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PROTECTING DEAF SUSPECTS' RIGHT TO UNDERSTAND CRIMINAL PROCEEDINGS*

INTRODUCTION

Although American criminal suspects who are deaf possess the same constitutional rights as hearing suspects, they are often denied full protection of those rights. The criminal justice system protects the rights of criminal suspects by guaranteeing *Miranda* warnings, public trials, the right to confront witnesses, and the assistance of counsel.¹ These protections, however, involve the use of spoken words that deaf criminal suspects cannot comprehend without the aid of a sign language interpreter.² Although it is not a perfect guarantee, sign language interpretation³ is essential to protect fully deaf criminal suspects' right to

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¹ The United States Constitution and the decisions of the United States Supreme Court guarantee these rights. The fifth amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V.

The sixth amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining Witnesses in his favor; and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court guaranteed to criminal suspects the right to be warned effectively of their constitutional rights before in-custody interrogation, and the Court guaranteed the right to assistance of counsel in *Escobedo v. Illinois*, 378 U.S. 478 (1964).

² Some deaf persons competently speechread (or lipread) and speak effectively. Although speechreading deaf suspects confront fewer problems in the criminal justice system than deaf suspects who cannot speechread and are refused sign language interpreters, speechreading alone is inadequate protection of the rights of the deaf criminal suspect. The criminal process is not well-suited to the use of speechreading. See *infra* note 11.

³ The American Linguists Association has accorded American Sign Language (A.S.L.) the status of a "language." In the United States, there are two principal forms of sign language for the deaf: American Sign Language (A.S.L. or Ameslan) and Signed English (S.E. or Seglish). Signed English closely follows the grammar of the English language; A.S.L., which has its own grammar, is more conceptual. Although many educators and hearing people favor Signed English, A.S.L. is the language of the deaf. As a result, most deaf criminal suspects will communicate in A.S.L. Like all languages, A.S.L. varies among different geo-

understand the proceedings at all stages of the criminal process.⁴

The deaf⁵ number about two million in America,⁶ or about one person in every 110.⁷ About thirteen million Americans are hearing-impaired,⁸ suffering from some form of significant hearing loss. Many hearing-impaired people function well in society with effective use of

graphic regions, ages, educational levels, and socio-economic backgrounds of the deaf. Also, A.S.L. is American only; the deaf in other nations use different sign languages.

⁴ For a short discussion of recent developments in the criminal justice system's protection of the rights of deaf suspects, see Goldberg, Gardner & DuBow, *Rights of the Deaf: Ensuring Effective Communication*, 17 TRIAL, Feb. 1981, at 39. For a discussion regarding the rights of deaf civil defendants, see Note, *Procedural Due Process: A Deaf Defendant's Right to be Heard Should Encompass a Right to 'Hear' Civil Trials Through Interpretation*, 29 CATH. U.L. REV. 867 (1980).

⁵ Deaf educators define "deaf person" as one in whom "the sense of hearing is non-functional for the ordinary purposes of life." P. HIGGINS, *OUTSIDERS IN A HEARING WORLD: A SOCIOLOGY OF DEAFNESS* 29 (1980). The state interpreting laws that define deafness vary significantly. See ARIZ. REV. STAT. ANN. § 12-242 (H) (West Supp. 1983) (one "whose hearing impairment is so significant that the individual is impaired in processing linguistic information through hearing"); MINN. STAT. ANN. § 611.31 (West Supp. 1984) (one who "cannot understand the proceedings or any charges made against him, or is incapable of presenting or assisting in the presentation of his defense"); MO. ANN. STAT. § 546.035(1) (Vernon Supp. 1984) (one who is "incapable of adequately understanding what is said at the proceedings"); MONT. CODE ANN. § 49-4-502(2) (1983) (one whose "hearing is totally impaired or whose hearing is so seriously impaired as to prohibit the person from understanding oral communications"); NEB. REV. STAT. § 25.2402(I) (1979) (one who "cannot readily understand or communicate the English language"); OKLA. STAT. ANN. tit. 63, § 2408(1) (West Supp. 1983) (one whose "sense of hearing is nonfunctional for the ordinary purposes of life"); OR. REV. STAT. § 133.515(2)(a) (1981) (one who "cannot understand the proceedings" and is "incapable of presenting or assisting in the presentation of his defense"); TENN. CODE ANN. § 24-1-103(a)(1) (Supp. 1983) (one who cannot understand "language spoken in a normal tone"); TEX. CODE CRIM. PROC. ANN. art. 38.31(g)(1) (Vernon Supp. 1982) (one who has a hearing impairment that "inhibits the person's comprehension of the proceedings").

Interestingly, many of these definitions are overly broad because they also can apply to hearing suspects who do not speak English. See *infra* MODEL INTERPRETING STATUTE § 2(a) (making clear that the statute applies only to those who cannot understand spoken language "through normal auditory processes").

The definition of deafness may be crucial in determining a particular defendant's status and rights under the state interpreting statutes. Hearing-impaired persons may not be able to understand "language spoken in a normal tone" but might be deemed capable of "adequately understanding" the English language.

⁶ J. SCHEIN & M. DELK, *THE DEAF POPULATION OF THE UNITED STATES* 3, 16 (1974). There are about twice as many deaf in the United States as there are blind. *Id.* at 87. In comparison to the deaf, the blind experience significantly fewer problems in dealing with the criminal justice system because the system depends mainly on spoken language. Telephone Interview with Tom Cunningham, Interpreter with the Chicago Hearing Society (Aug. 24, 1982).

⁷ P. HIGGINS, *supra* note 5, at 8.

⁸ *Id.* at 33. Three kinds of hearing loss affect the hearing-impaired: 1. *sensori-neural loss* (when the nerves of the inner ear do not function properly due to excessive noise, physical damage, or genetic defects); 2. *conductive loss* (when ear wax, fluid, or other matter blocks the middle or outer ear canal; such loss is often temporary and can be remedied by surgery); and 3. *central loss* (when the brain center that controls hearing is damaged). Medical science has not yet developed a permanent cure for sensori-neural and central losses.

residual hearing, speechreading, and hearing aids.⁹ Persons with a slight hearing loss confront few problems in the criminal justice system because their understanding and communication are not significantly limited. At the opposite end of the spectrum, the "profoundly" deaf must rely on one of the three visual means of communication: written transcription, speechreading, or sign language interpretation.

Sign language is the most effective method of visual communication for deaf criminal suspects because sign language interpretation gives deaf suspects a complete and simultaneous translation of the discussion.¹⁰ The deaf community increasingly uses sign language interpreters.¹¹ In the criminal process, however, the use of sign language requires a competent interpreter¹² who is familiar with the terminology

⁹ "Residual hearing," or the hearing that remains after loss, is an essential aid to communication for the hearing-impaired. In speechreading (or lipreading), the deaf person observes the speaker's lip movements to decipher the words spoken. A speechreader can understand only about one-third of the speaker's words, because only 33% of sounds have distinguishable mouth movements. Hearing aids merely increase the volume of sound going into the ear; they do not clarify sounds. Residual hearing, speechreading, and hearing aids, along with extensive training and therapy, increasingly assist the profoundly deaf in a hearing society, especially when hearing is lost after lingual development. See P. HIGGINS, *supra* note 5, at 29-30; E. LEVINE, *THE ECOLOGY OF EARLY DEAFNESS: GUIDES TO FASHIONING ENVIRONMENTS AND PSYCHOLOGICAL ASSESSMENTS* (1981).

¹⁰ Personal Interview with Mary Mulcrone, Chicago Hearing Society, in Chicago (Sept. 15, 1982).

¹¹ Written transcription and speechreading do not provide the deaf suspect with as complete a translation or with the same protections as does sign language. Because A.L.S. is a different language, written English is not understandable for deaf persons. Written transcription as a method of communication with the deaf criminal suspect can be costly, inefficient, time-consuming, and ineffective. Written transcription requires writing implements and extra time for writing and reading. Moreover, the use of written transcription presumes that the deaf criminal suspect is literate and can comprehend legal jargon. A sign language interpreter, on the other hand, needs no tools or extra time and often can explain legal jargon with additional and simplified signs.

Speechreading presents similar problems when employed in the criminal process. The effectiveness of speechreading varies according to the speed and articulation of the speaker, the training of the deaf speechreader, and the number of different speakers the speechreader must watch. Speechreading is ineffective at a criminal trial because the deaf defendant cannot always identify the speaker, cannot always face the speaker, and cannot always understand the legal terminology. At best, a deaf speechreader can effectively decipher only about one-third of the spoken words. Most importantly, speechreading is ineffective for the deaf criminal suspect who cannot speak because it is one-way communication; it presents no means for the deaf suspect to respond. Most of the deaf speak, however, putting to rest the old nickname "deaf-and-dumb," which is highly offensive to the deaf today. Deaf people are not dumb. In contrast to speechreading, sign language establishes two-way visual communication with the deaf criminal suspect. Telephone interview with Tom Cunningham, Interpreter with the Chicago Hearing Society (Aug. 24, 1982); Personal Interview with Shirley Stefanski, Interpreter with the Chicago Hearing Society, in Chicago (Sept. 15, 1982). See also B. BRANSON, *THE SILENT WORLD* (1971); P. HIGGINS, *supra* note 5; L. JACOBS, *A DEAF ADULT SPEAKS OUT* (1974).

¹² The Registry of Interpreters for the Deaf (R.I.D.) has established national standards of competency and ethics for interpreters. The R.I.D. issues licenses for interpreters, including

and procedures of the criminal justice system.

The federal government and thirty-nine states now provide sign language interpretation in some criminal proceedings as a means of communication with deaf criminal suspects.¹³ These recent laws indicate a growing public and political awareness of the problems of the handicapped, evidenced by the enactment of a large body of civil rights laws for the handicapped within the past decade.¹⁴ Yet, the present laws that provide for interpreting in the criminal justice system do not sufficiently protect deaf criminal suspects' right to understand the proceedings at all stages of the criminal process.¹⁵

This Comment argues that deaf criminal suspects possess the right to understand and participate in all criminal proceedings and that this right can be protected only when a qualified interpreter is provided. Presently, the criminal justice system's response to this need is inadequate. Thus, this Comment suggests improvements needed in the interpreting laws and within the criminal justice system to ensure full protection of deaf criminal suspects' right to understand the proceedings at all stages of the criminal process.

I. THE RIGHT TO UNDERSTAND CRIMINAL PROCEEDINGS

The United States Constitution does not provide deaf criminal suspects with an absolute or specific right to an interpreter. The Constitution does, however, grant all suspects, hearing and deaf, the rights to be informed of the nature and cause of the accusation,¹⁶ to be silent,¹⁷ to

the Comprehensive Skills Certificate (C.S.C.), the Legal Skills Certificate (L.S.C.), and the Reverse Skills Certificate (R.S.C.). The licenses require minimum training levels and hours of interpreting experience in different interpreting situations.

The R.S.C. interpreter, often a deaf person, is trained to translate American Sign Language (A.S.L.) for deaf persons with low grammatical skills. R.S.C. interpreting therefore requires two interpreters: one to interpret spoken words into A.S.L. and one to interpret A.S.L. into the grammatically simpler signs and concepts.

The R.I.D. requires L.S.C. interpreters to take intensive training courses and examinations in legal practices and procedures. About 100 interpreters in the United States have the L.S.C. certificate. These L.S.C. interpreters are the most qualified to interpret at any stage of the criminal process because they have training specifically geared towards interpreting in the criminal justice system. Personal Interview with Mary Mulcrone and Shirley Stefanski, Interpreters with the Chicago Hearing Society, in Chicago (Sept. 15, 1982).

¹³ See *infra* note 23.

¹⁴ See, e.g., Rehabilitation Act of 1973, 29 U.S.C. §§ 701-96 (1973) (providing the handicapped, *inter alia*, equal access to public buildings and equal opportunities for employment).

¹⁵ While the state statutes vary widely in focus, coverage, and effectiveness, many of the interpreting laws contain major weaknesses: they provide for interpreters only at trial, they require the deaf person to compensate the interpreter, and they lack standards of training and competency for interpreters. See *infra* text accompanying notes 142-68.

¹⁶ U.S. CONST. amend. VI, *supra* note 1.

¹⁷ U.S. CONST. amend. V, *supra* note 1.

the assistance of counsel,¹⁸ to confront adverse witnesses,¹⁹ and to due process of law.²⁰ Courts have protected these rights in cases involving deaf and foreign-language-speaking defendants by providing a right to foreign-language interpreters at the trial stage of the criminal process.²¹ Courts thus have attempted to protect defendants' right to understand the proceedings at trial.²² In addition, thirty-nine states provide by statute for the mandatory appointment of sign language interpreters for deaf criminal defendants at trial.²³

¹⁸ U.S. CONST. amend. VI, *supra* note 1.

