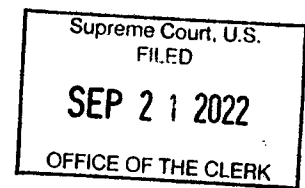


**ORIGINAL**



No. 22A264

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IN THE SUPREME COURT OF THE UNITED STATES

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Howard R. Hershops

Applicant,

V.

The California Supreme Court

Respondents

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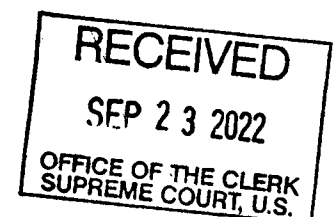
EMERGENCY APPLICATION FOR STAY PENDING PETITION FOR WRIT  
OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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TO THE HONORABLE JUSTICE ELENA KAGEN  
ASSOCIATE JUSTICE OF THE SUPREME COURT OF  
THE UNITED STATES  
AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT

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## PARTIES TO THE PROCEEDINGS AND RELATED PROCEEDINGS

Applicant Howard R. Hershops is a defendant in a criminal case entitled *People vs. Howard R. Hershops* in the Santa Clara County Superior Court limited jurisdiction and is currently under an Appeal of right before the Appellate Panel of the Santa Clara County Superior Court whose very acts “Discriminatory Animus” against a hearing impaired defendant is the subject matter of the appeal.

Applicant is a hearing impaired and needed Applicant’s hearing aids to effectively communicate. To appointed legal counsel which Santa Clara County refused to provide see App 1.

The Santa Clara County Superior Court was at all times under a “Settlement Agreement” with the United States of America requiring that the Santa Clara County Superior Court had an “affirmative duty to inform all hearing impaired parties appearing before the court of their rights to assisted listening devices”.

The Santa Clara County Superior Court entirely dismissed the “Settlement Agreement” and refused to comply with its terms, which is enforceable by the United States District Court in California see APP Pages 2-5.

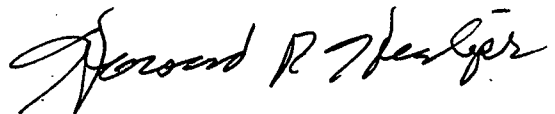
Additionally, Santa Clara County was also under a Consent Decree issued by the United States District Northern District of California, *Chavez vs. Santa Clara County* to provide hearing impaired inmates of the Santa Clara County Jail with their hearing aids and put in place a ADA Coordinator which was never implemented and admitted to by the Santa Clara County Counsel as of September 2021, see APP 6-9.

RULE 29.6 STATEMENT

As required by this Court's Rule 29.6. Applicant hereby state that he is an individual and thus have no parent entities and do not issue stock.

Dated September 19, 2022

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Howard R. Herships". The signature is written in a cursive style with some loops and flourishes.

Howard R. Herships

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[hherships@gmail.com](mailto:hherships@gmail.com)

No. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

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EMERGENCY APPLICATION FOR STAY PENDING PETITION FOR WRIT  
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TO THE HONORABLE JUSTICE ELENA KAGEN  
ASSOCIATE JUSTICE OF THE SUPREME COURT OF  
THE UNITED STATES  
AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT

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Applicant Howard R. Herships, hereby moves this Court for Stay pending the filing of a Petition for Writ of Certiorari from a direct appeal of right from a criminal case being heard by the Appellate Panel of the Santa Clara County Superior Court in which the issues before the Court on Appeal are did the Trial Court's failure to inquire into Applicant's hearing impairment and make a determination of reasonable access for a hearing impaired defendant to be able to communicate with court appointed legal counsel when the only accommodations

provided was the use of the “Court Amplification system” which actual prohibited any and all communication with legal counsel.

The Trial Court appointed legal counsel and with no ability for Applicant to communicate the trial court proceeded within all of “Ten minutes” sentenced Applicant to six months in the county jail.

Moreover, the Santa Clara County Public Defender’s Office never implemented any of the Federal Regulations required to ensure that Americans with Disability Act provided legal representation for hearing impaired defendants thus denying any and all ability to confer and communication in private.

These acts denied Applicant any legal representation in this criminal case thus preventing any hearing required by clearly established United States Supreme Court law.

Applicant then sought then filed a Writ of Mandate seeking Accommodations in the Sixth Appellate District pursuant to California Rules of Court Rule 1.100 (g) and the Court requested responsive pleadings which the Public entities blocked by refusing to serve Applicant and the Court then issued an Ex Parte Order adverse Applicant done in “Retaliation” of the pending request for accommodation which is a protective activity under 42 U.S.C. sections 12203 (a) (b).

The questions presented by these undisputed facts are can a Court hearing a criminal appeal of right in a criminal case when the Court has a direct, personal, substantial, and pecuniary interest in the outcome when all members of the very same court which would impose liability on the Court for the actual “discriminatory animus” against Applicant under both section 504 and a private right of action under 29 U.S.C. section 794 (a).

Nor has the unconstitutional conduct of the Appellate Department of the Superior Court even stopped here, the Court has set the case for oral arguments and



Applicant is not currently represented by an Attorney on Appeal who can ethically oral argue this issue as the current attorney of record on appeal asserted that because the Court provided the Court's amplification system fully provided the all that is required under the Americans with Disability Act, which is not the law.

Applicant asserts that the Appellate Attorney cannot oral argue the attorney's own incompetency.

Clearly, Applicant is entitled to an appeal of right before judges who have direct, personal, substantial, and pecuniary interest in the outcome of the case as such here any determination of these facts could impose liability against the very court that the members of Appellate panel serve on.

## DECISION BELOW

The California Supreme Court's Opinion and Order denying review and request for Stay is included in the Appendix to this Application at App 92 on August 24, 2022. The California Supreme Court has denied Applicant's request for Stay and transfer to different Court of Appeal in order to obtain an Appeal of right before a three judge panel who does not have a direct, personal and substantial pecuniary interest in the outcome of the case.

## JURISDICTION

The California Supreme Court issued its denial of Petition for Review and order denying a stay on August 24, 2022, is a final judgment from the California Supreme Court. And is reviewable by Certiorari under 28 U.S.C. § 1257 (a). This Court has the authority to stay the process of the Appellate Process pending Applicant's filing of petition for writ of Certiorari and this Court's disposition of that petition under 28 U.S.C. sections 1652 (a) and 2101 (f).

## CONSTITUTIONAL AND STATURORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution provides that no "State [shall] deprive any person of life, liberty or property, without due process of law." U.S. Constitutions Amendment XIV, § 1.

## REASONS FOR GRANTING THE APPLICATION

This Court may stay the execution and enforcement of a final judgment or an decree of any court subject to review on a writ of Certiorari including a state court of last of last resort, under 28 U.S.C. § 2101 (f). Under the All Writs Act § 1651 (a), this Court or an individual Justice has board discretion to stay a lower court

order in exigent circumstances where legal rights are at issues and are indisputable clear, *Ohio Citizens for Responsible Energy Inc. vs. Nuclear Regul Comm'n* 479 U.S. 1312 (1986) (Scalia J in chambers). This Court will stay a lower court's order if there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." See *Hollingsworth v Perry* 558 U.S. 183 190 (2012). Applicant has satisfied each of these standards here.

**THIS COURT IS LIKELY TO GRANT REVIEW, AND REVERSE, ON THE TWO CONSTITUTIONAL ISSUES THAT APPLICANT RAISES HERE.**

Given the California Supreme Court's clear conflict with this Court's opinion in *Williams vs. Pennsylvania* and its holding that that "no man can be a judge in his own case" "[A] multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just one jurist, but of the larger institution of which he or she is apart.

