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## Preserving the Sixth Amendment Rights of the Deaf Criminal Defendant

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# COMMENTS

## Preserving the Sixth Amendment Rights of the Deaf Criminal Defendant

The 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.<sup>1</sup>

### I. Introduction

Deaf<sup>2</sup> defendants involved in criminal proceedings<sup>3</sup> are pro-

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1. *Mothershead v. King*, 112 F.2d 1004, 1006 (8th Cir. 1940).

2. There is no standard definition for the term "deaf". According to the Fifth Edition of BLACK'S LAW DICTIONARY, a deaf person is "any person whose hearing is so seriously impaired as to prohibit the person from understanding oral communications when spoken to in a normal conversational tone." BLACK'S LAW DICTIONARY 359 (5th ed. 1979). Lowell Myers, a deaf attorney, proposes a more specific definition: "The term deaf is generally used to indicate those who cannot understand connected discourse through the ear, with or without a hearing aid, and must depend on their eyes to receive communications." LOWELL MYERS, THE LAW AND THE DEAF 3 (1964). The instructions to The National Census of the Deaf Population define deafness as "the inability to hear and understand speech". J. SCHEIN & M. DELK, JR., THE DEAF POPULATION OF THE UNITED STATES 133 (1974) [hereinafter DEAF POPULATION]. This Comment adopts this last, broad definition. The terms deaf and hearing impaired will be used interchangeably to connote this meaning.

Deafness does not include a less severe hearing loss in which speech is understood through the ear. MYERS, *supra* at 3. That condition is usually termed "hard of hearing" and is not included in this Comment's definition. Deafness should also be distinguished from other conditions affecting the ability to speak and understand speech such as imbecility, muteness, or other forms of developmental retardation. See Gregg F. Relyea, 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, 867 (1980) [hereinafter *Procedural Due Process*].

3. The scope of this Comment is limited to the deaf defendant's experience during a criminal trial.

tected by the same constitutional rights that are guaranteed to all criminal defendants.<sup>4</sup> Hearing impaired persons,<sup>5</sup> however, face unique communication obstacles in a courtroom setting which may prohibit them from obtaining a constitutionally fair trial.<sup>6</sup> Two guarantees provided by the Sixth Amendment are particularly vulnerable during a deaf defendant's trial: the right to be confronted with adverse witnesses, and the right to effective assistance of counsel.<sup>7</sup>

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For discussions of pre- and post-trial problems, see Jeffrey B. Wood, Comment, *Protecting Deaf Suspects' Right to Understand Criminal Proceedings*, 75 J. CRIM. L. & CRIMINOLOGY 166 (1984) [hereinafter *Deaf Suspects*] and Bonnie P. Tucker, *Deaf Prison Inmates: Time to be Heard*, 22 LOY. L.A. L. REV. 1 (1988). For an examination of deaf defendants in civil proceedings see *Procedural Due Process*, *supra* note 2. For discussions of deaf persons in roles other than that of defendants, see Andrew E. Shipley, *The Deaf Witness*, 14 LITIG., Fall 1987, at 13, 13 and Randy Lee, *Equal Protection and a Deaf Person's Right to Serve as a Juror*, 17 N.Y.U. REV. LAW & SOC. CHANGE 81 (1989-1990).

4. Terry v. State, 105 So. 386, 387-88 (Ala. 1925).

*In the absence of an interpreter it would be a physical impossibility for the accused, a deaf-mute, to know or to understand the nature and cause of the accusation against him. . . he could only stand by helplessly. . . without knowing or understanding, and all this in the teeth of the mandatory constitutional rights which apply to an unfortunate afflicted deaf-mute, just as they do to every person accused of a violation of the criminal law.*

*Id.*

5. There are 16 million hearing impaired people in the United States. Of those, 2 million are profoundly deaf, meaning they are unable to hear anything. Shipley, *supra* note 3, at 13.

6. In the past, deaf defendants were considered incompetent to stand trial because of their hearing impairments. See generally MYERS, *supra* note 2, at 130-32 (tracing the history of competency rulings on deaf defendants). This stemmed from the antiquated notion that deaf persons were of limited intelligence and should be placed in the same category as the mentally ill. *Id.* at 20. Fortunately, the use of interpretation and society's increasing understandings about the capabilities of deaf people have changed courts' views on whether or not a deaf defendant is competent to stand trial. However, the issue may still arise as only a few states have settled it. See, e.g., *Belcher v. Commonwealth*, 177 S.W. 455, 456 (Ky. 1915) (deafness is but one factor to be used in testing the defendant for fitness to stand trial); *Singer v. Florida*, 109 So.2d 7, 30 (Fla. 1959) (deaf person is no longer considered mentally ill and therefore may be required to stand trial). See also *People v. Lang*, 391 N.E.2d 350 (Ill. 1979) (questioning deaf defendant's competency).

7. U.S. CONST. amend. VI.

Though this Comment is limited to the discussion of preserving the deaf defendant's Sixth Amendment rights, other rights are susceptible to violation when deaf people are involved in criminal proceedings. See, e.g., *State v. Rewolinski*, 464 N.W.2d 401 (Wis. 1990). In *Rewolinski*, evidence from a telecommunication device for the deaf (TDD) was submitted to aid the prosecution in convicting a deaf defendant of murder. *Id.* at 404. The evidence consisted of a printout from a TDD which recorded the defendant's conversation with his wife during a call he made from the police station. *Id.* The printout showed that the defendant made threatening remarks to his wife during the call. *Id.* The defendant was subsequently convicted of murder. *Rewolinski*, 464 N.W.2d at 403. The police station did not record telephone conversations made on standard phone equipment, but recorded only calls made on the TDD machine. *Id.* at 404. The defendant argued that use of the TDD printout as evidence was a violation of his

To ensure constitutionally sound trials, courts must provide deaf defendants with a method of communication which enables the defendants to "hear" and understand the proceedings.<sup>8</sup> This can be achieved through interpretive or noninterpretive methods of communication.<sup>9</sup> Through noninterpretive methods of communication, the deaf defendant understands speech by viewing words either formed on the lips of a speaker or written on paper.<sup>10</sup> Interpretive methods of communication require the presence of someone in the courtroom whose sole purpose is to interpret speech using a system of translation with which the defendant is familiar.<sup>11</sup>

Currently the federal courts<sup>12</sup> and thirty-nine states<sup>13</sup> mandate that interpreters be appointed for deaf criminal defendants during court proceedings. These figures suggest that many jurisdictions are sensitive to the deaf defendant's communication difficulties and are working toward a solution. The assistance of an interpreter, however, does not guarantee that the deaf defendant's trial will be equalvalent to the trial of a hearing defendant. For example, the

Fifth Amendment right not to be a witness against himself and of his fourth amendment right to be free from unreasonable governmental searches and seizures. *Id.* at 405-411. The Supreme Court of Wisconsin rejected the defendant's arguments. *Id.* at 414.

8. *Mothershead v. King*, 112 F.2d 1004, 1006 (8th Cir. 1940).

9. See generally STEPHEN P. QUIGLEY, PH.D. & PETER V. PAUL, PH.D., LANGUAGE AND DEAFNESS 7-12 (1984) [hereinafter QUIGLEY & PAUL].

10. *Id.*

11. *Id.*

12. Court Interpreters Act, 28 U.S.C. § 1827 (1978).

13. ARIZ. REV. STAT. ANN. § 12-242(A) (West Supp. 1983); ARK. STAT. ANN. § 43-2101.1(a) (1977); CAL. EVID. CODE § 754(b) (West Supp. 1984); COLO. REV. STAT. § 13-90-201(b) (1973); CONN. GEN. STAT. ANN. § 17-137k(a) (West Supp. 1982); DEL. CODE ANN. title 10, § 8907 (Supp. 1982); FLA. STAT. ANN. § 90.6063(2) (West Supp. 1983); GA. CODE ANN. § 99-4002 {24-9-101}(a) (Supp. 1982); ILL. ANN. STAT. ch. 110, § 8-1402 (Smith-Hurd Supp. 1983); IOWA CODE ANN. § 622B.2 (West Supp. 1982); KAN. STAT. ANN. § 75-4352 (Supp. 1982); KY. REV. STAT. § 30A-410 (1980); LA. REV. STAT. ANN. § 15-270(A) (West 1981); ME. REV. STAT. ANN. tit. 5, § 48(2)(A) (Supp. 1983); MD. ANN. CODE art. 27, § 623A (1982); MASS. ANN. LAWS ch. 221, § 92A (Law. Co-op. Supp. 1983); MICH. STAT. ANN. § 28.1256(1) (Callghan 1978 & Supp. 1983); MINN. STAT. ANN. § 611.32 (West Supp. 1984); MISS. CODE ANN. § 13-1-16 (Supp. 1983); MO. ANN. STAT. § 546.035(2); (Vernon Supp. 1984); MONT. CODE ANN. § 49-4-503(1) (1983); NEB. REV. STAT. § 25.2403 (1979); NEV. REV. STAT. § 50.051 (1979); N.H. REV. STAT. ANN. § 521-A-2 (Supp. 1979); N.M. STAT. ANN. § 38-9-3 (Supp. 1983); N.Y. JUD. LAW § 390 (McKinney 1983); N.C. GEN. STAT. § 8B-2 (1981); N.D. CENT. CODE § 28-33-02(1) (Supp. 1983); OHIO REV. CODE ANN. § 2311.14(A) (Baldwin 1982); OKLA. STAT. ANN. tit. 63, § 2409(A) (West Supp. 1983); R.I. GEN. LAWS § 8-5-8 (1969); S.D. CODIFIED LAWS ANN. § 19-3-10(2) (1979); TENN. CODE ANN. § 24-1-103(b)(1) (Supp. 1983); TEX. CODE CRIM. PROC. ANN. art. 38.31(a) (Vernon Supp. 1982); VA. CODE § 19.2-164.1 (1983); WASH. REV. CODE ANN. § 2.42.030 (Supp. 1983); W. VA. CODE § 57-5-7(a) (Supp. 1983); WIS. STAT. ANN. § 885.37 (West Supp. 1983); WYO. STAT. § 5-1-109(a) (Supp. 1983).

