advocacy Center educates, advocates, and litigates on behalf of and to empower deaf and hard of hearing people. The NAD also advocates for legislative and public policy issues of concern to the deaf and hard of hearing community, particularly at the national level and often in collaboration with other national organizations.

The Ability Center of Greater Toledo:

The Ability Center of Greater Toledo ("Ability Center" or "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, Section 701 *et seq.*, Title 29, U.S. Code, 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, and health. A board of trustees, more than half of whom are individuals with disabilities, controls the Ability Center. The Ability Center

employs approximately 35 individuals, most of whom have 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 3,000 individuals with disabilities and their families each year. Many of these individuals, such as the juror at issue in this case, Ms. Leow-Johannsen, either work or reside in Northwest Ohio.

Ohio Association of the Deaf:

In 1961, the Ohio Deaf Motorist Association and the Ohio Federation of Organizations Serving the Deaf, including ten districts, merged to create the Ohio Association of the Deaf, Inc. The Ohio Association of the Deaf (OAD) is a non profit organization incorporated within the state of Ohio to protect the rights of deaf, hard of hearing, and deaf-blind citizens. This Association has been serving deaf, hard of hearing, and deaf-blind people of Ohio for more than 50 years. The OAD's mission is focused on improving educational opportunities; preserving, promoting, and enhancing the interests and privileges of deaf, hard of hearing and deaf-blind citizens as a minority group; and pursuing their economic security.

Communication Services for the Deaf:

Communication Service for the Deaf, Inc. (CSD) was established in 1975, primarily to provide sign language interpreting services to individuals who are deaf or hard of hearing. Today, CSD provides a broad continuum of social and human services programs, as well as telecommunications relay services. Through the Mental Health and Deafness Resource Program, CSD of Ohio offers culturally competent information, advocacy, and referral services statewide for deaf, hard of hearing, and deaf-blind consumers and their families. CSD also uses its expertise in deafness to train and educate mental health service providers on accessibility and cultural competence in meeting the needs of deaf, hard of hearing, and deaf-blind consumers. For more information, please visit www.c-s-d.org.

The Ohio School for the Deaf:

The Ohio School for the Deaf (OSD) is a state owned and operated pre-K through grade 12 school that provides deaf and hard of hearing learners in Ohio with high-quality early child care and education. OSD is a school that works for every learner enrolled at OSD and in Ohio's public schools.

The establishment of OSD as an educational facility stemmed from the commitment the Ohio Legislature made in 1829 to provide quality education for Ohio's deaf and hard of hearing learners. R.C. § 3325. OSD is the fifth school of its kind in continuous operation in the United States, resulting in productive lives for thousands of successful deaf citizens who have been educated at OSD since its inception.

The educational program at OSD is chartered by the State Board of Education. At its foundation, OSD utilizes a sequential, developmental curriculum for student achievement in academic and career-technical areas that are aligned with Ohio's Academic Content Standards. OSD is in compliance with the Ohio Department of Education's *Operating Standards for Ohio's Schools Serving Children with Disabilities* and the *Individuals with Disabilities Education Act* and the *No Child Left Behind Act*. These important constructs mean that the educational programs offered to learners at OSD, although individualized, are of the highest caliber, and are comparable to educational programs for other disabled and non-disabled learners in Ohio's public schools. In 2005, OSD earned full accreditation status from the North Central Association Commission on Accreditation and School Improvement (NCA/CASI) and the Conference of Educational Administrators in Schools for the Deaf (CEASD).

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* R.C. §

5123.60; Section 15041 *et seq.*, Title 42, U.S. Code. 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* (C.A.6, 2002), 276 F.3d 808 (*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* (1993), 66 Ohio St. 3d 355, 613 N.E. 2d 167 (IDEA requires county school to serve children residing at developmental center); *Heller v. Doe* (1993), 509 U.S. 312, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (*amicus curiae* counsel for organizations of people with disabilities in case involving civil commitment rights of people with mental retardation); *Martin v. Voinovich* (S.D. Ohio 1993), 840 F. Supp. 1175 (ADA Title II community integration case); *Cordrey v. Eukert*, 499 U.S. 938 (1991) (*denying cert*); *Cordrey v. Eukert* (C.A.6, 1990), 917 F.2d 1460 (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 and hard of hearing persons to participate in the court process as jurors, witnesses or parties.

STATEMENT OF FACTS

This case involves Scott Speer's convictions for involuntary manslaughter and aggravated vehicular homicide, which the Ottawa County Court of Appeals reversed because one of the jurors in his case was hard of hearing.

Speer went to trial on four charges -- aggravated murder, murder, involuntary manslaughter, and aggravated vehicular homicide -- arising from the drowning death of Speer's friend during a boating trip. During voir dire, a potential juror, Linda Leow-Johannsen, explained that, although she had some residual hearing, she would also need to read lips to understand the trial proceedings. (Tr. 154.) Ms. Leow-Johannsen stated that she did not need a sign language interpreter. She stated that her hearing disability would not affect her ability to serve as a juror as long as she could see the person who was talking. (Tr. 65, 145.)

At one point during voir dire, when the trial judge was talking to Ms. Leow-Johannsen, she could not see his lips. Therefore, she requested that the judge move his files. (Tr. 65.) Once the judge moved away from his files, Ms. Leow-Johannsen was able to respond to the court's questions, as well as to questions from the prosecutor and defense counsel. When defense counsel asked how best to accommodate her for the playing of a tape recording, Ms. Leow-Johannsen replied "type it down for me." (Tr. 165.)

Defense counsel challenged Ms. Leow-Johannsen for cause, expressing concerns that attorneys might have their backs to her when questioning witnesses and that she would not be able to hear all the evidence. The trial judge denied the challenge for cause. (Tr. 176.)

Although the judge reminded defense counsel that he could use one of his four peremptory challenges for Ms. Leow-Johannsen (Tr. 176-77), the defense did not excuse her and she was seated as a juror.

The judge told Ms. Leow-Johannsen that the court would accommodate her “in every way we can” during the trial (Tr. 176-177), and the record reflects such accommodations. The judge moved Ms. Leow-Johannsen to a seat in the jury box very close to the witness chair. (Dec. 17, 2007 Court Order and Decision, p. 7.) He instructed counsel and witnesses to face Mr. Leow-Johannsen when speaking. (Dec. 17, 2007 Court Order and Decision, p. 7.) He told Ms. Leow-Johannsen to simply raise her hand any time she had difficulty understanding. (Tr. 197.) On occasions when an attorney or witness forgot to face Ms. Leow-Johannsen, she reminded them to do so. (Dec. 17, 2007 Court Order and Decision, p. 7.) The judge also arranged for her to come out of the jury box and read the court reporter’s real-time transcript on a screen while audio tapes were played. (Tr. 197.)

One audio tape offered by the state was a recording of a 911 call that the defendant made from his boat after the victim went overboard. Ms. Leow-Johannsen read the court reporter’s transcript of the tape while it was being played (Tr. 230), *without any objection from defense counsel* that Ms. Leow-Johannsen was unable to perform her duties as a juror or otherwise could not fairly consider the tape because she is hard of hearing.¹

After deliberations, the jury returned verdicts acquitting Speer on the greater charges of aggravated murder and murder and convicting him on the lesser charges of involuntary manslaughter and aggravated vehicular homicide.

On appeal, Speer argued that the trial judge abused his discretion in denying his challenge for cause of Ms. Leow-Johannsen because Defendant claims that she could not, from written words alone, appreciate the emotions he expressed on the 911 audio tape or appreciate whether his speech was slurred during the call. The Court of Appeals gave no deference to the

¹ R.C. § 2945.29 allows a trial judge to remove a juror who is “unable to perform his duty” and replace that juror with an alternate.

trial court and reversed Speer's convictions, holding that Ms. Leow-Johannsen's presence on the jury denied Speer a fair trial. According to the Court of Appeals: "If any doubt exists that a juror can adequately and completely perceive and evaluate all the evidence, whether because of a physical impairment, mental capabilities, or other reason that would interfere with the performance of the juror's duties, the trial court must excuse that juror for cause." *State v. Speer*, 180 Ohio App. 3d 230, 2008-Ohio-6947, 904 N.E.2d 956, ¶34.

On February 13, 2009, the State filed a Memorandum in Support of Jurisdiction with this Court. The Court accepted this case for review on June 3, 2009. *State v. Speer*, 06/03/2009 Case Announcements, 2009-Ohio-2511.

ARGUMENT

Proposition of Law No. 1:

A deaf or hard of hearing juror, with accommodations, can competently perform the essential duties of a juror and afford the defendant a fair trial in a criminal case. Title II of the Americans With Disabilities Act (ADA) prohibits exclusion of qualified people with disabilities from the programs, services, and activities of public entities such as courts. The disability-based excusal for cause of a qualified deaf or hard of hearing juror is discriminatory under Title II of the ADA.

Title II of the ADA applies to "public entities" including both state and local governments, and their agencies and instrumentalities such as courts. Section 12131(1), Title 42, U.S. Code. It provides that "no qualified individual with a disability shall, by reason of 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." Section 12132, Title 42, U.S. Code. A person is a "qualified individual with a disability" if he or she can, with accommodations, meet the essential requirements to participate in the public entity's programs, services or activities. Section 12131(2), Title 42, U.S. Code.