In this case before this Court the Appellate Division of the Superior are members of the very Court who has refused to comply with a "Settlement Agreement with the United States of American and have engaged in a acts of "deliberate indifference" and "Acts of Retaliations" against Applicant while Applicant was seeking Accommodations for Applicant's hearing impairment a protective activity under 42 U.S.C. sections 12203 (a) & (b) also process a mens res acts subjecting the actual court here for damages under § 504 and 29 U.S.C. section 794 (a).

The Williams Court had "little trouble in concluding that a due process violation arising from the participation of an inter-ested judge defect 'not amenable' to harmless-error review.

In this Appeal of right all three judges seating as Appellate review justice are members of the very Court in which Applicant's under seal moving papers showing a systematic denied of any accommodations and done with a "a deliberate indifference" which denied Applicant legal representation in a criminal case, which gives a right to Applicant bring a civil suit for damages under both section 505 and 29 U.S.C. section 794 (a).

Clearly, the Appellate Panel of the Santa Clara County Superior Court is constitutional prohibited from hearing this appeal of right. Under *Williams v. Pennsylvania* as it is "structural error".

The Appellate Panel of the Santa Clara County Superior Court recognizing that the issues addressed by Applicant's filing under seal places the Appellate Panel in a direct, personal, substantial and pecuniary interest in the outcome of the case, has now set the case for oral arguments with no legal representation on Appeal on Applicant's interest.

This is because Court Appointed legal counsel never raised these issue taking the position that the mere fact that the Court provided the "Court's Amplification System" was all the Americans with Disability Act required.

This very issue was addressed by the Ninth Circuit in *Duvall vs. County of Kitsap* 260 F. 3d 1124 at 1141 footnote 14 asserting as follows: **"Especially when the accommodation is provided based upon stereotyped assumptions about the person's disability, such as the assumption that all hearing-impaired individuals need sign-language interpreters, or all hearing-aid wearers may be accommodated by a sound-amplification system."**

The Duvall Court then stated the law under 28 CFR § 35.160(b) (2) once a party request accommodations the Court must make an inquiry to just what accommodations is necessary for meaningful accommodations.

Now the Appellate Panel knowing full well that the Court cannot rule on Applicant's motion filed under seal as has decided to set the case for oral argument with no legal representation on behalf of Applicant see APP 82-84.

Clearly, Court Appointed legal counsel is prohibited from presenting any argument that he committed ineffective assistance of legal counsel in this appeal of Right.

Court Appointed legal counsel cannot argue his own incompetence which is prohibited under California Rules of Professional Conduct Rule 3-110 (A).

These acts of the Appellate Panel shows that the reviewing Court has no intentions of "hold the balance nice clear and true between the State and Applicant" as now Applicant was no legal representation on appeal of right mandated by Douglas vs. California at oral arguments regarding the systematic denial and interference by "retaliations" by the public entities including the Superior Court Judges order denying custody credits which was adverse action while a Writ of Mandate was pending seeking accommodations for the very subject matter of the writ of mandate seeking legal representation and the ability to communicate because if Applicant's hearing impairment.

Clearly, Applicant is entitled to a Appellate Panel who has no interest in the outcome of the case under this Court's opinion in Williams and equally Applicant is entitled to legal representation on an Appeal of Right be an Attorney which cannot be argued by the Court Appointed legal counsel as he must argue his previous dereliction of ineffective assistance of legal counsel.

Applicant has Constitutional right to an Appeal of right and these proceedings places the integrity of the Appellate Proceedings, this especially true were Applicant is not allowed legal representation at oral arguments in violation of Douglas vs. California deny any Appeal of this right of these systematic violations of the ADA.

APPLICANT WILL SUFFER IRREPARABLE HARM ABSENT A STAY AS  
APPLICANT WILL BE DENIED AN APPEAL OF RIGHT BEFORE A  
NEUTRAL DECISION MAKER AND WITHOUT ANY LEGAL  
REPRESENTATION

Applicant has no legal representation in this Appeal of Right at the Oral Arguments in which the Court is currently before the Appellate Division of the Appellate Panel on Applicant's moving papers filed under seal.

The Appoint legal counsel's papers filed under seal asserts that because the trial court provided the "Court's Amplification System" Applicant could not assert a denial of Accommodations for Applicant's hearing impairment even through the controlling case holds to the complete opposite.

The current ruling by the Appellate Panel is that they are going to consider Applicant's moving papers under seal at the oral arguments and done without any legal representation on behalf of Applicant.

Moreover, those issues filed under seal raises issues which places the Appellate Panel to rule on their own case as these issues the trial court acts shows a "discriminatory animus" with actual acts showing a "mens rea" which would allow a cause of action against the very Court that the Panel are members of under section 504 and 29 U.S.C. section 794 (a).

Applicant will be denied this Appeal of Right as well as legal representation on this appeal as clearly Court Appointed legal counsel cannot argue his own incompetency.

Applicant has no prospect of receiving a fair adjudication in this Appeal of right Appeal Right.

**TO THE HONORABLE JUSTICE ELLEN KARGEN, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:**

This criminal case had in its origin the complete breakdown of complying with the Americans with Disability Act when the Santa Clara County Superior Court was under a “Settlement Agreement “ with the United States of America requiring to implement to all parties appearing before the Court to provided assisted listening devices to ensure effective communications and an equal opportunity for hard of hearing personas to participate in the programs, services and activities conducted by the Court, see APP page 2 at ¶ 1.

In fact none of the Settlement Agreements provisions were never implemented as staff and the Judges were never trained as the record in this case shows, as Applicant was never provided legal representation in a criminal case by these systemic violations of the Americans with Disability Act, by not only the Santa Clara County Superior Court but also the Santa Clara County Public Defender’s Office a public entity.

Applicant made a request for “Accommodations” to courtroom staff on Jan 17, 2020 see APP 39 lines 9-11 which according to both the “Settlement Agreement” at APP page 2 at ¶ 3 as well as Federal Regulations under 28 CFR § 35.160 (b) (2) as once a request for “Accommodations” is made by a hearing impaired party the Court must inquire to both reasonable and adequate accommodations for the party to be able to participate in the judicial process which has been the law.

The Santa Clara County Superior Court never complied with these provisions of the Federal Regulations or even a “Settlement Agreement with the United States of America, which was required by the agreements as well the affirmative to duty to implement the Americans with Disability Act, here after the

ADA, a remedial acts which requires implantation for parties who are disabled and done to ensure that the disabled party participate in the court's programs. APP 2-5.

## STATEMENT

A. IN FACT, THE SANTA CLARA COUNTY SUPERIOR COURT BLOCKED EVERY ATTEMPT BY APPLICANT TO OBTAIN "ACCOMMODATIONS" WHICH CONDUCT WAS "MORE THAN NEGLIGENT, AND INVOLVED AN ELEMENT OF DELIBERATENES BY SHOWING ACTUALLY ACTS OF "RETALIATION" AGAINST APPLICANT BY THE PUBLIC ENTITIES INCLUDING THE SANTA CLARA COUNTY SUPERIOR COURT.

1. January 17, 2020, Requested for Accommodations made Courtroom staff and the only assistance provided was the "Amplification audio system of the Court" which the court confirmed and never made an inquiry required by both the settlement agreement and 28 CFR § 35.160 (b) (2) as once a request for a accommodations is made the court is required to inquire into the best solution to obtain accommodations, which was never done. See APP 39-46.