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

defendant may have to pay the extra costs of an interpreter,<sup>14</sup> the interpreter's qualifications may be challenged,<sup>15</sup> or the opposing party may challenge the neutrality of the interpreter.<sup>16</sup>

In 1982 the Supreme Court modernized interpretation in the courtroom when it permitted a deaf attorney to use a computerized system of instantaneous translation during his appellate oral argument.<sup>17</sup> The system enabled the attorney to answer questions with minimal delay.<sup>18</sup> Since then, deaf persons in all roles and stages of the judicial process have challenged courts throughout the nation to update their interpreting methods in order to guarantee constitutionally sound proceedings.<sup>19</sup>

This Comment argues that an adequate method of interpretation must be made available to deaf defendants during a criminal trial in order to secure their Sixth Amendment rights to confront adverse witnesses and to effective assistance of counsel. Part II discusses the requirements necessary to preserve each of those rights. Part III examines the noninterpretive methods of communication of lipreading and written notes and concludes that these methods are

14. Many jurisdictions will not pay for the interpreter. See, e.g., OR. REV. STAT. § 44.095 (1977) (costs are borne by the party who needs the interpreter). This may be discriminatory because statistics show that a deaf person's median income is two-thirds that of hearing people. L. Goldberg, *The Law: From Shield to Sword for Deaf People*, 9 HUMAN RIGHTS, Spring 1980, at 22, 24.

The costs of interpreters provided under the federal Court Interpreters Act are paid by the government, but the judge may apportion the interpreter fees among the parties or tax their costs to the losing party. 28 U.S.C. § 1827(g). Furthermore, the federal Court Interpreters Act limits mandatory appointment of interpreters to actions initiated by the United States. 28 U.S.C. § 1827(e)(2). This may preclude government appointed interpreters at proceedings requested by the defendant unless the defendant can pay for the interpreter.

In federal civil cases not initiated by the United States, Federal Rule of Civil Procedure 43(f) governs, which leaves both the appointment of the interpreter and the decision of who pays for the interpreter to the discretion of the court. FED. R. CIV. P. 43(f).

15. The state statutes often lack minimum standards for an interpreter's training and qualifications. See, e.g., MASS. GEN. LAW ANN. ch. 221 § 92 A (West Supp. 1979); MISS. CODE ANN. § 13-1-16 (Supp. 1979); N.C. GEN. STAT. § 8A-1 (Supp. 1979) (requiring that an interpreter be "qualified" without defining the term). The Registry of Interpreters for the Deaf (R.I.D.) is a national certifying organization for interpreters. Although, no states require that an interpreter be registered through this organization in order to be qualified, many states prefer to hire R.I.D. certified interpreters. Goldberg, *supra* note 14, at 24. See also *infra* note 97 and accompanying text.

16. This occurs frequently when the interpreter is a relative or friend of the deaf person. See *infra* note 98 and accompanying text.

17. *Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

18. Mary Fisk Docksai, *Deaf Attorney Argues Before Supreme Court While Using Electronic Translation Equipment*, 18 TRIAL, June 1982, at 18, 18.

19. See, e.g., *Adams v. State*, 749 S.W.2d 635 (Tex. Crim. App. 1988) (holding that trial court's failure to explore alternative means for providing deaf defendant, who did not know sign language or lipreading, with a minimal level of understanding of proceedings, constituted a denial of the defendant's Sixth Amendment rights to confront and cross-examine witnesses).

inadequate to preserve Sixth Amendment rights. Part IV discusses three interpretive methods of communication, including the newest method of computerized translation, and examines the adequacy of each in the courtroom. Part V compares the two most adequate methods of communication, sign language and computerized translation. Finally, in Part VI, the Comment analyzes factors that courts have considered in determining whether a deaf defendant's Sixth Amendment rights have been violated and endorses the method of communication best suited for preserving those rights.

## II. The Sixth Amendment Rights to Confrontation and Effective Assistance of Counsel: Requirements, Standards and Interpretations

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the assistance of counsel for his defense.<sup>20</sup>

### A. *The Right to be Confronted with Adverse Witnesses*

The right of the accused to be confronted with adverse witnesses guarantees the defendant not only the right to encounter witnesses face-to-face, but also the right to "actively test the state's case."<sup>21</sup> One way to test the state's case is through the process of cross-examination.<sup>22</sup> The United States Supreme Court applied the right of confrontation to the states in *Pointer v. Texas*.<sup>23</sup> The Court emphasized the importance of cross-examination in the adversarial process as a way to enable defendants to assist in their own defenses.<sup>24</sup> Since *Pointer*, the ability to cross-examine witnesses has become a central factor in determining whether a defendant's right to confront adverse witnesses is violated.<sup>25</sup>

Under the Sixth Amendment, a defendant ordinarily must have the opportunity to physically confront adverse witnesses. The Supreme Court, however, has refused to hold that the confrontation clause always requires a face-to-face encounter. Recently, in *Mary-*

20. U.S. CONST. amend. VI.

21. CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE 667 (1986).

22. *Garcia v. State*, 210 S.W.2d 574, 580 (Tex. Crim. App. 1988). "The 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.*

23. 380 U.S. 400 (1965).

24. *Id.* at 407.

25. See *infra* notes 125-56 and accompanying text.

*land v. Craig*,<sup>26</sup> the Court allowed a child witness to give testimony against an alleged child molester via a one-way television monitor.<sup>27</sup> It was feared that physical confrontation with the alleged molester might have caused serious emotional distress to the child witness.<sup>28</sup> The Court stressed that the "central concern" of the confrontation clause "is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."<sup>29</sup> Although this goal can be met without face-to-face confrontation, physical confrontation can be eliminated only where an important public policy is furthered and where the reliability of the testimony is otherwise assured.<sup>30</sup> In all cases, however, the other elements of confrontation should be present: the physical presence of the accused, the witness' taking of an oath, cross-examination of the witness, and the opportunity for observation of the witness' demeanor by the trier of fact.<sup>31</sup>

The deaf defendant can only confront adverse witnesses if the defendant can see the face of the witness. The ability to see the witness often determines whether the defendant understands the witness' testimony. "Face-to-face" confrontation becomes "face-to-ear" confrontation for a deaf defendant. The Supreme Court has never considered the confrontation clause with respect to a deaf defendant. Lower courts that have considered this issue have ruled that certain requirements must be met to preserve the deaf defendant's right of confrontation.

One interpretation of the right of confrontation requires that the defendant have a "minimum understanding" of the proceedings.<sup>32</sup> This includes the right of deaf defendants to have the proceedings presented to them in a language they understand<sup>33</sup> and the right to adequately understand all questions asked to and responses given by a witness.<sup>34</sup> Another factor in determining whether the right of con-

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26. \_\_\_ U.S. \_\_\_, 110 S.Ct. 3157 (1990).

27. *Id.* at \_\_\_, 110 S.Ct. at 3166.

28. *Id.* at \_\_\_, 110 S. Ct. at 3160.

29. *Id.* at \_\_\_, 110 S. Ct. at 3163.

30. *Craig*, \_\_\_ U.S. at \_\_\_, 110 S. Ct. at 3166.

31. *Id.* at \_\_\_, 110 S. Ct. at 3167.

32. *Adams v. State*, 749 S.W.2d 635, 638 (Tex. Crim. App. 1988).

33. *Id.*

34. *See, e.g., Peeler v. State*, 750 S.W.2d 687, 689 (Mo. Ct. App. 1988). This situation overlaps with the right to effective assistance of counsel. "[A] defendant's inability to spontaneously understand testimony being given would undoubtedly limit his attorney's effectiveness, especially on cross-examination. It would be as though a defendant were forced to observe the proceedings from a soundproof booth or seared out of hearing at the rear of the courtroom, being able to observe but not comprehend the criminal processes whereby the state had put his freedom in jeopardy." *Arizona v. Natividad*, 526 P.2d 730, 733 (Ariz. 1974) (en banc).

frontation is denied is whether the defendant or defense counsel alerted the court to the fact that the defendant was unable to adequately understand the witness' testimony.<sup>35</sup> Courts have also considered whether defendants were given an adequate opportunity to participate in their own defenses to determine if the right of confrontation was preserved.<sup>36</sup>

The Supreme Court's holdings along with the lower courts' factors elucidate the goals of the right of confrontation and the minimum requirements necessary to preserve the right. These goals and requirements can be used to analyze whether the deaf defendant's sixth amendment rights have been preserved.

