UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
Tallahassee Division

CHRISTOPHER VILLANUEVA, Plaintiff, vs. MICHAEL D. CREWS, in his official capacity as Secretary of the Florida Department Corrections; CORIZON, LLC, an out of state corporation registered and doing business in Florida; and WILLIAM NIELDS, in his individual capacity, Defendants.	)	Case No.

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

and

REQUEST FOR A PROMPT HEARING

and incorporated

MEMORANDUM OF LAW

Plaintiff, by and through undersigned counsel, and in accordance with Rule 65, Federal Rules of Civil Procedure, requests that this Court enter a preliminary injunction ordering Defendants to provide Plaintiff with a reasonable accommodation for his disability, namely, the necessary physical therapy and associated medical care to ensure he gets the benefit of his leg prosthesis and in the interim is provided aluminum crutches.

Plaintiff relies upon his Verified Complaint (DE 1) and the attached Declaration of Dr. Tamar Ference (Exh. 1) in support of this Motion. Briefly, Plaintiff was incarcerated in the Florida Department of Corrections for five years, during which he was able to keep his prosthetic leg without incident. After Plaintiff re-entered the FDOC two years later, however, Defendants took away Plaintiff's prosthesis without any justification whatsoever and refused to return it—against the recommendation of an FDOC doctor—for nearly two years, causing Plaintiff's leg to shrivel, as he lost muscle mass, muscle tone, strength, and range of motion below his left knee. After nearly two years of Plaintiff begging to have his prosthesis returned, and after Plaintiff's counsel requested his medical records and visited him at the institution, Defendants finally had a new prosthesis made without any explanation. However, after a near two-year delay, the prosthesis alone is useless without the necessary physical therapy and associated medical care, as Plaintiff cannot wear the prosthesis and his leg will not begin the healing process without it. Defendants have to date refused to provide the required daily physical therapy and care that Plaintiff desperately needs,[1] rendering Plaintiff's newly manufactured prosthesis useless.

In doing so, Defendants have intentionally discriminated against the Plaintiff in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*., Section 504 of the Rehabilitation Act, and exhibited deliberate indifference to serious medical needs and risk of harm in violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment to the U.S. Constitution. Moreover, absent injunctive relief, Plaintiff will continue to suffer irreparable injury, there is a substantial likelihood that the Plaintiff will ultimately prevail on the merits, there is a greater injustice to Plaintiff if the requested injunction is denied than harm to the Defendants if it is granted, and granting the requested the relief will not disserve the public interest.

[1]*See* attached Declaration of Tamar Ference, M.D, filed contemporaneously this date in support of Plaintiff's Motion for a Preliminary Injunction. Exh. 1.

A prompt hearing on this Motion is requested so as to put an end to the Defendants' unconstitutional and unlawful conduct so the Plaintiff can obtain the required physical therapy and regain the ability to walk.

I. Statement of Facts[2]

Plaintiff Christopher Villanueva is a state prisoner currently incarcerated at the FDOC's Mayo Correctional Institution. Verified Complaint at ¶ 9 (DE 1). Mr. Villanueva was involved in an all-terrain vehicle accident in 1991, and severely injured his left leg. As a result of a subsequent infection, his left leg was amputated several inches below his knee in 1993.[3] *Id.* He purchased a titanium and carbon fiber prosthesis costing $8,000 to $10,000 in 1993 so he could walk naturally, run, work, and exercise just as a non-disabled person. *Id.* at ¶¶s 14-17.

Mr. Villanueva was first incarcerated in the FDOC in 2000 with his prosthesis. *Id.* at ¶ 16. During the entire time of his incarceration until his release in 2005, Mr. Villanueva was allowed to maintain his prosthesis without any incident whatsoever. *Id.* As a result of having his prosthesis the first time he was incarcerated, Mr. Villanueva was able to walk, run, exercise, work, easily get around the prison, and otherwise participate in all FDOC programs and services just as if he was a non-disabled inmate. *Id.* at ¶ 17. Furthermore, by having a prosthesis the first time he was incarcerated, Mr. Villanueva did not lose muscle tone and muscle mass in his left side and leg, did not experience the same type of pain in his left leg as he is currently experiencing, and did not suffer great embarrassment and mental stress. *Id.*