A. Deaf and hard of hearing individuals are qualified to serve as jurors.

Twenty-five years ago, it was well accepted that “the deaf can learn and do anything a hearing person can,” including serve on juries. *People v. Guzman* (N.Y. Sup. Ct. 1984), 478 N.Y.S.2d 455, 460, *aff’d*, 76 N.Y. 2d 1, 555 N.E.2d 259 (1990); *see also United States v. Dempsey* (C.A.10, 1987), 830 F.2d 1084, 1088. In both *Dempsey* and *Guzman*, courts rejected the defendant’s challenge of a juror for cause. 830 F.2d at 1092; 478 N.Y.S.2d at 467. The perception that a juror could be considered unqualified by virtue of his or her hearing disability is “a passé conclusion which defies and has no connection with reality or common sense.” *Guzman*, 478 N.Y.S.2d at 460. This Court should recognize “the crucial role which uninformed and irrational thinking has played in the perpetuation of this misapprehension about the deaf,” *id.*, and reject unfounded conclusions regarding the qualifications of deaf or hard of hearing individuals to serve as jurors.

1. Perception of vocal inflection and intonation are not the sole methods of assessing credibility.

The Court of Appeals erred in speculating that the transcript of the 911 tape would not allow Ms. Leow-Johannsen to evaluate the evidence fully. There is emphatically “no reason to suppose that perception of vocal inflections is a necessary part or a superior method of assessing credibility.” *People v. Guzman*, 555 N.E.2d 259, 262 (N.Y. 1990). “Each juror is expected to bring... his or her own method of sorting fact from fiction—the same method the juror relies on in conducting everyday affairs.” *Guzman*, 555 N.E.2d at 262; *see also People v. Caldwell* (1993), 603 N.Y.S.2d 713, 715 (“Each juror brings to the deliberation process his or her own background and experience.”). In affirming a defendant’s conviction and holding that she was not denied a fair trial by the participation of a blind juror, the court in *Caldwell* stated that, “[i]n her everyday life, [the contested juror] has to make judgments and credibility determinations without relying

on visual clues and there is simply no reason to believe that she was incapable of using those same skills to reach a decision in this case.” *Caldwell*, 603 N.Y.S. 713, 715 (1993). Likewise, Ms. Leow-Johannsen has to make credibility decisions every day without some vocal clues, and “[n]othing but speculation suggests that this [is] a disadvantage.” *Guzman*, 555 N.E.2d at 262.

In *Enriquez v. Pliler* (C.A.9, 2005), 141 Fed. Appx. 573 (unpublished), the United States Court of Appeals for the Ninth Circuit refused to overturn the conviction of a defendant who alleged that a transcript of an audio recorded police interview did not allow a deaf juror to evaluate the “climate” of the interview. The Court of Appeals was “unwilling to speculate about vocal nuances in the recording or about interpretations of those nuances that might have favored [the defendant].” *Id.* Similarly, the Ohio Court of Appeals erred in speculating that Ms. Leow-Johannsen was unable to evaluate material evidence by reading a transcript of a phone call.

Jurors who are deaf or hard of hearing are able to assess credibility without auditory clues, and so it is “unlikely that mistakes or omissions would occur with significantly greater frequency than they do with hearing jurors, who may be distracted or inattentive at times.” *Id.* Many jurors have “less than perfect hearing or vision, or have other limitations on their abilities to assimilate or evaluate testimony and evidence.” *Dempsey*, 830 F.2d at 1088. No juror “hears everything that should be heard, interprets everything as it is meant to be interpreted, processes everything in the same fashion or reaches a decision in the same way.” *Guzman*, 478 N.Y.S.2d at 466 (“Some jurors are better educated than others, some are more observant, some more aware of auditory cues and some unfortunately hear and understand little or nothing that has gone on in the proceedings.”). The deliberative process accounts for these imperfections by allowing jurors to debate impressions, correct confusions, and fill in lapses of concentration. *Id.* Defendant presents no evidence whatsoever to support the speculation that Ms. Leow-Johannsen

was any less capable in this process than a hearing juror. With the accommodations provided by the trial judge, Ms. Leow-Johannsen was able to fully understand the evidence and arguments submitted at trial. Accordingly, the Court of Appeals erred in holding that Ms. Leow-Johannsen's presence on the jury denied Defendant a fair trial.

2. The accommodations provided for Ms. Leow-Johannsen ensured that she was qualified to serve as a juror and that Defendant received a fair trial.

A juror can only be excused for cause based on that juror's hearing disability if he or she cannot meet the essential requirements of jury service even with accommodations. *See United States v. Dempsey* (C.A.10, 1987), 830 F.2d 1084, 1088-89 (holding that court must find that the juror's "overall ability to perceive and evaluate evidence was so impaired as to render the trial constitutionally unfair to defendant."). A trial juror's duties are to understand the evidence, evaluate it fairly, apply the court's instructions of law to the evidence, and communicate effectively with fellow jurors. *People v. Guzman*, 76 N.Y. 2d 1, 5, 555 N.E.2d 259, 261 (1990). Ms. Leow-Johannsen was a "qualified person with a disability" because, with accommodations, she met the essential requirements to serve as a juror at Defendant's trial. Her presence on the jury did not deny him a fair trial. The Court of Appeals' concerns about Ms. Leow-Johannsen's ability to perform those duties at Defendant's trial are based solely on speculation.

The trial judge determined that Ms. Leow-Johannsen was qualified to serve as a juror, based on personal evaluation and impressions unique to the trial court. As this Court has held, "deference must be paid to the trial judge who sees and hears the juror," and the trial court's ruling on a challenge for cause will not be reversed unless it is "manifestly arbitrary and unsupported by substantial testimony." *State v. Williams* (Ohio 1997), 679 N.E.2d 646, 654 (*citations omitted*). The trial court's ruling on a challenge for cause will not be reversed absent an abuse of that discretion. *State v. Trimble*, No. 2005-2436, ¶68 (Ohio June 30, 2009).

In this case, the trial court made accommodations to ensure that Ms. Leow-Johannsen was able to understand and evaluate all of the evidence and testimony. While the Court of Appeals stated that it was “unknown whether the juror received all the testimony,” *Speer*, 2008 Ohio 6947 at ¶30, the record reflects that the trial judge seated Ms. Leow-Johannsen in a position where she could read the lips of all trial participants and instructed lawyers and witnesses to face her when speaking. This was the accommodation that Ms. Leow-Johannsen requested, and which the trial judge deemed appropriate. She did not hesitate in asking the trial judge to move his files so she could see his lips, and later reminded attorneys or witnesses to face her during trial.

Yet, according to the Court of Appeals, whenever there is “any doubt” about whether a juror with a physical disability can completely perceive all the evidence, that juror must be excused for cause. *State v. Speer*, 904 N.E.2d 956, 961 (Ohio Ct. App. 2008). This conflicts with the abuse of discretion standard and the deference that should be paid to the trial court regarding the qualifications of jurors. As the court in *Guzman* explained, the “any doubt” standard is inappropriate for the evaluation of potential jurors:

During the deliberative process any questions or confusion should be discussed; the lapses of concentration should be filled in; differences in impressions should be debated, considered and resolved.... We cannot, in reality, be sure of what any juror has seen or heard or understood or interpreted. We live in an imperfect world and the jury system is our imperfect attempt to deal with that world. The best we can do is to try to find 12 citizens, imperfect as they are, to listen, observe, consider, discuss, and reach the best verdict, the fairest verdict they know how, given their imperfections. That is the most we can ask, and to my unending surprise, by whatever route they travel, juries by and large arrive at substantial justice.

People v. Guzman, 478 N.Y.S. 2d at 462 (1984); see also *Dempsey*, 830 F.2d at 1088.

B. Other courts have held that deaf and hard of hearing individuals are qualified to serve as jurors when provided appropriate accommodations.

Courts in other jurisdictions have affirmed convictions and held that deaf and hard of hearing individuals are qualified to serve as jurors. See *Ronning v. State* (Ark. 1988), 748 S.W.2d 633, 636; *Carrillo v. People* (Colo. 1999), 974 P.2d 478, 492 n.10; *Ford v. State* (Ga. Ct. App. 2008), 658 S.E.2d 428, 429; *State v. Francis* (La. 1981), 403 So.2d 680, 682-83; *State v. Dugar* (La. Ct. App. 1994), 643 So. 2d 870, 871 (cert denied, 657 So.2d 1019); *Roberts v. State* (Md. Ct. Spec. App. 1968), 241 A.2d 903, 905-06; *Commonwealth v. Best* (Mass. 1902), 63 N.E. 1073, 1073; *Moore v. State* (Miss. Ct. App. 2005), 909 So.2d 77, 83; *State v. O'Neal* (Mo. 1986), 718 S.W.2d 498, 502; *Parish v. State* (Okla. Crim. App. 1943), 142 P.2d 642, 645-46; *Safran v. Meyer* (1916), 103 S.C. 356, 88 S.E. 3; *Skinner v. State* (Wyo. 2001), 33 P.3d 758, 764.²

In refusing to overturn a conviction because the trial court seated a hard of hearing juror, the appellate court in *State v. Dugar* recognized that “[t]rial judges are vested with broad discretion in determining whether a juror suffering from a physical infirmity is competent to serve.” 643 So. 2d at 871; see also *Dempsey*, 830 F.2d at 1087-88. A trial court’s decision that a juror’s hearing disability did not make the juror incapable of serving will be upheld absent an abuse of discretion. *Id.* The trial judge determines what accommodations, if any, the prospective juror requires to serve on the jury. *Carrillo*, 974 P.2d at 492 n.10.

Also, as in *Dugar*, Ms. Leow-Johannsen was able to remind the witnesses and counsel to face her when they spoke, thus ensuring that all evidence and testimony were effectively communicated to her. (Dec. 17, 2007 Court Order and Decision, p. 7). See also, *Sorensen v.*

² One court has even gone so far as to hold that individuals with hearing disabilities should be afforded *Batson*-like protection, and thus disallowed peremptory challenges based on hearing disability. *People v. Green*, 561 N.Y.S.2d 130, 131 (County Ct. 1990) (citing *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (forbidding litigants from using peremptory challenges to strike jurors based on race)).

