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## Forensic pretrial police interviews of deaf suspects avoiding legal pitfalls

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### 1. Introduction

There are 21,000,000 people in the United States with hearing loss. Of these, approximately 1,000,000 are children considered hard of hearing and 350,000 people who are profoundly deaf. It is this latter group who are the primary focus of this article (deHahn, 1994).

With the passage of the Americans with Disabilities Act (ADA), deaf and other disabled persons were provided with landmark civil rights legislation. It provided legal protections in employment, access to state and local government and public transportation, public accommodations, and telecommunications. Included is a requirement that police agencies and the courts use qualified interpreters to communicate with victims, witnesses, and suspects who are deaf or hard of hearing. However, legally sound, effective interviewing of deaf and hearing-impaired suspects requires far more than simply recognizing and using an interpreter. For example, police officers and prosecutors or courts who call upon an unqualified interpreter or fail to assess the quality of the interpreter and the communication skills of their suspect, may see critical evidence ruled inadmissible and/or entire cases dismissed.

Unfortunately, studies have shown that the ADA has been least effective for blind, deaf, and physically impaired persons. Perhaps it has been inappropriately relied upon for employee action, such as those claiming mental impairment.

This article sets forth some basic guidelines for police, attorneys, and the court system to follow in conducting meaningful, legally admissible interviews with deaf and hard-of-hearing

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suspects. It also presents a series of policy procedures for consideration, which supply answers to the following questions:

1. What steps must be taken to protect the rights of deaf and hearing-impaired suspects?
2. What are effective ways to interview deaf and hearing-impaired suspects?
3. What are the common mistakes made by police officers and others who interview deaf and hearing-impaired suspects?
4. Who bears the primary responsibility for obtaining appropriate services to meet the communication and other needs of deaf and hearing-impaired suspects?

It is critical that forensic experts (e.g., attorneys, psychologists, judges, and psychiatrists) involved in cases with deaf defendants or participants, know these procedures in order to either assure that they are followed or to see that evidence obtained when they are violated will not be admissible.

## **2. The Police Role in the United States**

For international readers unfamiliar with the police role in a federal system of government, the following may be helpful. The police and prosecutors are each role players whose interest is in convicting a guilty defendant. The police are responsible for effecting an arrest and developing evidence sufficient to secure a conviction beyond reasonable doubt. The prosecutor reviews the evidence and makes a decision to move forward with a trial, the goal of which is to punish the defendant. Alternatively, the prosecutor may develop his or her own evidence by convening a grand jury, a panel of citizens. The pre-indictment grand jury process theoretically enables citizenry to review and comment upon the evidence gathered by the prosecutor, though in practice it is often regarded as a tool of the state's attorney. When a deaf defendant is charged with a criminal offence, it is frequently the police who initiate the legal process and obtain the confession. For deaf defendants, prosecutors are often initially lulled by an illegally gained confession into concluding that the evidence against the defendant is overwhelming.

Determining the extent to which the criminal justice system serves deaf suspects in the United States is difficult because of the fragmentation of the system. No accurate data exists on the number of criminal suspects who are deaf. There is no mandate to report police interaction with people who have disabilities. The Uniform Crime Report (UCR) Division of the Federal Bureau of Investigation, which is the most widely recognized and accepted center for collection of crime data, maintains no information on people who have disabilities.

Most contact with the deaf suspects begins with the police at the point of arrest or during an investigation prior to an arrest. The greatest risk of mistakes and abuses in pretrial interviews begins at this point in the criminal justice process. There is no mandate that police agencies have written policies on interviewing deaf suspects. Most police agencies lack procedures to govern the way in which interpreters and other support services are used during pre- and postarrest interviews with deaf suspects. In most agencies that have formal policy, content focuses simply on a mandate to obtain an interpreter.

Two distinct differences distinguish pretrial interviews by prosecutors from those of law enforcement personnel. First, prosecutors have the legal background to avoid many of the pitfalls law enforcement officers may encounter when questioning suspects. Second, prosecutors have the opportunity to plan the interview and to control the environment in which it occurs. Generally, they have the time required to involve the necessary support services. Often, police officers and deputies conduct interviews during time of crisis, in the field at a crime scene, or at a precinct or district station immediately following arrest. In the field, circumstances do not always allow time to make audio or videorecordings, conduct preparatory interviews with interpreters, or await the involvement of other support personnel.

### **3. The Problem**

Prelingually deaf people are those who lost their hearing before learning basic language skills. This includes those born deaf or deafened before 3 years of age. When suspected of or charged with committing crimes, they pose unique problems to law enforcement officials and the courts. These occur primarily in administering the Miranda Warnings, in the individual's competence to waive them in conducting criminal interviews, and in the assessing the suspect's competence to stand trial (Vernon & Raifman, 1997; Vernon, Raifman, & Greenberg, 1996).