After he was released in 2005, Mr. Villanueva failed to register as a convicted felon and eventually was returned to the custody of the FDOC on March 22, 2012. *Id.* at ¶ 18. During the

[2]Pursuant to Rule 10(c), Federal Rules of Civil Procedure, Plaintiff incorporates the Verified Complaint's Factual Allegations at ¶¶ 14-26 (DE 1) as if fully set forth herein.
[3]Plaintiff's medical records incorrectly state throughout that the date of his leg amputation was 1997 even though it was 1991. Verified Complaint, ¶14 (DE 1).

initial classification process at the Reception and Medical Center (RMC) in Lake Butler, the security officer doing intake took Mr. Villanueva's prosthesis from him stating it was "a security risk." *Id*. He was instead given a pair of wooden crutches. *Id*. The use of wooden crutches quickly proved to be inadequate as a substitute and reasonable accommodation for his disability. *Id*.

Soon after Mr. Villanueva was processed at RMC for his permanent camp, he arrived in April 2012 at his first and only permanent institution, Mayo Correctional Institution. Mr. Villanueva requested that his prosthesis be returned, or a new prosthesis be manufactured. *Id*. at ¶ 19. Plaintiff also complained that his left leg was in pain, and he was already losing muscle tone, strength and muscle mass in his left leg. *Id*. It is not unusual for inmates to be allowed to possess a titanium and carbon fiber prosthesis just as Mr. Villanueva had the first time he was incarcerated as long as it is not used as a weapon, to hide contraband, or to hit someone. *Id.*

As a result of being denied the return of his prosthesis or the manufacture of a new one, Mr. Villanueva was excluded from participation in or denied the benefits of being able to work in more meaningful jobs, to exercise, to run, to walk just as able bodied inmates are allowed to do by the FDOC, and the failure to accommodate his disability has resulted in his inability to participate in these and other FDOC programs, services and benefits offered at Mayo CI. *Id*. at ¶ 23.

Mr. Villanueva filed numerous grievances requesting to be sent to the brace clinic to be fitted for a new prosthesis. Each request to be sent to the brace clinic at RMC to have a new prosthesis manufactured was sent by medical staff at Mayo to Utilization Management in Tallahassee, where each time it was denied. *Id*. at ¶ 20; Exh. 2. Seeking Utilization Management approval is the last step in having a medical procedure approved. *Id*. Utilization Management acts

as the Defendants' "gatekeeper." Without prior approval by Utilization Management, a medical procedure requiring any significant expenditure of money is simply not performed. *Id.*

Finally, after nearly two years of requesting that his prosthesis be returned, and after Plaintiff's counsel began investigating this matter, Plaintiff was finally given a new prosthesis. However, because of the delay which caused Plaintiff's leg to shrivel, the prosthesis does not fit correctly, Plaintiff has no range of motion in his left leg below his knee, and Plaintiff cannot wear it without getting severe blisters. Moreover, the prosthesis alone is insufficient for Plaintiff to begin the healing process; it must be accompanied by physical therapy and other medical care. However, Defendants have refused to provide Plaintiff with the required physical therapy, thus rendering his prosthesis useless. His leg continues to deteriorate, losing muscle mass, tone, and strength. With every day that passes without the required care, it becomes more likely that Mr. Villanueva may never be able to use his prosthesis again unless he is immediately provided daily physical therapy. Declaration of Tamar Ference, M.D., ¶¶ 21-22, Exh. 1.

Mr. Villanueva has fully used the inmate grievance process at the institutional levels and on appeal to both Defendants. *Id*. at ¶ 21. Mr. Villanueva also submitted an ADA Grievance to Martie Taylor, the FDOC's ADA Coordinator in Tallahassee. *Id*. at ¶ 21. Ms. Taylor never even bothered to respond to Mr. Villanueva's ADA Grievance. *Id*.