2. Applicant filed after being sentenced to six months in the County jail all done with no ability to communicate to legal counsel and being denied Accommodations Applicant filed a Writ of Mandate pursuant to California Rules of Court, Rule 1.100 (g) to seek accommodation based upon a denial of legal representation because of Applicant's hearing impairment into the Sixth Appellate District against the Superior Court and the Public Defender's Office in case Number H047816 see APP 20-21.

3. The Sixth Appellate District requested that real parties in interest respond by Feb. 21, 2020, and provided that Applicant would have 15 days to file any reply to the opposition see APP 20-21.



4. The Santa Clara District Attorney's Office was the only party that filed any responsive pleading and refused to served Applicant with their opposition, which "interfered" Applicant's protective rights to seek accommodations under Title 42 U.S.C. § 12203 (b). Applicant had to request via Email to receive the opposition only after the Court had entered a judgment against Applicant, see APP 28.

5. The Santa Clara County District Attorney's Office not only misstated the controlling law upon a hearing impaired party requesting accommodations to a court under 28 CFR § 35.160 (b) (2) that proving the Court's amplification system when the accommodation is provided based upon stereotyped assumptions about the person's disability all hearing-aid wearers may be accommodated by a sound-amplification system." *Duvall v. County of Kitsap*, 260 F.3d 1124, 1140 n.14 (9th Cir. 2001) see APP 27.

6. The Santa Clara County District Attorney's Office also withheld that the Santa Clara County Superior Court was already under a "settlement agreement" with the United States of America which can be enforced in a District Court see APP 4 at ¶ 10.

7. In fact, the District Attorney's Office concedes that the whole hearing took "approximately ten minutes" from appointment to sentencing with no ability to communicate with legal counsel due to Applicant's disability i.e. being hearing impaired and only provided the Court's Amplification system. see APP 27.

8. Applicant on Feb. 24, 2020, also filed into the Santa Clara County Superior Court pursuant to 28 CFR § 35.173 (2) seeking Accommodations via voluntary enforcement requesting within ten days, see APP 31-36.

9. The ADA Coordinator decide to ignore the request "for accommodations" by screening out an individual with a disability or any class of individuals with

disabilities from fully and equally enjoying any service, program, or acts” violates 28 CFR § 35.130 (8), see APP 37.

10. Santa Clara County was at all times under a Consent Decree issued by the United States District Court entitled Chavez vs. Santa Clara County which required implementation of ADA required for the County to implement regard providing a ADA Coordinator so hearing impaired inmates would have the ability to use their hearing aids in court proceedings which was never implemented by County Counsel’s Report as of Sept. 2021, see APP 17-18.

11. Applicant made a Court Appearance on March 6, 2020, in the Santa Clara County Superior Court and for the very first time the County of Santa Clara had returned Applicant’s hearing aids, see APP 50 -54.<sup>1</sup>

12. The Court reappointed the “PD” to obtain the record and investigate this issue, which was done because the Santa Clara County Public Defender’s Office had sent Applicant a letter withdrawing from legal representation see APP page 30, the Court set a hearing for March 13, 2020 to address the issue of denial of accommodations.

13. The Santa Clara County Public Defender’s Office never contacted Applicant or obtained the Court records or inquired into Applicant’s hearing impairment and as direct result no hearing was held and just a continuation of these public entities untoward acts of “Retaliations against Applicant’s moving for Accommodations on Jan. 29, 2020, in violation of 28 CFR § 36.206 and 29 CFR § 1630.12, see APP 55-58.<sup>2</sup>

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<sup>1</sup> Applicant’s Hearing aids were placed on Applicant’s property because the County Jail does not have any means for recharging batteries every night and as a direct result the hearing aids (cont) rechargeable batteries lost its setting and revered to a default mode and had to be reprogram they were working somewhat but not fully set for Applicant’s hearing impairment.

<sup>2</sup> While the Reporters Transcript asserts that Judge Drew Takaichi was hearing judge that was not true the March 6, 2020, was not Judge Takaichi and also the March 13, 2020, Judge was a different Judge that who hear the case on March 6, 2020.

14. The Santa Clara County Superior Court Judge actually “retaliated” by adverse action against Applicant by issuing an “Ex Parte Order” denying Applicant’s custody credits which was done to “Retaliate” against Applicant for moving for” Accommodations” in the Sixth Appellate District case No. H047816 see APP 20-22 a protective activity under Federal Law 42 U.S.C. § 12203 (a) (b) and 28 CFR § 36.206 and 29 CFR § 1630.12see APP 47-48.

15. The above adverse action taken by the Santa Clara County Superior Court against Applicant shows *mens rea* acts of "intentional discrimination," done with a "discriminatory animus." See *Duvall*, 260 F.3d at 1138; *id.* at 1139-1141.

16 These acts were done with a deliberate indifference with "knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that likelihood" would result as Applicant was entitled to hearing with legal representation on Applicant’s custody credits under a California Supreme Court decision in *People vs. Lara* 54 Cal 4<sup>th</sup> 896 at 903 (2012).

17. The Santa Clara County Superior Court acts of denying by “Ex Parte Order” Applicant’s custody credits clearly violated Applicant’s federally protected rights which required a hearing with legal representation and as a direct result increased a sentence already imposed by another 30 days these acts prove actual acts of “Retaliations” seeking to intimidate Applicant in violation of 42 U.S.C. section 12203 (a) & (b) for seeking Accommodation for Applicant’s hearing impairment.

These undisputed facts stated above in paragraphs 1-17 shows that the Santa Clara County Superior Court systemically denied and interfere and coercion with every attempt made by Applicant to receive Accommodations in a criminal case for Applicant’s hearing impairment and did so when at all times a Petition for Writ of Mandate was pending in the Sixth Appellate District seeking Accommodations,

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for a hearing impaired criminal defendant to be able to communicate with legal counsel for his defenses.

These acts totally shredded the remedial nature of the ADA into a hollow meaningless process where the Santa Clara County Superior Court actual prevents the disabled parties from being allowed to partake in the judicial process.

Moreover, these public entities acts prove a *mens rea* acts of **“retaliations”** by taking adverse action against Applicant for seeking “accommodations” so that Applicant could obtain legal representation in a criminal case a protected activity under 42 U.S.C. sections 12203 (a) and (b), which prevent a qualified disabled party who could never communicate with appointed legal counsel in violation of Applicant’s Federally protected rights.

The Santa Clara County Superior Court’s accommodation provided here is based upon stereotyped assumptions about the person's disability that **“all hearing-aid wearers may be accommodated by a sound-amplification system.”**

**The Santa Clara County Superior Court proceeded in this case by appointing the Public Defender’s Office and proceeded with the Court sound-sound amplification system with no ability to communicate with appointed legal counsel, see APP 39, and with no inquiry into Applicant’s disability and reasonable accommodations. See APP 38-46.**

**The whole process took “ten minutes” admitted to by the District Attorney’s Office see APP 27.**

**B. THE STANTA CLARA COUNTY PUBLIC DEFENDER’S OFFICE NEVER IMPLEMENTED FEDERAL REGULATIONS REQUIRED UNDER THE AMERICANS WITH DISABILITY ACT WHICH DEPRIVE HEARING IMPAIRED DFENDANTS’ THEIR RIGHTS TO BE ABLE TO COMMUNICATE WITH COURT APPOINTED LEGAL AND PROVIDE LEGAL REPRESENTATION IN CRIMINAL CASES.**

1. The Santa Clara County Public Defender's Office never complied with Federal Regulations, 28 CFR § 35.105, which required the Department to do a "Self-evaluation" of just how the Department was going represent both deaf/hearing impaired parties upon appointment. See APP 60.

