

IN THE
SUPREME COURT OF THE UNITED STATES
_____ 2018 TERM

NUMBER _____

BOBBY BYRD/#299312
Petitioner

v.

CITY OF BOSSIER, ET AL
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES FIFTH CIRCUIT COURT OF APPEAL
(Name of Court That Last Ruled on Merits of Your Case)

PETITION FOR WRIT OF CERTIORARI

Bobby Byrd#299312, Pro Se
Louisiana State Penitentiary
Main Prison West/Hickory-4
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QUESTIONS PRESENTED FOR REVIEW

1.

As a Recipient of Federal Funds, Do United States District Courts have an Obligation under the Americans With Disabilities Act ("ADA") and Rehabilitation Act ["RA"] to Appoint Counsel to Assist an ADA-Eligible Pro Se Pauper Litigant Who Is Prevented From Conducting his Own Trial on the Merits Because of the Severe Effects of a Physical or Mental Handicap?

or

In Civil Rights Case of an ADA-Eligible Pauper Litigant Prevented By Physical or Mental Handicap from prosecuting his own trial, Does such Physical or Mental Handicap constitute "Exceptional Circumstances" as contemplated under Ulmer v. Chancellor, 691 F.2d 209, 212 (5th Cir. 1982), requiring ADA Accommodation by Appointment of Counsel?

2.

Did the District Court's Conduct and Actions Demonstrate "Exceptional Circumstances" Actually Existed in this Case Despite Written Rulings Otherwise Thereby Showing It was An Abuse of Discretion to Derry Appointment of Counsel?

LIST OF PARTIES
RULE 12.6
STATEMENT

Petitioner, Bobby Byrd #299312 hereby certifies that the following persons have an interest in this outcome of this case:

Petitioner Bobby Byrd #299312, Pro Se
Louisiana State Penitentiary
Main Prison West/Hickory-4
Angola, LA 70712

United States District Court
Western District of Louisiana (Shreveport Division)
300 Fannin St., Suite 1167
Shreveport, LA 71101-3083

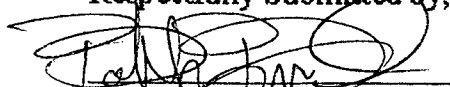
Lyle W. Cayce, United States Fifth Circuit Court of Appeal,
600 S. Maestri Place
New Orleans, LA 70130-3408

Robert Kennedy – Counsel for Bossier City Police Officer Roy Short
COOK YANCY KING & GALLOWAY, APLC
333 Texas Street, Suite 1700
Shreveport, LA 71120-2260

Nicole Marie Buckle (Bar Roll No.32113) – Counsel for Retired Shreveport Police Officers Robert Gordon and WW. Lindsey
STROUD, CARMOUCHE & BUCKLE, PLLC
7330 Fern Avenue, Suite 903
Shreveport, LA 71105

These representations are being made so that the Justices of this Honorable Court may evaluate possible conflicts of interest, disqualification or the need for recusal. There are no other parties to this action within the scope of *U.S. Supreme Court Rule 29.1*.

Respectfully Submitted by,



Bobby Byrd #299312, Pro Se
Louisiana State Penitentiary
Main Prison West/Hickory-4
Angola, LA 70712

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from federal courts:

The opinion if the United States court of appeals appears at **Appendix A** to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished

The opinion of the United States district court appears at **Appendix B** to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished

☐ For cases from state courts:

The opinion if the highest state court to review the merits appears at **Appendix** to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished

The opinion if the Louisiana 22nd Judicial District Court for Washington Parish appears at **Appendix** to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was June 13, 2018

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1)

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____, A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

The judgment of the United States Fifth Circuit Court of Appeal sought to be reviewed was entered in Docket No. 17-30569 on June 13, 2018. The petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rules 13.1 and 13.3 because it is being filed within 90 days after denial of a timely sought writ to the United States Fifth Circuit Court of Appeal. This Court has Jurisdiction to review the Judgment of the United States Fifth Circuit Court of Appeal pursuant to the U.S. Constitutional Article. 3 § 2, Clause 1, 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution Provides in pertinent part:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States' nor shall any state deprive any person of life, liberty, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Americans With Disabilities Act ("ADA") and Rehabilitation Act ("RA"); including 28 C.F.R. § 35.152(b)(1); 42 U.S.C. § 12102(1)(A), (2)(A); 28 C.F.R. § 35.130(B)(1)(i); 28 C.F.R. § 35.130(b)(3)(i-iii); 28 C.F.R. § 35.130(b)(7); 28 C.F.R. § 35.160(b)(1); 28 C.F.R. § 35.130(b)(3); 28 C.F.R. § 41.51(b)(3).