The problem is significant because hearing loss is the most prevalent chronic health problem in the United States and in other medically advanced countries throughout the world (Bate, 1978; Vernon & Andrews, 1990, p. 4). Among inmates of the correctional system, 35 to 40% failed a hearing screening test (Belenchia & Crowe, 1983; McRandle & Goldstein, 1986; Melnick, 1970). Approximately 13 to 20% of persons adjudicated guilty of crimes and sentenced to prison had significant hearing losses (Walle, Kaudel, Boslow, Reading, & Florenzo, 1972). Among antisocial groups housed in psychiatric hospitals, 69% had hearing impairments (Lamb & Graham, 1962). While all of these individuals are not prelingually deafened, many of them share some of the forensic problems of those who are.

In minor cases, errors and omissions by police officers and the justice system are rarely challenged. However, when a deaf suspect is charged in a homicide or other major crime, police mistakes are increasingly more likely to be brought to the attention of the court by astute defense attorneys. One result may be the release of confessed and otherwise guilty felons because evidence is found to be inadmissible in court due to procedural errors in interrogation. This is based, in part, on the exclusionary rule (Vernon & Coley, 1978; Vernon et al., 1996).

Procedural errors are usually due to the paucity of training for police officers in the special interview procedures required with deaf and hard-of-hearing persons. Generally, police supervisors and executives receive less training in this area than their officers. As a profession, the field of law enforcement has been weak in providing instruction to supervisors (Sheehan & Cordner, 1995, p. 80). There is little or no supervisory oversight or intervention with officers who conduct interviews with suspects. In fact, intervention usually occurs only when a mistake is made or a complaint is filed. Policies and procedures on conducting suspect interviews are brief, if they exist at all. Rarely do they address the specific issues involving

suspects who have disabilities (Greenberg, 1993). To avoid the resulting pitfalls, it is important for officers to be on guard against using isolation, positing of the defendant's guilt as a fact, subtle coercion, and other forms of intimidation referred to by the court in the *Miranda v. Arizona*<sup>1</sup> decision. It is equally essential that they be aware of the tendency of deaf suspects to sign papers and/or agree to confessions and other statements that they do not understand (Vernon & Raifman, 1997).

Protecting the individual rights of deaf suspects within the criminal justice system is complicated by the diagnostic complexities associated with these persons. For example, prelingual deaf criminals frequently experience marked linguistic deficits, have an increased probability of brain damage and mental disorders (Vernon & Andrews, 1990, pp. 40–67, 97–118).

Despite these and other difficulties, little has been written in professional journals about forensic issues related to deaf suspects or about their psychiatric and psychological characteristics (Harry, 1986; Harry & Dietz, 1985). In the popular press, the most widely read book is *Dummy*, authored by Tidyman (1978). It is about the alleged murder of two prostitutes by a deaf man. The book was later made into a movie starring Lavar Burton.

Klaber and Fakek (1963) and, more recently, Dubow and Geer (1992)(pp. 173–189), have written on key elements of law as they relate to deaf persons accused of criminal offenses and their special needs. However, the overall lack of knowledge about criminal offenders who are deaf or hard of hearing often leads police and justice system professionals to operate on the basis of faulty assumptions.

#### 4. Issues in Interviewing Deaf Suspects

Deaf and hard of hearing suspects vary in ways critical to police interviews. Suspects who suffered significant hearing impairment prior to the age of 3 years are generally at a far greater disadvantage than deaf persons who lost their hearing after the onset of language skills. Approximately 30% of those who were deaf prior to the age of 3 years leave school functionally illiterate, with a reading grade level 2.9 or below on standardized educational achievement tests. Sixty percent read at grade level 5.3 or below, and only 5% achieve a 10th grade reading level (Center for Assessment and Demographic Studies, 1992; Vernon & Andrews, 1990, pp. 113–115). These data demonstrate clearly that deaf persons are far less likely to achieve literacy than are their hearing counterparts. This reading retardation occurs because the prelingually deaf population never hears spoken English well enough to understand it.

In addition to inhibited development in reading and writing, prelingually deaf and hard-of-hearing individuals face other communication problems. Notwithstanding certain high-profile exceptions like Miss America of 1994, most people who are prelingually deaf do not develop intelligible speech (Braden, 1994, pp. 27–42; Conrad, 1979, pp. 140–142). Some never learn sign language, master English, or, as just indicated, learn to read. Obviously, such individuals

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

have markedly impoverished capacities for communication both expressively and receptively. Thus, many times police wrongly assume that deaf suspects will understand the Miranda Warnings and interview questions simply because a sign language interpreter is present or they are given in written form.