II. Need for a Preliminary Injunction

A preliminary injunction should issue if the Plaintiff successfully demonstrates that (1) there is a substantial likelihood of success on the merits; (2) the Plaintiff will suffer irreparable injury if the injunction is not issued; (3) the threatened harm to the Plaintiff outweighs any potential harm to the opposing party; and (4) the injunction, if issued, would not be adverse to the public interest. *Bellsouth Telecomms., Inc. v. MCI Metro Access Transmission Servs., LLC*, 425

F.3d 964, 968 (11th Cir. 2005); *Haitian Refugee Center, Inc. v. Nelson*, 872 F.2d 1555, 1561-62 (11th Cir. 1989), *aff'd* 498 U.S. 479 (1991); *Palmer v. Braun*, 287 F.3d 1325, 1329 (11th Cir. 2002).

This standard is not rigidly applied by assigning a fixed quantitative value to each of the four factors. Rather, a flexible scale -- which balances each consideration and arrives at the most equitable result, given the particular circumstances of each case -- is used. *Texas v. Seatrain International, S.A.*, 518 F.2d 175, 180 (5th Cir. 1975). And of all the factors, the "principal and overriding prerequisite is irreparable harm resulting from the absence of an adequate legal remedy." *Sampson v. Murray*, 415 U.S. 61, 88-92 & n.68 (1974). "It is the threat of harm that cannot be undone which authorizes exercise of this equitable power to enjoin before the merits are fully determined." *Parks v. Dunlop*, 517 F.2d 785, 787 (5th Cir. 1975). Plaintiff easily meets each of these four requirements.

Money damages simply will not make the Plaintiff whole. Only injunctive relief can provide a meaningful remedy to the Plaintiff.

A. Plaintiff Villanueva Has a Substantial Likelihood of Success on the Merits of his Claims for the Violations of the ADA and Rehabilitation Act

1. Defendant Crews has violated and continues to violate the American with Disabilities Act ("ADA")

In 1990, Congress enacted the Americans with Disabilities Act ("ADA"), as amended by the ADA of 2008, "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Title II of the ADA, which prohibits public entities from discriminating against certain individuals on account of that individual's disability, provides:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs,

> or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

Under the ADA, a "qualified individual with a disability" is a person who "with or without reasonable modifications to rules, policies or practices … or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. §12131(2). The Supreme Court has held that a disabled prisoner can state a Title II ADA claim if he is denied participation in an activity in state prison as a result of his disability. *See U.S. v. Georgia*, 546 U.S. 151, 154 (2006); *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 211 (1998); *see also Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1081 (11th Cir. 2007) (Title II of the ADA is applicable to services, programs and activities within prisons); *Raines v. State of Fla.*, 983 F. Supp. 1362, 1369-70 (N.D. Fla. 1997) (pursuant to Title II of the ADA, prisoners may not be discriminated against on account of their disability).

Title II of the ADA further requires the Attorney General to promulgate regulations that implement its prohibitions against discrimination. 42 U.S.C. § 12134(a). These regulations provide that:

> "[A] public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity."

28 C.F.R. § 35.160(b)(1). Moreover, the regulations states that "[i]n determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities." *Garcia v. Taylor*, 2009 WL 2496521, *10 (N.D. Fla. 2009) (citing 28 C.F.R. § 35.160(b)(2)).

Auxiliary aids such as prostheses are required to be provided to qualified individuals so long as their provision does not fundamentally alter the nature of the service or activity of the public entity. *Tennessee v. Lane*, 541 U.S. 509, 531-32 (2004).

In the prison context, "failure to make reasonable accommodations to the needs of a disabled prisoner may have the effect of discriminating against that prisoner because the lack of an accommodation may cause the disabled prisoner to suffer more pain and punishment than non-disabled prisoners." *McCoy v. Texas Dept. of Criminal Justice*, 2006 WL 2331055, *7 (S.D. Tex. 2006) (citing *United States v. Georgia*, 546 U.S. 151, 126 S.Ct. 877, 880-81 (2006)).[4]

Thus, in order to prove their ADA claim and prevail on the merits, Plaintiff must establish (1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities; and (3) that the exclusion, denial of benefit, or discrimination was by reason of the Plaintiff's disability. *Bircoll*, 480 F.3d at 1083; *Shotz v. Cates*, 256 F.3d 1077, 1079 (11th Cir. 2001) (citing 42 U.S.C. § 12132). In a failure to accommodate case in the prison context, courts have also held that a plaintiff may show that he was denied reasonable accommodations that would enable him or her to more fully participate in the services, programs and activities provided prisoners. *Scott v. District of Columbia*, 2006 WL 1409770, *3 (D.D.C. 2006).