2. In fact, the Santa Clara County Public Defender's Office never complied with 28 CFR § 35.107, which required the Department to employ an ADA Coordinator to handle grievances with hearing impaired defendants to assist deaf and hearing impaired defendants requiring that the Public Defender's Office complied with Federal Regulations, which is the core problem showing that that the Department never complied any ability for Applicant to communicate with anybody within the Public Defender's Office.

3. The Santa Clara County Public Defender's Office also discriminates against hearing impaired defendants when the Public Defender's Office is appointed required the "public entity **shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others** see 28 CFR § 35.160 (a) (1).

4. These acts denied Applicant legal representation in a criminal case and was the proximate cause of Applicant being denied his 30 days of custody credits in violation of Applicant's federally protected rights.

5. Additionally, the Public Defender's Office Department never implemented any means of communication required by 28 CFR § 35.161 which requires for receiving and directing incoming telephone calls, which system must provide effective real-time communication with individuals using auxiliary aids and services, including TTYs and all forms of FCC-approved telecommunications relay systems, including Internet-based relay systems.

6. The Santa Clara County Public Defender's Office actually "retaliated" and took adverse action against Applicant when Applicant filed a request for "Accommodations" into the Sixth Appellate District and sent Applicant a letter asserting that the Santa Clara County Public Defender's Office was no longer representing Applicant in the criminal case and Applicant would have to represent himself in the criminal case, see APP 30.

The under these policies, practices and customs of the Santa Clara County Public Defender's Office there could never be an attorney/client relationship between Applicant and the Deputy Public Defender as there was no ability to confer/communicate a necessary element for legal representation which was required by 28 CFR § 35.160 (a) (1)

These facts, shows a pattern of not only a "deliberate indifference" but a "discriminator animus" which was actually proves a mens rea "intentional discrimination," with full "knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that likelihood" Applicant's rights to legal representation would result.

These acts of the Santa Clara County Superior Court to provide Applicant with accommodations and meaningful access constitute and particularized injuries sufficient to satisfy a cause of action under both Title 29 U.S.C. § 794 (a) and section 504 of the Rehabilitation Act.

Moreover, these actual acts of "Retaliation" by the Santa Clara County Superior Court Judge who took adverse action against Applicant on March 3, 2020, by issuance of an "Ex Parte Order" denying custody credits served in this very case of 30 days, which fully vests to Applicant under California Law, pursuant to California Penal Code § 2900.5 (a) and done when Applicant was not represented by legal counsel in a criminal case see APP 30.

The above acts adverse action against Applicant in “Retaliation” which there was a direct connection between the adverse action and the protected activity seeking accommodations which was currently pending in the Sixth Appellate District case No. H047816, requesting legal representation by legal counsel.

The above act by the Santa Clara County Superior Court judge resulted in Applicant serving an additional 30 days in custody beyond the original sentence already imposed all which were done with no legal representation.

The Court proceeded to strike Applicant’s Motion, see APP 82-85.

This pending Appeal cannot be heard before an Appellate Panel who is reviewing a criminal appeal of right in which the issues on an appeal of right raises to a “discriminator animus” with actual acts of showing **mens rea** acts of “retaliations” for seeking accommodation in the Sixth Appellate District a protective under Title 42 U.S.C. sections 12203 (a) & (b).<sup>3</sup> see APP 26-27, 30, 47-48.

The Santa Clara County Appellate Panel has now set this Appeal of Right for Oral Arguments further showing that Santa Clara County Superior Court’s violations of principles that a Court cannot hear a case in which the Court has a Direct, personal, substantial, and pecuniary interest in the outcome of the case.

This Court in *Williams v. Pennsylvania* 579 U.S. \_\_\_\_ (2016) that decision of multimember tribunal because one member who had an interest in the outcome

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<sup>3</sup> Applicant has filed with this Application for Stay a Motion to Leave to File Documents under seal, which were ordered filed under Seal by the Appellate Panel of Santa Clara County Superior Court. Applicant filed on August 29, 2022, opposition to Appointed legal Counsel on an Appeal of rights who asserted that the Court does not have any duty to evaluate a criminal defendant’s needs for Accommodation when the party asks for Accommodations and the Court can then proceed against a hearing impaired defendant appoint legal counsel and provide no means of communication with appointed legal counsel and sentence a criminal defendant within 10 minutes.

of the case constituted “structural error” even if the judge in question did not cast a deciding vote on an appeal.

Here in this case all three members of the Appellate Division of the Santa Clara County Superior Court have a “direct, personal, substantial, and pecuniary interest in the outcome of the case” as the issues before the Appellant Panel address conduct of the trial court which raises issues proving multiple mens rea violations of the Americans with Disability Act for denying a disabled defendant meaningful access and reasonable accommodations.

Appellant filed on June 7, 2022 a Motion to strike appointed legal counsel’s Opening brief on Appeal based upon the failure to raise the Superior Court’s failure to inquire into Applicant’s hearing impairment after Applicant’s requested “Accommodation” from Courtroom personnel required by 28 CFR § 35.160 (b) (2) and Ninth Circuit case law on this very point.

The Santa Clara County Superior Court Appellate Division then proceeded requiring that Court Appointed Legal Counsel must reply under Seal to Applicant’s contentions over these issues and that Applicant can respond under seal by August 29, 2022.<sup>4</sup>

Applicant responded on August 29, 2022 under Seal which places the issues before the Appellate Division of the very Santa Clara County Superior Court on the issues of a “Discriminatory Animus” with actual acts of “Retaliations” against a hearing impaired defendant for moving the Appellate Court for Accommodations i.e. to be able to obtain legal representation a protected activity in violation of 42 U.S.C. section 12203 (a), see Applicant’s Motion to file under seal.

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<sup>4</sup> Applicant has filed a Motion in the United States Supreme Court seeking to file these responses under Seal pursuant to the Order of the Appellate Division with this Application for stay pending Certiorari.



Appellant filed under Seal all the actual violations of both the Superior Court and the Public Defender's Office as well as the Santa Clara County District Attorney's Office blocking Appellate from being allowed to file a reply moving papers requesting Accommodations in violation of 42 U.S.C. section 12203 (b) and none the Court has set oral arguments on this Appeal of right without an ability for Applicant to address these systematic violations of ADA which openings a yawning breach in over 20 years of federal decisions that requires public entities to inquire once Applicant requested Accommodations which the Court acknowledged see APP 39.

Here the Superior Court a Public Entity was on notice and did noting and proceeded all done with no legal representation and imposed a six month county jail sentence all done with no legal representation.<sup>5</sup>

The Appellate Panel of the Santa Clara County Superior Court issued an order permitting a sealed reply by Applicant to court appointed counsel's letter of claim ineffective assistance of legal counsel on appeal, see APP 86-89.

Applicant filed under sealed on August 29, 2022 asserting and pointing to the record on appeal of the undisputed facts proving that Applicant requested Accommodations for a hearing impaired defendant, which the Attorney General's regulations require the public entity to "give primary consideration to the requests of the individual with disabilities" when determining what type of auxiliary aid and service is necessary 28 C.F.R. § 35.160 (b) (2).