The problems of lipreading compound the communication issue. Forty to sixty percent of the sounds in English are either invisible (e.g., “g” and “k” sounds) or look like some other sound on the lips. “D,” for example, is perceived as “t,” “f” as “v,” and “m” as “b.” Surprising to most hearing people, lipreading or “oralism” is a notoriously weak form of communication. This is something of which few police officers or legal experts are aware. The average prelingually deaf lipreader understands only about 5% of what is said to him or her orally (Vernon & Andrews, 1990, pp. 100–102). Even in a one-to-one situation, in which the speaker is close to and facing the deaf person and where lighting is ideal, comprehension is still poor.

#### *4.1. Limitations of American Sign Language in Pretrial Interviews*

Most prelingually deaf people know and use American Sign Language (ASL). Employing both ASL and finger spelling, they can converse with other ASL users as fluently as most hearing people converse orally. However, every police officer, attorney, and judge should know that there are limitations to the use of ASL in pretrial forensic interviews. The vocabulary of ASL primarily covers everyday words referring to basic life processes, such as work, recreation, body functions, emotions, food, sexual behaviors, and so forth. It does not include the esoteric terminologies of the law or other academic and highly technical subjects.

When using ASL, educated deaf people will rely on finger spelling to express words for which there are no signs. They will also invent signs for special words to use with other educated deaf people. Finger spelling words and using “invented” signs familiar to other educated deaf people are of little or no communicative value to the 30% of prelingually deaf population that is functionally illiterate (Vernon & Andrews, 1990, p. 114). Nor are such techniques of value to many other deaf people with constricted vocabularies or limited knowledge of English syntax. These deaf persons, while able to converse adequately using ASL on day-to-day topics, are markedly limited or unable to make an informed, knowing decision about waiving their Miranda rights, signing consents to search and seizure, signing confessions, etc. On linguistic grounds alone, many of them cannot meet the basic requirements to stand trial (Vernon et al., 1996; Vernon & Raifman, 1997).

#### *4.2. Suggestion, Subtle Coercion, and the Deaf Person’s Habitual Response*

Many deaf people will sign documents such as a waiver of Miranda Warnings, search and seizure permission forms, leases, purchase agreements, loans, confessions, and other legal documents that they do not understand. For readers not familiar with United States law, the Miranda Waiver or Warning entitles defendants charged with crimes to have an attorney present while they are questioned about the alleged offense. The waiver is based on the fifth and sixth amendments to the U.S. Constitution. Evidence that is obtained as a result of interrogation that occurs when the Miranda Waiver has not been understood and signed by the suspect is inadmissible in court.

This willingness to sign documents they do not understand is especially true of those who lack education or reading and language skills, as well as those of low intelligence (Vernon et al., 1996). Other people, such as individuals who are educationally disadvantaged, mentally retarded, or foreign speaking, frequently do likewise (Fulero & Everington, 1995; Sigelman, Budd, Spanhel, & Schoenrock, 1981). In the case of deaf suspects, the reasons for signing or agreeing to information presented by police officers or other authoritative officials are threefold.

First, those who cannot read or who read very poorly, especially deaf individuals, are accustomed to signing papers they do not understand. Thus, when a police officer places a printed copy of the Miranda Warnings in front of a deaf suspect and points to where the individual should sign, many deaf persons will likely comply automatically. Despite the criminal nature of the situation, uneducated deaf persons often perceive the police officer as an accepted authority figure and assume that the document must be signed. Illiterate deaf people habitually handle documents requiring their signature by seeking the help of an authority figure because they have no choice (Shaw & Budd, 1982).

Second, because the average deaf person who relies on lipreading understands only about 5% of what is said, he or she responds much as a hearing person does when talking to a non-English-speaking person in a foreign country. Rather than appear ignorant and continually ask the speaker to repeat or explain, the deaf person tends to smile, nod his or her head, and, generally, acquiesce. As such, when a police officer asks a deaf person to whom the Miranda Warnings, have been shown or read, “Do you understand?” the deaf individual often nods “yes,” and signs the document, even though it may be totally incomprehensible to them.

Third, the average deaf person is at a tremendous disadvantage when taken into custody by a police officer. Because he or she cannot understand what is being said, there is little notion of what is taking place. Thus, there is a heightened state of fear, which could, in fact, be dangerous to the arresting or processing officers, should the deaf person panic or react in some aggressive way. Being incarcerated in an area with a group of criminals with whom he or she cannot communicate usually creates even greater fear. There are documented cases in which suspects were in such fear that they willingly signed confessions to homicides that they did not commit in naive anticipation they would be then be released to go home. In the best of circumstances, this fear inhibits effective interviewing of a deaf suspect.