In this case, Plaintiff has clearly established that he is "disabled" under the ADA, and that with a prosthesis he is otherwise qualified to enjoy the programs and services currently utilized by the non-disabled inmates within the FDOC, were he provided a reasonable accommodation to do so. While this initial element of Plaintiff's ADA claim has not yet been disputed by Defend-

[4]The "[t]hree theories of discrimination" that exist under the ADA are "(1) intentional discrimination; (2) discriminatory impact; and (3) a refusal to make a reasonable modification." *Swenson v. Lincoln County School Dist. No. 2*, 260 F.Supp.2d 1136, 1144 (D. Wyo. 2003).

ants, it should be noted at the outset that the ADA defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of an individual," and that the phrase "major life activities" has been defined to include "walking." *See Gilday v. Mecosta County***,** 124 F.3d 760, 763, n. 3 (6th Cir. 1997) (". . a person with only one foot is disabled under the ADA even if a prosthesis allows him to function just as well as most two-footed people. This is a core case of disability, and if the medical device fails or is unavailable the impairment would limit the major life activity of walking. *See* 29 C.F.R. § 1630.2(i).") (case citation omitted)). Thus, persons with only one foot have been consistently recognized by the courts as "disabled" as defined by the ADA. *Id.*

Mr. Villanueva has established that he has been denied a reasonable accommodation, and has been "excluded from participation in or denied the benefits of a public entity's services, programs, or activities," as a result of his disability. *Bircoll*, 480 F.3d at 1083; *Scott*, 2006 WL at *3. He cannot fully participate in recreation and work opportunities, and his mobility is constantly limited at all times. Defendants have been made aware of this, yet have failed to correct it for two years.

While Defendants may allege that they already provide Plaintiff with a reasonable accommodation to walk, e.g., crutches and now a new prosthesis, thereby rendering Plaintiff's request for an additional accommodation – physical therapy -- unreasonable, such an argument would be unavailing. Whether an accommodation is "reasonable" requires "a balancing of all the relevant facts, including: (1) the size, facilities, and resources of the defendant, (2) the nature and cost of an accommodation, (3) the extent to which the accommodation is effective in overcoming the effects of the disability, and (4) whether the accommodation would require a fundamental alteration in the nature of the defendant's program." *McCoy*, 2006 WL 2331055 at *9

(citing 45 C.F.R. § 84.12(c)(1-3)); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 288 n. 17 (1987); *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1386 (3d Cir. 1991). Additionally, pursuant to the Appendix to DOJ Regulation § 35.160, "[t]he public entity shall honor the [disabled individual's] choice [of auxiliary aid] unless it can demonstrate another means of [walking]." 28 C.F.R. pt. 35, app. A; *see also id*. § 35.160(b)(2) ("In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.").

Defendants' suggested accommodation of crutches -- or now a new prosthesis which the Plaintiff is unable to use -- is clearly ineffective to accommodate Plaintiff's disability. The use of crutches or a wheelchair, which Defendants insisted be used as an accommodation for Mr. Villanueva for the past two years, are clearly ineffective to accommodate the loss of one's leg below the knee. Providing Mr. Villanueva with simply a new prosthesis and without the necessary physical therapy he now needs as a result of not having a prosthesis for two years is tantamount to not giving him a prosthesis at all. Because as a result of non-use of his left leg with a prosthesis, Mr. Villanueva has now lost total range of motion below the knee and needs physical therapy 3-5 days a week by someone trained in giving physical therapy to persons with leg prostheses until such time as he can regain use of his left leg with the new prosthesis. Exh. 1, Declaration of Tamar Ference, M.D., ¶¶ 15-22.

2. *Defendants have Violated and Continue to Violate Section 504 of the Rehabilitation Act*

Like the ADA, the Rehabilitation Act prohibits discrimination on the basis of disability in federally conducted programs and in all of the operations of public entities that receive federal financial assistance. Specifically, the Rehabilitation Act provides, in relevant part, that:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. . . .

