

19-5611
No. _____

Supreme Court, U.S.
FILED

AUG 06 2019

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

J. L. Howze — PETITIONER
(Your Name)

vs.

CDCER, a public entity — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals for the Ninth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

J. L. Howze
(Your Name)

PRSP D7-104 P.O. Box 7500
(Address)

Crescent City, CA 95531
(City, State, Zip Code)

N/A
(Phone Number)

ORIGINAL

RECEIVED

AUG 13 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION(S) PRESENTED

1. If treating a disability is distinct from accommodating one, does treatment of this—if such is without success—justify denial of a Request for Accommodation?
2. If a disabled party is treated, without receiving accommodation, under the 8th Amendment to the U.S. Constitution, does denial of a Request for Accommodation fly in the face of the prohibition of Cruel and Unusual Punishment?
3. Is treating a disability the same thing as accommodating one?
4. Did the court below misapprehend that Howze took issue as to the "treatment" of his disability?
5. In investigating Howze's Request for Accommodation—to wit: For his disability—was the "need" for said accommodation [actually] investigated...or...was the investigation "limited" to whether, or not, Howze received adequate treatment for his disability?
6. Did CDCR act pursuant to the dictates of Dovell, 260 F.3d 1124 (9th Cir. 2001)?
7. Is there a distinction between a medical condition & a disability?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	
STATEMENT OF THE CASE.....	
REASONS FOR GRANTING THE WRIT	
CONCLUSION.....	

INDEX TO APPENDICES

APPENDIX A : Opinion, U.S. COAs, 9th Cir.	
APPENDIX B : Opinion, U.S.D.C.	
APPENDIX C : Denial, Petition For Rehearing	
APPENDIX D : 602, exhausted exclusionary.	
APPENDIX E : 602 preserving right to file.	
APPENDIX F : Complaint, allegations of.	
Appendix G: Single Cell Chrono.	
Appendix H: CDC 695, exclusionary.	
Appendix I: 1845 Accommodation.	
Appendix J: Consultation Report:	
Appendix K: Various documents contradicting basis of de-	
nial to affix "S" suffix.	

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<u>Bartlett,</u>	
156 F.3d at 331	10
<u>City of Canton v. Harris,</u>	
489 U.S. 378 (1988)	9
<u>Duvall v. City of Kitsap,</u>	
260 F.3d 1124 (9th Cir. 2001)	9, 12, 13, 14
<u>Ferguson v. City of Phoenix,</u>	
157 F.3d 668 (9th Cir. 1998)	9
<u>Love v. City of L.A.</u>	
250 F.3d 668 (9th Cir. 2001)	8
<u>Lucas v. Swarthout,</u>	
2011 U.S. ^{Dist. V} W.D. Ark. LEXIS 13874 at page 4	11
<u>Matthews v. Jefferson,</u>	
29 F. Supp. 2d 525 (W.D. Ark. 1998)	10
<u>Memmer,</u>	
169 F.3d at 663	9, 12
<u>Pa. Dept of Corr. v. Yeskey,</u>	
524 U.S. 206 (1998)	8
<u>Simmons v. Navajo County Ariz.,</u>	
609 F.3d 1011 (9th Cir. 2010)	7
<u>Wong,</u>	
192 F.3d at 818	10, 11

TABLE OF AUTHORITIES CITED

STATUTES AND RULES

PAGE NUMBER

42 U.S.C. §12101

6

42 U.S.C. §12132

6, 7, 8

42 U.S.C. §12182(a)

6

Rehab. Act, Section 504

8

29 U.S.C. §794(a)

6

OTHER

CCR §3377.1(c)

13

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 of 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 HOWZE v. CDC#R CV14-04067; or,

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

☐ is unpublished.

☐ For cases from **state courts**: (N/A)

The opinion of 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 of the _____ court 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 4.23.2019.

☐ 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: 7.12.2019, and a copy of the order denying rehearing appears at Appendix C.

☐ 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**: (N/A)

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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The VIII Amendment to the Federal Constitution provides: Excessive bail shall not be required, nor excessive Fines imposed, nor cruel and unusual punishments inflicted.

2. 42 USC §12102(2) provides: "Disability" is defined as:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual;

(B) a record of such impairment; or

(C) being regarded as having such an impairment.

