

# DEAF SUSPECTS AND CONSTITUTIONAL RIGHTS

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## ABSTRACT

This paper uses the court case *PEOPLE OF THE STATE OF MICHIGAN v MARY ANN MCBRIDE* to explore issues of interpretation in law enforcement settings. This case provides particularities that are of broad interest to interpreters who interact with police and deaf suspects. Specific issues addressed include the concept of whether a deaf suspect is capable of “knowingly” waiving constitutional rights found in the Miranda warning, interpreter roles and accountability, and the importance of preserving a visual record of police, deaf suspect, and interpreter interactions.

## INTRODUCTION

There is a court case currently in the appeal process that impacts deaf people, interpreters and police officers, raising many important issues and questions. Issues include whether a deaf suspect is capable of understanding the Miranda warning, standardizing minimum qualifications for hearing interpreters working in law enforcement situations, determining when certified deaf interpreters (CDIs) are required, and whether videotaping Miranda warnings and interrogations is mandatory.

*Disclaimer: The author does not know the interpreters involved in this case. The purpose of this article is to explore issues relating to the interpreting field.*

## BACKGROUND

The case is *PEOPLE OF THE STATE OF MICHIGAN v MARY ANN MCBRIDE*.<sup>1</sup> McBride, a deaf woman, was arrested and charged with open murder<sup>2</sup> in the death of her deaf boyfriend, Robert Adelsburg. At issue in the appeal is whether McBride knowingly waived her constitutional rights before making incriminating statements during an interrogation. Statements obtained from a suspect during a custodial interrogation are admissible in court only if the suspect voluntarily, knowingly and intelligently waived Fifth Amendment rights.<sup>3</sup> During the interrogation, McBride made statements that could lead the court to decide that McBride murdered Adelsburg with premeditation and intent, a verdict of first degree murder. The prosecution is arguing that statements made during the interrogation should be heard by a jury. These statements include the confession that the victim was asleep when McBride stabbed him, proving premeditation. The defense position is that the statements should be ruled inadmissible, arguing that McBride did not knowingly waive her rights and that, by ignoring her request for counsel before she gave her statement, the officers violated her constitutional right to counsel.

The basic facts, as drawn from the State of Michigan’s Court of Appeal Decision regarding this case, are as follows. After learning that McBride was deaf, the detectives in charge of the case called Sign Language Services of Michigan to obtain an interpreter. According to Detective Demick, neither he nor Detective Sarrach attempted to speak with McBride before the interpreter arrived. At approximately 6:30 a.m., Detective Sarrach retrieved McBride from her cell and placed her in the interrogation room. McBride was seated at a table, facing a video camera mounted above the door. The interpreter was seated across the table from McBride with her back to the camera. Because of the angle of the camera, the videotape of the interrogation does not clearly show many of the interpreter’s signs to McBride.

Detective Demick testified that, during the interrogation and the reading of a constitutional rights form, the interpreter was signing and mouthing the words as she interpreted to McBride. According to Detective Demick, McBride looked at Detective Sarrach while he was speaking and then would look at the inter-

1. No. 133142

2. Open Murder: Michigan law does not require a prosecutor to choose between First Degree or Second Degree Murder when issuing a complaint, or even at trial. A prosecutor may charge “Open Murder”, which is a combination of First and Second Degree Murder, and the jury may determine the appropriate degree based on the proofs. <http://www.sjosephcross.com/FM/murder.aspx>

3. *Akins, supra* at 564.

interpreting the Miranda, what they are doing and why comprehension of rights is in everyone's best interest. Officers don't want statements deemed inadmissible in court if it can be avoided.

Most hearing suspects are familiar with the Miranda warning since it is often recited on television. Yet many deaf people have never encountered it. McBride was asked by Detective Sarrach if she had "ever heard of *Miranda*." McBride shook her head side-to-side, and the interpreter vocalized this as a negative response. Detective Sarrach then inquired whether McBride watched television, to which McBride nodded her head up and down. The interpreter vocalized this as a "yes." Detective Sarrach then asked if McBride had ever seen a law program on television. McBride again shook her head side-to-side, which the interpreter vocalized as a negative response.

In the McBride case, the warning did not end with a question but a statement. "You can decide at any time to exercise your rights and not answer any questions or make any statement." Then before the signature line another statement appeared: "I understand that these are my rights under the law."<sup>13</sup> Interpreters are responsible for interpreting information in a way that matches the linguistic needs of the deaf person<sup>14</sup> to help ensure the deaf suspect gets the equivalent message that is provided to a hearing person. The interpreters can use linguistic expansion to "make meaning explicit from something inherently implicit."<sup>15</sup> This technique provides more than just words, it includes cultural information in the interpretation to keep the message dynamically equivalent. Interpreters can ask officers to have deaf suspects prove they understood the caution by having suspects explain, in their own words, the concepts in the Miranda.