By forcing Relator to present his own civil trial without disability accommodation the District Court violated the ADA by failing to "ensure that qualified inmates or detainees with disabilities shall not...be excluded from participation in, or be denied the benefits of, the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity," thereby warranting a new civil trial with appointment of counsel.

Relator is **requesting clarification** of the relationship between the pre-ADA case, *Ulmer v. Chancellor*, 691 F.2d. 209, 212 (5th Cir. 1982) to a federal district court's obligation to accommodate ADA-eligible litigants whose physical or mental disability prevents them from prosecuting their case.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Relator is a pro se prisoner suffering significant life-long mental illness including bipolar and/or schizophrenia disorder, intermittent explosive anger disorder, and impulse control disorder for which he receives anti-psychotic medication. Relator is an ADA-qualified person eligible for purposes of accommodation under the Americans With Disabilities Act ("ADA") and Rehabilitation Act ["RA"]. On 7/18/2012, Relator brought a claim¹ of excessive force via 42 U.S.C. § 1983 in reference to being beaten during his arrest in Shreveport/Bossier through assistance by attorney, B. Gerald Weeks.² On 5/24/2013, a motion to enroll³ Gregory N. Wampler⁴ in behalf of Relator was granted.⁵ Summary judgment was granted in favor of Defendants⁶ and a subsequent appeal was granted in part in favor of Relator on 10/2/2015.⁷ On 10/23/2015, Relator's attorney, B. Gerald Weeks moved to withdraw⁸ following an unsuccessful settlement attempt two days prior. On 10/21/15, Relator's other attorney, Gregory N. Wampler indicated he would withdraw also if no settlement could be reached and trial was needed. The district court GRANTED Weeks' motion to withdraw on 10/26/15,⁹ and less than two months later, [on 12/9/15] Gregory N. Wampler moved and was GRANTED permission to withdraw¹⁰ from the case leaving Relator to proceed pro se. On 12/14/15, the District Court

1 Rec. Doc. 1.

2 Listed at 1150 Expressway Dr., Ste 205, Pineville, LA 71360-6689 (318)-442-3045.

3 Rec. Doc. 15.

4 Listed at 607 Main St., Pineville, LA 71360; (318)-473-4220.

5 Rec. Doc. 16.

6 Rec. Docs. 64-65.

7 Rec. Doc. 72. Noteworthy is that claims dismissed against the "deep pockets" Defendants were affirmed on appeal, and Relator's attorneys only then sought to pull out of the lawsuit.

8 Rec. Doc. 75.

9 Rec. Doc. 76.

10 Rec. Docs. 77-78.

Ordered the parties to submit a pre-trial statement on or before 1/26/16.¹¹ Unable to comply with this ORDER because of not understanding, Relator sought help from the Civil Litigation Team - Main Prison at Louisiana State Penitentiary. Between December 22, 2015, and January 5, 2016, Offender Counsel Substitute [OCS]¹² read Relator's extensive record and attempted to prepare an adequate pre-trial statement which was submitted on 1/8/16.¹³ Five days later Relator submitted a motion to appoint counsel, also prepared by OCS.¹⁴ This motion was denied four months later on 5/26/16.¹⁵ After several more orders,¹⁶ a telephone conference,¹⁷ and a litany of new pre-trial orders—which were all confusing to Relator who did not understand what to do. On July 5, 2016, again through assistance of OCS – Relator later submitted an Ex Parte Motion for Reconsideration of Appointment of Counsel, and Motion for Video Conference with Assistance from Offender Counsel Substitute,¹⁸ which was also DENIED¹⁹ on July 15, 2016. At that time, the Court stated:

“The Court denies the Plaintiff's motion to reconsider the Court's previous order denying the appointment of counsel because the Plaintiff has failed to persuade the Court that the Plaintiff's condition gives rise to the exceptional circumstances required for the appointment of counsel under 28 U.S.C. § 1915(e)(1). See *Ulmer v. Chancellor*, 691 F.2d 209, 212 (5th Cir. 1982). The Plaintiff has also failed to provide any law substantiating [his] contention that the ADA imposes a specific duty on the Court to appoint counsel for a disabled person.