Because of the deaf suspect’s cooperation in confessing and signing the Waiver, police officers and courts may believe that the person has comprehended the Waiver. Unfortunately, when the limitations of lipreading, the deaf person’s low communication comprehension level, and the overall problems involved in understanding the waiver forms are demonstrated in court through an expert witness on behalf of a deaf defendant, judges often conclude that the deaf person could not have effectively waived his or her rights (Vernon et al., 1996). The information gained subsequent to Miranda—often the most important evidence in an investigation—is then disregarded (i.e., inadmissible in court). Valid cases are lost. The following example illustrates problems associated with communication and the waiver of rights by deaf suspects. It is taken from an actual case:

Curry was born deaf due to complications of Rh factor, a blood incompatibility between a fetus and its mother, which can cause deafness. He was educated, as are the majority of deaf youth today, in a mainstream program in the public schools. This meant that he attended

classes with hearing students, frequently with only meager support services. As is too often the case in these situations, the result was a grossly inadequate education. Curry left school functionally illiterate, reading at grade level 2.8, despite a performance IQ of 115. After some vocational training in welding and auto bodywork, he gained enough skill to obtain fairly steady work as a mechanic in garages and junkyards. Curry communicated by sign language. He did not have functional speech or lip-reading skills.

One evening Curry, then 23 years old, was in a bar at closing time drinking with some deaf friends. An intoxicated, hearing woman who knew no sign language became fascinated with him. When the bar closed, she followed Curry to his car and forced her way into the front seat. They drove some distance and stopped. The woman became sexually aggressive with Curry, who was unable to achieve an erection. Feeling humiliated and angry, he sought to terminate his involvement with the woman. She, feeling frustrated, rejected, and infuriated, kicked him in the groin.

Curry perceived this as a further attack on his masculinity, to which he reacted with rage. He assaulted the woman, beating her to death. Later, he stripped off her clothes and stuffed her nude body in a well.

The woman was soon reported missing. As a result of the investigation, Curry was arrested as a suspect. He signed a printed waiver of the Miranda Warnings, confessed to the crime, and led police to the body, the woman's clothes, and to other incriminating evidence. The prosecutor, sensing Curry may not have understood the written Miranda form, had the detectives interview Curry again and repeat the Miranda Warnings, this time with the support of a sign language interpreter.

At Curry's trial, four key points were made. First, the reading level required to comprehend most forms of the written Miranda Warnings is grade level six to eight (Vernon & Coley, 1978). Because Curry's reading level was measured to be grade 2.8 using objective educational achievement tests, the judge concluded that he had not been appropriately informed of his rights when he signed the printed version of the Warnings.

Second, because the average prelingually deaf lipreader comprehends only 5% of what is said through lipreading, the judge determined that the Miranda Warnings could not have been adequately given to Curry through oral conversation.

The third point established in the Curry case is significant not just for the Mirandas. It has a greater generality. With a hearing suspect who is illiterate, the Miranda can be given orally. As indicated in point two above, this cannot be done with an illiterate deaf person due to the limitations of lipreading. Nor can the Miranda Waiver be communicated to an illiterate deaf person by sign language because to adequately do this the interpreter must fingerspell certain terms. Fingerspelling, like print, is incomprehensible to someone who is illiterate.

The fourth point exemplified by the Curry case is that it is nearly impossible to put into ASL the complex concepts embodied in the Miranda Warnings unless the suspect has a good understanding of English and some basic knowledge of the justice system. In Curry's case, as with many deaf people who lost their hearing before age 3 years, the suspect lacked sufficient comprehension of the English language to be aware of the concepts contained in the Miranda Warnings even when they were fingerspelled. Many terms in the Miranda Warnings—such as “waive and “rights” have no clear equivalent signs that can be understood by the average deaf person.

Based on these data, the court ruled in the Curry case that the suspect had not been given his rights, *even though they were signed and explained to him by an interpreter*. As a result, Curry's confession and the evidence obtained by the police that resulted from his statements were not admissible. Thus, Curry was acquitted of the murder charge (Vernon & Coley, 1978).

Curry's release was unfortunate, but without changes in current police practices, such errors will occur. The senior author (M.V.) has been involved in three cases in which an apparently guilty deaf defendant was released due to either a failure to receive adequately his Miranda Warning or to linguistic incompetence. For this reason, certain procedures need to be followed with deaf suspects that are not required for dealing with those who hear.

#### *4.3. General Guidelines for Administering the Miranda Warnings to Deaf Suspects*

There are a number of steps officers can take to avoid the mistakes made in the Curry case. To minimize errors that jeopardize admissibility of statements, officers should encourage deaf suspects to engage an attorney, then proceed with police questioning only in the attorney's presence. This is the best approach to take with most prelingually deaf suspects. For those interested, a video on the Miranda Warnings and the deaf suspect which discusses this procedure and is available (Anonymous, 1994).

If an attorney is not present and questioning of the deaf suspect must proceed, several steps should be followed prior to questioning. First, the officer should obtain the services of a qualified sign language interpreter, preferably one certified for legal work through the National Registry of Interpreters (PH: 301-608-0050).