28 U.S.C. § 794(a).

Discrimination claims under the Rehabilitation Act are governed by the same standards used in ADA cases, and the two statutes are generally construed to impose the same requirements. *See Allmond v. Akal Sec., Inc.*, 558 F.3d 1312 (11th Cir. 2009); *Cash v. Smith*, 231 F.3d 1301 (11th Cir. 2000). This principle follows from the similar language employed in the two acts, and from the Congressional directive that implementation and interpretation of the two acts "be coordinated to prevent imposition of inconsistent or conflicting standards for the same requirements under the two statutes." *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 468 (4th Cir. 1999) (citing 42 U.S.C. § 12117(b)); *see also Yeskey v. Com. of Pa. Dep't of Corr.*, 118 F.3d 168, 170 (3rd Cir. 1997) ("[A]ll the leading cases take up the statutes together, as we will."), *aff'd*, 524 U.S. 206 (1998). As a result, "[c]ases decided under the Rehabilitation Act are precedent for cases under the ADA, and vice-versa.". *Cash*, 231 F.3d at 1305.

As argued more fully above, Plaintiff has already established that he is a (1) qualified individual with a disability in the United States; (2) that he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities; and (3) that the exclusion, denial of benefit, or discrimination was by reason of his disability. *Bircoll*, 480 F.3d at 1083; *Shotz v. Cates*, 256 F.3d at 1079; *see also* 28 U.S.C. § 794(a); 42 U.S.C. § 12132. Thus, in order to fully prevail on his Rehabilitation Act claim Plaintiff need only to additionally establish that "the program or activities from which they are excluded are operated by an agency that re-

ceives federal financial assistance." *Harris v. Thigpen*, 941 F.2d 1495, 1522 (11th Cir. 1991) (emphasis supplied).

As the FDOC receives federal funds, there is a substantial likelihood exists that Plaintiff will prevail on the merits of his Rehabilitation Act claim. Exh. 2, Upchurch Dep. 12:1-15; *see also Harris v. Thigpen*, 941 F.2d at 1522; *Schroeder v. City of Chicago, et al.*, 927 F.2d 957 (7th Cir. 1991) (clarifying that the Rehabilitation Act, as amended in 1988, applies to "the entirety of any state or local institution that [has] a program or activity funded by the federal government."); *Bonner v. Ariz. Dep't of Corr.*, 714 F. Supp. 420, 422 (D. Ariz. 1989) (holding that Rehabilitation Act plaintiff is entitled to appropriate auxiliary aids in all operations of the Department of Corrections, regardless of which specific program receives federal funds) (emphasis added).

B. Plaintiff Villanueva Has a Substantial Likelihood of Success on the 8th Amendment Claims As Defendants Crews and Corizon Have Violated and Continue to Violate the Cruel and Unusual Punishment Clause

"To prevail on a claim of deliberate indifference to serious medical need in violation of the Eighth Amendment, Mr. Villanueva must show: '(1) a serious medical need; (2) the defendant['s] deliberate indifference to that need; and (3) causation between that indifference and the plaintiff's injury.'" *Gilmore v. Hodges*, 738 F.3d 266, 273 (11th Cir. 2013), *citing Youmans v. Gagnon*, 626 F.3d 557, 563 (11th Cir. 2010) (quoting *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1306-07 (11th Cir. 2009)). This analysis contains both an objective and a subjective component. *Id., citing Thomas v. Bryant*, 614 F.3d 1288, 1304 (11th Cir. 2010). Mr. Villanueva must first show an objectively serious medical need that, if unattended, posed a substantial risk of serious harm, and that the official's response to that need was objectively insufficient. *Id., citing Bingham v. Thomas*, 654 F.3d 1171, 1175-76 (11th Cir. 2011). Second, the plaintiff must establish that the official acted with deliberate indifference, i.e., the official subjectively knew of and dis-

regarded the risk of serious harm, and acted with more than mere negligence. *See id.; Taylor v. Adams*, 221 F.3d 1254, 1258 (11th Cir. 2000).