### B. *The Right to Effective Assistance of Counsel*

The literal text of the Sixth Amendment does not include the word "effective", but the Supreme Court has determined that the right to counsel is meaningless unless counsel effectively represents his clients.<sup>37</sup> The two-part test used to determining ineffectiveness of counsel is set out in *Strickland v. Washington*.<sup>38</sup> First, the defendant must show that counsel's performance was deficient.<sup>39</sup> Deficiency of counsel means that the defendant's lawyer made such a serious error that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."<sup>40</sup> Second, the deficient performance must have prejudiced the defense.<sup>41</sup> Prejudice results if counsel's errors were so serious that the defendant did not receive a fair trial,<sup>42</sup> or if the outcome would have been different had the errors not been made.<sup>43</sup>

The *Strickland* Court refused to outline more specific guidelines, reasoning that the Sixth Amendment refers simply to "counsel" and does not specify particular requirements of effective assistance.<sup>44</sup> The Court determined, however, that to properly measure an attorney's performance, one should consider what a reasonable attorney under the prevailing professional norms would have done in

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35. See, e.g., *Adams*, 749 S.W.2d at 637.

36. *People v. Rivera*, 480 N.Y.S.2d 426, 432-33 (N.Y. Sup. Ct. 1984).

37. *Strickland v. Washington*, 466 U.S. 668, 680 (1984).

38. 466 U.S. 668 (1984).

39. *Id.* at 687.

40. *Id.*

41. *Id.*

42. *Strickland*, 466 U.S. at 687.

43. *Id.* at 691-92.

44. *Id.* at 696.



a similar situation.<sup>45</sup>

In the representation of a deaf defendant, ineffective assistance of counsel ordinarily occurs in one of two situations. First, a lawyer's own actions or inactions can cause ineffective assistance of counsel.<sup>46</sup> This category includes situations that all defendants might face, such as counsel's failure to make objections, make motions, or file documents for example. For the deaf defendant, however, ineffective assistance of counsel arising from a lawyer's inactions has often occurred where the defense attorney failed to ensure that the defendant was able to understand the proceedings.<sup>47</sup>

Second, ineffective assistance of counsel arises when there is a fundamental lack of communication between the defendant and the attorney.<sup>48</sup> The inability of a deaf defendant and counsel to communicate during trial because of inadequate methods of interpretation may be the basis for an ineffective assistance of counsel challenge, even if the attorney's actions are competent.

In sum, three factors must be examined when analyzing whether a defendant has obtained effective assistance of counsel: (1) the two-part *Strickland* test, (2) the counsel's actions or inactions, and (3) whether there is a fundamental lack of communication exists between the deaf defendant and the lawyer.

### III. Noninterpretive Methods of Communication: Excluding the Deaf Defendant from the Criminal Trial

Because deaf defendants are unable to hear spoken words, they cannot understand the judge, the attorneys and the witnesses in a trial.<sup>49</sup> Noninterpretive methods of communication are those methods by which the deaf person understands speech without the aid of a neutral person who translates speech into a visual language.<sup>50</sup> Noninterpretive methods of communication enable deaf defendants to comprehend only disconnected phrases and ideas throughout the trial.<sup>51</sup> Without a systematic method of interpreting speech throughout the proceeding, deaf defendants are effectively excluded from

45. *Id.* at 696-697.

46. *See supra* notes 38-39 and accompanying text.

47. *See, e.g.*, *State v. Staples*, 437 A.2d 266, 267 (N.H. 1981).

48. *See, e.g.*, *People v. Rivera*, 480 N.Y.S.2d 426, 433 (N.Y. Sup. Ct. 1984).

49. NATIONAL CENTER FOR LAW AND THE DEAF, LEGAL RIGHTS OF HEARING-IMPAIRED PEOPLE 117 (3d ed. 1986) [hereinafter LEGAL RIGHTS].

50. DEAF POPULATION, *supra* note 2, at 28.

51. *See generally* LEO M. JACOBS, A DEAF ADULT SPEAKS OUT 10 (1989) (supporting the proposition that lipreading can never be a complete form of communication).

participating in their own trials.<sup>52</sup> Remarkably, however, some courts have decided that noninterpretive methods of communication are adequate to preserve a deaf defendant's Sixth Amendment rights.<sup>53</sup> Because these methods are still employed by the courts, they are examined here with a discussion of their adequacy.

#### A. Lipreading<sup>54</sup>

People who become deaf after they have already developed the ability to speak often can watch others speak and derive meaning from words they see formed on the lips.<sup>55</sup> Prelingually deaf persons<sup>56</sup> have great difficulty lipreading because they have never heard speech and cannot associate the positions of the lips with any particular sounds.<sup>57</sup> Consequently, the first limitation in relying on lipreading in a trial is that not all deaf people are able to lipread.

In ideal conditions, a lipreader will only understand about one-third of the speaker's words because only 33% of all sounds made in spoken English have distinguishable mouth movements.<sup>58</sup> Where conditions of a physical setting hinder the ability to lipread, the percentage of speech that will be understood by a deaf person is even lower.<sup>59</sup> A courtroom setting presents particularly inadequate conditions for lipreading. For example, pacing or other movement of the attorneys while they are speaking, dim or glared lighting, the distance between the deaf person and the speaker, overlapping or interruption of speakers (as when objections are made), and the defendant's lack of familiarity with legal terms and their pronunciation are conditions that hinder the accuracy of lipreading.<sup>60</sup> The value of lipreading in the courtroom, therefore, is negligible. By lipreading alone, the deaf defendant will not completely understand the proceedings.<sup>61</sup>

Preservation of Sixth Amendment rights is particularly difficult

52. See *infra* notes 54-81 and accompanying text.

53. See *infra* notes 54-81 and accompanying text.

54. Also called "speechreading". *Quigley & Paul, supra* note 9, at 11.

55. MICHAEL RODDA & CARL GROVE, LANGUAGE, COGNITION AND DEAFNESS 25 (1987) [hereinafter RODDA & GROVE].

56. Prelingually deaf persons are born deaf or lose their hearing before they developed speech. A. DONALD EVANS & WILLIAM W. FALK, LEARNING TO BE DEAF 2 (1986).

57. Kay Mogford, *Lip-reading in the Prelingually Deaf*, in HEARING BY EYE: THE PSYCHOLOGY OF LIP-READING 191, 192-208 (Barbara Dodd & Ruth Campbell, eds., 1987).

58. *Id.* at 202.

59. RODDA & GROVE, *supra* note 55, at 25.

60. See *id.*

61. See *id.* (listing the factors that reduce the accuracy of lipreading and ways to improve lipreading conditions).

if lipreading is the sole method of communication available to a deaf defendant. To accurately lipread, the defendant must be positioned in the courtroom where he or she can see all speakers' faces at all times.<sup>62</sup> This may require a restructuring of the courtroom setting and might result in the defendant being physically separated from his or her lawyer.<sup>63</sup> The defendant's inability to consult with counsel during the trial deprives the defendant of effective assistance of counsel.

A defendant who must lipread a witness' testimony will understand at best one-third of the witness' statement.<sup>64</sup> A witness' speech may be hampered by emotion or nervousness, which will further hinder the ability of the defendant to lipread. Because the preservation of the right to confront witnesses relies upon the deaf defendant's ability to understand the proceedings,<sup>65</sup> lipreading is inadequate to preserve the right to be confronted with adverse witnesses. Lipreading as the sole communication method used during trial will not guarantee the preservation of the deaf defendant's Sixth Amendment rights.<sup>66</sup>

### B. *Written Communication*

Writing notes to the deaf defendant has only once been upheld as an appropriate method of communication between an attorney or the court and the deaf defendant.<sup>67</sup> This method is inadequate to preserve the right of confrontation because it is not fast enough to keep the defendant informed of adverse witnesses' testimony in a timely or thorough manner.<sup>68</sup> The defendant also may not be able to

62. *See id.*

63. *See Procedural Due Process, supra* note 2, at 870 (concluding that lipreading as a method of communication in civil trials would require a fundamental restructuring of the trial proceeding).

64. *See supra* notes 59-62 and accompanying text.

65. *See supra* notes 32-34 and accompanying text.

66. Lipreading during a trial might be adequate for persons other than defendants, however. For example, Philadelphia lawyer Harold Diamond was rendered profoundly deaf at the age of 15 after being involved in a car accident. Diamond says his inability to use standardized sign language limits him to lipreading in court. Consequently, he must move his position numerous times during a proceeding to be able to see the faces of the speakers. When he questions a witness he must stand right next to the witness box. Diamond believes that this gives him an advantage because his proximity sometimes unnerves the witness. He is also unable to take notes during the trial because he must continually look at the speakers. He sees all of these "inabilities" as a way to intimidate the opposing party. "You have to get them to fear and respect you," Diamond says. "Then they're more reluctant to lie." William Kramer, *In Philadelphia's Courts, a Deaf Lawyer Gets Hearings Regularly*, L.A. DAILY J., Sept. 5, 1983, at 4.

67. *Stevens v. Page*, 420 F.2d 933 (10th Cir. 1969).

68. *See infra* text accompanying note 217.

understand what is being written because many English-speaking deaf persons are functionally illiterate.<sup>69</sup> Written communication during trial, therefore, does not adequately preserve the defendant's right to understand the adverse witnesses' testimony. Consequently, the defendant cannot assist in his or her defense or assist with the cross-examination of adverse witnesses.

The right to effective assistance of counsel may be impaired when the defendant's lawyer is distracted from the trial by writing notes to the defendant to translate the proceedings and to ask the defendant if any adverse testimony is untrue.<sup>70</sup> This prevents the lawyer from responding and objecting in a keen and timely fashion, which may result in the lawyer's failure to meet the *Strickland* competency test.<sup>71</sup> For example, in *Stevens v. Page*,<sup>72</sup> the petitioner argued unsuccessfully that communication between the attorney and the deaf defendant by means of written notes did not constitute the "full and effective" communication needed to preserve the defendant's right to effective assistance of counsel.<sup>73</sup>

Because of the high risk of inaccuracy and untimely translation, both of the noninterpretive methods of communication, lipreading and written communication are inadequate to preserve deaf defendants' rights to confront adverse witness and to receive effective assistance of counsel.

