

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

EUGENE BATCHELDER, et al.,
Plaintiffs,
v.
JAMES M. GEARY, et al.,
Defendants.

No. C-71-2017 RMW
ORDER ON MOTIONS TO TERMINATE
CONSENT DECREES
**[Re Docket Nos. 231, 324, 337, 338, 339, 348,
349, 350, 352, 353]**

In 1973, this court approved two consent decrees between Santa Clara County ("County") and inmates in its jails. The first required the County to establish a law library for inmates ("Access to the Courts Decree"). The second required the County to create a written code of rules and procedures to govern the imposition of in-jail disciplinary offenses ("Amended Disciplinary Procedures Decree").¹ On November 3, 2004 the County moved to terminate both Decrees under the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626 *et seq.* Kevin Hopkins ("Hopkins"), Barth Capela ("Capela"), Charles Lyons ("Lyons"), Ricky Reyes ("Reyes"), Theotis Golden ("Golden"), Timothy Walker ("Walker"), and Shawn Bautista ("Bautista") (collectively "prisoners")—who purport to represent a class of *pro per* inmates

¹ On September 16, 2004 the court issued an order to show cause why the County was not in contempt of the Decrees. The court held a hearing on November 19, 2004. On September 30, 2005 the court issued an order finding the County in contempt but declining to determine a remedy until after ruling on the County's motion to terminate the Decrees.

1 in the County's jails—oppose the motion and urge the court to modify, rather than terminate, the Decrees.
2 At the pre-hearing conference on September 27, 2005 the parties agreed that an evidentiary hearing in
3 connection with the motion was not necessary and the matter could be decided based upon declarations.
4 Oral argument took place on November 4, 2005. The court has read the moving and responding papers
5 and considered the arguments of counsel. For the reasons set forth below, the court (1) terminates the
6 Access to the Courts Decree and (2) terminates the Amended Disciplinary Procedures Decree except to
7 the extent that it requires a written statement of decision in certain disciplinary matters and (3) orders the
8 parties to meet and confer with respect to the County's compliance with the requirement for written
9 statements of decision.

10 I. BACKGROUND

11 On April 13, 1973 Judge Peckham of this court issued a preliminary injunction against the County's
12 jail system. Schmid Decl. Supp. Mot. Term. Consent Decree ("Schmid Decl.") Ex. A. Noting that inmates
13 have a constitutional right to "adequate access to the courts," Judge Peckham required the parties to submit
14 plans to facilitate this right. *Id.* at 2. Judge Peckham also noted that the Due Process Clause of the United
15 States Constitution's Fourteenth Amendment entitled inmates who had been charged with disciplinary
16 offenses to certain procedural guarantees, including (1) notice of the alleged infraction, (2) a hearing before
17 an impartial tribunal, (3) clearly-stated prison rules, (4) the right to call and cross-examine witnesses, and
18 (5) the right to some form of representation. *Id.* at 3-4. Judge Peckham approved a modified version of a
19 disciplinary scheme that the County had proposed. *Id.* at 7.

20 The parties filed the Access to the Courts Decree, which Judge Peckham approved on June 20,
21 1973. Schmid Decl. Exs. B, C. After the United States Supreme Court decided *Wolff v. McDonell*, 418
22 U.S. 539 (1974), the parties submitted the Amended Disciplinary Procedures Decree. Schmid Decl. Ex.
23 D. Judge Peckham approved the Amended Decree on August 30, 1977. Schmid Decl. Ex. E. The court
24 briefly describes each Decree below.

25 A. The Access to the Courts Decree

26 The Access to the Courts Decree "consists of a combination of furnishing inmates . . . with law
27 books and legal materials and . . . legal services." Schmid Decl. Ex. B at 1. The Decree requires the
28 County to establish law libraries at the Main Jail in San Jose, the Men's Rehabilitation Center in Milpitas,

1 the Elmwood Men's Rehabilitation Center, and the Elmwood Women's Detention Facility. *Id.* at 1, 5. The
2 Decree mandates that the Main Jail and Men's Rehabilitation Center libraries contain current versions of
3 specific sources. *Id.* at 1-2. In addition, the Decree created a system whereby inmates could borrow
4 books and material from the Santa Clara Law Library. *Id.* at 2-3.

