

Department of Justice Civil Rights Division’s 2017 Memorandum: “Examples and Resources to Support Criminal Justice Entities in Compliance with Title II of the Americans with Disabilities Act” (2017 DOJ Memo).¹

I. ADA Requirements for State Court Proceedings

Persons with mental health disabilities are “qualified individual[s] with a disability” under the ADA. 2017 DOJ Memo, at 1.² Title II of the ADA “protects individuals with mental health disabilities . . . from discrimination within the criminal justice system.” *Id.* It requires affirmative steps be taken by all state criminal justice entities – including courts and prosecutors – to “ensure that people with mental health disabilities . . . are treated equally in the criminal justice system[.]” *Id.* “Nondiscrimination requirements” include “providing reasonable modifications to policies, practices, and procedures[.]” *Id.*

Discrimination, due to a mental health disability, is banned within “services, programs, and activities” of all “justice system entities,” including the courts. *Id.* at 1-2; 28 CFR pt. 35 app. B, at 690 (“All governmental activities of public entities,”

¹ The 2017 DOJ Memo is a “Technical Assistance Publication” interpreting the ADA for present purposes. In the ADA, Congress specifically required DOJ to issue such interpretive guidance. This is one of several published technical assistance memoranda that DOJ has produced pursuant to the ADA.

² Federal law defines disability as a physical or mental impairment that substantially limits one or more major life activities, when there is a record of such an impairment or the person is regarded as having such an impairment. 42 U.S.C. § 12102; 28 C.F.R. § 36.105. “The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.” 42 U.S.C. § 12102 (4)(A).

including the “judicial” branch of State government). “Such services, programs, and activities **include . . . taking testimony,**” as well as sentencing. 2017 DOJ Memo at 2 (emphasis added). Because of this prohibition, the entity (court) must “[m]ake reasonable modifications in policies, practices, or procedures when necessary to avoid disability discrimination[.]” *Id.* at 3.

This Court thus has an obligation under the ADA to make “reasonable modifications to rules, policies, or practices” so that [REDACTED] can fully participate in this proceeding. 42 U.S.C. sec. 12131(2). Reasonable modifications are not required if they would “fundamentally alter the nature of the service, program, or activity,” 28 CFR sec. 35.130(b)(7)(i), or result in “undue financial and administrative burdens.” 28 CFR sec. 35.150(a)(3). But none of the reasonable modifications requested below would do that.

II. [REDACTED] Disability

As relevant to the accommodations sought here, Mr. [REDACTED] has been diagnosed with Post Traumatic Stress Disorder, Major Depressive Disorder, and Anxiety, by [REDACTED], LCSW-C, LICSW (CV attached), who evaluated him in [REDACTED] and [REDACTED], and will be present in court on [REDACTED], should the Court have any questions for her. In addition to these recognized mental health disorders, Mr. [REDACTED] scored very high on a suicidality scale. All of these conditions are severe, interrelated, and complex in

that they have been compounded by new traumatic events occurring throughout Mr. [REDACTED] life.

Some of the traumatic events in Mr. [REDACTED] past are detailed here, as relevant criteria supporting his PTSD diagnosis. Having never met his parents, he was raised by his grandmother, who was a very poor subsistence farmer in [REDACTED]. He was often hungry and without shoes or sufficient clothing. At age nine he was raped by an adult man several times. As an adolescent, police repeatedly assaulted him (including pulling him out of school), erroneously suspecting he was a gang member³; and actual gang members also assaulted him because he refused to join a gang. The gang [REDACTED], for example, inflicted the following brutal violence on him:

- they beat him with a bat and left him for dead; he couldn't walk for five days;
- when he was 13, gang members took him, his cousin and a friend from Mr. [REDACTED] home, tied them up and gagged them, and took them to a remote wooded area; they then cut his friend into pieces (removing his hands and head with a machete) in front of him, and threatened to do the same to him;
- gang members grabbed him and his cousin and took them to a house, forced them to dig a hole while beating them, and then brought an unknown man to the hole and cut him up while he was still alive.

³ This was a common experience for many boys of that age in El Salvador at the time.

After these incidents, the gang began threatening Mr. [REDACTED] even more, causing him to go into hiding, and ultimately to leave the country.⁴

After he immigrated to the United States, to live with his sister in [REDACTED] [REDACTED] Mr. [REDACTED] was approached by [REDACTED] gang members at his high school, due to the area of [REDACTED] he was from. Because he refused to join them, however, they beat him with a bat outside of his sister's home. Mr. [REDACTED] [REDACTED] reported the incident – and his attackers – to authorities. After he was subpoenaed to testify against them, the gang began continuously harassing him and threatened to kill his family. On two occasions they tried to stab him, and he only narrowly escaped inside his sister's apartment for safety; on another, they showed him photos of the mutilated corpse of [REDACTED].