State (Wyo. 2000), 6 P.3d 657, 661-62 (“reasonable accommodations were made for him to signal the court in the event he was unable to hear the evidence”). Given that the judge in Defendant’s trial directly observed those few incidents that Defendant contends demonstrated prejudice, “[t]here has been no sufficient showing of incompetency as to establish an abuse of discretion by a judge both apprised of the problem and in observation of the juror.” *Lyda v. United States* (9th Cir. 1963), 321 F.2d 788, 791.³

C. State statutes prohibit exclusion of deaf or hard of hearing individuals from jury service.

Many jurisdictions have specifically protected jurors from discrimination based on speculation and prejudice because a hearing disability, when accommodated, does not hinder a person’s ability to serve as a juror. Many states have enacted statutes that explicitly prohibit the exclusion of individuals with hearing disabilities from juries. *See* Alaska Stat. § 09.20.010(b) (“A person is not disqualified from serving as a juror solely because of the loss of hearing or sight in any degree or a disability that substantially impairs or interferes with the person’s mobility”); Ark. Code Ann. § 16-31-102(a) (“no person shall be disqualified solely on the basis of loss of hearing or sight in any degree”); Cal. Code of Civ. Proc. § 203(6) (“no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person’s ability to communicate or which impairs or interferes with

³ In cases where courts overturned convictions due to the presence of a deaf or hard of hearing juror, the trial court was either not aware of the juror’s hearing disability or did not accommodate the juror. In *Commonwealth v. Brown*, 332 A.2d 828 (Pa. Super. Ct. 1974), a conviction was overturned where a juror did not advise the court of his hearing disability and was not accommodated during the trial. In *Commonwealth v. Greiner*, 455 A.2d 164, 167 (Pa. Super. Ct. 1983), the court overturned a conviction where a juror’s inability to hear was discovered after the parties had introduced testimony. Any accommodations made thereafter could not cure the lack of accommodations during the earlier testimony. In *State v. Miller*, 722 P.2d 1131 (Kan. Ct. App. 1986), the court found an abuse of discretion where the juror advised the trial judge that she was hard of hearing, but the trial judge did not accommodate the juror. Unlike these cases, Ms. Leow-Johannsen advised the trial court that she was hard of hearing before the trial began, and the trial court provided necessary accommodations for her to serve as a juror.

the person's mobility"); Fla. Stat. § 40.013(5) ("no person shall be excused from service on a civil trial jury solely on the basis that the person is deaf or hearing impaired"); Iowa Code § 607A.2 ("A person shall not be excluded from jury service or from consideration for jury service in this state on account of age if the person is eighteen years of age or older, race, creed, color, sex, national origin, religion, economic status, physical disability, or occupation"); Mo. Rev. Stat. § 494.425(5) ("any person unable to read, speak and understand the English language [shall be disqualified from serving as a juror], unless such person's inability is due to a vision or hearing impairment which can be adequately compensated for through the use of auxiliary aids or services"); N.M. Stat., State Court Rules, Uniform Jury Instructions – Civil 13-110A ("New Mexico law permits all citizens to serve on a jury whether or not... they are hearing-impaired"); Or. Rev. Stat. § 10.030(4) ("a person who is blind, hard of hearing or speech impaired or who has a physical disability is not ineligible to act as a juror and may not be excluded from a jury list or jury service on the basis of blindness, hearing or speech impairment or physical disability alone"); R.I. Gen. Laws § 9-9-1.1(d) ("Notwithstanding subdivisions (a)(4) and (5), a person with a disability shall not be ineligible to serve as a juror solely on the basis of his or her disability, and if that person meets the above requirements, with reasonable accommodations if necessary, he or she shall be deemed a qualified juror"); S.D. Codified Laws § 16-13-10 ("No potential juror may be excluded from jury duty because of a visual or hearing impairment"); W. Va. Code § 52-1-8(b)(2) ("For the purposes of this section [regarding the qualifications of jurors], the requirement of speaking and understanding the English language is met by the ability to communicate in American sign language or signed English"); Wis. Stat. § 756.001(3) ("No person who is qualified and able to serve as a juror may be excluded from that service in any court of this state on the basis of... a physical condition").

Furthermore, a number of states explicitly provide for transcriptions, assistive listening devices, interpreters, or other reasonable accommodations for deaf and hard of hearing jurors. See Cal. Civ. § 54.8(a); Colo. Rev. Stat. §13-71-137; Colo. Rev. Stat. § 13-90-204; Conn. Gen. Stat. § 51-245; Fla. Stat. § 90.6063; Ill. Comp. Stat. 5/8-1402; Kan. Stat. § 75-4355a; Ky. Rev. Stat. § 30A.410(1)(a); La. Code Crim. Proc. art. 401.1; Md. Rules, Rule 4-462; Mass. Gen. Laws ch. 234A, § 69; Mo. Rev. Stat. § 476.753; N.J. Stat. Rules of Ct., Directive 3-04 (2004); N.M. Stat., State Ct. Rules, Uniform Jury Instructions – Civil 13-110A; N.Y. Crim. Proc. § 190.25; Okla. Stat. § 2409(A); R.I. Gen. Laws § 9-9-1.2; Tex. Civ. Prac. & Rem. Code Ann. § 21.002; W. Va. Code § 57-5-7. Under the established law in all of these jurisdictions, Ms. Leow-Johannsen could not have been excluded on the basis of her hearing disability.

In federal courts, the Jury Selection and Service Act of 1968, Sections 1861-77 Title 28, U.S. Code states that any persons is qualified to serve on a federal jury unless, *inter alia*, he or she “is incapable, by reason of mental or physical infirmity, to render satisfactory jury service.” *Id.* § 1865(b)(4). In *United States v. Dempsey* (C.A.10, 1987), the Tenth Circuit expressly held that a juror’s deafness does not disqualify him or her from jury service. 830 F.2d 1084, 1088-89 (finding that deaf juror, with accommodations, was able to evaluate the evidence presented). Similar to the federal statute, Ohio law states that a juror may be challenged for cause if “he otherwise is unsuitable for any other cause to serve as a juror.” R.C. § 2945.25(O). This statute does not even go so far as to mention physical disability as a possible consideration in a challenge for cause. The Court of Appeals erred in interpreting Ohio law to require that Ms. Leow-Johannsen be excluded from jury service.

D. The ADA prohibits the exclusion of deaf and hard of hearing individuals from jury service.

The Americans with Disabilities Act of 1990 (ADA) supports the conclusion that the trial judge did not abuse his discretion in denying the challenge for cause of Ms. Leow-Johannsen. The Court of Appeals erred in second-guessing the trial court's determination that Ms. Leow-Johannsen was qualified to serve as a juror.

The ADA was enacted "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Section 12101(b)(1), Title 42, U.S. Code. Title II of the ADA applies to "public entities," including both state and local governments, and their agencies and instrumentalities, such as courts. Section 12131(1), Title 42, U.S. Code. It provides that "no qualified individual with a disability shall, by reason of 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." Section 12132, Title 42, U.S. Code. A person is a "qualified individual with a disability" if he or she can, with accommodations, meet the essential requirements to participate in the public entity's programs, services, or activities. Section 12131(2), Title 42, U.S. Code.

Congress passed Title II of the ADA in part because "many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities.... including exclusion of persons with... hearing impairments from jury service." *Tennessee v. Lane* (2004), 541 U.S. 509, 527, 124 S. Ct. 1978, 158 L. Ed. 2d 820. As stated by the President when signing the ADA, the legislation "signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life." *People v. Green* (1990), 561 N.Y.S.2d 130, 133 (citing U.S. Code Cong. and Admin. News, No. 6, September 1990, at 602).

The need for equality and full participation in society becomes even greater in the context of jury service. *Powers v. Ohio* (1991), 499 U.S. 400, 407, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (“Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.”). Additionally, a defendant has “the right to be tried by a jury whose members are selected by nondiscriminatory criteria.” *Powers*, 499 U.S. at 404.

Title II of the ADA prohibits public entities from excluding persons with disabilities “from participation in... the services, programs, or activities of a public entity” by reason of that person’s disability. Section 12132, Title 42, U.S. Code.⁴ Ms. Leow-Johannsen’s hearing disability was the only reason on which Defendant based his challenge for cause to her qualifications to serve as a juror. This claim is based solely on speculation, with no evidence to suggest that Ms. Leow-Johannsen was not qualified to serve as a juror.

Congress intended to eradicate this exact type of misconception and prejudice by enacting the ADA. Tellingly, the ADA begins with the finding that “physical or mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination.” Section 12101(a)(1), Title 42, U.S. Code. For the Court of Appeals to speculate that Ms. Leow-Johannsen’s hearing disability would render her service as a juror dissatisfactory after the trial court determined that she was qualified would be a violation of both the letter and purpose of the ADA.

⁴ Compliance with Title II of the ADA involves both a duty to refrain from direct or indirect exclusion of persons with disabilities and an affirmative obligation to modify exclusionary policies, practices, and procedures. Sections 35.130(b)(1)(i) and (b)(3)(i) (1998), Title 28, C.F.R. This includes the prohibition of “eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity...” Section 35.130(b)(8), Title 28, C.F.R. See discussion *infra*.

Section 504 of the Rehabilitation Act, Section 794, Title 29, U.S. Code (the pre-ADA federal law prohibiting discrimination by recipients of federal funds) was specifically enacted in response to historical segregation of persons with disabilities from society and the fact that “such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.” Section 12101(a)(2), Title 42, U.S. Code. Section 504 sought to “ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or ignorance of others.” *School Bd. of Nassau County v. Arline* (1987), 480 U.S. 273, 284, 107 S. Ct. 1123, 94 L. Ed. 2d 307. There is a “tendency on the part of officialdom to overgeneralize about the handicapped,” and the law must accordingly afford protections against such stereotypes. *See Galloway v. The Superior Court of the District of Columbia* (D.D.C. 1993), 816 F. Supp. 12, 16. Consequently, courts have held that “mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context.” *Southeastern Community College v. Davis* (1979), 442 U.S. 397, 405, 99 S. Ct. 2361, 60 L. Ed. 2d 980. In *DeLong*, the court “acknowledge[d] that deaf persons... can efficiently serve on juries, [and] also by permitting litigants to be judged by ‘a body truly representative of the community.’” *DeLong v. R. Bruce Brumbaugh* (W.D.Pa. 1989), 703 F. Supp. 399, 406 (holding that trial court violated the Rehabilitation Act by excluding deaf individual from jury).