5 **B. The Amended Disciplinary Procedures Decree**

6 The Amended Disciplinary Procedures Decree requires the County to provide inmates with a copy
7 of the Uniform Procedures of Prisoner Conduct. Schmid Decl. Ex. D at 1, 2. The Decree provides that
8 prisoners are entitled to a hearing before a Violation Review Board if they plead not guilty to a major rule
9 violation. *Id.* at 2. Under the Decree, the officer who observes the violation must prepare a written report
10 and forward it to his supervisor. *Id.* at 3. The supervisor must provide the prisoner with a copy of the
11 violation and inform him of his rights (1) to a hearing, (2) to request aid in investigating and preparing his
12 case, and (3) to request a lay advocate. *Id.* at 4-5. The hearing must occur no more than five days after
13 the prisoner receives notice of the alleged violation and within ten days of the incident itself. *Id.* at 5-6. The
14 Decree empowers prisoners to cross-examine witnesses and "to present relevant evidence on his . . . behalf
15 at no expense to the County." *Id.* at 7. The Decree mandates that the Board "render its decision orally" at
16 the end of the hearing and "thereafter . . . indicate in writing its decision and the facts" on which it relied. *Id.*

17 **C. The LRA**

18 In 1987, the Santa Clara County Department of Corrections ("DOC") began operating the
19 County's jail system.² In 2003 the DOC closed the jail libraries. The DOC contracted with Legal
20 Research Associates ("LRA") to serve inmates' legal research needs. Williams Reply Decl. Supp. Rep.
21 Mot. Term. Consent Decrees ("Williams Reply Decl.") Ex. A. Richard Williams ("Williams"), an attorney
22 licensed to practice in California, owns and operates LRA. Williams Reply Decl. ¶ 1.

23 Inmates first learn about LRA when they see a DOC orientation video upon entering jail. *Id.* at ¶
24 13. Jail personnel inform new inmates that the facility does not contain a physical law library. Marti-Torres
25 Decl. Supp. Rep. Mot. Term. Consent Decrees ("Marti-Torres Decl.") ¶ 4. To use LRA's services,

26 _____
27 ² The DOC operates the Main Jail and the Elmwood facility. Marti-Torres Decl. Supp. Rep.
28 Mot. Term. Consent Decrees ("Marti-Torres Decl.") ¶ 2. If an inmate at Elmwood receives *pro per* status,
the DOC transfers him to the Main Jail. *Id.*

1 inmates complete request forms. Williams Reply Decl. at ¶ 6(a).³ Twice each day, jail staff collect the
2 forms, log them, and fax them to LRA's offices. *Id.* at ¶ 6(b). LRA receives the forms, logs them into an
3 electronic database, and prioritizes requests by *pro per* inmates and other inmates with impending court
4 dates. *Id.* at ¶ 6(c). LRA then shreds the faxed requests. *Id.* at ¶ 18. LRA collects responsive
5 information and inserts it into unsealed envelopes. *Id.* at ¶ 6(d).⁴ LRA sends the responses by overnight
6 courier to the jails. *Id.* at ¶ 6(e). At some point, either officers or LRA employees log the date each inmate
7 receives the response. *Id.* at ¶ 6(e). Officers also return the original research request to the inmate. *Id.* at
8 ¶ 18. The contract between LRA and DOC requires LRA to respond to inmates within three working
9 days of the request. *Id.* at ¶ 6(f). If LRA needs more time, it must contact the inmate and explain why. *Id.*

10 Williams, who also practices law, spends about 60% of his time working for LRA. *Id.* at ¶¶ 2, 7.
11 The LRA staff consists of one certified paralegal, Curtis Denton, and four other employees, Shelley Howell,
12 Shani Williams, Sharon Williams, and Jeffery Williams. *Id.* at ¶ 7. LRA uses Lexis-Nexis and Westlaw for
13 legal research. *Id.* at ¶ 9.

