

Linton v. State, No. PD-0413-08 (Tex. Crim. App. 1/14/09).
Carla M. Mathers on behalf of the NCIEC Legal Interpreting Workgroup
January 17, 2009

Background. The Court of Criminal Appeals in Texas is the highest appellate court in the state for criminal cases. This matter started as a DUI trial in which the issue of deaf interpreters was raised and denied. On appeal to the intermediate level appeals court, the trial court's decision not to appoint a deaf interpreter was reversed. The state then took an appeal to the Court of Criminal Appeals and on January 14, 2009, it issued its opinion reversing the court of appeal's decision to require a deaf interpreter.

The RID and the NCIEC filed a joint *amicus* brief in support of the intermediate court of appeals' decision requiring deaf interpreters when the court interpreter indicated difficulty in communicating with a deaf litigant.¹ The brief was joined by Communication Services for the Deaf, the Texas Association of the Deaf, an individual David Quinto-Pozos, Ph.D. The brief set forth *amici's* opinion that in high stakes legal settings when the court interpreter indicates that a deaf interpreter would assist, improve or enhance the interpretation, the court should appoint a deaf interpreter. The brief provided guidance to the court on the profession of deaf interpreting. The brief also suggested that the provision of an interpreter who could hear at the table to summarize and explain information to the defendant during breaks was an insufficient accommodation to ensure the defendant's linguistic presence. Advocacy, Incorporated and the National Association of the Deaf filed a separate *amicus* brief in support of the court of appeal's decision.

The Texas Criminal Court of Appeals' Opinion.

The Court set forth its holding straight away: “[W]e find that the three deaf interpreters (sic) provided by the trial court were constitutionally sufficient. We therefore reverse the court of appeals which had held, in essence, that the trial court reversibly erred in not providing the “best” interpretive services – including a deaf-relay interpreter – to ensure appellant's full understanding of the trial proceedings.” Opinion at 2.

After recounting the evidence presented below and the applicable law, the Court of Appeals noted that the Constitution does not provide the right to a perfect trial or perfect understanding. The Court agreed that the duty of the trial court once learning that the defendant is deaf is to take whatever steps are necessary to ensure minimum understanding. A minimum understanding means that the defendant is able to understand the proceedings and assist in the defense. Ms. Linton's counsel argued and expert testimony was presented that she did not understand ASL and was not fluent in English. The argument suggested that because the interpreter chose to use an English based form of signing which was above Ms. Linton's English reading level, she consequently did not have a minimum understanding of the proceedings. While the lower court agreed and

¹ While the court did not discuss the arguments presented in the RID/NCIEC brief, they did cite to and incorporate the brief's definition of a deaf interpreter as “a deaf interpreter functions ‘in an intermediate capacity between the court interpreter who can hear and the deaf litigant.’” Opinion at 3 n.6.

ruled that this minimum understanding should be instantaneous and the trial court's decision to have the table interpreter explain during breaks was inadequate to protect Linton's rights, the Court of Appeals disagreed. It considered that the explanatory function belongs to counsel, not the interpreter, and there is no need for counsel's explanations to be immediate. The court then set forth numerous examples of instances in which Ms. Linton was able to communicate and interact through the interpreter during the proceedings. According to the court, these direct exchanges demonstrated that Ms. Linton had a minimum understanding of the proceedings.

The court catalogued a number of cases indicating that due process did not require a perfect translation. The Court explained that the "best" interpretation is not constitutionally required unless the defendant can point to specific examples in which understanding was impossible or in which he was unable to assist counsel. The Court noted that Ms. Linton failed to set out in any motion any specific instances in which she failed to understand crucial testimony or was unable to communicate with counsel. The state, on the other hand, set forth numerous instances showing Ms. Linton engaged in the proceedings.

The Opinion sets forth guidance for attorneys who represent deaf clients who need deaf interpreters. Clearly, counsel must formally move for a deaf interpreter. Here, the discussion of a deaf interpreter emanated from the expert witness provided in response to a question from the State regarding the type of accommodation which would permit Ms. Linton to minimally understand the proceedings. Defense counsel should affirmatively move for a deaf interpreter at the earliest possible indication of communication difficulties. Further, counsel must make a clear record of each and every time there is a difficulty in understanding the interpretation or in being able to assist in the defense. The Court left open the opportunity for deaf interpreters upon an adequate showing that understanding was not possible or that there were difficulties in the interpretation. Counsel must have competent linguistic assistance at the table to monitor the proceedings interpreters in real time in order to make an appropriate record on appeal. Finally, the Opinion sets forth guidance for interpreters working in court. Upon perceiving that there are communication difficulties, the interpreter should make a clear record that communication is not transpiring and that a deaf interpreter is needed in order to ensure that the interpretation is in a language understandable to the deaf person. Interpreters should also be comfortable in explaining to counsel the need for an interpreter at the table to ensure that the defendant is able to understand, to participate and assist in the defense.

The Concurring Opinion

Judge Johnson filed a concurring opinion which forcefully states that on the proper facts a deaf interpreter is an absolute necessity. This concurring opinion provides even more guidance to counsel representing deaf people. Judge Johnson had personal experience representing deaf people and specifically working with a deaf interpreter which motivated the writing of a separate concurring opinion.

Judge Johnson explained the process of ‘relay interpretation’ and stated “[a deaf interpreter] is absolutely necessary for communication between hearing individuals and some deaf individuals.” Concurring Opinion at 2 (emphasis added). Judge Johnson indicated that a deaf interpreter was an absolute necessity at times because some “deaf individuals may have additional challenges, such as mental retardation or mental illness, cerebral palsy, a low level of competence or a lack of education in commonly used modes of manual communication, or low levels of ability to read or write.” *Id.* The concurring opinion claimed “a need for intermediary interpretation is not common, but when it exists, it is a necessity, not an option.” *Id.*

In terms of practical guidelines, the concurring opinion noted that a trial court should first inquire of the interpreter as to whether there are any communication difficulties. The opinion aptly recognized that some interpreters may not want to admit that there are communication difficulties for fear of appearing incompetent. The opinion concisely explained that the communication difficulties that indicate a deaf interpreter should be retained may be related to the deaf person’s limited fund of knowledge of the legal system. The opinion also warned trial judges of the “head-nod” syndrome which at times is used to feign understanding when a person does not want to appear unintelligent or unsophisticated. The concurring opinion also provided some guidance to trial courts in how to phrase a question to ensure a narrative response and avoid reliance on yes-no questions which can more easily hide true understanding.

On these facts, however, Judge Johnson agreed with the majority that Ms. Linton’s interactions with the other driver, with the police, with the court and with counsel during the proceedings all indicated that she had a minimum level of understanding and was able to participate in the proceedings. As a result, she joined the majority in reversing the intermediate court of appeals.