

1 both the County and State have no immunity and (2) it is Defendant's choice of just what
2 assisted hearing device that a party can request and at all that was necessary was to release
3 Defendants' hearing aids held by the Santa Clara County.
4

5 Defendant herein moves this Court to disqualify itself in this appeal of rights and
6 transfer this case to the California Supreme Court as here the issue of disqualification is a
7 Constitutional issue as clearly the Santa Clara County Superior Court has a "direct stake
8 in the outcome of this case, because the Court can be held liable for violations of under
9 Title 29 U.S.C. section 794 (a) as the Ninth Circuit put it in *Updike vs. Multnomah County*
10 870 Fed 3rd 939 (9th Cir 2017 Cert Denied) stated the law as follows:
11

12 "Nor could the County or State really dispute this:
13 The State and County's alleged failure to provide
14 Updike with an ASL interpreter or the use of
15 auxiliary services constitute concrete and
16 particularized injuries sufficient to satisfy
17 Article III. Further, Updike's inability to
18 effectively communicate with corrections staff
19 or even communicate at all with his lawyer or
20 family was caused by the Defendants' failure to
21 provide him with accommodation and meaningful
22 access. Finally, a decision favorable to Updike
23 would redress his injuries. *See Lujan*,
24 504 U.S. at 560-61, 112 S.Ct. 2130."
25

26 Here a criminal defendant had no ability to communicate to either the Court of
27 appointed legal counsel and when the defendant requested accommodations Court made no
28 inquiry to defendant's hearing impairment, which resulted in no legal representation and
29 sentence to the county jail in violation of Defendants Federal Constitutional Rights.
30

31 Moreover, at no time did Defendant have any ability to communicate with legal
32 counsel during any of the court proceedings and in fact when Petitioner filed a Writ of
33

1 Mandate on Jan. 29, 2020, into the Sixth Appellate, the Public Defender's Office withdrew
2 from legal representation for filing a writ of Mandate against the Public Defender see
3 Exhibit 4.
4

5 The United States Supreme Court in Tumey vs. Ohio 273 U.S. at 523 "it certainly
6 violates the Fourteenth Amendment ... to subject [a person's] liberty or property to the
7 judgment of a court the judge of which has a direct, personal substantial, pecuniary
8 interest in reaching a conclusion against him in a case."
9

10 This places the Appellate Division of the Santa Clara County Superior Court
11 interest in this case turns these violations of the ADA the Santa Clara County Court can be
12 held liable under Title 29 U.S.C. section 794 (a) as it places this very Court must rule on its
13 own liability which is prohibited under In re Murchison 349 U.S. 133 at 136 (1955) ruling
14 on its own liability prohibited by the United States Constitution.
15

16 These undisputed facts places this very court in having to decide if this Court
17 violated ADA the "settlement" with the United States of America and if these violations
18 under the ADA resulted a "discriminatory animus" against a qualified individual imposing
19 liability on this very court.
20

21 Clearly, this Court cannot hear an Appeal of Right where this court must rule on its
22 own violations of the Americans with Disability Act in which this very Court was under a
23 "Settlement Agreement with the United States of America" and was on notice at all times
24 of continuing course of conduct, which resulted in a cause of action under Title 29 U.S.C.
25 SECTION 794 (a) for damages against the Santa Clara County Superior Court was
26 required to affirmatively to effectively implement 28 CFR § 35.160 (b) (2) .
27

1
2 WHEREFORE, Defendant requests that this Court disqualify itself as the violations
3 of the Americans with Disability Act, which proves retaliatory conduct by three public
4 entities as well as the Santa Clara County Superior Court imposing liability under Title 29
5 U.S.C. section 794 (a) for this very conduct.
6

7
8 Dated May 22, 2022
9

10 Howard Hershops
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POINTS AND AUTHORITIES

THE RECORD IN THIS CASE PRESENTS MORE
MERE ALLEGATIONS OF BIAS AND PREJUDICE
IT SHOWS ACTUAL PROOF OF ACTS OF
RETALIATIONS AGAINST A QUALIFIED HEARING
IMPAIRED CRIMINAL DEFENDANT WHO WAS
RETALIATED AGAINST BECAUSE OF BEING
HEARING IMPAIRED.

The controlling case law is *Aetna Life Ins. Co. vs. Lavoie* 475 U.S. 813 (1986) in which
a judge in a 5 to 4 decision require recusal of the court as the Judge had a pecuniary interest in
the case.

In this case the three judges of the Appellate Panel are all members of the Santa Clara
County Superior Court who must address issues on a direct appeal of right in which must decide
if fact the Santa Clara Superior Court violated the Settlement with the United States of America
for violations of the Americans with Disability Act based upon the failures to inquire into
defendant's denial of the use of defendants hearing aids which denied defendant any and all
ability to communicate with court appointed legal counsel.

Moreover here at all times defendant was not only blocked from gaining relief from the
Court but here the Santa Clara County Public Defender's Office withdrew from legal
representation abandoning a criminal defendant and the Santa Clara County District Attorney's
Office refused to provide their opposition to Petitioner's Writ of Mandate.

If those above acts are not enough to show retaliation in violation of 42 U.S.C. Sections
12203, 12132 and 12133 then clearly, the retaliation by the Santa Clara County Superior Court
Judge denied Defendant's right to a hearing for the custody credits served on these very charges

1 And did so in full retaliation in the Judges March 3, 2020, Ex Parte Order which was prohibited
2 by the California Supreme Court decision in *People vs. Lara* 54 Cal 4th 896 at 903 (2012).
3

4 While the decision in *Aetna Life Ins. Co. vs. Lavoie* only directly effective Justine Embry
5 the other justice were only had a slight pecuniary interest based upon the class action status in
6 the Blue Cross class action at 475 U.S. at 826-827.

7 In this case all members being judges of the Santa Clara County Superior Court have a
8 direct pecuniary interest in the outcome of this appeal as the above violations of the ADA created
9 a cause of action under Title 29 U.S.C. § 794 (a) imposing damages against the Superior Court as
10 the ADA accepts Federal Funds therefore waived the 11th Amendment.
11

12 This Court cannot hear an Appeal of Right in which the very Court can be sued for
13 damages under Federal Law as it places the Court to hear their own case prohibited upon see In
14 the *Murchison* 349 U.S. 133 at 136 (1955).
15

16
17 Dated May 22, 2022



Howard Hershops

Proof of Service

I declare I am a citizen of the United States, over 18 years and on May 23, 2022,

I cause to be served Defendant's Motion to Disqualify the Appellate Panel of the Superior Court

Santa Clara County Appellate Division in this Appeal of Right

I certified that served the Santa Clara County District Attorney's Office at

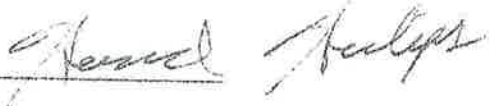
Allyson Bragg, at abragg@dao.sccgov.org

Danielle Rich, at drich1@dao.sccgov.org

Motions dropbox@dao.sccgov.org

saffordlegal@gmail.com

department12@scscourt.org

By 

Howard Herships

Filed
May 25, 2022
Clerk of the Court
Superior Court of CA
County of Santa Clara
20AP002650
By: afloresca

A-77

Signed: 5/25/2022 10:33 AM
afloresca

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA
APPELLATE DIVISION

PEOPLE OF THE STATE OF
CALIFORNIA,
Plaintiff and Respondent,

v.

HOWARD RALPH HERSHIPS,
Defendant and Appellant.

No. 20AP002650

Trial Ct No. BB517233

**ORDER STRIKING "PRO SE"
FILING**

1 Appellant Howard Ralph Herships filed a notice of appeal from his
2 misdemeanor conviction on February 14, 2020. This was followed on February 18,
3 2020, with a request for appointment of counsel, as Herships had been represented
4 by appointed counsel from the Office of the Public Defender in the trial court.
5 William Safford was appointed as counsel on appeal in this case by order filed April
6 13, 2020. The record was initially prepared but counsel filed a notice of omission in
7 August of 2020. That was followed by a motion to augment the record in November
8 2021, which also noted additional omissions from the normal record on appeal. That
9 motion to augment was granted by order filed on November 9, 2021. The
10 augmented record was completed on April 28, 2022, and the appellant's opening
11 brief is now due on May 31, 2022.

12 On May 23, 2022, Herships himself "Pro Se" filed what he captions
13 "Defendant's Application and Motion Pursuant to Rules 8.806 & 8.808 to Disqualify
14 the Appellate Division of the Santa Clara County Superior Court to Hear This
15 Appeal of Right as the Court Has a 'Direct, Personal, Substantial, [And], Pecuniary'
16 Interest in the Case Constitutionally Prohibiting Any Member of the Santa Clara
17 County Superior Court From Hearing An Appeal of Right."