14 Williams claims that he designed LRA to facilitate research on behalf of individuals who often lack
15 formal legal training. According to Williams, inmates may request cases by portions of the case name, and
16 LRA employees will search using alternative names if they are initially unable to find a case. *Id.* at ¶ 10. In
17 addition, LRA has created approximately 500 information packets on subjects about which inmates
18 frequently inquire. *Id.* at ¶ 11. Williams contends that the packets enable inmates to make research queries
19 in plain English. *Id.* The packets generally contain statutes, selections from secondary sources, forms, and
20 standard jury instructions. *Id.* For example, LRA offers packets on how to set aside an information under

22 ³ Prisoners contend that Williams' explanation of how LRA operates is inadmissible because
23 it (1) lacks foundation, (2) is improper lay witness testimony, and (3) violates Local Rule 7-5(b), which
24 requires affidavits to "contain only facts . . . and avoid conclusions and argument"). These arguments lack
25 merit. For one, Williams, who created LRA, has firsthand knowledge of how the system works. *See* Fed.
26 R. Evid. 602 (witness' own testimony may establish that they "ha[ve] personal knowledge of the matter").
27 Second, Williams need not be qualified as an expert to describe LRA. *See* Fed. R. Evid. 701, 2000 amend. (lay testimony that stems from "particularized knowledge that the
28 witness has by virtue of his or her position in the business" is proper if explained in terms most laypeople
can understand). Finally, prisoners' objection under Local Rule 7-5(b) is inapplicable to this portion of
Williams' declaration, which consists solely of facts.

⁴ According to Williams, LRA does not seal envelopes to allow jail personnel to inspect their
contents more easily. Williams Reply Decl. ¶ 6(d).

1 California Penal Code section 995 or to suppress evidence under California Penal Code section 1538.5.

2 *Id.* Some packets include sample motion forms, including points and authorities. *Id.*⁵

3 LRA gives inmates printouts from Westlaw's "citing references" function to Shepardize authorities.
4 *Id.* at ¶ 15. It provides inmates with tables of contents and indices from some secondary sources but not
5 others. *Id.* at ¶ 16. It does not provide inmates with a list of available packets. *Id.* LRA also exercises its
6 discretion not to provide certain sources to inmates, such as *Law Review* articles, Restatements of the
7 Law, or Continuing Education of the Bar publications. *Id.* at ¶ 17. It also refuses to provide unpublished
8 cases or briefs in order "to avoid having an inmate rely upon authorities that cannot be used in support of
9 requested relief." *Id.*

10 **D. The County's Disciplinary Policy**

11 The County has a written policy for Inmates Rules and Discipline. Fischer Decl. Supp. Rep. Mot.
12 Term. Consent Decrees ("Fischer Decl.") Ex. A.⁶ Jail personnel provide inmates with an Inmate
13 Orientation and Rule Book when they enter the facility. *Id.* at ¶ 2, Ex. B. Rule Books are available in both
14 English and Spanish. *Id.* at ¶ 2. The County posts copies of the Rules and Penalties conspicuously in all
15 general population housing. *Id.* The Rule Books set forth the disciplinary procedure for criminal, major,
16 and minor rule violations. *Id.*

17 When an officer observes an inmate violating a major rule, he must draft a written infraction report
18 within twenty-four hours. *Id.* at ¶ 5. The officer must give the inmate a copy of this report. *Id.* The officer
19 then forwards the report to a sergeant, who investigates the matter. *Id.* The sergeant informs the inmate
20 that he is entitled to a hearing if he denies committing the violation and may have the assistance of a
21

22 ⁵ Prisoners contend that Williams' description of the packets violates the best evidence rule.
23 Federal Rule of Evidence 1002 provides that "[t]o prove the content of a writing, recording, or photograph,
24 the original writing, recording, or photograph is required" Even assuming that prisoners are correct
25 that Williams asserts what the packets contain and thus seeks to prove their contents, prisoners do *not*
26 contend that Williams' description is inaccurate. The best evidence rule only applies "when the terms of the
writing *are in dispute.*" *Seiler v. Lucasfilm, Ltd.*, 808 F.2d 1316, 1319 (9th Cir. 1986) (emphasis
added). The court thus overrules prisoners' objection.

27 ⁶ Prisoners move to strike Fischer's testimony on the grounds that the County did not present
28 Fischer as its Federal Rule of Civil Procedure 30(b)(6) person most knowledgeable with respect to
disciplinary procedures. The court denies the motion. Fischer's declaration consists almost entirely of
background facts; exactly what prisoners seek to accomplish with this motion is unclear.

