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## *Documenting Current Practices of Accommodating Linguistic Needs of Deaf Defendants\**

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### **ABSTRACT**

Deaf defendants are an underexamined population in criminal justice research, and very few studies have examined their involvement in the criminal justice system. In addition, research on accommodating the linguistic needs of deaf defendants is sparse. Failure to accommodate the linguistic needs of deaf defendants presents several concerns, including disparate treatment and violations of ADA-guaranteed rights that may lead to inadmissible evidence, dismissals of cases, and not-guilty verdicts, as well as lawsuits and litigation, all of which create additional strain on an already overburdened system. The current study combines previous research on deaf defendants with the findings of data gathered from courtroom practitioners nationwide to gain an understanding of the current practices used to facilitate communication during criminal trials involving deaf defendants.

**KEY WORDS** ADA; Deaf; Defendants

Deaf defendants are an underexamined population of the criminal justice system, and very few studies of deaf suspects, defendants, and offenders have been done (Miller, Vernon, and Capella 2005; Vernon and Greenberg 1999). Even less information is available on the most effective ways of facilitating communication with deaf defendants on trial. Without standardized practices and procedures for accommodating the linguistic needs of deaf defendants, the criminal justice system runs several risks, including disparate treatment and violations of rights that can lead to inadmissible evidence, dismissals of cases, and not-guilty verdicts, as well as civil lawsuits resulting in huge financial settlements and decisions picked up by taxpayers (Brodin 2005; Seaborn 2004).

The Rehabilitation Act of 1973 codified equal treatment of people with disabilities by outlawing their discrimination by any federal agency or department, as well as by any agency or department receiving financial assistance from the federal government (Shine 2019; U.S. Department of Justice 2010). In addition, the Americans with Disabilities Act (ADA) was established in 1990 and “prohibits discrimination

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against people with disabilities in employment, transportation, public accommodation, communications, and governmental activities” (U.S. Department of Labor 2015). The ADA was created to assure all people equal rights and reasonable accommodations, regardless of mental or physical limitations. These rights were extended to suspects, defendants, and offenders, and they have significantly affected the way the criminal justice system deals with cases involving people with disabilities.

While the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 have helped to reduce disparate treatment, they have also presented difficulties, particularly from organizational perspectives. Since the passage of the Rehabilitation Act and the ADA, litigation filed on behalf of deaf suspects, defendants, and offenders in the criminal justice system has ballooned (Shine 2019; Vernon and Miller 2005; Vernon, Raifman, and Greenberg 1996; Wood 1984). Evidence has been made inadmissible, charges have been reduced, appeals have been filed, convictions have been overturned, cases with strong evidence of guilt have been thrown out, and lawsuits have been filed, all stemming from mistakes made in cases involving deaf suspects, defendants, and offenders. Deaf people face disadvantages at every stage of the criminal justice system, creating two systemic concerns. First, disadvantage erodes the credibility of the criminal justice system because of systemic injustice via disparate treatment, and second, not providing deaf people with equal rights raises both ethical and financial concerns. The prevention of equal rights and reasonable accommodations for deaf populations at the hands of criminal justice practitioners has led to increased expenses due to additional appeals and civil court costs, as well as costly financial settlements.

## **LITERATURE REVIEW**

### *Obstacles Faced by Deaf Defendants*

Research by Vernon and Miller (2005) suggests deaf people face disadvantages across all stages of the criminal justice system. These disadvantages often result from a lack of understanding of deaf individuals and the barriers they face. To be fair to criminal justice practitioners, some of this lack of understanding is due to infrequent contact with deaf suspects, defendants, and offenders, as less than one percent of American citizens are deaf (Wood 1984). Given practitioners’ infrequent contact and interactions with deaf populations, they are often unaware of the most effective means of communicating with those who are deaf.

Another, and perhaps the largest, problem deaf defendants face is the inability of criminal justice practitioners to understand the linguistic, cultural, and educational characteristics of deaf people (Mathers 2006; Vernon and Miller 2005). Given that equality is a central tenet of justice, it is essential that these disadvantages be addressed in order to minimize disparate treatment. Moreover, the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 prohibit disability-based discrimination.

### *The Rehabilitation Act of 1973*

Established in 1973, the Rehabilitation Act mandated equal treatment of the mentally and/or physically disabled by banning discrimination against them by any federal agency or department, as well as by any agency or department receiving funds from the federal government (McEntee 1995; U.S. Department of Justice 2010). The act paved the way for a wide range of services for the physically and mentally disabled. The Rehabilitation Act of 1973 was created to minimize barriers to employment and to allow the pursuit of autonomous living, self-determination, and inclusion in American society. The Rehabilitation Services Administration, an agency of the U.S. Department of Education, oversees the act. Two sections of the act are applicable to the criminal justice system: Sections 504 and 508.

