Case No. 24-5358

IN THE SUPREME COURT OF THE UNITED STATES

James Andrew Metcalf

Petitioner

v.

The Geo Group, Incorporated, et al.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI

TO

THE UNITED STATES COURT OF APPEALS

FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

James Andrew Metcalf
Petitioner, In forma Pauperis, pro se
Inmate Number 1411894
Haynesville Correctional Center
VADOC Centralized Mail Distribution Center
3521 Woods Way
State Farm, Virginia 23160

QUESTIONS PRESENTED

Mr. Metcalf petitions this Honorable Court, alleging that his civil action was improperly dismissed by the lower courts primarily based on the courts' opinions that his pro se complaint and submissions in opposition to summary judgment were not technically sound in his attempt to verify and or notarize his documents. Although prisoner pro se filings are to be liberally construed and held to less stringent standards, this "technicality" created the lack of an adversary presentation in opposition to each of the three seperate motions for summary judgment. Thus this case presents the following questions:

QUESTION ONE

Are prisoners' Constitutional Rights to access the Courts violated when the institutional law library is closed in response to COVID-19 protocols, leaving the prisoners without any meaningful means to research or prepare any filings for extended periods of time?

QUESTION TWO

Should Courts be more favorable and compelled to grant pro se prisoners' motions for appointment of counsel when unprecedented events, such as COVID-19, causes the institutional law library to be closed for extended periods of time as presented in question one?

QUESTION THREE

Are prisoners' Constitutional Rights under the Eighth Amendment violated when prisoners are diagnosed by a specialist and prescribed treatment, and the medical staff at the prison ignores the diagnosis and treatment of the specialist, leaving the diagnosed medical condition untreated?

QUESTION FOUR

Are prisoners' rights under Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12102 and 12131 violated when diagnosed with a disability and the prison medical staff ignores the disability and refuses to provide the disabled prisoner reasonable accommodations?

QUESTION FIVE

Is it proper for the District Court for the Eastern District of Virginia to reject a prisoner's pro se complaint as a "verified" document based on the wording or muddled draftmanship in the verification statement under the liberal construction rule?

QUESTION SIX

Is it proper for the District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit not to consider "unrebutted legally significant evidence" when deciding material issues of fact at summary judgment?

LIST OF PARTIES

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

THE GEO GROUP, INCORPORATED, Contract Vendor for the Virginia Department of Corrections

MICHAEL BRECKON, Facility Administrator,
Lawrenceville Correctional Center
Lawrenceville, Virginia

ANNETTE SCHWENDINGER, Facility Nurse Practitioner,
Lawrenceville Correctional Center
Lawrenceville, Virginia

STEPHEN HERRICK, Director of Health Services for
Virginia Department of Corrections
Richmond, Virginia

N. H. SCOTT, Deputy Director for
Virginia Department of Corrections
Richmond, Virginia

RELATED CASES

Metcalf v. The Geo Group, Inc., 3:19-cv-00842-HEH-EWH
U.S. District Court for the Eastern District of Virginia
Richmond Division
Judgment entered - February 24th, 2022

Metcalf v. The Geo Group, Inc., No. 22-6269
U.S. Court of Appeals
Fourth Circuit
Judgment entered - June 4th, 2024

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears at Appendix A and is unpublished.

The opinion of the United States District Court for the Eastern District of Virginia, Richmond Division appears at Appendix B and is unpublished

JURISDICTION

The date on which the United States Court of Appeals for the Fourth Circuit decided my case was June 4th, 2024.

A timely petition for a rehearing was filed and denied by the United States Court of Appeals for the Fourth Circuit on July 30th, 2024 and a copy of the petition appears at Appendix C and a copy of the order denying the request for a rehearing appears at Appendix D.

The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following statutory and constitutional provisions are involved in this case.