1 representative if he desires. *Id.* at ¶ 6. Friends Outside, a group that assists inmates, may interview
2 witnesses and prepare the inmate for the hearing. *Id.* at ¶ 8. The hearing must occur within ten judicial
3 days but no sooner than twenty-four hours after the inmate receives a copy of the infraction. *Id.* at ¶ 9.

4 Inmates may present documentary evidence and call witnesses at the hearing. *Id.* at ¶ 10.
5 However, the County sometimes does not permit certain witnesses to appear because of safety concerns.
6 *Id.* For example, witnesses classified as "double red" have previously assaulted other inmates or staff and
7 thus may not be entitled to call witnesses. *Id.* Inmates may not cross-examine witnesses. *Id.* An
8 administrative lieutenant oversees the hearing. *Id.* at ¶ 11. After the hearing, the panel provides a written
9 statement. *Id.* at ¶ 13. The statement lists (1) the officer who observed the infraction, (2) the inmates
10 involved, (3) the date the hearing was held, (4) a description of the incident, (5) the hearing lieutenant and
11 panel members, and (6) the panel's factual findings and conclusions. *Id.* The panel informs the inmate that
12 he may appeal the decision to the Division Commander, who must affirm or reverse within five days. *Id.*

13 **E. The Prisoners**

14 **1. Hopkins**

15 The County incarcerated Hopkins in the Main Jail from December 3, 2003 to April 22, 2005.
16 Hopkins Decl. Supp. Opp. Mot. Term. Consent Decrees ("Hopkins Decl.") ¶ 2; Schmid Decl. Supp. Rep.
17 Mot. Term. Consent Decrees ("Schmid Reply Decl.") ¶ 20(a)(i).⁷ Hopkins represented himself in his
18 criminal case in California Superior Court from December 11, 2003 until August 18, 2004. Hopkins Decl.
19 ¶ 3. When Hopkins decided to proceed *pro per*, he "did so under the assumption that [he] would have
20 access to a physical law library." *Id.* at ¶ 4. After the court approved Hopkins' *pro per* status, the County
21 provided him with legal tablets, subpoenas, pencils, a sample discovery motion, and criminal procedure
22 rules. Schmid Reply Decl. at ¶ 20(a)(ii). The County also allowed Hopkins to spend about ten hours per
23 week in a word processor room. *Id.* Ultimately, LRA provided Hopkins with about 3,800 pages of
24
25

26 ⁷ Prisoners correctly note that Schmid's declaration improperly contains legal argument, thus
27 violating Local Rule 7-5. However, both parties have taken liberties with this rule: prisoners' opposition
28 brief contains dozens of pages of similar legal argument in two appendices. The court believes the best
course is to consider both Schmid's declaration and prisoners' appendices.

1 research material, including 104 criminal packets, forty-five statutes, twenty-six cases, one civil packet, and
2 four forms. Williams Reply Decl. ¶ 19.⁸

3 Hopkins filed thirty-two criminal trial court motions, two habeas corpus petitions, and two appellate
4 court writs contesting trial court rulings. Hopkins Decl. ¶ 6(a)-(y); Schmid Rep. Decl. ¶ 20(b)(c). The
5 court granted approximately thirteen of Hopkins' criminal trial court motions. Hopkins Decl. ¶ 6(a)-(y).
6 Hopkins claims that LRA is inadequate because it took an average of five to ten days to receive materials in
7 response to his research requests. *Id.* at ¶ 9. In addition, Hopkins asserts that LRA sometimes ignored his
8 requests or responded that he needed to be "more specific." *Id.* at ¶¶ 10-11. Hopkins contends that he
9 was not aware that LRA could Shepherdize cases or provide him with expedited responses during trial. *Id.*
10 at ¶¶ 13-14. Hopkins claims that officers left LRA's responses "between the bars of the communal cell in
11 which [he] was housed, exposing them to any of the dozen or so inmates in that cell." *Id.* at ¶ 15.

12 According to Hopkins, LRA's inadequacies prevented him from succeeding on five motions: (1) a
13 motion seeking to release documents produced pursuant to a subpoena *deuces tecum*, (2) a motion to
14 dismiss the prosecution against him under the *ex post facto* clause, (3) a motion to compel a witness to
15 appear for cross-examination during his preliminary examination, (4) a motion for access to the courts, and
16 (5) a request for a hernia operation. *Id.* at ¶¶ 6(d), 17(a)-(d). Hopkins claims that LRA's failures caused
17 him to withdraw from *pro per* status. Hopkins Decl. ¶ 19.

