2007 WL 4557552 (C.A.9) (Appellate Brief)
United States Court of Appeals,
Ninth Circuit.

Eugene BATCHELDER, et al., plaintiff and Appellant,
v.
James M. GEARY, et al., Defendants and Appellees.

No. 07-15788.
November 5, 2007.

Appeal from Judgment Terminating Access to the Courts Decree and Terminating In Part Amended Disciplinary Procedures Decree By the United States District Court for the Northern District of California the Hon. Ronald M. Whyte, Judge Case No. C-71-02017 RMW

Appellants' Opening Brief

James McManis, Michael Reedy, Mcmanis Faulkner, & Morgan, A Professional Corporation, 50 W. San Fernando Street, 10th F1., San Jose, California 95113, Telephone: (408) 279-8700, Facsimile: (408) 279-3244.

James Zahradka, Kyra Kazantzis, Public Interest Law Firm, Law Foundation of, Silicon Valley, 111 West St. John Street, Suite 315, San Jose, CA 95113, Telephone: (408) 293-4790, Facsimile: (408) 293-0106, Attorneys for Appellants, Class of Inmates of Santa Clara, County Department of Corrections.

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*1 JURISDICTIONAL STATEMENT

The District Court had subject-matter jurisdiction over this matter pursuant under 28 U.S.C. § 1331. This civil action arose under the Constitution and laws of the United States, including the Fourteenth Amendment and 42 U.S.C. § 1983. Excerpts of Record ("ER") 1953-1954 [Order on Motion to Terminate Consent Decree ("Order")].

This Court has jurisdiction over this appeal from the final decision of the District Court under 28 U.S.C. § 1291.

The District Court rendered its final judgment, disposing of all of the parties' claims, on March 8, 2007. ER 2012-2014. The inmates filed their notice of appeal on April 5, 2007, ER 2015-2016, within 30 days of entry of judgment. This appeal is timely under Federal Rules of Appellate Procedure, Rule 4(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred when it applied the legal analysis pertaining to *in pro. per.* **convicted** inmates' right to access courts for post-conviction relief under the Due Process Clause to in pro. **per. pre-trial detainees'** right to a defense in their criminal cases under the Sixth Amendment;

2. Whether the District Court erred when it created a standard that an in pro. per. inmate cannot demonstrate prejudice related to inability to access legal research materials unless he or she "proves that flaws in the prison's research system ***2** affected his [or her] case in an outcome-determinative manner," despite this Court's authority disapproving such a standard;

3. Whether the District Court erred when it held that in pro. per. inmates bear the burden to prove "evidence of actual injury";

4. Whether the District Court erred in its ultimate holding that the County's unilateral closure of physical law libraries (in violation of a consent decree) and replacement of them with a system that requires in pro. per. inmates to submit written research requests and receive responses via mail through a remote, third-party "research service" that is slow, inaccurate, and lacking in confidentiality did not violate those inmates' Sixth Amendment rights to a defense in their criminal cases;

5. Whether the District Court erred in its ultimate holding that voluminous evidence, demonstrating that the County's closure of physical law libraries had a concrete adverse effect on inmates' ability to (1) represent themselves in their criminal cases and (2) meaningfully access the courts for post-conviction relief, did not constitute "legally-cognizable injuries widespread

enough to warrant systematic relief"; and

6. Whether the District Court erred when it held that the decree failed to meet the need-narrowness-intrusiveness test and therefore, in conjunction with its ***3** erroneous holding as to the lack of constitutional violations, should be terminated under the Prison Litigation Reform Act.

STATEMENT OF THE CASE

This is an appeal from the District Court's partial grant of the County of Santa Clara's motion to terminate the prospective relief (pursuant to the Prison Litigation Reform Act, 18 U.S.C. § 3626(b) ("PLRA")) contained in two consent decrees. These decrees were originally agreed to over thirty years ago by the County and plaintiffs in response to the County's violation of plaintiffs' rights to access courts under the Due Process Clause and their Sixth Amendment right to defend themselves in their criminal cases, as well as plaintiffs' right to due process in disciplinary matters.

At issue here is the prospective relief contained in the consent decree pertaining to inmates' (1) Sixth Amendment right to a defense in their criminal cases and (2) access to courts for post-conviction matters (the "Access to Courts Decree"). The District Court terminated the prospective relief in that decree because it erroneously determined that (1) the County was not committing current and ongoing violations of inmates' constitutional rights to access courts by denying them adequate access to legal materials that they need to prepare their cases, and (2) the decree failed to meet the need-narrowness-intrusiveness test.

*4 STATEMENT OF FACTS

On April 13, 1973, Judge Peckham of the Northern District of California issued a preliminary injunction against Santa Clara County's jail system. ER 1954. Judge Peckham further ordered the parties to submit plans to facilitate the constitutional rights of inmates to adequate access to the courts and self-representation. *Id.* On June 20, 1973, Judge Peckham approved the Joint Plan, filed jointly by Santa Clara County and a class of inmates in Santa Clara County jails. ER 1953-1954. The Joint Plan called the "Access to Courts Decree" by the District Court in the Order required the County to establish law libraries in its jails; it further required those libraries to contain current versions of specific legal materials. ER 1954, 227-228, 231. The Decree also required a system that allowed inmates to borrow books and material from the Santa Clara County Law Library. ER 1954, 228-229.

On the same day, Judge Peckham issued an order requiring the County to create a written code of rules and procedures to govern the imposition of in-custody disciplinary offenses; after a change in case law, the parties jointly submitted an amended Disciplinary Procedures Decree, which was approved on August 30, 1977. ER 1953-1954, 229-230, 233.[1]

***5** In 1987, the Santa Clara County Department of Correction ("DOC") began operating the County's jail system. ER 1955. In 2003, the DOC closed its jail libraries and instituted a legal research system provided by an outside contractor, Legal Research Associates ("LRA").[2] *Id.* The DOC closed its law libraries without obtaining court approval for termination or modification of the Access to Courts Decree and, thus, was found in contempt of that Decree by the District Court on September 30, 2005. ER 1954. On November 3, 2004, the County moved to terminate both decrees. ER 1953.

Seven *in pro per.* inmates, on behalf of all *in pro per.* inmates in Santa Clara County jails, opposed the motion. ER 1953-1954. These inmates testified uniformly that the LRA system is a flawed and inadequate means of conducting legal research. Kevin Hopkins ("Hopkins") represented himself in his criminal case from approximately December 11, 2003, until August 18, 2004, and was incarcerated in the Santa Clara County jail during that time. ER 1958-1959. At the time of the Order, Shawn Bautista ("Bautista") was in pro. per. in his pending criminal case, and in two cases concerning civil rights. ER 1964. At the time of the Order, Timphony Walker ("Walker") was in pro. per. in his pending civil ***6** cases. ER 1963. From November 2003 to April 2004, Barth Capela ("Capela") represented himself in his criminal case. ER 1960. From April to July 2004, Charles Lyons ("Lyons") represented himself in his criminal case. Id. Ricky Reyes ("Reyes") was in pro. per. in two criminal cases from December 2003 until May 2004, and in a third criminal case from February to May 2004. ER 1961. At the time of the Order, Theotis Golden ("Golden") was in pro. per. in his criminal case and civil rights case. ER 1962.

All of the inmates identified numerous inadequacies with the LRA service. ER 1958-1964. A number of the inmates testified that these problems hindered their ability to effectively represent themselves and, in some cases, forced them to withdraw from representing themselves *in pro. per. Id.* Capela testified that because he did not have sufficient access to adequate legal research materials, he was convicted at trial while representing himself. ER 1960.

SUMMARY OF THE ARGUMENT

In reaching its decision to terminate the prospective relief contained in the Access to Courts Decree, the District Court made several erroneous holdings on the legal issues on which this case turns, issues which sound in the fundamental constitutional rights of the County's in pro. per. inmates. This Court should reverse the District Court's termination order and reinstate the prospective relief because the County failed to meet its burden under the PLRA to prove that it is not ***7** committing current and ongoing violations of in pro. per. inmates' right to access courts and to a defense in their criminal cases.

First, the District Court erroneously applied legal principles pertaining to **convicted** in *pro. per.* inmates' rights to access courts for post-conviction matters under the **Due Process Clause to pre-trial** detainees' right of self-representation in their criminal cases under the **Sixth Amendment.** The court's application of the "actual injury" standard articulated in the context of the Due Process Clause to the completely distinct Sixth Amendment claims at issue in this case is contrary to legal authority and cannot stand. Nor is it supported by common sense, given the fundamentally different posture of the inmates who assert their rights under these two amendments.