11 Rec. Doc. 79.

12 OCS Michael Zihlavsky/#309324, paralegal, not admitted to practice.

13 Rec. Doc. 80.

14 Rec. Doc. 81.

15 Rec. Doc. 85.

16 Rec. Docs. 86 – 88.

17 Rec. Doc. 89.

18 Appellate Exhibit-DD; Record Document #93. Nine months after denying assistance of OCS [in July 2016] after requesting appointment of counsel a pre-trial conference was held on Wednesday, April 26, 2017, and OCS was permitted by the District Court to assist Plaintiff re: Jury Instructions, Voir Dire & Admissibility of Testimony, Witnesses and Evidence; and was given 10 days to submit pre-trial order listing witnesses and copies of evidence.

19 Record Document #94.

The Court also denies the Plaintiff's motion asking the Court to 'make arrangements' with personnel at Louisiana State Penitentiary to allow the Plaintiff use video conference technology and have offender counsel substitute [OCS] present when participating in pretrial conferences with the Court. Although the Plaintiff fuses the two issues into a single request, the assistance of offender counsel substitute and video-conferencing are separate issues involving different considerations. Insofar as the motion can be construed as requesting that offender counsel substitute speak on behalf of the Plaintiff at a pretrial conference or other hearing, the Court **must deny** the Plaintiff's motion because offender counsel substitute is not authorized to practice law and therefore cannot speak on behalf of the Plaintiff in any forum, including pre-trial conferences or hearings. With respect to the use of video-conferencing, the Court must deny the Plaintiff's motion because at this point the Court does not foresee the need for any party to use video-conferencing for conferences with the Court."²⁰ (Emphasis Supplied)

Despite this set back, Relator was able to obtain assistance in preparing a Motion to Compel a police video that was deliberately withheld.²¹ Jury trial was reset by the Court for June 12, 2017. Curiously, despite the written ruling denying exceptional circumstances warranting appointment of counsel, the District Court spent the next nine months actively seeking attorneys who were willing to assist Relator pro bono.

On June 13, 2016, through the Honorable Judge Elizabeth E. Foote presiding:

"The Court recounted the unsuccessful efforts it had made prior to the [pre-trial] conference to secure pro bono representation for [Plaintiff] Mr. Byrd. The Court explained that civil legal aid organizations like Northwest Louisiana Legal Services cannot represent Mr. Byrd because the conditions of their funding prevent them from representing prisoners."

The Court ordered a video pre-trial conference would be scheduled for 4/17/2017. In a surprising turn of events and over vigorous objections of counsel for the Defendants, the Honorable Judge Foote permitted OCS Zihlavsky not only to attend this pre-trial conference but to *actively participate and help Relator understand* what was happening. After permitting

²⁰ Rec. Doc. 94, pg. 1 ¶3 – pg. 2 (dated July 15, 2016).

²¹ Defendant Robert Gordon admitted to having reviewed the video from officer Kelly Mormon's police cruiser with his supervisor shortly after the incident, although Defendants throughout discovery hotly contended this video did not exist. [Compare Rec. Docs. 101 – 102].

direct assistance from OCS, Relator was able to timely submit a plethora of pre-trial documents in a very short amount of time.²² After trial and in its Order²³ denying the Motion for New Trial,²⁴ the District Court states:

“Byrd argues that the Court’s failure to appoint counsel to represent him warrants a new trial. He re-urges the same arguments put forth in his two motions to appoint counsel [Record Documents 81 & 93], both of which were denied. Here and in those motions, Byrd argues that the Americans With Disabilities Act imposes on this Court a duty to appoint counsel to represent him. The Court has twice rejected that argument and does so again here. Record Documents 85 & 94. [Emphasis Added] The Court has also found that Byrd’s case does not present exceptional circumstances to warrant appointment of counsel. See id. (citing Ulmer v. Chancellor, 691 F.2d 209, 212 (5th Cir. 1982). Despite ultimately concluding that Byrd’s case did not present exceptional circumstances, the Court nonetheless allowed inmate counsel to play a limited role in assisting Byrd during trial.” [Emphasis Supplied and Footnote omitted.]