U.S. CONSTITUTION, ARTICLE IV, § 4

The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

U.S. CONSTITUTION, AMENDMENT I - Petition Clause

Congress shall make no law respecting an establishment of religion, or prohibiting the free excerise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably assemble, and to petition the Government for a redress of grievances.

U.S. CONSTITUTION, AMENDMENT V - Due Process Clause

No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONSTITUTION, AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONSTITUTION, AMENDMENT XIV, §1 - Equal Protection Clause

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

38 C.F.R. § 3.385 - Disability due to impaired hearing

For the purposes of applying the laws administered by VA, impaired hearing will be considered to be a disability when the auditory threshold in any of the frequencies 500, 1000, 2000, 3000, 4000 Hertz is 40 decibles or greater; or when the auditory thresholds for at least three of the frequencies 500, 1000, 2000, 3000, 4000 Hertz are 26 decibels or greater; or when speech recognition scores using the Maryland CNC Test are less than 94 percent.

28 U.S.C. § 1746 - Unsworn declarations under penalty of perjury

Whenever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a depostion, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn

declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under the penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under the penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)",

28 USS.C. § 1254 - Court of appeals; certiorari; certified questions Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification that the Supreme Court may give binding instructions or require the entire record be sent up for decision of the entire matter in controversy.

42 U.S.C. § 1983 - Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailible. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 12102 - Definition of disability

As used in this Act;

(1) Disability. The term "disability" means, with respect to an individual-

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

(2) Major life activities.

(A) In general. For purposes of paragraph (1), a major life activities include but are not limited to, caring for

oneself, performing maunal tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, learning, reading, concentrating, thinking, communicating, and working.

42 U.S.C. § 12131 - Definition of Public Entity and Qualified individual
As used in this title:

(1) Public entity. The term "public entity" means-

(A) any State or local government;

(B) Any department, agency, special purpose district, or other instrumentality of a State of States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act, 42 U.S.C.S. § 24102(4).

(2) Qualified individual with a disability. The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meet the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

RULE 61 - Federal Rules of Civil Procedures
Unless justice requires otherwise, no error in admitting or excluding evidence-or any other error by the court or a party-is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every

stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

RULE 402 - Federal Rules of Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules, or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

STATEMENT OF THE CASE

The petitioner, James Andrew Metcalf (hereinafter "Metcalf"), filed a Civil Rights Action pursuant 42 U.S.C. § 1983 against the defendants alleging that his Eighth Amendment Rights were violated when the defendants failed to treat his Bi-lateral hearing loss. Metcalf also claims that his rights under Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12102 and 12131 ("ADA"), were also violated when the defendants refused to provide him with the prescribed reasonable accommodations for his hearing disability.

During the course of this action the institutional law library was closed for an extensive amount of time due to protocols implemented in response to the COVID-19 pandemic. This hindered Metcalf's ability to research and prepare his complaint and other filings significantly. Metcalf expressed this "extraordinary circumstance" to the district court and filed motions for appointment of counsel at the various stages in the proceedings. All of his requests were denied. The lower court opined that Metcalf's handwritten filings were evidence that he was competent to represent himself in the case.

At summary judgment the district court dismissed Metcalf's claims based on a "flaw" in his verification statement and in the way that he attempted to notarize his papers. Therefore, ruling that Metcalf failed to proffer any admissible evidence. Yet, the court failed to consider the "unrebutted, legally significant evidence" submitted by the Commonwealth's attorney... Metcalf's audiogram./

Metcalf appealed to the United States Court of Appeals for the Fourth Circuit, who affirmed the District Court's judgment. Metcalf filed a petition for a rehearing, which was denied by the Appeals Court.

REASONS FOR GRANTING THE PETITION

A. Importance of Questions One and Two

This case presents a fundamental question of the interpretation of this Court's decision in Bounds v. Smith, 430 U.S. 817 (1977). The questions presented are of great public importance because they affect prisoners in all 50 states. In view of the unprecedented event of COVID-19, where prisoners were confined to their cells for extensive amounts of time and denied access to the prison law libraries, guidance on the questions are of great importance because it affects prisoners' Constitutional rights to access the courts and ability to prepare and file meaningful legal papers.