Further, even assuming that this analysis is correct, the standard that the court created to evaluate pre-trial detainees' claims that the government violated their Sixth Amendment right of self-representation is not compatible with the legal authority on which the court relied. In fact, the District Court created its own standard - that pre-trial detainees in pro. per. must demonstrate that the government's denial of their criminal defense affected their cases in an "outcome- determinative manner" - from whole cloth. This standard creates an insurmountable barrier to pre-trial detainees' claims, severely compromising their ***8** fundamental rights; it is also incorrect as applied to convicted inmates asserting their access-to-court rights under the Due Process Clause.

By applying this flawed and inappropriate standard, the District Court reached an equally flawed conclusion: that in pro. pet. inmates had not suffered "legally-cognizable injuries widespread enough to warrant systematic relief," and therefore that the County was not committing a current and ongoing constitutional violation. Thus, the Court erroneously granted the County's PLRA motion to terminate the prospective relief in the Access to Courts decree. This Court should reverse this conclusion.

STANDARD OF REVIEW

With one very limited exception discussed *infra,* all of the issues in this appeal present questions of law that this Court reviews de novo. Thus, this Court gives no deference to the District Court's opinion. See *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 970 (9th Cir. 2003).

ARGUMENT

II. THE PRISON LITIGATION REFORM ACT APPLIES, BUT DOES NOT MANDATE TERMINATION OF THE PROSPECTIVE RELIEF.

The PLRA applies to this matter since the consent decree arose from a "civil action with respect to prison conditions" and contains "prospective relief." See 18 U.S.C. § 3626(b)(2); see also 18 U.S.C. §§ 3626(g)(2), (7) (definition section). Under the PLRA, courts are required to terminate prospective relief in federal civil ***9** actions regarding prison conditions on application by the defendant unless the court makes written findings that prospective relief
(1)remains necessary to correct a current and ongoing violation of the Federal right,

(2) extends no further than necessary to correct the violation of the Federal right, and

(3) is narrowly drawn and the least intrusive means to correct the violation.

18 U.S.C. § 3626(b)(3). In this case, all three of these conditions are present, and therefore the District Court erred when it granted County's motion to terminate the prospective relief in the Access to Courts decree.

III. THE DISTRICT COURT ERRONEOUSLY ANALYZED THE INMATES' CLAIMS FOR VIOLATION OF THEIR SIXTH AMENDMENT RIGHT TO A CRIMINAL DEFENSE UNDER THE COMPLETELY SEPARATE LAW GOVERNING PRISONERS' RIGHT TO "ACCESS COURTS" FOR POST-CONVICTION REMEDIES.

The District Court fatally erred when it took the unprecedented step of analyzing the plaintiffs' Sixth Amendment claims of violations of their right to a defense in their criminal cases under the completely separate body of law governing "access to courts" claims made by prisoners seeking to pursue post-conviction remedies.

The Sixth Amendment to the United States Constitution provides that:

> In all criminal prosecutions, the accused shall enjoy the right... to be informed of the nature and cause of the accusation; to be confronted ***10** with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Over thirty years ago, in the landmark Faretta case, the Supreme Court held that this Amendment "does not provide merely that a 'defense shall be made for the accused; it grants to the accused personally the right to make his defense." Faretta v. California, 422 U.S. 806, 819 (1975). Accordingly, the government cannot constitutionally force criminal defendants to accept representation by state- appointed counsel: "Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense." Id. at 821. A criminal defendant who is "literate, competent, and understanding, and. voluntarily exercising his informed free will" when choosing to defend himself has a "constitutional right to conduct his own defense." Id. at 835-836.

The Supreme Court's decision in Lewis v. Casey, 518 U.S. 343 (1996), dealt with an entirely different issue than Faretta. There, the Court held that a prisoner affirmatively seeking to challenge prison conditions or to secure post-conviction relief must show "actual injury," which means showing that the prisoner was or is being impeded in presenting a non-frivolous claim to court. See id. at 352-53 (emphasis added). That analysis is inapplicable to pretrial detainees who are defending themselves against criminal charges (as were six of the seven witnesses ***11** who testified in this proceeding, and as are the majority of the prisoners in the county jails at issue in this proceeding).

The Second Circuit recognized this distinction in the Benjamin case, holding that "Lewis is inapplicable to Sixth Amendment claims of pretrial detainees." *Benjamin v. Fraser*, 264 F.3d 175, 185 (2d Cir. 2001). The court rejected the government's argument that inmates had to show actual injury from being deprived of access to counsel. *Id.* The Benjamin court found critical the fact that pretrial detainees are not "present[ing] claims to the courts," like prisoners asserting rights under Lewis, but rather are "defend[ing] against the charges brought against them." *Id.* at 186. The court further explained that:

> The access claims at issue in *Lewis* concerned the ability of convicted prisoners to attack their sentences, directly or collaterally, and to challenge the conditions of their confinement. By contrast, here we are concerned with the Sixth Amendment right of a pretrial detainee, in a case brought against him by the state...

Id. Because of this difference, the court did not apply Lewis to the Sixth Amendment claims of pretrial detainees because "[i]t is not clear to us what 'actual injury' would even mean" in this context. *Id.;* see also *Amador v. Humboldt County Correctional Facility*, 2007 WL 1411615, *9, 12 (N.D. Cal. 2007) (contrasting right of "criminal defendant proceeding in propria persona," who "is entitled to some legal resources in the preparation of a defense," with "[t]he rights addressed in Bounds and its progeny," which "are post-trial rights involving ***12** situations in which inmates have no right to counsel"); *Reed v. Schriro*, 2007 U.S. Dist. LEXIS 10969 *14 n.7 (D. Ariz. 2007) ("because *Lewis* was a case involving a prisoner civil

rights complaint, it did not establish any federal law in a circumstance where appointment of counsel and/or advisory counsel were available.").

The District Court dismisses the importance of the *Benjamin* court's holding by failing to distinguish inmates' rights under the Sixth Amendment and the Due Process Clause. On a basic level, the language from *Benjamin* that the District Court quotes in support of its holding that inmates must make the "actual injury" showing refers to the Lewis analysis of prisoners' court access rights - not the Faretta Sixth Amendment right. *See* ER 1977.

The District Court tries to distinguish an in pro. per. inmate's right to "tools to prepare a defense" from the "right to representation" because the latter is a "textual Sixth Amendment right." *Id.* However, while this is literally true - i.e., the text of the Constitution does not contain the words "tools to prepare a defense" - the courts have long interpreted the Sixth Amendment to include rights not explicitly stated in its text. "Although not stated in the Amendment in so many words, the right to self-representation - to make one's own defense personally - is ... necessarily implied by the structure of the Amendment." Faretta, supra, 422 U.S. at 819; see id. n.15 ("This Court has often recognized the constitutional ***13** stature of rights that, though not literally expressed in the document, are essential to due process of law in a fair adversary process. It is now accepted, for example, that an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings, to testify on his own behalf, and to be convicted only if his guilt is proved beyond a reasonable doubt." [citations omitted]).

This Court has made clear that an essential part of Faretta is the in pro. per. inmate's right to access materials needed to prepare a defense. In Milton, this Court declined to address whether Bounds "should be interpreted as placing an affirmative duty upon the state to provide a library for the defendant who has rejected the assistance of counsel for trial" because under the Sixth Amendment, as interpreted by Faretta, "[a]n incarcerated defendant may not meaningfully exercise his right to represent himself without access to law books, witnesses, or other tools to prepare a defense." *Milton v. Morris,* 767 F.2d 1443, 1446 (1985). Significantly, the 9th Circuit rendered the same holding in a post-Lewis case, *Bribiesca v. Galaza,* 215 F.3d 1015, 1020 (9th Cir. 2000),[3] citing Milton. Thus, ***14** the Sixth Amendment/Faretta-based standard enunciated in Milton and reaffirmed in Bribiesca applies to the right to make a defense for criminal pro pers that is primarily at issue in this case; the *Bounds/Lewis* line of cases, including the "actual injury" framework enunciated in the latter, does not.

This Court has repeatedly reaffirmed Milton's core holding that the right of self-representation for criminal defendants is meaningless without "access to law books, witnesses, or other tools to prepare a defense," Milton, supra, 767 F.2d at 1446, in other cases - including those that the District Court cites, see ER 1973- 1975. See, e.g., *United States v. Robinson,* 913 F.2d 712, 717 (9th Cir. 1990) (same; also stating right in terms of "'meaningful access' to resources with which to prepare his defense," id. at 718); *Taylor v. List,* 880 F.2d 1040, 1047 (9th Cir. 1989) ("the Sixth Amendment right to self-representation recognized in Faretta includes a right of access to law books, witnesses, and other tools necessary to prepare a defense" [emphasis added]); *United States v. Sarno,* 73 F.3d at 1470, 1491 (9th Cir. 1995) ("the Sixth Amendment demands that a pro se defendant who is incarcerated be afforded reasonable access to law books, witnesses, or other

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***16** analysis. The right is either respected or denied; its deprivation cannot be harmless." *McKaskle v. Wiggins,* 465 U.S. 168, 177 n.8 (1984); see also *United States v. Gonzalez-Lopez,* 126 S. Ct. 2557,2564(2006) (Scalia, J.); *Frantz v. Hazey,* 472 F.3d 1104, 1105 (9th Cir. 2007) (same). The harmless error doctrine is inapplicable here for another reason; the remedy sought is not a new criminal trial, but rather continued injunctive relief against the County. See Benjamin, supra, 264 F.3d at 186 n.9.