On appeal, the U.S. Fifth Circuit Court of Appeal appears to deliberately avoided answering the questions presented for review regarding whether a federal district court has an obligation to accommodate an ADA-eligible person unable to prosecute his civil action without appointment of counsel by virtue of his physical or mental disability. The 5th Circuit even characterized Byrd’s well-documented and significant disabilities as “alleged mental illness.” and then examined the case in hindsight as it had previously stated is improper on review, instead of focusing on whether Relator presented exceptional circumstances:

“In the pretrial conference on April 26, 2017, Byrd participated in via video conference. He requested that an inmate counsel substitute, who was a trained paralegal, be allowed to assist Byrd during trial. The district court stated that it would allow the inmate counsel substitute to assist Byrd during trial...”²⁵

Relator requests this Honorable Court grant certiorari in this case to resolve a gateway

22 See Exhibit-BB – Affidavit of Michael Zihlavsky/#309324.

23 Rec. Doc. 162.

24 Rec. Doc. 154.

25 Appendix B, pg. 2, last two sentences.

question that has **not been addressed** by either of the lower courts, other than merely asserting the Americans With Disabilities Act ("ADA") does not obligate federal district courts to accommodate physically or mentally disabled prisoners who cannot prosecute their civil action without assistance from an attorney:

As a Recipient of Federal Funds, Do United States District Courts have an Obligation under the Americans With Disabilities Act ("ADA") and Rehabilitation Act ["RA"] to Appoint Counsel to Assist an ADA-Eligible Pro Se Pauper Litigant Who Is Prevented From Conducting his Own Trial on the Merits Because of the Severe Effects of a Physical or Mental Handicap?

or

In Civil Rights Case of an ADA-Eligible Pauper Litigant Prevented By Physical or Mental Handicap from prosecuting his own trial, Does such Physical or Mental Handicap constitute "Exceptional Circumstances" as contemplated under *Ulmer v. Chancellor*, 691 F.2d 209, 212 (5th Cir. 1982), requiring ADA Accommodation by Appointment of Counsel?

If this Honorable Court answers affirmatively to this gateway question; Relator prays this Honorable Court resolve one additional related question:

Did the District Court's Conduct and Actions Demonstrate "Exceptional Circumstances" Actually Existed in this Case Despite Written Rulings Otherwise Thereby Showing It was An Abuse of Discretion to Deny Appointment of Counsel?

MAY IT PLEASE THE COURT: Now Comes, BOBBY BYRD, Relator herein requesting this Honorable Court GRANT certiorari to provide clarification of federal district courts responsibility under the ADA/RA to appoint an attorney to accommodate a physically or mentally handicapped civil prisoner litigant unable to prosecute triable issues due to those disabilities, and to articulate the relationship of those disabilities to the pre-ADA "exceptional circumstances" set forth in *Ulmer v. Chancellor*, 691, F.2d 909 (5th Cir. 1982)

REASONS FOR GRANTING THE PETITION

This is a case of first impression. Relator cannot locate a single instance where a federal district court appointed an inmate counsel substitute to assist and accompany another prisoner to civil trial to accommodate his mental disabilities. The inmate counsel substitute was permitted to speak and actively advocate at the pretrial conference, prepare motions, all the trial documents, order of witnesses, questions for the witnesses, and trial strategy. Moreover, the district court even issued a transport order for both Relator and inmate counsel substitute to accompany the mentally disabled Relator to assist during trial, including an order to the Department of Public Safety and Corrections to submit its transport and housing accommodation of both Relator and inmate counsel substitute prior to trial for court approval.