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<sup>5</sup> Appointed legal counsel on an appeal of rights asserts that the Court has no duty to inquire into Applicant's hearing impairment, as all the trial court has to do is provide may be accommodated by "a sound-amplification system" which was determined to be a violation of 28 CFR § 35.160 (b) (2) in *Duvall v. County of Kitsap* 260 F. 3d. 1124 at 1139-1140 (9<sup>th</sup> Cir 2001).

In fact, the Ninth Circuit in addressing this very point about a court using the Court's amplification system by stating "Especially when the accommodation is provided based upon stereotyped assumptions about the person's disability, **such as the assumption that all hearing-impaired individuals need sign-language interpreters, or all hearing-aid wearers may be accommodated by a sound-amplification system.**" *Duvall v. County of Kitsap*, 260 F.3d 1124, 1140 n.14 (9th Cir. 2001). See APP 39 lines 8-11.

In fact, the Court never made any inquiry into Applicant's needs which denied Applicant any ability to confer or communicate with appointed legal counsel in a criminal case see APP 39-45 all done in "ten minutes" and no ability to confer or communicate with appointed legal counsel and admitted to be the District Attorney's Office APP 28.

Additionally, here the Santa Clara County Public Defender's Office has never implemented any the Attorney General's Federal Regulations for public entities 28 CFR sections 35.105 requiring a "Self-evaluation of just how the Public Defender's Office was going to represent hearing impaired defendants, see APP 60, moreover the Department has no ADA Coordinator position, mandated by 28 CFR § 35.107, nor does the Public Defender's Office implemented any ability to provide any provisions for a private communicate with a hearing impaired defendant mandated by 28 CFR § 35.160 (a) (1).

Furthermore, the Public Defender's Office also never implemented any means for TTY communicate with the Public Defender's Office mandated by 28 CFR § 35.161.

These failures of the Public Defender's Office Public Entity preventing any ability for Applicant to confer or communicate with Public Defender's denied legal representation in this criminal case which resulted in a sentence of Sixth months in the county jail and also failure to provide 30 days custody credits on the very case.

Applicant then moved the Sixth Appellate District and requested a stay of the Appeal of Right and moved the Court for Judicial Notice of the "Settlement Agreement" between the Court and the United States of America as well as a Report by Santa Clara County Counsel to the Santa Clara County Board of Supervisors that the County never implemented and complied with a Federal Court Consent Decree requiring for a ADA Coordinator over the County Jail system to ensure hearing impaired inmates have accommodation, APP 90-91

The Sixth Appellate District denied request for Judicial Notice and denied the Writ seeking a transfer of the Appeal before a three judge panel who has no interest in the proceedings, APP 90.

Applicant then filed a Petition for Review into the California Supreme Court seeking Review and a request for Stay based upon the legal theory that an Appellate Court cannot hear an Appeal of Right in which the Court has a "Direct, personal, substantial, and pecuniary interest in the outcome of case".

This based upon "[T]he Federalist No. 10 at 47 "[n]o man is allowed to be a judge in his own cause".

This Court has long applied that Due Process Clause to guarantee the impartial adjudicators that the Framers of the Fourteenth Amendment found lacking in *Tumey v. Ohio* 273 U.S. 510 (1927).

The *Tumey* Court at 532 held it prohibited on judges serving in cases in which they have a direct pecuniary interest, but rather encompasses those cases in which a judge's interest "**might lead him not to hold the balance nice, clear and true**".

The question presented by these undisputed facts in this case is can the Appellate Division of the Santa Clara County Superior Court hear an Appeal of Right which under the "procedural safeguard" of Due Process of Clause which requires the guarantees that "no man can be a judge in his own case"

The facts, of this case shows that Applicant a hearing impaired defendant who needs Applicant's hearing aids to be able to communicate a necessary life function and which the Santa Clara County refused to release those hearing aids to Applicant's court appearance and the Court's only means of accommodations was the Court's sound-amplification system, which actually deprive Applicant of means of communication with court appointed legal counsel.

These acts as stated above shows a state of mind of the public entities including the Santa Clara County Superior Court which in a systematic denial of "meaningful access" and reasonable accommodations denied Applicant to legal representation in a criminal case.

Moreover, this conduct of the public entities intentions were done with a *mens rea* of intentional discrimination by showing a "discriminatory animus" as these acts "Retaliations" for seeking Accommodations for a hearing impaired defendant in criminal case so Applicant can confer and communicate with legal counsel in the Sixth Appellate District resulted in both "interference, coercion, and intimidation of Applicant see APP 20-28

It is Applicant's contention that these acts where done in a deliberate indifference with knowledge that a harm to a federally protected rights would occur thus creating that the Santa Clara County Superior Court can be liable for damages under § 504 of the Rehabilitation Act as well as a private right of action under 29 U.S.C. § 794 (a).

It is Applicant's contention in this Request for Stay that Applicant is entitled To a "guarantee of neutrality on a appeal of right in first instance under Ward v. Village of Monroeville and Williams v Pennsylvania holds it is "structural error" to have an appeal of right held before a three member court when all three members have an Appeal of right before them in which the Court must decide if by violating the Americans with Disability Act will impose liability on their very court.

This Court in **Williams v. Pennsylvania** 579 U.S. \_\_ (2016) held that it is “unconstitutional failure to recuse constitutes structural error.

The Appellate Division of the Santa Clara County Superior Court has now set a November 18, 2022, oral arguments in this case in which Applicant has raised serious violations under American’s with Disability Act which the Appellate Division has a “direct, personal, substantial, and pecuniary interest in the outcome in the case before them.

Moreover, by setting this case for oral arguments shows that the Court has no intentions of “holding the balance clear and true” as these principles as Due Process of Law requires an impartial adjudication which under current review by the Santa Clara County Superior Court Appellate Division is unconstitutional under the this Court decision in **Williams v. Pennsylvania**.

Moreover, the current Court Appointed Attorney never raised the violations of Americans with Disability Act as the appointed Attorney on Appeal asserts that the Court by providing the Court’s sound-amplification system cures Applicant’s hearing impair and is reasonable accommodations all done with no inquiry by the Court. See Applicant’s Motion requesting leave to file under Seal.

However this is not the controlling law in this Circuit “ It is required to undertake a fact-specific investigation to determine what constitutes a reasonable accommodation, and we have provided the criteria by which to evaluate whether that investigation is adequate. "[M]ere speculat[ion] 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 v. Regents of University of California**, 192 F.3d 807 at 818 (9<sup>th</sup> Cir 1999).

Currently pending in the Appellate Panel of the Santa Clara County Superior Court on appeal of right in case No. 20-AP002650 IS Applicant's Motion under Seal that the opening brief filed court appointed legal counsel is ineffective assistance of legal counsel on an Appeal of Right for failure to point to the record on Appeal showing a denial of Applicant's Right to Accommodations under 28 CFR § 35.160 (b) (2) and actual acts of "Retaliations" by both the Court and the Public Defender's Office, the District Attorney's Office and the Santa Clara County Superior Court done to interfere and coercion and intimidation in violation of 42 U.S.C. sections 12203 (a) & (b).

The Santa Clara County Superior Court Appellate Panel has set oral arguments for November 18, 2022 in this case and clearly Court Appointed legal counsel on this Appeal of Right in a criminal case cannot ethically or effectively argue on appeal his own incompetence under California Rules of Professional Conduct Rule 3-110 (A).