¹⁹ *Id.*

²⁰ U.S. CONST. amend. V, *supra* note 1.

²¹ In cases involving foreign-language-speaking suspects, courts have provided the right to interpreters where the interpreters would aid the suspect's understanding in order to protect the suspect's constitutional rights of confrontation, assistance of counsel, and due process. *See infra* text accompanying notes 87-111.

²² In *State v. Vasquez*, 101 Utah 444, 121 P.2d 903 (1942), the Utah court ruled that the defendant had a right to understand the proceedings:

[T]he defendant has the right to see the witness testifying against him and to hear what the witness says. Are these rights more essential, or even as essential, than the right to understand what is going on in the proceeding? Suppose a defendant were placed in a transparent compartment where he could see all that took place, yet was deprived of hearing what was said because all sound was cut off, could it be said that such a situation were less than a deprivation of the constitutional right of confrontation? The purpose of the confrontation must be to permit the defendant to be advised of the proceedings against him.

Id. at 449-50, 121 P.2d at 905.

Likewise, in *Mothershead v. King*, 112 F.2d 1004 (8th Cir. 1940), the court of appeals affirmed the suspect's right to understand the proceedings, noting that "[t]he conviction of a person whose infirmities are such that he cannot understand or comprehend the proceedings resulting in his conviction and cannot defend himself against such charges, is violative of certain immutable principles of justice." *Id.* at 1006.

²³ ARIZ. REV. STAT. ANN. § 12-242(A) (West Supp. 1983) (enacted 1982); ARK. STAT. ANN. § 43-2101.1(a) (1977) (enacted 1973); CAL. EVID. CODE § 754(b) (West Supp. 1984) (enacted 1977); COLO. REV. STAT. § 13-90-201(b) (1973) (enacted 1963); CONN. GEN. STAT. ANN. § 17-137k(a) (West Supp. 1982) (enacted 1976); DEL. CODE ANN. tit. 10, § 8907 (Supp. 1982) (enacted 1976); FLA. STAT. ANN. § 90.6063(2) (West Supp. 1983) (enacted 1980); GA. CODE ANN. § 99-4002 [24-9-101] (a) (Supp. 1982) (enacted 1974); ILL. ANN. STAT. ch. 110, § 8-1402 (Smith-Hurd Supp. 1983) (enacted 1982); IOWA CODE ANN. § 622B.2 (West Supp. 1982) (enacted 1980); KAN. STAT. ANN. § 75-4352 (Supp. 1982) (enacted 1972); KY. REV. STAT. § 30A-410 (1980) (enacted 1976); LA. REV. STAT. ANN. § 15-270(A) (West 1981) (enacted 1968); ME. REV. STAT. ANN. tit. 5, § 48(2)(A) (Supp. 1983) (enacted 1977); MD. ANN. CODE art. 27, § 623A (1982) (enacted 1968); MASS. ANN. LAWS ch. 221, § 92A (Law. Co-op. Supp. 1983) (amended 1978); MICH. STAT. ANN. § 28.1256(1) (Callaghan 1978 & Supp. 1983) (enacted 1955); MINN. STAT. ANN. § 611.32 (West Supp. 1984) (enacted 1969); MISS. CODE ANN. § 13-1-16 (Supp. 1983) (enacted 1972); MO. ANN. STAT. § 546.035(2) (Vernon Supp. 1984) (enacted 1965); MONT. CODE ANN. § 49-4-503(1) (1983) (enacted 1979); NEB. REV. STAT. § 25.2403 (1979) (enacted 1973); NEV. REV. STAT. § 50.051 (1979) (enacted 1979); N.H. REV. STAT. ANN. § 521-A-2 (Supp. 1979) (enacted 1977); N.M. STAT. ANN. § 38-9-3 (Supp. 1983) (enacted 1979); N.Y. JUD. LAW § 390 (McKinney 1983) (enacted 1972); N.C. GEN. STAT. § 8B-2 (1981) (enacted 1981); N.D. CENT. CODE § 28-33-02(1) (Supp. 1983) (enacted 1979); OHIO REV. CODE ANN. § 2311.14(A) (Baldwin 1982) (enacted 1973); OKLA. STAT. ANN. tit. 22, § 1278(a) (West 1958) (enacted 1957); OKLA. STAT. ANN. tit. 63, § 2409(A) (West Supp. 1983) (enacted 1982); R.I. GEN. LAWS § 8-5-8 (1969) (enacted 1968);

The constitutional rights guaranteed by the fifth and sixth amendments must be protected at other stages of the criminal process. All suspects have the same right to understand the proceedings, but deaf suspects have a physical inability to understand criminal proceedings without the aid of a sign language interpreter. Because the Constitution grants all criminal suspects, deaf and hearing, the same guarantees of justice and fairness, criminal justice officials must protect deaf suspects' rights to understand and participate in criminal proceedings while under arrest, while standing trial, and while incarcerated.

A. PROTECTING DEAF SUSPECTS' RIGHTS UPON ARREST

Police officers face several problems when they question, arrest, or take into custody a deaf person. They must administer *Miranda* warnings fully and effectively, in accordance with the United States Supreme Court's decision in *Miranda v. Arizona*.²⁴ If they want to question deaf suspects, they must establish communication. If they press charges, they must inform deaf suspects of the nature and cause of the accusation.²⁵ Because deaf suspects are physically unable to understand spoken *Miranda* warnings and spoken questions, police officers must provide sign language interpreters²⁶ upon the arrest, questioning, and arraignment of deaf suspects.

Miranda v. Arizona dictates that suspects "must be adequately and effectively apprised of [their] rights" to permit them the full opportunity to exercise the right to remain silent.²⁷ The warning is essential to en-

S.D. CODIFIED LAWS ANN. § 19-3-10(2) (1979) (enacted 1974); TENN. CODE ANN. § 24-1-103(b)(1) (Supp. 1983) (enacted 1981); TEX. CODE CRIM. PROC. ANN. art. 38.31(a) (Vernon Supp. 1982) (enacted 1979); VA. CODE § 19.2-164.1 (1983) (enacted 1982); WASH. REV. CODE ANN. § 2.42.030 (Supp. 1983) (enacted 1973); W. VA. CODE § 57-5-7(a) (Supp. 1983) (enacted 1982); WIS. STAT. ANN. § 885.37 (West Supp. 1983) (enacted 1975); WYO. STAT. § 5-1-109(a) (Supp. 1983) (enacted 1979).

Five other states provide for the discretionary appointment of an interpreter at the criminal trial of a deaf defendant: ALA. CODE § 12-21-131 (1975) (enacted 1965); HAWAII REV. STAT. § 606-9 (1976); S.C. CODE ANN. § 15-27-110 (Law. Co-op. 1976) (enacted 1962); UTAH CODE ANN. § 77-35-15(b) (1982) (enacted 1953); VT. R. CRIM. P. 28 (1983) (enacted 1973).

²⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Miranda*, the United States Supreme Court held that officers interrogating suspects after they have been taken into custody must inform them of their constitutional rights: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444. Further, the Court indicated throughout its opinion that the warnings must be full and effective. *Id.* at 444, 479.

²⁵ U.S. CONST. amend. VI, *supra* note 1.

²⁶ Although some authorities use written transcription to inform deaf suspects of their *Miranda* rights and to question deaf suspects, this method of communication is inadequate. See *supra* note 11; see also *infra* note 46 and accompanying text.

²⁷ *Miranda*, 384 U.S. at 467.

sure that suspects know of their privilege against self-incrimination.²⁸ Suspects who do not understand English must be given a translation of the *Miranda* warnings that they can understand. The problem facing deaf suspects, therefore, is twofold: they must receive a translation of the *Miranda* warnings and they must obtain an adequate—that is, full and effective—understanding of the warnings.

Criminal suspects who speak only in a foreign language face similar problems. While courts have examined the failure of police officers to communicate full and effective *Miranda* warnings to deaf suspects in particular cases,²⁹ they have not directly confronted any failure to understand *Miranda* warnings in cases involving foreign-language-speaking suspects. In *People v. Wong*,³⁰ a California court noted that the Chinese-speaking defendant “was properly advised of his *Miranda* rights and that he voluntarily waived them, and there is nothing in the record indicating that [the defendant] did not understand the admonitions given.”³¹ In none of three other cases involving foreign-language-speaking suspects did a court conclude that the suspect failed to understand *Miranda* warnings.³²

Several states recently have recognized by statute that deaf criminal suspects need sign language interpretation to understand *Miranda* warnings fully and effectively and to be adequately informed of the nature and cause of the accusation.³³ Fifteen states now provide deaf sus-

²⁸ The *Miranda* Court asserted:

The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. . . . [A] warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

Id. at 468-69. Although giving an adequate warning is not “so simple” when the suspect is deaf, the Court implies that an adequate warning is only one that informs the suspect.

²⁹ See *Kiddy v. City of Oklahoma City*, 576 P.2d 298, 301 (Okla. 1978); *State v. Mason*, 53 Or. App. 811, 819, 633 P.2d 820, 826 (1981); see also *infra* text accompanying notes 38-55.

³⁰ 35 Cal. App. 3d 812, 111 Cal. Rptr. 314 (1973).

³¹ *Id.* at 825, 111 Cal. Rptr. at 324.

³² *Tertrou v. Sheriff*, 89 Nev. 166, 509 P.2d 970 (1973) (interrogating officer took interpreter who interpreted *Miranda* warnings to defendant; statements were admissible); *People v. Guerrero*, 454 N.Y.S.2d 492, 114 Misc. 2d 635 (1982) (court reversed defendant's conviction because the State failed to notify the defendant of its intention to offer a statement given by the Spanish-speaking defendant after officers delivered *Miranda* warnings in English; the court did not discuss whether the defendant understood the warnings or whether the statement was admissible); *State v. Lavaris*, 32 Wash. App. 769, 649 P.2d 849 (1982) (confessional statements made before officers gave interpreted *Miranda* warnings to Spanish-speaking defendant did not taint open confession made after the interpreted *Miranda* warnings).

³³ The North Carolina statute, one of the few state interpreting laws that sets forth the

pects with a sign language interpreter upon arrest, thereby protecting the constitutional right to be informed of the nature and cause of the accusation.³⁴ Three states require police officers to procure an interpreter specifically to deliver *Miranda* warnings to deaf suspects.³⁵ Eight states require that statements obtained by questioning deaf suspects without a sign language interpreter present be excluded from evidence at a criminal trial.³⁶ Ten states mandate the appointment of a sign language interpreter when a grand jury examines deaf suspects.³⁷

Even in those states that require the police to make sign language interpreters available, police officers do not always locate interpreters

constitutional rights of deaf suspects during arrest and interrogation, clearly protects deaf suspects' rights:

[T]he arresting officer shall immediately procure a qualified interpreter from the appropriate court for any interrogation, warning, notification of rights, arraignment, bail hearing or other preliminary proceeding, but no arrestee otherwise eligible for release on bail . . . shall be held in custody pending the arrival of an interpreter. No answer, statement or admission taken from the deaf person without a qualified interpreter present and functioning is admissible in court for any purpose.

N.C. GEN. STAT. § 8B-2(d) (1981) (enacted 1981).

³⁴ ARIZ. REV. STAT. ANN. § 12-242(C) (West Supp. 1983); ARK. STAT. ANN. § 5-715.1(c) (Supp. 1983); COLO. REV. STAT. § 13-90-201(d) (1973); FLA. STAT. ANN. § 901.245 (West Supp. 1983); KAN. STAT. ANN. § 75-4351(e) (1977); KY. REV. STAT. § 30A.400(2) (1980); MINN. STAT. ANN. § 611.32(2) (West Supp. 1984); MONT. CODE ANN. § 49-4-503(3)(b) (1983); N.H. REV. STAT. ANN. § 521-A:3 (Supp. 1979); N.C. GEN. STAT. § 8B-2(d) (1981); N.D. CENT. CODE § 28-33-02(2) (Supp. 1983); OKLA. STAT. ANN. tit. 63, § 2410(A) (West Supp. 1983); OR. REV. STAT. § 133.515(1) (1981); S.D. CODIFIED LAWS ANN. § 19-3-10(4) (1979); TENN. CODE ANN. § 24-1-103(b)(3) (Supp. 1983).

The Georgia interpreting statute allows the arresting officer to take a statement in *writing* and to interrogate the deaf suspect in *writing*; the arresting officer must preserve the written questions and answers for review. GA. CODE ANN. § 99-4002 [24-1-5] (Supp. 1982). The Florida statute allows the arresting and interrogating officers to question the deaf suspect in writing if an interpreter cannot be located. FLA. STAT. ANN. § 901-245 (West Supp. 1983).