"A serious medical need is 'one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.'" *Youmans*, 626 F.3d at 564 (quoting Mann, 588 F.3d at 1307). "In general, serious medical needs are those 'requiring immediate medical attention.'" *Id*. (quoting *Hill v. Dekalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1190 (11th Cir. 1994)).

Second, to prove "deliberate indifference" to a serious medical need, Mr. Villanueva must show "(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than [gross] negligence." *Townsend v. Jefferson Cnty.*, 601 F.3d 1152, 1158 (11th Cir. 2010) (alteration in original) (quoting *Bozeman v. Orum*, 422 F.3d 1265, 1272 (11th Cir. 2005)). "Under section 1983 'knowledge of the need for medical care and intentional refusal to provide that care has consistently been held to surpass negligence and constitute deliberate indifference.'" *Carswell v. Bay Cnty.*, 854 F.2d 454, 457 (11th Cir. 1988) (quoting *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 704 (11th Cir. 1985)); see also *Bingham*, 654 F.3d at 1176 ("A complete denial of readily available treatment for a serious medical condition constitutes deliberate indifference.").

Both prongs are easily satisfied here. Mr. Villanueva has been experiencing pain, and has been losing muscle mass, tone, and strength in his left leg because he did not have his prosthesis for two years. Having one's leg wither away when it is preventable certainly qualifies as a serious medical need. Indeed, the FDOC's own doctor, Dr. Solorzano, recommended that Plaintiff be given a prosthesis on more than one occasion, only to have his recommendation denied by Defendants Crews, Corizon, and Nields, head of the FDOC's Utilization Management, until just

recently. Mr. Villanueva is still unable to use his new prosthesis because he has lost range of motion below the knee and gets blisters because he has not been given physical therapy, thereby making his new prosthesis unusable.

Defendants knew, and still know now, that Mr. Villanueva did not have access to his prosthesis—indeed, they were the ones who ordered that it be taken away, and then refused to allow him to have it back, against the recommendation of the FDOC's own doctors. They further knew, and still know, that not having his prosthesis is causing Mr. Villanueva to experience pain, blisters, and causing loss of muscle mass, tone, and strength, as Mr. Villanueva has submitted numerous grievances detailing this information. They also know that Mr. Villanueva has not received the physical therapy required to actually make his prosthesis useable and to prevent the further deterioration of his leg. Yet Defendants have ignored this information, and have chosen to allow Mr. Villanueva to suffer instead. The Eleventh Circuit has "long held that deprivation of needed eyeglasses or **prosthetic devices** stated an Eighth Amendment violation because the unavailability of eyeglasses or prostheses may lead to 'severe harm.' " *Gilmore v. Hodges*, 738 F.3d at 274–75 (emphasis supplied); *see also Farrow v. West*, 320 F.3d 1235, 1243–44 (11th Cir. 2003) ("In certain circumstances, the need for dental care [including dentures] combined with the effects of not receiving it may give rise to a sufficiently serious medical need to show objectively a substantial risk of serious harm.").

C. Plaintiff Will Continue to Suffer Irreparable Injury in the Absence of a Preliminary Injunction

Having demonstrated a substantial likelihood of success on the merits, Plaintiff must next demonstrate that he will suffer irreparable injury if the requested injunction is not issued. *Haitian Refugee Center, Inc.*, 872 F.2d at 1561-2. "Irreparable injury" is distinguishable from mere injury, in that irreparable injury cannot be adequately compensated through the award of money.

United States v. Jefferson County, 720 F.2d 1511, 1520 (11th Cir. 1983); *Ray v. School District of DeSoto County*, 666 F. Supp. 1524, 1535 (M.D. Fla. 1987).