18 Although a criminal defendant has a right to represent himself or herself in
19 the trial court, this right derives from the Sixth Amendment and does not apply on
20 appeal. (*In re Barnett* (2003) 31 Cal.4th 466,472-473 (*Barnett*); *People v. Scott*
21 (1998) 64 Cal.App.4th 550, 554, 560-579.) Further, a criminal defendant
22 represented on appeal by appointed counsel has no right to submit filings pro se,
23 and such filings may be rejected by the clerk or stricken if filed mistakenly.
24 (*Barnett*, at pp. 473-474; *People v. Kellet* (1969) 1 Cal.App.3d 704, 714 [where
25 defendant is represented by counsel on appeal, court need not consider contentions
26 made by defendant on his or her own behalf and such documents may be stricken
27 from the court files].)
28

1 As a criminal defendant represented by appointed counsel on appeal has no
2 right to separate filings or submissions on his or her own behalf (except in the case
3 of briefs filed under *People v. Wende* (1979) 25 Cal.3d 436), we strike the document
4 filed by Hershops on May 23, 2022, and direct the clerk of the appellate division to
5 permanently delete it from the court's docket in this case. The clerk is also directed
6 to serve a copy of this order on counsel of record and on Hershops at the address
7 listed on his filing of May 23, 2022.

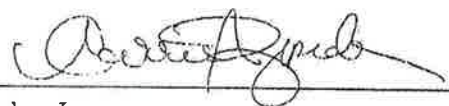
8 IT IS SO ORDERED.
9

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12 Date: May 24, 2022



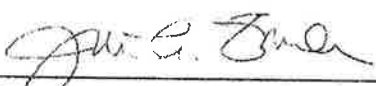
Williams, P.J.

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16 Date: May 25, 2022



Zepeda, J.

17
18
19
20 Date: May 25, 2022



Emede, J.

A-80

County of Santa Clara
Law Offices of the Public Defender
120 West Mission Street
San Jose, California 95110
(408) 299-7700 FAX (408) 938-1106



Molly O'Neal
Public Defender

July 1, 2022

Howard Hershops
Email: hhershops@gmail.com
Sent via email

Re: June 5, 2022 CPRA request

Dear Mr. Hershops:

The Santa Clara County Office of the Public Defender is in receipt of your 6/5/2022 email to Aryn Harris with County Counsel requesting certain records from the Public Defender's Office. As I previously communicated to you, my office first became aware of your request on 6/21/2022. Specifically, you wrote:

Ms. Harris,

I am requesting pursuant to 28 CFR section 35.105 (c) (1) (2) (3) of the Self-evaluations done under the Americans with Disability Act for both the Public Defender's Office as well as the County Jail.

The relevant sections of the Federal Regulations 28 CFR section 35.105 (c) (1) (2) (3) requires a description of areas examined and any problems identified and the description of any modification made.

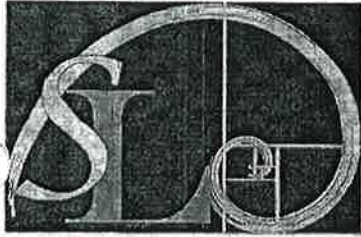
Howard Hershops

The Public Defender's Office has no records that are responsive to your request.

Kind regards,

Charlie Hendrickson
Assistant Public Defender
Santa Clara County

Chief Assistant Public Defender: Jose G. Guzman
Assistant Public Defenders: Damon Silver, Charlie Hendrickson, Sarah McCarthy



Safford LEGAL
Social Justice Law Firm

P.O. Box 13241
Chicago, Illinois 60613

Electronically Filed
by Superior Court of CA,
County of Santa Clara,
SaffordLegal.com

on 6/3/2022 11:33 AM

Reviewed By: A. Floresca

Case #20AP002650

Envelope: 9135051

A-81

June 3, 2022

Presiding Judge Helen Williams, Appellate Division
SANTA CLARA COUNTY SUPERIOR COURT
191 North First Street
San Jose, California 95113
[submitted via electronic filing]

Re: Request for Marsden Inquiry – *People v. Herships*, 1-20-AP-002650 [BB517233]

Presiding Judge Williams:

As you know, I represent Appellant Howard Herships in the matter of *People v. Herships*, 1-20-AP-001650, an appeal taken from the January 17, 2020, revocation and sentencing hearing in Criminal Division docket BB517233. I write to convey a request that you conduct an inquiry into the quality of my representation in this case, to determine whether Mr. Herships has been afforded the effective assistance of counsel.

I do not have access to the documents Mr. Herships has filed in the past week. I have not seen a copy of the writ petition which he filed in the Sixth District Court of Appeal (docketed as H050077), and if he has submitted any motions to the Appellate Division this week, I am unaware of them. However, Mr. Herships and I have corresponded extensively.

I cannot reveal the content of my communications with Mr. Herships. (Rules Prof. Conduct, rule 1.6(a); Bus. & Prof. Code, § 6068, subd. (e)(1).) However, based on those communications, I am compelled to conclude that Mr. Herships believes I have, through “inexcusable neglect”, “excluded a crucial defense from the appeal.” (*In re Greenfield* (1970) 11 Cal.App.3d 536, 543; accord *People v. Lang* (1974) 11 Cal.3d 134, 142 [reversing where “appellate counsel failed to raise crucial assignments of error which arguably might have resulted in reversal, thereby depriving defendant of the effective assistance of counsel to which he was constitutionally entitled”].) More broadly, I conclude that Mr. Herships believes the quality of my representation fails to meet “an objective standard of reasonableness under prevailing professional norms.” (*People v. Harris* (1993) 19 Cal.App.4th 709, 714.)

A-82

If Mr. Herships is correct about any of this, then this Court has an obligation to take action to protect his right to effective assistance of court-appointed counsel, including, if warranted, striking a brief and removing counsel. (*People v. Freeman* (2013) 220 Cal.App.4th 607, 610 [“court has the obligation to ensure adequate representation of counsel, even to the extent of removing retained counsel”], citing *People v. Daniels* (1991) 52 Cal.3d 815, 846, and *Alexander v. Super. Ct.* (1994) 22 Cal.App.4th 901, 911-912.) Mr. Herships has “a right not only to counsel on appeal . . . , but to competent counsel on appeal.” (*Harris, supra*, 19 Cal.App.4th 709, 713-714, citing *Douglas v. California* (1963) 372 U.S. 353, 356-357, and *Evitts v. Lucey* (1985) 469 U.S. 387.)

The law governing the question of when and how these issues should be handled in an appeal is not spelled out as clearly as it is for trial courts, so I fall back on the *Marsden* framework as a model. (*People v. Marsden* (1970) 2 Cal.3d 118, 123-126.) Given what has been articulated by Mr. Herships, I believe I have an obligation to treat his comments as: (1) an assertion that he has been deprived of his right to effective counsel; and (2) a *de facto* request for my removal. By conveying that assertion now, I enable the Court to provide Mr. Herships with “ample opportunity to explain and if possible to document the basis of his contention.” (*Id.* at p. 125.)

To be clear, I am not asking to be removed as counsel. I stand by the work I have done in this case, and unless this Court removes me, I intend to continue representing Mr. Herships to the best of my ability. However, after consulting with colleagues and carefully considering my ethical obligations, I believe I have a duty to make the Court aware of Mr. Herships’s concerns, so the Court can ensure he has been provided with effective assistance. (*Freeman, supra*, 220 Cal.App.4th 607, 611 [court which proceeds despite inadequate briefing by appellant’s counsel does “a disservice to appellant and the appellate process”].) Mr. Herships may make his own explicit request at some point, but my obligation exists whether he does so or not.¹

¹ I also note that, on May 25, 2022, this Court struck a motion filed independently by Mr. Herships. The Court cited *Barnett, inter alia*, as holding that “a criminal defendant represented on appeal by appointed counsel has no right to submit filings *pro se*”. (See *In re Barnett* (2003) 31 Cal.4th 466, 473-474.) The filing which this Court struck had nothing to do with the question of whether Mr. Herships is adequately represented in this matter.

Mr. Herships may file papers independently, asserting a denial of his right to effective assistance of counsel on appeal. If so, I believe this Court will receive and consider such papers. (*Barnett, supra*, 31 Cal.4th 466, 469 [appellate court will “file and consider *pro se* motions limited to matters concerning the inmate’s representation”], citing *Marsden, supra*.)

A-83

If you have any questions, please do not hesitate to contact me. I do not intend to file any formal papers on this subject unless directed by the Court to do so. And, if the Court conducts an inquiry which requires a response from me, my duty to protect confidential communications will most likely require that I provide such response through an *in camera* hearing or a sealed filing. (Rules Prof. Conduct, rule 1.6(a); Bus. & Prof. Code, § 6068, subd. (e)(1); see, also, *People v. Crandall* (1988) 46 Cal.3d 833, 894 fn. 6 [“in camera hearing provided an opportunity to inquire into the specific interactions between client and counsel pertinent to defendant’s complaints”], and Cal. Rules of Court, rule 8.46(d).)