³⁵ ARIZ. REV. STAT. ANN. § 12-242(C) (West Supp. 1983); N.C. GEN. STAT. § 8B-2(d) (1981); TEX. CODE CRIM. PROC. ANN. art. 38.22(d) (Vernon Supp. 1982).

³⁶ ARK. STAT. ANN. § 5-715.1(c) (Supp. 1983); CAL. EVID. CODE § 754(f) (West Supp. 1984); KY. REV. STAT. § 30A.400(3) (1980); MONT. CODE ANN. § 49-4-503(3)(c) (1983); N.C. GEN. STAT. § 8B-2(d) (1981); OKLA. STAT. ANN. tit. 63, § 2410(A) (West Supp. 1983); TENN. CODE ANN. § 24-1-103(b)(3) (Supp. 1983); TEX. CODE CRIM. PROC. ANN. art. 38.22(3)(d) (Vernon Supp. 1982).

³⁷ ARIZ. REV. STAT. ANN. § 12-242(A) (West Supp. 1983); FLA. STAT. ANN. § 90-6063(2) (West Supp. 1983); GA. CODE ANN. § 99-4002 [24-9-101](a) (Supp. 1982); KAN. STAT. ANN. § 75-4351(a) (1977); KY. REV. STAT. § 30A.410(1) (1980); MONT. CODE ANN. § 49-4-503(1) (1983); OKLA. STAT. ANN. tit. 63, § 2409(A) (West Supp. 1983); WASH. REV. CODE ANN. § 2.42.030 (Supp. 1983); W. VA. CODE § 57-5-7(a) (Supp. 1983); WYO. STAT. § 5-1-109(a) (Supp. 1983).

In addition, three states mandate the appointment of an interpreter in grand jury proceedings when any witness is deaf: COLO. REV. STAT. § 13-90-201(a) (1973); PA. R. CRIM. P. 209; S.D. CODIFIED LAWS ANN. § 19-3-10(1) (1979).

Two states allow the discretionary appointment of interpreters in grand jury proceedings. Ohio permits interpreters "where needed," OHIO R. CRIM. P. 6(e). Vermont's similar rule provides that an interpreter may be present, VT. R. CRIM. P. 6(e).

after arresting deaf suspects. *Kiddy v. City of Oklahoma City*³⁸ and *State v. Mason*³⁹ highlight several of the problems arising when police officers arrest deaf suspects. *Kiddy* upheld the statutory right of deaf suspects in Oklahoma to an interpreter upon arrest.⁴⁰ *Mason* upheld the right of deaf suspects to understand *Miranda* warnings.⁴¹

In *Kiddy*, the Oklahoma Supreme Court observed the consistent failure of municipal police officers to provide deaf suspects with interpreters for arrest, *Miranda* warnings, and arraignment.⁴² Because the Oklahoma interpreting statute mandates that interpreters be provided upon arrest,⁴³ the court granted injunctive relief against the police department on behalf of George Kiddy⁴⁴ and the Oklahoma Association of the Deaf and instructed the police agency to comply with the terms of the statute.⁴⁵ The court noted that without interpreters, "deaf-mutes, because of their inability to appreciate all their rights, and communicate with those able to help them, may be required to remain incarcerated for a longer period than other individuals not so impaired."⁴⁶

In *State v. Mason*, the Oregon Court of Appeals excluded from trial

³⁸ 576 P.2d 298 (Okla. 1978).

³⁹ 53 Or. App. 811, 633 P.2d 820 (1981); *see also* *State v. Mason*, 56 Or. App. 164, —, 641 P.2d 1139, 1141 (1982) (statements obtained in violation of *Miranda* need not be excluded from evidence in a probation revocation hearing).

⁴⁰ *Kiddy*, 576 P.2d at 300-01.

⁴¹ *Mason*, 53 Or. App. at 821-22, 633 P.2d at 826-27.

⁴² The court noted the allegations, verified by affidavit, that "numerous similarly situated individuals" were denied the benefits of the Oklahoma interpreting statute: "Indeed, the uncontroverted, verified petition asserts that such deprivation of deaf-mutes' rights amounted to a continuous course of conduct on the part of the City of Oklahoma City and its agents and employees. . . . [W]e must accept the verified allegations as true." *Kiddy*, 576 P.2d at 301.

⁴³ The Oklahoma statute considered by the court in *Kiddy* provided:

Every deaf-mute person who is charged with the commission of a criminal offense shall be entitled to the assistance and services of a qualified interpreter. Prior to questioning upon arrest and all subsequent proceedings, the court shall procure a qualified interpreter to assist such persons in communications with officers of the court.

OKLA. STAT. ANN. tit. 22, § 277, replaced by OKLA. STAT. ANN. tit. 63, §§ 2407-2415 (West Supp. 1983).

"When a deaf-mute is arrested he shall be entitled to the assistance of an interpreter. Evidence by the state relating to any statement made by a deaf-mute to a law enforcement officer shall be limited solely to statements offered, elicited, or made in the presence of a qualified interpreter." OKLA. STAT. ANN. tit. 22, § 278, replaced by OKLA. STAT. ANN. tit. 63, §§ 2407-2415 (West Supp. 1983).

⁴⁴ The court noted the denial of Kiddy's constitutional rights: "George Kiddy was left to languish in jail for two days after arrest and was arraigned without benefit of an interpreter and without being apprised of: the charges against him, his right to counsel, the right to remain silent, and the right to be released on bail." *Kiddy*, 576 P.2d at 301.

⁴⁵ *Id.* at 300.

⁴⁶ *Id.* at 301. The court also noted that police officers, consistent with the statute, could take deaf suspects into physical custody before providing an interpreter; the statute requires an interpreter only "within a reasonable time after arrest." *Id.*

statements obtained from a deaf suspect when the police detective failed to communicate adequately the *Miranda* warnings to the deaf suspect.⁴⁷ The Oregon interpreting statute⁴⁸ provides for interpreters upon arrest, but it does not include a statutory exclusionary rule. Police detectives repeatedly questioned Dale Mason over a two-week period prior to his arrest.⁴⁹ The police provided four different interpreters, but none of the interpreters "was able to communicate adequately in defendant's own language the concepts contained in *Miranda* warnings."⁵⁰ Concluding that the defendant did not understand his *Miranda* warnings,⁵¹ the court excluded incriminating statements from evidence.⁵²

As the *Mason* case shows, sign language interpretation of the *Miranda* warnings does not ensure that the warnings will be full and effective. Deaf suspects will receive varied and inadequate impressions of the *Miranda* warnings through sign language interpretation because sign language varies widely in vocabulary and style.⁵³ Moreover, deaf sus-

⁴⁷ *State v. Mason*, 53 Or. App. 811, 821, 633 P.2d 820, 826 (1981). Dale Mason was both deaf and mute.

⁴⁸ OR. REV. STAT. § 133.515 (1981).

⁴⁹ 53 Or. App. at 813-17, 633 P.2d at 822-24.

⁵⁰ *Id.* at 821 & n.3, 633 P.2d at 826 & n.3. The second of four interpreters spent 30 minutes with Mason in an interview room at police headquarters attempting to communicate the *Miranda* warnings. The police then attempted to have Mason sign the *Miranda* form but the interpreter said Mason did not understand his *Miranda* rights. The detectives allowed the interpreter to ask defendant directly if he wanted a lawyer, to which Mason responded, "Yes. Better lawyer, I think. Better lawyer." *Id.* at 814, 633 P.2d at 822.

At a later interview, police detectives visited Mason at his home and conducted an interrogation without the use of an interpreter by using written transcription.

Later, a third interpreter spent 10 minutes attempting to interpret the *Miranda* warnings to Mason before police administered a polygraph test. During the polygraph test, interrogators strapped Mason in a chair and "told [him] not to move or to use his hands and that his answers to questions had to be verbalized." *Id.* at 816, 633 P.2d at 823. This interrogation prevented Mason from using sign language entirely because his hands were not free.

At the final interview, a fourth interpreter spent no time interpreting the *Miranda* warnings at all. Mason then made the incriminating statements and the police recorded "the interpreter's version of what defendant [was] reported to have said." *Id.* at 817, 633 P.2d at 824.

⁵¹ The trial court reasoned that "[t]o give *Miranda* warnings to this defendant so as to make an intelligent waiver possible would require an interpreter familiar with and competent in his primary language. This he did not have." *Id.* at 822 n.3, 633 P.2d at 827 n.3. Mason also could have benefited from an R.S.C. interpreter (Reverse Skills Interpreter). *See supra* note 12.

⁵² *See Mason*, 53 Or. App. at 821, 633 P.2d at 827. The court also determined that police detectives had detained Mason in *custody* at the police station at the time he made the incriminating statements; such detention is a prerequisite for exclusion of the statements under Oklahoma law. *Id.* at 821, 633 P.2d at 826.

⁵³ After viewing an experimental film version of the *Miranda* warnings developed by the National Association of the Deaf in consultation with linguistic experts, three highly educated educators of the prelingually deaf gave widely diverse and substandard interpretations of the warnings:

I. It is about 3 choices you would have when you are arrested by a policeman. 3

pects may not be able to comprehend the legal meaning of the *Miranda* warnings—the “right to remain silent”—through sign language interpretation.⁵⁴ Written or printed forms of the *Miranda* warnings are ineffective because many deaf persons are functionally illiterate in the English language.⁵⁵

choices are: 1. not to sign anything and keep quiet, 2. make a confession to sign your name - if you change my mind about my confession, I must refuse to sign my name and 3. get a lawyer and that I should not worry about money to pay for lawyers fee. I can get them for free.

II. He said, “Suppose you had a police interrogating you” — You have 3 choices. 1. keep quiet. 2. get a lawyer — can be free of charge if you have no money. 3. If confession is desired, you can confess some and hold back some information. You have to sign a form called “CONFESSION FORM” (or whatever).

III. He said: If you get caught by a police you will have three choices. One is - you don't have to talk, just be silent even if police asking you some questions. Two - you can get a lawyer for some advice. Third - you may tell or admit all the list you have done, then you change mind; you have right to change your mind.

Cunningham, *The Deaf Suspect*, BUFFALO POLICE DEP'T LEGAL BULL., Mar. 16, 1981, at 6-7.

⁵⁴ Many deaf criminal suspects may have only limited vocabularies in American Sign Language (A.S.L.). Some may not know the particular sign for the concept of “legal right.” Although finger-spelling may be used for the word “right” in place of a sign, the deaf person will not understand the meaning of the word unless he or she already understands the concept of “legal right.” In the translations of the experimental film version of the *Miranda* warnings, *supra* note 53, the deaf educators interpreted the “three rights” contained in the warnings as “three choices.”

⁵⁵ See *Mason*, 53 Or. App. at 813-14, 821-22 n.3, 633 P.2d at 822-23, 826 n.3.

The standard written form of *Miranda* warnings is above the sixth grade reading comprehension level. Only 10% of the prelingually deaf (those deaf at birth or deaf before the development of language skills) can read above the sixth grade reading level. Thus, 90% of the prelingually deaf cannot fully comprehend the standard written *Miranda* warnings. Cunningham, *supra* note 53, at 3.

More of the deaf can understand another written form of the *Miranda* warnings, at the second grade reading level, but it omits the legal content of the warning and the substance of the constitutional rights protected. While the sixth grade reading level version conveys “the right to talk to a lawyer,” the second grade reading level version merely communicates to deaf suspects that they can talk to an attorney if they desire. Compare the two versions:

Sixth Grade Version

1. You have the right to remain silent.
2. Anything you say can and will be used against you in Court.
3. You are not being promised anything to talk to us and no threats are or will be made against you.
4. You have the right to talk to a lawyer and have him present now or at any time during questioning. If you proceed to answer questions without a lawyer the questioning will stop if you should change your mind and request the presence of a lawyer.
5. If you cannot afford a lawyer, one will be furnished without charge before any questioning if you so desire.

Second Grade Version

1. You don't have to talk to me.
2. We will use the things you tell me in Court. We will use them to decide if you did something wrong or not.
3. We will not give you anything for talking. We will not do anything to you if you don't talk.
4. You can talk to a lawyer if you want. You can have a lawyer here while you talk. If you start to talk and then decide you want a lawyer, we will get one.
5. If you don't have the money for a lawyer, we will get one for you. We can get the lawyer before you start talking.

Cunningham, *supra* note 53, at 4.