IV. THE DISTRICT COURT'S STANDARD FOR "ACTUAL INJURY" IS INCONSISTENT WITH LEWIS AND CREATES AN IMPOSSIBLE BAR FOR INMATES' CONSTITUTIONAL CLAIMS.

The District Court not only erred in holding that the Lewis access-to-courts analysis limits the Sixth Amendment right to a defense, it misstated the Lewis analysis, creating from whole cloth a standard that is untenable under Lewis itself, as well as being in direct conflict with this Court's previous ruling. The District Court's "outcome-determinative" standard is not even applicable to inmates pursuing post-conviction remedies or suits about conditions of confinement, whose claims are governed by *Lewis.*

The District Court ruled that "a *pro per* defendant can bring a Sixth Amendment claim if he proves that flaws in the prison's research system affected his case in an **outcome-determinative** manner." ER 1977. What the court meant by "outcome-determinative" is shown by its use of the phrases "issue that could not possibly have exonerated him," and "arguably exculpatory motion," to ***17** describe the showing an inmate must make to establish "actual injury" under Lewis. ER 1977. This standard requires inmates to prove that "LRA's flaws, and not some other factor, frustrated their claims." ER 1981-1982. In short, the outcome-determinative test prevents inmates from sustaining a claim under *Faretta/Milton* for denial of meaningful access to law books, witnesses, or other tools to prepare a defense unless the detainee can prove that but for that denial - and no other factor - he or she would have won the case.

This reductionist vision of "actual injury" ignores the complex nature of criminal cases and the impossibility of knowing what facts or legal rulings "determined" the outcome of the case. For example, as the inmates' criminal law research expert testified, many criminal cases involve complicated issues concerning the admission or suppression of evidence. ER 1488, ¶ 9. If an *in pro. per.* inmate cannot file a proper suppression motion because the government failed to provide meaningful access to legal resources, and the inmate is ultimately convicted, who can know whether the improperly admitted evidence was the deciding factor?

Another example: As the inmates' expert testified, it is critical for in pro. per. inmates to have information about the full range of offenses with which they might be charged and all of the possible penalties for those offenses when they are ***18** weighing a plea offer. ER 1489-1490, ¶¶ 13-14.[5] Knowing whether they have been overcharged or if there is a more appropriate lesser offense is essential to unrepresented defendants' decisions, just as it is to counsel's recommendations to represented clients. But one can only speculate whether refusal of a particular plea bargain offer was "outcome-determinative."

Given the above, it is unsurprising that this Court has repeatedly rejected different versions of the "outcome determinative" standard applied by the District Court. This Court recently reaffirmed the principle that "in order to establish actual injury, a plaintiff need not show, ex post, that he would have been successful on the merits had his claim been considered."[6] *Phillips v. Hust,* 477 F.3d 1070, 1076 (9th Cir. 2007) (quoting *Allen v. Sakai,* 48 F.3d 1082, 1085 (9th Cir. 1994).) Rather, "[i]nmates have an established right to present their legal claims to the courts and to have them considered by the courts," and an inmate need only show that he or she "could not present a claim to the courts because of the state's failure to fulfill its constitutional obligations." *Allen, supra,* at 1085.

Further, the "outcome-determinative" standard is not supported by Lewis, which the District Court cites as authority. There, the Court held that to "establish ***19** relevant actual injury," an inmate must "demonstrate that the alleged shortcomings in the library or legal assistance program **hindered his efforts to pursue a legal claim."** Lewis, supra, 518 U.S. at 351 (emphasis added). This standard is much more appropriate than the "outcome-determinative" standard manufactured by the District Court here (though, as discussed, "actual injury" does not apply to the Sixth Amendment claims).

The "outcome-determinative" standard is inconsistent with this Court's holding in Gilmore that inmates must demonstrate that the governmental policy at issue had "a concrete effect on inmates' access to the courts." *Gilmore v.California,* 220 F.3d 987 1009 (9th Cir. 2000) (footnote omitted). As detailed below (and in the summary of inmate allegations set forth in the District Court's opinion, see ER 1982-1992), the claims at issue fit squarely within the standards set forth in Lewis and *Gilmore.*

The record is replete with uncontradicted testimony showing how the County's legal research system adversely affected inmates' efforts to access legal resources to allow them to meaningfully (1) mount a defense in their criminal cases, and (2) access courts for post-conviction matters. These efforts were repeatedly hindered by LRA's myriad deficiencies. Thus, the District Court's improper standard led it to inappropriately characterize the injuries suffered by inmates as not constituting "actual injury" under Lewis, despite the fact that Lewis ***20** only requires an inmate to prove that library shortcomings "hindered his efforts to pursue a legal claim." *Lewis, supra,* 518 U.S. at 351.

This Court and others have found actual injury under Lewis based on analyses of inmate allegations without applying an "outcome-determinative" standard. *See Hiser v. Franklin,* 94 F.3d 1287, 1289, 1294 n.6 (9th Cir. 1996) (this Court remanding case for District Court to consider merits of inmate claims that jail routinely denied photocopies of legal material; inmate alleged that this denial had "on several occasions . caused him to suffer difficulty and harm in pursuing his legal claims"); *Cody v. Weber,* 256 F.3d 764, 768 (8th Cir. 2001) (holding the advantage defendants obtained by reading the plaintiffs private legal papers constituted actual injury); *Goff v. Nix,* 113 F.3d 887, 891-892 (8th Cir. 1997) (holding that

prison's policy that made co-plaintiffs unable to coordinate recruitment of witnesses for trial "impeded" a non-frivolous claim and that plaintiff who "lost papers critical to his post-conviction proceeding" was actually injured); *Purkey v. CCA Det. Ctr.*, 339 F. Supp. 2d 1145, 1152 (D. Kan. 2004) (inmate allegations that disposal of his legal materials by prison officials "hindered" his "ability to use these past recollections recorded, to refresh his current recollection, and as independent evidence of the events of December of 1998" were "sufficient. to show he was prejudiced"); *Lueck v. Wathen*, 262 F. Supp. 2d 690, 695 (N.D. Tex. 2003) (inmate allegations that prison officials confiscated affidavit needed for ***21** inadequate assistance of counsel claim sufficient to demonstrate "actual injury").

The District Court's standard is not legally supported.

V. THE DISTRICT COURT ERRONEOUSLY HELD THAT PRO. PER. INMATES BEAR THE BURDEN OF PROOF TO SHOW "EVIDENCE OF ACTUAL INJURY" UNDER LEWIS.

The District Court committed an additional legal error when it held that the pro. per. inmates bear the burden of proof to show "evidence of actual injury" under Lewis. ER 1982. This position is foreclosed by this Court's holding in Gilmore that defendants, not the plaintiffs, bear the burden of proof on the presence of a continuing and ongoing violation. *Gilmore, supra*, at 1008-09.8 The ***22** District Court actually acknowledged this holding in its opinion, stating that "the County must prove that it is complying with prisoners' constitutional rights." ER 1970. However, the District Court displayed hostility toward Gilmore, citing its "serious doubts" about the holding, assailing its logic as leading to "bizarre" results at odds with "common sense," and implying it is "unwise" and "incorrect." ER 1969-1970. This may explain the court's later departure from *Gilmore.*

The court's concern was that *Gilmore* would require the County to "prove a negative" i.e., the absence of a current and ongoing violation of inmates' constitutional rights to court access or to present a defense as guaranteed by the Sixth Amendment. But litigants are routinely required to "prove a negative." Only last Term, in another PLRA case, the Supreme Court held that prison officials must plead and prove prisoners' failure to exhaust administrative remedies as the PLRA requires. *See Jones v. Bock*, 127 S. Ct. 910, 921 (2007).