In this case, the only reason provided by the Court of Appeals for disqualifying Ms. Leow-Johannsen was the introduction of an audio tape into evidence. *See Speer*, 904 N.E.2d at 967. This type of reasoning, however, has been explicitly rejected in the context of visual impairments and likewise should be rejected here. As the court in *Caldwell* explained:

It is difficult to imagine a trial in which absolutely no documents, diagrams, police reports, photographs or physical evidence are introduced. If this Court were to hold that [the

contested juror] was disqualified simply because a few documents and a few photographs were presented, it would, in effect, be concluding that there were almost no cases on which visually-disabled or blind jurors could sit. Such a ruling would violate the spirit and intent of the ADA and of the Rehabilitation Act of 1973.

Caldwell, 603 N.Y.S.2d at 716. Based on *Caldwell*, the Court of Appeals erred in excluding Ms. Leow-Johannsen based solely on the use of an audio tape.

Including persons with disabilities as participants in juries also serves the broader interest of preserving “the integrity of the judicial process and... the fairness of the criminal proceeding.” *Powers*, 499 U.S. at 401. The United States Supreme Court has unambiguously held that “the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community.” *Taylor v. Louisiana* (1975), 419 U.S. 522, 527, 95 S. Ct. 692, 42 L. Ed. 2d 690; *see also Smith v. Texas* (1940), 311 U.S. 128, 130, 61 S. Ct. 164, 85 L. Ed. 84; *Glasser v. United States* (1942), 315 U.S. 60, 85, 62 S. Ct. 457, 86 L. Ed. 680; *Thiel v. S. Pac. Co.* (1946), 328 U.S. 217, 220, 66 S. Ct. 984, 90 L. Ed. 1181. The “important social policy” of adhering to the law throughout a trial “argues against automatically foreclosing members of an important segment of our society from jury duty” merely on the basis of their disabilities. *Dempsey*, 830 F.2d at 1091. The ADA operates to protect individuals against this type of discriminatory exclusion. Consequently, under the principles of the ADA, the Court of Appeals erred in holding that Ms. Leow-Johannsen’s presence on the jury rendered Speer’s trial unfair.

E. Ohio state law and policy support inclusion of deaf and hard of hearing jurors.

Ohio law implements Title II’s inclusion mandate for full participation in court proceedings by individuals who are deaf or hard of hearing and provides further support for rejecting the Court of Appeals’ erroneous reasoning that Ms. Leow-Johannsen should have been excused for cause. For example, R.C. § 2311.14 requires courts to appoint qualified interpreters to assist parties or witnesses who are deaf or hard of hearing. This Court’s decision in *State v.*

Schaim (1992), 65 Ohio St. 3d 51, 1992-Ohio-31, 600 N.E.2d 661 requires trial courts to hold a hearing when a criminal defendant demonstrates that he is deaf or hard of hearing and needs accommodations in order to understand testimony.

Ohioans who are deaf or hard of hearing are likewise included in jury service through legislation and court rules. Disability per se is not one of the bases to challenge jurors for cause in criminal or civil cases under Ohio statutes and rules of procedure. R.C. § 2945.25; R.C. § 2313.42; Ohio R. Crim. 24(C). Also, this Court has made it clear that people who are deaf or hard of hearing are entitled to the accommodations they need to participate in jury service. The Ohio Trial Court Jury Use and Management Standards which this Court adopted in 1993 states:

It is the obligation of every court to reasonably accommodate the special needs of physically handicapped jurors. While physically handicapped jurors may pose special issues for courts and their personnel, these issues are manageable. Support agencies and advancing technologies exist to aid courts in accommodating the special needs of hearing impaired...jurors, for example. The obligation of jury service falls on all citizens; it is vitally important that the legal system open its doors to each person who desires to serve on a jury.

Rules of Superintendence for the Courts of Ohio, Appendix B, Ohio Trial Court Jury Use and Management Standards, Standard 1 Opportunity for Service.

The one Ohio case other than *Speer* to address a challenge for cause to a juror who was deaf or hard of hearing turned on the lack of available accommodations. In *Burke v. Schaffner*, (1996) 114 Ohio App. 3d 655, 683 N.E.2d 861, the trial judge excused for cause a juror who was deaf. The Court of Appeals upheld the excusal only because an interpreter was not available to assist the juror. *Burke*, 114 Ohio App. 3d at 660, 683 N.E.2d at 865. The *Burke* court explicitly disavowed doubts about the juror's ability to assess the demeanor of witnesses, ability to communicate in a group setting, and having an interpreter during deliberations as "concerns we are *not* prepared to sanction as legitimate challenges for cause...." *Id.* (emphasis added).

This Court is now working to correct situations like that in *Burke* so that individuals who are deaf or hard of hearing can participate as jurors with the benefit of an interpreter, where needed. The Court's Proposed Amendments to the Rules of Superintendence, published for public comment in January, 2009, require trial courts to provide interpreters for jurors who are deaf or hard of hearing, and set demanding qualification standards for interpreters who work in legal proceedings. Proposed Sup. R. 82, 85, 88(B).

Thus, Ohio statutes, decisions, and rules of court all support the inclusion and accommodation of persons who are deaf or hard of hearing in court proceedings and jury service. The Court of Appeals' holding in *Speer* undermines these efforts.

CONCLUSION

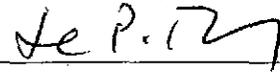
The Court of Appeals erred in reversing Defendant's conviction based solely on Ms. Leow-Johannsen's hearing disability. Ms. Leow-Johannsen advised the trial court she was hard of hearing, and the court consequently accommodated her. Established case law and state statutes throughout the United States support the inclusion of deaf and hard of hearing individuals as jurors. *See People v. Guzman*, 478 N.Y.S.2d 455, 460 (N.Y. Sup. Ct. 1984), *aff'd*, 76 N.Y. 2d 1, 555 N.E.2d 259 (1990). Title II of the ADA prohibits exclusion of deaf and hard of hearing individuals as jurors. Ohio's law and policy, emanating from this Court, similarly mandate inclusion of deaf or hard of hearing individuals in jury service.

The unintended effect of the Court of Appeals' decision is to encourage trial courts to exclude deaf or hard of hearing people from jury service at the outset, for cause, solely because they have a disability -- the very type of discrimination that the ADA is intended to prevent. With accommodations, Ms. Leow-Johannsen was qualified both under Ohio laws and rules of court and the ADA to perform the essential duties of a juror at Defendant's trial. She could understand the evidence, evaluate it fairly, and carefully apply the law to the evidence.

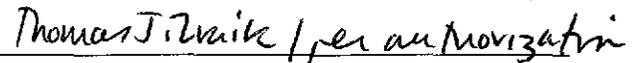
The Court of Appeals erred in holding that Ms. Leow-Johannsen's presence on the jury denied Defendant a fair trial. This Court should reverse the Court of Appeals' decision and reinstate Defendant's convictions.

Dated:

Respectfully submitted,

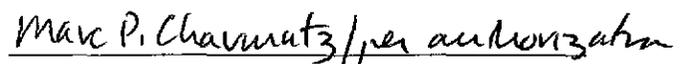


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⁵ Attorneys for Amici gratefully acknowledge the support and work of Jodie Graham, law student at the George Washington University Law School, and Anna McClure, law student at the Georgetown University Law Center.

PROOF 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, via regular U.S. mail on this 3rd day of August, 2009, to the following:

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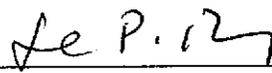
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APPENDIX

1. Rules of Superintendence for the Courts of Ohio, Appendix B, Standard Opportunity for Service
2. Proposed Amendments to the Rules of Superintendence for the Courts of Ohio
3. *Enriquez v. Piler* (C.A.9, 2005), 141 Fed. Appx. 573

RULES OF SUPERINTENDENCE FOR THE COURTS OF OHIO

RULE	TITLE	CORRESPONDING FORMER RULE(S)
Appendices		
A. Statistical Reporting Forms		
B. Jury Management Standards		
C. Court Security Standards		
D. Court Facility Standards	M.C. 17	
E. Facsimile Filing Standards		
F. Model Standards of Practice for Family and Divorce Mediation (adopted by the American Bar Association, Association of Family and Conciliation Courts and the Association for Conflict Resolution) modified to reference express provisions of Ohio law		
G. Special Policy Considerations of State Regulation of Family Mediators and Court Affiliated Programs		

OHIO TRIAL COURT JURY USE AND MANAGEMENT STANDARDS

The Ohio Trial Court Jury Use and Management Standards

were adopted by the Supreme Court of Ohio on August 16, 1993.

APPENDIX B

STANDARD 1 OPPORTUNITY FOR SERVICE

A. The opportunity for jury service should not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation, disability, or any other factor that discriminates against a cognizable group in the jurisdiction.

B. Jury service is an obligation of all qualified citizens.

Commentary

Standard 1 is essentially identical to the ABA Standard.

It is the obligation of every court to reasonably accommodate the special needs of physically handicapped jurors. While physically handicapped jurors may pose special issues for courts and their personnel, these issues are manageable.

Support agencies and advancing technologies exist to aid courts in accommodating the special needs of hearing impaired and visually impaired jurors, for example.