Mr. [REDACTED] has also suffered multiple violent rapes while incarcerated, beginning with a cellmate in the [REDACTED] Detention Center who was a gang member and knew about Mr. [REDACTED] past cooperation with authorities. Later, while in immigration detention, he was repeatedly coerced to perform oral sex on an inmate (a gang member), under threat, and then violently anally raped while another inmate kept watch. (He reported this attack and tried to press charges.)

⁴ The traumatic events Mr. [REDACTED] experienced in [REDACTED] were fully credited by the Immigration Court that granted him asylum. See Exhibit 1 to Mr. [REDACTED] pending habeas corpus petition, at 5.

Mr. [REDACTED] has also attempted suicide many times. While incarcerated in [REDACTED] awaiting sentencing in the present case, he cut himself several times with a razor and tried to hang himself with a sheet. He was hospitalized at [REDACTED] more than once.

All of these traumatic events have taken a toll. Mr. [REDACTED] reports he can still hear the screams of people wailing as they were mutilated and murdered before his eyes in [REDACTED]. He suffers auditory hallucinations along the same theme as these horrors; which also at times urge him to end his own life.⁵ He is prescribed medication for those symptoms, but the medication does not eliminate them entirely. The symptoms increase surrounding moments of elevated stress, anxiety, and fear. He experiences flashbacks, nightmares, and intrusive memories and thoughts of past events. He feels nervous, anxious, a constant sense of dread, and a high level of fear that someone is going to hurt him or kill him.

Specifically relevant to the upcoming evidentiary hearing, as explained to counsel by expert and evaluator [REDACTED], Mr. [REDACTED] mental health disabilities cause him to experience or display the following traits:

- One feature of Mr. [REDACTED] mental disabilities is “cognitive perceptual disruption.” This manifestation causes a person to have

⁵ Mr. [REDACTED] specific depression diagnosis is “Major Depressive Disorder, recurrent, severe, with mood-congruent psychotic features.” “Mood-congruent psychotic features” means the presence of delusions or hallucinations whose content is consistent with the typical depressive themes of person inadequacy, guilt, disease, death, nihilism, or deserved punishment. In addition, “command auditory hallucinations,” such as those that direct a person to harm themselves, can occur with not only Major Depressive Disorder, but also with severe PTSD.

disturbances in their senses *e.g.* tunnel vision, blurred vision, ringing or buzzing in the ears. For Mr. [REDACTED], these disturbances in his senses include the auditory hallucinations mentioned above; and will occur even though outwardly he may appear relaxed.

- Cognitive perceptual disruption can also cause a person to experience a “blank mind” when triggered by stressors or fear; outwardly it might appear that a person is callous or disinterested, but this is instead an unconscious brain response that protects a person from re-experiencing past traumas.
- Finally, Mr. [REDACTED] recurrently displays a slight “smile” (sometimes described as a “smirk”) without his intention to do so. This is an atypical but recognized feature of depression that can mask true mental states, including suicidal ideation.

Certain known triggers can cause or exacerbate his disabilities, including cold/harsh surroundings, isolation, leading or repetitious questions, questioning specifically about past traumatic events, and the presence of visual reminders or people associated with past traumatic events. To reduce these triggers, counsel request certain modifications of courtroom procedure under Title II of the ADA; due process (fundamental and procedural fairness); and equal protection of law. These reasonable accommodations would increase Mr. [REDACTED] ability to meaningfully participate in his upcoming hearing.

III. Reasonable Modifications Requested

Mr. [REDACTED] respectfully requests the following accommodations at his [REDACTED] evidentiary hearing:

1. Leave to waive his appearance – without any adverse inference or prejudice – during:

- a. testimony or discussion of traumatic events in [REDACTED], and violent assaults by gang members in the United States;
 - b. testimony from Officer [REDACTED];
 - c. testimony from [REDACTED]; and
 - d. at other times as needed, when other traumatic or triggering subject matter comes up in testimony or argument.
2. Leave for Mr. [REDACTED] to give his testimony while seated at counsel table, rather than the witness stand (with the understanding that neither of his attorneys would counsel him during his testimony);
 3. Leave for counsel to conduct direct examination of Mr. [REDACTED] in Spanish;
 4. Leave to allow Mr. [REDACTED] to take breaks during his testimony as needed if his mental health symptoms are triggered;
 5. Leave to establish Mr. [REDACTED] testimony about his history of victimization by gangs through his existing affidavits.

IV. Request to Place This Filing Under Seal

Mr. [REDACTED], through counsel, respectfully requests that this filing and attachments be placed under seal because they contain not only personal medical information, but also information that could put Mr. [REDACTED] at risk of gang retaliation.

Respectfully Submitted,

[Redacted]

By Counsel

Counsel for the Petitioner:

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]