Thank you,



William Safford
Counsel for Appellant

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CERTIFICATE OF SERVICE

I, the undersigned, am a citizen of the United States, over 18 years of age, and not a party to the above-entitled action. I hereby certify that, on this 3rd day of June, 2022, I caused a true and accurate copy of the foregoing letter, titled "Request for *Marsden* Inquiry", to be served upon each of the following, either by electronic service with the consent of the party served, or placement with the United States Postal Service in a sealed envelope with postage prepaid, as indicated below:

Kaci Lopez, Supervising Deputy

Cheri Hawkins, Deputy

Pablo Wudka-Robles, Deputy

SANTA CLARA COUNTY DISTRICT ATTORNEY

klopez@dao.sccgov.org

chawkins@dao.sccgov.org

pwudka-robles@dao.sccgov.org

motions_dropbox@dao.sccgov.org

Howard Hershships, Appellant

hhershships@gmail.com

By:


William Safford

286948

Counsel for Appellant

Filed
July 26, 2022
Clerk of the Court
Superior Court of CA
County of Santa Clara
20AP002650
By: afloresca

Signed: 7/26/2022 08:52 AM


SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA
APPELLATE DIVISION

PEOPLE OF THE STATE OF
CALIFORNIA,
Plaintiff and Respondent,

v.
HOWARD RALPH HERSHIPS,
Defendant and Appellant.

No. 20AP002650
Trial Ct No. BB517233

**ORDER PERMITTING SEALED
REPLY BY MR. HERSHIPS TO
HIS COUNSEL'S LETTER RE
CLAIMED IAC**

In its Order filed on June 8, 2022, the court directed Mr. Safford as appellant's appointed appellate counsel to respond to Mr. Hership's prior communications to the court about claims of ineffective assistance of counsel and to do so under seal concurrently with the reply brief. Mr. Safford has complied by letter response dated July 20, 2022, and that letter has been filed under seal (and mailed via U.S. mail to Mr. Herships). The court's Order of June 8, 2022, further indicated that the court would allow Mr. Herships to reply to Mr. Safford's response

1 by a date certain, and that the reply would be likewise filed under seal. The court
2 now directs Mr. Herships to file any reply to Mr. Safford's letter that he wishes, and
3 that he do so by August 29, 2022. The court will refrain from setting the appeal for
4 oral argument until this deadline has passed. The clerk of the appellate division is
5 directed to send a copy of this Order directly to Mr. Herships through the U.S. mail
6 at the address for him listed on the proof of service of Mr. Safford's letter of July 20,
7 2022.

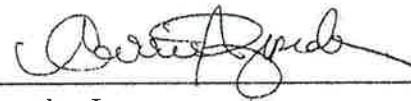
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10 IT IS SO ORDERED.

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14 Date: July 25, 2022



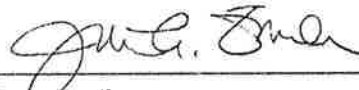
Williams, P.J.

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16
17 Date: July 25, 2022

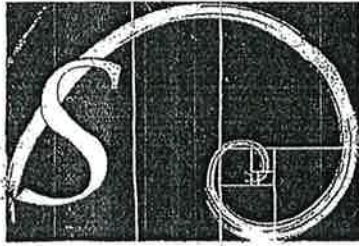


Zepeda, J.

18
19
20
21 Date: July 25, 2022



Emede, J.



SaffordLEGAL
Social Justice Law Firm

A-87

P.O. Box 13241
Chicago, Illinois 60613
(847) 744-4903
SaffordLegal@gmail.com

July 20, 2022

Presiding Judge Helen Williams, Appellate Division
SANTA CLARA COUNTY SUPERIOR COURT
191 North First Street
San Jose, California 95113
[submitted via electronic filing]

Re: Response to Appellant's Correspondence [Sealed Filing]
***People v. Herships*, 1-20-AP-002650 [BB517233]**

Presiding Judge Williams:

I am writing in response to the Court's request for a response to communications sent by my client, Howard Herships. Since the Court indicated that such response will be sealed by the Clerk of Courts, I am filing this letter under seal, without the added step of an application for same. Copies will be sent only to the Court (electronically) and Mr. Herships (by mail).

Before I begin, I feel compelled to bring two things to the Court's attention. First, I believe that all sealed filings should be sent to Mr. Herships by U.S. Mail only, not by email. I have been contacted by a person *other* than Mr. Herships *using his email account*, and thus the confidentiality of any documents sent there cannot be reasonably ensured.¹ I have, however, been successful in sending signature-required mailings to Mr. Herships at the address he lists on court filings – P.O. Box 1501, Carmichael, CA 95609. Thus, if the Court does the same, sealed documents are more likely to be received by Mr. Herships confidentially. Non-sealed documents, such as orders this Court will issue regarding Mr. Herships's opportunity to respond to this letter, can and should still be sent to him by email.

¹ The other account user identified herself as "Karen Fletcher with a JD", spoke of Mr. Herships in the third person, asserted that she is "authorized by Howard Herships to communicate to [me]", and accused me of both incompetence and "down right fraud". I cannot say whether Mr. Fletcher has a "JD", but I can say that no such person is licensed to practice law in California.

A-88

Second, I would like to emphasize that any statement by me, in this letter, should *not* be relied upon by the Court, in deciding the merits of any claim of error in this appeal. While I may be compelled here to comment on the merits of a claim, I would not be able to do so if I felt that I was formally taking a position adverse to my client's position in this litigation. (See, e.g., *Smith v. Robbins* (2000) 528 U.S. 259, 281-282 [lawyer violates "his duty to further his client's interests" if he "characterize[s] his client's claims as frivolous"].) Thus, as I discuss Mr. Herships's actual and desired claims of error, any comments on the merits are submitted *only* because the Court requested that I confidentially address the spectre of ineffective assistance, and *only* in reliance upon the promise that my comments would be sealed. Without that promise, I would not feel comfortable providing this information at all.

Relevant Claims by Mr. Herships

In the order dated June 8, 2022, this Court referred to three communications from Mr. Herships: (1) an emailed letter, sent June 4, 2022; (2) an email, sent June 7, 2022; and (3) a letter, filed with the Court on June 7, 2022. However, upon further review, it appears that the June 4 emailed letter (which was copied to me by Mr. Herships when he sent it) and the June 7 filed letter (which was forwarded to me by the Court) are in fact the same document.

As I understand and interpret it, the *letter* (in each copy) contains the following assertions regarding my performance as appointed counsel:²

1. The opening brief is "deficient" [p. 1, ¶ 1];
2. The opening brief fails to address "facts which are in the record" [p. 3, ¶ 9];
3. The opening brief fails to point to portions of the record reflecting "ADA violations" and "a hearing for custody credits" [p. 4, ¶ 1];
4. The opening brief fails to address a deprivation of Mr. Herships's federal constitutional right to due process [p. 4, ¶ 2];
5. The opening brief demonstrates "ineffective assistance of legal counsel on an appeal of right", because it fails to address the "discriminatory animus" of the trial court [p. 4, ¶ 3];
6. My performance indicates an unwillingness to "ruffle the feathers of the Santa Clara Court" [p. 4, ¶ 4];³

² I refrain from responding to other assertions here – such as Mr. Herships's comments on what happened in the trial court – except as necessary to address the allegations concerning my representation.

³ It is unclear whether this refers to the Criminal Division, the Appellate Division, or the two collectively.

A-89

7. I have “refused to research the controlling principles of law for defendants who are hearing impaired” [p. 4, ¶ 7];
8. I “could care less about . . . a hearing impaired defendant” [p. 4, ¶ 7];⁴ and,
9. My failure to “advance a claim so clearly in defendant’s best interest” reflects “ignorance”, rather than “tactical advantage” [p. 5, ¶ 4].

Additionally, as I understand and interpret it, the *email* contains the following assertions regarding my performance:

1. The opening brief “constitutes ineffective assistance of legal counsel” [¶ 1]; and,
2. The opening brief “omit[s] a clearly dispositive issue” [¶ 2].

In context, these claims resolve themselves into three broad allegations:

1. Mr. Herships believes that I breached my ethical duty to provide effective representation when I declined to assert a claim of error based on a perceived violation of the Americans with Disabilities Act of 1990 (“ADA”), and he has suggested this is because I failed to adequately research and understand the issue, which he believes should be the centerpiece of this appeal.
2. Mr. Herships believes that I failed to competently brief the custody credits issue, set forth in Claim IV.
3. Mr. Herships believes that I am afraid to take controversial positions or criticize the Superior Court, that I do not care about his interests or well-being, and that my fear and lack of concern have caused me to breach my ethical duty to advocate effectively on his behalf.