The obligation of jury service falls on all citizens; it is vitally important that the legal system open its doors to each person who desires to serve on a jury.

Reference is made to the ADA.

Ohio Statutes

O.R.C. 2313.47 Race or color shall not disqualify a juror.

STANDARD 4 ELIGIBILITY FOR JURY SERVICE

All persons should be eligible for jury service except those who:

- A. Are less than eighteen years of age;
- B. Are not citizens of the United States;
- C. Are not residents of the jurisdiction in which they have been summoned to serve;
- D. Are not able to communicate in the English language; or
- E. Have been convicted of a felony and have not had their civil rights restored.

Commentary

Standard 4 is identical to the ABA Standard.

Legislative changes recommended in order for Standard 4 to be consistent with Standard 6.

Ohio Statutes

O.R.C. 1901.25 Selection and impaneling of a jury.

O.R.C. 1907.28 Authorizes county courts to adopt local rules regarding jury selection and impaneling.

O.R.C. 2961.01 Precludes convicted felons from serving as jurors.

**PROPOSED AMENDMENTS TO THE RULES OF SUPERINTENDENCE
FOR THE COURTS OF OHIO**

Comments Requested: The Supreme Court of Ohio will accept public comments until January 13, 2009 on the following proposed amendments to the Rules of Superintendence for the Courts of Ohio.

Comments on the proposed amendments should be submitted in writing to: John VanNorman, Policy and Research Counsel, Supreme Court of Ohio, 65 South Front Street, 7th Floor, Columbus, Ohio 43215-3431, or vannormj@sconet.state.oh.us not later than January 13, 2009. Please include your full name and mailing address in any comments submitted by e-mail.

Key to Proposed Amendment:

1. Original language of the rule appears as regular typescript.
2. Language to be deleted appears ~~thus~~.
3. Language to be added appears thus.

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3 **PROPOSED AMENDMENTS TO THE**
4 **RULES OF SUPERINTENDENCE FOR THE COURTS OF OHIO**

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8 ***

9 **Sup. R. 80. Definitions.**

10 As used in Rules 80 through 88 of the Rules of Superintendence for the Courts of Ohio:

11
12 (A) “Consortium for State Court Interpreter Certification” means the multi-
13 state partnership dedicated to developing foreign language interpreter proficiency
14 tests, making tests available to member states, and regulating the use of the tests.

15
16 (B) “Foreign language interpreter” means an individual who, as part of any
17 case or court function, facilitates communication between or among legal
18 professionals and a limited English proficient or non-English speaking party or
19 witness through the interpretation of oral messages and the conversion of written
20 documents from one language into the spoken form of another language.

21
22 (C) “Language-skilled foreign language interpreter” means a foreign language
23 interpreter appointed by a court in a case or court function pursuant to division
24 (C)(3) of Rule 88 of the Rules of Superintendence for the Courts of Ohio.

25
26 (D) “Limited English proficient” means an individual who does not speak
27 English as a primary language or who has a limited ability to read, speak, write, or
28 understand English and requires the assistance of a foreign language interpreter to
29 effectively communicate.

30
31 (E) “Program” means the Supreme Court interpreter services program.

32
33 (F) “Provisionally qualified foreign language interpreter” means a foreign
34 language interpreter who has received provisional certification from the program
35 pursuant to division (G)(3) of Rule 81 of the Rules of Superintendence for the
36 Courts of Ohio.

37
38 (G) “Sign language interpreter” means an individual who, as part of any case
39 or court function, facilitates communication between or among legal professionals
40 and a deaf, hard of hearing, or deaf blind party, witness, or juror through the use
41 of sign language or other manual representation of a spoken language.

42
43 (H) “Supreme Court certified foreign language interpreter” means a foreign
44 language interpreter who has received certification from the program pursuant to
45 Rule 81 of the Rules of Superintendence for the Courts of Ohio.

46

47 (I) “Supreme Court certified sign language interpreter” means a sign
48 language interpreter who has received certification from the program pursuant to
49 Rule 82 of the Rules of Superintendence for the Courts of Ohio.

50
51 (J) “Translator” means an individual who, as part of any case or court
52 function, takes written text from one language and renders it into an equivalent
53 written text of another language.

54
55 **Sup. R. 81. Certification for Foreign Language Interpreters.**

56
57 **(A) Certification**

58
59 A foreign language interpreter may receive certification from the program and be
60 styled a “Supreme Court certified foreign language interpreter” pursuant to the
61 requirements of this rule.

62
63 **(B) General requirements for certification**

64
65 An applicant for certification as a Supreme Court certified foreign language
66 interpreter shall satisfy each of the following requirements:

- 67
68 (1) Be at least eighteen years old;
69
70 (2) Be a citizen or legal resident of the United States or have the legal
71 right to remain and work in the United States;
72
73 (3) Have not been convicted of any crime involving moral turpitude.

74
75 **(C) Application for certification**

76
77 An applicant for certification as a Supreme Court certified foreign language
78 interpreter shall file an application with the program. The application shall
79 include each of the following:

- 80
81 (1) Verification the applicant is at least eighteen years old;
82
83 (2) Verification the applicant is a legal resident or citizen of the United
84 States or has the legal right to remain and work in the United States;
85
86 (3) A copy of a completed criminal background check showing no
87 conviction of a crime involving moral turpitude;
88
89 (4) A nonrefundable application fee in an amount as determined by the
90 program.

93 **(D) Orientation training**

94
95 An applicant shall attend an orientation training session conducted or sponsored
96 by the program providing an introductory course to interpreting and addresses
97 ethics, legal procedure and terminology, modes of interpretation, and other
98 substantive topics. The program may waive this requirement upon an applicant's
99 demonstration of equivalent experience or training. The program shall charge an
100 applicant a nonrefundable fee in an amount as determined by the program for
101 attendance at a program-sponsored training session.

102
103 **(E) Written examination**

104
105 (1) An applicant for certification as a Supreme Court certified foreign
106 language interpreter shall take the Consortium for State Court Interpreter
107 Certification's written examination and the written examination's basic translation
108 component in languages where the translation component is available. The
109 written examination and translation component shall be administered by the
110 program in accordance with the standards described in the Consortium's test
111 administration manuals.

112
113 (2) To pass the written examination, an applicant shall receive an overall
114 score of eighty percent or better in the English language and grammar, court-
115 related terms and usage, and professional conduct sections of the written
116 examination. To pass the translation component, an applicant shall receive a
117 passing score on the translation component.

118
119 (3) An applicant who fails the written examination shall wait one year before
120 retaking the written examination. An applicant who passes the written
121 examination but fails the translation component shall wait until the next testing
122 cycle to retake the translation component.

123
124 (4) An applicant who has taken the written examination in another member
125 state of the Consortium within the past twenty-four months may apply to the
126 program for recognition of the score. The program shall recognize the score if it
127 is substantially comparable to the score required under division (E)(2) of this rule.
128 The applicant shall also provide proof of having received a passing score on the
129 translation component or its equivalent in the other state or shall receive a passing
130 score on the translation component in an examination taken in this state.

131 **(F) Post-written examination training course**

132
133 Upon compliance with the written examination requirements of division (E) of
134 this rule, an applicant for certification as a Supreme Court certified foreign
135 language interpreter shall attend a training course sponsored by the program
136 focusing on simultaneous, consecutive, and sight translation modes of
137 interpretation in English and the applicant's target language. The program may
138 charge an applicant a nonrefundable fee in an amount as determined by the
139 program for attendance at the training course.

140
141 **(G) Oral examination**

142
143 (1) After attending the post-written examination training course pursuant to
144 division (F) of this rule, an applicant for certification as a Supreme Court certified
145 foreign language interpreter shall take the Consortium for State Court Interpreter
146 Certification's oral examination. The oral examination shall be administered by
147 the program in accordance with the standards described in the Consortium's test
148 administration manuals.

149
150 (2) To pass the oral examination, an applicant shall receive a score of seventy
151 percent or better in each of the sections of the oral examination.

152
153 (3) An applicant who receives a score of less than seventy percent but at least
154 sixty percent in each of the sections of the oral examination shall receive
155 provisional certification from the program and be styled a "provisionally qualified
156 foreign language interpreter." The applicant may maintain provisional
157 certification for up to twenty-four months following the oral examination. If the
158 applicant fails to receive an overall score of at least seventy percent in the sections
159 of the oral examination within this time frame, the applicant's provisional
160 certification shall cease.

161
162 (4) An applicant who receives a score of at least seventy percent in two of the
163 sections of the oral examination may carry forward the passing scores for up to
164 twenty-four months or two testing cycles, whichever occurs last. If the applicant
165 fails to successfully pass any previously failed sections of the oral examination
166 during the time period which passing scores may be carried forward, the applicant
167 shall complete all sections of the oral examination at a subsequent examination.
168 An applicant may not carry forward passing scores from an oral examination
169 taken in another member state of the Consortium.

170 **(H) Written and oral examination preparation**

171
172 The program shall provide materials to assist applicants for certification as
173 Supreme Court certified foreign language interpreters in preparing for the
174 Consortium for State Court Interpreter Certification's written and oral
175 examinations, including overviews of each examination. The program also shall
176 provide and coordinate training for applicants.

177
178 **(I) Reciprocity**

179
180 An applicant for certification as a Supreme Court certified foreign language
181 interpreter who has previously received certification as a foreign language
182 interpreter may apply to the program for certification without fulfilling the
183 applicable training and examination requirements of this rule as follows:

184
185 (1) An applicant who has received certification from the federal courts
186 shall provide proof of certification and be in good standing with the
187 certifying body.

188
189 (2) An applicant who has received certification from another member
190 state of the Consortium for State Court Interpreter Certification shall
191 provide proof of having passed the Consortium's oral examinations. The
192 program may verify the test score information and testing history before
193 approving certification.