#### IV. Interpretation in the Courtroom: Including the Defendant in the Criminal Trial

##### A. Oral Interpretation

An oral interpreter mouths words, without the use of voice or breath, to a deaf person at the moment the speaker utters the

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69. The average 18-year-old deaf person reads at the fourth grade level. OFFICE OF DEMOGRAPHIC STUDIES, GALLAUDET COLLEGE, ACADEMIC ACHIEVEMENT TEST RESULTS OF A NATIONAL TESTING PROGRAM FOR HEARING IMPAIRED STUDENTS IN THE UNITED STATES (Spring 1981). Only 10% of the prelingually deaf can read above a sixth grade level and more than half of the adult deaf population has not completed high school. Of those, 28% have completed only the eighth grade or less. DEAF POPULATION, *supra* note 2, at 51. The majority of deaf students in the United States do not possess native competence in English. J. Charrow & E. Fletcher, *English as the Second Language of Deaf Children*, 10 DEV. PSYCHOL., 460, 463-70 (1974).

70. *See, e.g.*, petitioner's arguments in *Stevens v. Page*, 420 F.2d 933, 934 (10th Cir. 1969).

71. The test requires, in part, that a lawyer act as a reasonably competent lawyer would in similar circumstances. *Strickland v. Washington*, 466 U.S. 668, 696-697 (1984).

72. 420 F.2d 933 (10th Cir. 1969).

73. *Id.* at 933-34.

words.<sup>74</sup> This form of translation differs from lipreading because one stationary, neutral interpreter mouths words to the defendant throughout the trial while using pre-defined hand signals to identify which person is speaking.<sup>75</sup> The oral interpreter substitutes words that have difficult patterns or confusing mouth formations with simple, understandable synonyms.<sup>76</sup>

In a courtroom, however, many legal terms may be unfamiliar to the defendant or to the oral interpreter.<sup>77</sup> The interpreter may not be able to make accurate or quick substitutions, which will reduce the effectiveness of this form of interpretation in a courtroom setting.<sup>78</sup> Oral interpretation is also ineffective when speakers overlap or interrupt each other.<sup>79</sup>

Because of these shortcomings, reliance on oral interpretation is inadequate to protect the Sixth Amendment right to confront adverse witnesses.<sup>80</sup> Unless defendants can understand all of the witness' testimony, they are deprived of the right of confrontation because they cannot assist in their own defenses and are deprived of effective cross-examination.<sup>81</sup>

Oral interpretation is an especially ineffective method of interpretation in protecting the right to effective assistance of counsel. The oral interpreter cannot interpret private conversations during trial, thus eliminating communication between the defendant and his or her attorney.<sup>82</sup> The defendant cannot participate in his or her own defense because oral interpretation provides no opportunity for private or spontaneous communication during the trial.<sup>83</sup>

74. Susan R. Harris, *The Hearing Impaired Advocate*, 67 JUDICATURE, August 1983, at 95, 96.

75. *Id.*

76. *Id.* For example, the words "baby" and "paper" are indistinguishable when formed by the mouth. DAVID WRIGHT, *DEAFNESS* 5 (1969). The 40 basic units of English speech ("phonemes") form only 16 discriminable visual units. MOGFORD, *supra* note 57, at 192.

77. RODDA & GROVE, *supra* note 55, at 25.

78. *Recognizing and Preserving Legal Rights for the Hearing Impaired in the Courtroom*, 59 WIS. BAR BULL., November 1984, at 14, 15.

79. See RODDA & GROVE, *supra* note 55, at 25 (suggesting that oral interpretation is impossible when people are talking simultaneously).

80. Oral interpretation may be adequate for deaf lawyers, however. Susan Harris is a deaf lawyer who finds oral interpretation adequate when used during appellate argument. Harris, *supra* note 74, at 96. In that setting, though, there is less chance of overlapping speakers than there is in a trial setting.

81. See *supra* notes 23 and 34 and accompanying text.

82. Attorneys would have to request a recess during a trial every time they wished to privately consult a deaf defendant.

83. Harris, *supra* note 74, at 96.

## B. Sign Language

The majority of deaf people communicate by using a system of hand signals, called "signs", to convey meaning.<sup>84</sup> Two standard forms of sign language are prevalent in the United States, American Sign Language<sup>85</sup> (A.S.L.) and Signed English.<sup>86</sup> Signed English translates English grammar word-for-word.<sup>87</sup> American Sign Language translates concepts<sup>88</sup> and uses its own syntax and linguistic rules.<sup>89</sup> Each country has its own form of standardized sign language, and regional or cultural variations exist within each country.<sup>90</sup>

Because the rate, amount, and accuracy of information conveyed in sign language and spoken language are nearly identical,<sup>91</sup> sign language is the interpretive mode of communication most often used in criminal proceedings.<sup>92</sup> Federal law and many state laws provide for mandatory appointment of interpreters where the defendant is unable to comprehend the proceedings.<sup>93</sup> The statutes aim at ensuring the factual accuracy of a deaf defendant's trial.<sup>94</sup>

Usually only the defendant can waive his or her right to an interpreter, and only if the defendant can convince the judge that he or she will understand all aspects of the proceedings without an interpreter.<sup>95</sup> Courts are reluctant to allow a deaf defendant to enter a guilty plea without an interpreter present.<sup>96</sup> Even in jurisdictions where interpreters are guaranteed by statute, other issues arise that affect the constitutionality of the trial. These include the qualifications of the interpreter<sup>97</sup> and the neutrality of the interpreter, espe-

84. QUIGLEY & PAUL, *supra* note 9, at 6-8.

85. The American Linguistics Association has granted American Sign Language the status of a "language". See *Deaf Suspects*, *supra* note 3, at 166.

86. QUIGLEY & PAUL, *supra* note 9, at 10.

87. *Id.*

88. HARLAN LANE & FRANCOIS GOSJEAN, RECENT PERSPECTIVES ON AMERICAN SIGN LANGUAGE 2 (1980).

89. *Id.*

90. *Id.* at 1-2.

91. *Id.*

92. See generally MYERS, *supra* note 2, at 26-32, 43-46.

93. See *supra* notes 12 and 13 and accompanying text.

94. See, e.g., NEB. REV. STAT. § 25-2461 (1975) (deaf persons cannot be fully protected against error unless interpreters are available to assist them in legal proceedings).

95. See, e.g., *State v. Neave*, 344 N.W.2d 181 (Wis. 1984) (the right to an interpreter is a personal right of the defendant and may not be waived by his attorney and a defendant does not necessarily lose the right to an interpreter by not asserting it).

96. *Mothershead v. King*, 112 F.2d 1004 (8th Cir. 1940) (deaf defendant's guilty plea held unconstitutional when entered without an interpreter); *Garcia v. State* 210 S.W.2d 554 (Tex. Crim. App. 1948) (the only plea a non-English speaking defendant may enter without an interpreter is "not guilty").

97. The Registry of Interpreters for the Deaf (R.I.D.) certifies interpreters according to

cially if the interpreter knows the defendant,<sup>98</sup> and other related issues.<sup>99</sup>

Because sign language is the most widely used method of communicating with a deaf defendant during a criminal trial,<sup>100</sup> the constitutional issues of the right to confront witnesses and the right to effective assistance of counsel have been decided in many cases involving sign language interpreters.<sup>101</sup> Both of these constitutional guarantees are examined separately.

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national standards of competency and ethics. The Registry issues specialized skills licenses, such as the Legal Skills Certificate (L.S.C.). *LEGAL RIGHTS*, *supra* note 49, at 2. As of 1984, only 100 interpreters in the United States have the L.S.C. *Deaf Suspects*, *supra* note 3, at 169. These licensees are most qualified to interpret criminal proceedings because they are trained in legal terminology and procedures. *Id.* Many states and federal jurisdictions prefer the hiring of a R.I.D.-certified interpreter over a non-R.I.D. certified interpreter. *LEGAL RIGHTS*, *supra* note 49 at 2.

Unfortunately, many interpreters avoid working in the legal profession because the risks of error and malpractice suits are high, payment is often low, and the work is difficult because there are no signs for many legal terms. Shipley, *supra* note 3, at 14.

The constitutionality of many cases has turned on the issue of the qualification of an interpreter. *See, e.g.*, *People v. Rivera*, 480 N.Y.S.2d 426, (N.Y. Sup. Ct. 1984) (prior felony convictions of deaf defendant, obtained without a qualified sign language interpreter, were unconstitutional for the purposes of sentencing as second felony offender); *Turner v. State*, 429 So.2d 645 (Ala. Crim. App. 1982) (deaf defendant's guilty pleas were considered voluntary even though defendant was not represented by a state certified interpreter, but used his own attorney, who knew sign language, to interpret).

98. When a deaf person cannot communicate in a standardized form of sign language, but has developed a personalized system of gestures, courts have allowed family members and friends to interpret for that person during trial. *See, e.g.*, *Robinson v. State*, 444 So.2d 902 (Ala. Crim. App. 1984) (teacher of defendant); *Minor v. State*, 659 S.W.2d 161 (Tex. Ct. App. 1983) (first cousin of complainant); *Hyman v. State*, 338 So.2d 448 (Ala. Crim. App. 1976) (teacher of complainant); *Fairbanks v. Cowan*, 551 F.2d 97 (6th Cir. 1977) (father of victim); *Doucette v. State*, 463 A.2d 741 (Me. 1983) (relative of deaf victim). Even co-defendants have been allowed to interpret for each other without affecting constitutionality of trial. *See, e.g.*, *Peeler v. State*, 750 S.W.2d 687 (Mo. Ct. App. 1988).