The importance of these two questions are enhanced when the civil actions are seeking vindication of fundamental civil rights and the lower courts in this case have misinterpreted Bounds. This Court held that the fundamental constitutional right of access to the courts require prison authoriteis to assist inmates in preparation and filling of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law. This Court expounded by stating that "it hardly follows that a law library or other legal assistance is not essential to frame such documents. It would verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties Plaintiff and Defendant and types of relief availible. Most importantly, of course, a lawyer must know the law is in order to determine whether a colorable claim exisits, and if so, what facts are necessary to state a cause of action. If a lawyer must perform

such preliminary research, it is no less vital for a pro se prisoner. Without a library, an inmate will be unable to rebut the States's arguments." Id.

Metcalf expressed to the district court that due to the state of emergency that was caused by COVID-19 and the protocols set by the Virginia Department of Corrections, his access to the law library was denied, preventing him from conducting any meaningful research or use any peripheral equipment to prepare any of his legal papers. Without access to the law library , Metcalf's ability to contend with three seperate motions for summary judgment was greatly hindered. While the three seperate "lettered" attorneys had boundless research capabilities and vast resources, Metcalf's research material consisted of a single "Prisoners' Litigation Handbook."

The prison rejected Metcalf's request for a typewriter and stated that if he needed any cases to submit a request form them. However, without the ability to research how would he know what cases to request? How would he be able to shepardize the cases to ensure they were current or even appropriate? As stated in Bounds, prison authorities have an affirmative obligation to "assit inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." The prison did neither of their "affirmative obligations" concerning Metcalf's civil action.

The extended lockdowns due to COVID-19 frustrated and impeded Metcalf's access to the law library and ultimately caused an actual injury to his rights to bring a non-frivolous claim before the courts concerning the conditions of his confinement. Lewis v. Casey, 518 U.S. 343, 351-53, 116 S. Ct. 2174 (1996). (See also, Fogle v.

Pierson, 435 F.3d 1252, 1258-59 (10th Cir. 2006)(plaintiff's allegation that he was kept in 23-hour lock-in 5 days a week and 24-hour lock-in for the other 2, with no access to law library clerks or prison lawyers, might meet the "extraordinary circumstances" test...) Here, Metcalf's requests to the court for appointment of counsel demonstrated an "extraordinary circumstance" that were both beyond his control and unavoidable. Metcalf exercised his due diligence by requesting assistance from the prison and the Court to no avial, and then he attempted to file his papers to the best of his ability.

Some courts seem to assume that the prisoner's case must be dismissed, or prevented from being filed, in order to be "frustrated or impeded." Other assume that obstacles that impair the ability to present one's case effectively are also actionable. Here, both are true, Metcalf's case was dismissed because he was prevented from filing his evidence at summary judgment and the restrictions imposed by COVID-19 "frustrated or impeded" his ability to present his case effectively.

The lower court reasoned that Metcalf's hand written papers were evidence that he was competent to represent himself in the case and that the case involved no "extraordinary circumstances," despite the effects imposed on the prison by COVID-19. However, at summary judgment, the lower court dismissed Metcalf's claim based on Metcalf's verification statement was "lacking" and therefore treated Metcalf's complaint as "mere pleading allegations." The lower court opined that his complaint was also neither sworn to under penalty or perjury nor notarized properly. Interestingly, in the beginning the lower court used his papers as a sheild to deny

Metcalf's motions for appointment of counsel and then at summary judgment used his then "flawed" papers as a sword to slay his case. Because Metcalf was impeded and frustrated from conducting meaingful research and used the only reference material avàilible to him, he was not able to present his case effectively at summary judgment.