194
195 (3) An applicant who has received certification from the National
196 Association of Judiciary Interpreters and Translators shall provide proof of
197 having received a score on the Association's examination substantially
198 comparable to the scores required under divisions (E)(2) and (G)(2) of this
199 rule. The program may verify the test score information and testing
200 history before approving reciprocal certification.

201
202 (4) Requests for reciprocal certification from all other applicants shall
203 be reviewed by the program on a case-by-case basis, taking into
204 consideration testing criteria, reliability, and validity of the certifying
205 body's examination procedure. The program shall verify the applicant's
206 test score after accepting the certifying body's certification criteria.

207
208 **(J) Oath or affirmation**

209
210 Each Supreme Court certified foreign language interpreter and provisionally
211 qualified foreign language interpreter shall take an oath or affirmation under
212 which the interpreter affirms to know, understand, and act according to the code
213 of professional conduct for court interpreters and translators, as set forth in
214 Appendix H to this rule.

215

216 **Sup. R. 82. Certification for Sign Language Interpreters.**

217
218 **(A) Certification**

219
220 A sign language interpreter who has received a passing score on the Registry of
221 Interpreters for the Deaf-National Association of the Deaf's specialist
222 certification: legal examination may receive certification from the program and be
223 styled a "Supreme Court certified sign language interpreter" pursuant to the
224 requirements of this rule.

225
226 **(B) General requirements for certification**

227
228 An applicant for certification as a Supreme Court certified sign language
229 interpreter shall satisfy each of the following requirements:

- 230
231 (1) Be at least eighteen years old;
232 (2) Be a citizen or legal resident of the United States or have the legal
233 right to remain and work in the United States;
234
235 (3) Have not been convicted of any crime involving moral turpitude.

236
237 **(C) Application for certification**

238
239 An applicant for certification as a Supreme Court certified sign language
240 interpreter shall file an application with the program. The application shall
241 include each of the following:

- 242
243 (1) Verification the applicant is at least eighteen years old;
244
245 (2) Verification the applicant is a legal resident or citizen of the United
246 States or has the legal right to remain and work in the United States;
247
248 (3) A copy of a completed criminal background check showing no
249 conviction of a crime involving moral turpitude;
250
251 (4) Proof of having received a passing score on the specialist
252 certification: legal examination;
253
254 (5) A nonrefundable application fee in an amount as determined by the
255 program.

256 **(D) Oath or affirmation**

257
258 Each Supreme Court certified sign language interpreter shall take an oath or
259 affirmation under which the interpreter affirms to know, understand, and act
260 according to the code of professional conduct for court interpreters and
261 translators, as set forth in Appendix H to this rule.

262
263 **Sup. R. 83. Revocation of Certification.**

264
265 The program may revoke the certification of a Supreme Court certified foreign language
266 interpreter or a Supreme Court certified sign language interpreter or the provisional
267 certification of a provisionally qualified foreign language interpreter for any of the
268 following reasons:

269
270 (A) A material omission or misrepresentation in the interpreter's application
271 for certification;

272
273 (B) A substantial breach of the code of professional conduct for court
274 interpreters and translators, as set forth in Appendix H to this rule;

275
276 (C) Noncompliance with the applicable continuing education requirements of
277 Rule 85 of the Rules of Superintendence for the Courts of Ohio.

278
279 **Sup. R. 84. Code of Professional Conduct for Court Interpreters and Translators.**

280
281 Supreme Court certified foreign language interpreters, Supreme Court certified sign
282 language interpreters, provisionally qualified foreign language interpreters, language-
283 skilled foreign language interpreters, and translators shall be subject to the code of
284 professional conduct for court interpreters and translators, as set forth in Appendix H to
285 this rule. The program shall determine what action, if any, shall be taken for a violation
286 of the code.

287
288 **Sup. R. 85. Continuing Education.**

289
290 **(A) Requirements**

291
292 (1) Each Supreme Court certified foreign language interpreter and Supreme
293 Court certified sign language interpreter shall complete and report, on a form
294 provided by the program, at least twenty-four credit hours of continuing education
295 offered or accredited by the program for each two-year reporting period. Eight of
296 the credit hours shall consist of ethics instruction and the remaining sixteen
297 general credit hours shall be relevant to the interpreter's work in the legal setting.
298 The interpreter may carry forward a maximum of twelve general credit hours into
299 the following biennial reporting period.

301 (2) Each provisionally qualified foreign language interpreter shall complete
302 and report, on a form provided by the program, at least twenty-four credit hours of
303 continuing education offered or accredited by the program within twenty-four
304 months after the date of the last Consortium for State Court Interpreter
305 Certification oral examination administered by the program.

306
307 **(B) Duties of the program**

308
309 In administering the continuing education requirements of this rule, the program
310 shall do both of the following:

311
312 (1) Keep a record of the continuing education hours of each Supreme
313 Court certified foreign language interpreter, Supreme Court certified sign
314 language interpreter, and provisionally qualified foreign language
315 interpreter, provided it shall be the responsibility of the interpreter to
316 inform the program of meeting the continuing education requirements;

317
318 (2) Accredit continuing education programs, activities, and sponsors
319 and establish procedures for accreditation. The program may assess a
320 reasonable nonrefundable application fee in an amount as determined by
321 the program for a sponsor submitting a program or activity for
322 accreditation.

323
324 **Sup. R. 86. Certification Roster.**

325
326 The program shall maintain a list of each Supreme Court certified foreign language
327 interpreter, Supreme Court certified sign language interpreter, and provisionally qualified
328 foreign language interpreter who is in compliance with the applicable continuing
329 education requirements of Rule 85 of the Rules of Superintendence for the Courts of
330 Ohio and shall post the list on the website of the Supreme Court.

331
332 **Sup. R. 87. Establishment of Procedures by the Program.**

333
334 The program may establish procedures as needed to implement Rules 80 through 86 of
335 the Rules of Superintendence for the Courts of Ohio.

336
337 **Sup. R. 88. Appointment of a Foreign Language Interpreter or Sign Language**
338 **Interpreter.**

339
340 **(A) When appointment of a foreign language interpreter is required**

341
342 A court shall appoint a foreign language interpreter in a case or court function in
343 the following situations:

344
345 (1) A party or witness who is limited English proficient or non-English
346 speaking requests a foreign language interpreter and the court determines
347 the services of the interpreter are necessary for the meaningful
348 participation of the party or witness;

349
350 (2) Absent a request from a party or witness for a foreign language
351 interpreter, the court concludes the party or witness is limited English
352 proficient or non-English speaking and determines the services of the
353 interpreter are necessary for the meaningful participation of the party or
354 witness.

355
356 **(B) When appointment of a sign language interpreter is required**

357
358 A court shall appoint a sign language interpreter in a case or court function in the
359 following situations:

360
361 (1) A party, witness, or juror who is deaf, hard of hearing, or deaf
362 blind requests a sign language interpreter and the court determines the
363 services of the interpreter are necessary for the meaningful participation of
364 the party, witness, or juror;

365
366 (2) Absent a request from a party, witness, or juror for a sign language
367 interpreter, the court concludes the party, witness, or juror is deaf, hard of
368 hearing, or deaf blind and determines the services of the interpreter are
369 necessary for the meaningful participation of the party, witness, or juror.

370
371 **(C) Certification requirement for foreign language interpreters**

372
373 (1) When appointing a foreign language interpreter pursuant to division (A) of
374 this rule, the court shall appoint a Supreme Court certified foreign language
375 interpreter whenever possible. A Supreme Court certified foreign language
376 interpreter shall be presumed to meet the requirements of Rules 604 and 702 of
377 the Rules of Evidence.

378
379 (2) If a Supreme Court certified foreign language interpreter does not exist or
380 is not reasonably available, a court may appoint a provisionally qualified foreign
381 language interpreter after considering the gravity of the proceedings and whether
382 the matter could be rescheduled to obtain a Supreme Court certified foreign
383 language interpreter. The court shall summarize on the record its efforts to obtain
384 a Supreme Court certified foreign language interpreter and the reasons for using a
385 professionally qualified foreign language interpreter.

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(3) If a Supreme Court certified foreign language interpreter or provisionally qualified foreign language interpreter does not exist or is not reasonably available, a court may appoint a foreign language interpreter who demonstrates to the court proficiency in the target language and sufficient preparation to properly interpret the case proceedings. Such interpreter shall be styled a “language-skilled foreign language interpreter.” The court may appoint a language-skilled foreign language interpreter after considering the gravity of the proceedings and whether the matter could be rescheduled to obtain a Supreme Court certified foreign language interpreter or provisionally qualified foreign language interpreter. The court shall summarize on the record its efforts to obtain a Supreme Court certified foreign language interpreter or professionally qualified foreign language interpreter and the reasons for using a language-skilled foreign language interpreter. The language-skilled foreign language interpreter's experience, knowledge, and training should be stated on the record. Each language-skilled foreign language interpreter shall take an oath or affirmation under which the interpreter affirms to know, understand, and act according to the code of professional conduct for court interpreters and translators, as set forth in Appendix H to this rule.

(D) Certification requirement for sign language interpreters

(1) Except as provided in divisions (D)(3) and (4) of this rule, when appointing a sign language interpreter pursuant to division (B) of this rule, the court shall appoint a Supreme Court certified sign language interpreter whenever possible. A Supreme Court certified sign language interpreter shall be presumed to meet the requirements of Rules 604 and 702 of the Rules of Evidence.