The Ninth Circuit in *Pineda v. Craven* (9th Cir. 1970) 424 F.2d 369, 372 stated it as follow: "**There is nothing strategic or tactical about ignorance ....**"

In the case before this Court it is difficult to conceive of a tactical advantage which could have been served by neglecting to advance a claim so clearly in Applicant's best interest as there was never any ability for Applicant to confer or communicate in private with Court appointed legal counsel in a criminal case due to Applicant has hearing impaired was never provided an Accommodations to do so in private and the Superior Court's appointment and subsequent sentencing hearing with took some "ten minutes" does not constitutes legal representation in any sense of the term. See APP 28, a admission by the Santa Clara County District Attorney's Office.

Currently, Applicant has no legal representation on these issue before a Appellate Panel who clearly, does not hold the "balance nice clear and true" as the

Appellate Panel has a direct, personal, substantial and pecuniary interest in the outcome of the Appeal of Right, which would place liability on the very Superior Court that the three members of Appellate Panel are members of under both section 504 and 29 U.S.C. § 794 (a).

The California Supreme Court denial of Applicant's Petition for Review and request for Stay is included in the Appendix to this Application at App page \_\_\_. Allowing the Santa Clara County Appellate Division hear an Appeal of Right in which all three members of the Appellate Panel has a direct, personal, substantial, and pecuniary interest in the outcome of the Appeal which this Court has ruled is "Structural Error" in Williams v. Pennsylvania.

The California Supreme Court issued its order on August 24, 2022, App 92 denying and permitting the Appellate Division of the Santa Clara County Superior Court Appellate Division to hear an Appeal of Right in which the Court has a direct, personal, substantial and pecuniary interest in the outcome of the Appeal in that the issues pending in Applicant's motion filed under sealed are currently before the Court which would render liability against the very that are hearing the case.

The Appellate Division of the Santa Clara County Superior Court has now set oral arguments in this Appeal of Right in which the Court hearing the Appeal must decide if the Santa Clara County Superior Court in denying Accommodations to a hearing impaired defendant did so not only in violation of a Settlement Agreement with the United States of America but also denied said rights to accommodations with not only a "discriminatory animus" but an actual **mens rea** acts p actual "Retaliations" for proceeding on writ seeking "accommodations a protective activity, to deny Applicant's constitutional rights to legal representation in a criminal case see APP, 28, 30, 47-48.

## ARGUMENT

**THE APPELLANT PANEL OF THE SANTA CLARA COUNTY SUPERIOR COURT HAS A DIRECT, PERSONAL, SUBSTANTIAL, AND PECUNIARY INTEREST IN THE OUTCOME OF THE ISSUES ON APPEAL OF RIGHT CURRENTLY BEFORE THE COURT AS THESE ACTS OF THE PUBLIC ENTITIES SUPPORT A PRIVATE RIGHT OF ACTION UNDER 42 U.S.C. SECTIONS 504 & 794 (a) BASED UPON THE ACTUAL ACTS OF “RETALIATIONS” IN VIOLATION OF 42 U.S.C. SECTION 12203**

**These facts, are undisputed the Santa Clara County Superior Court only provided the Court’s sound-amplification system to Applicant after Applicant requested “Accommodations” from courtroom personnel and the Court see APP 39 lines 8-11.**

**The Court made no inquiry into Applicant’s hearing impairment and appointed the Santa Clara County Public Defender’s Office to represent Applicant see APP 39-45.**

**The whole process from appointment to sentencing took all of “ten minutes” admitted to by the Santa Clara County District Attorney’s Office. See APP 27.<sup>6</sup>**

**The Santa Clara County District Attorney’s Office asserted in their opposition that the Court provide all the necessary accommodations by providing by providing the Court’s accommodated by a sound-amplification system see APP page 27.**

**However, the Controlling case law in this Circuit is Duvall v. County of Kitsap 260 F.3d 1124 at 1139-1141 and footnote 14 which specifically covers that very point stated as follows:**

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<sup>6</sup> This admission was made in the Santa Clara County District Attorney’s response to Applicant’s Writ of Mandate filed into the Sixth Appellate District seeking Accommodations so that Applicant can obtain legal representation in case No. H047816.



**“Especially when the accommodation is provided based upon stereotyped assumptions about the person's disability, such as the assumption that all hearing-impaired individuals need sign-language interpreters, or all hearing-aid wearers may be accommodated by a sound-amplification system.” *Duvall v. County of Kitsap*, 260 F.3d 1124, 1140 n.14 (9th Cir. 2001)**

**The Ninth Circuit in *Duvall* stated the law that the Court is required to undertake a fact-specific investigation to determine what constitutes reasonable accommodations. See *Duvall supra* at 260 F. 3d 1139-1141.**

**In fact, if the Court had done that it would have discovered that the Santa County Jail had booked Applicant's hearing aids into Applicant's property because the hearing aids were not permitted because the hearing aids had to recharge every night and inmates had no access to electrical sockets as the County refused to release the hearing aids.**

**It is also noteworthy that the Santa Clara County District Attorney's Office refused to serve Applicant with their opposition which was done to deny Applicant's rights to file a reply, which was done to “interfere” with Applicant's rights to seek Accommodation a protected activity under 42 U.S.C. section 12203 (b) see *Mary's Honor Center v. Hicks* 509 U.S. 502 (1993) and Compare 28 CFR § 36.206 (a) (b) (c) (1) (2) (3) (4) and 29 CFR § 1630.12 (a) (b), see APP 28.**

**These acts of the Santa Clara County Superior Court never provided Applicant any means to communicate with court appointed legal counsel to discuss any aspect of the facts of case therefore violating Applicant's right to legal representation under *Aversinger v. Hamlin*, 407 U.S. 25 (1972) “no attorney no jail”.**

**Moreover, the Santa Clara County Public Defender's Office also does not provide any means for a hearing impaired defendant to be able to**

**communicate with appointed legal counsel as the Department never complied with 28 CFR § 35.105, see APP 60.**

**Moreover, the Santa Clara Public Defender’s Office also never implemented the requirements of 28 CFR § 35.107 creating an ADA Coordinator to ensure compliance with the requirements of Federal Regulations for hearing impaired defendants who are represented by the Public Defender’s Office.**

**Additionally, the Santa Clara County Public Defender’s Office denied Applicant any ability for hearing impaired clients to have direct communication with the Department required by 28 CFR §35. 161 et.seq.**

**The Public entity the Santa Clara County Public Defender’s Office never complied with 28 CFR § 35.160 (a) (1)**

**“A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.”**

**The Santa Clara County Public Defender’s Office also “Retaliated” against Applicant as the Department sent Applicant a letter after Applicant had filed a writ of mandate seeking accommodators for Applicant’s hearing impairment that the Department will no longer represent Applicant in the criminal case and must file his own notice of appeal, see APP 30.**

**These undisputed shows that the Santa Clara Public Defender’s Office has no ability to represent a hearing impaired defendant as the Public Defender’s Office does not provide any means of private communicate with hearing impaired clients required by 28 CFR § 35. 160 (a) (1).**

**In fact, that is further shown at the Court appearances on March 6, 2020, where the Court Appointed the” PD” to investigate the denial of**

**accommodations on January 17, 2020, and set a hearing for March 13, 2020, see APP 50-54.**

**Once again the Santa Clara County Public Defender's Office did nothing see APP 55-58.**

**Clearly, Applicant was never represented by legal counsel in a criminal case which all brought about by the systematic interference to seek accommodation by these public entities or any means of reasonable accommodations to communicate with appointed legal counsel in a criminal case.**

