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Court: Witness's Limitations Did Not Cause Sixth Amendment Violation

By a MetNews Staff Writer

A deaf prosecution witness' inability to speak or use standard sign language to communicate did not violate the defendant's Sixth Amendment right to confront that witness's and cross-examine her, the Ninth U.S. Circuit Court of Appeals clarified yesterday.

The panel affirmed the decision of U.S. District Court Judge Andrew J. Guilford of the Central District of California dismissing Daniel Vasquez's petition for habeas corpus based on an asserted violation of his Confrontation Clause rights.

Vasquez was charged with the 2001 murder of Frank Hernandez. Hernandez's mother, Carmen Zapata, witnessed the shooting and identified Vasquez as the perpetrator to police.

At trial, Zapata was the prosecution's key witness. Because Zapata is deaf and does not speak, she testified with the assistance of a court-certified American Sign Language interpreter and a certified intermediary interpreter.

According to the statement of facts taken from the state appellate court's decision, Zapata has never learned any standard form of sign language, and has a very limited ability to read and write. She communicates with others using a combination of signs, gestures, facial expressions and sounds.

During the course of Zapata's testimony, the interpreters paused to confer with each other more than 40 times regarding the best way to interpret Zapata's statements for the jury.

The trial judge, interpreters and attorneys also conferred outside of the presence of the jury on several occasions to determine how best to facilitate Zapata's testimony.

In addition to the use of interpreters, Zapata was also aided by photographs, diagrams and picture dictionaries in giving her testimony. She was asked to act out the murder as well.

Defense counsel repeatedly objected during both direct examination and cross-examination, but the trial court overruled the objections.

A jury subsequently convicted Vasquez of first degree murder and he was sentenced to 60 years in prison.

On direct appeal, Vasquez argued that he was denied his right to due process and to confront and cross-examine witnesses because of Zapata's limited ability to comprehend questions and to communicate her responses.

The California appellate court rejected Vasquez's argument in an unpublished opinion, adopting the reasoning of *People v. Tran*, 47 Cal. App. 4th 759 (1996), which involved a quadriplegic witness who could only answer yes or no questions.

As the limitations on the witness's ability to testify affected both the prosecution and defense and were dictated by the witness's physical impairments, the *Tran* court held that the defendant's confrontation rights had not been violated.

After the California Supreme Court denied Vasquez's petition for review without opinion, he sought habeas corpus relief in federal court.

The magistrate judge recommended that habeas relief be granted, but the district court rejected the recommendation and entered an order denying Vasquez's habeas petition.

Writing for the federal appellate court, Judge Betty B. Fletcher said that she could "empathize with the challenges that defense counsel faced in cross-examining Zapata," but explained that the inherent difficulty of cross-examining a witness whose ability to understand questions and communicate answers is impaired does not "rise to a deprivation of the *opportunity* for effective cross-examination."

As the trial court placed no limits on the scope or duration of cross-examination, Fletcher reasoned that Vasquez had "ample opportunity" to question Zapata about the shooting and about her identification of Vasquez and have the jury observe her demeanor and assess her credibility.

Noting the absence of any factually analogous Supreme Court ruling that limitations caused by a witness's physical impairment violated the Confrontation Clause, Fletcher concluded that the California appellate court's decision to affirm Vasquez's conviction was neither contrary to nor an objectively unreasonable application of clearly established federal law.

Judges Raymond C. Fisher and Ronald M. Gould joined Fletcher in her decision.

Deputy Federal Public Defender Michael Tanaka argued on behalf of Vasquez and Deputy Attorney General David F. Glassman argued on behalf of the state.

The case is *Vasquez v. Kirkland*, 08-55699.