Further, this very case shows that "proving a negative" is not an unreasonable burden. The County produced considerable evidence concerning inmates' access to courts by using inmates' court files and deposition testimony. That their proof may have been inadequate merely confirms the merit of plaintiffs' claims, rather than the impossibility of applying *Gilmore.*

Plaintiffs might concede that if the County produced sufficient evidence to establish a prima facie showing that it provided meaningful court access to in pro. ***23** per. inmates, then plaintiffs would bear the burden of production to rebut that evidence. Although the County did not meet its burden, plaintiffs produced voluminous evidence about the County's denial of their rights to court access and to present a criminal defense; as discussed infra. Here the court improperly shifted the burden of persuasion (as opposed to the burden of production, see *Dir. v. Greenwich Collieries*, 512 U.S. 267,273 (1994)) to the inmates when it held that the "lack of evidence of actual injury" constitutes either a "failure of proof" on the inmates' part or "the County's successful negation of an essential element of prisoners' constitutional claims." ER 1982. With this incorrect application of the burden of proof, the District Court's ruling is flawed and this Court should overturn it.

VI. BECAUSE IT (1) FAILS TO PROVIDE IN PRO. PER. INMATES WITH MEANINGFUL ACCESS TO LEGAL RESEARCH MATERIALS, AND (2) HINDERS THEIR ABILITY TO REPRESENT THEMSELVES, THE COUNTY IS COMMITTING CURRENT AND ONGOING VIOLATIONS OF THE SIXTH AMENDMENT RIGHTS OF DETAINEES DEFENDING THEMSELVES UNDER FARETTA AND THE COURT ACCESS RIGHTS OF PERSONS PURSUING POST-CONVICTION REMEDIES OR CHALLENGING CONDITIONS OF CONFINEMENT.

The District Court's erroneous view of the law applicable in this case affected its examination of the voluminous evidence provided by inmates. This evidence establishes (1) LRA's serious systemic flaws, and (2) how the County's use of LRA as the sole means of accessing legal research materials hindered *in pro.* ***24** *per.* inmates' efforts at self-representation in their individual cases. This system is dysfunctional, both for persons defending themselves under the Sixth Amendment *Faretta* right and for those persons pressing claims governed by *Lewis.*

As to systemic issues, the District Court ignored them because, under its erroneous view, they did not constitute the type of "actual injury" the court believed necessary to show a constitutional violation under the Lewis standard. ER 1978-1979. However, under the Sixth Amendment, these infirmities amount to constitutional violations, because they deprive inmates of the reasonable access to legal research materials that is an intrinsic part of their right to present a criminal defense. These failings are discussed in detail below.

As to individual inmates' cases, the District Court analyzed their claims of prejudice. Applying various aspects of the erroneous legal analysis discussed above, it determined that the inmates' allegations about the County's use of LRA did not deprive them of either their Sixth Amendment rights under Faretta or their access-to-courts rights under *Lewis.*[9] ER 1982-1992. The inmates do not dispute ***25** the District Court's factual findings as to the inmates' allegations regarding the lack of meaningful access to legal research materials and hindrance of their ability to make legal claims to the court;[10] however, the court's application of the erroneous legal standard it created, set forth above, led it to improperly disregard these individual allegations, as discussed in detail below.

A. LRA fails to provide constitutionally adequate legal research services because its design and implementation are inherently flawed.

LRA is a legal research request-response operation wherein an inmate submits a request to LRA for research material; LRA then returns the purportedly responsive materials to the inmate. ER 1956. Pursuant to an agreement between LRA and the County, LRA must provide in pro. per. inmates with legal research materials. ER 797-800,828-841. LRA is contractually obligated to satisfy the constitutional minimums for in pro. per. inmates' legal research needs. Id.

First, this Court has held that systems that do not provide inmates with physical access to an adequate law library - i.e., systems like LRA - fail to provide meaningful access to legal research materials and are therefore unconstitutional:

> Simply providing a prisoner with books in his cell, if he requests them, gives the prisoner no meaningful chance to explore the legal remedies he might have. Legal research often requires browsing through various materials in search of inspiration; tentative theories may have to be abandoned in the course of research in the ***26** face of unfamiliar adverse precedent. New theories may occur as a result of a chance discovery of an obscure or forgotten case.

Toussaint, supra, at 1109-10 (quoting *Williams v. Leeke,* 584 F.2d 1336, 1339 (4th Cir. 1978)); *see also Williams, supra,* at 1340 & n.2 (noting that "one cannot expect prisoners to immediately turn to exactly the right case, or to immediately discover the proper legal avenue to explore in search of an answer to their problems," and emphasizing importance of inmates' "opportunity to research their claims by rummaging through law books and by pursuing different avenues of research"). As the inmates' experts have established, the "browsing through various materials" and "chance discoveries" that the *Toussaint* court recognized as essential to an inmate's "meaningful chance to explore the legal remedies he ***27** might have" are as impossible for inmates in Santa Clara County's jails who are forced to use LRA as they were for the California Department of Corrections inmates at Folsom and San Quentin who were forced touse "paging" systems. ER 346-348 at 7-10; 1487-1490 at 5-15; 1674-1675.

In addition to this fundamental underlying flaw in its design, LRA is cumbersome and difficult to use in application. As demonstrated by evidence provided to the District Court, this system produced an unreasonably high quantity of misleading, erroneous, and incomplete legal research material; it relied upon untrained and unqualified researchers; and it provided only indirect contact with inmates. LRA further suffers from irremediable confidentiality problems and an intrinsic lack of timeliness. And because the County exercises virtually no oversight of the LRA contract, as demonstrated infra, it cannot ensure that in pro. per. immates have access to constitutionally-adequate legal research. Because the County fails to assure that in pro. per. inmates receive confidential and timely access to appropriate legal research materials, it is (1) failing to provide inmates meaningful access to the legal research tools they need to mount a criminal defense under the Sixth Amendment and (2) hindering their ability to pursue their legal claims for post-conviction relief or in response to civil rights violations. Thus, the County is violating its constitutional obligations.

***28** To understand why the County could not meet its constitutional obligations by using LRA, the inmates submitted

evidence showing how LRA operates. After an inmate secures in pro. per. status, DOC personnel provide the inmate with LRA request forms (when available) and advise him or her to complete these forms. ER 466-468, 1956.[12]

The request form, designed by LRA, requires the inmate to provide personally identifying information, the date of request, which law enforcement agency sent the inmate to jail, whether he or she has been sentenced, the type of case and whether it is active, the next court date, whether he or she has a lawyer, and whether he or she is court-certified in pro. per. ER 800-801, 1800-1801. After providing the above information, the inmate must identify the "Reference Material Requested." ER 1487 at ¶ 6, 1800-1801. The form includes no information regarding what "reference material" is available. On the back of the form, LRA indicates that it is not the inmate's lawyer. ER 1801. The information on the reverse of the form speaks only to the process by which an inmate requests and receives legal research material from LRA. It does not provide any instruction to inmates on how to conduct legal research or identify issues in their cases. Id. In ***29** fact, DOC staff provide in pro. per. inmates with no training about how to perform legal research. ER 565-566.

The inmate must return the completed research request form to a DOC administrative staff member, or, if this fails, place the' form on the bars of his or her cell for the staff member to find or give it directly to a correctional officer. ER 454-457. DOC faxes the collected forms to LRA's offices in Alameda County. ER 469-470, 482. DOC staff generally faxes out the forms once a day, typically in the morning. ER 469. After LRA receives the faxed forms, LRA's non-lawyer employees place legal research that they believe is responsive to the requests inside envelopes. ER 802-803. These envelopes which are kept unsealed, ER 513-514, are then inserted into a larger envelope and sent via UPS to the Main Jail and Elmwood Correctional facilities. ER 804. DOC administrative personnel must then match up the original request forms, which have been retained in their offices, with the LRA packets. ER 511-512.

The County admitted that as many as three days may pass between its receipt of responses from LRA and delivery of the responses to the inmate. ER 476-477. Administrative staff sometimes delivers the still unsealed responses directly to the inmates, but staff often must give the responses to guards, who deliver them to the inmates. ER 471-474, 518-520. DOC staff sometimes leaves ***30** the materials at the inmate's cell, which may house other inmates who could access the unsealed materials. ER 519-520.

1. LRA's Legal Research Process is Cumbersome and Difficult for Inmates to Use.

Plaintiffs provided testimony from legal research experts demonstrating that LRA is too cumbersome to provide in pro. per. inmates with legal research in a timely manner, and evidence showing that inmates must often submit multiple requests to obtain the information they seek.[13] ER 1485-1492, 1674-1675. The cumbersome nature of LRA's request-response process is a result of several flaws in the LRA system, particularly LRA and the County's refusal to provide direct communication between the inmate and the research provider; LRA and the County's refusal to inform inmates of what materials are available; and LRA's refusal to provide indices or table of contents and certain secondary sources. (See discussion infra.) These problems are exacerbated by the lack of inmate training in how to use the LRA system or to conduct legal research. (See discussion infra.)

a. No Information about LRA's Resources or How to Use Them Is Provided to Inmates.