The Proposed ADA Claim

I was appointed to represent Mr. Herships on April 13, 2020. Since that time, I have received over 300 emails purporting to be from him.⁵ These emails tend to be lengthy, and they frequently include attachments containing documents for my review. The majority of the emails discuss Mr. Herships’s belief that his disability rights were infringed in the trial court. As such, I anticipated this issue and planned to analyze the record to see if it could be raised.

⁴ Presumably, Mr. Herships intends to suggest that I could *not* care less, since that phrase would more aptly indicate a lack of sympathy or compassion.

⁵ As noted previously, another individual uses Mr. Herships’s email account, but generally, the tone is consistent across these emails, and I believe that *most* of them are from my client.

Early in my representation, Mr. Herships made frequent references to his original trial, which occurred in December of 2008. There is little doubt that he believes he was unfairly convicted in that trial, and moreover, that his conviction was the product of bias on the part of every judge involved in his case, due to a perceived connection between one judge and the complaining witness. However, Mr. Herships appealed that conviction many years ago. (See *People v. Herships*, 1-09-AP-000751 [aff. June 9, 2011].) The present appeal was taken from his 2020 probation revocation hearing, so I made it clear to Mr. Herships, before the initial record was filed, that I did not anticipate litigating issues arising out of the trial or original sentencing.

After the initial record was filed, I requested some records from the original phases of the case, but only to provide context to the modern proceedings. In my view, nothing had changed – I still did not see any basis for litigating events from more than a decade ago which were already litigated in the first appeal and are not part of the present controversy. And, to his credit, Mr. Herships has mostly stopped addressing the original trial in his regular emails, but he does periodically reiterate his belief that the entire Santa Clara County Superior Court bench is ineligible to hear any of his legal matters based on the bias he believes infects the bench.

After the record was complete, I spent considerable time reviewing it, despite its relative brevity, and I went back through my correspondence with Mr. Herships to see if there was anything else I should consider. I keep *all* emails related to my cases, and I frequently find it useful to review early conversations with clients and trial counsel, especially when an appellate record has taken years to complete. In this case, I went over all the material Mr. Herships sent, and considered all of it when conducting my own independent research on the proposed ADA claim.

When I select issue in an appeal, I am cognizant of that fact that issue selection is my responsibility, not the client's. As a rule, I "need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." (*Smith v. Robbins* (2000) 528 U.S. 259, 288, citing *Jones v. Barnes* (1983) 463 U.S. 745; see, also, *In re Sade C.* (1996) 13 Cal.4th 952, 970 ["appellate counsel is not under a 'constitutional duty to raise every nonfrivolous issue requested by the defendant'"], quoting *Jones, supra*, 463 U.S. 745, 746.)

At the same time, I believe appellate representation works best when the client is involved and is encouraged to provide input. Moreover, I do *not* discount legal theories simply because they come from a client. At times, my clients have brought issues to me that I had not previously considered, and I have occasionally briefed those issues. Thus, when Mr. Herships advocated his ADA claim, I considered it seriously and carefully. I understand the claim he wishes to

articulate, and while I cannot say with certainty that the Court would agree, I think there might be a viable legal argument there. Sometimes, I change my mind on an issue as I begin trying to assemble an argument, but based on my preliminary research, I see at least the potential for a valid legal argument.

The problem for Mr. Herships is not the legal argument – the problem is the record. The core factual premise of his claim is that, when the trial court conducted its revocation and resentencing proceeding on January 17, 2020, Mr. Herships was deprived of his ability to participate in the proceeding because he was denied a necessary accommodation – namely, the use of a hearing aid. Yet, that premise is not supported by the record. At the beginning of proceedings, Judge Takaichi said, “[T]he Defendant is present, in custody, being assisted by the amplification audio system of the court.” (3RT 602.) Nothing in the transcript contradicts that statement.

Based on this, I cannot rule out the possibility that Mr. Herships was in fact denied a necessary accommodation, but neither can I prove that such a denial took place. Understandably, his silence during the proceeding might be the product of his inability to hear the words spoken around him – logically, he could not object to anything the judge said if he could not hear it. Nonetheless, I am still left with a record that affirmatively shows Mr. Herships *did* receive accommodation (i.e., “the amplification audio system”), and does not do anything to effectively support an opposing viewpoint.

As part of analyzing this issue, I considered Mr. Herships’s subsequent efforts to assert his claim in the trial court, but found them to be neither timely nor helpful in this appeal. On February 13, 2020, he filed a self-authored “Notice of Motion for Post Sentence Credits”, asserting the denial of custody credits, but no mention was made of the disability claim. (CT 8-14.) A notice of appeal was then filed by the Office of the Public Defender on February 14, 2020. (CT 15-16.)

On February 26, 2020, Mr. Herships filed his own notice of appeal. (CT 23-27.) He also filed a self-authored “Notice of Motion to Correct Error in Presentence Credits”, once again asserting the error in calculation of his custody credits. (CT 29-43.) This time, he mentioned his claim that he was denied a hearing aid, but only to explain why he was unable to “inform the public defender of the 31 day[s] spent in custody in this case”. (CT 35.)

On March 3, 2020, Judge Takaichi issued an order addressing the request for additional custody credits. Rather than getting into the diverse legal and factual flaws in that order, I will simply note that the disability issue was not mentioned, and the request was denied. (CT 46-47.)

Mr. Herships appeared in court twice more, on March 6 and 13, 2020. The transcripts indicate that these appearances were in front of Judge Takaichi (see 4RT 901 & 5RT 1201), but the minute orders clarify that these proceedings were in fact conducted by Judge Brown (CT 28 & 50). Mr. Herships was permitted to address Judge Brown directly, and asserted that he "wasn't really represented" because he "didn't have [his] hearing aids", but the judge challenged him for "proof" of this. (4RT 902.) Nonetheless, the matter was set over by one week so the Office of the Public Defender could look into the claim. (4RT 903-904.) On March 13, the parties again appeared in front of Judge Brown, and Mr. Herships's counsel asked to have the matter set in front of Judge Takaichi. (5RT 1202-1203.) However, the prosecutor objected and the request was denied, in part based on the pendency of Mr. Herships's appeal. (5RT 1203.)

As I see it, this resolves into two categories of record indication. First, we have a clear statement in the record, at the time of the disputed proceeding (Jan. 17, 2020), that Mr. Herships *was* assisted by an audio amplification device. Second, we have several attempts by Mr. Herships to express an opposing view, but all these took place *after* judgment was pronounced and *after* the notice of appeal was filed. Moreover, the denial of accommodation was not presented to the trial court, even at these late dates, as the basis for a new hearing, but rather was presented only as the reason for the belated presentation of the fact of Mr. Herships's prior custodial service.

Taking all this into consideration, I believed – and continued to believe – that the ADA claim is not viable because it is not supported by the record. Mr. Herships's belated assertions of the denial might have some value, but given their timing and their stated purpose, I do not see enough of a basis for setting forth a record-supported claim that he was in fact denied the assistance he required.

To be clear, this does not mean that such a claim cannot *ever* be made. I cannot make it in the direct appeal, because the record support is not there. However, Mr. Herships could file a *habeas corpus* petition, in which he presents additional evidence (if any exists) to support his claim. In that context, the reviewing court would not be bound by the limitations of the direct appeal. While I do not want to speculate as to what form such evidence might take, I can at least conceive of the possibility. But, in the direct appeal, I do not believe the claim has sufficient support.

Additionally, even if I thought the claim was marginally supportable on this record, I would not have included it, because it is comparatively weak. When I select between multiple available appellate issues, I consider multiple factors, including, *inter alia*, the strategic objective of the litigation, as I understand it, and the likely effect of the various claims.

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From my perspective, the strategic objective here is to make sure Mr. Herships does not spend any additional time in custody. The method by which he was released from custody left that ambiguous – there is at least some possibility, using the calculations employed by Judge Takaichi, that Mr. Herships could be later deemed to ‘owe’ the Superior Court additional time in custody on his sentence. So, my goal in this litigation is to make sure that threat goes away. I conveyed to Mr. Herships the possibility of adverse consequences resulting from the attempt (including the possibility that litigating the custody question might bring him to the attention of the courts in a way that would not otherwise occur), but since he did not choose to abandon the appeal, my only way forward was to aggressively litigate the credits issue.