Recognizing the inadequacies of the interpreted version or the printed form of the *Miranda* warnings, some interpreters simply instruct deaf suspects to wait for an attorney or question deaf suspects directly to determine whether they want an attorney.⁵⁶ While this method may protect deaf suspects from an illegal interrogation, it does not ensure that deaf suspects will be apprised of their right to remain silent, as the United States Supreme Court envisioned in *Miranda*.⁵⁷

Miranda warnings cannot be full and effective for most deaf criminal suspects unless the warnings are interpreted adequately through sign language. In *Mason*, the Oregon court used an exclusionary rule to guarantee adequate *Miranda* warnings to deaf suspects through sign language interpretation.⁵⁸ Although a few states provide interpreters upon arrest,⁵⁹ and others mandate an exclusionary rule for non-interpreted interrogations,⁶⁰ deaf suspects' right to be informed of the *Miranda* warnings fully and effectively must be protected in all states.⁶¹ The legal system can guarantee a translation, but deaf educators, interpreters, linguists, and the legal system must work together to provide deaf criminal suspects with a full and effective understanding of the *Miranda* warnings.

B. PROTECTING DEAF SUSPECTS' RIGHT TO THE ASSISTANCE OF COUNSEL

After police arrest deaf criminal suspects and adequately inform them of the *Miranda* rights, deaf suspects may exercise those constitutional rights by requesting an attorney. The right to an attorney guaranteed by the sixth amendment means the right to effective assistance of counsel.⁶² To represent a deaf suspect effectively, the appointed attorney must establish and maintain communication with the client. To do

⁵⁶ See *supra* note 50.

⁵⁷ *Miranda*, 384 U.S. at 444.

In Chicago in early 1982, city policemen learned a hard lesson about the nature of the deaf. Two policemen observed several teenagers on a street corner signing with each other in sign language, using bold and articulated gestures which the policemen assumed were obscene. As the police started to approach the boys to investigate, the boys ran away. The policemen suspected trouble from the fleeing boys, chased them, accosted them, and struck two of them. The officers arrested the group for disorderly conduct. Later, the police learned from parents that the boys were deaf and that the "obscene" gestures were the boys' means of communicating. The arresting officers had assumed the boys were simply members of a street gang. One parent responded, "The only gang [they're] part of is a deaf-mute crowd. . . . What makes me so mad is that they didn't even have the sense to bring in an interpreter so the boys could explain themselves." Royko, *Deaf Ear of the Law*, Chi. Sun-Times, April 4, 1982, at 2.

⁵⁸ 53 Or. App. at 821, 633 P.2d at 826.

⁵⁹ See *supra* note 34.

⁶⁰ See *supra* note 36.

⁶¹ See *infra* MODEL INTERPRETING STATUTE § 4(a).

⁶² *Miranda*, 384 U.S. at 470-73; see also *Escobedo v. Illinois*, 378 U.S. 478, 488 (1964).

so, the attorney must use an interpreter for conferences with the deaf client at all stages of the criminal process. Four states presently provide sign language interpretation for conferences between deaf suspects and their attorneys,⁶³ at least at some stages of the criminal process.

Courts have not considered whether a sign language interpreter is necessary to ensure the effective assistance of counsel for deaf suspects. In cases involving foreign-language-speaking criminal suspects, courts have differed as to whether criminal suspects have the right to interpreted conferences with their attorneys at various stages of the criminal process. The courts all recognized, however, that judges must consider the existence of communication between the suspect and the attorney in evaluating whether the suspect's right to the assistance of counsel was protected.

In *Parra v. Page*,⁶⁴ the Oklahoma Court of Criminal Appeals set aside the defendant's conviction in the lower court where the Spanish-speaking defendant appeared at arraignment and pleaded guilty without the benefit of a Spanish interpreter.⁶⁵ Although the court appointed an attorney on the day of the arraignment, the attorney was not able to communicate with Parra to formulate a defense or even to discover the facts. In setting aside the conviction, the court concluded that Parra did not understand the proceeding and had no effective assistance of counsel.⁶⁶

In *United States ex rel. Navarro v. Johnson*,⁶⁷ involving a Spanish-speaking defendant, the District Court for the Eastern District of Pennsylvania ordered an evidentiary hearing to consider "whether or not the possible breakdown in communication between petitioner and his counsel . . . affected petitioner's constitutional rights to effective counsel, due process, and/or confrontation."⁶⁸ The district court expressed concern about "whether petitioner could comment to his lawyer about the witnesses' testimony, point out inconsistencies with the facts if they oc-

⁶³ ARIZ. REV. STAT. ANN. § 12-242(A) (West Supp. 1983) (possibly restricting interpreted sessions to conferences in court or immediately prior to trial because the language of the statute provides for an interpreter "to interpret preparations with the deaf person's attorney"); KY. REV. STAT. § 30A.425 (1980) (broadly defining the duties of the interpreter to include interpreting "any and all meetings and conferences between client and his attorney" during court and court-related proceedings); OKLA. STAT. ANN. tit. 63, § 2409(A) (West Supp. 1983) (requiring the court to appoint a qualified interpreter "to assist in preparation with counsel"); TEX. CODE CRIM. PROC. ANN. art. 38.31(b) (Vernon Supp. 1982) (providing an interpreter for communications between the deaf suspect and counsel).

⁶⁴ 430 P.2d 834 (Okla. Crim. App. 1967). *Parra* was a *habeas corpus* proceeding involving a Spanish-speaking suspect.

⁶⁵ *Id.* at 836, 838.

⁶⁶ *Id.* at 837.

⁶⁷ 365 F. Supp. 676 (E.D. Pa. 1973).

⁶⁸ *Id.* at 681.

curred and make suggestions as to questions to be asked."⁶⁹ Without ruling on the constitutional issue of the suspect's right to effective assistance of counsel,⁷⁰ the district court reviewed the rights of non-English-speaking criminal defendants in a two-page footnote to the case,⁷¹ *inter alia*, to underscore the constitutional importance of the ability of the accused "to consult with his lawyer with a reasonable degree of rational understanding."⁷²

In *Cervantes v. Cox*,⁷³ the Court of Appeals for the Tenth Circuit held that "[t]he existence of a language barrier between counsel and client is merely one circumstance probing the questions of whether the accused has been adequately represented by counsel and has voluntarily and knowingly entered his plea."⁷⁴ Although Cervantes claimed a language barrier, the court found that he had a sufficient knowledge of English "to be completely aware of all the proceedings."⁷⁵

Parra supports a *per se* right of deaf suspects to have a sign language interpreter present to enable suspects to understand and communicate with counsel.⁷⁶ While not finding an absolute right to interpreted conferences between attorney and client, *Navarro* and *Cervantes* note that inadequate communication between criminal suspects and their attorneys may deny the suspects their right to assistance of counsel.⁷⁷ Deaf suspects thus do not have a *per se* right to an interpreter under the guarantee of effective assistance of counsel. They must have an interpreter,⁷⁸

⁶⁹ *Id.* at 683.

⁷⁰ The district court held that the issue of effective assistance of counsel was moot because the defendant made no complaint about his inability to confer with his attorney. *Id.*

⁷¹ *Id.* at 681-83 n.3. The district court spoke approvingly of a proposed congressional bill to establish a bilingual court system in federal jurisdictions with large non-English-speaking populations.

⁷² *Id.* at 682 n.3 (quoting *Dusky v. United States*, 362 U.S. 402 (1962) (per curiam); also citing *United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970)).

⁷³ 350 F.2d 855 (10th Cir. 1965). Cervantes, a Spanish-speaking defendant who also spoke some English, brought a *habeas corpus* proceeding challenging the constitutionality of his state conviction. The Court of Appeals for the Tenth Circuit upheld the conviction, ruling that Cervantes had no constitutional right to an interpreter to help facilitate the right to assistance of counsel. *Id.* at 855.

⁷⁴ *Id.*

⁷⁵ *Id.* at 855-56.

⁷⁶ *Parra*, 430 P.2d at 837.

⁷⁷ *Cervantes*, 350 F.2d at 855-56; *Navarro*, 365 F. Supp. at 683.

⁷⁸ Interpreting at attorney-client conferences during trial raises several issues. If the guarantee of effective assistance of counsel means that the deaf suspect should be provided with an interpreter for conferences with the attorney during trial, then two interpreters may be required: one to interpret the testimony and one to interpret conferences with the attorney. Alternatively, the trial judge could order breaks in the course of the trial for such conferences.

The *Navarro* court's analysis of the right to effective assistance of counsel at trial also should apply to pre-trial conferences between the suspect and the attorney because the well-prepared attorney always should be aware of the client's version of the facts. Furthermore, an attorney may help protect the suspect's rights at interrogation.

however, when they show a failure to understand communications with counsel.⁷⁹

When the criminal justice system makes interpreters available for conferences between deaf suspects and attorneys, courts will have to face the question of the confidentiality of the interpreted conference. Although all criminal suspects are entitled to the benefits of the attorney-client privilege,⁸⁰ it is unclear whether deaf criminal suspects enjoy the attorney-client privilege for conversations when an interpreter is present. Deaf suspects will not give their attorneys a full and honest disclosure without an attorney-client privilege that also guarantees the confidentiality of the interpreter. Fourteen states protect by statute the confidentiality of interpreted conversations that would be privileged if the interpreter were not present.⁸¹ Although the courts have never ruled

⁷⁹ Deaf criminal suspects may face a difficult burden in showing their failure to understand. Some courts have held that deaf suspects may "understand" the proceedings through written transcription.

In *Turner v. State*, 429 So. 2d 645 (Ala. Crim. App. 1982), an Alabama court affirmed the conviction of a deaf-mute defendant who appeared at an arraignment without an interpreter. The deaf defendant communicated with the judge entirely by written transcription and nodding his head. Citing *Todd v. State*, 380 So. 2d 370 (Ala. Crim. App. 1980), for the proposition that a deaf-mute may testify at trial through written questions and answers, the *Turner* court extended the holding in *Todd* to allow a deaf defendant to be apprised of the proceedings at arraignment through written transcription. *Turner*, 429 So.2d at 647. The court reasoned: "All the law contemplates is that the accused know and understand the nature of the accusation he is called upon to answer." *Id.* The court noted that where the suspect fails to request an interpreter under the state interpreting statute (ALA. CODE § 12-21-131 to 12-21-134 (1975) (enacted 1965)), how the constitutional requirement that the suspect understand the accusation is satisfied is immaterial, "so long as it is actually satisfied." *Id.*

It is common for a deaf person, or anyone conversing in an unfamiliar language, to nod his or her head in agreement without fully understanding the nature of the assent. Thus, interpreters and lawyers should ascertain a "yes" or "no" answer rather than a nodding of the head.

Although written transcription is inadequate for the purposes of a lengthy criminal trial, *see supra* note 11, it may serve to inform a particular deaf suspect of the proceedings. The *Turner* court correctly stressed that the suspect actually must understand the proceedings. *Turner* errs, however, in placing the burden on the suspect to request an interpreter or, by failing to request one, to waive the right. *See infra* MODEL INTERPRETING STATUTE §§ 3(b), 5 for a solution to the waiver problem.

⁸⁰ Under the attorney-client privilege, all communications made to an attorney by the client seeking legal advice are permanently protected from disclosure by the client and the attorney unless the privilege is waived. 8 J. WIGMORE, EVIDENCE § 2292, at 554 (McNaughton rev. 1961).

⁸¹ ARIZ. REV. STAT. ANN. § 12-242(E) (West Supp. 1983); FLA. STAT. ANN. § 90.6063(7) (West Supp. 1983); IOWA CODE ANN. § 622B-6 (West Supp. 1982); KY. REV. STAT. § 30A.430 (1980); MINN. STAT. ANN. § 611.33(4) (West Supp. 1984); NEV. REV. STAT. § 50.053 (1979); N.H. REV. STAT. ANN. § 521-A:11 (Supp. 1979); N.M. STAT. ANN. § 38-9-10 (Supp. 1983); N.C. GEN. STAT. § 8B-5 (1981); N.D. CENT. CODE § 28.33-06 (Supp. 1983); OKLA. STAT. ANN. tit. 63, § 2414 (West Supp. 1983); TENN. CODE ANN. § 24-1-103(f) (Supp. 1983); VA. CODE § 19.2-164.1 (1983); WIS. STAT. ANN. § 905.015 (West Supp. 1983).