Section 504 of the Rehabilitation Act of 1973 is a national law that protects qualified individuals from discrimination based on their disability (Shine 2019; Wegner 1984). The nondiscrimination requirements of the law apply to employers and organizations that receive federal funding. Section 504 forbids employers, organizations, and agencies from barring individuals with disabilities an equal opportunity to obtain benefits and services. People with a history of or who are regarded as having a physical or mental impairment that “substantially limits one or more major life activities” are also covered. Major life activities include being able to walk, hear, speak, work, learn, and live independently. The federal government has provided billions of dollars to criminal justice agencies since the passage of the Rehabilitation Act, particularly since 9/11 (Williams 2014). In addition, federal courts are funded entirely through federal assistance. As such, Section 504 of the Rehabilitation Act of 1973 applies to every court in the United States.

The Rehabilitation Act was amended in 1998, mandating that federal agencies make their electronic and information technology accessible to disabled populations (U.S. Department of Justice 2010). Section 508 was passed to reduce technological barriers and create equal opportunities for people with disabilities, and to prioritize the development of technologies to achieve these goals. As such, the Department of Justice began employing accessible software, video, and media programs to assist individuals with disabilities, including those who are deaf and hard of hearing.

### *The Americans with Disabilities Act of 1990*

The Americans with Disabilities Act of 1990 added to the framework of the Rehabilitation Act of 1973 by furthering equal opportunities and accessibility for disabled populations. The Americans with Disabilities Act is a comprehensive addition to civil rights legislation that forbids disability-based discrimination relating to employment, state and local government, public accommodations, commercial facilities, transportation, and telecommunications (U.S. Department of Justice 2010; McEntee 1995). The ADA applies only to people who qualify as disabled. According to the act, an individual is considered disabled if he or she has a mental or physical impairment that significantly impedes a “major life activity.” Major life activities are defined as the core activities involved in day-to-day life, including walking, talking, seeing, hearing, and learning.

After the passage of the Americans with Disabilities Act of 1990, several civil rights cases came before the U.S. Supreme Court. A chain of Supreme Court decisions, including *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), interpreted the Americans with Disabilities Act of 1990 in a way that made it challenging to prove that an impairment is a disability, consequently failing to protect those whom the legislation was designed for (U.S. Department of Labor 2015). In 2008, the ADA Amendments Act (ADAAA) was passed, making major changes to the ADA's definition of "disability" and widening coverage under both the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973. The changes defined what had been implicit up to that point, which was the basis for the Supreme Court's difficulty in proving that impairments qualify as disabilities: an impairment that significantly impedes one major life activity is not required to inhibit other major life activities in order to be deemed a disability (Long 2008; U.S. Equal Employment Opportunity Commission 2008). In addition, the ADAAA of 2008 expanded the list of major life activities to include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

#### *Issues Surrounding Deaf Defendants and the Courts*

Courts have faced several issues when it comes to adhering to ADA standards and upholding equity during criminal trials involving deaf defendants. One concern relates to linguistic and reading challenges. Because of their limitations, deaf defendants, particularly the undereducated and prelingually deaf, may have difficulties participating in their own defense and are convicted and sentenced without fully comprehending their rights or the legal process (Vernon et al. 1996). This is known as linguistic incompetence (Vernon and Miller 2001). According to Vernon and Miller (2005), when a deaf suspect is deemed linguistically incompetent, he or she should be found incompetent to stand trial and unable to be tried until deemed competent. Unfortunately, once deaf defendants are deemed linguistically incompetent, they are infrequently found to be competent at a later date, and their cases are often discharged. Such was the case in the Ohio Supreme Court's decision of *Ohio v. Burnett* (2005), who avoided criminal prosecution because of his linguistic incompetence.

Another concern criminal courts face when trying deaf defendants is that legal proceedings are dictated by the pace of courtroom workgroups, not by the processing speed of the defendants. Even among higher-educated deaf people, it takes three to four times longer for deaf individuals to process American Sign Language (ASL) than it does for people who can hear to understand spoken English (Brauer 1993; Steinberg et al. 1998). If legal proceedings are happening faster than a deaf defendant can process them, the deaf defendant's ability to work on his or her own defense is inhibited, putting him/her at a disadvantage and undermining justice. In addition, more than half of the deaf offenders incarcerated at one penal institution in Texas did not understand their sentence or how the legal process works (Miller 2001). If deaf defendants are unable to comprehend the legal process, their ability to work on their own behalf is also inhibited, exacerbating their

disadvantage during their trial. The inability for deaf defendants to fully participate in their own trials as a result of the disadvantages mentioned above has led to an unfortunate injustice: deaf offenders are overrepresented in jail and prison settings (Zingesser 1999).

Although it is important for deaf defendants to understand their rights and the legal process, issues surrounding the ADA and courtroom interpreters are an even bigger issue for the courts. There are two major concerns when it comes to courtroom interpreters: accessibility and qualifications.