Second, the officer should have the interpreter make an informal assessment of the suspect's communication skills, including use of sign language, reading, writing, speech, lipreading, educational background, and competence in English. Good, experienced interpreters will want to spend time just conversing (signing) with a deaf person prior to an interview in order to determine whether or not he or she is able to establish adequate communication and rapport with the deaf suspect.

Ideally, the suspect's reading level should be determined by a standardized educational test, such as the Stanford Achievement Test or the Peabody Individual Achievement Test. The Wide Range Achievement Test (WRAT) is not recommended. If this formal testing is not possible, a rough approximation of reading and writing competence can be obtained by giving the deaf person a newspaper article to read and then having the individual write answers to a few simple open-ended questions on the article. This evaluation of reading should be done through the interpreter and videotaped. A qualified interpreter will be capable of identifying those deaf suspects whose lack of language skills preclude their being capable of informed, reasonable consent to the Miranda Waiver.

In questioning deaf suspects, police officers should avoid the question, "Do you understand?" In order to avoid appearing ignorant, uncooperative, or repetitive, deaf individuals will often answer "Yes," and smile and/or nod in the affirmative even though they have not comprehended the question. Therefore, instead of the officer asking "Did you understand?," the suspect should be told to restate in his or her own language what he or she understood was meant by the Miranda Waivers or whatever the question is.



Third, after assessing the communication skills of the deaf person, a decision must be made by the officer (and, ideally, the prosecutor) on whether or not to proceed with the interview. If time permits, the Basic Competencies Checklist should be used in making this decision (Appendix A).

In a particularly complex case, these steps become critically important in order to withstand a defense challenge that the suspect lacked adequate communication to waive Miranda Rights or be interviewed. When it is evident that a deaf suspect cannot communicate well in sign language and/or has great difficulty with reading and writing, a police or court interview should not be undertaken until the deaf suspect has an attorney present and the attorney agrees to the procedure.

Fourth, an important tool to use when interviewing deaf suspects is the videotape. Procedures such as administering the Miranda Warnings, follow-up interviews, confessions, and any sign language interpreting of documents to which the deaf person signs his or her name should be videotaped from start to finish. Videotaping is to sign language as audiotaping is to speech. The courts have recognized it as necessary to an accurate recording of the use of sign language and interpreting in police interviews.

Sign language interpreting is a subjective activity, not simply “translation,” as many people believe. The sign language interpreter may testify in court about his or her perception of what was signed by the deaf suspect, not necessarily what was actually signed or intended.

Meaningful videotaping requires that everything communicated be fully visible on the tape. When a sign language interpreter is signing to a deaf suspect, all of the signs both parties use must be captured on the videotape. This includes the hands, arms, and faces of all individuals doing the signing.

Important components of human communication are facial expression and body language. They are especially critical in deaf communication. Both linguistically and conceptually, the facial expression and body language (including hand positions) are integral parts of the message communicated. It is through this integration of words, spelling, expression and body language that the “listener” can learn the “speaker’s” nuances and expressed ideas (e.g., strongly agree, extremely hot, scared, or intensely angry). Videotape is the only means by which the totality of the signed interview can be captured and preserved. Only through video can the courts factually verify the nature and quality of the interview.

Interpretation of ASL is unique among languages. At the United Nations, where the world’s best foreign language interpreters work, speakers pause after every few words to allow interpreters to translate in another language. By contrast, sign language interpreters “translate” the police officer’s statements continuously, without pause. In the police interview, this process of continuous interpreting leads to omissions and errors that can give defense attorneys cause to question the integrity and validity of the interpreting and, therefore, the entire interview. Thus, as was indicated earlier, a videotaped recording is essential to validate what was actually signed.

A logical legal argument holds that videotaped interviews with deaf suspects are discriminatory unless they are conducted only in those situations in which an audiotape recording would be used with hearing suspects. Failure to follow this policy could lead to Fifth Amendment violations of a deaf suspect’s right against self-incrimination. In addition, some interpreters may regard videotaping as an intrusion. Others feel threatened or inhibited

by video monitoring of their signing and technique. However, interpreters should not be permitted to avoid a videotaped presentation, because it can be a critical factor in a trial.

Recent court cases, notably the *Estelle v. Smith*<sup>2</sup> Supreme Court decision, protect the suspect's right to avoid self-incrimination during competence to stand trial assessments. These decisions exclude from use in a trial evidence derived from a competency assessment relating to the defendant's guilt. As a result, a suspect may choose not to participate in interviews that are videotaped. To date, the courts have not imposed sanctions on deaf suspects who decline to participate in a videotaped interview.