The Kentucky interpreting statute's section on privilege is one of the most well-written: Every person who acts as an interpreter in circumstances involving the arrest, police

on this issue,⁸² the confidentiality of interpreted conversations should be protected, and states without such protections should enact statutes providing for interpreter confidentiality.⁸³

The assistance of counsel cannot be effective for deaf suspects unless suspects have an opportunity to confer with their attorneys through a sign language interpreter. A few states provide for interpreted conferences between deaf suspects and attorneys,⁸⁴ but the right to effective assistance of counsel must be protected by statute in all states.⁸⁵ Furthermore, attorneys must be informed of the special problems confronting deaf suspects in the criminal justice system.⁸⁶

C. PROTECTING DEAF SUSPECTS' RIGHT TO CONFRONT WITNESSES AT TRIAL

The sixth amendment to the United States Constitution guarantees to all criminal suspects the right to confront the witnesses testifying against them.⁸⁷ Hearing suspects can exercise this constitutional right when prosecutors present witnesses in open court with the suspect present. In contrast, deaf defendants cannot exercise their right of confrontation without a sign language interpreter to help them understand the testimony of the witnesses.

The right of confrontation guaranteed in the sixth amendment protects the right of criminal suspects to be physically and mentally present when the prosecution presents adverse testimony.⁸⁸ In *Ohio v. Roberts*,⁸⁹

custody or other stage in a criminal, civil, or other matter of a [deaf] person . . . shall not be examined as a witness regarding conversations between that person and his attorney, when such conversations would otherwise be subject to the attorney-client privilege, without the consent of that person.

KY. REV. STAT. § 30A.430 (1980).

The interpreter does not have a *per se* privilege not to reveal interpreted conversations. He should have the privilege, however, not to reveal *privileged* conversations.

⁸² In *Public Defender for Anne Arundel County v. State's Attorney for Anne Arundel County*, 281 Md. 702, 381 A.2d 1153 (1978), the prosecutor summoned an interpreter before the grand jury to testify about a conversation between a deaf suspect and his attorney when the interpreter and two other persons were also present. Because the grand jury indicted the suspect without the interpreter's testimony, the court ruled the issue of interpreter confidentiality moot. *Id.* at 703, 381 A.2d at 1154.

⁸³ See *infra* MODEL INTERPRETING STATUTE § 9.

⁸⁴ See *supra* note 63.

⁸⁵ See *infra* MODEL INTERPRETING STATUTE § 4(d).

⁸⁶ See *infra* MODEL INTERPRETING STATUTE § 13(f). Law schools should develop courses dealing with the rights of the handicapped.

⁸⁷ U.S. CONST. amend. VI, *supra* note 1. The Supreme Court imposed the sixth amendment obligations on the states in *Pointer v. Texas*, 380 U.S. 400, 405 (1965), in which Justice Black wrote: "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Id.* at 405.

⁸⁸ *Baltierra v. State*, 586 S.W.2d 553, 556 (Tex. Crim. App. 1979).

the United States Supreme Court observed that "the [Confrontation] Clause envisions 'a personal examination and cross-examination of the witness in which the accused has an opportunity . . . of testing the recollection and sifting the conscience of the witness.'"⁹⁰ One state supreme court has ruled that "[t]he purpose of the confrontation must be to permit the defendant to be advised of the proceedings against him."⁹¹

To protect suspects' constitutional right of confrontation, courts have provided the right to interpreters in cases involving foreign-language-speaking suspects where interpreters would aid the suspect's understanding. In *Garcia v. State*,⁹² a Texas court ruled that the lower court abused its discretion by denying the Spanish-speaking defendant an interpreter because "[u]nless appellant was in some manner, either through his counsel or an interpreter, afforded knowledge of the testimony of the witness, the right of cross-examination could not be exercised by him."⁹³ Likewise, in *United States ex rel. Negron v. New York*,⁹⁴ the Second Circuit noted that it is "imperative that every criminal defendant—if the right to be present is to have meaning—possesses 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.'"⁹⁵ Like these foreign-language-speaking defendants, deaf defendants can be guaranteed their constitutional right to confront the witnesses only when they understand the testimony. The

⁸⁹ 448 U.S. 56 (1980).

⁹⁰ *Id.* at 63-64 (quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)).

⁹¹ *State v. Vasquez*, 101 Utah 444, 450, 121 P.2d 903, 905 (1942).

⁹² 151 Tex. Crim. 593, 210 S.W.2d 574 (Tex. Crim. App. 1948).

⁹³ *Id.* at 601, 210 S.W.2d at 580. The court also noted that "[t]he constitutional right of confrontation means something more than merely bringing the accused and the witness face to face; it embodies and carries with it the valuable right of cross-examination of the witness." *Id.*

⁹⁴ 434 F.2d 386 (2d Cir. 1970). In *Negron*, the court affirmed the relief granted in a *habeas corpus* proceeding, ruling that *Negron's* trial lacked the basic fairness required by the Due Process Clause of the fourteenth amendment. Although the trial judge provided an interpreter to translate the testimony of two Spanish-speaking witnesses for the benefit of the court and the jury, *Negron* had no interpreter to translate the testimony of the English-speaking witnesses.

⁹⁵ *Id.* at 390 (citing *Dusky v. United States*, 362 U.S. 402 (1962) (per curiam)). Judge Kaufman, writing for the Second Circuit in *Negron*, also commented:

[T]he right that was denied *Negron* seems to us even more consequential than the right of confrontation. Considerations of fairness, the integrity of the fact-finding process, and the potency of our adversary system of justice forbid that the state should prosecute a defendant who is not present at his own trial, unless by his conduct he waives that right. . . .

Not only for the sake of effective cross-examination, however, but as a matter of simple humaneness, *Negron* deserved more than to sit in total incomprehension as the trial proceeded. Particularly inappropriate in this nation where many languages are spoken is a callousness to the crippling language handicap of a newcomer to its shores, whose life and freedom the state by its criminal processes chooses to put in jeopardy.

Id. at 389-90 (citations omitted).

criminal justice system must protect deaf defendants' right to understand the testimony by providing a sign language interpreter.

Presently, thirty-nine states provide by statute for the mandatory appointment of an interpreter at the criminal trial of a deaf defendant.⁹⁶ Under most of the mandatory interpreting statutes, the court must appoint an interpreter unless the deaf defendant can adequately understand the proceedings without a sign language interpreter.⁹⁷ Another five states permit the court to appoint an interpreter at the judge's discretion.⁹⁸ These forty-four statutes contain varied procedural and substantive provisions that affect deaf suspects' constitutional rights.⁹⁹ The other six states provide little or no statutory protection at all for deaf suspects.

The states that adopted mandatory interpreting statutes showed little faith in judicial discretion in the *sua sponte* appointment of interpreters.¹⁰⁰ In states without mandatory interpreting statutes, a trial court's failure to appoint an interpreter will cause reversal of the defendant's conviction only if the trial judge abused the discretion. In *United States v. Desist*,¹⁰¹ involving a foreign-language-speaking defendant, the Court of Appeals for the Second Circuit held that there was no abuse of discretion. The trial judge could refuse to appoint an interpreter where the defendant had sufficient financial means to compensate an interpreter and had access to bilingual attorneys.¹⁰² The court noted that "the real point is guarantee of a fair trial."¹⁰³

Other courts have limited the reach of the state interpreting statutes on both procedural and substantive grounds. Courts may ignore the statutes if the failure to appoint an interpreter resulted in no prejudice,¹⁰⁴ if the suspect's lack of understanding was not caused by

⁹⁶ See *supra* note 23.

⁹⁷ See, e.g., KY. REV. STAT. § 30A-410(1)(a) (1980) (interpreter should be appointed when person has "difficulty in readily understanding or communicating" spoken words).

⁹⁸ See *supra* note 23.

⁹⁹ See *infra* text accompanying notes 142-68.

¹⁰⁰ In *Baltierra v. State*, 586 S.W.2d 553 (Tex. Crim. App. 1979), the court noted that the mandatory state interpreting statute enacted in 1961 effectively overturned *Field v. State*, 155 Tex. Crim. 137, 232 S.W.2d 717 (1950) which had allowed the deaf defendant to waive an interpreter by failing to request one. *Baltierra*, 586 S.W.2d at 557. Judge Davis disagreed in dissent, arguing instead that the "abuse of discretion test" should still apply, even against mandatory statutes. *Id.* at 559-60 (Davis, J., dissenting). The court in *Baltierra* directed trial judges to appoint interpreters, under the mandate of the statute, "when it is made known to the trial court that an accused does not speak and understand the English language." *Id.* at 559.

¹⁰¹ 384 F.2d 889 (2d Cir. 1967).

¹⁰² *Id.* at 902.

¹⁰³ *Id.*

¹⁰⁴ *Chatoff v. Public Service Commission of New York*, 60 A.D.2d 700, 400 N.Y.S.2d 390 (1977). In *Chatoff*, a case involving a deaf civil plaintiff, the court held that the absence of a

the court's failure to appoint an interpreter,¹⁰⁵ or if the suspect failed to request an interpreter within a reasonable time before trial.¹⁰⁶ Courts are more likely to find reasons not to apply even the mandatory statutes if they are convinced of the defendant's guilt.¹⁰⁷

The only constitutionally acceptable standard of review is whether the deaf suspect was able to understand the proceedings without a sign language interpreter; this is precisely the standard envisioned in the mandatory interpreting statutes.¹⁰⁸ The "abuse of discretion" standard or "fairness" test employed by some courts is not appropriate because the courts remain free to overlook a suspect's lack of understanding and consequent denial of constitutional rights. While the absence of prejudice to a civil party provides support for upholding trial court decisions,¹⁰⁹ criminal suspects deserve to have such denials reviewed under a stricter standard. As the framers of the Constitution recognized in the sixth amendment,¹¹⁰ prejudice is likely to result when a deaf defendant cannot confront adverse witnesses and cannot report possible inaccuracies in testimony. Trial courts should not deny deaf defendants the right to understand the testimony through sign language interpretation merely because the deaf defendant failed to request an interpreter.¹¹¹ The burden of coming forward with evidence of an inability to understand spoken language should be on the deaf defendant only where such inability is not obvious to the trial court.

D. PROTECTING DEAF SUSPECTS INCOMPETENT TO STAND TRIAL

Courts determining whether to provide an interpreter focus on the nature of the deaf suspect's understanding of the criminal process. In

sign language interpreter at plaintiff's hearing "did not prejudice [his] case and does not, therefore, warrant a reversal." *Id.* at 700, 400 N.Y.S.2d at 392.

¹⁰⁵ *People v. Guillory*, 178 Cal. App. 2d 854, 3 Cal. Rptr. 415, *aff'd sub nom.* *Guillory v. Wilson*, 402 F.2d 34 (9th Cir. 1968). In *Guillory*, involving a deaf suspect's malfunctioning hearing aid, the court put the burden on the deaf defendant to bring batteries or request the court to change seating arrangements at trial to enable the defendant to better understand the testimony. Reluctant to require the trial judge to make any special effort, the court held: "No objection was made to proceeding further or effort made to change the seating arrangements. . . . It is quite apparent that any difficulty defendant may have had in following the proceedings was self-induced." *Id.* at 859, 3 Cal. Rptr. at 419.

¹⁰⁶ *Field v. State*, 155 Tex. Crim. 137, 232 S.W.2d 717 (1950). On rehearing, the court in *Field* made clear that the deaf-mute defendant could waive the constitutional right to confront the witnesses by the failure to request the services of an interpreter within a reasonable time. *Id.* at 140, 232 S.W.2d at 718.

¹⁰⁷ In *Field*, the court heard direct testimony by a witness, the victim, that the defendant shot at her. *Id.* at 138, 232 S.W.2d at 718; *see also infra* note 167.

¹⁰⁸ *See infra* MODEL INTERPRETING STATUTE § 3(b); *see also supra* note 23.

¹⁰⁹ *See supra* note 104.

¹¹⁰ U.S. CONST. amend. VI, *supra* note 1.

¹¹¹ *See infra* MODEL INTERPRETING STATUTE § 3(a)-(b).

most cases, a sign language interpreter can aid deaf suspects to reach a full understanding of the proceedings. In some cases, however, deaf suspects are completely unable to communicate even with the aid of a sign language interpreter. Because the Constitution guarantees to the defendant in criminal prosecutions the rights to "be informed of the nature and cause of the accusation" and to the "assistance of counsel,"¹¹² deaf suspects unable to communicate may not stand trial.¹¹³

Although incompetent suspects are incapable of standing trial, they also may not be committed to mental institutions "simply on account of [their] incompetency to stand trial on the charges . . ." ¹¹⁴ In *Jackson v. Indiana*,¹¹⁵ the United States Supreme Court held that defendants found unfit to stand trial must be either civilly committed or released.¹¹⁶ A combination of temporary civil commitment¹¹⁷ and sign language training equitably protects suspects' constitutional right not to stand trial while giving suspects sign language training so that they may someday stand trial. Furthermore, temporary commitment protects the public interest in helping to keep streets free of suspected lawbreakers.