3. 42 USC §12132 provides: "no qualified individual with a disability shall, by reason of such disability, 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 such entity."

STATEMENT OF THE CASE

1. The U.S. Court of Appeals for the Ninth Circuit, in adjudicating Howze's appeal, made "2" critical errors: (i) it misconstrued that his..... Complaint was based on inadequate treatment For his disability; consequently making..... it possible (ii) For said court—erroneously—to find that allegations made by him were "contradicted by documents referenced in the complaint," as is illustrated at page 2 of the Memorandum appearing as Appendix C.

2. But For the *Findings* of which were conducted in ERROR, the allegations "rejected-as-contradicted" would not have been; indeed, had Howze's allegations—to wit: that he is disabled & is not receiving accommodation—as opposed to is not receiving treatment—For his disability—been *rightly* construed, the documents in issue, rather than being found as contradictory, would have been found as fully supportive of Howze's position: Treated—unsuccessfully, by the way—For his "medical condition", BPH (Benign Prostatic Hyperplasia), he *has not* received accommodation For the "disability," Impaired Urological Function, induced by said medical condition.

3. Although, on multiple occasions, the *distinction* between Howze's "medical condition" & his "disability" has been pointed out (insofar as there is a *difference* between "treating" the former—especially, as here, if said treatment has been less than successful—and "accommodating" the latter), the public entity in this case, to Howze's detriment, has either failed to see or refused to acknowledge as much.

REASONS FOR GRANTING THE PETITION

A.

Certain Questions Presented By Howze Are Of National Importance

1. Though Howze poses multiple questions in his QP (Questions Presented), Four of them, for reasons articulated HEREAFT, are particularly worthy of being decided by this Court.

2. The 1st of said questions is: "If treating a disability is distinct from accommodating a disability, does treatment of a disability—if said treatment is without success—justify denial of a Request For Accommodation?"

3. The 2nd of said questions is: "If a disabled party is treated, without being accommodated, and said party, for want of accommodation, remains in a state of agonizing physical pain, under the 8th Amendment to the U.S. Constitution, does denial of his Request For Accommodation fly in the face of the prohibition of Cruel & Unusual Punishment?"

4. The 3rd of said questions is: "Is treating a disability synonymous with accommodating a disability?"

5. The 4th of said questions is: "Is there a distinction between a medical condition & a disability?"

6. I submit: Unless said questions are decided, the distinctions implicated—the differences, that is, between "efficacious" & "nonefficacious"; between "medical condition" & "disability"; and between receiving "accommodation" & receiving "treatment" (specifically that which is inefficacious in nature)—will afford state agencies in future, as it has afforded CDCR in the past (enter subjudice) a "loophole" by

which they may avoid complying with the Accommodation Clause of the ADA: 42 U.S.C. §12132. (See, too, 42 U.S.C. §12182(a); 29 U.S.C. §794(a).)

7. In other words, lack of clarification of said distinctions, in addition to creating multiple "loopholes," has brought into being multiple issues of 1st impression—including, but not limited to, "But for said lack of clarification, would the outcome in the instant ADA case have been different?" "Looking to the [mis]apprehension of the courts below in this case, is it possible that said lack of clarification could effect—or, indeed, has effected—ADA cases on a nation-wide scale?" "Does said lack of clarification compromise the enforceability of the ADA?" "Is said lack of clarification—intentionally, or inadvertantly—being used by other agencies, as it was used by CDCR (see Appendix D) to exclude whole classes of prisoners from benefiting from its #for their accommodation services?"

8. Because said issues draw into question whether a Federal statute—42 U.S.C. §12101 et seq.—is being enforced as was intended by Congress; because said issues, involving as they do the ADA of 1990, have Nation-wide implications; and because the questions in issue, if not decided, leave not only Howze vulnerable to suffering in violation of the 8th Amendment to the U.S. Constitution, but those who are similarly situated—excluded, that is, as he has been, from participating in the ARP (Appendix D)—as well—for said reasons, this Court should find that Howze has presented questions of which are of National importance.

B.