Courts have not allowed family or acquaintances to interpret where the interpreter is involved in the action. *See, e.g.*, *Prince v. Beto*, 426 F.2d 875 (5th Cir. 1970) (husband as interpreter for deaf wife constituted fundamental unfairness where husband was accused of taking part in conspiracy against his wife).

Courts that are uncomfortable with allowing a relative or acquaintance to interpret for the deaf person have the discretion to delay the trial until the deaf person can be instructed in a standardized sign language which would permit the use of a neutral interpreter. *See, e.g.*, *Shook v. State*, 552 So.2d 841 (Miss. 1989).

99. Other issues include whether the interpreter must take the same oath that a witness takes, *see, e.g.*, *Brown v. State*, 331 So.2d 820 (Ala. Crim. App. 1976) (no oath necessary because jury is not hearing the testimony of the interpreter); *Todd v. State*, 380 So.2d 370 (Ala. Crim. App. 1980) (interpreter does not testify as to what hard-of-hearing witness is saying, therefore there is no need to place interpreter under oath), and whether the presence of the interpreter prejudices the jury by making the deaf witness' testimony inflammatory, *see, e.g.*, *Johnson v. State*, 244 S.W.2d 823 (Tex. Crim. App. 1952) (testimony of deceased victim's deaf mother in court through an interpreter was not inflammatory or highly prejudicial to defendant's rights).

100. *See supra* note 92 and accompanying text.

101. *See infra* notes 105-28 and accompanying text.

1. *Sign Language Interpretation and the Right To Be Confronted With Adverse Witnesses.*—The Sixth Amendment right of the accused to be confronted by adverse witnesses includes the right to hear the testimony of the witnesses in order that the accused may have a minimal understanding of the proceedings.<sup>102</sup> A primary goal of the right of confrontation is to secure the opportunity to cross-examine the witness.<sup>103</sup> Even a defendant with normal hearing can argue that conditions in the courtroom prevented him or her from fully hearing adverse witnesses' testimony, and thus violated the defendant's Sixth Amendment right.<sup>104</sup>

The issue of interpreters with respect to the right to confront witnesses was first examined in *Garcia v. State*.<sup>105</sup> A Spanish-speaking defendant was unable to understand the English testimony of adverse witnesses and made a timely request for an interpreter to be present at trial.<sup>106</sup> The appellate court held that the trial court's denial to grant the request for an interpreter<sup>107</sup> constituted a constitutional error.<sup>108</sup> The court reasoned that in order to protect the confrontation clause's implicit right of cross-examination, the defendant was entitled to have the witness' testimony interpreted.<sup>109</sup>

The first case involving a deaf defendant, *Terry v. State*,<sup>110</sup> applied the same rationale as *Garcia* regarding the right of confronta-

102. *Ferrell v. Estelle*, 568 F.2d 1128, 1132 (5th Cir. 1978).

103. *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934); see also *supra* note 22.

104. See, e.g., *State v. Weldon*, 74 S.E. 43 (1912) (defendant required to sit so far away from the witness box that he could not hear the testimony).

105. 210 S.W.2d 574 (Tex. Crim. App. 1948).

106. *Garcia*, 210 S.W.2d at 580. Courts are split on whether the right to have an interpreter present is preserved only by the defendant's request for an interpreter or if the trial court must appoint an interpreter if it sees the need for one, even in the absence of a request by the defendant. Compare *Field v. State*, 232 S.W.2d 717 (Tex. Crim. App. 1950) (deaf defendant waived constitutional right to be confronted with witnesses by failing to make timely request that testimony of such witnesses be communicated to him through an interpreter) with *Baltierra v. State*, 586 S.W.2d 553 (Tex. Crim. App. 1979) (Spanish-speaking defendant did not waive her right to have proceedings translated by failing to request an interpreter and the fact that the court did not furnish an interpreter at trial denied defendant her right of confrontation).

Courts have even allowed a deaf defendant who neglected to make a request for an interpreter at trial to raise that issue on appeal in the federal courts. See, e.g., *Felts v. Murphy*, 201 U.S. 123, 130 (1906).

107. The appointment of an interpreter in states where it is not mandated by statute rests in the discretion of the trial court. See, e.g., *Garcia*, 210 S.W.2d at 579.

108. *Garcia*, 210 S.W.2d at 580. "Every person accused of crime is entitled to be tried in accordance with law. Such a trial is not accord when a constitutional right, timely requested, has been denied." *Id.*

109. *Id.* at 580. Additionally, dicta in this case suggests that had *Garcia's* lawyer been able to translate for him, that interpretation would have been adequate. *Id.* "Unless 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." *Id.*

110. 105 So. 386 (Ala. App. 1925).



tion. The Court in *Terry* held that the trial judge failed to provide the necessary means of communication for the defendant. Consequently, the defendant's constitutional right to confront witnesses has been violated.<sup>111</sup>

In recent cases, the right to be confronted by adverse witnesses has been guaranteed through the use of interpreters at trial. For example, in *Adams v. State*<sup>112</sup> the Texas Court of Appeals held that the trial court had a duty to explore alternative means of providing the defendant with a minimal understanding of the proceedings.<sup>113</sup> The defendant was deaf but did not know sign language, could not lipread, and did not use any personalized system of communication through which a friend or relative could interpret.<sup>114</sup> Because the trial court failed to devise an effective method of communication for the defendant, the defendant could not attain the minimal understanding of the proceedings necessary to protect his constitutional right to confront and cross-examine witnesses.<sup>115</sup>

More than just the presence of an interpreter is needed to preserve the constitutional right to be confronted with adverse witnesses.<sup>116</sup> The interpreter must be effective and must be able to provide communication with the defendant by using a system of interpretation with which the defendant is familiar.<sup>117</sup> Courts are reluctant to find a constitutional violation where a hearing impaired defendant refuses to take all available measures to secure optimum hearing ability at trial. For example, in *Guillory v. Wilson*<sup>118</sup> the defendant's hearing aid batteries had run down at the beginning of the trial.<sup>119</sup> To compensate for his inadequate hearing, the court allowed the defendant to sit with his lawyer in the jury box near the witness.<sup>120</sup> Because the defendant did not indicate thereafter that he

111. *Terry*, 105 So. at 388.

112. 749 S.W.2d 635 (Tex. Crim. App. 1988).

113. *Id.* at 638.

114. *Id.* at 636.

115. *Id.* at 639.

116. See *infra* note 117 and accompanying text.

117. See, e.g., *People v. Starling*, 315 N.E.2d 163 (Ill. App. Ct. 1974) (defendant was denied his right to confront witnesses where both State and defense counsel complained about the interpreter's ineffectiveness and judge admonished interpreter for frequently engaging in unrecorded discussions with witness); *But compare* *Valladares v. United States*, 871 F.2d 1564 (11th Cir. 1989) (interpreter deemed adequate even though provided only summaries of testimony, not word-for-word translation, particularly because defendant failed to object to adequacy of interpretation) with *Bednarski v. Bednarski*, 366 N.W.2d 69 (Mich. Ct. App. 1985) (stipulation that interpreter for deaf parties would paraphrase witnesses testimony to expedite the proceeding is unacceptable).

118. 402 F.2d 34 (9th Cir. 1968).

119. *Id.* at 35.

120. *Id.* at 36.

was unable to hear the witnesses' testimony, the court found that the defendant was not deprived of the right of confrontation.<sup>121</sup>

Because the right to confront witnesses encompasses the right to cross-examine witnesses, no constitutional violation occurs if every essential portion of the witness' testimony is repeated during cross-examination.<sup>122</sup> In *Harrison v. State*,<sup>123</sup> the defendant and his attorney were familiar with the witnesses' expected testimony before the trial began. During trial, the defense counsel did not assert that the defendant was unable to hear the witness, did not request that any of the witnesses' answers be repeated, and essentially repeated the witnesses' testimony during cross-examination. On appeal, the court found that the rights of confrontation and cross-examination were not violated.<sup>124</sup>

The right to be confronted with adverse witnesses does not encompass the right to have a perfect interpretation of the trial.<sup>125</sup> Courts will grant reasonable means of interpretation, often determined by balancing the defendant's "rights under the sixth amendment against the public's interest in the administration of criminal law."<sup>126</sup> The court may place a limit on the amount of money, time, or personnel that may be used to grant a defendant an interpretation of the trial. This implies that defendants may not always be granted the best method of interpretation.

As early as 1978, however, a federal court recognized a need to provide stenographers to simultaneously translate the trial for a defendant who had gone deaf between the time of the alleged murder and the time of trial.<sup>127</sup> The court emphasized that trial courts should explore all reasonable alternative means for providing the defendant with an understanding of the proceedings. At the same time, however, the federal court acknowledged that courts are not bound to see that every criminal defendant comprehend the testimony "with the precision of a Rhodes Scholar" or be able to appreciate nuances of witness' testimony "with the skill of a doctor of psychol-

121. *Guillory*, 402 F.2d at 38. See also *infra* note 131 and accompanying text.

122. *Harrison v. State*, 104 So.2d 881 (Fla. Dist. Ct. App. 1958).

123. *Id.*

124. *Id.* at 882. However, in *Harrison* the defendant was a hearing person and argued that the distance that the trial court had determined must remain between the defendant and the witness (defendant's daughter) in an incest case prohibited defendant from fully hearing the witness' testimony. *Id.* at 881. The court justified its decision by ruling that when there has been a cross-examination, there has been a confrontation and to hold otherwise would mean that a slightly deaf defendant would always have ground for reversible error. *Id.* at 882.