In effect, the Illinois courts achieved this result in the case of Donald Lang. Lang, who had no communication skills and no knowledge of

¹¹² U.S. CONST. amend. VI, *supra* note 1.

¹¹³ See *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam) (test of competency to stand trial is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him").

In *United States v. Mathers*, 539 F.2d 721 (D.C. Cir. 1976), involving a mentally ill defendant, Judge Bazelon ruled: "It is 'fundamental to an adversary system of justice' that an individual whose 'mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense' may not be subjected to a trial." *Id.* at 725 (citations omitted).

William Blackstone recognized in the eighteenth century that "if it is found at the trial of the prisoner that he cannot understand the proceedings, the judge ought to discharge the jury and put an end to the trial, or order a verdict of not guilty." 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 24 (9th ed. 1873); see Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 458 (1967).

Many courts never considered the issue of a deaf defendant's capacity to stand trial because some states traditionally did not hold the deaf criminally responsible for their behavior. This practice changed along with enlightened social attitudes toward the deaf. P. HIGGINS, *supra* note 5, at 25-26.

¹¹⁴ *Jackson v. Indiana*, 406 U.S. 715, 720 (1972).

¹¹⁵ 406 U.S. 715 (1972).

¹¹⁶ *Id.* at 738. In *Jackson*, the Court ruled that the state may not subject a mentally retarded deaf defendant to permanent civil commitment on the basis of an unproved criminal charge that is forever unprovable because the deaf criminal suspect is constitutionally prevented from standing trial. *Id.*

¹¹⁷ In most states, civil commitment must be based on a judicial finding that a person (1) is mentally ill and reasonably expected to inflict serious physical harm upon himself or another, or (2) is mentally ill and unable to provide for his basic physical needs. See, e.g., ILL. ANN. STAT. ch. 91 1/2, § 1-119 (Smith-Hurd Supp. 1983).

sign language, was arrested in 1965 for one murder and charged in 1971 with another.¹¹⁸ After the original 1965 charge, Lang's lawyer agreed to waive Lang's constitutional protections against his standing trial, realizing that Lang faced indefinite commitment otherwise.¹¹⁹ The court, however, denied Lang's request for trial and civilly committed him.¹²⁰ Lang's lawyer filed a petition in *habeas corpus*, contending that Lang was serving a sentence for life when he had never been convicted of a crime. The Illinois Supreme Court held that Lang deserved a trial to determine whether the state had enough evidence to convict Lang or whether he should be released.¹²¹ At this trial, five years after the 1965 murder, the state dropped the charges and released Lang because the principal witness had died.¹²²

After the second charge of murder, Lang's lawyer again waived Lang's constitutional right not to stand trial,¹²³ and the trial court, taking special precautions to guarantee a fair trial, sentenced Lang to fourteen to twenty-five years imprisonment after the jury found Lang guilty.¹²⁴ The Illinois Appellate Court reversed the conviction,¹²⁵ finding that "no trial procedures could effectively compensate for the handicap of a deaf mute with whom there could be no communication."¹²⁶ That court remanded the case for a hearing on Lang's fitness to stand trial.¹²⁷ In 1979, after procedural delays, both Lang's public defender and conservator appealed his case to the Illinois Supreme Court.¹²⁸

The Illinois Supreme Court acknowledged that deaf criminal sus-

¹¹⁸ *People v. Lang*, 76 Ill. 2d 311, 316-22, 391 N.E.2d 350, 351-54 (1979). After eighteen years of litigation in the Illinois courts, Donald Lang's case still is unresolved.

¹¹⁹ *Id.* at 317, 391 N.E.2d at 351. *Jackson*, 406 U.S. 715 (1972), which established the due process and equal protection rights of deaf criminal suspects, had not yet been decided.

¹²⁰ *People v. Lang*, 37 Ill. 2d 75, 81, 224 N.E.2d 838, 841 (1967); *see supra* note 116. The Superintendent of the State Department of Mental Health certified that it was unlikely that Lang would ever be able to stand trial because he performed poorly in sign language training. *Lang*, 76 Ill. 2d at 317, 391 N.E.2d at 351.

¹²¹ *People ex rel. Myers v. Briggs*, 46 Ill. 2d 281, 288, 263 N.E.2d 109, 113 (1970).

¹²² *Lang*, 76 Ill. 2d at 317, 391 N.E.2d at 351.

¹²³ *Id.* at 317, 391 N.E.2d at 351.

¹²⁴ *Id.* at 318, 391 N.E.2d at 352.

¹²⁵ *People v. Lang*, 26 Ill. App. 3d 648, 658, 325 N.E.2d 305, 311 (1975).

¹²⁶ *Lang*, 76 Ill. 2d at 318, 391 N.E.2d at 352.

¹²⁷ At this hearing, the trial judge ordered Lang released on bail, under section 5-2-2(a) of the Unified Code of Corrections (ILL. ANN. STAT. ch. 38, § 1005-2-2(a) (repealed by P.A. 81-1217, § 3, effective Dec. 28, 1979; replaced by ILL. ANN. STAT. ch. 38, §§ 104-10 to 104-29 (Smith-Hurd 1980))). The court directed the Department of Mental Health and Developmental Disabilities to develop an appropriate language training program. In October 1977, however, the trial court allowed the Department to discharge Lang to the Cook County jail, at the same time issuing a writ of *mandamus* directing the Department to create a treatment program. The appellate court reversed the *mandamus* order and denied a separate petition for *habeas corpus* filed on Lang's behalf. *Lang*, 62 Ill. App. 3d 688, 378 N.E.2d 1106 (1978).

¹²⁸ *Lang*, 76 Ill. 2d at 311, 391 N.E.2d at 350.

pects ruled unfit to stand trial present special problems for the criminal justice system.¹²⁹ A finding of unfitness could result in permanent commitment to a mental institution, which creates "long periods of confinement for criminal defendants who, had they been fit, might have plea bargained to a relatively light sentence, obtained an outright or insanity acquittal, or received a prison sentence subject to both maximum limits and parole."¹³⁰ The result is inequitable to deaf criminal suspects. Other defendants who are unfit to stand trial because they are mentally incompetent are legitimately subject to involuntary civil commitment. Deaf suspects like Lang, however, become subject to commitment because of an alleged crime for which they cannot stand trial and for which the criminal justice system presents no other solution.

Donald Lang arguably was not subject to involuntary commitment under the Illinois statute because he was not mentally ill.¹³¹ Release of Lang, on the other hand, was not a feasible political step for the court.¹³² The Illinois Supreme Court held that Lang should be "considered" mentally ill for the purposes of civil commitment:

Hereafter, if a person is found unfit to stand trial, he should be considered to be mentally ill under the [Mental Health and Development Disabilities] Code unless his unfitness is due to a solely physical condition. If that person also meets the dangerousness requirement of the Code, he should be considered to be a "person subject to involuntary admission."¹³³

Remanding the case for a hearing on Lang's dangerousness,¹³⁴ the court indicated its intention to keep Lang in custody where he could attempt to learn sign language. Although it is unlikely Lang will ever be fit to stand trial,¹³⁵ he is being given care and training in sign language.

The crux of the Illinois decision, however, is that deaf defendants with little cultural contact (those who lacked the opportunities to develop communication skills) may be subject to civil commitment based entirely on circumstantial evidence of dangerousness.¹³⁶ In effect, the

¹²⁹ *Id.* at 324, 391 N.E.2d at 355.

¹³⁰ *Id.* at 323, 391 N.E.2d at 354.

¹³¹ *Id.* at 324, 391 N.E.2d at 355.

¹³² *Id.*

¹³³ *Id.* at 327, 391 N.E.2d at 356. The statute cited is ILL. ANN. STAT. ch. 91 1/2, §§ 1-110 to 6-107 (Smith-Hurd Supp. 1983).

¹³⁴ On rehearing, the trial court civilly committed Lang to the Illinois Department of Mental Health and Developmental Disabilities. Telephone interview with Donald Paull, Lang's Public Defender, in Chicago (Sept. 1983).

¹³⁵ Lang will probably never learn enough sign language to be able to stand trial, but he has learned simple concepts in sign language. He understands the concept of "death," but probably does not understand the concept of "murder." Lang has a mild character disorder that is not mentally based. His condition is diagnosed as *suerto-phrenia*, a medical term that is used to describe only deaf persons such as Lang who have been culturally deprived. *Id.*

¹³⁶ *Id.* Without sworn testimony in a court of law, the charges against any criminal suspect remain unproved and thus circumstantial.

Illinois court defines deafness, where the deaf person has no communication skills, as a mental illness.

The Louisiana Supreme Court followed the *Lang* precedent in *State v. Williams*,¹³⁷ ruling over strong dissent¹³⁸ that deaf suspects found unfit to stand trial may be subject to involuntary civil commitment when the trial court finds them to be dangerous.¹³⁹ The court highlighted procedural safeguards that protect civilly committed persons from wrongful commitment: judicial review after 180 days, administrative review by the director of mental health, and federal *habeas corpus*.¹⁴⁰ These procedural reviews are not adequate because they do not resolve the question of the deaf defendant's guilt or innocence; thus, under this reasoning, deaf suspects may continue to be subject to permanent commitment on the basis of circumstantial evidence of guilt.

Legislatures should enact statutes mandating temporary custodial care and training in sign language for deaf defendants incapable of standing trial.¹⁴¹ Alternatively, the courts could release deaf defendants in custodial care or on probation while providing sign language training through a state agency. Deaf suspects incapable of standing trial must be afforded an opportunity as early as possible to obtain a trial on the unproven criminal charge.

II. IMPLEMENTING THE RIGHT OF DEAF SUSPECTS TO UNDERSTAND THE PROCEEDINGS

Deaf criminal suspects' right to an interpreter at all stages of the criminal process is meaningless without effective machinery in state and federal criminal justice systems to implement the right. Many states¹⁴² and the federal government¹⁴³ have enacted legislation to implement and protect deaf suspects' right to an interpreter. Although most legisla-

¹³⁷ 392 So. 2d 641 (La. 1980).

¹³⁸ "The majority now strains a new definition of 'mentally ill' from the defendant's inability to communicate because of his speech and hearing impairment." *Id.* at 645 (Dixon, J., dissenting). Judge Dixon suggested "interdiction," or custodial care, for the deaf defendant who is ruled unfit to stand trial. *Id.* at 645-46.

¹³⁹ "If a person is found unfit to stand trial because of an inability to effectively communicate, he should be considered 'mentally ill' under La.R.S. 28:54 unless his unfitness is due solely to a physical condition." *Id.* at 643-44. If his unfitness is solely physical, the court can civilly commit the deaf person if it finds the person dangerous. *Id.* at 644.

¹⁴⁰ *Id.* at 644; see also *State v. Hunt*, 47 Ohio St. 2d 170, 351 N.E.2d 106 (1976) (two-year limited term of civil commitment of a deaf-mute is constitutionally permissible under the *Jackson* standard).

¹⁴¹ See *infra* MODEL INTERPRETING STATUTE § 12.

¹⁴² See *supra* note 23.

¹⁴³ In 1978, Congress approved the Bilingual Hearing and Speech Impaired Court Reporter Act, 28 U.S.C. § 1827 (Supp. 1983), which mandates appointment of a qualified interpreter in any civil or criminal action initiated by the United States with a deaf participant.

tures have expressed some intent to aid deaf criminal suspects' right to understand legal proceedings,¹⁴⁴ substantive and procedural limitations prevent all of the implementing statutes from adequately serving this goal.

The procedural concerns in providing an interpreter are many. First, court or criminal justice personnel must determine whether an interpreter is needed and then must locate an interpreter. After this, the court must ensure that proper communication takes place. Finally, the interpreter must be compensated.

Many of the state interpreting statutes do not indicate how a court should determine whether an interpreter is needed. Some states require that the deaf suspect request the services of an interpreter between two days and thirty days prior to the proceedings.¹⁴⁵ Several states allow the court to require that the deaf participant furnish reasonable proof of deafness.¹⁴⁶ Only seven states allow the deaf defendant to request a Re-

¹⁴⁴ Four states declared their legislative purposes in the body of the state interpreting statutes. Washington's 1973 Act states:

It is hereby declared to be the policy of this state to secure the constitutional rights of deaf persons and of other persons who, because of impairment of hearing or speech, are unable to readily understand or communicate spoken language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.

WASH. REV. CODE ANN. § 2.42.010 (Supp. 1983). The Montana and Nebraska statutory purpose sections mirror that of Washington's. MONT. CODE ANN. § 49-4-501 (1983); NEB. REV. STAT. § 25-2401 (1981).