With that in mind, I had to choose the best arguments, and on that point, I found plenty of fertile ground. To put it simply, the January 17, 2020 hearing was a disaster. The trial court took action without going through any of the right steps, and at the end, placed Mr. Herships on probation without proper findings and without his consent. I analyzed that process, and after extensively researching a number of potential ways to characterize aspects of the proceedings as error, I settled on two structural flaws (Claims I and II), the neglected question of competence (Claim III), and a straightforward attack on the credits calculation (Claim IV). I believed (and continue to believe) that all four claims are meritorious, but they were selected because I believe the combination presented the best approach to securing the ultimate goal.

If the Court requires more information on my issue selection process, I can provide it, but I think enough has been said on this subject. I should note, however, that the strategy seems to have paid off. The People have conceded the credits claim, and since that is ultimately the claim which most directly addresses the actual jeopardy faced by Mr. Herships, I am happy to concede that the other three claims are moot – in the reply brief (concurrently filed), I have done exactly that. There is, of course, no certainty that the Court will accept the People’s concession, but since I continue to believe the claim is strong, I think acceptance is likely.

The bottom line is, I did not raise the ADA claim because I do not believe it is supported by the record, and because, even if a weak argument could be made, I do not believe, and have never believed, that the claim is a viable means by which to get Mr. Herships the best outcome.

The Custody Credits Claim

As noted above, Mr. Herships also made vague reference to the custody credits issue (Claim IV). It is not clear whether he views this as merely part of the ADA argument, or an entirely separate issue. Regardless, since he has suggested I failed in this area as well, I will briefly address it.

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As noted above, my goal in this litigation has been to make sure Mr. Herships does not spend any more time in custody. The greatest danger to him, in that context, is the possibility that he still 'owes' the trial court some additional time, and that he could be compelled back into custody to serve that time. I am not sure this is a *likely* outcome, but it is at least a possible one, and moreover, it is the only outcome which I have any capacity to meaningfully address.

With that in mind, I briefed the claim, and in order to secure for Mr. Herships the best chance of ensuring a proper calculation, I also briefed claims which I thought would invalidate the judgment, either by eliminating any obligation to serve the sentence or by providing a new hearing at which the custody time could be correctly calculated.

As I wrote the brief, I was aware of Mr. Herships's belated efforts to raise the issue with Judge Takaichi, and I included references to these events in the brief. (See, e.g., AOB 4.) However, I did not *focus* on those proceedings, largely because I did not (and do not) view them as particularly important to this Court's review. As pointed out in the brief, an improper calculation of credits can be corrected at any time, even without an attempt to first raise it in the lower court. (See AOB 24, citing *People v. Acosta* (1996) 48 Cal.App.4th 411, 425-427.)

Since I viewed forfeiture as a 'non-issue', it seemed unwise to dwell unnecessarily on Mr. Herships's unsuccessful attempt to take this issue up after the notice of appeal was filed. Instead, I addressed the matter perfunctorily, bearing in mind that, if the People chose to press a claim of forfeiture, I could reference the efforts to correct the matter (to the extent such references might be helpful). But, the People have made no such argument, instead conceding that the miscalculation can and should be corrected by this Court.

Failure to Advocate Effectively

As noted previously, I was appointed to represent Mr. Herships on April 13, 2020. As much as three weeks before that appointment officially was made, I began working on Mr. Herships's behalf, trying to secure his release from custody. Sylvia Perez-MacDonald, Director of the Independent Defense Counsel Office (IDO), and Mr. Herships's trial counsel, Kyle Neddenriep, were part of that effort, which was eventually successful (though not as quick as any of us would have liked). I recall being very worried about Mr. Herships who, then 76 years old, languished in a jail which was already beginning to feel the ravages of the pandemic.

Since that time, I have given Mr. Herships my best efforts. He is *my client*, and for me, that is a deeply meaningful statement. But, as a practical matter, this appeal offers very little opportunity

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to improve his life. In fact, I have only been able to identify one benefit to Mr. Herships which might accrue from success here – as stated earlier, insulation against the possibility of additional time in custody.

I am aware that Mr. Herships desires other things. First, I believe he strongly desires a 'win' against the Superior Court. He has been fighting that battle for nearly two decades (the criminal case was filed in 2005), but has never had the 'win' he desires. The problem is, while I hope to secure him a victory in this appeal, and thus avoid any possibility of additional custodial time, I cannot relitigate the events he finds truly troubling, since that attempt was made, and failed, years ago.

Second, I believe Mr. Herships anticipates the possibility of legal action against the Superior Court or the County of Santa Clara based on the violation of his disability rights, and would like this appeal to help advance that potential claim. To be clear, I have no reason to disbelieve him when he says that he was denied proper disability accommodation, and I would be happy to see him succeed in litigating that issue in a proper court, but I do *not* have the capacity to help him with it. I am not his attorney for any purpose other than direct appellate representation, and in this appeal, I cannot establish that his disability rights were violated.

Since Mr. Herships first saw an advance draft of the opening brief, and decided to start actively opposing my efforts to represent him, I have received a barrage of emails from him. Of the more than 300 he has sent over the course of our relationship, nearly one-third came in the last seven weeks. These included threats to sue me and to report me to the California Bar, alongside complaints to the IDO Director about my performance. However, his antipathy does not alter two essential truths: (1) my ethical obligation to serve Mr. Herships's best interests is the bedrock of my professional existence; and (2) the personality attributes of even my most abrasive clients have never stopped me from desiring to secure them the best possible outcomes.

If I felt any other way, I would ask this Court to permit me to withdraw, but I do not intend to do so, because I genuinely wish Mr. Herships well, and believe myself competent to represent him. The flood of verbal abuse can be hard to take at times, but above all other emotions, I feel sympathy for him. He is clearly 'stuck' in his criminal case. I have had clients before who were similarly 'stuck', and one of the more disheartening aspects of this job can be my inability to help those clients break free of a cycle which is unproductive, and dangerous to their emotional and mental well-being. If I could help Mr. Herships break free of this, I would, but since I cannot, I will continue to give him my best efforts as appellate counsel, and do what I can to make sure that he is not subject to further carceral punishment in the case at bar.

In short, I am not in conflict. If that changes, I will promptly advise the Court.

As for the other point Mr. Herships made – that I am afraid to “ruffle the feathers” – I am confident this Court knows that to be untrue. If anything, I am guilty of exactly the opposite. I routinely argue, in appeals, motions, and writ petitions, that judges of the Superior Court have been derelict in their duties, violated rights, behaved inappropriately, and generally failed at the basic task set before them. At time, this Court has even chastised me for assertions that, in its view, press too far in that direction. So, to the allegation that I have held back out of fear, I will stand on my record in this Court.

On a personal level, I view the trial court's conduct in this case as deeply troubling. The January 17, 2020 transcript reveals a hearing bereft of due process and disregardful of the law governing revocation and resentencing proceedings. Reading it for the first time, I was deeply outraged by what I saw in that transcript. To make matters worse, I have a substantial body of extrinsic knowledge (from my own personal experiences in the trial court, my reading of transcripts, and information conveyed to me by other attorneys) indicating that this was *not* an atypical experience. In Santa Clara County, in-custody misdemeanor probation revocation proceedings have long been a locus for exactly the sort of problems manifest in this case.

That said, I cannot make briefing decisions based on matters outside the record, nor can I select issues based on my level of moral outrage. I did discuss the problems with the January 17, 2020 hearing in the opening brief, including in the introduction, but I did not press too hard, choosing instead to dig into specific arguments which best serve Mr. Herships's interests. And, in the reply brief, I have chosen not to press this Court to take these issues up notwithstanding the mootness doctrine. While I might personally like to see a ‘course correction’, the best outcome for Mr. Herships is a quick resolution of this matter, based on the People's concession.

Moving Forward

Writing this letter has been a new experience for me. I had not genuinely contemplated the possibility of an appellate ‘Marsden’ process until I sat down to prepare my letter of June 3, 2022. So, I cannot be entirely sure how this Court will handle the task of evaluating Mr. Herships's ineffectiveness claim, nor can I say with confidence that I have given the Court the information it requires.⁶ However, I can say this: . . .

⁶ Naturally, if I can answer questions or provide additional information, I will promptly do so in a sealed supplement upon request.

I have been working in various aspects of criminal defense since approximately 2003, nearly a decade before I was licensed. While still in law school, I briefed and argued my own appeals, and I have been making legal arguments of increasing complexity, on behalf of criminal defendants, ever since. I may not be the best attorney practicing before this Court, and as a general rule, I am uncomfortable even claiming to be above average. I learn more about my job every day, and constantly discover new things that I need to learn. But, I am confident that I have provided Mr. Herships with competent representation in this case. If the Court disagrees, it should immediately discharge me as counsel and find a suitable replacement.