### Interpreter accountability

Interpreting requires extracting the meaning from the source language and rendering it in the target language. Thus, interpreters have a duty to be sure suspects understand their constitutional rights before agreeing to waive those

rights and answer questions from the police. Without this step, interpreters are omitting meaning and not abiding by their oath to accurately interpret for the deaf suspect. If suspects do not understand their rights, then the interpreters have failed to provide an accurate translation. If suspects are unable to understand their rights due to cognitive impairment or linguistic inadequacies, then they should not be allowed to continue the interrogation without an attorney. There is legal precedent for dealing with suspects' competency to waive rights.<sup>16</sup> By allowing a suspect to continue without comprehension, interpreters are not performing their ethical duties.

In the McBride case, an issue was raised that the interpreter was never given the opportunity before or during the interview to review the form or to interpret the portions of each right that Detective Sarrach failed to read. Deafness is a low-incident occurrence and many police officers have never encountered deaf suspects. The officers often need to rely on the interpreters' expertise and professionalism. Interpreters do not "fix" officers mistakes, but should provide equivalent interpretations. Until there are legal precedents set through court decisions, qualified, experienced interpreters must regulate how they handle specific situations. It is through education, discussions, and training that interpreters establish best practices and standards. Interpreters can do a sight translation (written English into sign language) of the written warning presented to a deaf suspect. McBride shrugged when the detective asked if she could read. The interpreter verbalized an affirmative answer. The detective handed McBride the paper, assuming, because of the interpreter's error, that McBride could read it. At this point, the interpreter could have done a sight translation of the written warning to be sure the suspect understood the English.

Of the interpreters involved with the McBride case found in public record, one holds no national certification; one has a Certificate of Transliteration (CT).<sup>17</sup> A

16. Competency to Confess - (Brown v. Mississippi, Miranda v. Arizona). Competency to Waive the Right to Counsel - (Godinez v. Moran, McKaskle v. Wiggins, Faretta v. California).

17. CT (Certificate of Transliteration) "Holders of this certificate are recognized as fully certified in transliteration and have demonstrated the ability to transliterate

major component of the SC:L examination tests an interpreter's ability to interpret the Miranda warning supporting the idea that interpreters must pass the SC:L exam before being permitted to interpret for deaf suspects. Since more than 90 percent of all criminal cases never go to trial,<sup>18</sup> there is often no way to challenge an interpreter's rendition of the Miranda warning. The only reason we know so much about the McBride situation is because the defense attorney challenged the interpretation. Not all defense attorneys are that capable and informed about possible interpreter errors. Without SC:L certification and a CDI, there is no reasonable way to judge if a deaf suspect has been denied due process because of interpreter ignorance or incompetence.<sup>19</sup>

### Do police officers and courts know enough about interpreting to distinguish who is qualified?

Not only do interpreters and deaf leaders need to monitor who interprets for deaf suspects, it is imperative to educate legal personnel on what makes an interpreter qualified to handle legal interactions. Under the Americans with Disabilities Act (ADA), the term qualified interpreter is defined as, "an interpreter who is able to interpret effectively, accurately and impartially both receptively and expressively, using any necessary specialized vocabulary."<sup>20</sup> There is no requirement for certification, and thus, no way to hold interpreters accountable or protect a deaf suspect's rights to due process. Several states have passed legislation on certification requirements for court interpreters, including Pennsylvania's new statute,<sup>21</sup> but many states have not. Granted, judges have the final say in deciding if interpreters are qualified or not, but are the courts educat-

between English-based sign language and spoken English for both sign-to-voice and voice-to-sign tasks. The transliterator's ability to interpret is not considered in this certification." www.rid.org

18. More than 90 percent of all criminal cases never go to trial. The defendant pleads guilty, often after the prosecutor and defense attorney negotiate. www.crf-sa.org/brown50th/color\_of\_justice.htm

19. Interpreters holding SC:Ls and CDI certification make errors, but fewer and less serious than an interpreter without certification and training.