From the outset, in pro. per. inmates seeking to use LRA are hobbled by a very basic problem; they have no way to find out what legal research materials are available for their use. LRA fails to provide in pro. per. inmates with information ***31** about what materials are contained in its electronic library subscriptions. ER 809- 810. LRA principal Richard Williams testified that LRA has between 400 and 500 topical information packets, copies of which it may provide to inmates. ER 795. However, inmates are not provided a list of the packet topics.[14] ER 876. Moreover, inmates are not given substantive instructions about how to use LRA or training about how to conduct legal research. Unlike a law library where one could browse bookshelves to determine what materials are available inmates using LRA have no way of knowing what materials are available. ER 346 at ¶ 7. Moreover, "LRA['s]... attempt to guess what materials the inmate wants can be just as speculative as the inmate's attempt to guess what materials LRA has" because (1) the inmate's request may be difficult to decipher because he lacks the appropriate tools to adequately construct a request; (2) the LRA researcher is often not a lawyer, and thus, lacks familiarity with legal concepts; and (3) LRA has no direct contact with the inmate. ER 1490-1491 at ¶ 16.

Plaintiffs proved that the cumbersome nature of LRA is not an abstract problem. On a daily basis, class members are frustrated and discouraged by the ***32** LRA system. In one example,[15] plaintiff class member Shawn Bautista requested material regarding witnesses. He received no materials from LRA; instead, he received a memo saying that the materials were unavailable. ER 1682 at ¶ 18. He received no information to help him submit a more specific request. ER 1682 at ¶ 19. Bautista eventually discovered at least 26 legal resources that LRA refused to provide, based upon requests that were denied. ER 1682-1691 at ¶ 21. Because of LRA's failure to provide him with these materials, Bautista was unable to file motions or was forced to file inadequate motions that were denied. ER 1680-1695.

When class member Timphony Walker requested a specific topic in the most current volume of the American Law Reports, LRA sent a memo asking for a specific page number. ER 1544-1545 at ¶¶ 16-17. Walker could not provide a specific page number because he did not have an index or table of contents. Id. Walker has found it far more time-consuming to use LRA than to conduct research in a law library as a pro. per. ER 1544. This evidence, and other examples provided to the District Court, proved that in pro. per. inmates are deprived of the legal research tools they need to mount a criminal defense and to access courts.

***33 b. LRA' s Failure to Provide Certain Necessary Legal Resources Further Hinders Inmates' Ability to Conduct Legal Research.**

In addition to LRA's failure to list its available resources and materials, it does not provide inmates with tables of contents or indices. Tables of contents and indices are a "critical starting point for legal research." ER 1689 at ¶ 11. It is standard practice for most lawyers to begin legal research projects by turning to either an index or a table of contents of, in criminal cases, the Penal Code. *Id.* at ¶ 12. Indices and tables of contents provide researchers with the means to access information available in the voluminous materials containing relevant information. *Id.* Without access to indices or tables of contents, in pro. per. inmates must "blindly guess" what statutes or cases address their issues. ER 1490 at ¶ 15.[16]

LRA also fails to provide *in pro. per.* inmates with valuable secondary source materials; under its contract, LRA provides secondary source materials at its discretion. See ER 834 at ¶ 8, 504-505. LRA refuses as a matter of policy to provide inmates with access to a number of significant legal resources, including ***34** law review articles, legislative history, judges' benchbooks, legal reference materials in languages other than English, out-of-state statutes, restatements, and other legal research materials that are critical for inmates to have meaningful access to the courts.17 See ER 1682 at ¶ 21(a), 1705, 1707. LRA responds to plaintiffs' legal research requests for these materials and others18 with a boilerplate memorandum. See Id. The memorandum provides a list of unavailable resources and a blank line to include other materials LRA may choose not to provide. Id. Without knowing what is available, inmates face the dismal prospect of spending precious time and energy submitting requests for materials that LRA may simply decide not to provide. LRA's failure to provide relevant research materials deprives in pro. per. inmates of the tools to which they are constitutionally entitled.

In one example,[19] Golden submitted a legal research request for an article entitled *Direct Examination: A Criminal Defense Attorney 's Guide,* by Gould. ER 288 at ¶ 29(1), 336-338. Golden found this reference in the California Defense Practice, a portion of which was provided by LRA. ER 288 at ¶ 29(a), 336. He ***35** wanted to use the article to learn how to conduct direct examinations. ER 288 at ¶ 29(b). In response, he received only a memorandum saying that this publication was a secondary source that LRA did not provide. ER 288 at ¶ 29(c), 338. LRA's refusal to provide this article hindered Golden's ability to defend himself. ER 288 at ¶ 29(d).

Because LRA fails to provide inmates with a resource list, tables of contents and indices, or any other guidance for their research, inmates must make vague and broad requests. When they do, LRA frequently responds by asking the inmate to resubmit the request.[20] Thus, after an inmate's initial shot-in-the-dark request, the inmate must try again, and be further delayed in receiving research materials. Since the inmate is not instructed on how to ask a better question, the inmate must repeat the question or even abandon his or her efforts altogether.[21]

The cumbersome nature of LRA's system is particularly problematic for inmates defending their criminal cases *in pro. per.*, given that they have to file and respond to motions in accordance with the rapid pace of California's criminal ***36** justice system. These inmates have a limited amount of time to obtain answers to their legal questions, as the court may push the case to trial early, consonant with the State of California's policy that criminal matters be disposed of quickly. See ER 1487-1488 at ¶ 7. Plaintiffs submitted sufficient evidence to prove that LRA's refusal to provide access to important legal

resources deprives plaintiffs of access to the courts. As a result, in pro. per. inmates are denied the means to represent themselves in their cases.

2. The Lack of Confidentiality in the LRA Legal Research System Deters Inmates From Fully and Adequately Utilizing the System Because of the Risk of Self-Incrimination.

LRA also fails because it requires the *in pro. per.* inmate to disclose his legal strategies without providing any degree of confidentiality. The in pro. per. inmate must reveal his thought processes and legal strategies when submitting an LRA request form. ER 1491-1492 at ¶¶ 19-20. According to LRA's view, the in pro. per. inmate's legal strategies and mental impressions reflected in his LRA request forms and responses are not privileged, since they have been revealed to a third party (i.e., LRA).[22] This puts the inmate's strategies and mental impressions at risk of discovery by the party opposing the inmate (usually the District Attorney and, in civil actions regarding conditions in jail, the County).

***37** This is not an abstract scenario. LRA has produced inmate request forms to a district attorney and its principal personally testified against the inmate during his criminal trial. ER 1979 at fn. 23; 364 at ¶ 15,901-904 [Kaushik Decl., Ex. 14 (*People v. DeMarco*, 2001 Cal. WL 1215851 (Cal. Ct. App. 1st Dist.))]. In that case, DeMarco, the prosecutor successfully relied on Williams' testimony and the request forms in closing argument to counter the defendant's insanity defense. ER 902-903. After DeMarco, all in pro. per. inmates must fear that their legal research request forms, their responses, and even Richard Williams's testimony might be offered against them in their criminal cases. The *in pro. per.* inmate must also fear disclosure of his or her legal strategies by DOC personnel because DOC employees handle the unsealed inmate requests and responses,23 see ER 517-521, and they have no legal obligation to refrain from accessing and/or disclosing these materials. An enterprising district attorney might well subpoena DOC employees ***38** as well as LRA employees.24 It is hard to imagine a situation where an in pro. per. inmate would be less likely to reveal critical information about his or her case, which is the sine qua non of obtaining a meaningful response from LRA.

The chilling effect of these breaches of confidentiality makes in pro. per. inmates reluctant to provide LRA with enough information for LRA to respond to their requests. ER 1551 at ¶ 43. Some *in pro. per.* inmates will refrain from using LRA's services without a guarantee of confidentiality. See ER 1481 at ¶ 19.

For example, inmate Golden was concerned that other inmates and DOC staff could read his legal research materials. ER 277-278. at ¶ 7. On at least two occasions, Golden received other inmates' legal research materials. *Id.* On several occasions, the DOC's practice of leaving legal research responses between the bars of his communal cell has resulted in Golden not receiving legal materials, which forced him to re-submit his requests. *Id.* When he did so, LRA refused to provide the materials because they already had been requested. *Id.*

Under the LRA system, there is no way to ensure that inmates' requests or the materials returned by LRA are confidential. This is a significant impediment to their ability to meaningfully access legal research materials.