**These acts were the result of the Santa Clara County Superior Court willful violations of the "Settlement Agreement" between the Court and the United States of America showing a mens rea intent by Court to discriminate against hearing impaired parties. APP 2-5.**

**In fact, Applicant further attempted to obtain the ability to communicate with appointed legal counsel by filing with the Santa Clara County Superior Court ADA Coordinator a request for voluntary compliance pursuant to 28 CFR § 35.173 (2) which was also totally ignored see APP 31-37, still another showing of the Court's mens res attitude toward hearing impaired parties violating 28 CFR § 35.130 (8).**

**Here all four public entities, the County of Santa Clara County Jail, the Public Defender's Office, Santa Clara District Attorney's Office and the Santa Clara County Superior Court all interfered with Applicant's request for Accommodations filed into the Santa Clara County Sixth Appellate District in case No. H047816 serious violations under 42 U.S.C. sections 12203 (a) & (b).**

**In fact, even acts taken by the Santa Clara County Superior Court Judge in denying Applicant's Notice of Motion and Motion for Hearing to**

**correct the award of Custody Credits by denying those credits by an “Ex Parte Order” constitutes “adverse action”, which said credits fully vested to Applicant under California Penal Code 2900.5 (a) in which the Court had authority to deny.**

**These acts by the Santa Clara County Superior Court was adverse action taken by a the Santa Clara County Superior Court with a direct connection between the adverse action and the protect activity requesting Accommodations to be able to communicate with appointed legal counsel in the pending Writ of Mandate in case No. H047816 as of March 3, 2020, see APP 20-26.**

**These above acts of “Retaliation” by the Santa Clara County Superior Court Judge establishes prima facie case of improper retaliation, the burden shifts to the Santa Clara County Superior Court to a legitimate nondiscriminatory reason for the adverse action, see *Mary’s Honor Center v Hicks* 509 U S 502 (1993).**

**The Ninth Circuit in *Updike v. Multnomah Cnty., Corp.*, 870 F.3d 939, 947 n.5 (9th Cir. 2017 Cert Denied) summed up this way:**

**“Nor could the County or State really dispute this: The State and County's alleged failure to provide Updike with an ASL interpreter or the use of auxiliary services constitute concrete and particularized injuries sufficient to satisfy Article III. Further, Updike's inability to effectively communicate with corrections staff or even communicate at all with his lawyer or family was caused by the Defendants' failure to provide him with accommodation and meaningful access. Finally, a decision favorable to Updike would redress his injuries. *See Lujan*, 504 U.S. at 560–61, 112 S.Ct. 2130.<sup>7</sup>**

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<sup>7</sup> *Updike vs. County of Multnomah County* 870 F. 3d 933 (9<sup>th</sup> Cir 2017 Cert Denied) the case went to a jury trial and the jury awarded \$100,000 in damages for the violations for the two days in the county jail and whereas here Applicant never had any legal representation and was

**The Ninth Circuit has held that plaintiff in a civil suit under § 504 must prove a *mens rea* of "intentional discrimination," to prevail on a § 504 claim, that standard may be met by showing "deliberate indifference," and not only by showing "discriminatory animus." See *Duvall*, 260 F.3d at 1138-1141 (deliberate indifference with "knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that likelihood" would result see *Lovell v. Chandler*, 303 F.3d 1039 at 1056 ( 9th Cir 2002).**

**Thus, a public entity can be liable for damages under 29 U.S.C. § 504 if it intentionally or with deliberate indifference fails to provide meaningful access or reasonable accommodation to disabled persons.**

**Here Applicant was denied legal representation in a criminal case, when the Santa Clara County Superior Court Retaliated against Applicant while a writ seeking accommodations was pending with responsive pleading all done to intimidate Applicant in violation of 42 U.S.C. section 12203 by all Public Entities involvement even the Superior Court.**

**Here the Court had "knowledge" of Applicant's hearing impairment when the County held Applicant's hearing aids and refused to release them until after the Court hearing of Jan 17, 2020, see APP 59, the element is satisfied where the public entity has notice of the Applicant's accommodations need, and "the failure to act" element is satisfied by the conduct that is "more than negligent, and involves an element of deliberateness" see *Pierce v. Dist. of Columbia* 128 F. Supp 3d 250 at 279 ( DC Court Ketanji Brown Jackson U.S. District Court Judge).**

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incarcerated for 80 days without any legal representation and never had a hearing with legal representation because of Applicant's disability.

This unconstitutional failure to recuse by the Santa Clara County Superior Court Appellate Division constitutes structural error on an appeal of right that is “not amenable” to harmless-error review, see *Williams vs. Pennsylvania* 579 U.S. \_\_\_ (2016).

“A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part.” See *Williams vs. Pennsylvania* 579 U.S. \_\_\_ (2016).

This Court in **Ward v. Village of Monroeville**, 409 U.S. 57 at 62 (1972) held that a defendant had a right to an impartial adjudication in “first instance before a neutral and detached judge in first instance”

It is Applicant’s contention that this holding of this Court in **Ward**, *supra* is equally applicable here the right to an Appeal of Right under **Griffin v. Illinois** 351 U.S. 12 (1956) that once the State grants a right of Appeal the State cannot deny that right to independent review by a Court hearing the Appeal of right that has a direct, personal, substantial, and pecuniary interest in the outcome, as it amounts to “Structural error” under *Williams vs. Pennsylvania supra*, holding that one member of panel can influence the entire panel.

Clearly here all three members of the panel hearing an appeal of right are hearing an appeal of right where the panel have a direct, personal, substantial, and pecuniary interest in the outcome of the case because of the a total systematic violations of Americans with Disability Act by the public entities including the Santa Clara County Superior Court as there is no immunity based upon the *mens rea* acts of the very Court against Applicant.

**Appellant is entitled to an Appeal of Right before a three judge panel before an Appellant panel who has no interest in the outcome.**

This Court has held in Williams Supra that it is “Structural error “ for an Appellant panel for one judge who has an interest in the outcome of the case, whereas here all three members have an interest as they are all members of the very Court who has violated Applicant’s rights to accommodations and did so with a discriminatory animus and done with mens rea intent to do so.

## II

THE APPELLATE PANEL OF THE SANTA CLARA COUNTY SUPERIOR COURT HAS SET THIS APPEAL OF RIGHT IN A CRIMINAL CASE FOR ORAL ARGUMENT IN WHICH APPLICANT HAS NO LEGAL REPRESENTATION AT THE ORAL ARGUMENTS IN VIOLATION OF THIS COURT’S DECISION IN DOUGLAS VS. CALIFORNIA

Applicant has a California Constitutional right under Article VI sections 2, and 3 to be represented by legal counsel at oral arguments in an appeal of right under Douglas vs. California 372 U.S. 353 (1963).

Moreover that right to legal representation on an appeal of right requires more than just a friend of the court appearance see **Anders v. California, 386 U.S. 738 (1967)**

That right is being denied in this case as the Court here has set oral argument for November 18, 2022, done without legal representation see APP 93.

The facts, here shows that the current appointed legal counsel on appeal of right never raised the issue in his opening brief that Applicant a hearing impaired defendant in a criminal case was not permitted to use his hearing aids in Court when the County refused to release the hearing aids to Applicant and the Trial Court refused accommodations denying Applicant any ability to confer/communicate with appointed legal counsel.