In the context of the ADA and Rehabilitation Act, courts have consistently held that "discrimination on the basis of disability is the type of harm that warrants injunctive relief." *Doe v. Judicial Nominating Commission for the Fifteenth Judicial Circuit of Florida*, 906 F. Supp. 1534, 1545 (S.D. Fla. 1995); *Spiegel v. City of Houston*, 636 F.2d 997 (5th Cir. 1981).[5] Irreparable harm has been suffered and injunctive relief is appropriate "when a disabled person loses the chance to engage in a normal life activity." *D'Amico v. N.Y. State Board of Law Examiners*, 813 F. Supp. 217, 220 (W.D.N.Y. 1993); *Ray*, 666 F. Supp. at 1535 ("Denial of the opportunity to lead as normal an educational and social life as possible" constitutes irreparable injury). Indeed, because it is often difficult for individuals with disabilities to create their own recreational opportunities, the exclusion of disabled individuals from such opportunities causes irreparable emotional and psychological harm, for which injunctive relief is appropriately granted. *Concerned Parents to Save Dreher Park v. City of West Palm Beach*, 846 F. Supp. 986, 992 (S.D. Fla. 1994); *Tugg*, 864 F. Supp. at 1209; *Chalk v. U.S. Dist. Court Cent. Dist. of California*, 840 F.2d 701, 709 (9th Cir. 1988) ("[I]rreparable injury was found in the consequent emotional stress, depression and reduced sense of well-being, which constituted psychological and physiological distress … the very type of injury Congress sought to avert.") (citations omitted).

That Plaintiff will suffer such irreparable harm here is indisputable. For the past year and eleven months, Mr. Villanueva has been unable to keep his prosthesis or have a new one manufactured so he could walk, run, exercise and work at RMC and Mayo CI, just as non-handicapped inmates are able to do, solely on the basis of his disability and Defendants refusal to

[5]In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), the Eleventh Circuit adopted all decisions of the Fifth Circuit rendered prior to October 1, 1981 as binding precedent.

provide a reasonable accommodation. DE 1 at ¶¶ 23-25. Defendants' decision to take away the prosthesis which he had for five years during an earlier incarceration, not provide a new one for nearly two years, and to give him wooden crutches instead, has caused Mr. Villanueva to lose muscle mass and muscle tone in his left leg and left side of his body, and lose range of motion in his left leg below the knee. Already excluded from certain prison work assignments and faced with the daily stress of not being able to walk, run, and exercise with other inmates by reason of his disability, Plaintiff Villanueva is now cell bound for the most part by virtue of having to ambulate on crutches. The denial of this opportunity to more easily get around – one which is so vital to those individuals who are incarcerated – and the resulting physical, emotional and psychological stress which it creates – cannot be fully compensated later by a monetary remedy. *See Jefferson County*, 720 F.2d at 1520.

Without the proper physical therapy and associated medical care sought here, the recently provided prosthesis is useless, and Plaintiff continues to suffer from deterioration of his leg. Declaration of Tamar Ference, M.D., at Exh. 1. His leg continues to deteriorate, losing muscle mass, tone, and strength. If this continues, the harm to his leg may become permanent, thus preventing Plaintiff from ever using a prosthesis again. *Id*. With every day that passes without the required care, it becomes more likely that Mr. Villanueva may never be able to use his prosthesis again unless he is immediately provided daily physical therapy. Declaration of Tamar Ference, M.D., ¶¶ 21-22, Exh. 1 An injunction is required ordering physical therapy so that Plaintiff will be able to receive the care necessary to begin rebuilding his shriveled leg, and regaining range of motion below the left knee so he can eventually walk again without crutches.

D. The Continued and Irreparable Harm Suffered by Plaintiffs Far Outweighs Any Potential Harm Which the Injunction May Cause

The irreparable harm suffered by the Plaintiff, as discussed at length above, is clear. Without the reasonable accommodation requested herein, Plaintiff will continue to be unable to walk, run, work and exercise like a non-disabled inmate, and he will continue to be excluded from FDOC services and programs, and otherwise discriminated against by Defendants Crews and Corizon because of his disability. His leg will continue to shrivel.

Defendants Crews and Corizon, on the other hand, can point to no legally recognizable harm whatsoever to themselves or others if they are required to take the steps necessary to provide Mr. Villanueva with the equal opportunity to participate in programs, services, and activities that the law requires.