In fairness, the lower court should have considered the lack of access to the law library imposed on Metcalf and therefore either; (1) granted Metcalf appointment of counsel; (2) given Metcalf leniency in the construction and wording of his papers; or (3) directed Metcalf to correct the "flaws" in the verification statement and notary section and instructed him to resubmit them.

The Third Circuit ruled in Montgomery v. Pinchak, 294 F.3d 492, 2002 U.S. App. LEXIS 12536 (3rd Cir. 2002) that the district court abused its descretion in denying Montgomery counsel. Stating that "[b]ecause we believe that Montgomery's ability to meet evidentiary requirements of summary judgment motion was prejudiced by his lack of counsel." Id.

These legal questions have never been presented to this Court in this context concerning such an unprecedented event as COVID-19 and the impact on the Nation as a whole. Never has the prison community experienced such extended lock-downs nor protocols implemented where prisoners were confined to their cells and denied access to the law libraries for such lengthy periods. The conflict between the circuits is too vast and clarity by this court is necessary to define "extraordinary circumstances," when considering motions for appointment of counsel.

B. Importance of Question Three

This case presents a fundamental question of the interpretations of this Court's decisions in Estelle v. Gamble, 429 U.S. 97, 50 L.Ed 2d 251, 97 S. Ct. 285 (1976), and Farmer v. Brennan, 511 U.S. 825, 128 L.Ed 2d 811, 114 S. Ct. 1970 (1994). This question is of great public importance because it affects prisoners in all 50 States. In view of the provisions of the Eighth Amendment for protections against cruel and unusual punishment, are prisoners' rights violated when a prison fails to properly treat a prisoner's diagnosed condition or ignores the diagnosis or the prescribed treatment mandated by a specialist?

Prisoners must rely completely on prisons for any and all of their medical needs. When the prison medical staff are incapable of diagnosing any ailment complaint by a prisoner, they are usually sent to an outside specialist for evaluation. Once the specialist diagnoses the prisoner and prescribes treatment, is it a violation of the Eighth Amendment when that prison "over-rules" the diagnosis and or treatment prescribed by the specialist? Does the prison have the legal authority or the capacity to make any rational decisions concerning the specialist's diagnosis or treatment after the level of care has escalated beyond the means of the prison?

Here, Metcalf was seen by the prison doctor for severe ringing in his ears. The prison doctor, unable to diagnose Metcalf, scheduled him to be seen by an Ear, Nose and Throat specialist. The specialist then diagnosed Metcalf with bi-lateral hearing loss and tinnitus. The specialist then prescribed hearing aids to treat Metcalf's ailments. However, the Nurse practioner, Defendant Schwendinger, conducted an "admin" review of Metcalf's records and deemed that

he did not need hearing aids. She failed to follow the prescribed treatment of the specialist, leaving Metcalf's hearing impairment untreated for over fourteen months, which during that time his hearing loss worsened.

The lower court opined that Metcalf's claims were "essentially nothing more than a dispute with his prison medical provider over the proper level of care." However, this is simply not the case. The prison medical staff admit in their actions that they were unable to diagnose Metcalf, and sent him to a specialist. Once the diagnosis and treatment were precribed, the facility nurse practitioner made the decision to over-rule the specialist based on her "admin" review of Metcalf's medical records, never conducting any physical evaluation, **ever**.

This case directly involves the decisions by this Court in Estelle, Farmer and Helling v. McKinney, 509 U.S. 25, 125 L.Ed 2d 22, 113 S. Ct. 2475 (1993). A serious medical need has been defined as "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity of a doctor's attention." Id.

Here, Defendant Schwendinger was **NOT** the treating physician, it had already escalated beyond her scope of adeptness. She merely conducted an "admin" review of Metcalf's records, never personally consulting with him, nor physically evaluating him. Neither did she conduct any follow up after she deviated from the prescribed treatment. She simply chose a lesser and ineffective course of treatment for only the tinnitus, ignoring the crux of the diagnosis, Metcalf's bi-lateral hearing loss and his disability.