(2) Except as provided in divisions (D)(3) and (4) of this rule, if a Supreme Court certified sign language interpreter does not exist or is not reasonably available and after considering the gravity of the proceedings and whether the matter could be rescheduled to obtain a Supreme Court certified sign language interpreter, a court may appoint a sign language interpreter who holds one of the following certifications:

(a) A “national interpreter certification master” from the National Association of the Deaf and the Registry of Interpreters for the Deaf;

(b) A “national interpreter certification advanced” from the National Association of the Deaf and the Registry of Interpreters for the Deaf;

(c) A “certification of interpretation” or “certification of transliteration” from the Registry of Interpreters for the Deaf;

(d) A “comprehensive skills certificate” from the Registry of Interpreters for the Deaf;

432 (e) A “master comprehensive skills certificate” from the Registry of
433 Interpreters for the Deaf;

434
435 (f) A “level v” certification from the National Association of the Deaf.
436

437 (3) If the communication mode of the deaf, hard of hearing, or deaf blind
438 party, witness, or juror is unique and cannot be adequately accessed by a sign
439 language interpreter who is hearing, a court shall appoint a sign language
440 interpreter certified as a “certified deaf interpreter” by the Registry of Interpreters
441 for the Deaf.

442
443 (4) If the communication mode of the deaf, hard of hearing, or deaf blind
444 party, witness, or juror requires silent oral techniques, a court shall appoint a sign
445 language interpreter who possesses an “oral transliteration certificate” from the
446 Registry of Interpreters for the Deaf.

447
448 (5) A court shall summarize on the record its efforts to obtain and reasons for
449 not using a Supreme Court certified sign language interpreter.

450
451 **(E) Appointment of multiple foreign language interpreters or sign language**
452 **interpreters**

453
454 To ensure the accuracy and quality of interpretation, a court may consider
455 appointing two or more foreign language interpreters or sign language
456 interpreters, as applicable, for a case or court function in any of the following
457 situations:

458
459 (1) The case or court function will last two or more hours and require
460 continuous, simultaneous, or consecutive interpretation;

461
462 (2) The case or court function will last less than two hours, but the
463 circumstances are usually complex and warrant the appointment of two or
464 more interpreters;

465
466 (3) The case or court function involves multiple parties, witnesses, or
467 jurors, requiring the services of an interpreter.

468
469 **(F) Examination on record**

470
471 In determining whether the services of a foreign language interpreter or sign
472 language interpreter are necessary for the meaningful participation of a party,
473 witness, or juror, the court shall conduct an examination of the party, witness, or
474 juror on the record.

475 **(G) Waiver**

476

477 A party may waive the right to a foreign language interpreter or sign language
478 interpreter, unless the court has determined the interpreter is required for the
479 protection of the party's rights and the integrity of the case or court function.

480

481 **(H) Administration of oath or affirmation**

482

483 (1) A court shall administer an oath or affirmation to a foreign language
484 interpreter or sign language interpreter in accordance with Rule 604 of the Rules
485 of Evidence.

486

487 (2) A court should use all reasonable efforts to avoid appointing a foreign
488 language interpreter or sign language interpreter if any of the following applies:

489

490 (a) The interpreter is compensated by a business owned or controlled
491 by a party or a witness;

492

493 (b) The interpreter is a friend or a family or household member of a
494 party or witness;

495

496 (c) The interpreter is a potential witness;

497

498 (d) The interpreter is a law enforcement officer, probation department
499 personnel, or court personnel;

500

501 (e) The interpreter has a pecuniary or other interest in the outcome of
502 the case;

503

504 (f) The appointment of the interpreter would not serve to protect a
505 party's rights or insure the integrity of the proceedings;

506

507 (g) The interpreter does or may have a real or perceived conflict of
508 interest or appearance of impropriety.

509

510 **(I) Americans with Disabilities Act**

511

512 In legal proceedings involving a party, witness, or juror who is deaf, hard of
513 hearing, or deaf blind, nothing in this rule shall be deemed to contravene the
514 requirements of the "Americans with Disabilities Act of 1990," 104 Stat. 327, 42
515 U.S.C.A. 12101, as amended.

516 APPENDIX H

517
518 CODE OF PROFESSIONAL CONDUCT FOR COURT INTERPRETERS AND
519 TRANSLATORS

520
521
522 PREAMBLE

523
524 As officers of the courts, foreign language interpreters, sign language interpreters,
525 and translators help ensure that individuals enjoy equal access to justice, including case
526 and court functions and court support services. Foreign language interpreters, sign
527 language interpreters, and translators are highly skilled professionals who fulfill an
528 essential role by assisting in the pursuit of justice. They act strictly in the interest of the
529 courts they serve and are impartial officers of those courts, with a duty to enhance the
530 judicial process.

531
532 DEFINITIONS

533
534 As used in this code, “language-skilled foreign language interpreter,”
535 “provisionally qualified foreign language interpreter,” “Supreme Court certified foreign
536 language interpreter,” “Supreme Court certified sign language interpreter,” and
537 “translator” have the same meanings as in Rule 80 of the Rules of Superintendence for
538 the Courts of Ohio.

539
540 APPLICABILITY

541
542 This code applies to Supreme Court certified foreign language interpreters,
543 Supreme Court certified sign language interpreters, provisionally qualified foreign
544 language interpreters, language-skilled foreign language interpreters, and translators.
545 This code shall bind all agencies and organizations that administer, supervise, use, or
546 deliver interpreting or translating services in connection with any case or court function.

547
548 A court may use this code to assist it in determining the qualifications of any
549 individual providing services as an interpreter under Rule 702 of the Rules of Evidence.

550
551 CANON 1

552
553 HIGH STANDARDS OF CONDUCT

554
555 Interpreters and translators shall conduct themselves in a manner consistent with
556 the dignity of the court and shall be as unobtrusive as possible, consistent with the ends
557 of justice.

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Commentary:

Interpreters and translators should maintain high standards of conduct at all times to promote public confidence in the administration of justice.

CANON 2

Accuracy and Completeness

Interpreters shall render a complete and accurate interpretation without altering, omitting, or adding anything to what is spoken or written, and shall do so without explaining the statements of the original speaker or writer.

Commentary:

In order to preserve the court's record and assist in the administration of justice, interpreters should completely and accurately interpret the exact meaning of what is said or written without embellishing, explaining, omitting, adding, altering, or summarizing anything. This includes maintaining accuracy of style or register of speech, as well as not distorting the meaning of the source language, even if it appears obscene, incoherent, non-responsive, or a misstatement. Interpreters have a duty to inform the court of any error, misinterpretation, or mistranslation so that the record may be promptly corrected. The terms "accurately," "completely," and "exact" do not signify a word-for-word or literal interpretation, but rather mean to convey the exact meaning of the speaker's or writer's discourse.

CANON 3

Impartiality and Avoidance of Conflicts of Interest

Interpreters and translators shall be impartial and unbiased. Interpreters and translators shall refrain from conduct that may give the appearance of bias and shall disclose any real or perceived conflict of interest.

Commentary:

Interpreters and translators must disclose to the court any prior involvement with a case or court function, parties, or witnesses that creates or could be viewed as creating a conflict of interest, provided such disclosure must not include anything that is privileged or confidential. The court must then determine whether the interpreter or translator may continue on the case or court function. Counsel for either party may petition the court for appointment of a different interpreter or translator on the basis of a conflict of interest and the court must determine on the record whether to release the interpreter or translator from the case or court function.

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CANON 4

Confidentiality

Interpreters and translators shall protect from unauthorized disclosure all privileged or other confidential communications, documents, or information they hear or obtain while acting in a professional capacity.

Commentary:

Interpreters and translators must maintain confidentiality with respect to any communication, document, information, or other type of confidential matter, including police and medical records and attorney-client privileged communications protected under section 2317.02 of the Revised Code. Interpreters and translators must not derive, either directly or indirectly, any profit or advantage from any confidential communication, document, or information acquired while acting in a professional capacity.

CANON 5

Representation of Qualifications

Interpreters and translators shall accurately and completely represent their credentials, certifications, training, references, and pertinent experience.

Commentary:

Interpreters and translators have a duty to present accurately and completely any applicable credentials, certifications, training, references, and pertinent experience, consistent with canon 6 of this code. It is essential that interpreters and translators present a complete and truthful account of their qualifications before appointment to allow the court to fairly evaluate their qualifications for delivering interpreting or translating services.

CANON 6

Proficiency

Interpreters and translators shall provide professional services only in matters in which they can proficiently perform.

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Commentary:

By accepting an assignment, interpreters and translators warrant they have the skills, training, and understanding of terminology to interpret or translate accurately and effectively in the given setting, are fluent in the required languages, and have the ability to understand regional differences and dialects. Interpreters have a duty to request from the court and the parties all pertinent information and materials necessary to prepare for the case or court function.

Interpreters and translators should strive continually to improve language skills and knowledge of specialized vocabulary and familiarize themselves with the judicial system and any applicable court rules. Interpreters and translators are responsible for having the proper dictionaries and other reference materials available when needed.

CANON 7

Assessing and Reporting Impediments to Performance

Interpreters shall at all times assess their ability to perform effectively and accurately. If an interpreter discovers anything impeding full compliance with the interpreter's oath or affirmation and this code, the interpreter shall immediately report this information to the court.

Commentary:

Interpreters must immediately inform the court of any condition interfering with their ability to provide accurate and complete interpretation. This may include excessively rapid, quiet, or indistinct speech, physical interference such as inability to see exhibits, noise in their surroundings, or any other factor interfering with the interpreter's ability to hear, see, or communicate during the case or court function.

Interpreters must inform the court if they are having difficulties obtaining pertinent information or materials required to prepare for a case or court function that may impede their ability to perform adequately. If at the time of a hearing or trial the interpreter has not been provided with necessary information or materials, the interpreter must inform the court on the record and request a recess to review such information or materials.

Interpreters should withdraw from an assignment if they are unable to understand or satisfactorily communicate with the non-English speaking, limited English proficient, deaf or hard-of-hearing party, witness, or juror, or if they lack required skills, preparation, or terminology to perform effectively in the case or court function for which they have been summoned.