### *Courtroom Interpreters and ADA Requirements*

State and local courts are bound by Title II of the ADA, which applies to “public entities.” The U.S. Department of Justice has issued regulations defining its expectations. Title II of the ADA requires local and state courts to provide *qualified* sign language interpreters and other auxiliary aids, such as transcription or assistive listening systems, to ensure effective communication with deaf and hard-of-hearing individuals. Preference of what auxiliary aid is needed is given to deaf defendants (28 C.F.R. Section 35.160). Although some courtrooms now have “computer-assisted transcripts,” which allow immediate transcripts of trial testimony and discussion to appear on screens, such a system may be useless for a defendant who communicates only through sign language. In the event that a defendant’s only means of communication is ASL, a qualified interpreter is required. Despite this requirement, 25 percent of deaf defendants do not have a certified interpreter on hand during their legal proceedings (Miller 2001; Miller and Vernon 2002).

The Department of Justice has also stated that a qualified interpreter may be necessary when the information being relayed “is complex, or is exchanged for a lengthy period of time.” A qualified interpreter is defined by the Title II regulation as one who is able “to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary” (28 C.F.R. Section 35.104). The Department of Justice goes on to note that this definition does not limit or invalidate state-regulated requirements that are more stringent than the ADA’s definition; rather, it sets minimum standards that state and local governments must adhere to. Along with the ADA, several states have their own standards for effective communication in criminal trials (National Association of the Deaf [NAD] 2015). Federal courts are also required to follow the Federal Court Interpreters Act of 1978 and the Bilingual, Hearing, and Speech-Impaired Court Interpreter Act of 1979, which demand the assignment of a qualified interpreter to any criminal or civil case brought by the federal government involving a deaf, speech-impaired, or non-English-speaking participant (McEntee 1995).

Expenses associated with courtroom interpreters may not be passed on to defendants, regardless of whether defendants are convicted, as effective communication is a right guaranteed by the Americans with Disabilities Act. As such, the federal government has stated, “Where a court system has an obligation to provide qualified interpreters, it has the corresponding responsibility to pay for the services for the interpreters” (45 Fed. Reg. 37630, 1980).

*Other Courtroom-Interpreter Considerations*

Despite qualified-interpreter requirements, cases have arisen in which family members interpret for defendants during criminal trials. Such was the case in *Palermo v. Olivarez* (2000), when the mother of a deaf defendant charged with shooting someone aided the court by signing during this trial (Miller 2001). Such actions are a conflict of interest and should not be allowed by any state or local criminal courts. The Department of Justice, in an analysis of Title II, suggests family and friends of deaf criminal suspects or defendants should not interpret for the defendants during legal proceedings. The Department of Justice suggests that friends and family usually are not familiar with legal code even if they are fluent in ASL and that even if they are familiar with legal terms, their “emotional or personal involvement or considerations of confidentiality . . . may adversely affect the ability to interpret effectively, accurately, and impartially” (56 Fed. Reg. at 35701, 1991). In addition, in states where no additional laws govern qualified interpreters, legislation should be established to ensure the interpreters’ accuracy and objectivity (Belliveau 1991). Such standards have already been established by the federal government: a Specialist Certificate is required and a nationwide database known as the Registry of Interpreters for the Deaf (RID) is managed (RID 2015; U.S. Courts 2015b).

Another courtroom interpreting issue involves the use of simultaneous or consecutive interpreting. Simultaneous interpreting is the most common form of interpreting, whereby the interpreter facilitates communication by immediately interpreting from one language to another (Simon 1993). An example of simultaneous interpreting is when an interpreter is signing something in real time, as when the national anthem is being played at a sporting event. In contrast, with consecutive interpreting, the interpreter takes note of what is being relayed before communicating the message in the target’s language. Although more time-consuming, consecutive interpreting is better in instances in which precision is key. In federal courts and some state courts, consecutive interpreting is required when witnesses who cannot speak English give testimony. Additional consideration should be paid to consecutive interpreting, however, not only for witness testimony, but any time someone participating in a criminal trial is not fluent in English.

According to research by Debra Russell (2002), consecutive interpreting is significantly more accurate during trials than is simultaneous interpreting. In citing research she completed for her doctoral dissertation, Russell challenged the accuracy of simultaneous interpretation in courtrooms by conducting and videotaping four mock trials with courtroom interpreters, judges and attorneys, and deaf and hearing witnesses. Each interpreting team translated for two trials, signing simultaneously for one and consecutively for the other. After the trials, Russell interviewed all participants and analyzed the videotaped interpretations for errors. The accuracy of interpreting in the consecutively interpreted trials was at or above 95 percent, whereas the accuracy of interpreting in simultaneously interpreted trials ranged from 83 percent to 87 percent, underscoring the difference in accuracy between the two interpretation methods.

The final issue related to courtroom interpreting involves the use of dual interpretation. Dual interpretation involves using two interpreters—one deaf and one

hearing—to facilitate communication between parties. For instance, if a deaf defendant were communicating with the court in a dual-interpretation format, the defendant would sign his/her message to a deaf interpreter, who would then sign the message to a hearing interpreter, and then the hearing interpreter would translate the message to the court. Although on its surface, dual interpretation may seem excessive and impractical, there is good reason for it. According to Smith (1991), deaf people are collectively communal, and interpreters who are deaf themselves can aid in the integrity of the legal process by highlighting cultural differences in communication to the court that might not be picked up by hearing interpreters. In addition, deaf interpreters have a more thorough understanding of linguistic differences that need to be addressed during the course of examination, testimony, and the like (Wilcox 1995). As such, additional consideration should be given to the role of dual interpretation in the courtroom.