"A prison physician cannot simply continue with a course of

treatment that he [or she] knows is ineffective in treating the inmates's condition." Arnett v. Webster, 658 F.3d 742, 753 (7th Cir. 2011)(citing Greeno v. Daley, 414 F.3d 645, 2005 U.S. App. LEXIS 13125 (7th Cir. 2005)(See also Arnett, (citing Simek, 193 at 490)) "[P]laintiff stated a claim where prison doctor delayed arranging appointments for inmate to see a specialist and failed to follow the specialist's advice, during which time inmates's condition continued to worsen."

"Failure to provide the level of care that a treating physician believes is necessary could be found conduct which [surpasses] negligence and [constitutes] deliberate indifference." Miltier v. Beorn, 896 F.2d 848, 851 (4th Cir. 1990). See also Ancata v. Prison Health Serv., Inc., 769 F.2d 700, 704 (11th Cir. 1985)("intentional failure to provide service acknowledged to be necessary is the deliberate indifference proscribed by the Constitution.")

This Court held in Helling, stating "[w]e have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmates's current health problems but may ignore a condition... that is sure or very likely to cause serious illness and needless suffering the next week or month of year." The Courts of Appeals have plainly recognized that a remedy for unsafe conditions need not await a tragic event."Id.

The Seventh Circuit ruled in Ralston v. McGovern, 167 F.3d 1160 (7th Cir. 1999) that "ignoring a physician's threapy decisions can be cruel and unusual." (See also Jones v. Simek, 193 F.3d 485, 1999 U.S. App. LEXIS 22793 No. 98-2243, Sept. 20, 1999). The Fourth Circuit ruled in Smith v. Smith, 589 F.3d 736, 739 (4th Cir. 2009) "Deliberate Indifference when prison nurse delayed inmate's

medical treatment by tearing up doctor's order." Here, is virtually the same issue, although Schwendinger did not tear up the doctor's order, she deliberately ignored the doctor's order to treat Metcalf's hearing loss with hearing aids.

This legal question is important to all prisoners throughout the fifty states because prison medical staff are the only source for medical care for the incarcerated. Once a prison doctor determines that the treatment and or diagnosis is beyond the capability of that at the prison and sends the prisoner to a specialist the level of care has then escalated to the care of the specialist. The prison medical staff should not be allowed to then recant their opinion and authority when the prison does not agree with the specialists' diagnosis or prescribed treatment. This issue causes unnecessary wanton infliction of pain and suffering due to prolonged delays in providing treatment to prisoners' diagnosed ailments, violating their rights secured under the Eighth Amendment.

C. Importance of Question Four

This case presents a fundemental question of the provisions under Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12102 and 12131, et seq. ("ADA"). This question is of great public importance because it affects disabled prisoners in all 50 states. In view of the provisions under the ADA are disabled prisoners or "offenders with disabilities," rights violated when a prison ignores a diabled prisoner's disability and refuses to provide them with reasonable accommodations?

Disabled prisoners must completely rely on prisons for any and all of their medical needs, especially the need of those who are

disabled and require accommodations to participate in normal life activities. The Virginia Department of Corrections has an operating procedure that specifically addresses "Managing Offenders with Disabilities," yet the defendants failed to comply with these standards.

Metcalf was sent to a hearing specialist where he was given an audiogram, which revealed that he has bi-lateral sensorineural hearing loss. The auditory thresholds of the audiogram meet the requirements to be considered a disability pursuant to 38 C.F.R. § 3.385.[1] Metcalf's audiogram also demonstrates that his hearing impairment meets the requirements to be classified as disabled because it is a "record" of such an impairment under the provisions of the ADA.[2]

The ADA requires public entities (state and local governments) and private entities (businesses and nonprofit organizations that serve the public) to provide auxilary aids and services to make sure that individuals with speech, hearing and vision disabilities can understand what is said or written and can communicate effectively.