125. *Ferrell v. Estelle*, 568 F.2d 1128, 1131 (5th Cir. 1978).

126. *Id.* at 1132.

127. *Id.* at 1133.

ogy".<sup>128</sup> Unfortunately, interpretation of any kind can never really preserve the nuances of speech, but courts should ensure that the defendant will "sufficiently understand the proceedings against him to be able to assist in his own defense."<sup>129</sup> The trial judge carries the burden of ensuring that the defendant has this minimum understanding.<sup>130</sup>

Deaf defendants should preserve their Sixth Amendment right to be confronted with adverse witnesses by making a timely request to have an interpreter present throughout the trial.<sup>131</sup> The discretion to grant this request in jurisdictions without statutory authority rests with the trial court.<sup>132</sup> Even without a defendant's request, however, certain jurisdictions have authority to appoint an interpreter when they determine that interpretation is necessary.<sup>133</sup> The constitutional right to confront witnesses would be meaningless unless the testimony of the witnesses is understood by the accused. Mere physical confrontation of the witnesses is useless if the defendant cannot hear or understand the testimony.<sup>134</sup>

2. *Sign Language Interpretation and the Right to Effective Assistance of Counsel.*—Under the Sixth Amendment, the accused has the right to be assisted by counsel.<sup>135</sup> Effectiveness of counsel can be hindered in two ways: by an attorney's ineffective actions, or by communication barriers between a defendant and his attorney.<sup>136</sup>

When an attorney's actions or lack of actions are substandard, a defendant is deprived of effective assistance of counsel.<sup>137</sup> Defense attorneys representing clients in criminal proceedings assume a special duty to "take all necessary action to inform the accused of his rights and to vindicate such rights."<sup>138</sup> An attorney representing a

128. *Id.* at 1131.

129. *Ferrell*, 568 F.2d at 1132.

130. *Id.*

131. Where courts will not take it upon their own motion to appoint an interpreter on their own motion, the request for an interpreter is crucial in preserving the issue of interpretation for appeal. *See, e.g.*, *Field v. State*, 210 S.W.2d 574 (Tex. Crim. App. 1950) (deaf defendant held to have waived right to alternate communication by failing to request it); *Williams v. State*, 238 S.W.2d 534 (Tex. Crim. App. 1951) (death penalty for deaf defendant unanimously affirmed where defendant did not request any form of alternate communication, and trial court found that defendant could hear adequately during trial).

132. *See supra* note 107.

133. *See supra* notes 12 and 13 and accompanying text.

134. *Terry v. State*, 105 So. 386, 387 (Ala. 1925).

135. U.S. CONST. amend. VI.

136. *See supra* note 48 and accompanying text.

137. *See supra* notes 46-47 and accompanying text.

138. A.B.A., STANDARDS FOR THE DEFENSE FUNCTION AND STANDARDS FOR CRIMINAL JUSTICE, § 4-3.6, § 4.46.

deaf client, therefore, must take all reasonable steps necessary to provide adequate interpretation for the client during all stages of the criminal proceedings or risk being charged with ineffective assistance of counsel.<sup>139</sup> In many instances, where the attorney has failed to request adequate interpretation for a client, the court will determine that the defendant was deprived of effective assistance of counsel.<sup>140</sup>

In *State v. Staples*,<sup>141</sup> the defendant argued that his trial counsel inadequately represented him because he did not take action to compensate for the defendant's hearing impairment during trial.<sup>142</sup> The attorney was well aware of his client's hearing problem as he told the court, "We have a problem with our defendant who cannot hear a single word that is being said."<sup>143</sup> After this announcement, the lawyer failed to take steps to have the proceedings interpreted for the defendant. The lawyer merely whispered witnesses' testimony to the defendant during trial and explained the testimony to the defendant during the court's recesses.<sup>144</sup> The Supreme Court of New Hampshire found that the defendant was ineffectively represented as a matter of law.<sup>145</sup>

A similar case involved a second degree murder prosecution of a defendant whose son, a co-defendant, sat with him during trial and wrote notes to keep his father informed.<sup>146</sup> The court found that the attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under similar circumstances and that the defendants were consequently prejudiced.<sup>147</sup> Both defendants argued that the attorney's failure to request an interpreter affected their rights to have a fair trial.<sup>148</sup> The hearing-impaired father argued that the absence of an interpreter deprived him of his right to confront witnesses and deprived him of due pro-

139. See, e.g., *Peeler v. State*, 750 S.W.2d 687, 691 (Mo. Ct. App. 1988) (defense counsel's failure to request interpreter for defendant who indisputably suffered from severe hearing loss and was unable to understand what was being said at trial was ineffective assistance in second-degree murder prosecution).

140. See *id.*; see also *State v. Staples*, 437 A.2d 266, 268 (N.H. 1981) (defense counsel ineffective because he didn't take remedial steps to ensure that deaf defendant would have full opportunity to participate in his defense).

141. 437 A.2d 266 (N.H. 1981).

142. *Id.* at 267.

143. *Id.*

144. *Id.* at 267-68.

145. *Staples*, 437 A.2d at 268.

146. *Peeler v. State*, 750 S.W.2d 687 (Mo. Ct. App. 1988).

147. *Id.* at 688 (following the *Strickland* standard discussed *supra* at notes 37-45 and accompanying text).

148. *Peeler*, 750 S.W.2d at 688.

cess.<sup>149</sup> The son argued that the absence of an interpreter hindered his ability to focus his attention solely on the proceedings.<sup>150</sup>

Although the trial judge believed there was no need to appoint an interpreter, the record shows that the same judge told the son that the court wasn't sure if his father understood everything.<sup>151</sup> In light of this evidence, the appellate court held that the failure of the defendants' counsel to request an interpreter constituted ineffective assistance of counsel.<sup>152</sup>

Counsel can be deemed ineffective not only when the attorney neglects to request an interpreter, but also when the attorney fails to request that the interpreter be used throughout the proceedings. In *United States v. Tapia*<sup>153</sup> an interpreter was present throughout the trial but assisted the defendant only while the defendant gave his testimony.<sup>154</sup> The defense counsel never requested that the interpreter sit near the defendant during the course of the proceedings and interpret all witnesses' testimony. The defendant did not understand the testimony of principal government witnesses.<sup>155</sup> The appellate court held that the attorney's neglect constituted ineffective assistance of counsel.<sup>156</sup>

The second situation which results in ineffective assistance of counsel occurs when the communication between defendant and attorney is hindered simply because of the defendant's hearing impairment, regardless of the attorney's action or inaction.<sup>157</sup> For example, a petitioner to the Tenth Circuit argued that he was deprived of his Sixth Amendment right to effective assistance of counsel because the communication between the defendant and his lawyer, achieved only through written notes and questions because the court failed to appoint him an interpreter, was grossly inadequate.<sup>158</sup>

Because courts vary as to whether the defendant and his attorney must move for an interpreter to be present, or whether the court should appoint one despite the absence of such a request,<sup>159</sup> the prudent lawyer should request an interpreter for a hearing impaired cli-

149. *Id.*

150. *Id.*

151. *Peeler*, 750 S.W.2d at 689.

152. *Id.* at 691.

153. 631 F.2d 1207 (5th Cir. 1980).

154. *Id.* at 1209.

155. *Id.* at 1209-1210.

156. *Id.* at 1210.

157. *See supra* note 48 and accompanying text.

158. *Stevens v. Page*, 420 F.2d 933, 934 (10th Cir. 1969) (court rejected petitioner's argument).

159. *See supra* notes 106-107 and accompanying text.

ent in all cases. Even when an attorney takes all necessary steps to provide interpretation and the request for an interpreter is denied by the court, defendants might still be deprived of effective assistance of counsel if they have no means or inadequate means of communicating with their attorneys during the proceedings.<sup>160</sup>

*C. The Newest Interpretation Method: Instantaneous Computerized Translation*

In 1982 Michael Chatoff became the first deaf lawyer to argue a case<sup>161</sup> before the U.S. Supreme Court. The Court allowed him to use a computer system which translates spoken words onto a computer screen as the court reporter records the proceedings.<sup>162</sup> The court stenographer records phonetic sounds which are then sent to a computer outside the courtroom. The computer translates the information into full English text and within seconds sends the written record back into the courtroom where the deaf person reads it on a video display terminal.<sup>163</sup>

Chatoff had informed the Court in writing that he was totally deaf and that sign language was not accurate or fast enough to enable him to effectively argue his case.<sup>164</sup> The Court's granting of his request to use electronic translation departs from the Court's traditional ban on the use of recording systems or electronic equipment of any kind.<sup>165</sup>

As early as 1978, the Fifth Circuit ruled that a state trial court violated a deaf defendant's rights to confront witnesses and to assist in his own defense when the court refused to provide stenographers to simultaneously transcribe a murder trial.<sup>166</sup> Although the technology considered in that case was a crude system of giving the defendant the phonetic transcription directly from the court reporter, the case foreshadowed the importance of technology in providing a deaf defendant with an understanding of court proceedings. The circuit court stated that the state must guarantee the defendant's rights by

160. See *supra* note 48 and accompanying text.

161. *Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

162. *Docksai*, *supra* note 18, at 18.

163. *Id.* This type of instantaneous translation is impossible without a computer because of the phonetic nature of the stenographic records which are almost undecipherable to the average reader. Translation System's Incorporated, which developed the system, designed an algorithm that analyzes sentence context to discriminate between like-sounding and like-spelled words. The system has a dictionary of more than three million words. *Id.*

164. *Docksai*, *supra* note 18, at 19.