## **METHODS**

This qualitative study employs a dual-survey design aimed at identifying current courtroom practices for accommodating the linguistic needs of deaf defendants on trial. In light of the limited amount of research available on criminal trials involving deaf defendants, a two-part sampling approach was used. The first step was to create and disburse an informational questionnaire for courtroom practitioners using critical case sampling, a purposive sampling technique intended to examine rare and understudied phenomena that have been unable to be evaluated empirically (Teddlie and Yu 2007; Yin 2003). When limited information is known about an issue, critical case sampling lets researchers develop generalizations from the themes and consistencies that emerge from the cases examined (Flyvbjerg 2006). The questionnaire is open-ended and is designed to solicit information about (1) data kept on deaf defendants; (2) standard protocols and procedures for ensuring appropriate language access; and (3) any issues and concerns practitioners would like to see addressed regarding how best to accommodate the linguistic needs of deaf defendants.

Guided by previous research, along with the data gathered from the questionnaire, several survey questions were constructed in an attempt to identify current practices for trials involving deaf defendants. This purposive sampling method is known as expert sampling. Expert sampling is appropriate when researchers examine understudied topics and want to elicit the insight of individuals who have personal experience in dealing with the topics of interest (Trochim 2006). The survey is constructed based on the themes and issues raised from the exploratory questionnaire data, and its questions are more specific in nature, with the goal of identifying gaps of practitioner knowledge regarding deaf defendants and their rights, as well as reemerging themes and information of how to effectively accommodate the linguistic needs of deaf defendants.

### *Critical Case Sample*

After a review of the extant research regarding deaf defendants, the decision to employ a critical case sample for the wave 1 questionnaire was made for several reasons. First, it



became clear that deaf defendants are an understudied population, and what research has been conducted was done through the framework of deaf advocacy rather than systemic efficiency. Targeting critical cases to identify underexplored issues allows researchers to develop generalizations from the cases examined (Flyvbjerg 2006). Second, while reviewing the research, it became clear that the extant research was conducted using case studies. It should be noted that this is no fault of previous researchers but rather that, because of low numbers of overall involvement in the criminal justice system, data on deaf defendants was not being tracked by courts. The third reason a critical case analysis was selected is that critical case analysis is the methodology of choice when resources limit the evaluation of the study (Patton 1987). When this occurs, it is strategic to target cases (in this case, knowledgeable respondents) that can provide the most information and insight about the issues being examined. The fourth reason a critical case sample was selected was to highlight issues unique to trials of deaf defendants. A large sample size is not required to identify such issues, particularly given that some of the issues have been identified through previous research. What is important is to contact practitioners to confirm the validity of previously stated concerns, as well as to see if any additional concerns may have gone unresearched. Finally, a critical case sample was selected in the name of efficiency. In general, respondents are more likely to participate when the questions being asked of them do not take too much of their time. The questions in the wave 1 questionnaire are mainly open-ended survey questions. Because of this, concern regarding response rate developed, and a decision to keep the sample size smaller for the questionnaire was made. This decision was rooted in Patton's conclusion that "there are no rules for sample size in qualitative inquiry" (1990:184) and that sample size should be decided upon based on the information sought and how to maximize time and resources.

In terms of validating the methodology from an academic standpoint, critical case sampling was appropriate for several reasons. First, critical case sampling is a form of purposeful nonprobability sampling (Patton 2015; Suri 2011; Tashakkori and Teddlie 2003; Teddlie and Yu 2007). Nonprobability sampling is appropriate for studying information-rich cases in detail. Conversely, probability sampling is appropriate when researchers want to generalize from a sample to a greater population; however, implicit in probability sampling is the fact that data have been collected and can be examined for quantitative inference. Absent data, probability sampling is inappropriate, as there is nothing to generalize from.

Critical case sampling is also strategic when specific cases may yield information of vital importance to the research being conducted (Patton 1987, 1990). Applying this rationale to the current study, the questionnaire was disbursed to courtroom practitioners in multiple locations across the country. Respondents who have specific experiences with issues are ideal to target when employing critical case sampling (Marshall 1996). Large cities were targeted because practitioners in them were likely to have encountered more deaf defendants because of the larger populations and thus would be able to provide more insight based on their increased experiences with deaf defendants.

Finally, critical case sampling was chosen to provide a framework for the wave 2 survey. Although studying small numbers of critical cases does not allow for empirical inferences to be made, logical generalizations may be made from limited cases,

particularly absent any other available data (Patton 1987, 1990). Information gained through critical case sampling provides valuable insight into unstudied and understudied research topics (Yin 2003) and serves as a foundation for the construction of more detailed questions and, eventually, testable hypotheses. Put more simply, it sheds light on what is and is not known about the issues being explored in a study and provides a framework for which questions to ask moving forward.