Respectfully,



William Safford
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August 29, 2022

Presenting Judge Helen Williams, Appellate Division
 Santa Clara County Superior Court
 191 North First Street
 San Jose, California 95113
 (Submitted via electronic filing)

Re: Response to Attorney William Safford's Correspondence People vs. Hershops.
 1-20-AP-002650 [BB517233]

Presiding Judge Williams,

This is Appellant's submittal response to Mr. Safford's July 20, 2022 letter brief in the above entitled case.

Appellant is a hearing impaired party and has been so designated by the Veteran's Administration since 2013, as Appellant needs the use of his hearing aids to be able to communicate a necessary life function, see Attachment 1.

In fact, the letter brief actual continues in his legal theory under the ADA and misstates the controlling law and Federal Regulations implemented by the United States Department of Justice so that public entities can affirmatively implement the remedial aspect of the ADA for hearing impaired parties appearing before a Court and can participate in the court proceedings.

Mr. Safford on page 5 of July 2020 letter brief misstated the law regarding when a party makes a request for "Accommodations" such as here.

When a hearing-impaired party requested accommodations from courtroom personnel on Jan. 17, 2020, the only accommodations available that was provided was the "Court's amplification audio system" for their hearing impairment. This denied me any ability to participate as I had no means to communicate with Court-appointed legal counsel in private confidential way which was required for "reasonable accommodations" to obtain legal representation in a criminal case. The Rule in this Circuit was established in *Duvall vs. County of Kitsap* 260 F.3d 1024 at 1139 (9th Cir 2001) states 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 (all but first alteration in original; citation and internal quotation marks omitted). Furthermore, 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). Accordingly, a public entity does not "act" by proffering just any accommodation; it must consider the particular individual's need when conducting its investigation into what accommodations are reasonable. Because in some instances events may be attributable to bureaucratic slippage that constitutes negligence rather than deliberate action or inaction, we have stated that deliberate indifference does not occur where a duty to act may simply have been overlooked; or a complaint may reasonably have been deemed to result from events taking their normal course. See *Ferguson*, 157 F.3d at 675. Rather, in order to meet the second element of the deliberate indifference test, a failure to act must be a result of conduct that is more than negligent, and involves an element of deliberateness. See *Bartlett*, 156 F.3d at 331; *Matthews v. Jefferson*, 29 F.Supp.2d 525, 535-536 (W.D.Ark. 1998) (notice combined with failure to provide appropriate facilities may violate Title II). *Duvall v. County of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001).

The Ninth Circuit's holdings in the *Duvall* case which was a civil case held that the failure to provide reasonable accommodations resulted in a denial of Mr. Duvall's ability to participate with his attorney during the case and held the Court reasonable for damages.

The *Duvall* case was followed by *Updike v. Multnomah Cnty., Corp.*, 870 F.3d 939, 947 n.5 (9th Cir. 2017 Cert Denied) which stated the law when the Court denies "reasonable accommodations and meaningful access by denying communication with a defendant's lawyer summed up as follows:

"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."

Appellant made a Public Records requested on the Santa Clara County Public Defender's Office to see if the Department complied with the United States Department of Justice's implementation of the Federal Regulations under 28 CFR § 35. 105.

The Santa Clara County Public Defender's Office never implemented any means for a hearing impaired defendant in a criminal case to be able to confer and communicate to legal counsel which was required by 28 CFR § 35.105 as the attached response shows that the Department never had any ability to communicate in private with client that was hearing impaired, see Attachment 2.

Not only did Appellant have any ability to communicate with the Public Defender's Office but the Public Defender's Office never implement any procedure to comply with the "Self-evaluation" to implement said requirement in violation of Federal regulations.

Simply put Mr. Safford's statement is illogical in that the only way to be able for a hearing impaired defendant to obtain legal representation is to confer and communicate with legal counsel to put on a defense. See In Re Newbern 53 Cal 2nd 786 (1960) and People vs. Maddox 67 Cal 2nd 647 at 652 (1967). which was never implement by Santa Clara County Public Defender's Office.

Clearly, the record in this case shows that Appellant never had any "reasonable accommodation and meaningful access to legal representation by the Public Defender's Office" as such Appellant filed a Writ of Mandate into the Sixth Appellate District seeking Accommodations in case No. H047816, which the trial court requested real parties in interest to respond to including the Santa Clara County Public Defender's Office, see Attachment 3.

The Santa Clara County Public Defender's Office the sent a letter to Appellant that because Appellant filed a Writ into the Sixth Appellate District the Department was withdrawing from legal representation in the criminal case leaving Appellant unrepresented see Attachment 4.

The Santa Clara County District Attorney's Office refused to serve their opposition on Appellant which was done to "interfere" with Appellant's rights to seek "Accommodations" a statutorily protected activity under Title 42 U.S.C. section 12203 (b) and 28 CFR § 35.134 (b). see Attachment 3 pages 8-9 in response to Appellant's Email.

In fact, what is most interesting is Santa Clara County District Attorney's Office in their opposition admitted that the time frame from Appointment of the Public Defender's Office to sentencing on January 17, 2020, took all of "Ten Minutes" and all done with no ability to confer and communicate with Appellant a hearing impaired defendant which was a denial of legal representation in a criminal case see Attachment 3 page 7, all done to hearing impaired defendant with no ability to communicate.

Appellate having no legal representation in this case decided to file a request for hearing for a correction of the Custody Credits awarded as Appellate had served 30 additional days as a condition of probation back in 2009 in this very case and requested a hearing, which was filed on Feb. 26, 2020 in Pro Per. See Attachment 5.

The Trial Court's denial of those 30 days of custody credits, by an Ex Parte Order" on March 3, 2020, was adverse action taken against Appellant during which a request for Accommodations was pending in the Sixth Appellate District (H047816) while Appellant had a request for accommodations pending over the very issue denial of any ability to communicate due to Appellant's hearing impairment. see Attachment 6.

In fact, according to the California Supreme Court decision in *People vs. Lara* 54 Cal4th 896 at 903, (2012) the Court held that the Court had no discretion to deny custody credits because California Rules of Court, Rule 4.130 requires the Sheriff's Department to calculate the credits and any question about the credits must be addressed by a hearing with the burden on the People by bring a Notice of Motion, which was never done.

"The court awards such credits at the time of sentencing (§ 2900.5, subd. (a)). not as an exercise of discretion, but based on the sheriff's report of "the number days that [the] defendant has been in custody and for which he or she may be entitled to credit," and only after hearing any challenges to the report. (Cal. Rules of Court, rule 4.310.) When the People claim the defendant has forfeited credits through misconduct, the People have the burden of proof. *People v. Johnson* (1981) 120 Cal.App.3d 808, 815, 175 Rptr. 59.)"

These acts of the Santa Clara County Superior Court Judge's Ex-Parte Denial of Custody Credits never held a hearing with notice on Appellant which required legal representation all done in violation of Appellant's rights. This also violated Title 42 U.S.C. § 12203 (a) (b) as said acts of the Santa Clara County Superior Court engaged in "Retaliation" against Appellant for proceeding on Appellant's request for "accommodation" for the very acts of denying Appellant's ability to partake legal representation in a criminal case, due to Appellant's hearing impairment. see *St. Mary's Honor Center v. Hicks* 509 U.S. 502 (1993) holding is that there only has to be a causal connection between accommodation sought and the adverse action.

Moreover, here the Santa Clara County Superior Court was already under a "Settlement Agreement" with the United States of America mandating compliance with the Americans with Disability Act and decided to ignore the affirmative duty to implement procedures of ADA remedial provisions to stop discriminations against hearing impaired defendants a Public Policy provision of California Rules of Court Rule 1.100.

Nor did the denial of legal representation stop there on March 6, 2020. Appellant made a court Appearance and for the first time Appellant was finally provided Appellant's hearing aids after successfully appealing a grievance for the return of appellant's hearing aids in which the Sheriff's Dept. had booked into Appellant's property.

However, because Appellant's hearing aids batteries had totally discharged all programmed adjustments for Appellant's hearing aids reverred to a default mode and required readjustments.

On March 6, 2020, for the very first time appellant had the ability to inform the Judge that that Appellant was hearing impaired and never had any ability to confer and communicate with legal counsel. The Judge reappointed the "PD" to obtain the Court Record and set a hearing for March 13, 2020, see RT March 6, 2020.

On March 20, 2020, Court Appearance the Public Defender's Office never investigated and did nothing showing a complete denial of legal representation see Reporters Transcripts of March 13, 2020.

Mr. Safford's July 20, 2022, response cites no authority for his contentions that by providing use of the "Court's amplification audio system" somehow provided any ability to communicate with court appointed legal counsel.

In fact, the controlling principles of case law is just the opposite as states in *Duvall* supra requires the Court to inquire and make a specific inquiry to just what would be a reasonable accommodation for meaningful access to communicate in private with appointed legal counsel.