686 CANON 8

687
688 Duty to Report Ethical Violations

689 Interpreters shall report to the court any efforts to impede their compliance with
691 any law, this code, or other official policy governing interpreting. Interpreters shall
692 promptly report to the appropriate legal or disciplinary authority if they observe another
693 interpreter improperly performing an assignment; accepting remuneration apart from
694 authorized fees; disclosing privileged or confidential communications, documents, or
695 information; or otherwise committing a breach of this code.

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697 Commentary:

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699 Interpreters must report to the court any ethical violation, action, or information
700 that refers to the persistence of a party demanding that an interpreter violate this code,
701 subject to any applicable privilege. In such a situation, the Supreme Court interpreter
702 services program must determine what action, if any, should be taken.

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705 CANON 9

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707 Scope of Practice

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709 Interpreters shall not give legal advice, communicate their conclusions with
710 respect to any answer, express personal opinions to individuals for whom they are
711 interpreting, or engage in any other activity that may be construed to constitute a service
712 other than interpreting while serving as an interpreter.

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714 Commentary:

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716 Since interpreters are only responsible for enabling others to communicate, they
717 should exclusively limit themselves to the activity of interpreting. Interpreters should
718 refrain from initiating communications while interpreting or at all times except as set out
719 below.

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721 Interpreters may be required to initiate communications during a case or court
722 function when they find it necessary to seek assistance in performing their duties.
723 Examples of such circumstances include seeking direction when unable to understand or
724 express a word or thought, requesting speakers to moderate their rate of communication
725 or repeat or rephrase something, correcting their own interpreting errors, or notifying the
726 court of reservations about their ability to satisfy an assignment competently. In such
727 instances the interpreter should refer to him or herself in the third person, making it clear
728 and on the record that the interpreter is speaking for him or herself.

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At no time may an interpreter give advice. An interpreter should not explain the purpose of forms, services, or otherwise act as counselor or advisor. The interpreter may sight translate language on a form, but may not provide independent legal advice as to the form's purpose or instruct the litigant as to the proper manner of completing the form.

Interpreters should not personally serve to perform acts that are the official responsibility of other court officials including, but not limited to, court clerks, pretrial release investigators or interviewers, or probation officers, except as required by and in the presence of such officials.

CANON 10

Restrictions from Public Comment

Consistent with canon 4 of this code, interpreters and translators shall not publicly discuss, report, or offer an opinion concerning a matter in which they are or have been engaged, even when that information is not privileged or required by law to be confidential.

Commentary:

Interpreters and translators must refrain from making public comments or giving opinions or reports concerning any particulars of a case or court function in which they are or have provided professional services, regardless whether the information is privileged or confidential. This restriction does not apply to general public comments or reports concerning the interpreting or translating professions.



LEXSEE 141 FED. APPX. 573

MARCOS ANTHONY ENRIQUEZ, Petitioner - Appellant, v. CHERYL K. PLILER, Acting Deputy Director of the Parole and Community Services Division of the Department of Corrections, Respondent - Appellee.

No. 03-56669

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

141 Fed. Appx. 573; 2005 U.S. App. LEXIS 15638

July 11, 2005, Argued and Submitted, Pasadena, California

July 27, 2005, Filed

NOTICE: **[**1]** RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Central District of California. D.C. No. CV-02-07736-CAS. Christina A. Snyder, District Judge, Presiding.

COUNSEL: For MARCOS ANTHONY ENRIQUEZ, Petitioner - Appellant: Mark McBride, Woodland Hills, CA.

For CHERYL K. PLILER, Warden, Acting Deputy Director of the Parole and Community Services Division of the Department of Corrections, Respondent - Appellee: Susan S. Kim, Esq., AGCA - OFFICE OF THE CALIFORNIA ATTORNEY GENERAL (LA), Los Angeles, CA.

JUDGES: Before: FARRIS, D.W. NELSON, and TALLMAN, Circuit Judges.

OPINION

[*575] MEMORANDUM *

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by *Ninth Circuit Rule 36-3*.

Before: FARRIS, D.W. NELSON, and TALLMAN, Circuit Judges.

Habeas petitioner Marcos Anthony Enriquez complains **[**2]** that he was denied the *Sixth Amendment* right to effective assistance of counsel at his trial for three counts of attempted murder and assault with a firearm. This Court has jurisdiction pursuant to 28 U.S.C. § 2253. Under the Antiterrorism and Effective Death Penalty Act, habeas corpus relief on a claim adjudicated by a state court on the merits will be denied unless the decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). *Strickland v. Washington*, 466 U.S. 668, 688, 691-94, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) sets forth the standard for a claim of ineffective assistance: a habeas petitioner must demonstrate that his representation (1) fell "below an objective standard of reasonableness," and (2) that counsel's mistakes were "prejudicial to the defense," that is, such mistakes as create a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding **[**3]** would have been different."

Enriquez makes four claims. First, he argues that his attorney was ineffective because his lawyer did not contact the attorney for Macias, the admitted driver of the car during one of the charged shootings, to tell him that Macias would testify against Enriquez and that the recording of Macias's conversation with Detective Rivera would be introduced. Enriquez argues that this, in turn, prevented Macias from invoking his privilege against self-incrimination under the *Fifth Amendment*.

We reject his argument. Even if Enriquez could demonstrate that Macias could have invoked the privilege at all, he has failed to show that Macias could have done so in order to shield himself from prosecution for the testimony he gave at trial. See *United States v. Vavages*, 151 F.3d 1185, 1192 (9th Cir. 1998) (the fear of a legitimate perjury prosecution does not support invocation of the privilege). Likewise, the argument that the recorded statement would have been excluded if Macias had invoked the privilege is not persuasive. Since Macias's testimony conflicted with his recorded statement, the recorded statement became admissible; if Macias's testimony had [**4] matched that of the recorded statement, there would have been no need to introduce the recorded statement. In either case, Macias would not have been able to invoke the privilege so as to avoid testifying for fear that he might be prosecuted for what he would say on the stand.

Further, even if we agreed that counsel erred, there was no prejudice as a matter of law. Three eyewitnesses identified Enriquez as the shooter. Even if counsel's performance was deficient, Enriquez has not demonstrated that he has been prejudiced. See *Strickland*, 466 U.S. at 691-94.

Second, Enriquez claims that it was constitutional error for his lawyer not to challenge the empanelment of a deaf juror because that juror was unable to hear the vocal nuances in the tape recorded interview between Macias and Detective Rivera.

[*576] The California Code of Civil Procedure states that "no person shall be deemed incompetent [to serve as a juror] solely because of the loss of . . . hearing in any degree . . ." *Cal. Civ. Proc. Code* § 203(a)(6). At least two Circuits have held that the presence of a hearing-impaired juror, as a general matter, does not render a verdict constitutionally [**5] suspect. See *United States v. Saadeh*, 61 F.3d 510, 524-25 (7th Cir. 1995); *United States v. Dempsey*, 830 F.2d 1084, 1088-89 (10th Cir. 1987).

Enriquez contends that the ability to hear the testimony was particularly crucial because the jurors were required to make a determination about whether Macias's recorded or live testimony was more credible. Though the deaf juror was provided with the transcript of the recorded testimony, Enriquez claims that the juror could not detect any subtleties in the "climate" of the interview. But Enriquez points to no such nuances in the recorded dialogue that would have supported a finding that Macias's recorded testimony was false; rather, Enriquez argues that he was necessarily prejudiced because the deaf juror could not perceive such hypothetical subtleties. This claim fails. We are unwilling to speculate about vocal nuances in the recording or about interpretations of those nuances that might have favored Enriquez. See *Cooks v. Spalding*, 660 F.2d 738, 740 (9th Cir. 1981).

Third, Enriquez argues that he was denied effective assistance when his attorney failed to object to the prosecutor's statement, [**6] in closing, that "not even [Enriquez's] fiancée would come up and testify for him. Maybe it's because she's not deceived."

Though it may have been improper for counsel not to object when the prosecutor made this statement, this is insufficient to found a claim of prejudice under *Strickland*. The jurors were properly instructed that no argument or statement made by the attorneys during the course of trial was evidence, and that the defendant was not required to call as a witness every person with knowledge of relevant facts. Moreover, the statement was at best peripheral to the evidence of the crimes with which Enriquez was charged.

Fourth, Enriquez complains that his attorney was ineffective by introducing the testimony of Enriquez's mother, sister, and best friend, that he was a "good guy" and not violent. This testimony "opened the door" for the government to introduce evidence that Enriquez had been convicted of three crimes: (1) driving a stolen white Toyota on September 10, 1997, (2) "allowing a gun in the car" on November 21, 1997, and (3) carrying a concealed weapon on December 5, 1997. The prosecutor also elicited an admission from Enriquez that he had "borrowed" the [**7] Toyota approximately six weeks after the shooting incidents, and counsel did not object to this testimony.

Even allowing that counsel's conduct may have fallen below an objectively reasonable standard on this issue, this evidence does not create a reasonable probability that, but for counsel's error, Enriquez would have been acquitted. None of the evidence that was admitted as a result was relevant to the two shooting incidents. Further, there was no reason for the jury to conclude that the Toyota was of necessity the same car that had been used to transport Enriquez to the

shootings. The jury was also explicitly instructed that character evidence was only relevant to make credibility determinations. Lastly, Enriquez was identified as the shooter by three eyewitnesses, a fact that remains unaffected by the character evidence offered [*577] by the government against him. The state court's conclusion that Enriquez was not prejudiced by this evidence and counsel's failure to object is not contrary to or an unreasonable application of *Strickland*.

We reject Enriquez's reliance on *United States v. Cronin*, 466 U.S. 648, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984). Enriquez was not completely denied counsel nor [**8] did counsel "entirely fail[] to subject the prosecution's case to meaningful adversarial testing[.]" *Id.* at 659.

AFFIRMED.