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[1] Impaired hearing will be considered to be a disability when the auditory threshold in any frequencies 500, 1000, 2000, 3000, or 4000 hertz is 40 decibels or greater; or when the auditory thresholds for at least three of the freqencies 500, 1000, 2000, 3000, or 4000 hertz are 26 decibels or greater; or when speech recognition scores using the Maryland CNC Test are less than 94 percent.

[2] (1) Disability. The term "disability" means, with respect to an individual;
A. A physical or mental impairment that substantially limits one or more major life activities of such individual;
B. A record of such impairment; or
C. Being regarded as having such impairment.

(2) Major Life Activities.
A. In general, for purposes of paragraph (1), major life activities include but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learing, reading, concentrating, thinking, communicating, and working.

The issue in this case is that all the parties involved failed to acknowledge that Metcalf has a hearing disability and requires hearing aids in order to communicate effectively. The Defendants aver that if Metcalf was able to communicate in any capacity that he must not have a hearing disability. This is simply not the case, as evidenced by his audiogram. Regardless how an individual is able to adapt and communicate, it does not negate the fact the the individual is disabled in accordance with the provisions of the ADA.

The Facility Nurse Practitioner, who is NOT a hearing specialist failed to acknowledge Metcalf's audiogram results and dismissed the prescribed treatment for his hearing disability. The results of Metcalf's audiogram clearly indicate that he does not hear in the "normal" range, and requires hearing aids to accommodate for his hearing loss.

"The fact that unusual accommodations may be necessary, in light of their special needs, to accomplish the provision of minimal conditions of incarcerartion does not absolve prison officials of their duty toward handicapped inmates." Ruiz v. Estelle, 503 F.Supp. 1265, 1345 (S.D. Tex. 1980). "[D]eprivation of sight and hearing aids condemned." Id. Under the provisions of the ADA and the Rehabilitation Act, the reasonable accommodation rule requires defendants to provide "meaningful access" to programs that persons with disabilities are otherwise entitled to. One does not have to be completely excluded from a service, program, or activity to state a claim. It is enough that access is made unusually difficult, painful, or dangerous by the failure to accommodate the prisoner's disability. Under the disibility statutes, prisoners need only show that thier disabilities were not reasonably accommodated.

"Title II protects only a 'qualified individual with a disability.' A plaintiff must make this threshold showing before he or she can even invoke the nondiscrimination provisions of the Statute." Constatine v. Rectors & George Mason Univ., 411 F.3d 474, 2005 U.S. App. LEXIS 11608 at 487 (4th Cir, 2005). Here, the lower courts ignored unrebutted, legally significant evidence provided by the state defendants Herrick and Scott, Metcalf's audiogram.

The Defendants aver that Metcalf is not disabled, yet the record (Metcalf's audiogram) is material fact which is disputed by the opposing parties. The defendants cannot simply close their eyes and make such an assertion when the evidence demonstrates otherwise. If this were so any public entity could avoid the requirement of Title II and evade culpability.

This legal question is important to all prisoners across this nation because it requires that prisons meet the needs of the disabled offenders so that their rights secured under Title II of the ADA are not violated. Prisoners are sent to prisons as punishment, they are not sent to prison to be punished, especially discriminated against because of their disability.

D. Importance of Question Five

This case presents a fundamental question of the interpretation and application of this Court's decisions in Haines V. Kerner, 404 US 948, 30 L Ed 2d 819, 92 S Ct 963 (1972), Hughes V. Rowe, 449 US 5, 101 S Ct 173, 66 L Ed 2d 163 (1980), and Erickson v. Pardus, 551 US 89, 94, 127 S Ct 2197, 167 L Ed 2d 1081 (2007). This question is of great public importance because they affect prisoners in all 50 states that file court papers and are unrepresented. It

is a great hinderance of the judicial process when a non-lettered prisoner seeks vindication from Constitutional Right injury and they are then held to the same stringent standards as seasoned attorneys. The precedent set by this Court has clearly established that pro se documents are to be liberlly construde, however inartfully pleaded. Other circuits have also ruled on these similar matters stating that liberal construction relieves the pro se litigant from strict application of procedural rules and demands that a court not hold missing of inaccurate legal terminology or muddled draftmanship against them. (See Blaidswell v. Frappiea, 729 F 3d 1237, 1241 (9th Cir. 2013).