20. <http://www.nad.org/site/pp.asp?c=foINKQMBF&b=101229>

21. <http://www.courts.state.pa.us/index/InterpreterProgram/Program.asp>

13. Roseville Police Department Constitutional Rights Certificate of Notification.

14. RID Code of Professional Conduct.

15. Lawrence, S. (2007, December). Expansion and Compression. *RID VIEWS*. RID Press.

## INTERPRETERS' ROLES AND RESPONSIBILITIES

Because interpreters will continue to play a major role in criminal investigations when deaf people are arrested, it is important for interpreters to discuss and debate the ramifications of interpreters' roles and responsibilities. The author of this paper is a strong proponent of using certified deaf interpreters (CDI)<sup>8</sup> for all police interrogations. "The CDI has an extensive knowledge and understanding of deafness, the Deaf community, and/or Deaf culture which combined with excellent communication skills, can bring added expertise into uniquely difficult interpreting situations."<sup>9</sup> Many people in the interpreting field support legislation that requires interpreters to hold a Special Certificate: Legal (SC:L)<sup>10</sup> and have legal training before accepting assignments in the legal arena. The stakes are too high in deaf persons' lives to use inadequately trained interpreters. Too often, interpreters have jeopardized an investigation or denied a deaf person right to due process by operating out of ignorance.

For interpreters, like attorneys, legal training and credentials are essential for working in legal settings.<sup>11</sup> RID-NAD's second tenet of the Code of Professional Conduct states: "Interpreters possess the professional skills and knowledge required for the specific interpreting situation." Legal interpreting certainly requires additional education and training.

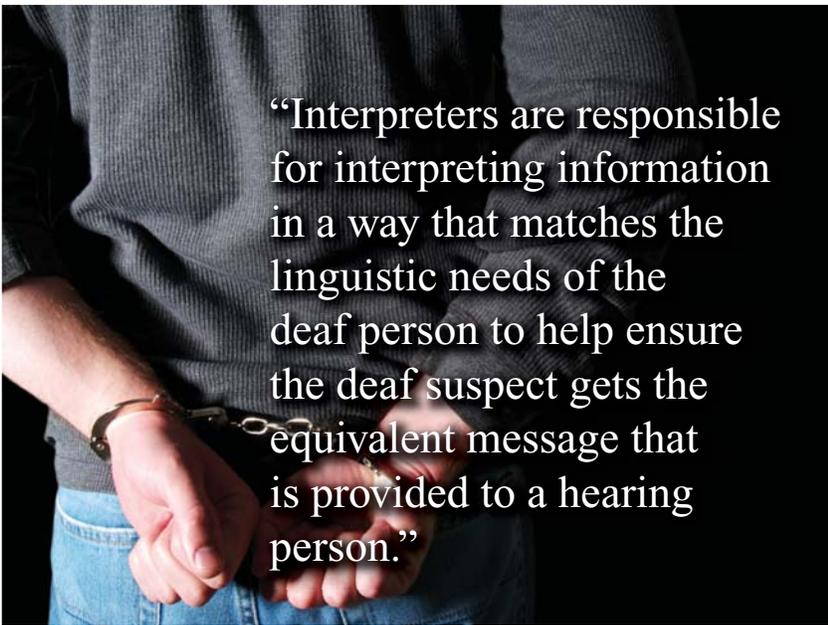
Another area of concern is the need to train and certify more deaf interpreters.

Pennsylvania, a large state, only has two CDIs and four hearing interpreters holding SC:Ls. Many states have statutes that limit the time police officers can hold a suspect in custody to caution and interrogate before arraignment. At the arraignment, suspects are assigned attorneys if they haven't already invoked their right to counsel. Thus it is crucial to have a larger supply of interpreters, both deaf and hearing, to be available to interpret police interactions. Without enough qualified interpreters, the police are hampered in their duty to investigate a crime and the deaf suspect might be denied their right to due process.

### Importance of preserving a record

No interpretation is 100 percent accurate. The courts realize that interpreters make mistakes and precedents have been established in law to address the issues of interpreter error.<sup>12</sup> Inconsequential errors are dismissed, but substantive errors must be rectified. While working with police cautions and interviews, it is vital that interpreters have a clear, preserved record of the proceedings. Without said record, errors might not come to light and due process may be denied the suspect. For deaf suspects it is imperative to videotape the transaction since ASL is a visual language. Unlike the McBride case, both the suspect and interpreter must be videotaped. This may require two cameras. Most police stations are equipped with video recording equipment. However, in one extremely small rural police department, an interview was conducted in a cell where the officers routinely lock up intoxicated

12. *People v. DeLarco* 142 Cal. App 3d 307 (1983) "Merely because an interpreter has had some problem translating is not sufficient to rebut the presumption that the interpreter in her performance of official duty has acted regularly."