The Finding Of The Court Below Was Con-
ducted In Error

9. The court below, in large part, affirmed the judgment of the district court based on the holding in Simmons v. Navajo County, Ariz., 609 F.3d 1011, 1022 (9th Cir. 2010) ("The ADA prohibits discrimination because of disability, not inadequate treatment for disability.") (Appendix A at page 2.)

10. Looking to the record, however, said affirmation, based on said holding, was conducted in error: Howze, neither in the appeal exhausted to preserve his right to bring suit in Federal Court (Appendix E), nor within the Complaint itself (Appendix F), made a single allegation that he "was not receiving adequate treatment for his disability"; instead, each allegation made by him revolves around his insistence—from which he has not deviated—that he "was not receiving accommodation for his disability," a distinction made by him—and which was ignored by the courts below—time & time again.

11. Because there is no evidence Howze took issue as to treatment for his disability; and because the record reflects that the exact opposite is true, this Court should find that the court below, as did the district court, misapprehended Howze's allegations & rendered affirmation of the judgment in issue in error.

C.

The Court Below So Far Departed From
 The Accepted And Usual Course Of Judicial Pro-
 ceedings As To Call For An Exercise Of This Court's
 Supervisory Power

12. Title II of the ADA provides: "...no qualified individu-
 al with a disability shall, by reason of such disability,
 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 such entity." 42 U.S.C. §12132. This Court has
 held that Title II applies to state prisons. Pa. Dep't
of Corr. v. Yeskey, 524 U.S. 206, 210, 118 S. Ct. 1952, 141
 L. Ed. 2d 215 (1998); accord, Love v. City of Los Angeles,
 250 F.3d 668, 1691 (9th Cir. 2001).

13. To prove that a public program or service violated
 Title II of the ADA, a plaintiff must show: (1) he is a
 "qualified individual with a disability"; (2) he is
 otherwise qualified to receive the benefit; (3)
 he was denied the benefits of the program sole-
 ly by reason of his disability; and (4) the program
 receives Federal Financial Assistance. §504 of
 the Rehabilitation Act; accord, 42 U.S.C. §12132

14. To recover monetary damages under Title II of the ADA or the Rehabilitation Act, a plaintiff must prove intentional discrimination on the part of the defendant. Ferguson v. City of Phoenix, 157 F.3d 668, 674 (9th Cir. 1998).

15. Under the ADA, the test for intentional discrimination is deliberate indifference (Duvall v. City of Kitsap, 260 F.3d 1124, 2001 U.S. App. LEXIS 18316 at page 8]), which requires both knowledge that harm to a federally protected right is substantially, and a failure to act upon said likelihood. City of Canton v. Harris, 489 U.S. 378, 389, 103 L.Ed. 2d 412, 109 S.Ct. 1197 (1988). In Memmer, we required the plaintiff to identify "specific reasonable" and "necessary" accommodations that the defendant failed to provide. 169 F.3d at 633. When a plaintiff alerts the public entity of his need for accommodation (or where the need for accommodation is obvious, or required by statute or regulation), the public entity is on notice that an accommodation is required, and the plaintiff has satisfied the first element of the deliberate indifference test.

16. A public entity's duty on receiving a request for accommodation is well settled: a fact-specific investigation to determine what constitutes

a reasonable accommodation is required...." Mere [speculation that a suggested accommodation is not Feasible Falls short of the reasonable accommodation requirement; the Acts create a duty to gather sufficient information from the [disabled individual] and qualified experts as needed to determine what accommodations are necessary." Wong, 192 F.3d at 818. ... a public entity does not "act" by proffering just any accommodation; it must consider the particular individual's need when conducting its investigation into what accommodations are reasonable. ... in order to meet the 2nd element OF the deliberate indifference test, a Failure to act must result from conduct that is more than negligent, and involves an element of deliberateness. See Bartlett, 156 F.3d at 331; Matthews v. Jefferson, 29 F. Supp. 2d 525, 535-36 (W. D. Ark. 1998) (notice combined with failure to provide appropriate facilities may violate Title II).

17. That said, despite the finding OF the court below - to wit: that Howze took issue as to not receiving treatment for his disability (Appendix C at page 2) - the record will reflect that he, a disabled individual, sought "accommodation" for his disability, discriminatorily was denied the accommodation sought, and took issue as to

said discrimination.