165. *Id.*

166. *Ferrell v. Estelle*, 568 F.2d 1128, 1133 (5th Cir. 1978).

"by providing him with . . . any device that will display or convey words to him and allow him to understand what the witnesses say and to assist his attorney in the conduct of his defense."<sup>167</sup>

Today, computerized translation, also called "real-time" technology, is highly developed and exceeds other methods of interpretation in many ways. Transcripts can be produced immediately on computer terminals in front of the witnesses, judge, jury, parties, and attorneys.<sup>168</sup> When a deaf witness who is able to speak uses the system it allows the witness to project to the jury better than sign language.<sup>169</sup> Many people who lose their hearing as adults never become fluent in sign language; real-time reporting is an essential communication tool for this population.<sup>170</sup>

Outside of its use for deaf people, computer technology can be used to compare documents and depositions to current testimony by displaying both on a split screen.<sup>171</sup> A court stenographer is able to make immediate corrections on the computer system, which helps to eliminate confusion in the transcript.<sup>172</sup> The system can also be programmed to translate English into other languages.<sup>173</sup>

Computer translation is especially useful where a deaf defendant engages in self-representation, particularly for an appeal where there is no constitutional right to counsel and the defendant cannot afford to hire an attorney.<sup>174</sup> In 1990 a *pro se* deaf appellant used a computer system during oral argument.<sup>175</sup> Joan P. Whitmer used her own voice to address the court and read the judge's questions and responses on a computer terminal.<sup>176</sup> In a subsequent interview, one of the three judges who presided at Ms. Whitmer's appeal concluded that the computer system was not a distraction and welcomed it into the courtroom.<sup>177</sup> Although Ms. Whitmer had some hearing capability, she stated that the equipment made it possible for her not to

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167. *Id.* at 1133.

168. Sheryl Nance, *Introducing the Computer Age Into Courtrooms: Deaf Witness Testifies Using "Real-Time Technology"*, 203 N.Y. L.J. 22, March 28, 1990, at 1, 1.

169. *Id.* at 8.

170. *Doing Some Real-Time*, STUDENT LAWYER, December, 1991, at 5, 6.

171. *Id.*

172. Debra Cassens, *The Courtroom of the Future Is Here: Computers Can Aid Deaf Lawyers*, 75 A.B.A. J., Feb. 1989, at 26, 26.

173. *Id.*

174. Teresa Sullivan, *Computer Helps Hearing-Impaired Woman To Take Part In Appeal*, CHI. DAILY L. BULL., March 1, 1990, at 2.

175. *Id.*

176. *Id.*

177. Sullivan, *supra* note 174, at 2. "I think it's excellent," said Judge James C. Murray. "The court ought to adopt [the computer system]. What it does is open up the judicial process for deaf people." *Id.*

miss any of the proceedings and gave her a better chance of understanding the appeal process.<sup>178</sup>

Perhaps the best example of the benefits of computerized translation is found in the case of *Adams v. State*.<sup>179</sup> Adams, who was deaf and did not know sign language, was originally convicted of sexual assault.<sup>180</sup> During his trial, Adams' attorney explained to the court that Adams could speak, but was deaf and required a sign language interpreter in order to understand the proceedings.<sup>181</sup> The trial judge denied this motion based on a pre-trial discussion with the defense attorney which revealed that the defendant had been deaf from birth but did not develop a working knowledge of sign language.<sup>182</sup> The court allowed the defendant to rely upon his limited ability to read lips along with his lawyer's written notes.<sup>183</sup> Upon conviction, Adams appealed, claiming that his right to confront and cross-examine witnesses was violated. The appellate court agreed with Adams and held that the trial court's failure to explore alternative means for providing Adams with a minimal level of understanding of the proceeding denied him of his Sixth Amendment rights.<sup>184</sup> His conviction was reversed and the case was remanded to the lower court.<sup>185</sup>

At the retrial, a Houston court reporter equipped the courtroom with a computer translation system in which the court stenographer acted as the "interpreter".<sup>186</sup> After having served four years in prison, Adams was acquitted.<sup>187</sup> Adams' attorney credited the computer device for the victory. He said the computer system enabled him to better cross-examine the prosecution's witnesses because Adams knew what those witnesses were saying and could aid in his defense.<sup>188</sup>

While computerized translation in the courtroom has many benefits, it also has limitations. First, to use this system, the defendant must be literate and must be able to read quickly enough to keep

178. *Id.*

179. 749 S.W.2d 635 (Tex. Crim. App. 1988).

180. *Id.* at 636.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Adams*, 749 S.W.2d at 638-39.

185. *Id.* at 639.

186. Gary Taylor, *Preserving Sixth Amendment Rights: Computer Help Acquits Deaf Defendant*, 12 NAT'L L.J., January 29, 1990, at 21. Adams was indigent but the Houston Court Reporters Association paid the expenses of the computer system. *Id.*

187. *Id.*

188. *Id.*



pace with the translation as it appears on the screen.<sup>189</sup> Consequently, computer translation in the courtroom is most useful for deaf persons who know how to read but are not proficient in sign language.<sup>190</sup> The computer system does not provide much assistance to deaf people with poor English skills.<sup>191</sup> Attempts to read unfamiliar legal language during the fast paced courtroom procedures may inhibit rather than facilitate communication with a deaf defendant whose language skills are not highly developed.<sup>192</sup>

Second, if a defendant cannot speak, the system can only convey the courtroom proceedings to the defendant.<sup>193</sup> A sign language interpreter will still be needed in order to transmit the defendant's testimony to the court. In this situation, a court may allow both the computer system and an interpreter would have to be used. This may result in confusion and an inaccurate record.<sup>194</sup>

Third, the computer translation system inhibits eye contact because the screen must be viewed at all times when the deaf person is not speaking or signing.<sup>195</sup> One witness who used the system claimed that it was distracting to have to look back and forth from the computer screen to the questioning attorney.<sup>196</sup> Because of the screen's small print and the accumulation of many questions on the screen at the same time, the witness lost her place several times during questioning.<sup>197</sup> The judge or attorney had to refer her to the current question on the screen, which caused delay and distraction.<sup>198</sup>

Finally, the computer system is expensive and it is not likely that a lower court or the average deaf defendant would be able to pay for such a system.<sup>199</sup>

189. Cassens, *supra* note 172, at 26.

190. *Id.*

191. *Id.* According to Sy DuBow, former legal director of the National Center for Law and the Deaf in Washington, D.C., "[the computer system] shouldn't be touted as a panacea . . . there are only some situations where it would be useful." *Id.*

192. Eileen C. Moore, *Courtroom Procedures Must Accommodate the Deaf*, 103 L.A. DAILY J., December 14, 1990, at 7.

193. For this reason the system is most effective for deaf persons who can speak. Nance, *supra* note 168, at 1.

194. For example, the court reporter will only transmit through the computer system the words spoken in court. There will be no written record of the communication between the witness and the sign language interpreter when the interpreter must rephrase questions or otherwise communicate independently with the defendant. Therefore, if an accurate record is to be maintained of the entire trial, the court should make a video tape of the interpreter and the witness. Moore, *supra* note 192, at 7.

195. Nance, *supra* note 168, at 8.

196. *Id.*

197. *Id.*

198. *Id.*

199. The computer system can cost anywhere from \$20,000 to \$60,000 to fully equip one courtroom. Cassens, *supra* note 172, at 26; *see also* Nance, *supra* note 168, at 8.

## V. Sign Language Interpretation Versus Computerized Translation

In order to preserve the Sixth Amendment rights of the deaf criminal defendant, the defendant must use the method of interpretation best suited for trial. The advent of the computer age and the existence of a computerized translation system raises the issue of which method of interpretation is best and most practical to protect the deaf defendant's constitutional rights.<sup>200</sup>

Sign language has many advantages over computerized translation. It involves no need for equipment and requires only one additional person in the courtroom.<sup>201</sup> The signed translation is never recorded in a permanent fashion so there is no risk of violating court rules about recording the proceedings where such rules exist.<sup>202</sup>

Additionally, sign language interpreters are trained to express language by gestures and expressions which will help the deaf defendant to understand subtleties of speech.<sup>203</sup> A human interpreter can meet the deaf defendant before the proceedings begin and make adjustments for the defendant's language skill levels, intelligence, and education.<sup>204</sup> The interpreter can make quick substitutions that will explain legal phrases to the deaf person.<sup>205</sup> A deaf person's vocabulary often limits the meaning of words and a sign interpreter can compensate by substituting words appropriately and by communicating through concepts rather than individual words.<sup>206</sup> The skilled sign interpreter will neither add to, nor omit from, a deaf person's responses, thereby retaining a precise interpretation of a deaf person's testimony.<sup>207</sup>

By contrast, the computerized translation system requires that additional equipment be placed in the courtroom.<sup>208</sup> It uses the services of employees to set up and run the programs.<sup>209</sup> The "inter-

200. Additional issues of cost, burden of paying for the interpretation, availability of equipment, and defendant's ability to understand will affect the decision as to what system can be used. The discussion here is limited to the setting which would permit either mode to be used without financial or situational limitations.

201. LEGAL RIGHTS, *supra* note 49, at 123.

202. *See, e.g., supra* note 165 and accompanying text.