### *Expert Sample*

Expert sampling, another form of purposeful sampling, was selected for the second wave of data collection. Expert sampling is a widely accepted purposeful-sampling technique used in social science research (Ghosh et al. 2013; Trochim 2006), and it was selected for several reasons. First, it will reveal if data are being kept on deaf defendants. The experts (in this case, judges and attorneys) will know if there is any data being kept on deaf defendants passing through their courts, and if such data exists, they will be able to provide it for the current study. Conversely, if data on deaf defendants are not being tracked, courtroom practitioners will be able to note this in their responses, which also provides information for the current study. In essence, having no information is valuable, in that it is telling of the current state of data on deaf defendants and may serve as a justification for why such data should be tracked moving forward.

Expert sampling was also chosen because of the lack of empirical evidence available on issues related to the current study. According to Laerd Dissertation (2012), a research-oriented website committed to the promotion of research methods and statistical training, expert sampling is the sampling technique of choice for topics for which no empirical evidence is available and no conclusions regarding the topics being explored have been definitively reached. When this is the case, the logic behind using expert sampling is that, absent any testable data from which to draw empirical conclusions, it is best to gain insight from experts in the field who have had experience with the topics and can draw from their experiences to provide researchers with a better understanding of the topics being studied (Trochim 2006). In addition, absent any empirical evidence, views of experts are more respected than those of people who have no personal experience from which to draw their conclusions (Changing Works 2015). Although certainly not without its methodological limitations, expert sampling provides insight on topics that, particularly when reinforced by a significant proportion of the sample, help researchers to gain the best possible understanding of their topics of interest.

Finally, expert sampling was selected with the intent of reaching out to courtroom practitioners across several geographic regions and population sizes in order to maximize representation and generalizability. Whereas critical case samples examine a relatively smaller number of cases to highlight issues related to research topics of interest (in this study, managing deaf defendants from a systemic perspective), expert samples typically employ a larger sample size to increase the generalizability of evidence gained through the topics being explored. Although information gained through expert sampling is not empirical, its reliability is improved upon relative to critical case sampling because of the increase in sample size. Whereas the goal of critical case sampling in the current study is

to identify issues and concerns faced by practitioners during trials involving deaf defendants, the goal of expert sampling in the current study is to identify the best ways of managing those issues and concerns, as identified through the critical case sample. As such, samples that allow for geographic diversity and variation in the population sizes of cities and counties represented in the study are desired.

As mentioned above, geographic diversity and variation in population size are priorities for the expert sample. Geographic diversity is prioritized to (1) identify if there are regional ways of handling deaf defendants and (2) allow for maximum generalizability of the list of best practices developed from the current study. In addition, the population size of where experts work has been theorized as important, as courtroom practitioners working in suburban and rural areas may have less experiences with cases involving deaf defendants than do their urban counterparts. Although practitioners in lower-populated jurisdictions may not have as much experience as their urban counterparts with cases involving deaf defendants, they are still the experts within their courts and should be represented in the expert sample. Moreover, although lower-populated jurisdictions may have less exposure to deaf defendants, practitioners in these jurisdictions may still have unique and informative insights to share.

### *Recruitment Process*

The recruitment processes for the wave 1 questionnaire and wave 2 survey share similarities. Recruitment for each wave employed a two-stage process that involved identifying judges and attorneys to participate, which required administrative approval, and then identifying courtroom practitioners with knowledge of their respective policies and procedures who were willing to complete the questionnaires and surveys.

*Wave 1 Questionnaire.* Recruitment for the wave 1 sample began with reaching out to 10 law and judicial offices across the United States. Judges and prosecutors were targeted based on geographic diversity to capture potential differences in responses due to variation in laws, policies, and procedures, as well as any potential unknown regional influences that may influence responses. In addition, courtroom practitioners in large cities were contacted under the assumption that they would have an increased likelihood of contact with deaf defendants because of larger population size. Once prosecutors' and judicial offices were selected, they were contacted through legal and judicial office lines identified through online searches.

Administrative assistants responsible for answering prosecutor and judicial office lines were briefly informed about the study and its goals, at which point they provided contact information for supervisors from their offices who were in positions to approve or deny permission for their respective prosecutors and judges to complete the questionnaire. Supervisors were informed of the nature of the study, and requests were made for names of prosecutors and judges with previous experience in cases involving deaf defendants. Once office approval was granted, the questionnaire and information sheet were forwarded on to prosecutors and judges either directly by the office supervisors or by the primary investigator (PI) when the supervisor provided direct

contact info for the office's prosecutors and judges, along with an explanation of the research project and a request to complete the questionnaire. Prosecutors and judges then decided whether they would complete the questionnaire, which was optional and not required by their respective offices. The questionnaire was created using a Word document, and respondents were asked to complete it by typing their responses in the Word document and then e-mailing it back to the PI directly or having their supervisors return it to the PI via e-mail. All data gathered were deidentified at both the individual and organizational levels.