"Interpreters are responsible for interpreting information in a way that matches the linguistic needs of the deaf person to help ensure the deaf suspect gets the equivalent message that is provided to a hearing person."

individuals, since that was the only room wired for video. Interpreters may be wise to put a video camera and a couple of sealed (to ensure the tape is not contaminated) videotapes in their car before setting off to an assignment at a rural police station. The police keep the videotape as evidence to be used in court, if necessary.

### Interpreting gestures

One linguistic issue that came up repeatedly in McBride involved if and when the interpreter should vocalize gestures and head nods. At the outset of the interaction, interpreters should recommend that all "yes," "no," "I don't understand," or "I don't know" answers be rendered in sign language, not gesture. Interpreters can explain to officers and suspects why this is vital to prevent errors. Head nodding in ASL does not necessarily indicate agreement with the speaker. It can mean, "I understand what the interpreter is signing," or "I am confused, but will keep trying to figure out what you mean," or even, "let's get this over with quickly so I can leave."

Rather than simply having deaf suspects answer "yes" when asked if they understand their rights, interpreters can ask deaf suspects to repeat and explain what was just interpreted. For example, after interpreters finish interpreting the Miranda warning, but before expecting a yes/no answer to the questions, "Do you understand these rights and agree to speak with me?" interpreters can ask suspects to explain the rights that have just been stated to check for accuracy. The interpreters may have to explain to the police officers, before they begin

suspect's understanding of rights is at center of case. *Detroit Free Press*.

8. A certified deaf interpreter (CDI) is an individual who is deaf or hard of hearing and has been certified by the Registry of Interpreters for the Deaf as an interpreter. RID Standard Practice Papers

9. Registry of Interpreters for the Deaf, (1997) *Use of a Certified Deaf Interpreter*. Standard Practice Paper.

10. Registry of Interpreters for the Deaf, (2007) *Interpreting in Legal Settings*. Standard Practice Paper. "The field of sign language interpretation has developed specific credentials that indicate minimum levels of competency to interpret in legal settings. RID awards the Specialist Certificate: Legal ("SC:L") to interpreters who meet specific criteria regarding prior certification, education and experience."

11. Burnley, J., (2007, November). Certification Alone Does Not A Legal Interpreter Make. *RID Views*.

preter as she signed for her. Detective Demick testified that McBride would sometimes nod her head side-to-side or up and down during the interview to indicate a negative or affirmative response to Detective Sarrach's questions. Often, the interpreter did not verbalize McBride's head movements.

Detective Sarrach then asked McBride if she could read and write. According to Detective Demick's testimony, McBride said "Yes." However, the videotape shows that after Detective Sarrach asked McBride if she could read and write, McBride responded with a shrug of her shoulders, which the interpreter verbalized as an affirmative response. Detective Sarrach then stated, "I'm gonna give you a sheet of paper, and you can follow along with me, if you want." The paper to which Detective Sarrach referred was a constitutional rights form. Detective Sarrach placed the constitutional rights form on the table between himself and McBride, so that McBride was able to see it and presumably follow along as Detective Sarrach read each right. However, Detective Demick testified that McBride was unable to simultaneously read the form and follow the interpreter's signs as Detective Sarrach spoke.

Detective Sarrach began to read the constitutional rights form to McBride but combined the first part of the first right with the second part of the second right. Notably, Detective Sarrach left off the second clause of the first right: "that you do not have to answer any questions put to you or make any statements." Detective Sarrach then asked McBride, "You understand that?" McBride nodded her head up and down, and the interpreter verbalized this as an affirmative response. However, using sign language for the first time during the interview, McBride immediately then inquired either, "No, wait, am I supposed to have a lawyer?" or "Do I need a lawyer?" Detective Sarrach responded, "Well, you have a right to *have* one." McBride nodded her head up and down. But the interpreter did not verbalize this response. Detective Sarrach did not respond to McBride's head nod, and McBride did not ask any further questions or attempt to make any statements regarding an attorney.

Detective Sarrach then placed the

form in front of McBride. McBride appeared to pause and read the form, and then she signed her name at the bottom. The interpreter was never given the opportunity before or during the interview to review the form or to interpret the omitted portions of each right that Detective Sarrach failed to read.

After asking some preliminary questions, Detective Sarrach asked McBride, "Do you know why you're here?" McBride nodded up and down, and the interpreter verbalized this as an affirmative response. Detective Sarrach then asked McBride if she wanted to tell him why she was there, and she shook her head side-to-side while shrinking away from the table. The interpreter did not verbalize this response. But Detective Sarrach immediately continued to question McBride, and during the interview that followed, McBride confessed to stabbing Adelsburg while he was sleeping.