Here, the lower court was completely inverse with the holdings of this Court in Haines, Huges and Erickson, when it rejected Metcalf's pro se Complaint and subsequent filings as inadequate to proffer admissable evidence because his verification statement included the wording "upon information and belief," thereby determining it then to be "lacking." Because of this semantic flaw, the lower court treated his complaint as "mere pleading allegations."

However, puruant to 28 U.S.C. § 1746, Metcalf included in each and every document he filed the required phrase: "I certify under the penalty of perjury that the foregoing to true and correct." The lower court expessed that it "will not consider as evidence in opposition to any motion for summary judgment a memorandum of law and facts sworn to under penalty of perjury. Rather, any verified allegations must be set forth in a seperate document titled 'Affidavit' or Sworn Statement;' Under the liberal construction rule, Metcalf's Complaint should have sufficed as such required "affidavit" in oppostion to summary judgment motions.

The magnitude of this question falls squarily on this Court's assessment of questions one and two. If it is this Court's opinion that there is no Consitutional violation for access to the courts during events like COVID-19, where the prison law library is closed and inmates access is denied, and that in these situations the Courts should not be compelled to provide counsel, then in these situations more clarity is needed to define the liberal construction rule. Should the lower courts be allowed to create an absence of an adversary presentation simply because the pro se litigant worded a statement in a particular way? Especially when the pro se litigant has no access to the law library and the very same statement is accepted by other districts?

This question is of legal significance to all prisoner across this nation because it sets the standard for pro se prisoners who are challenging the constitutional violations while incarcerated. If they will be held to the strict applications of procedural rules regardless of how they obtain guidance to form and prepare their papers, then direction that the words used in any statement are subject to scrutiny dependant upon the district they are filing in. This seems inequitable to the pro se prisone litigant. Therefore, attention by this Court is necessary.

QUESTION SIX

This case presents a fundemental question of Rule 402 of the Federal Rules of Evidence, General Admissibility of Relevant Evidence, and the interpretation of the consideration of unrebutted, legally significant evidence standard. The question presented is of great public importance because it affects the public as a

whole when the opposing party submits evidence that supports the claims within an action. Rule 402 states that "[r]elevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court." Evidence that is considered admissible is availible for any party to substantiate their claims. If an adverse party provides damaging evidence to their defense or stance in the case, it still should be considered by the trier of the facts at summary judgment.

Here, the case involved three (3) seperate attorneys, who each filed three seperate motions for summary judgment. The two retained attorneys included portions of Metcalf's prison medical record, but excluded the specialist's diagnosis and audiogram. However, the Commonwealth's attorney submitted a complete copy of Metcalf's prison medical record, including the specialist's diagnosis, prescribed treatment and the audiogram. This evidence was unrebutted by Metcalf, and is legally significant to the case. Metcalf pointed to this evidence to the district court in his opposition to summary judgment and also in his appeal to the Appeals Court. Both lower courts failed to consider this evidence as a genuine issue of material fact, Metcalf avers that he has a serious medical need, prescribed treatment and his condition is for all tense and purposes a disability under the ADA. The defendants reject this claim and deny that Metcalf has a serious medical need and is not disabled. The Commonwealth's own evidence demonstrates the triable issue in question.

"A court abuses its descretion when it makes an error of law Koon v. United States, 518 US 81 100 116 S Ct 2035, 135 L Ed 2d

3921(1996) or when it ignores unrebutted, legally significant evidence, Alvarez Lagos v. Barr, 927 F 3d 236, 255 (4th Cir. 2019)." United States v. Under Seal (In Re Search Warrant Issued June 13, 2019), 942 F 3d 159 2019 U.S. App LEXIS 32600, 2019 WL 5607697 (4th Cir. 2019).