Yet, both the district court and the U.S. Fifth Circuit Court of Appeal deny existence "exceptional circumstances." The district court denies that duty even exists under the ADA/RA obligating the court to appoint counsel to a mentally or physically disabled civil prisoner litigant unable to prosecute the action due to impairment directly attributable to the physical or mental handicap. The U.S. Fifth Circuit Court of Appeal, without any elaboration on exactly what showing must be made, stated: "He [Byrd] has not shown that the district court has a duty [under the ADA/RA] to appoint counsel as a reasonable accommodation for his alleged disability pursuant to these two statutes." As stated in those requests to the lower courts, this is a case of first impression and what showing must be made has not been decided to date.

This Honorable Court should decisively answer this question to provide guidance to the lower courts on this important public issue.

ASSIGNMENT OF ERRORS RAISED IN THE U.S. 5th CIRCUIT COURT OF APPEAL

ISSUE #1: As a Recipient of Federal Funds, Does the District Court have an Obligation under the ADA to Appoint Counsel to Assist an ADA-Eligible Pro Se Pauper Litigant Whose Physical or Mental Handicap Prevents Conducting his own Trial on the Merits?

ISSUE #2: Is The Court's Obligation to Accommodate an ADA-Eligible Incarcerated Indigent Plaintiff with Physical Or Mental Handicap Preventing Him From Prosecuting His Case With Appointment Of Counsel, An Inquiry Separate and Distinct from 28 U.S.C. § 1915 or Extra-Statutory Duty to Appoint Counsel?

ISSUE #3: In Civil Rights Case of an ADA-Eligible Pauper Litigant Prevented By Physical or Mental Handicap from prosecuting his own trial, Does such Physical or Mental Handicap constitute "Exceptional Circumstances" as contemplated under *Ulmer v. Chancellor*, 691 F.2d 209, 212 (5th Cir. 1982), requiring ADA Accommodation by Appointment of Counsel?

ISSUE #4: "Exceptional Circumstances" Existed in this Case and [Did] District Court Abuse[Its] Discretion By Failing to Appoint Counsel for Plaintiff for Civil Trial?

ARGUMENT ON CERT. ISSUE #1 – THRESHOLD QUESTION

1.

As a Recipient of Federal Funds, Do United States District Courts have an Obligation under the Americans With Disabilities Act (“ADA”) and Rehabilitation Act [“RA”] to Appoint Counsel to Assist an ADA-Eligible Pro Se Pauper Litigant Who Is Prevented From Conducting his Own Trial on the Merits Because of the Severe Effects of a Physical or Mental Handicap?

or

In Civil Rights Case of an ADA-Eligible Pauper Litigant Prevented By Physical or Mental Handicap from prosecuting his own trial, Does such Physical or Mental Handicap constitute “Exceptional Circumstances” as contemplated under *Ulmer v. Chancellor*, 691 F.2d 209, 212 (5th Cir. 1982), requiring ADA Accommodation by Appointment of Counsel?

Relator relies on his previous arguments to answer affirmatively to this threshold question.

It is a matter of law that any physically or mentally handicapped civil litigant unable to exercise his right to prosecute cognizable civil rights claim presenting a genuine issue of material fact which has survived summary judgment is entitled to accommodation which may certainly include appointment of counsel under the ADA.

As a Recipient of Federal Funds, the District Court has an encompassing obligation under the ADA to appoint counsel to assist an ADA-eligible pro se litigant whose physical or mental handicap prevents conducting his own trial on the merits.

For instance, if a civil litigant is blind or deaf, these physical handicaps necessarily prevent the litigant from prosecuting viable claims which have survived summary judgment. It is an abuse of discretion for a federal district court to refrain from appointing counsel to accommodate the blind or deaf physically disabled litigant. Relator avers that the devastating physical impairments of blindness or deafness constitutes “exceptional circumstances” under

the Ulmer standard.

Likewise, a civil litigant whose claims have survived summary judgment but who is prevented from prosecuting his case for no other reason than his mental illness which impairs, thinking, concentrating and communicating – is entitled to accommodation under the ADA to appointment of counsel. It would be a violation of the ADA/RA to refuse to accommodate said litigant and forcing this person to do the best they can without reasonable accommodation.