***39 3. LRA's Failure to Provide Legal Research to Inmates in a Timely Matter Impedes Inmates' Ability to Represent Themselves Adequately.**

Plaintiffs proved that LRA's cumbersome design causes unacceptable time delays in inmates' receipt of pertinent legal research because inmates must make repeated requests to obtain useful material. Even when LRA provides an accurate response, its frequent and serious delays in doing so essentially amount to denial of access to those materials. inmates testified to the unreasonably long turnaround to obtain even one research response. ER 1681 at ¶ 15 (average response time of 7 days); ER 353 at ¶ 9 (average response time of 5-10 days); ER 473 at ¶ 6 (average response time of 7 days); ER 1494 at ¶ 8 (average response time of 7-10 days); ER 273 at ¶ 10(c) (average response time of 7 days).[25] These turnaround times ranged from 5 to 14 days and were an average of 7 days. *Id.;* see also ER 906-913. An inmate could access materials in a physical law library in a much shorter time period.

An expert analysis of LRA and County data shows that overall 26% of LRA requests are not received by the inmate until after one day; 31 % are received after two days; 14% are received after three days; and 15% are received after four days.

***40** *See* ER 1526 at ¶ 3, 1539-1540. Disturbingly, 9% of requests are not fulfilled until after five days and 3% (60) are not fulfilled until after six days.[26] *Id.*

LRA admits to times where it took longer than three to five days to complete research responses.[27] See ER 817, 820. Although LRA's contract with the County requires a three-day[28] turnaround, it allows LRA to send a communique informing the inmate that its response will be delayed longer than 7 days. See ER 834 at ¶3, 817-818, 855.[29] Moreover, the "more than seven days" timeframe refers only to ***41** the time that LRA needs to process the request and does not take into account how long the DOC may take to return the response to the inmate. *See* ER 781.

Significant delays can and do occur between the time an inmate makes a request and the time LRA receives it. The County admits that the time lag between the inmate's submission and the date the forms arrive at the administrative office for faxing has been as long as three days. See ER 455-456. The County admits that legal research requests are faxed only once a day; thus, if the DOC staff collects an inmate's request form in the afternoon, the request will not be faxed until the following day, ER 469-470, or, in the case of an intervening weekend, as many as three days later. *Id.*

Delays also occur on the response-delivery side. During jail "lockdowns," civilian staff may be prohibited from handing inmates their response packets, in which case Marti-Torres relies upon DOC officers to give the packets to the inmates. ER 472-473. In approximately twenty instances, the officers did not even hand response packets to inmates during lockdowns. ER 474-475. On ten to fifteen occasions, LRA's responses to inmate legal research requests never arrived at DOC's office, requiring DOC staff to contact LRA to re-send the responses. ER 503-504.

***42** LRA's inherent problems with timeliness are exacerbated when an inmate needs legal research quickly. Although LRA may provide expedited responses to legal research requests when notified that an inmate is "under a terrible time crunch," see ER 155-156, inmates are not advised that LRA will provide expedited responses during trial or other emergencies. ER 273 at ¶ 10(d); 278-279 at ¶ 9; 353 at ¶ 14; 524; 1499 at ¶ 28.

Plaintiffs proved that this failure had a direct prejudicial effect on plaintiffs' abilities to represent themselves; several inmates testified that they did not file specific motions because they knew of LRA's sluggish response time and were unaware of their right to get materials on an expedited basis. See, e.g., ER 272- 275; 278-279; 1474 at ¶ 10; 1496-1498. This lack of information explains why there have been only three or four requests for expedited processing of legal research requests. ER 522-523.

The statistical data, admissions from LRA and DOC, and testimony of inmates proved that LRA is too slow to be an adequate tool for in pro. per. inmates' legal research needs. Given the realities of legal research (as this Court articulated in the *Toussaint* case discussed *infra*), it is a serious hindrance for inmates to have to wait even one day to receive legal materials. LRA's typically sluggish response time which - even under ordinary circumstances - can stretch ***43** out for several days is an even greater hindrance, which violates plaintiffs' constitutional rights.

4. Legal Research Associates' Inadequate Staffing Structure and Lack of Oversight Contribute to Its Failure to Provide Adequate Legal Research to Inmates Who Are In Pro. Per.

a. Research for Santa Clara County Inmates Is Conducted by Untrained and Inexperienced Laypersons.

LRA's frequent research errors are unsurprising when one reviews its inadequate staffing structure. The vast majority of legal research for inmates in the Santa Clara County jail is conducted by an LRA employee who lacks the training and experience to perform adequate research. This employee, Shelley Howell, performs 85-90% of the inmate-requested research for Santa Clara County. See ER 785-786. Howell is not an attorney or a paralegal. ER783. She lacks both courtroom experience and any practical experience with criminal practice and procedure. ER 866.[30]

In fact, none of LRA's lay researchers have courtroom experience or any practical experience with criminal practice and procedure. ER 866. One employee, Curtis Denton, is a certified paralegal.[31] ER 782-783. However, LRA ***44** does not require Denton to attend continuing education courses to ensure that his paralegal-level research skills are updated; Richard Williams recalled sending him to only one continuing education course on criminal law and one on civil procedure during the prior four years. ER 867-868. The other researchers, including the primary researcher for Santa Clara County, have only on-the-job

legal research training; they are not paralegals or even legal secretaries. ER 782- 783.

It is questionable whether LRA's chief supervising attorney, Richard Williams, is sufficiently experienced or capable of overseeing the work of the LRA researchers. Williams has no specialized training in legal research methodologies. ER 776. He has not practiced criminal law in 20 years and, at that time, handled only two felonies at most; he never went to trial in a criminal matter. ER 873-874.

b. LRA Lacks Internal Oversight and Controls to Ensure Adequate Research for In Pro. Per. Inmates.

The minimal oversight of the LRA researchers, by Williams and his colleague Alex Gustafson, is informal, sporadic and inadequate. Williams has not established a formal oversight system. ER 789. He conducts no spot-checking of research responses, even for work done by non-paralegals. ER 789-790. LRA does not maintain a quality assurance program to evaluate inmates' satisfaction with the service. ER 808.

***45** Although LRA operates in 14 counties, ER 780, and has only three employees conducting legal research (including one who also does data entry), ER 781, Williams spends only 60% of his time overseeing LRA. ER 778-779. He devotes 40% of his time to his private practice, located in the same office. ER Id. Although Williams testified that he reviews inmate grievances, forwarded by DOC, to determine whether they have merit, ER 791, LRA's failure to preserve much of the relevant material prevents any meaningful review of or response to these grievances. Not only does LRA destroy every inmate request, ER 793 and 837 at ¶ 6, it does not save copies of the research material sent to each inmate that would allow LRA to review whether the material was responsive to the request. ER 796. LRA, thus, is reduced to responding to inmate grievances by reiterating the number of pages of research that its staff copied for the inmate or relying on the memories of staff members who respond to tens of thousands of research requests monthly.

5. Another Cause of LRA's Failure to Provide Adequate Legal Research to Inmates is the County's Lack of Oversight of LRA's Contract and Inappropriate Delegation of Its Constitutional Responsibilities.

a. The County Has No System to Monitor LRA's Work.

Plaintiffs proved that the problem of LRA's inadequate supervision of its staff's legal research work is compounded by the County's non-existent oversight. The County has inappropriately delegated to LRA its responsibility to ensure that ***46** *in pro. per.* inmates get adequate legal materials to defend themselves and access the courts, as stated in its contract. See ER 829 at § I; 834 at ¶ 1.

Although the contract allows the County to monitor LRA's work, ER 830 at § V, the County has never evaluated LRA's services in any formal way, other than an audit conducted during LRA's pilot phase. ER 451-453, 459-460.[32] DOC has not reviewed the subject matter research packets that LRA distributes to inmates. See ER 392.

The County has no systematic procedure to monitor LRA's contract performance. Most significantly, the County admitted that no one reviews the research responses that LRA sends to verify whether they are correct and complete. *See* ER 545. The testimony of Lisa Marti-Torres, produced as the person most knowledgeable about the County's policies and procedures regarding ensuring inmates' access to courts including legal research, ER 443, makes clear that the County has no system to ensure that LRA delivers timely and adequate research to self-represented inmates.[33] Marti-Torres had no idea whether the County had ever exercised its right to monitor LRA's contract performance records or its ***47** procedures. ER 459-461.[34] Marti-Torres could describe only limited oversight, including contacting LRA when responses were not delivered, ER 449; forwarding some LRA-related grievances to LRA, ER 450; and attending meetings at which a limited number of issues were discussed. ER 451-453. Marti-Torres did not even know whether those meetings constituted monitoring under the LRA contract. ER 445.