The trial court ruled that the confession was inadmissible. The Court of Appeals affirmed that the trial court did not commit a reversible error. McBride's statements could not be used in court because she did not knowingly waive her rights and agree to talk to the police without an attorney. The prosecution appealed the decision and at the time of writing, the case is waiting to be heard by a higher court.

#### WAIVING RIGHTS

The Michigan Association of Deaf and Hard of Hearing (MADHH) filed a brief of amicus curiae<sup>4</sup> in support of McBride's case. They state in their brief that, "Deaf and hearing impaired suspects do not have the same comprehension as hearing defendants" and go on to explain that "Deaf people are a cultural minority and ASL is a different and distinct language." They then expand their arguments and say that a "pathological" view of deafness, that does not understand the Deaf community, treats deaf people as "incapable of self-determination." They conclude by requesting the court to "protect the rights of the deaf defendant here and in the future by denying the Peoples'

4. Latin for "friend of the court." This term describes a person or organization that is not a party to a lawsuit as plaintiff or defendant but that has a strong interest in the case and wants to get in its two cents. <http://www.nolo.com/definition.cfm>

application for leave to appeal."<sup>5</sup> This indicates that not only should McBride's confession be deemed inadmissible, but future deaf defendants should have the same ability to base arguments on the theory that deaf people are not able to understand waiving rights. MADHH's argument unintentionally raises a quandary of treating deaf people as capable of self-determination, yet at the same time, treating them as incapable of deciding whether to waive constitutional rights.

Other studies and articles also question whether a deaf suspect can understand the Miranda warning, such as in Aviva Twersky-Glasner's article, *Miranda Warnings and Deaf Suspects: It is Not Just a Matter of Translation*,<sup>6</sup> where she states that: "Deaf people thus face tremendous challenges within the criminal justice system. Foremost among these challenges is their ability to understand what is being said to them, as well as their ability to communicate their thoughts and feelings."

There are deaf people who can easily understand the Miranda warning and exercise self-determination. However, many deaf people and hearing people who are arrested lack general knowledge of the legal system and are not well enough educated to fully understand their constitutional rights. Until courts set precedents that deaf people and others with limited English capabilities are exempt from the Miranda warning and automatically assigned attorneys before interrogations, interpreters will be involved in police interactions. Do we as a society really want to automatically exclude limited English users from interrogations? The police play an important role in maintaining order in our society and one way they bring perpetrators to justice is by investigating cases. Interrogations are a major component in gathering evidence used to obtain convictions. In McBride's case, the deaf victim's family wants to see justice done and is angry that McBride's charges may be reduced to second degree murder if the confession is deemed inadmissible.<sup>7</sup>

5. <http://courts.michigan.gov/supremecourt/Clerk/11-07/133142/133142-MADAmicus.pdf>

6. Twersky-Glasner, A. (2006). *Miranda Warnings and Deaf Suspects: It is Not Just a Matter of Translation*, Crim. L. Bull. Retrieved from Disability Law database.

7. Masson, J. (2006, March 31) Deaf

ed enough about the interpreting field to make that assessment? Do courts even know what questions to ask to qualify interpreters in a case involving a deaf defendant?

During the *Walker*<sup>22</sup> hearing that followed the move to suppress McBride's statements, a witness testified on behalf of McBride regarding Deaf culture and the interpreting process. This witness stated that American Sign Language (ASL) is a conceptual language. She testified that a deaf individual's understanding level, education and background can influence the way an interpreter signs. The witness also testified that deaf people generally tend to be submissive to authority figures and will acquiesce to any demand.

On the basis of her review of the interrogation videotape, the witness concluded that the interpreter was often merely translating word-for-word and not interpreting the concepts of what Detective Sarrach was saying when he read from the constitutional rights form. The witness "noticed that [the] interpreter a lot of times would sign exactly the words that were being said. But what is meant by what is being said is not signed. So all that the client is receiving is a bunch of words." The witness explained that when statements are translated in this way, "the deaf person might understand a little bit from piecing the words together, but he or she is left to guess and assume a lot about what is being said."

22. *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

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## CONCLUSION

In McBride's case, a verdict of first degree murder means life in prison. In Pennsylvania, the same verdict could mean the death penalty for the defendant. Most cases, including McBride's, don't rely solely on statements made during interrogation, but include other evidence as well. Yet, confessions can play a major role in determining degree of guilt. Deaf defendants should not be disadvantaged by, nor should police officers have statements deemed inadmissible, due to lack of experience and education of the interpreter. ■

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