In support of this assertion, Relator turns to the same law provided the lower courts. Relator first addressed the four Ulmer factors in his Motion for Appointment of Counsel,²⁶ and then turned to the Americans With Disabilities Act (“ADA”) and Rehabilitation Act (“RA”) in support of his motion.

THE AMERICAN DISABILITY ACT

The ADA defines “a qualified individual with a disability” as a person who suffers from a “physical or mental impairment that substantially limits one or more major life’s activities,” including but not limited to, “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”²⁷ [Emphasis Supplied].

Federal courts are public entities and recipients of federal funding, and they are obligated to “ensure that qualified inmates or detainees with disabilities shall not...be excluded from participation in, or be denied the benefits of, the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.”²⁸ When circumstances otherwise

²⁶ Appendix CC.

²⁷ 42 U.S.C. § 12102(1)(A), (2)(A).

²⁸ 28 C.F.R. § 35.152(b)(1).

dictate, "the opportunity to participate in or benefit from [an] aid, benefit, or service" must be provided by federal courts to eligible persons.²⁹ In fact, Congress has recognized the need for public entities to make "reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability,"³⁰ and that such entities must "furnish *appropriate auxiliary aids and services* where necessary to afford individuals with disabilities...an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity."³¹

The district court provided at least two jurors with assistive hearing devices for purposes of accommodating their *alleged* hearing disabilities when questioned by the court before voir dire even began. This provision was made to accommodate the disabled potential jurors from participating in the benefits of the services, programs or activity of this public entity – the district court selecting jurors to hear the excessive force civil trial.

The district court asserted in at least three separate Rulings,³² that "exceptional circumstances" [as contemplated under Ulmer] did **not exist** in this case. In those same rulings, "[t]he Court has twice rejected [Relator's] argument...that the Americans With Disabilities Acts imposes on this Court a duty to appoint counsel to represent him...and d[id] so again..." in the Memorandum Order in response to Relator's Motion for a New Trial.³³ Relator was denied procedural and substantive due process³⁴ of law through these acts of handicap discrimination and should be awarded a new civil jury trial with assistance of

²⁹ 28 C.F.R. § 35.130(B)(1)(i).

³⁰ 28 C.F.R. § 35.130(B)(7).

³¹ 28 C.F.R. § 35.160(B)(1).

³² Rec. Docs. 85, 94 and 162.

³³ Rec. Doc. 162, pg. 2 ¶ 2.

³⁴ U.S.C.A. 14.

counsel.

Likewise, the U.S. Fifth Circuit Court of Appeal affirmed that Relator's argument must fail because the district court recorded in several rulings or orders that "exceptional circumstances" as contemplated under Ulmer were not present in this case. The Fifth Circuit made no in-depth inquiry into the obligation the ADA/RA imposes, if any, upon a district court in the context of accommodating a physically or mentally handicapped civil litigant with appointment of counsel, when that person's handicap prevents them from meaningfully participating in the services, benefits, or programs of the public entity. The Circuit Court affirmed the district court finding that the ADA/RA does **not** impose a duty upon the court to appoint counsel to accommodate a physical or mental disability which prevents the litigant from prosecuting his case.

If the judgment from the lower courts is correct, then upon what factual and legal basis was an unlicensed inmate counsel appointed by the district court to assist Relator prior to and during trial? The answer to this questions hinges on the remaining issue raised in this petition for certiorari.

ARGUMENT ON CERT. ISSUE #2

Did the District Court's Conduct and Actions Demonstrate "Exceptional Circumstances" Actually Existed in this Case Despite Written Rulings Otherwise Thereby Showing It was An Abuse of Discretion to Dery Appointment of Counsel?

In this case, the "service, benefits, or program" Relator was denied participation in was prosecution of his civil jury trial. The only reason, Relator was unable to participate in this service, benefit, or program, is because Relator suffers from severe mental illness, including

bipolar, intermittent explosive anger, and impulse control disorders since the time he had been sexually abused as a child by a babysitter.