#### 4.4. Working With Interpreters

Several tasks need to be considered by police officers who work with sign language interpreters. It is important that officers seek interpreters who are certified for legal interpreting. Because legally certified interpreters are few in number, officers should be comfortable engaging the services of a person who has Comprehensive Skills Certification. If certified interpreters are not available, the police officer may have to rely on the most competent signing individual available. The officer should then ask the interpreter if he or she is able to understand the deaf suspect and determine from the suspect if he or she understands and is satisfied with the interpreter. The officer should explain to the interpreter and the suspect that the interview will be videotaped and, possibly, used in court. The police officer must judge continuously the extent to which good communication is occurring between the deaf suspect and the interpreter. If the communication is inadequate, the interview should be stopped. Failure to stop a poor interpretation will result in a loss of evidence, possible dismissal of the case, or else an acquittal when the videotape showing of the inadequate interpreting is presented and critiqued in court.

Using family members as interpreters is unacceptable, as is having people interpret who have taken one or two sign language classes but have had little interaction with deaf people. The courts demand qualified, comprehensive interpreting skills. In keeping with the ADA, all police agencies should make qualified interpreting available for suspects in interviews on a 24-hour basis.

#### 4.5. Relay Interpreters

Sign language is difficult to master, due in part to its own unique syntax and vocabulary. There are regional, ethnic, and idiosyncratic variations. Sometimes the hearing interpreters are unable to adequately grasp what deaf suspects who have poor command of English or whose signs are highly idiosyncratic are signing. In these situations, it may be necessary to use deaf people who are more familiar with the form and level of sign language used by the suspect than the hearing interpreter (Dignan, 1998). These deaf people are known as "relay interpreters." Their function is to take difficult-to-understand signs and "relay" them to a

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<sup>2</sup> *Estelle v. Smith*, 31 Cal. App. 4th 1185 (1995).

hearing sign language interpreter in more conventional sign language. Relay interpreters also rephrase the sign language of the hearing interpreter into a form the suspect can better understand.

Relay interpreters make possible communication that enables a police interview to take place where it would otherwise be impossible or ineffective. Because relay interpreting is a more subjective process than conventional interpreting, it is essential that the interview be videotaped and that police officers be especially alert as to whether or not adequate understanding is occurring.

#### *4.6. Oral Interpreters*

Some deaf suspects do not know sign language. If they can write coherently, writing or simultaneous captioning may be used or else oral interpreters may be employed. Oral interpreters are people who are easy to lipread and who know enough about deaf people's language limitations and the problems involved in lipreading that they can rephrase what a police officer says in ways the deaf suspect can better understand. Oral interpreting does not offer the level of understanding provided by sign language interpreting, but it can be of value when interviewing a deaf suspect who does not sign but possesses English language competence.

#### *4.7. Other Professionals*

The deaf suspect's reading level, English vocabulary, sign language competence, and knowledge of legal terminology are among the issues that should be considered when determining whether he or she should be given the Miranda Warnings and a waiver, search and seizure consents, agreements to take a polygraph, exams, etc. A team of professionals—interpreters, psychologists, attorneys—will provide a foundation for overcoming obstacles and for conducting interviews in complex major cases. For example, a psychologist experienced with deafness might be called upon to administer standardized reading, vocabulary, and IQ tests. These data can yield a sound legal foundation and direction for proceeding with the interview. An interpreter can assess sign language competence. A prosecuting attorney can be used to develop a vocabulary list of legal concepts that may be needed in court. The suspect's understanding of these terms can be "tested" by the sign language interpreter, enabling the court to determine if the deaf suspect's knowledge of critical legal terms is adequate for trial.

## **5. Policy Implications**

Police departments should have a written policy on how and when interpreters should be used. This may stand as a separate policy or as part of an overall policy on the agency's response to the ADA and people who have disabilities. The policy should address use of interpreters to support interviews with victims, witnesses, and suspects. It should also indicate how police officers should interact with interpreters. A policy that simply dictates that police officers call an interpreter when working with a person who is deaf or hearing impaired is inadequate.

### *5.1. Evaluating Interpreters' Qualifications*

Policy should state clearly that the investigating officer has responsibility to ensure that the interpreter has the needed skills and that the interpreter assesses the communication level of the person being interviewed prior to asking questions related to the case. This is a significant change from most existing police policies and procedures that limit the officer's role to making the initial contact with the interpreter. An officer's failure to assume this responsibility could negate any evidence or confessions gained as a result of the interview. The officer conducting the interview should spend time with the interpreter before it begins. He or she should ask specific questions of the interpreter and should note the responses in the appropriate report (see Appendix B).

### *5.2. Assessing a Suspect's Communications Skills*

A police department policy on using interpreters must do more than simply cite their availability or mandate their use. Police agencies will need to have more than one or two interpreters on call. Police department procedures and training should reflect these varied language experiences of deaf people and the importance of assessing their skills. By following the steps cited in Appendix C, "Assessing a Deaf Suspect's Communications Skills," many of the challenges that arise in court and lead to inadmissibility of evidence may be avoided.