Although the County made some attempt to influence the timeliness of LRA's responses, its efforts were erratic and unsystematic. Despite requiring LRA to respond to research requests within three business days, the County does nothing more than contact LRA about delays. ER 503-505. The County has contacted LRA to inquire about late responses on only 10

or 15 occasions, ER 503, despite evidence showing that more than 25% of responses took more than three days. See ER 1526, 1540.

Deputy County Counsel Linda Deacon, who replaced Ms. Marti-Torres as the person most knowledgeable about LRA's obligations, failed to describe any systematic oversight of LRA's services. Deacon testified that the County does nothing to ensure that Richard Williams and Alex Gustafson personally supervise all research services or to verify that LRA's staff is sufficiently trained and ***48** supervised; the County's principal "method" of oversight is merely entering into a contract with LRA.[35] See ER 382, 400-402. Nor does DOC assess LRA's quality control system. ER 403. Deacon testified that DOC monitors the quality of LRA's research services through receiving inmate grievances.[36] ER 381-391.

b. The County and LRA's Mishandling of Inmate Grievances Regarding LRA's Legal Research Services Further Demonstrated the Lack of County Oversight of LRA's Contract.

One potential avenue that DOC could have used to obtain feedback about LRA's legal research services was by reviewing, investigating and addressing inmate grievances about LRA. Unfortunately, DOC missed that opportunity; grievances about LRA's services were not appropriately handled. Aside from contacting LRA from time to time to ask about delayed packets, *see* ER 503, grievances about the quality of LRA's services are not investigated and, oftentimes, simply ignored.[37] ER 551-552, 556-562. The County maintained no written policy or procedure requiring DOC to send LRA-related grievances to LRA. See ER 398-399. Marti-Torres, who is responsible for grievances and for ***49** handling the *pro. per.* requests at the Main Jail (as well as the PMK), had never seen 15 of 32 LRA-related grievances that she was asked about.[38] ER 527-547, 552-553, 563.

Although the LRA/County contract requires that all "grievances filed relating to services provided by LRA shall be responded to by LRA within 24 hours," ER 834 at ¶ 4,[39] this provision was not followed in at least six instances, where LRA was not provided copies of LRA-related grievances. ER 535, 544, 546, 548-550, 564. Moreover, the County does not follow up on grievances sent to LRA. ER 536-537. The fact that Williams was only aware of two of the many instances where inmates' research requests were incompletely answered, see ER 825-827, reveals the inadequate supervision of research conducted by LRA's non-attorneys.

B. The County and LRA's (1) failure to provide in pro. per. inmates with the ability to defend themselves under the Sixth Amendment and (2) denial of meaningful access to courts for inmates to pursue post-conviction matters has caused them prejudice.

The inmates provided the evidence enumerated above to the District Court to prove that LRA's deep systemic flaws render it impossible for in pro. per. inmates ***50** to gain reasonable access to the legal materials they need to implement their Sixth Amendment rights to a criminal defense and their post-conviction right to meaningfully access courts. These problems repeatedly manifested themselves with actual prejudice in individual inmates' cases, see ER 1644-1662.[40] As discussed above, although "actual injury" is not a predicate for a Sixth Amendment violation, Lewis does contain such a requirement for the post-conviction access right; the vast majority of the prejudice alleged by the inmate witnesses here relates to the former. Nevertheless, assuming arguendo a prejudice analysis does apply to the Sixth Amendment claims, inmates have demonstrated, it.

For example, Kevin Hopkins testified about a motion he made for a subpoena duces tecum to release documents that he believed contained exculpatory evidence. ER 355-356 at ¶ 20. This motion was denied, but Hopkins believes it failed because he did not use the proper legal terminology, due to materials he received from LRA. *Id.* He believes that he would have properly pled that motion if he had been provided access to a physical law library. *Id.*

***51** Hopkins also filed a motion to dismiss the charges against him, arguing that the prosecution was impermissible under the ex post facto clause. ER 354 at ¶ 17(a). When he requested information from LRA to help draft the motion, the response was unhelpful. *Id.* Because he was unable to properly research it using LRA's services, he withdrew that motion before the court ruled on it. *Id.*

Another example of prejudice caused to Hopkins by LRA's inadequacies came after the criminal court ordered a key witness

for the prosecution to be present to testify at his preliminary hearing. ER 354-355 at ¶ 17(b). When that hearing was rescheduled, the witness failed to appear and Hopkins was unable to cross-examine the witness about statements he had made to the arresting officer. *Id.* As soon as possible after that hearing, Hopkins requested information from LRA about how to compel that witness to appear for cross-examination. *Id.* Because of the cumbersome nature of LRA's system, Hopkins was unable to file that motion for approximately one month. *Id.* The court denied the motion as untimely. ER 358.

On two occasions while he was *in pro. per.* in his criminal case, Barth Capela requested information from LRA to help him argue that the District Attorney had acted improperly by filing additional felony charges against him after the preliminary hearing, but did not receive adequate responses. See ER 271 at ¶ 9. Capela's first request for this information came shortly before trial. *Id.* at ¶ 9(b).

***52** He asked LRA whether it was legal for the District Attorney to file felony charges after the preliminary hearing without new evidence. *Id.* LRA failed to provide him with useful information. Id. Approximately two or three days after trial, LRA provided the information that Capela had requested. ER 271-272 at ¶ 9(c). Only then did he receive confirmation that the District Attorney's addition of felony charges after the preliminary hearing without new evidence was arguably illegal; unfortunately, he also learned that he had waived any objection to those actions by proceeding with trial. *Id.* Thus, he received the information too late for it to be useful. *Id.* Because he was unable to adequately defend.himself, Capela was convicted of attempted robbery. ER 274-275 at ¶¶ 12-18. If he had been provided proper access to research materials, he could have made a colorable motion to have that charge dismissed before trial, since it was added after the preliminary hearing. ER 275 at ¶ 18.

Charles Lyons requested information from LRA on how to file a Pitchess motion to request access to information in the arresting police officer's personnel file that might show a proclivity for misconduct. ER 1474 at ¶10. He used a sample motion from LRA to prepare the motion. ER 1474,1480. The judge asked him to refile the motion on the grounds that it was incomplete. ER 1474 at ¶ 10. Lyons then asked LRA to provide information about how to refile a complete motion. *Id.* In response, LRA sent him the same sample motion that the judge had ***53** rejected as incomplete. *Id.* Because time was running out on filing other motions, and Lyons had no access to resources to research further into how file a complete motion, he did not refile the Pitchess motion. *Id.*

Shawn Bautista requested specific materials from LRA on several occasions to assist him in crafting a petition for a writ of mandate to challenge the denial of a California Penal Code Section 995 motion to dismiss. ER 1682 at ¶ 21(a); 1685 at 21(g); 1703,1717,1719,1731. He discovered these materials during his research, only to have LRA refuse to provide them. *Id.* He eventually filed a writ without the requested materials, and the writ was denied. ER 1682-1683 at ¶ 21(a). The writ was inadequate because he did not have access to the requested materials. *Id.*

LRA refused to provide Bautista a publication that he sought to use to help him craft a lawsuit based on DOC personnel's destruction and/or seizure of his legal research. ER 1683-1684 at ¶ 21(d), 1715. Critical legal documents, including legal strategies and notes from an interview with the key witness to his criminal case, went missing after a DOC walk through of his cell. *Id.* Bautista found himself unable to file the lawsuit because of LRA's refusal to provide the requested material. *Id.*

Despite these and a number of other allegations of injury by the seven inmate witnesses, see ER 1644-1662, the District Court ruled that none of these examples amounted to the "actual injury" it considered necessary to support a ***54** constitutional claim. These rulings reflect the application of erroneous legal standards upon which the District Court relied.[41] In particular, as to each of the example allegations of injury detailed above, the court repeatedly invokes its holding that not only must inmates demonstrate actual prejudice to sustain a Sixth Amendment claim, ER 1982-1992, they must demonstrate that the injury they suffered was "outcome-determinative" and that no other factor could have caused the injury. See, e.g., ER 1982 (court refusing to find denial of Hopkins' motion to release allegedly exculpatory material prejudicial because "the court could not conclude that Hopkins' lack of success stemmed from LRA's flaws without engaging in speculation"); ER 1983 (Hopkins testified he was unable to file motion to dismiss on ex post facto grounds; court disregards because it "cannot determine whether Hopkins' motion had any merit"); id. (Hopkins's inability to compel critical witness to appear for cross-examination not actual injury because court concluded it was "highly unlikely" that inability to cross-examine witness "contributed to the court's probable cause determination"); ER 1985 (although LRA failed to timely provide information to enable Capela to challenge late-added charges, court ruled that because, under its reading of the California Penal Code, a ***55** prosecutor may add such charges under some circumstances, it could not constitute actual injury); id. (court's rejection of Lyons's Pitchess motion not actual injury because inmate "cannot demonstrate that the criminal trial court's denial of his Pitchess motion affected the outcome of his case"); ER 1981 (court finding Bautista's statement that "he would have had a

better chance of success" on a writ petition if LRA had properly responded to his requests as insufficient [internal quotation marks omitted]); id. (criticizing Bautista's failure to prove that a particular resource was an "absolute necessity" for filing a conditions of confinement case).[42]

***56** These rulings do not comport with the appropriate legal standard as announced by this Court, its sister circuits, and other courts. These courts have held that inmates suffered potentially cognizable constitutional injury on showings similar to-or even considerably less weighty than - those the inmates made here. See, e.g., *Hiser, supra,* 94 F.3d at 1289,1294 n.6 (denial of photocopies); *Cody, supra,* 256 F.3d at 768 (defendants reading plaintiffs private legal papers); *Goff, supra,* 113 F.3d at 891 (inability to coordinate recruitment of witnesses, loss of legal papers); *Purkey, supra,* 339 F. Supp. 2d at 1152 (prison officials' disposal of inmates' legal materials); *Lueck, supra,* 262 F. Supp. 2d at 695 (prison officials' confiscation of affidavit re inadequate assistance of counsel claim). The District Court's rulings that the evidence does not prove that actual prejudice was suffered by the inmates are contrary to the facts and the law.