*Wave 2 Survey.* Recruitment for the wave 2 sample began by calling a larger sample of law and judicial offices nationwide. In addition to prosecutors and judges, public defenders were also recruited to complete the wave 2 courtroom practitioner survey. Courtroom practitioners were targeted based on geographic diversity, with multiple states from each region of the country included in each sample population to account for possible differences in responses due to variation in laws, policies, and procedures, as well as any possible unknown regional influences that could shape responses. In addition, courtroom practitioners from urban, suburban, and rural communities were contacted to account for potential differences in responses based on population size. Once law and judicial offices were selected, they were contacted through legal and judicial office lines found through online searches. Once contact with a supervisor in a position to approve participation was established, an information sheet explaining the study, its assurance of confidentiality, and its IRB approval was submitted via e-mail. The survey was created using Qualtrics (an online survey software company), and respondents were asked to complete it by clicking on the link provided from the PI or their supervisors. As with the wave 1 questionnaire, all data gathered were deidentified at the individual and organizational levels.

## **FINDINGS**

The results of the current study are discussed below. Wave 1 findings are covered first, followed by wave 2 findings, and each wave is broken down based on the results from the responses of courtroom practitioners. In addition, the wave 2 findings are compared to findings from previous research to identify consistencies and differences, as well as any new information learned from the current study.

### *Wave 1 Questionnaire*

Using critical case sampling, ten prosecutors' and judicial offices from across the country were contacted to complete the wave 1 courtroom practitioner questionnaire. Prosecutors' and judicial offices were selected on the basis of geographic diversity and size, with large cities targeted. Of the 10 offices contacted, 6 approved a courtroom practitioner to complete the questionnaire (60 percent response rate). All practitioners who received approval from their offices completed the questionnaire.

***Approximately how many deaf defendants are channeled through your court system?***

Three of the six respondents stated that they had no idea how many deaf defendants are channeled through their court system, and two respondents stated that they have from one to three deaf defendants being prosecuted in their jurisdiction at a given time. One respondent noted that his court encounters approximately 2500 deaf defendants a year (a number that seems extremely high, regardless of how many total cases go before a court in a given year).

***What type of general issues, problems, or reoccurring themes has the court dealt with in regards to deaf defendants?***

Courtroom practitioners identified a few general issues, problems, and reoccurring themes related to cases involving deaf defendants. The first is that there is often a wait list for certified interpreters, which often leads to continuances and slows the legal process. Occasionally, arrangements are made in advance, but most of the time, the court does not know that the defendant is deaf until his/her first court appearance. In addition, one respondent noted that trials involving deaf defendants take longer because of the additional time associated with interpreting.

***What are some of the standard protocols used for providing interpreters for deaf defendants in working with their attorneys?***

Two of the six respondents stated that their office had standard protocols for providing interpreters for deaf defendants, including assigning a qualified interpreter to the defendant. One respondent stated that the competency of the interpreter is tested prior to assignment to ensure his or her qualification to interpret in court. Finally, one respondent noted that the court relies on the defense attorney to notify the court if an interpreter is necessary. In the event that the court is not notified by the defense attorney, an interpreter is not provided to the defendant and the defendant relies solely on lip reading.

***What happens if a deaf defendant does not understand sign language?***

Four of the six courtroom practitioners stated that they had never encountered a deaf defendant who did not understand sign language, and they offered no answer as to how they would respond to such an issue should it arise. The remaining two respondents stated that family members who understand the defendant's makeshift signs are sworn in and translate for the defendant during trial.

***In regards to that last question, has it been your experience that deaf defendants are more or less apt to take their case to trial, or are they more likely to plea bargain? Similarly, have you noticed either prosecutors or***

***defense attorneys being more or less likely to make or take a plea deal on behalf of deaf defendants?***

Five of the six respondents stated that the percentage of cases disposed of through plea bargaining were identical for deaf and hearing defendants, and that deafness is not a factor in a prosecutor's decision to offer a plea bargain. One respondent noted that every deaf defendant (s)he prosecuted was offered and accepted a plea bargain and stated that prosecutors are more likely to make a lenient plea offer to a deaf defendant and courts are more likely to accept a lenient plea offer because the courtroom work group understands how difficult a jury trial would be with a deaf defendant, as well as the difficulties that jails and prisons face when housing deaf offenders.

***Are you aware of what type of deaf interpreter your court system uses? In other words, are these interpreters deaf themselves, or are they interpreters who don't happen to be deaf?***

Five of the six respondents stated that their court has never used an interpreter that is deaf himself/herself, and one respondent stated that in the two cases involving deaf defendants (s)he has worked, one interpreter could hear and one was deaf.

***What type of problems have you noticed specifically regarding some of the actors in the courtroom work group? Are there noticeable problems judges, prosecutors, or defense attorneys encounter in dealing with deaf defendants?***

In terms of problems associated with trying deaf defendants, the speed of the trial was the main issue identified. How to facilitate communication with a deaf defendant who does not know ASL was also identified as a concern.

***Similarly to the last question, have you noticed the courtroom members working together to address the issues/problems of deaf defendants, or does the presence of a deaf defendant affect the cohesiveness of the courtroom workgroup?***

All respondents stated that cases involving deaf defendants do not affect the cohesion of the courtroom work group and that such cases merely slow the legal process.