Minnesota has declared: "It is . . . the policy of this state that the constitutional rights of persons handicapped in communication cannot be fully protected unless qualified interpreters are available to assist them in legal proceedings." MINN. STAT. ANN. § 611.30 (West Supp. 1984).

Arkansas includes the legislative history of the interpreting law in the 1981 statutory compilation:

WHEREAS, there are approximately 30,000 deaf citizens residing in the State of Arkansas; and WHEREAS, there is no provision in the laws of this State providing for an impartial and verbatim translation of court proceedings wherein deaf persons are either parties thereto or called as witnesses therein; and WHEREAS, this Act is necessary in order to insure the integrity of our judicial process in the eyes and minds of our deaf citizens

ARK. STAT. ANN. § 22-148 to 153 (Supp. 1983) (Legislative History).

¹⁴⁵ ALA. CODE § 12-21-133 (1975) (requiring 30 days); FLA. STAT. ANN. § 90.6063(4) (West Supp. 1983) (requiring five days); GA. CODE ANN. § 99-4002 [24-9-102](a) (Supp. 1982) (requiring five days); IOWA CODE ANN. § 622B-3 (West Supp. 1982) (requiring request within three days after receiving notice of hearing, or if the notice is received within less than five days before the hearing, "as soon as practicable"); N.M. STAT. ANN. § 38-9-6 (Supp. 1983) (requiring two weeks); OKLA. STAT. ANN. tit. 63, § 2412 (West Supp. 1983) (requiring 48 hours).

North Carolina and Texas simply require that the deaf person notify the court "prior to appearance." N.C. GEN. STAT. § 8B-4 (1981); TENN. CODE ANN. § 24-1-103(c) (Supp. 1983).

¹⁴⁶ GA. CODE ANN. § 99-4002 [24-9-102] (b) (Supp. 1982) (court may request proof of disability); ME. REV. STAT. ANN. tit. 5, § 48(2)(C) (1979) (court may require proof of deafness); N.M. STAT. ANN. § 38-9-6 (Supp. 1983) (may require reasonable proof of deafness); N.C. GEN. STAT. § 8B-4 (1981) (court may require proof of deafness); N.D. CENT. CODE § 28-

verse Skills Certified (R.S.C.) interpreter¹⁴⁷ or an aural-oral interpreter.¹⁴⁸ A few states permit deaf persons to waive the right to an interpreter, although in several of these states deaf persons may waive their rights only with the approval of their attorney or the court.¹⁴⁹

Statutes that require deaf suspects to request an interpreter do not adequately protect the deaf suspects' rights. Given their handicap, deaf suspects often are poor advocates for their own constitutional rights. Deaf suspects may be unaware of the protection the state interpreting law affords or unable to acquire such protection. Deaf suspects may not

33-03 (Supp. 1983); OKLA. STAT. ANN. tit. 63, § 2412 (West Supp. 1983) (court may require "reasonable proof of deafness"); TENN. CODE ANN. § 24-1-103(d) (Supp. 1983) (court may require deaf person to provide "reasonable proof of his deafness"). The statutes do not define the reasonable proof needed. These statutes may thus allow too much judicial discretion in the decision whether an interpreter is necessary.

¹⁴⁷ Four states allow the deaf defendant to request an R.S.C. (Reverse Skills Certified) interpreter to supplement the originally appointed interpreter. ARIZ. REV. STAT. ANN. § 12-242(f) (West Supp. 1983); CAL. EVID. CODE § 754(d) (West Supp. 1984); KY. REV. STAT. § 30A.410(2) (1980); MONT. CODE ANN. § 49-4-505 (1983) (deaf person may request an "intermediary interpreter"); *see supra* note 12.

Although the Nevada statute does not specifically allow the deaf defendant to request an R.S.C. interpreter, it authorizes the deaf participant to request a replacement for the appointed interpreter and gives the deaf person a choice of interpreters "whenever possible." NEV. REV. STAT. § 50.052 (1979).

In Arizona, if the only available interpreter "does not possess adequate interpreting skills for the particular situation, the court . . . may permit the deaf person to nominate another person [such as an R.S.C. interpreter or a family member] to act as an intermediary interpreter between the deaf person and the appointed interpreter during proceedings." ARIZ. REV. STAT. ANN. § 12-242(F) (West Supp. 1983).

¹⁴⁸ Three states allow the deaf person to request an aural-oral interpreter. N.C. GEN. STAT. § 8B-1(3) (1981); OKLA. STAT. ANN. tit. 63, § 2410(B) (West Supp. 1983); TENN. CODE ANN. § 24-1-103(a)(3) (Supp. 1983). The deaf person who can speak and relies on speech-reading rather than sign language can use an aural-oral interpreter who exaggerates the lip and facial movements of speech so that the deaf person can easily and effectively decipher the words spoken and then respond verbally. The use of aural-oral interpreting is rare because it requires a very well-trained deaf speechreader.

¹⁴⁹ ARIZ. REV. STAT. ANN. § 12-242(G) (West Supp. 1983) (deaf person may waive the right or provide one's own interpreter); IOWA CODE ANN. § 622B.2 (West Supp. 1982) (court shall appoint an interpreter unless the deaf person waives this right); MISS. CODE ANN. § 13-1-16 (Supp. 1983) (court shall appoint interpreter unless right is waived); MONT. CODE ANN. § 49-4-510 (1983) (deaf person may waive right to interpreter); N.M. STAT. ANN. § 38-9-4 (Supp. 1983) (deaf person may "at any point in any proceeding waive the right to the services of an interpreter"); N.C. GEN. STAT. § 8B-3(b) (1981) (deaf person may provide an interpreter at his or her own expense); OKLA. STAT. ANN. tit. 63, § 2410(B) (West Supp. 1983) (the right to an interpreter can be waived only by a non-signing deaf person in writing and with the approval of the person's attorney and the judge); TENN. CODE ANN. § 24-1-103(a)(3) (Supp. 1983) (right to an interpreter may not be waived except in writing, subject to the approval of the deaf person's attorney and the judge); VA. CODE § 19.2-164.1 (1983) (deaf person may waive the right with the approval of counsel). Requiring the approval of counsel for waiving an interpreter is not much protection for the deaf suspect because most attorneys have no experience with interpreters or deaf suspects. This is one argument for public awareness programs about the deaf. Law schools in particular are well-situated to sponsor such programs.

be able to request an interpreter orally. Without paper and pencil, deaf suspects cannot request an interpreter even in writing. The interpreting statutes should provide for interpreters on the request of the deaf suspect or next friend of the suspect; furthermore, appointing authorities should be required to procure an interpreter when they observe that the suspect cannot understand spoken words.¹⁵⁰

The state interpreting statutes should not place the burden of requesting an interpreter on the deaf suspect alone; likewise, they should not place too much discretion in the appointing authority.¹⁵¹ The appointing authority may exercise discretion and not appoint an interpreter under the erroneous belief that the suspect is understanding the proceeding. Because the suspect cannot always communicate the request, mandatory appointment is necessary. The statutes should avoid the possibility that the court will fail to appoint an interpreter simply because the judge believes the testimony or proceeding is not crucial to the question of the suspect's guilt or innocence.¹⁵² Even guilty suspects are guaranteed the procedural safeguards of the Constitution, *inter alia*, a trial by jury and the assistance of counsel.

The state interpreting laws generally provide that courts and other officials should request interpreters from a state agency or association of the deaf.¹⁵³ Sixteen states require that interpreters meet some kind of statutory qualifications ranging from standards established by the National Registry of Interpreters¹⁵⁴ to the simple requirement that the in-

¹⁵⁰ See *infra* MODEL INTERPRETING STATUTE §§ 3, 5.

¹⁵¹ Some statutes place too much discretion in the appointing authority in determining the need for an interpreter. South Carolina's interpreting statute, for example, provides for judicial appointment of interpreters "unless the deaf person shall waive such or the judge shall find that it is not necessary for the fulfillment of justice." S.C. CODE ANN. § 15-27-110 (Law. Co-op. 1976). Under this standard, a judge who believes that an interpreter is not essential to achieve justice could disregard the entire statute even where the deaf suspect cannot understand the proceedings. See also ALA. CODE § 12-21-131 (1975); HAWAII REV. STAT. § 606-9 (1976); UTAH CODE ANN. § 77-35-15(b) (1982); VT. R. CRIM. P. 28 (1983).

¹⁵² See *supra* note 107 and accompanying text.

¹⁵³ Seven states provide that the court may request an interpreter from a particular state agency that coordinates such requests. See IOWA CODE ANN. § 622B.4 (West Supp. 1982) (list kept by "state department of health"); MO. ANN. STAT. § 546.035(2) (Vernon Supp. 1984) (list kept by the "Missouri school for the deaf"); MONT. CODE ANN. § 49-4-507(2) (1983) (list kept by "state department of social and rehabilitation services"); N.H. REV. STAT. ANN. § 521-A:7 (Supp. 1979) (list kept by the "department of education," "New Hampshire association of the deaf," and the "New Hampshire registry of interpreters for the deaf" [R.I.D.]); N.M. STAT. ANN. § 38-9-7 (Supp. 1983) (referrals from the "state vocational rehabilitation division" or the "New Mexico registry of interpreters for the deaf"); N.C. GEN. STAT. § 8B-6 (1981) (list kept by the "State Department of Human Resources" and the "North Carolina Council for the Hearing Impaired"); TENN. CODE ANN. § 24-1-103(e) (Supp. 1983) (lists kept by the "Tennessee registry of interpreters for the deaf," the "Tennessee council for the hearing impaired," and the "state department of education, division of vocational rehabilitation").

¹⁵⁴ Seven states require interpreters to meet the standards of the National Registry of In-

terpreter be "able to communicate with the deaf suspect."¹⁵⁵ The interpreting statutes should explicitly define the qualifications required for legal interpreters¹⁵⁶ and provide for a state agency to coordinate interpreter requests.¹⁵⁷

Once the judge or appointing authority has located an interpreter, some states also require the appointing authority to determine that the interpreter is "readily able to communicate" with the deaf suspect.¹⁵⁸ It is essential for the appointing authority to ensure that the deaf suspect actually understands the interpreter. Twenty-seven states require the interpreter to take an oath to make a true interpretation to the interpreter's best skill and judgment¹⁵⁹ and one state permits the judge to

interpreters for the Deaf (N.R.I.D.). *See* CAL. EVID. CODE § 754(c)(1) (West Supp. 1984); FLA. STAT. ANN. § 90.6063(3)(b) (West Supp. 1983); GA. CODE ANN. § 99-4001(2) (Supp. 1982); ME. REV. STAT. ANN. tit. 5, § 48(1)(G) (Supp. 1983); N.H. REV. STAT. ANN. § 521-A:1(IV) (Supp. 1979); OKLA. STAT. ANN. tit. 63, § 2408(2) (West Supp. 1983); TENN. CODE ANN. § 24-1-103(a)(2) (Supp. 1983).

Three states have established state agencies that promulgate standards for interpreters. ARIZ. REV. STAT. ANN. § 12-242(H) (West Supp. 1983) (requires certificate approved by the Arizona council for the deaf); N.C. GEN. STAT. § 8B-1(3)(1981) (standards established by the "department of human resources"); TEX. CODE CRIM. PROC. ANN. art. 38.31(f) (Vernon Supp. 1982) (standards established by the "state commission for the deaf").

Two states have created state commissions to regulate certification of "interpreters who have reached varying levels of proficiency in manual communication skills." ARIZ. REV. STAT. ANN. §§ 36-1941, 36-1946 (West Supp. 1975-83); TEX. HUM. RES. CODE ANN. § 81-007 (Vernon 1980).

Two states allow court personnel to adopt standards of qualification for interpreters. ARK. STAT. ANN. § 22-149 (Supp. 1983) (standards adopted by the "Executive Secretary of the Judicial Department"); IOWA CODE ANN. § 622B.1(2) (West Supp. 1982) (rules adopted by the "supreme court").

¹⁵⁵ MINN. STAT. ANN. § 611.33 (West Supp. 1984); NEB. REV. STAT. § 25.2404 (1979); OR. REV. STAT. § 133.515(2)(b) (1973); WASH. REV. CODE ANN. § 2.42.020 (Supp. 1983). The Minnesota statute defines an interpreter as a person who is "readily able to communicate with the handicapped person, translate the proceedings for him, and accurately repeat and translate the statements of the handicapped person to the officials . . ." MINN. STAT. ANN. § 611.33 (West Supp. 1984).

¹⁵⁶ *See infra* MODEL INTERPRETING STATUTE § 2(c).

¹⁵⁷ *See infra* MODEL INTERPRETING STATUTE § 13.