18 2. Capela

19 Capela entered County custody in August 2003. Capela Depo. at 9:20-10:1. The County
20 appointed a public defender to represent him. *Id.* at 16:3-10. Capela requested *pro per* status on
21 November 19, 2003. *Id.* at 19:18-23:4; Capela Decl. Supp. Mot. Term. Consent Decrees ("Capela
22 Decl.") ¶¶ 2-4. He represented himself in his criminal case until April 2004. *Id.* at ¶ 4. After the court
23 granted his request, the County transferred him from Elmwood to the Main Jail. *Id.* at ¶ 5. The County
24 provided him with three legal pads, pencils, subpoena forms, and written information about his rights.
25 Capela Depo. at 33:18-34:5. Capela asserts that he made the decision to represent himself because he

26 ⁸ The prisoners contend that Williams' summary of what LRA provided Hopkins and other
27 inmates is inadmissible because it violates the best evidence rule. Not so. The best evidence rule requires a
28 party to introduce an original document to prove its contents. *See* Fed. R. Evid. 1002. Williams offers the
summary not to prove anything specific about a particular document, but the fact that Hopkins received a
certain number of documents.

1 believed that he would have access to a physical law library. Capela Decl. ¶ 6. He submitted eighteen
2 requests to LRA. Williams Reply Decl. ¶ 19. LRA responded with 827 pages of material. *Id.*

3 Capela's criminal trial began on March 31, 2004. Capela Decl. at ¶ 12. Capela claims that LRA
4 prevented him from effectively researching jury instructions or how to subpoena a key defense witness. *Id.*
5 at ¶¶ 13-16. In addition, he contends that LRA prevented him from successfully challenging a robbery
6 charge which the district attorney improperly added after the preliminary hearing. *Id.* at ¶ 9. Overall, he
7 filed thirteen motions and succeeded on one. *Id.* at ¶ 11(a)-(g). Capela alleges that his family hired an
8 attorney to represent him in post-conviction matters because they realized that continued *pro per*
9 representation would be futile. *Id.* at ¶ 17.

10 3. Lyons

11 A public defender represented Lyons from January to April 2004. Lyons Decl. Supp. Mot. Term.
12 Consent Decrees ("Lyons Decl.") ¶ 3. From April to July 2004, Lyons represented himself. *Id.* at ¶ 4.
13 Lyons claims that LRA responded to his requests in three to eight days. *Id.* at ¶ 6. He argues that this was
14 problematic because he generally only received one week's notice of hearings in his case. *Id.* According
15 to Lyons, LRA once replied so close to the filing deadline that he could not file a motion to strike an
16 improper charge in time. *Id.* at ¶ 11. In addition, he contends that a court once rejected a sample *Pitchess*
17 motion⁹ that he had obtained from LRA as "incomplete." *Id.* at ¶ 10. Finally, he asserts that LRA enclosed
18 its responses in unsealed envelopes, and often left them "out in the open." *Id.* at ¶ 7. Overall, he submitted
19 thirty research requests and received 1,055 pages of material. Williams Reply Decl. ¶ 19. He filed
20 approximately fourteen motions and succeeded on two. Lyons Decl. at ¶ 13(a)-(j). He asserts that he
21 withdrew from *pro per* status in July 2004 because he realized that he could not properly defend himself.
22 He contends that he then retained an attorney who entered a guilty plea against his wishes. *Id.* at ¶ 14.

23 4. Reyes

24 Reyes faced two drug-related charges and one charge of failure to register with a law enforcement
25 agency. Reyes Depo. at 6:14-7:4. A public defender represented Reyes from September 2003 to
26

27 ⁹ A *Pitchess* motion is a request that the court "screen[] law enforcement personnel files *in*
28 *camera* for evidence that may be relevant to a criminal defendant's defense." *People v. Mooc*, 26 Cal. 4th
1216, 1225 (2001).

1 December 2003. Reyes Decl. Supp. Mot. Term. Consent Decrees ("Reyes Decl.") ¶ 3. From December
2 2003 to May 2004, he represented himself in two criminal cases. *Id.* at ¶ 4. From February to May 2004,
3 he represented himself in a third criminal case. *Id.* He claims that he decided to proceed *pro per* because
4 he believed that he would have access to a physical law library. *Id.* at ¶ 5.