"[T]he disrtict court abused its discretion when it denied relief without considering 'unrebutted, legally significant evidence.'" United States v. Braxton, 2022 US Dist. LEXIS 16155 (D. MD. 2022) *2 to *3, citing United States v. Spotts, App No. 60-6791, 2021 US App. LEXIS 37214, 2021 WL 5985035 (4th Cir. 2021).

The essense of the inquiry before this Court is if the Commonwealth's submission, which was not rebutted by Metcalf and is legally significant, "presents a sufficient disagreement to require submission to the jury." Anderson v. Liberty Lobby, Inc., 477 US 242, 106 S Ct 2505, 91 L Ed 2d 202 (1986).

Rule 61 of the Federal Rules of Civil Procedures states, in part; "An error in admitting or excluding evidence, or and error by the court or a party, must be disregarded under Rule 61 if it is 'harmless,' ie., when it does not affect any party's 'substantial rights.'" Here the exclusion of Metcalf's evidence and the inclusion of the Defendants' evidence is prejudicial towards Metcalf's claims when he adopted the Commonwealth's "admissable evidence" in his opposition, demonstrating that his audiogram and the specialist's diagnosis and prescribed treatment were ignored by the defendants, and also subsequently ignored by the lower courts, who's judgment was substantially swayed by the error. United States v. Cone, 714, F.3d 197, 219 (4th Cir. 2013). This error was therefore harmful and directly affected Metcalf's substantial rights.

CONCLUSION

Due to the restrictions imposed by the prison, Metcalf was denied access to the law library, which prevented him from conducting any meaningful research in order to frame his documents and meet the standrds to filing his civil rights complaint. He requested assistance from the prison and subsequently motioned the District Court for appointment of counsel during the unprecedented event of COVID-19. All his requests were denied.

At summary judgment, the District Court dismissed his case due to a technical error in the way he, a pro se, prison litigant, worded his verification statement. All the while his serious medical needs and his disability were not being properly addressed by the prison. During this fourteen month delay, Metcalf's hearing loss progressed and worsened.

For the foregoing reasons, and the questions presented to this Honorable Court, a Writ of Certiorari should be issued to review the judgment and opinions of the District Court and the Fourth circuit Court of appeals.

August 13th 2024
Date

Respectfully submitted,

James Andrew Metcalf
JAMES ANDREW METCALF
Inmate Number 1411894
Haynesville Correctional Center
VADOC Centralized Mail Dist. Cntr.
3521 Woods Way
State Farm, Virginia 23160

CERTIFICATE OF COMPLIANCE

This Writ of Certiorari is filed by the petitioner, James Andrew Metcalf, an informa pauperis, pro se, prison litigant, currently incarcerated by the Virginia Department of Corrections at Haynesville Correctional Center.

The Petitioner submits this Writ of Certiorari in compliance with Supreme Court Rules 33.2, 34, and 39, and certifies the following:

1. This document complies with Supreme Court Rule 33.2, because;

   - The document is prepare on 8½ by 11 inch paper, double spaced, except for indented quotations, which shall be single spaced, on opaque, unglazed, white paper.
   - The document does not exceed 40 pages. This document contains 26 pages.

2. This document complies with Supreme Court Rule 34, because;

   - The document is prepared in accordance with all the general requirements of Rule 34.

3. This document complies with Supreme Court Rule 39, because;

   - The document contains a motion for leave to proceed in forma pauperis and an affidavit or declaration in support as required by Rule 21.
   - The petitioner is an inmate confined in an institution and is not represented by counsel, in which case he only submits only the original.

I, James Andrew Metcalf, declare under the penalty of perjury that the foregoing to true and correct.

Respectfully Submitted

August 13th 2024
Date

James Andrew Metcalf
James Andrew Metcalf,
Petitioner, pro se