18. Documents Furnished by Howze evincing said discrimination &/or deliberate indifference— including, but not limited to, a Single Cell Chrono marked "Permanent" (Appendix G); a 695 Form insisting that Howze "is not" an ADA class member (Appendix H); and a Second Level 602 which, in effect, acknowledges Howze is "without an avenue for reasonable accommodation" (Appendix I)— were rejected &/or otherwise were not given weight of which they are worthy. (But see Lucas v. Swarthout, 2011 U. S. Dist. LEXIS 131874 at page 4. (single cell chrono ignored by committee may support claim for deliberate indifference); Wong, 192 F.3d at 818 ("... the Acts create a duty to gather sufficient information^{from} the [disabled individual] and qualified experts as needed to determine what accommodations are necessary.")

19. Here, however, not only was information gathered from Howze—the Single Cell Chrono¹; the 695; the 602²—not weighed, but no information whatsoever was gathered from a "qualified expert" as required by Wong. Ibid.

20. And although, purportedly, Howze received accommodation by being assigned a lower bunk (Appendix J), because said accommodation was insufficient to resolve his particular access is-

sue (in Howze's case, proximity to the toilet is not the problem; rather, the problem comes into play when his restroom access is impeded by said facility being used by a cellmate—to wit: at such time as coincides with Howze's need to do so—invariably which, while "waiting" for said party to quit said facility, results in him lapsing into agonizingly painful urinary retention) (Appendix H), said accommodation, superseding as it did the clearly more effective single cell accommodation³ (Appendix G), was inherently unreasonable.

21. Due to said unreasonableness—to wit: insofar as said accommodation failed to allow Howze to participate equally in CDCR's restroom services—the court below should have found that Howze prevailed on his ADA claim... as it did in the case of Duvall: "To prevail under the ADA, Duvall must show that the accommodations offered... were not reasonable, and that he was unable to participate equally in the proceedings at issue." Mem. v. Marin County Courts, 169 F.3d 630, 633-34 (9th Cir. 1999). (Citing Duvall, 2001 U.S. App. LEXIS¹⁸³¹⁶ at page 7.)

22. Likewise as to Howze's ADA claim otherwise—to wit, as to intentional discrimination: Because the record makes quite clear (i) that information

gathered From Howze was (unreasonably) disregarded; (ii) that no information whatsoever was gathered From a qualified expert; and (iii) that said public entity (CDCR) had knowledge that harm to a Federally protected right was substantially likely, and yet, For all intents & purposes, Failed to act on said likelihood³ - For said reasons, the court below had sufficient grounds to Find that Howze prevailed on his claim of intentional discrimination. (For authorities relied on, see paragraphs 14.-16. supra.)

23. Based on the aforementioned, I submit: The court below so far departed From the dictates promulgated in Duvall, 260 F.3d 1124 (2001), as to call for an exercise of this Court's supervisory power.

Footnotes

1. Medical, in the 1st instance, issued said chrono as to prevent Howze From suffering physical injuries (of which are induced under circumstances set forth in paragraph 20.). In order for said chrono to be "enforced," an "S" suffix must be affixed by a classification committee to one's custody designation. (CCR § 3377.1, subd. (c).) Here, on the premise Howze had no "infectious disease" or "mental health" concerns which would warrant Single Cell housing.

ing, the CC (Classification Committee) made a determination to not affix the "S" suffix; however, the premise given, in addition to being belied by issuance of the chrono itself, is contradicted by multiple documents presented by Howze (Appendix K) — neither which, in determining whether Howze underwent intentional discrimination, was considered by the court below.

2. Said 602 is a major corroborator of — and materially is indistinct from — the document appearing below as Appendix H.

B. Without a cellmate — when the possibility of Howze's restroom access being impeded is not possible — the prospect of him suffering injuries is virtually eliminated; thus, as an accommodation, single cell housing, for Howze, is effective. Accordingly, the accommodation opted for, unreasonable & ineffective, as set forth in paragraphs 20. & 21., rose to the level of a failure to act. (Duvall [2001 U.S. App. LEXIS 18316 at page 9] (... a public entity does not "act" by proffering just any accommodation....).)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

J. Z. Houze

Date: 8/15/2019