¹⁵⁸ COLO. REV. STAT. § 13-90-202 (1973); FLA. STAT. ANN. § 90-6063(6) (West Supp. 1983); GA. CODE ANN. § 99-4002(c) (Supp. 1982); KAN. STAT. ANN. § 75-4353(b) (1977); MONT. CODE ANN. § 49-4-504 (1983); N.H. REV. STAT. ANN. § 521-A:4 (Supp. 1979); N.C. GEN. STAT. § 8B-2(f) (1981); TENN. CODE ANN. § 24-1-103(1),(2) (Supp. 1983).

¹⁵⁹ ARK. STAT. ANN. § 43-2101.1(d)(1977); CAL. EVID. CODE § 751 (West Supp. 1977); COLO. REV. STAT. § 13-90-203 (1973); FLA. STAT. ANN. § 90-6063(7) (West Supp. 1983); GA. CODE ANN. § 99-4005 (Supp. 1982); IND. CODE § 4-22-1-22.5(d) (1982); IOWA CODE ANN. § 622B.5 (West Supp. 1982); LA. REV. STAT. ANN. § 15-270(B)(2) (West 1981); MINN. STAT. ANN. § 611.33(2) (West Supp. 1984); MO. ANN. STAT. § 546.035(4) (Vernon Supp. 1984); MONT. CODE ANN. § 49-4-508 (1983); NEB. REV. STAT. § 25-2405 (1979); NEV. REV. STAT. § 50.053 (1979); N.H. REV. STAT. ANN. § 521-A:10 (Supp. 1979); N.M. STAT. ANN. § 38-9-9 (Supp. 1983); N.C. GEN. STAT. § 8B-7 (1981); N.D. CENT. CODE § 28-33-04 (Supp. 1983); OHIO REV. CODE ANN. § 2311.14(B) (1982); OKLA. STAT. ANN. tit. 22, § 1278(c) (West 1958); R.I. GEN. LAWS § 8-5-8 (1970); S.D. CODIFIED LAWS ANN. § 19-14-4.1 (1979); TENN.

require such an oath.¹⁶⁰ These procedural safeguards help guarantee an effective interpretation.¹⁶¹

Although the substantive and procedural guidelines for sign language interpretation in the criminal process vary, one similarity exists: all but a few of the states that provide interpreters in criminal proceedings also provide for state or court compensation of the interpreter.¹⁶² Some states may be reluctant to compensate interpreters, believing that such compensation constitutes the use of public funds to aid private individuals.¹⁶³ Compensation of interpreters to guarantee the deaf suspects' right to understand the proceedings, however, should not differ from compensation of court-appointed attorneys to guarantee indigent suspects' right to the assistance of counsel. Interpreters also perform a public service in conserving the time of judges and juries and increasing trial efficiency, and therefore should be compensated by the state as are court reporters, bailiffs, and other necessary personnel.¹⁶⁴ The interpreting statutes should provide compensation for interpreting at all stages of the criminal process and should establish a state agency to coordinate interpreter compensation.¹⁶⁵

The state interpreting statutes lack enforcement provisions or incentives for the appointment of interpreters. With the exception of eight states that exclude at trial a statement taken from a deaf suspect without an interpreter present,¹⁶⁶ no penalties exist for criminal justice officials who do not provide the deaf suspect with an interpreter as required by law. Officials, including judges, can and do ignore the interpreting statutes.¹⁶⁷ The interpreting laws should contain an

CODE ANN. § 24-1-103(f) (Supp. 1983); TEX. CODE CRIM. PROC. ANN. art. 38.31(e) (Vernon Supp. 1982); UTAH CODE ANN. § 77-35-15 (1982); VT. STAT. ANN. tit. 12, § 5811 (1973); WASH. REV. CODE ANN. § 2.42.050 (Supp. 1983); W. VA. CODE § 57-5-7(e) (Supp. 1983).

¹⁶⁰ ALA. CODE § 12-21-130 (1975).

¹⁶¹ See *infra* MODEL INTERPRETING STATUTE §§ 6, 7(e).

¹⁶² Arizona, Arkansas, Colorado, Indiana, Kansas, Louisiana, Maine, and Massachusetts provide for interpreters, see *supra* note 23, but lack the statutory mechanism to compensate them.

¹⁶³ In *Myers v. County of Cook*, 34 Ill. 2d 541, 542, 216 N.E.2d 803, 804 (1966), an action by an interpreter for payment of fees, the County argued that the Illinois constitution prohibited compensation of interpreters because it provides that "[t]he state shall never pay, assume or become responsible for the debts or liabilities of, or in any manner give, loan or extend its credit to or in aid of any public or other corporation, association or individual." ILL. CONST. art. IV, § 20.

¹⁶⁴ *Myers*, 34 Ill. 2d at 543, 216 N.E.2d at 804. In *Myers*, the Illinois Supreme Court ordered payment of the interpreter's fees for these public service reasons. *Id.* at 543-44, 216 N.E.2d at 807-08.

¹⁶⁵ See *infra* MODEL INTERPRETING STATUTE § 13(h).

¹⁶⁶ See *supra* note 36.

¹⁶⁷ An interpreter in Chicago reported that courts often proceed in cases involving a deaf suspect without an interpreter, commenting: "If they've got a case to hear, interpreter or no

exclusionary clause¹⁶⁸ and should mandate a retrial when deaf suspects are denied interpreters to which they are entitled under the statute.¹⁶⁹ The exclusionary and retrial provisions, codifying appellate review, thus would serve to make judges and police officials aware of the need to provide interpreters to guarantee deaf criminal suspects' right to understand the proceedings at all stages of the criminal process.

III. CONCLUSION

Deaf criminal suspects have the constitutional right to understand the proceedings at all stages of the criminal process. Sign language interpretation is essential to protect deaf suspects' rights to understand *Miranda* warnings, police questioning, interrogation, notification of charges, and criminal proceedings at court. States should adopt comprehensive interpreting statutes to assure that these rights are protected.

Protecting these constitutional rights by statute may not be enough for deaf suspects, however. Judges, police officers, court personnel, and attorneys also must be made aware of the special needs and concerns of deaf suspects through awareness programs, information services, training programs, and review courses. The deaf suspects' constitutional right to understand fully and participate in the proceedings at all stages of the criminal process can be protected only when legislatures, judges, and police officials work together to eliminate the legal handicaps of the deaf.

IV. APPENDIX: MODEL INTERPRETING STATUTE¹⁷⁰

1. To protect fully the constitutional rights of deaf persons and those who are unable to understand or communicate spoken language, and to ensure a full understanding of criminal proceedings and a full participation in the criminal process, this Act is hereby established.

2. *Definitions.* For the purposes of this Act,

(a) "Deaf" means those who cannot understand spoken words through normal auditory processes.

(b) "Deaf person" means any witness, suspect, accused, detainee, defendant, juror, complainant, victim, or interested party to the action who cannot understand spoken words through normal auditory processes.

(c) "Qualified interpreter" means a person with the knowledge and un-

interpreter, they'll go without you." Chicago Hearing Society Workshop, Chicago (Sept. 11, 1982).

¹⁶⁸ See *infra* MODEL INTERPRETING STATUTE § 10.

¹⁶⁹ *Id.*

¹⁷⁰ This Model Interpreting Statute borrows from several of the state interpreting statutes discussed in this Comment.

derstanding of the Code of Ethics of the National Registry of Interpreters for the Deaf who is able to recognize the comprehension level of a deaf or hearing-impaired person and is able to communicate effectively in a mode of communication used by the deaf and to interpret accurately the statements of the deaf person.

(d) "Appointing authority" means the person designated in section 4 of this Act.

3. The appointing authority shall appoint a qualified interpreter of the deaf sign language in the following instances:

(a) Whenever a deaf person requests an interpreter, unless the appointing authority finds such request is frivolous.

(b) Whenever the appointing authority recognizes that a witness, suspect, accused, detainee, defendant, juror, complainant, victim, or any interested party to the action cannot understand spoken words through normal auditory processes.

(c) Whenever the parent, spouse, legal guardian, physician, or blood relative of a deaf person requests an interpreter, unless the appointing authority finds such request is frivolous.

4. A qualified interpreter of the deaf sign language shall be appointed:

(a) By the arresting officer or superior, to interpret the delivery of *Miranda* warnings to a deaf person.

(b) By the interrogating officer or superior, to interpret the questioning of a deaf person in custody by police officers.

(c) By the attending officer or superior, to interpret any statement given by a deaf person to police officers.

(d) By the official who appoints the attorney, to interpret conferences between a deaf person and the court-appointed attorney, whenever such attorney deems the conference to be essential to the deaf person's defense to a criminal charge.

(e) By the police officer, judge, prosecutor, or other official, to interpret the delivery of a criminal charge to a deaf person.

(f) By the court or the court's selected authority, to interpret the arraignment of a deaf person.

(g) By the grand jury prosecutor or prosecutor's selected authority, to interpret the grand jury examination of a deaf person.

(h) By the court or the court's selected authority, to interpret any court proceeding at which a deaf person receives, pleads to, or defends a criminal charge, including trials, hearings, and trial conferences, but not limited to these.

(i) By the hearing officer, to interpret any prison hearing, parole hearing, or any other institutional hearing at which a deaf person is a witness or principal party in interest.

5. Such deaf person, or the parent, spouse, legal guardian, physician,

or blood relative of a deaf person, shall notify the appointing authority at least one week (seven days) before the time of appearance listed in section 4 of this Act regarding the request for an interpreter, unless such notification is impossible. At no time shall an appointing authority deny a deaf person the services of an interpreter for the lack of a request.

6. After procuring an interpreter, the appointing authority shall ensure that the deaf person can understand spoken words through the sign language interpreter. If the deaf person remains unable to understand spoken words, the appointing authority shall:

- (a) Appoint an interpreter skilled in reverse interpreting to interpret statements to and from the deaf person and the original interpreter, or
- (b) Appoint an aural-oral interpreter, or
- (c) Appoint a second interpreter.

7. The duties of the interpreter procured by the appointing authority shall be:

- (a) To establish communication with the deaf person.
- (b) To interpret any and all *Miranda* warnings, police questions, threats, or other communication with the deaf person.
- (c) To establish that an interpreter was present for any concurrent recording or record.
- (d) To notify the appointing authority of any irregularities or gaps in the interpreting with the deaf person.
- (e) To take an oath, when interpreting for trial, hearing, questioning, or other examination, that the interpreter will make a true and accurate representation of the communication to the deaf person to the best of the interpreter's skills and abilities.
- (f) To maintain an active rôle in the profession of interpreting and maintain an awareness of recent research, standards, improvements in techniques, and ethics review.

8. A standard polygraph test may not be given to a deaf person.

9. If an interpreter communicates a statement that would be privileged if the interpreter were not present, the privilege shall also extend to the interpreter.

10. In the event that an interpreter is not provided as required under the provisions of this Act, the statements taken in violation of section 4(a), (b), or (c) shall not be admissible in evidence in any court of this state; proceedings conducted in violation of section 4(d), (e), (f), (g), (h), or (i) shall be void and retrial or rehearing shall be set, unless the services of an interpreter are rendered unnecessary under section 3 or section 11 of this Act.

11. A deaf person may not waive the services of an interpreter unless the need for an interpreter is frivolous, as determined by the deaf person acting with the approval of the appointing authority.

12. If the deaf person cannot understand spoken words even with the assistance of a qualified interpreter or special interpreter as specified in section 6 of this Act, the court shall institute sign language training for the deaf person with the cooperation of the secretary of the state department of health and welfare and the court shall place the deaf person in temporary custodial care with the cooperation of the state probation officer.

13. This Act hereby creates a State Commission for Assistance to the Deaf, which shall have the following duties:

(a) To maintain lists of active interpreters who have had or desire to have experience in legal interpreting.

(b) To establish standards of competency, skill, and ethics for interpreters to deaf persons, which standards shall be strictly enforced.

(c) To monitor the criminal justice system to ensure that the provisions of this Act are adhered to and to ensure the availability of qualified interpreters.

(d) To coordinate requests from appointing authorities for the services of an interpreter under the provisions of this Act.

(e) To compile lists of frequency of interpreter requests.

(f) To establish and maintain public awareness programs to acquaint citizens and attorneys with the problems and characteristics of the deaf.

(g) To establish and maintain police awareness programs, training programs, review courses, and information services to acquaint police officers and court personnel with the problems and the characteristics of the deaf.

(h) To compensate interpreters utilized by the appointing authorities under the provisions of this Act, based on a daily rate which shall be determined by the State Commission for Assistance to the Deaf. The Commission shall apply for reimbursement of funds from the County in which the interpreter services are rendered.

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