This was required by the axiomatic principle that no attorney no jail stated in *Aversinger v. Hamlin* 407 U.S. 25 (1972) which is exactly not only happen here but the Santa Clara County actual imposed additional punishment beyond the sentence as further "Retaliation" for proceeding on a request for "Accommodations" a protected activity.

Mr. Safford's responses in his July 20, 2020 letter is not support be case law and is in fact contrary to case law, cited above.

Clearly the Santa Clara County Superior Court had an affirmative duty to evaluate Appellant's accommodations requirements for Appellant's disability to communicate with appointed legal counsel and its failure to do so constitutes disability discrimination along with actual acts of "Retaliations" all done to deprive Appellant of his Federal protected Constitutional rights.

Judge Ketanji Brown Jackson as United States District Court Judge in *Pierce v. Dist. of Columbia*, 128 F. Supp. 3d 250, 278 (D.D.C. 2015) who is know a United States Supreme Court Justice held as follows:

"Deliberate indifference is 'knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that likelihood.'" *Duvall*, 260 F.3d at 1139 (citation omitted). The "knowledge" element is satisfied where the public entity has notice of the plaintiff's accommodation need, and the "failure to act" element is satisfied by conduct that is "more than negligent, and involves an element of deliberateness." *Id.*"

Appellant requested "accommodations" on January 17, 2020 from Courtroom staff and the Court made no attempt to inquire and just proceeded without any ability of Appellant to be able to communicate with legal counsel a denial of legal representation which was never addressed throughout the case.

Mr. Safford's contentions not only lack merit but Mr. Safford does not have any authority for his contentions as the ADA is a remedial statute which requires the public entities affirmatively ensure a disabled person to participate once a Appellate sought "accommodations on Jan 17, 2020 and was just ignored in a "deliberate indifference" which then escalated into a actual "retaliations" with adverse actions by the Santa Clara County Public Defender's Office, the Santa Clara County District Attorney's Office as well as the Santa Clara County Superior Court.

These undisputed facts shows that Appellant was never represented by legal counsel in any sense of the term moreover these acts of "Retaliations" by the Santa Clara County Superior Court also places the this very Court in ruling on this Appeal of Right to rule on their own case, which is prohibited under the decision in Tumey vs. Ohio 273 U.S. 510 (1927) as there is a serious question as states in Tumey, supra 273 at 534 "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused. ."

Clearly, the Santa Clara County Superior Court never implemented the "Settlement Agreement" with the United States of America requirements for defendants who are in custody and have no ability to implement any of the procedures under Rule 1.100 California Rules of Court to obtain accommodations due to the policies, practices and customs of County of Santa Clara, the Santa Clara County Public Defender's Office and Santa Clara County Superior Court.

Mr. Safford's opening brief and reply brief constitutes ineffective assistance of legal counsel on an appeal of right as at no time was Appellant ever represented by legal counsel in this criminal case a violation of Appellant's constitutional rights which requires reversal as it is "Structural Error and pre se reversible to deny legal representation.

If Mr. Safford made even a cursory review of case law under the Americans with Disability Act Mr. Safford would have discovered that by making a request for accommodation then requires the Court to make an inquiry to ensure that the disabled party has the necessary access to partake in the Court process here one of most absolute requirements legal representation.

Appellant never had any legal representation throughout the whole process and which actually resulted in actual acts of "Retaliations" by all the parties the District Attorney's Office, the Public Defender's Office as well the Santa Clara County Superior Court all taken against Appellant for requesting "Accommodations".

Howard Hershops



A-104

Filed
February 14, 2023
Clerk of the Court
Superior Court of CA
County of Santa Clara
20AP002650
By: afloresca

Signed: 2/14/2023 09:16 AM
af

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA
APPELLATE DIVISION

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

HOWARD RALPH HERSHIPS,

Defendant and Appellant.

Case No. 20AP002650

Trial Ct. No. BB517233

MEMORANDUM DECISION

THE COURT*

Appellant Howard Ralph Hershships¹ was convicted on December 17, 2008 after a jury trial of vandalism in an amount less than \$400 (Pen. Code § 594, subd. (a)/(b)(2)(A)²), a

* Chung, Acting P.J., Emede, J., Adams, J.

¹ Hershships is represented by appointed counsel on appeal. There is no right to self-representation in California in a criminal appeal. (*In re Barnett* (2003) 31 Cal.4th 466, 473 (*Barnett*)). "[S]tates may exercise broad discretion when considering what representation to allow and may require an indigent [defendant] 'to accept against his will a state-appointed attorney' for representation on a direct appeal without violating the federal Constitution." (*Ibid.*, citing *Martinez v. Court of Appeal*, Fourth Appellate District (2000) 528 U.S. 152, 164.) With certain exceptions not applicable here (i.e., *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*)), a criminal defendant represented by appointed counsel on direct appeal may not file their own

1 misdemeanor.³ The instant appeal arises not from the original conviction, however, but from
2 rulings at Herships's 2020 probation revocation hearing.

3 Herships claims error on four bases: (1) the trial court violated his right to due process
4 and acted in excess of its jurisdiction when it proceeded with a new sentencing hearing at the
5 probation revocation hearing without first determining whether it had jurisdiction to do so; (2)
6 even if the trial court's actions could be interpreted as impliedly finding a revocation of
7 probation, such a finding was not supported by substantial evidence; (3) the trial court violated
8 state law and the United States Constitution's guarantee of due process when it failed to, on its
9 own motion, suspend criminal proceedings and initiate an inquiry into his competency; and (4)
10 the trial court violated his right to due process, denied him equal protection of the law, and
11 acted in excess of its jurisdiction when it failed to award credit for the time previously served in
12 custody in connection with this case.

13 Respondent concedes that at the time of final sentencing, Herships was entitled to
14 custody credits for the 30 days he spent in the county jail after he was initially sentenced.
15 Respondent invites this court to modify the judgment to acknowledge those custody credits.
16 They assert that correcting Herships's credits will result in a determination that Herships has
17 served his sentence, rendering the rest of his claims moot. Herships acknowledges the
18

19 briefs and arguments on the merits of their case, or supplement or supersede those of counsel,
20 and the court need not consider any such filings. (*Barnett*, at p. 473.) But such a party may file a
21 *Marsden*-type requests to substitute counsel, and the court will consider those, which are limited
22 to matters concerning representation. (Id. at pp. 473-474, see *People v. Marsden* (1970) 2
23 Cal.3d 118 (*Marsden*.) At the request of Herships and his counsel here, we conducted an
24 inquiry into Herships's apparent assertion he had been deprived of his right to effective counsel
25 and/or made a defacto request for his counsel's removal. We ordered, received, and reviewed
26 written submissions (which were ordered to be sealed in the court's file) by Herships and his
27 counsel. After consideration of the submissions, we see no basis to substitute appellate counsel
28 and Herships's request for his counsel's removal is denied.

26 ² Unless otherwise specified, all further statutory references are to the Penal Code.

27 ³ Herships was originally charged with vandalism – four hundred dollars and more (§
28 594, subds. (a) & (b)(1)), a felony. On April 19, 2007, a preliminary hearing was held. Before
any holding decision had been made, Herships moved for and the court granted a reduction of
the charge to a misdemeanor pursuant to section 17.

1 concession and agrees that so long as this court agrees with the resolution of his custody credits
2 claim, the remaining arguments are moot.

3 We accept the people's concession, find the trial court erred in denying Herships
4 custody credits relating to his 2009 incarceration, and will order the judgment corrected to
5 reflect those custody credits. With that correction, we agree that Herships has completed his
6 sentence and therefore the other issues raised on appeal are moot.

7 **FACTUAL AND PROCEDURAL HISTORY**

8 This appeal challenges only issues relating to Herships's probation revocation hearing.
9 The underlying facts are not in dispute and are not pertinent to the issues on appeal, and so are
10 not included here.

11 Our analysis begins with the terms of Herships's sentence following his conviction. On
12 October 2, 2009, almost ten months after the jury delivered its verdict, the sentencing judge (a
13 different judge than the trial judge) suspended imposition of sentence and placed Herships on
14 three years of formal probation with conditions, including completion of a three month anger
15 management program, a requirement that he must not practice law without a license, completion
16 of psychological treatment at the direction of probation, and a stay away order from the victim.
17 Herships was also ordered to serve a sentence of one year in the county jail, of which the
18 sentencing judge suspended all but 30 days. The sentencing judge also ordered that Herships
19 would not be eligible for any early release programs.

20 As an additional part of his sentence, Herships was ordered to pay fines and fees,
21 including a \$100 general fund fine, \$235 penalty assessment, \$100 restitution fine, and a \$20
22 court security fee. Finally, the sentencing judge ordered Herships to pay restitution to the victim
23 in the total amount of \$5,615.13. Herships was remanded into custody that day. At the time of
24 sentencing, no reference was made to any custody credits to which Herships may have been
25 entitled. On October 16, 2009, Herships's sentence was modified to reflect 16 actual days of
26 custody credit as of that date against the 30 days he was sentenced to serve in the county jail.