The only accommodations provided by the trial court were the Court's sound-amplification system, see APP 39 lines 8-11.

The Court appointed attorney on this appeal of right asserts that the Trial Court's fully accommodate Applicant by providing the Court's Amplification System, which is not the controlling case law, see *Duvall v. County of Kitsap* 260 F. 3d 1124 at 1139-1141, (9<sup>th</sup> Cir 2001).

Appointed legal counsel on appeal of right asserts that a hearing impaired defendant has no right of choice for his Accommodations for a hearing impair party to be able to communicate it is whatever the Court decides and all done without inquiring as to what accommodations are necessary.<sup>8</sup>

Applicant objected to the filing of opening brief and moved to strike it and which resulted in the Appellate Panel issuance of order on June 8, 2022 requiring that Court Appointed legal counsel respond to Applicant's letters of June 7, and June 8, 2022 under seal and that Applicant can respond by August 29, 2022, also under Seal see APP pages 82-84.

The Court order of June 8, 2022, further states "Should the court require further briefing on this topic after reviewing and assessing Mr. Hersh's claims concerning his representation on appeal in conjunction his representation on appeal in conjunction with our review of full briefing and the record, the court will request the same and may defer submission of the cause to fully address this issue at that time" see APP page 84.

Court Appointed Appellate counsel takes the position that the after a party requests accommodations from Courtroom personnel all the trial court has to do is

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<sup>8</sup> In fact, the "Settlement Agreement" between the United States of America and the Santa Clara County Superior Court specifically holds to that the Court must ask the party just what choice does the hearing impaired party needs to be able to communicate, which was never done here, see APP 2 at ¶ 3, which the Court ignored at all times.



provide the “Court’s sound-amplification system” corrects Applicants hearing impairment and the trial court can proceed.

Clearly, Court Appointed legal counsel on appeal never research the controlling law under the Americans with Disability Act as in fact the Ninth Circuit case of Duvall v. County of Kitsap 260 F. 3d 1141 at footnote 14 address this very issue where the Court stated it the following:

**“Especially when the accommodation is provided based upon stereotyped assumptions about the person's disability, such as the assumption that all hearing-impaired individuals need sign-language interpreters, or all hearing-aid wearers may be accommodated by a sound-amplification system.”**

**In fact, the Ninth Circuit held that once a hearing impaired party requests accommodations from the Court it imposes duties on the Court to inquire into the parties needs for accommodation stated as follows:**

**“A public entity's duty on receiving a request for accommodation is well settled by our case law and by the applicable regulations. It is required to undertake a fact-specific investigation to determine what constitutes a reasonable accommodation, and we have provided the criteria by which to evaluate whether that investigation is adequate. "[M]ere speculat[ion] 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 *Duvall v. County of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001)**

**Clearly, the Court appointed attorney on this Appeal of Right never researched the law regarding Accommodations yet plead that no accommodations were required for Applicant to be able to confer or communicate with the Public Defender to obtain legal representation.**

**The Ninth Circuit put it somewhat brutally in *Pineda v. Craven* (9th Cir. 1970) 424 F.2d 369, 372: "There is nothing strategic or tactical about ignorance ...." In the case before this Court it is difficult to conceive of tactical advantage which could have been served by neglecting to advance a claim so clearly in Applicant's best interest, nor did Court Appointed Appellant legal counsel.**

**The decision to forego litigation on the violation of providing Accommodations was apparently the product of a culpable misconception of the relevant principles of law, just as in *Pineda v Craven supra* where the defense legal counsel never raised an illegal search and seizure of a current United States Supreme Court opinion.**

**This failure here by Court Appointed legal counsel on appeal of right is actually more egregious as here Applicant has proven that Applicant was never represented by legal counsel as the entire time from appointment to sentencing took only "ten minutes" all done with no ability to communicate with the Public Defender, which was admitted to by the District Attorney's Office.**

**Applicant's filing under seal which is currently before the Appellate Panel on this appeal of right showing both acts of "discriminator animus" by both the Santa Clara County Superior Court by denying Applicant's custody credits which fully vests with Applicant and done while a Request for Accommodations was pending for the very request for legal representation a protective activity under 42 U.S.C. section 12203 (a) & (b).**

**Applicant has an absolute right to legal representation in this appeal of right before this Appellate Panel which guaranteed by the California Constitution, see *Moles v. Regents of University of California* (1982) 32 Cal.3d 867, 874.**

Nor can the current legal counsel on appeal effectively represent Applicant on Applicant's issue of a denial of Accommodation as it creates a conflict of interest as appointed legal counsel cannot "argue one's own incompetence see California Rules of Professional Conduct Rule 3-110 (A) , see **In Re Fountain**, (1977) 74 Cal App 3<sup>rd</sup> 715 at 719.

These acts of denying Applicant legal representation on Appeal in this case on Appellant's issues of failure to provide accommodations to a hearing impaired defendant in a criminal case when it was the very acts of the Santa Clara County who at all times refused to release Applicant's hearing aids and did so when the County at all times it was in violations of Consent Decree and admitted to by Santa Clara County Counsel when the County never implement the position of a ADA Coordinator to provide timely assisted listening devices to inmates see APP 6-19 specifically pages 17-18.

Clearly, these facts shows that California Courts refusal to "hold the balance nice clear and true as the direct, personal, substantial and pecuniary interest in the outcome of this case shows the Court has no intentions of complying the legal representation even on an appeal of right as court appointed attorney cannot oral argue his own incompetence see **Tumey vs. Ohio** 273 U.S. 510 (1927)

The Court record on in this case shows that Applicant was never represented by legal counsel throughout this case and even on this Appeal of right as such Applicant was denied Due Process of Law and was illegally in custody from Jan. 8, 2020 through March 28, 2020, in violation of Applicant's constitutional rights and continuing on in this appeal of rights all done with no legal representations mandated by this Court's clearly established United States Supreme Court Law in **Aversinger vs. Hamlin** 407 U.S. 25 (1972) no attorney no jail".

## CONCLUSION

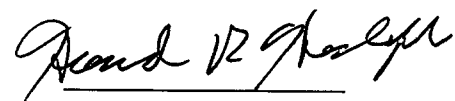
This Court should stay the pending Appellate review in the Santa Clara County Appellate Division pending the filing of Applicant's Petition for Writ of Certiorari as participating in hearing an appeal in which all three members of the panel has a direct, personal, substantial, and pecuniary interest in the outcome of the case as the question of liability of the very court under section 504 violations as well as a private right of action under 29 U.S.C. section 794 (a) all of which are before the Court under seal in Applicants moving papers.

Additionally, the Appellate panel has now set this case for oral argument on November 18, 2022, in which the question before the Court is did Applicant received ineffective assistance of legal counsel on appeal of right by the Appointed attorney when that Attorney never raised denial by the Court of the right to accommodation of a hearing impaired defendant.

Applicant is currently not represented by legal counsel in an appeal of right which is required under Douglas vs. California as clearly Appointed legal counsel on an appeal of right cannot argue his own incompetency under California Rules of Professional Conduct Rule 3-110 (A).

These acts shows that the Santa Clara County Superior Court has no intentions" of holding the balance clear and true" and has been entitled to legal representation throughout this whole case which has never occurred because Applicant is hearing impaired and never was represented by legal counsel and actually retaliated against for bring a writ to seek accommodations as such a stay of this Appeal pending the filing of the Petition for Writ of Certiorari in this case.

Dated *Sept. 19, 2022*



Howard Herships