***From your observations, is it ever a concern that a deaf defendant may be unable to get his or her point across effectively? And if so, could it affect the outcome of a case?***

All respondents stated that they had never been involved in any case in which a deaf defendant did not understand the questions being asked of him/her, and one respondent noted that, should such a circumstance arise, the prosecution would stop the proceedings until the issue was remedied. Five courtroom practitioners stated they had no concerns about deaf defendants expressing themselves effectively, with one adding that judges give deaf defendants ample time to express themselves and that in the event a judge is

unable to understand what a defendant is trying to tell the court, the judge will inquire further until clarity is achieved. One respondent stated that lip reading during a trial inhibits accurate communication and could affect the outcome and, as such, an interpreter should always be provided to deaf defendants.

***Are there any other issues that we have not discussed that you think are important to understanding what happens to deaf defendants in the criminal justice system?***

None of the respondents identified any items not addressed in the questionnaire.

### *Wave 2 Survey*

Using expert sampling, 30 law and judicial offices around the country were contacted to complete the wave 2 survey. In addition to prosecutors and judges, the wave 2 survey included defense attorneys in the sample. Offices were selected on the basis of geographic and population diversity. Eight (8) of the 30 law and judicial offices contacted agreed to participate in the study and found a courtroom practitioner willing to complete the online survey (26.7 percent response rate).

***Does your office keep track of the number of deaf defendants it deals with annually?***

All eight respondents stated that their offices do not keep track of the number of deaf defendants they encounter annually. This provides support for the idea that prosecutors, defense attorneys, and judges are not collecting data on deaf suspects.

***What is the most effective way of ensuring the linguistic competence of a deaf defendant? Please describe.***

When asked about the most effective way of ensuring the linguistic competence of a deaf defendant, respondents stated that court-appointed certified interpreters should assess the defendant's linguistic competence prior to trial.

***Has your state defined the minimum standards for a "qualified interpreter"?***

Five respondents said that their states had defined the minimum standards for qualified interpreters, and three said they were unsure. No respondents answered *no*.

***If your state has not defined the minimum standards for a "qualified interpreter," what do you think they should be? Please describe.***

When asked what the minimum standards for a "qualified interpreter" should be, one respondent noted that a judge should review an interpreter's qualifications prior to trial, and another respondent stated that interpreters should be certified and should be familiar with legal terminology. These suggestions are similar to the requirements of federal court

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interpreters, which state that the interpreter must possess and display an understanding of legal terminology in addition to passing the Administrative Office Certification Examination (U.S. Courts 2015a).

***Are you familiar with the difference between simultaneous and consecutive interpreting?***

Five respondents stated they were familiar with the difference, and three said they were not.

***If you are familiar with the difference between the two, when should simultaneous interpreting be used in a deaf defendant's trial? Please describe.***

Responses indicated that respondents believed simultaneous interpreting should occur throughout the entire trial, any time the defendant is not testifying, and not at all.

***Again, if you are familiar with the difference between simultaneous and consecutive interpreting, when should consecutive interpreting be used in a deaf defendant's trial? Please describe.***

Responses to this question included *never*, *only when the defendant is testifying*, and *always* (because of its improved accuracy in comparison to simultaneous interpreting). The latter response is the one supported by previous research, which suggests that consecutive interpreting should always be used in formal courtroom proceedings, as it is significantly more accurate than simultaneous interpreting (Russell 2002).

***Are family members of a deaf defendant allowed to interpret in the defendant's criminal trial in your jurisdiction's court?***

All eight respondents said that family members of a deaf defendant are not allowed to interpret in such a case.

***Do you think family members of a deaf defendant should be allowed to interpret in the defendant's criminal trial?***

In response to this question, all eight respondents again answered *no*. These findings are supported by the Department of Justice's suggestion that friends and family members should not interpret for a deaf suspect in court because they are usually unfamiliar with the legal code and terminology and they may have emotional and/or personal involvement in the case, which may affect their ability to interpret effectively, correctly, and neutrally (56 Fed. Reg. at 35701, 1991).

***Does your jurisdiction's court always provide sign language interpreters for deaf defendants?***

Seven respondents stated that their jurisdiction's court always provides sign language interpreters for deaf defendants, but one stated that his/her court did not. With the



exception of one respondent, these findings support the use of sign language interpreters in all courtroom proceedings, which is not only strongly suggested by previous researchers but also required in most jurisdictions (Mathers 2009; Vernon and Miller 2005).

***Do you think courts should always provide sign language interpreters for deaf defendants?***

All eight respondents replied *yes* to this question.

***What is the most effective way of ensuring deaf defendants are able to participate in their own defense? Please describe.***

When asked this question, respondents stated that deaf defendants must be able to communicate with their attorneys and the court, and that certified sign language interpreters should be present for all court proceedings (which is supported by previous research, as listed above). In addition, one respondent stated that it is the responsibility of the defendant's defense attorney to explain the legal process to the defendant, and another noted that dual interpreting should be used in any proceedings lasting longer than two hours.