203. MYERS, *supra* note 1, at 43-46.

204. Robert L. Lowery, *I Can't Hear You*, 16 ARK. LAWYER, July 1982, at 130, 130.

205. MYERS, *supra* note 2, at 43-46.

206. Moore, *supra* note 192, at 7. For example, there is no sign for the legal concept "habeas corpus." An interpreter would have to use eleven signs to express that one concept: "document," "demand," "bring," "prisoner," "face-to-face," "court," "police," "must," "answer," "why," and "imprisoned." Faye Fiore, *Problems of Deaf Too Troublesome For "Impatient Courts"*, 96 L.A. DAILY J., June 13, 1983, at 16.

207. Lowery, *supra* note 204, at 130.

208. *See supra* notes 174-99 and accompanying text.

209. *See supra* notes 174-99 and accompanying text.

preter" is really the court reporter, aided by the computer, so there is no third party interpreter present. The computerized transcription is immediately and permanently recorded, which may violate some courts' rules prohibiting recording devices in the courtroom. The system relies on the accuracy and speed of the defendant's reading skills.<sup>210</sup> When using the computer system the defendant is required to view the monitor at all times. Thus, the defendant loses the freedom of having a sign language interpreter positioned in the courtroom in such a way that enables the defendant to peripherally view the court's proceedings.<sup>211</sup>

Furthermore, the computer system interprets speech word-for-word. This will not help the deaf defendant who communicates through concepts, rather than through individual words.<sup>212</sup> Deaf people use a different set of gestures than hearing people use. Only a live interpreter can properly decipher a defendant's responses, which can make a significant difference in the outcome of a trial. For example, in a case involving a sign language interpreter a deaf defendant nodded yes and signed no to an interpreter's questions.<sup>213</sup> When the opposing party challenged the interpreter's translation of this as "no", the trained interpreter explained to the court that a nod in sign language simply reflects the deaf person's understanding of the question. It is the hand motion that determines whether the actual answer to the question is affirmative or negative.<sup>214</sup>

A deaf Phoenix lawyer, Bonnie Tucker, has renounced the computer system and refuses to use it in court.<sup>215</sup> Ms. Tucker cites two primary faults of the system. First, the lag time of the computer prevents her from interrupting and objecting in a timely fashion during proceedings.<sup>216</sup> Ms. Tucker believes that a live interpreter is better able to preserve the natural pace of the proceedings because the interpreter is usually only two or three words behind the speaker.<sup>217</sup> Second, Ms. Tucker notes that it was her experience that the computer translation system consistently failed to translate the stenographer's notes correctly.<sup>218</sup>

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210. See *supra* notes 174-99 and accompanying text.

211. See *supra* note 203 and accompanying text.

212. See *supra* note 88 and accompanying text.

213. Fiore, *supra* note 206, at 16.

214. *Id.*

215. Cassens, *supra* note 172, at 26.

216. *Id.*

217. *Id.*

218. *Id.*

## VI. The Better Method of Interpretation

In order to determine which method of interpretation best preserves a deaf criminal defendant's Sixth Amendment rights, the requirements and factors comprising each right must be analyzed with respect to each method. Both methods of interpretation have shortcomings that may hinder a defendant's Sixth Amendment rights. When analyzed with respect to the factors that courts have deemed necessary to preserve each right, the sign language method of interpretation is the only method that can adequately preserve both the right to confrontation of adverse witnesses and the right to effective assistance of counsel.

### A. *The Right To Be Confronted With Adverse Witnesses*

The factors that help to determine whether the right to be confronted with adverse witnesses has been violated include whether or not defendant was physically confronted by the witness, whether the defendant could hear and understand the witness' testimony in order to effectuate cross-examination and participate in the defense, and whether or not the defendant had a minimum understanding of the entire proceeding.<sup>219</sup>

1. *Physical Confrontation.*—Sign language better preserves the defendant's right to a physical confrontation with the witness. The computerized system of translation diminishes the defendant's ability to see the witness, even peripherally, because the defendant must concentrate on the video monitor in order to keep pace with the testimony as it appears on the screen. Sign language, on the other hand, allows the defendant to be facing the witness and to watch the interpreter while glancing at the witness from time to time. The defendant can watch the witness peripherally if the interpreter is strategically placed in the courtroom.<sup>220</sup> This ensures that the defendant not only comprehends the witness' testimony, but also sees the witness give the testimony which best simulates the holistic confrontation that hearing people experience.

2. *Cross-examination and Participation in Defense.*—Understanding the witness' testimony is essential to preserving the defendant's right to an effective cross examination and to participate in the defense. Sign language relates the witness' testi-

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219. See *supra* notes 21-36 and accompanying text.

220. MYERS, *supra* note 2, at 43-46.

mony at a conversational pace. The interpreter maintains emphasis where the witness puts emphasis, pauses where the witness pauses, and preserves other rhythms of the witness' speech that can affect the meaning of the testimony.<sup>221</sup> The sign language interpreter can reproduce emotion through the use of gestures and facial expressions; emotion cannot be translated through an inanimate video screen. The experienced sign interpreter knows how to combine phrases and substitute synonyms for words that are unfamiliar or confusing to the deaf defendant.<sup>222</sup> The defendant will develop a rapport with the translator and will become comfortable with his or her mannerisms, thus making it easier to comprehend the translation as the proceedings continue. These factors will enable the defendant to quickly react to testimony and relate to the attorney points of disagreement or untruths that the defense counsel can bring out in cross-examination.

Computerized translation at the trial level would only be effective if the defendant is able to read proficiently and quickly enough to keep pace with the translation. Because of the computer's lag time and the intensity of concentration needed by the defendant to read the screen, the defendant will not be able to react quickly to testimony. The computer system, therefore, may inhibit rather than enhance the defendant's ability to cross-examine and participate in the defense.

3. *Minimum Understanding of the Entire Proceeding.*—The computer system provides a word-for-word translation. Verbatim translation is not effective for most deaf people who are more familiar with a system of communicating by concepts. Words alone have little meaning to a deaf person and reading words without seeing accompanying gestures or expressions can often be meaningless.

Sign language preserves the defendant's right to obtain a minimal understanding of the entire proceeding because it presents concepts to the deaf defendant in context. The concepts are accompanied by supporting gestures and facial expressions. The deaf defendant will more easily derive an understanding of the entire proceeding when sign language is used. Because confrontation of adverse witnesses involves more than just being presented with a written recording of witnesses' testimony and because the human aspects of witnesses' testimony are not translated through computerized

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221. *See id.*

222. *See id.*

translation, sign language is the more accurate method through which the deaf defendant's right of confrontation is preserved.

### *B. The Right to Effective Assistance of Counsel*

In determining whether a deaf defendant's right to effective assistance of counsel was violated, courts have used the *Strickland* test as analyzed in the special context of the deaf defendant.<sup>223</sup> This analysis is triggered when one of two situations gives rise to the challenge that the deaf defendant's counsel is ineffective: 1) the counsel's actions or lack of action are challenged; or 2) the inability of the defendant to communicate with counsel prevents the defendant from obtaining effective assistance of counsel.

1. *Counsel's Actions or Lack of Actions.*—Defense counsel must vigorously attempt to discover a method of communication for the deaf defendant which will best provide the defendant with an understanding of the proceedings. Requesting sign language where the defendant is unable to use sign language is inappropriate. Similarly, requesting computerized translation where the defendant is illiterate or cannot read proficiently is inappropriate. Defense counsel must analyze the defendant's capabilities and, in conjunction with the wishes of the defendant, request an appropriate method of communication. Neither system is superior with respect to this factor.

2. *Inability of the Defendant to Communicate with Counsel.*—The ability of a defendant to communicate with counsel is better preserved by the use of sign language interpretation than by the use of the computerized translation system. The computer system's greatest flaw with respect to the right of effective assistance of counsel is its inability to translate any conversation that is not spoken for the record and recorded by the court reporter.<sup>224</sup> The sign language interpreter will be able to interpret all speech during the trial, and may even translate "whisperings" between the attorney and the defendant when the attorney confers privately with the defendant. The computerized translation system does not enable the attorney and the defendant to communicate privately, either during the trial or outside of the courtroom during recesses.

Sign language is also a more efficient method of communication because it can be used in many different stages of the judicial pro-

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224. This is a current limitation of the system as it is used today. Technology may improve upon this in the future.

cess. The computerized translation is only available in proceedings where a court reporter is present. A sign language interpreter may still have to be employed for other proceedings, such as pretrial conferences. If the defendant becomes familiar with the sign interpretation method, he or she should not have to switch methods later during trial. The method of interpretation used for each of the related criminal proceedings should be consistent so that the defendant can become familiar enough with a certain method to ensure that his or her Sixth Amendment rights will be preserved during the criminal trial.

## VI. Conclusion

Of the five methods of interpretation commonly used by deaf people, only sign language and computerized translation can adequately preserve the deaf defendant's sixth amendment rights to be confronted with witnesses and to effective assistance of counsel during a criminal trial. Assuming that the costs of each system and the abilities of the defendant to use each system are equal, sign language is the method that best guarantees the deaf defendant a constitutionally sound trial. In order to guarantee the rights of confrontation and effective assistance of counsel, the human aspects of sign language are needed. The defendant should not bear the burden of having to read an entire trial as it proceeds, but should be able to "hear" it in signs which the deaf person comprehends as quickly and accurately as hearing people comprehend oral sounds. While computerized translation may be adequate for deaf lawyers during oral argument, it is not the system that best minimizes the constitutional risks that a deaf defendant faces during a criminal trial. Sign language is the only method of interpretation currently used in courts that preserves the deaf defendant's Sixth Amendment rights to be confronted by adverse witnesses and to effective assistance of counsel.

*Michele-Lee Berko*