27 On July 15, 2011, a no-bail bench warrant issued for Herships's arrest based on alleged
28 violations of the terms of his probation. The warrant included a summary revocation of

1 probation. More than eight years later, on January 2, 2020, Herships was arrested on the
2 warrant. On January 9, 2020, Herships appeared in court in custody and was remanded without
3 bail. On January 17, 2020, the judge hearing the violation of probation (a different judge than
4 the sentencing judge) imposed a six month county jail sentence with no eligibility for early
5 release programs and ordered that Herships's probation be terminated. The court awarded
6 Herships 32 days of custody credits relating to his warrant-related incarceration, based on 16
7 actual days plus 16 days credit under section 4019. According to the minute order, fines and
8 fees were ordered to be collected civilly.

9 On February 14, 2020, Herships filed this appeal. On February 15, 2020, Herships filed
10 a Notice of Motion for Post Sentence Credits, alleging he had "served 20 days as a condition of
11 probation, making the correct number of presentence credits defendant is entitled to is 36 days."
12 In addition, Herships claimed he was "also entitled to act [sic] of 36 days, making a total of 72
13 days." Herships filed another "Notice of Motion to Correct Error in Presentence Credits" on
14 February 26, 2020. In this motion, he claimed the proper number of credits was 74 days and
15 requested a hearing where he could be present.

16 Herships's attorney filed a Request for Calendar Setting on March 3, 2020, asking for a
17 hearing on "Client's request to correct credits previously awarded." The request indicated
18 Herships had "credits from a previous commitment on the same case that he would like credited
19 toward his sentence." The case was scheduled for a hearing on March 6, 2020.

20 On March 3, 2020, the judge who sentenced Herships when he appeared on the warrant
21 issued a written order that stated, "Because the Court did not terminate probation and reinstate
22 the previously imposed one-year term, Defendant is not entitled to his prior credits against his
23 present sentence, which is a term of his probation and a consequence of the violation of his
24 probation." The order also deleted the sentence imposed on October 2, 2009 of one year in
25 county jail. The court cited to no authority in support of its order denying prior credits.

26 Herships appeared in court on March 6, 2020 on his Request for Calendar Setting. The
27 case was then continued to March 13, 2020. On March 13, 2020, the court (a different judge
28 than any that had made earlier rulings) denied the motion for additional credits.

1 On March 26, 2020, due to the COVID-19 pandemic, the supervising judge of the
2 criminal division issued an order to release a number of defendants, including Herships, from
3 custody within 72 hours and to stay their remaining sentences.

4 LEGAL AUTHORITY

5 Section 4019 provides that a person confined to county jail under a judgment of
6 imprisonment may earn additional days of custody credit so long as they have not refused to
7 satisfactorily perform labor as assigned and have satisfactorily complied with the reasonable
8 rules and regulations of the sheriff. (§ 4019, subds. (a) & (d).) At the time of Herships's 2009
9 confinement on his original 30 days sentence, Herships was entitled to two days of conduct
10 credit for every four days spent in jail. (*People v. Brown* (2012) 54 Cal.4th 314, 318.) By the
11 time of Herships's confinement after he was sentenced in 2020, section 4019 provided a person
12 so confined would earn four days of credit for every four days spent in custody. (§ 4019, subd.
13 (f).)

14 "A defendant may waive custody credits as a condition of probation, or in exchange for
15 other sentencing considerations. [Citations.] The waiver, however, must be 'knowing and
16 intelligent' in the sense that it was made with 'awareness of the consequences. [Citations.]"
17 (*People v. Salazar* (1994) 29 Cal.App.4th 1550, 1554.)

18 The failure to properly calculate custody and conduct credit is a jurisdictional error that
19 can be corrected at any time, including by a reviewing court. (*People v. Chilelli* (2014) 225
20 Cal.App.4th 581, 591.)

21 DISCUSSION

22 A. Custody Credits

23 It is undisputed that Herships received 16 days of actual credit against his original 30
24 day probation-related sentence on October 16, 2009. The record is silent as to the date of
25 Herships's release after that initial sentence, and neither party raises any concern that Herships
26 was not properly released at the conclusion of that sentence. Accordingly, we conclude
27 Herships is entitled to at least 30 days custody credit from that confinement. (Evid. Code, §
28 664.)

1 It is also undisputed that Herships was confined from January 2, 2020 until he was
2 released pursuant to the order dated March 26, 2020, presumably within 72 hours of March 26,
3 2020. (Evid. Code, § 664.) Accordingly, his actual custody time would be between 85 and 88
4 days, depending on the day he was released. The matching conduct credits would be between 84
5 and 88 days, resulting in total custody credits of 169 to 176 days against his 180 day sentence.

6 There has been no argument raised that Herships in some way waived any custody
7 credits at the time of sentencing on the violation of probation. Although the record is silent as to
8 exactly how many days Herships served on the 2009 sentence, we presume Herships was
9 released from custody in 2009 after serving custody time calculated as 30 days, including
10 conduct credit days. (Evid. Code, § 664.) Under any reasonable calculation, given Herships's
11 total credits of between 169 and 176 days of 2020 custody credits, Herships served in excess of
12 his 180 day sentence.

13 Accordingly, we conclude the trial court erred in denying Herships custody credits
14 relating to his 30 day probation-related sentence. Accordingly, we will order the judgment to be
15 modified to reflect that Herships was entitled to custody credits of 30 additional days. To make
16 the judgment complete, and finding the presumptions in Herships's favor, we will order the
17 judgment to be further modified to reflect custody credits of 176 days for his 2020 incarceration
18 (88 days of actual time plus 88 days credit under section 4019). Accordingly, Herships is
19 deemed to have fully served his 180 day sentence.

20 **B. Mootness of Other Issues**

21 Respondent argues that if this court determines Herships has served his sentence in its
22 entirety, the other issues raised in his appeal are moot, and Herships concurs. We agree. When
23 an appellant's jail term has been served, an appeal is moot because "the court's resolution of the
24 issue could offer no relief regarding the time he spent in custody . . ." (*People v. DeLeon*
25 (2017) 3 Cal.5th 640, 645.) In light of our determination above that Herships has served his
26 sentence in full, any other issues raised in his appeal are deemed to be moot. Further, we decline
27 to find the other claims of error to present "issue[s] of broad public interest that [are] likely to
28 recur," and so do not address them further. (See *In re William M.* (1970) 3 Cal.3d 16, 23.)

DISPOSITION

The judgment is ordered modified to reflect 30 days of presentence custody credit relating to Herships 2009 probation-related sentence, and to reflect 88 days actual time served in 2020 plus 88 days conduct credit under section 4019 for total custody credits of 206 days. Herships's sentence of 180 days is deemed to have been served in full. All other issues raised on appeal are deemed to be moot. The judgment is affirmed in all other respects.

A-111

S279781

SUPREME COURT
FILED

MAY 02 2023

SUPREME COURT No. _____

IN THE SUPREME COURT OF

Jorge Navarrete Clerk

THE STATE OF CALIFORNIA

Deputy

Howard R. Herships,

Court of Appeal No. H 050858

Petitioner,

Superior Court Nos. BB517233
20APO2650

Vs.

Santa Clara County Superior Court

Petition for Review
Exhaustion of State
Remedies under
CRC Rule 8.508

Respondent.
_____ /

PETITIONER FOR REVIEW AFTER
SUMMARY DENIAL OF A PETITION
FOR PREMEPTORY WRIT OF MANDATE
AGAINST THE SANTA CLARA COUNTY
SUPERIOR COURT BY THE SIXTH
APPELLATE DISTRICT

HOWARD R. HERSHIPS

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In Pro Per

A-112

SUPREME COURT

FILED

JUN 14 2023

Court of Appeal, Sixth Appellate District - No. H050858

Jorge Navarrete Clerk

S279781

IN THE SUPREME COURT OF CALIFORNIA

Deputy

En Banc

HOWARD R. HERSHIPS, Petitioner,

v.

SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent;

THE PEOPLE, Real Party in Interest.

The petition for review is denied.

GUERRERO

Chief Justice

Proof of Service under Rule 29

I declare as follows:

That I placed a true copy of Applicant's Request for Extension of time in sealed envelope addresses as follows

Matthew L. Green
Best Best & Krieger LLP
655 West Broadway, 15th Floor
San Diego, California 92101

I then fully prepaid second day delivery by FedEx to the attorney for the Superior Court of California County of Santa Clara.

I declare under penalty of perjury that all of the above is true and correct

Dated Oct. 15, 2026.
At Sacramento County


Howard R. Herships