These significant mental disorders require daily administration of psychotropic medications, routine visits with a psychiatrist and social worker through the DPS&C mental health program. More significantly, unlike the two jurors alleging their need for hearing assistive devices, Relator's mental illness is not merely "alleged," but well-documented by child social services, adult mental health services, and the Department of Public Safety and Corrections. The Court itself has considered Relator mentally disabled by its own actions. Relator is an ADA-eligible because these mental illnesses significantly impair "caring for oneself, learning, reading, concentrating, thinking, communicating, and working."³⁵

Relator argued on appeal:

Before the trial, the District Court knew Appellant suffered from bipolar and/or schizophrenia, intermittent explosive anger disorder and impulse control disorder for which Appellant had received treatment since childhood after surviving childhood sexual abuse. More than a year before trial, Appellant informed the Honorable District Court the grave effect these significant disabilities had on Appellant's ability to think, focus, concentrate or present his case at trial.³⁶

When circumstances otherwise dictate, "the opportunity to participate in or benefit from [an] aid, benefit, or service" must be provided by federal courts to eligible persons.³⁷ Because the District Court failed to perform an inquiry into Appellant's ADA-eligibility, and instead accepted from its own first hand perception and dealings with Appellant prior to trial; it is apparent the District Court considered Appellant disabled when trying to later accommodate at trial via appointment of OCS Zihlavsky.

Both the ADA and Rehabilitation Act specify that a party considered disabled by virtue of an entity attempting to accommodate the individual, need not inquire whether the disabled party is actually ADA-eligible in retrospect. In other words, once an entity attempts to accommodate a party asserting a right to physical or mental handicap or ADA-eligibility, a suit for discrimination on the basis of disability may not be defeated by seeking to prove the party was not eligible in the first place. [Emphasis Added].

³⁵ 42 U.S.C. § 12102(1)(A), (2)(A).

³⁶ See Appellant Exhibits CC and DD.

³⁷ 28 C.F.R. § 35.130(B)(1)(i).

The district court claimed it found no “exceptional circumstances” nor did it recognize any duty imposed under the ADA to appoint counsel to accommodate Relator. Yet, the district court still appointed OCS Zihlavsky to prepare numerous documents to assist Relator and then ordered the DPS&C to make transportation and housing arrangements for both Relator and OCS Zihlavsky at trial from June 12 – 16, 2017. These actions constitute violations of substantive and procedural due process³⁸ and handicap discrimination under the ADA/RA, warranting grant of a new civil jury trial with assistance from counsel.

If there were no exceptional circumstances and no duty to appoint counsel to accommodate Relator under the ADA. There is no basis in law or fact explaining why the district court appointed an Offender Counsel Substitute to assist Relator as it did in this case of first impression. There is no rational basis for the district court appointing a non-lawyer to assist Relator, except – or but for – recognizing its inherent duty to accommodate Relator’s mental disabilities which prevented him from conducting his own civil jury trial unassisted.

Indeed, if OCS Zihlavsky had not been appointed to assist, Relator would have had no trial outline to follow, no questions prepared, no idea how to lay the foundation for entry of evidence. If OCS Zihlavsky had not prepared a written opening and closing statement and provided the emotional support Relator needed by accompanying him to David Wade Correctional Center, being in the lockdown cell with him for the week from June 12 through June 18, 2017, Relator had no chance of presenting evidence, examining and cross-examining witnesses, etc. Indeed, OCS Zihlavsky has continued to assist Relator through the Circuit Court and in this Petition for Certiorari to this Honorable Court. All Relator has done is sign

³⁸ U.S.C.A. 14.

and date the pleading prepared in his behalf by OCS Zihlavsky.

The lower courts have reviewed these claim through patently improper *hindsight*. The only questions that really require answering is (1) Did the court have the duty to accommodate Relator under these circumstances by appointing counsel, and (2) were there “exceptional circumstances” either under the Ulmer standard or created by Relator’s mental illness? If the answer is yes, then failing to appoint counsel and forcing Relator to prosecute his claims without assistance was an abuse of discretion and thus grounds for a new civil trial with assistance from counsel.

