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Trials&TRIBULATIONS

Jury service by deaf or hard-of-hearing individuals

According to various published reports, the Greater Rochester area has the largest deaf population per capita in the country. As a result, it should not be unusual for a deaf or hard-of-hearing individual to be among a typical jury pool. In fact, according to Monroe County's Commissioner of Jurors, Charles G. Perreaud, advocates in Monroe County were instrumental in amending section 190.25(3-a) of the Criminal Procedure Law to permit sign language interpreters to participate during grand jury proceedings.

In a March 24, 1996, article, the Democrat and Chronicle reported on the first deaf person to serve on a grand jury in Monroe County, and possibly the state.

Monroe County has been at the forefront of facilitating jury service by deaf and hard-of-hearing persons, and indeed, should be proud of that leadership. All Monroe County state trial courtrooms are equipped for assistive listening devices, and ASL interpreters are regularly provided to assist deaf prospective jurors in navigating through the jury process. The federal courts in the Western District provide similar accommodations to jurors who are deaf or hard-of-hearing.

Unfortunately, a recent decision from the New York State Court of Appeals demonstrates that the same cannot be said for every court in the state. On Nov. 15, 2011, the New York State Court of Appeals issued a decision in *People v. Guay*, addressing for the second time the issue of whether a court may dismiss a hard-of-hearing prospective juror for cause, and if so, under what circumstances. The court determined that the Supreme Court in Clinton County did not abuse its discretion in dismissing a hard-of-hearing juror for cause over defense counsel's objections, "based on the particular facts of this case."

As an initial matter, the facts of *Guay* were particularly disturbing, and one cannot help but wonder if they had some influence on the court's determination. The defendant in *Guay* had discovered that he was the father of a child when the girl was four years old, and upon this discovery, he attempted to establish a relationship with her.

When the daughter was seven years old, the defendant

crawled into bed with her one night and sexually molested her, only stopping when his one-year-old son, who was also in the same bed, woke up. The next day, the defendant broke off all relations with his daughter, announcing that he would not see her again. The daughter told her mother that the defendant did not want to see her again, but did not reveal what had happened because she did not comprehend that the defendant's actions were wrong.

Two years later, after attending an educational program at her school, the daughter realized that her father had engaged in inappropriate sexual contact and reported it to the school counselor. The defendant was arrested and admitted to engaging in inappropriate sexual conduct.

The defendant was indicted on charges of first-degree rape, first-degree sexual abuse, and endangering the welfare of a child, and he was convicted by a jury on all counts.

New York Judiciary Law §510(4) currently provides that, in order to qualify as a juror, a person must be "able to understand and communicate in the English language." These requirements have been modified

over the years. The Judiciary Law used to require a prospective juror to be able to speak English "in an understandable manner" and to be in possession of their "natural faculties."

The Court of Appeals noted that, while there are certain fundamental minimum requirements as set forth in the Judiciary Law, jury service is considered under New York law "to be a civil right that is a privilege and duty of citizenship protected by the state Constitution." During *voir dire* in the *Guay* case, a prospective juror responded that he had some trouble hearing, but he should be "pretty good" if allowed to sit in the front row of the jury box.

No other accommodations were suggested by the prosecution or defense counsel, the juror, or the court. Indeed, at oral argument of this matter before the Court of Appeals, there was a

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great deal of focus on whether the juror should have been offered the accommodation of an assistive listening device, but the court noted that this was never raised during the proceedings below. Instead, the prosecution moved to dismiss the juror for cause, and the trial court granted the motion over defense counsel's objections.

This was not the first time that the Court of Appeals has addressed the issue of dismissal of deaf or hard-of-hearing prospective jurors. In *People v. Guzman*, 76 NY2d 1 (1990), the Court of Appeals held that a hearing impairment does not *per se* preclude an individual from serving as a juror. Rather, the court must make a discretionary determination as to whether the individual has the ability to "understand all of the evidence presented, evaluate that evidence in a rational manner, communicate effectively with the other jurors during deliberations, and comprehend the applicable legal principles, as instructed by the Court," *Id.* at 5.

If a reasonable accommodation would allow a deaf or hard-of-hearing prospective juror to fulfill these duties without interfering with the defendant's trial rights, such measures should be taken. In *Guzman*, the court held that it was not an abuse of discretion to allow a hard-of-hearing juror to serve with the assistance of an interpreter who communicated using "signed English," which transmitted the speaker's words literally without any translation.

In affirming the Appellate Division in *Guay*, the Court of Appeals placed significance on the fact that no other accommodations were suggested by defense counsel or anyone else for that matter. Yet, while the Court of Appeals refused to set aside the verdict based on the dismissal of this prospective juror, it emphasized that "a better course would have been for Supreme Court to take steps on its own accord to inquire about the prospective juror's auditory limitations and discuss possible accommodation."

The court repeated that a trial judge should "make a reasonable and tactful inquiry of any prospective juror who appears to have a hearing impairment and consider offering to provide an assistive amplification device or some other appropriate accommodation available in our court system."

Of note, the Appellate Division, Fourth Department has affirmed a conviction where the prosecutor used a preemptory challenge to strike a prospective juror because of the juror's hearing impairment, *People v. Kalkenstein*, 288 AD2d 922 (4th Dep't 2001), lv. denied, 97 NY2d 704 (2002).

The Fourth Department relied extensively on the Seventh Circuit's determination in *United States v. Harris*, 197 F.3d 870

(1999), *cert. denied*, 528 U.S. 1044 (2000), which held that disabled persons are neither a suspect or quasi-suspect class and, therefore, use of a preemptory challenge to strike a disabled prospective juror is not subject to heightened scrutiny.

The *Harris* court rejected the argument that the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, created the disabled as a suspect class. In *Guay*, the Court of Appeals did not address the issue of the ADA's impact on the facts of the case, because the issue had not been raised below.

In contrast to the minimum requirements in state court, the requirements in federal court, pursuant to the Jury Selection and Service Act of 1968, as amended, 28 U.S.C. §§1861 *et seq.*, appear more stringent on their face. That act provides that a person will not be qualified to serve on a jury if the person is "unable to read, write, and understands the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form" or if the person is "unable to speak the English language," 28 U.S.C. §1865(b)(2) & (3).

In addition, a person will be disqualified from jury service if he or she "is incapable, by reason of mental or physical infirmity, to render satisfactory jury service ...," *Id.* §1865(b)(4).

In *United States v. Dempsey*, 830 F.2d 1084 (10th Cir. 1987), the 10th Circuit held that a deaf juror's ability to perceive and weigh the evidence was best evaluated by the trial judge, and the court found that the trial judge did not abuse her discretion in allowing a juror, who could speak but not hear the English language, to serve on a jury with the aid of an interpreter.

Moreover, the Judicial Conference of the Administrative Office of the United States Courts has adopted a policy that all federal courts will provide reasonable accommodations to deaf or hard-of-hearing persons. The Jury Plan in the Western District, adopted in 2009, does not specifically address these accommodations, but I understand that accommodations are regularly provided to facilitate the service of those persons who are deaf or hard-of-hearing.

The scenario depicted in the *Guay* case is not likely to occur in the Western District or Monroe County. But if one is faced with such a scenario, and objects to the disqualification of a prospective juror based upon the juror's hearing capabilities, one of the most important lessons from the *Guay* decision is for counsel to proactively suggest accommodations that can be made to assist the prospective juror and make an adequate record so that all issues may be preserved for any appeal.

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