***Are you familiar with dual interpretation? If you are familiar with dual interpretation, when should it be used in a deaf defendant's trial? Please describe.***

Six respondents indicated they were familiar with dual interpretation, and two stated that they were not. Of the respondents who indicated that they were familiar with dual interpretation, one that dual interpretation should be used any time a court proceeding lasts longer than two hours, as it ensures the accuracy of the interpretation and avoids interpreter fatigue, indicating that (s)he was unfamiliar with what dual interpretation actually is. Dual interpretation, although it may seem impractical, can bolster the integrity of the legal process by recognizing and translating cultural differences in communication to the court that might not be picked up by hearing interpreters (Smith 1991); moreover, deaf interpreters have a better understanding of the linguistic differences that need to be addressed during the course of examination, testimony, and so on (Wilcox 1995). As such, previous research suggests that additional consideration should be given to the use of dual interpretation during trials.

***Are there any other issues or information regarding the handling of deaf defendants that is not mentioned above and needs to be addressed? If so, please explain.***

Respondents identified no additional issues.

## **DISCUSSION**

Research on deaf defendants has been a largely underexplored area of interest (Miller et al. 2005; Vernon and Greenberg 1999). Absent such research, courtroom practitioners are

left reliant on a piecemeal approach to handling deaf defendants, leaving the window open for inequitable treatment and violations of rights that can and have resulted in inadmissible evidence, dismissals of cases, and not-guilty verdicts, as well as litigation and lawsuits (Brodin 2005; Seaborn 2004).

In light of the limited amount of research available, two waves of qualitative data were collected with the goal of constructing a list of current practices of courtroom practitioners in criminal cases involving deaf defendants. Data were gathered using critical case sampling (wave 1) and expert sampling (wave 2), both types of purposeful sampling, a nonprobability sampling technique that involves identifying respondents for a specific purpose (Patton 1990; Tashakkori and Teddlie 2003; Teddlie and Yu 2007). The data gained through the study provide a glimpse of how courtrooms across the United States facilitate communication with deaf defendants.

In addition to providing a snapshot of current practices, results of the current study indicate a need for law offices and courtrooms nationwide to collect data on deaf defendants so future research can be quantitative as well as qualitative. Without the collection of such data, official statistics cannot be attained and empirical testing is not possible. As such, courts across the country should keep track of the number of deaf defendants they encounter annually and should document any issues, successes, or concerns associated with accommodating the linguistic needs of these defendants.

### *Limitations*

As with any research, the current study has limitations to the methodologies and findings. These limitations can be categorized into two types: general limitations of qualitative research and specific limitations associated with the study itself. These general and specific limitations are discussed in this section.

The first limitation that needs to be acknowledged relates to qualitative research in general. There are no clear rules for sampling in qualitative research. Whereas sampling techniques for quantitative research are typically well established, sampling techniques for qualitative research are not explicit, and multiple techniques may be employed (Palinkas et al. 2013). Because different sampling techniques may be used to study similar issues, the window is left open for different findings due to inconsistencies in measurement; however, this freedom in selecting sampling strategies affords researchers the opportunity to maximize their exposure to information-rich cases that are the foundation of qualitative research (Patton 1987).

The other general limitation of qualitative research is that data gained from qualitative research are not able to be examined statistically and are therefore not empirically verifiable. The limited research and virtually nonexistent data on deaf defendants and their involvement in the criminal justice system do not allow for quantitative analysis, however, and purposeful sampling is the only way to gain a better understanding of the issues examined in the current study. Qualitative research should be judged in context by its contribution to the issues being examined, not by sample size or inferential power (Patton 1990).

In addition to the general qualitative limitations, there is a limitation specific to the current study, in regard to the study's low response rates. Although the response rates for the wave 1 questionnaire and wave 2 survey were lower than desired, the responses for both waves of data collection were rich with qualitative data. In addition, the reason for the lower response rate of the wave 2 survey relative to that of the wave 1 questionnaire may have been the inclusion of suburban and rural populations in the samples. The decision to include suburban and rural populations in the wave 2 survey was made to include responses across all population levels, but it is possible that these populations had encountered fewer deaf defendants and thus did not see participating in the study as beneficial to their courts.

### *Future Research*

Although this study advances the current knowledge on common practices of handling deaf defendants, there is still much to learn. One future interest related to the current study includes working with courtroom practitioners to gain access to deaf defendants for case studies of their experiences, with the goal of proactively identifying concerns and offering recommendations as those concerns arise, rather than reactively waiting for litigation to pile up (and the potential for systemic injustice via disparate treatment and violations of the ADA as a result of waiting). In addition, if and when quantitative data are collected by the courts, issues relating to deaf defendants should be explored quantitatively. Ultimately, this research is the first step in understanding current courtroom practices in cases involving deaf defendants, and it provides a foundation to examine whether these practices are consistent with the recommendations of previous research on how best to accommodate the linguistic needs of deaf defendants.

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