## **6. Potential Relevance of Model Practices From Other Jurisdictions**

In the United Kingdom, the enactment of the Police and Criminal Evidences Act of 1984 assured a deaf person the following rights with regard to police or prosecutorial interrogation:

If a person is deaf, or there is doubt about his hearing ability, he must not be interviewed in the absence of an interpreter unless he agrees in writing to be interviewed without one. If an individual who is mentally ill or mentally impaired is to be interviewed by police, this should always be done in the presence of an "appropriate adult" and a solicitor. An interpreter may also be required (the interpreter cannot also fulfill the role of "appropriate adult").

With regard to fitness to please, the UK has five criteria:

1. Ability to understand charge and enter plea.
2. Ability to understand court proceedings.
3. Capacity to instruct lawyer.
4. Ability to challenge juror.
5. Ability to understand evidence.

These are similar to the U.S. standards for competence to stand trial, which were derived from the English requirements.

A person is found unfit to plead if he fails to satisfy criteria established in 1836 in the case of Pritchard, a "deaf mute" (not our terminology) accused of bestiality. The issue

itself is usually decided by a jury, although not necessarily, after the presentation of psychiatric evidence.

Once found unfit to plead, an individual is dealt with under Section 5 of the Criminal Procedures (Insanity) Act of 1964 in which the person is found “under disability” in lieu of trial. The individual must be admitted to hospital under conditions that are now equivalent to Section 37/41 of the Mental Health Act of 1983. This is a hospital order with Home Office restriction on discharge without limit of time. If the patient subsequently becomes fit, the Act allows for remission back to court at the discretion of the Secretary of State. If the court finds that the accused person is unable to understand court proceedings or to fulfill certain other criteria, he can be found “unfit to plead.”

If the defendant is unable to communicate (by speech, writing, signing, etc.), medical evidence will be called to indicate whether the individual is “mute by malice” or “mute by visitation of God.” If he is mute by visitation of God, he is unlikely to be found fit to plead.

In the United Kingdom, there is a protection for defendants such as those who are mentally ill or juvenile, called the “appropriate adult” (AP). The role of the AP includes the following functions:

1. To ensure, if at all possible, the presence of parent(s) or guardian at the Police Station.
2. To ensure the presence of a solicitor unless this would cause undue delay. If an interview has commenced and the AP feels that a solicitor should be present, the AP should stop the interview.
3. To know the circumstances of the young person’s arrest and detainment.
4. To ensure no “informal” interview has taken place.
5. To determine that the young person was cautioned correctly and understands his/her rights, including the right to remain silent.
6. To determine the young person is not coerced into saying things they do not mean.
7. To determine that young person is not intimidated.
8. To ensure a correct record of the interview was made and to sign as much.
9. To keep independent notes on questions asked and responses given.
10. To ensure that the young person is aware of his/her rights in relation to: having the right to remain silent; ensuring the young person is not photographed or fingerprinted before they have been interviewed and charged if the young person has been photographed or fingerprinted prior to interview and no charges result from the interview, then the young person can request the destruction of photographs, etc., in their presence.

In this format, the mentally ill person is advocated for by another individual, usually his relative or close family friend who accompanies the defendant and acts to respond to the demands placed upon the defendant by the police “as if” he were in the defendant’s position. The advocate is expected to know the defendant’s values and beliefs, and to answer the questions in a manner that he assumes the defendant would employ. In that way, he is not substituting his own opinions for those of the defendant.

Whether or not this “appropriate adult” model or some modification of it should be applied to deaf defendants incompetent to plead is debatable, but deserves thorough consideration.

No European country has legislation as comprehensive as the ADA, but the United Kingdom's is the closest. However, a recent breakthrough, Section 137 of the Treaty of Amsterdam, empowers the European Community and member states to combat social exclusion. People with disabilities are considered to be among the socially excluded. It is too soon to know what action will be taken under this provision. Initial steps have begun under the European Society for Mental Health and Deafness.

## 7. Summary

Prelingually deaf suspects and defendants pose unique problems to the criminal justice system, especially law enforcement and the courts. These problems grow out of the communication difficulties posed by the disability. They manifest in practice of basic legal processes, such as police and prosecutorial interrogation, administration of the Miranda Waiver, determination of competence to stand trial, the right to search and seizure, etc.

In the United States, legislation such as the ADA has improved the plight of deaf suspects and defendants, but much remains to be done. The United Kingdom has also made significant strides, as have several European nations. However, those who are prelingually deaf continue to face an uphill battle when dealing with possible criminal charges. Before full justice is provided these individuals, the police, attorneys, juries, and the courts, particularly judges, need education on the legal implications of early onset deafness and appropriate adjustments made in the legal system to accommodate the disability.