***57 VII. THE PROSPECTIVE RELIEF IN THE ACCESS TO COURTS DECREE EXTENDS NO FURTHER THAN NECESSARY TO CORRECT THE COUNTY'S VIOLATION OF IN PRO. PER. INMATES' CONSTITUTIONAL RIGHTS, IS NARROWLY DRAWN, AND IS THE LEAST INTRUSIVE MEANS NECESSARY TO CORRECT THE VIOLATION.**

In addition to improperly analyzing the underlying constitutional rights at issue here, as well as using the wrong standard to assess the County's compliance with those rights, the District Court erroneously held that the prospective relief in the Access to Courts decree was terminable in other respects. To survive a termination motion, the PLRA requires that prospective relief in a consent decree relating to prison conditions extend no further than necessary to correct the current and ongoing constitutional violation that the correctional officials are committing, and that the relief be (1) narrowly drawn and (2) the least intrusive means necessary to correct the violation. 18 U.S.C. § 3626(b)(3). The relief in the Access to Courts Decree satisfies these requirements, known collectively as the "need-narrowness-intrusiveness findings." *Benjamin v. Fraser,* 343 F.3d 35 (2d Cir. 2003); *Feliciano v. Serra,* 300 F. Supp. 2d 321, 332 (D.P.R. 2004).

Congress did not break new ground by including this requirement in the PLRA. Discussing similar language in section 3626(a)(1)), this Court held that the PLRA "has not substantially changed the threshold findings and standards required to justify an injunction. To this extent,... the PLRA merely codifies existing law and does not change the standards for determining whether to grant an injunction."

***58** *Gomez v. Vernon,* 255 F.3d 1118,1129 (9th Cir. 2001) (internal citation, quotation marks and brackets omitted); accord, *Gilmore, supra,* at 1006 (holding that "the general standard for granting prospective relief differs little from the standard set forth in [sections 3626(b)(2) and (3)]. The limits on federal court jurisdiction are essentially the same - no more than necessary to correct the underlying constitutional violation.").

This Court set out that general standard in detail in the Toussaint case, stating that while

> [i]njunctive relief against a state agency or official must be no broader than necessary to remedy the constitutional violation... [,i]n fashioning a remedy for constitutional violations, a federal court must order effective relief. Therefore, a federal court may order relief that the Constitution would not of its own force initially require if such relief is necessary to remedy a constitutional violation. A defendant's history of noncompliance with prior court orders is a relevant factor in determining the necessary scope of an effective remedy.

Toussaint v. McCarthy, 801 F.2d 1080,1086-87 (9th Cir. 1986) (quoted in *Feliciano, supra,* at 332) (internal citations omitted). This concept was reaffirmed in the context of the PLRA in a decision by the Second Circuit, which held that

> Although the PLRA's requirement that relief be "narrowly drawn" and "necessary" to correct the violation might at first glance seem to equate permissible remedies with constitutional minimums, a remedy may require more than the bare minimum the Constitution would permit and yet still be necessary and narrowly drawn to correct the violation.

Benjamin v. Fraser, supra, 343 F.3d at 54.

***59** In addition to the fact that court-ordered relief may extend beyond the constitutional floor in order to remedy the constitutional violation, it is clear that court orders relating to prison policy do not ipso facto violate the PLRA's need-narrowness-intrusiveness requirement. In *Ashker v. California Department of Corrections,* 350 F.3d 917, 923 (2003), this Court upheld an injunction against a California Department of Corrections policy requiring that "approved vendor labels" be attached to all books sent to prisoners. Below, the District Court had noted that its injunction against the policy was, in fact, less intrusive than requiring "the continuous supervision of the court" or judicial interference in the running of the prison system." *Ashker v. Department of Corrections,* 224 F. Supp. 2d 1253, 1263 (2002), aff'd, 350 F.3d 917 (2003).43

Similarly, in the *Feliciano* case, the court denied the government's motion to terminate a consent decree relating to inmate health care throughout the Puerto Rico correctional system. *Feliciano, supra,* at 323, 344. The remedy there involved removing the health care of indigent inmates from the hands of the government altogether and creating a new nonprofit corporation to provide those ***60** services. Id. at 334. The court found that remedy in compliance with section 3626(b)(3)'s need-narrowness-intrusiveness requirements. *Id.*

Another example of systemic relief in the post-PLRA era is found in *Skinner v. Uphoff,* 234 F. Supp. 2d 1208 (D. Wyo. 2002), where the court held that a remedy for inmate-on-inmate violence must address the institutional "culture" impeding the effective supervision and discipline of staff. *Id.* at 1218. The court further held that "systematic and prophylactic measures" may be ordered if necessary to correct the constitutional violations, while affirming that such measures would comply with the PLRA's need-narrownes-intrusiveness requirements. *Id.* In yet another case, the court entered an extensive and detailed order regarding the due process procedures that the State was required to follow before placing inmates in a so-called "supermax" prison. See Austin v. Wilkinson, 204 F. Supp. 2d 1024,1026 (D. Ohio 2002). The court held that this detailed, systemic relief was the "least intrusive means to correct the violation." *Id.*

Given courts' commonsensical interpretation that the PLRA neither (1) limits federal courts to issuing orders stating simply, "obey the Constitution," nor (2) prohibits systemic relief where appropriate, the District Court's holding that the Access to Courts Decree does not meet the needs-narrowness-intrusiveness test because it requires the County to provide law libraries as a means of providing in pro. per. inmates with legal research materials is mistaken. ER 1980.

***61** The County's use of LRA as the sole means of providing in pro. per. inmates with legal research materials is unconstitutional, as discussed in detail above, because it utterly fails to provide legal research materials adequate to allow those inmates to represent themselves.

The District Court's holding that the failure of the Access to Courts Decree to expressly limit "the availability of the library... to the discrete categories of inmates who are entitled to them" renders it subject to termination, ER 1980, fails to consider these requirements in context. While the decree does not specifically set out the categories of inmates that are entitled to utilize the law libraries and legal services that the County had to provide, the term "access to courts" appears in the decree and in Judge Peckham's final order, implying the provisions of the decree are meant to apply to those inmates with a constitutional right to such access. ER 227,235,237. Further, all of the cases cited by Judge Peckham in his initial order for the proposition that federal law requires correctional officials to provide law libraries relate to in pro. per. inmates. ER 219-220 (citing, inter alia, *Johnson v. Avery,* 393 U.S. 483 (1969); *Gilmore v. Lynch,* 319 F. Supp. 105 (N.D. Cal. 1970)).44 Thus, it is clear from the context of the Access to Courts Decree that ***62** the only inmates to whom the County's obligations extend are those to whom they are constitutionally obliged to provide those services - i.e., the in pro. per. inmates in the three categories discussed above.[45]

CONCLUSION

The Access to Courts Decree meets the requirements of section 3626(b)(3) because it (1) remains necessary to correct the County's current and ongoing violation of in pro. per. inmates' right to a criminal defense and to access courts for post-conviction matters, (2) extends no further than necessary to correct the County's violation, (i.e., it is narrowly drawn), and (3) is the least intrusive means necessary to correct the County's violation. Therefore, this Court should reverse the District Court's termination of the prospective relief contained in the decree and remand with instructions to the District

Court to reinstate that relief. In the ***63** alternative, if this Court decides that the decree does not meet the need-narrowness-intrusiveness test in some respect, it should reverse and remand with instructions to the District Court to modify the decree to meet those requirements.