Appointing an inmate counsel substitute, although tremendously beneficial, was patently improper and inadequate to accommodate Relator’s mental illness; while Court undoubtedly had good intentions, these actions still constitute handicap discrimination against Relator as set forth under the ADA/RA. This Honorable Court should clarify the law and give district courts proper guidance in this important public matter.

Specifically, the District Court permitted LSP OCS Zihlavsky, who is neither a member of the Bar or authorized to practice law instead of appointing counsel during pre-trial and trial. OCS Zihlavsky, further assisted in selection of a jury, instructing Relator in raising several objections, and moving for appointment of counsel at trial at the time the Defendants again raised an objection to the presence of OCS Zihlavsky who was actively assisting Relator.³⁹ Relator was assisted in pre-trial video conference, post-trial motion for new trial, and in preparing this appeal to this Honorable [Appellate] Court.⁴⁰

Only “exceptional circumstances” [under Ulmer] or its duty to accommodate [under

³⁹ During Voir Dire, the District Court DENIED both Defense and Plaintiff motions concerning presence of Zihlavsky and appointment of counsel, respectively.

the ADA/RA] could possibly provide the district court the impetus to even consider this patently improper arrangement over vigorous objections from defense counsel. Clearly the district court *recognized* Relator's right to participate in services, benefits, or programs offered by the district court and it recognized its duty to accommodate Relator, despite what the district court repeatedly ruled otherwise.

There can be no other basis in fact or law permitting a federal district court to assign an inmate counsel, even ordering provision of transportation and housing to the Department of Public Safety and Corrections for OCS Zihlavsky to accompany Relator. The district court clearly abused its discretion to use this means to accommodate Relator's mental illness, or to parry exceptional circumstances perceived by the court. The very fact the district court permitted OCS Zihlavsky to accompany and assist Relator in this capacity constitutes "exceptional circumstances" and is a case of first impression. What other federal court has done such a thing?

It is apparent from the pre-trial record the District Court recognized OCS Zihlavsky was neither a member of the bar nor authorized to practice law in any capacity; yet OCS Zihlavsky's appointment was deliberately utilized in violation of 28 C.F.R. §35.130(b)(3)(i-iii). This violation of the ADA/RA provided both the appellate and this Honorable Court the evidence necessary to find, meet and overcome the "abuse of discretion" standard on review, showing a new civil trial is warranted. Relator informed the district court and the appellate court of this eventual outcome from the beginning each one has instead carefully worded its

40 Appellant received assistance from OCS in preparing and submitting his previous appeal which was granted by this Honorable Court which REVERSED and REMANDED to the District Court for jury trial.

opinions and rulings to effectively "passed the buck" with hardly a paragraph attributed to the ADA/RA claim on appeal.

Relator was discriminated against and deprived the substantive and procedural due process means to present viable claims at trial or to preserve errors for a fair appeal in violation of U.S.C.A 14. Instead, as noted by juror Harry Johnson, Relator was forced by the district court to play on an unlevel field while unnecessarily burdened by the inability to concentrate, think or communicate his claims to the jury merely because Relator suffers serious mental health issues.

Failure to make such reasonable accommodations may subject individuals with disabilities to discrimination on the basis of disability, in violation of both the ADA,⁴¹ and the Rehabilitation Act.⁴² Section 504's regulations prohibit recipients of federal assistance from "utiliz[ing] criteria or methods of administration...(i) that have the effect of subjecting qualified handicapped person to discrimination on the basis of handicap [or] (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipients program with respect to handicapped persons."⁴³

That is exactly what happened in this case and Relator believes the district court's intentions were good, it was partly because of the lack of guidance that these serious mistakes were made.

CONCLUSION

In conclusion, Relator prays this Honorable Court GRANT certiorari and remand this

41 28 C.F.R. § 35.130(b)(3).

42 28 C.F.R. § 41.51(b)(3).

43 28 C.F.R. §35.130(b)(3)(i-iii).

matter back to the district court for a new trial with assistance of counsel with instructions and guidance by answering the first three of four questions posed to the Circuit Court.

Respectfully submitted this 10th day of September, 2018.

A handwritten signature in black ink, appearing to read 'Bobby Byrd', with a large, stylized flourish extending from the end of the signature.

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