## Appendix A

### Basic Competencies Needed for Deaf Suspect to Understand Miranda Warning

1. The deaf individual has a reading level of seventh grade or higher if he/she is not fluent in sign language.
- or–
2. The deaf individual has a reading level of fourth grade, is fluent in sign language, and the Miranda Warnings are administered through an excellent sign language interpreter.
3. The administration of the Miranda Warnings should be videotaped.
4. The interpreter should spend at least 15 minutes signing with the suspect, not interpreting, in order to assess the level of the suspect's competence in sign language.
5. The interpreter should give to the police officer her/his opinion of whether or not the suspect is capable of understanding the Miranda Warnings and/or if she/he feels capable of conveying them to the suspect in a way in which the suspect will understand them.
6. The questions should always be asked in such a way that the suspect has to re-state (re-sign) in his/her own language what each part of the Miranda Warnings means.
7. Certain words and phrases such as *right*, *attorney or lawyer*, *remain silent*, *have the right*, etc. must be explained to the suspect in his own words or signs.

## **Appendix B**

### **Evaluating an Interpreter's Qualifications**

1. Does the interpreter have legal certificates or a Comprehensive Skills Certification? The Registry of Interpreters for the Deaf (PH: 301-608-0050) is a professional organization that certifies interpreters at various levels of competence. While certification is no assurance of competence, it is a good indicator. Ideally, the interpreter should hold Legal Certification and/or Comprehensive Skills Certification and be able to demonstrate this to the investigating officer prior to conducting the interview.
2. Is the interpreter a CODA (child of deaf adults)? Generally, interpreters who have grown up signing to their deaf parents possess excellent skills. If a certified interpreter is not available, one who is a CODA will often demonstrate sufficient expertise to satisfy inquiry by the courts.
3. Is the interpreter comfortable with the interview being videotaped?
4. If the interpreter lacks the skills necessary to conduct a criminal interview, he/she may decline to interpret when faced with being videotaped.
5. Do you know the Miranda Warnings and, if not are you willing to go over them prior to the start of the interview so that they may be properly conveyed to the suspect? Experience in criminal interviews is not essential to quality interpreting. However, officers dealing with interpreters who have not worked in criminal cases may want to give them an overview of the Miranda Warnings prior to the start of the interview. This helps the interpreters and further ensures the suspect's rights.
6. What will you do to assess the communication skill of the suspect prior to starting the interview? Officers should use the checklist provided in Appendix C to assess a suspect's communications skills. The methods used to assess the suspect's communications skills should be recorded in the officer's report.
7. Interpreters should be told by the officer to let him/her know immediately if they are unable to relay information effectively and completely to and from the suspect? Making this clear provides the interpreter with a level of comfort in stating that the interview is not going well.

## **Appendix C**

### **Assessing a Deaf Suspect's Communication Skills**

1. Give the sign language interpreter 10–30 minutes to sign with and to assess the suspect's communication skills in both American Sign Language (ASL) and English. Qualified interpreters can effectively evaluate a deaf person's communication skills. Time must be allowed for this to occur. The investigating officer should instruct the interpreter to conduct this assessment. The interpreter's findings related to the suspect's skill should be recorded in the officer's report.

2. Have the interpreter write the following six terms/expressions and ask the suspect to write a definition for each.
  - 2.1. Lawyer
  - 2.2. Guilty
  - 2.3. Innocent
  - 2.4. Murder (or other crime being investigated)
  - 2.5. You have the right to have a lawyer
  - 2.6. Judge or court By analyzing the written responses to each item, the investigating officer and interpreter will get a sampling of the deaf suspect's vocabulary and command of the English language. Failure to respond effectively in writing does not negate the suspect's ability to comprehend sign language, but is an indicator of potential problems in communication. It can also show whether or not using written messages to communicate will be effective.
3. Have the interpreter sign the same six terms/expressions and have the suspect sign a definition for each. This will provide an indicator of the suspect's competence and ability to comprehend and/or willingness to use American Sign Language.
4. Instruct the interpreter during the interview to repeatedly ask the suspect to restate the question in his or her own words. The ability to demonstrate in sign his or her comprehension of the question is an excellent indicator of the suspect's communication comprehension skill. If the suspect gives an inadequate response, the question should be skipped or reworded.
5. Warn the interpreter to avoid using the phrase, "Do you understand?" Officers should also avoid using this phrase. Most deaf people who have trouble communicating will smile and nod "yes" to this question even though they have no concept of what was asked. It is far more effective to ask a follow-up question that requires a complete answer such as "What do I mean by . . .?" It is also important to instruct the interpreter then signing the Miranda Warnings to make certain the suspect understands key concepts such as "You have the right to have a lawyer." "Anything you say may be used against you in court."

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