Pursuant to the ADA and the Rehabilitation Act, a public entity can only avoid providing a disabled individual with that individual's requested choice of needed auxiliary aid if "it can demonstrate [the action] would result in a fundamental alteration in the nature of a device, program or activity or [create] an undue financial and administrative burden." 28 C.F.R. § 35.164. In such circumstances, the public entity has the burden of demonstrating that providing the requested auxiliary aid for the disabled individual would create such a hardship. *Id*. This determination must further be made in writing, by the head of the public entity, who must set forth "the reasons why the entity cannot comply with the wishes of the disabled individual, after considering all available resources. *Id*.

Defendants Crews and Corizon cannot meet that burden here. Accommodating Mr. Villanueva' disability will not result in any sort of fundamental administrative, financial, or security-related burden, and thus it is clear that the irreparable harm that Plaintiff continues to suffer outweighs any potential harm which the requested injunction may cause. *See also Doe*, 906 F. Supp. at 1545 ("The third prong of the test for a preliminary injunction is also met because no

damage ensues to the JNC in abiding by the ADA."); *Ray*, 666 F. Supp. at 1535 ("[A]ctual, ongoing injury to Plaintiffs … clearly outweighs the potential harm to others"); *Concerned Parents*, 846 F. Supp. at 993 ("[T]he expenditure of funds cannot be considered a harm if the law requires it.").

E. The Public Interest Clearly Supports Injunctive Relief

The broad public interest in providing protection against violations of these vital anti-discrimination laws decidedly tips the balance of equities in favor of the entry of a preliminary injunction. There simply can be no question of any harm to the public by ensuring that Defendants comply with the ADA and the Rehabilitation Act and its prohibitions against discrimination against individuals with disabilities. Quite to the contrary, it has been found that it is in the public's interest that our prison officials not believe themselves to be above the law, as the late U.S. District Court Judge Charles Scott once stated:

> A free democratic society cannot cage inmates like animals in a zoo or stack them like chattels in a warehouse and expect them to emerge as decent, law abiding, contributing members of the community. In the end, society becomes the loser.

Costello v. Wainwright, 397 F. Supp. 20, 38 (M.D. Fla. 1975) (footnotes omitted).

Indeed, the ADA and Rehabilitation Act themselves were based on strong public policy concerns. Congress enacted these laws to address the "serious and pervasive" social problem caused by discrimination against people with disabilities and to provide a clear and comprehensive national mandate for the elimination of discrimination against such individuals. 42 U.S.C. § 12101. It serves the public interest to carry out the mandates of these laws. *See Doe*, 906 F. Supp. at 1545 ("[T]he fourth prong is met because the public interest requires that discrimination against the disabled not be tolerated."); *Tugg*, 864 F. Supp. at 1211 ("[T]he public has an interest in providing for the full participation by persons with disabilities in the [benefits] afforded by the

state."); *Concerned Parents*, 846 F. Supp. at 993 ("The equality of all persons is the underlying principle of the ADA, and one which the public has a strong interest in promoting.").

F. Plaintiff Should Not be Required to Post Bond

This Court has the discretion to issue a preliminary injunction without requiring the Plaintiff to post bond. *People of State of Cal. ex rel. Van De Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319 *modified on other grounds*, 775 F.2d 998 (9th Cir. 1985); *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 539 (6th Cir. 1978). Exercise of that discretion is particularly appropriate where, as here, an action is brought by an indigent Plaintiff, *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982), or where issues of public concern or important federal rights are involved. *See Cont'l Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 782 (10th Cir. 1964).

WHEREFORE Plaintiff, for the foregoing reasons, respectfully request that this Court:

A. promptly schedule a hearing on Plaintiff's Motion for Preliminary Injunctive Relief;

B. issue a Writ of *Habeas Corpus ad Testificandum* requiring the Florida Department of Corrections to produce Plaintiff Villanueva at a prompt hearing;

C. issue a Preliminary Injunction requiring Defendants to provide Plaintiff Villanueva with the necessary physical therapy and medical care to make his prosthesis effective for him;

D. issue a Preliminary Injunction requiring Defendants to provide Plaintiff Villanueva with aluminum crutches to use until he is able to walk full-time with his prosthesis;

E. waive the posting of a bond for security; and

F. grant such other relief as the Court may deem just and equitable.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that on March 14, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: *s/ Randall C. Berg, Jr.*
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