5 According to Reyes, "[u]sing LRA was difficult" because its response times ranged from a week to
6 ten days. *Id.* at ¶ 8. In addition, Reyes asserts that, about five to seven times, LRA simply did not respond
7 to requests. *Id.* at ¶ 9. Reyes states that the fact he faced multiple charges made using LRA more difficult.
8 For example, he claims that LRA only permitted him to make three requests at a time. *Id.* at ¶ 19. He
9 contends that it took six months to receive all of the California Penal Code sections with which he had been
10 charged. *Id.*

11 Reyes asserts that LRA was responsible for his inability to obtain information about police reports
12 and discovery. In addition, he claims that LRA hindered his ability to file (1) a motion to suppress evidence
13 under California Penal Code section 1538.5, (2) a *Pitchess* motion, (3) a motion to hold a witness in
14 contempt, (4) a motion for a continuance, (5) a motion to strike prior felony convictions, under California
15 Penal Code section 1385, and (6) a motion to be released on his own recognizance. *Id.* at ¶¶ 10, 17, 21,
16 22. He submitted twenty-nine requests to LRA and received 1,501 pages of material. Williams Reply
17 Decl. ¶ 19. He filed approximately twelve motions and succeeded on three. *Id.* at ¶ 13(a)-(j). He
18 ultimately withdrew from *pro per* status and pled guilty to all of the counts against him. Reyes Decl. ¶¶ 28-
19 29.

20 5. Golden

21 The County incarcerated Golden in the Main Jail from April 2004 to May 2005. Golden Decl.
22 Supp. Opp. Mot. Term. Consent Decrees ("Golden Decl.") ¶ 2. Golden represented himself in a civil rights
23 lawsuit against a parole officer for alleged false imprisonment in March 2004. *Id.* at ¶ 3. He also
24 represented himself in his pending criminal case beginning in December 2004. *Id.* at ¶ 4. Golden's criminal
25 trial began on January 19, 2005 and ended on January 27, 2005. RJN Ex. BBB.¹⁰ He claims that he was
26 not aware that LRA would expedite research requests during trial. *Id.* at ¶ 9. As a result, he asserts, he
27

28 ¹⁰ The minutes from the trial erroneously state the date as "2004." *See* RJN Ex. BBB.

1 was not able to contest the district attorney's hearsay objection to a "critically, potentially exculpatory"
2 report authored by an investigator. *Id.* at ¶ 9(a)-(b). He contends that he received "no response
3 whatsoever" from LRA "[o]n at least three occasions." *Id.* at ¶ 10. According to Golden, LRA frequently
4 refused to provide him with sources he needed, such as (1) a section from the Model Penal Code, (2) an
5 article in the *Harvard Law Review*, (3) petitions for *certiorari*, (4) citing references to an unpublished
6 case, and an excerpt from *California Criminal Defense Practice*. Golden Decl. ¶¶ 15-22. Overall, he
7 filed approximately sixteen motions in his criminal case and succeeded on two. *Id.* at ¶ 14(a)-(o). He
8 submitted 236 research requests to LRA and received 7,469 pages of material, including 356 cases, 368
9 statutes, 346 criminal packets, ten civil packets, twenty forms, and thirty-four memos. *Id.*

10 On January 21, 2005 Golden received an infraction for failing to wear his identification wristband
11 and being disrespectful to an officer. Golden Decl. Ex. 22. He appealed. Golden Decl. Ex. 23. Golden
12 claims that he did not know that he engaged in prohibited conduct because he never received a Rule Book.
13 Golden Decl. ¶ 39. According to Golden, he met with Jose Hernandez ("Hernandez") from Friends
14 Outside on the day of the hearing. *Id.* at ¶ 40. Golden asserts that he did not know that he was entitled to
15 call witnesses until Hernandez told him. *Id.* at ¶¶ 41(a)-(b). Golden contends that he could have called
16 witnesses who would have contradicted the officer's version of the events. *Id.* at ¶¶ 41(c)-(d). He alleges
17 that Hernandez did not tell him that he could obtain a continuance to find these witnesses. *Id.* at ¶ 41(h).
18 He also claims that the panel did not inform him of his rights to (1) call witnesses, (2) continue the hearing,
19 (3) avoid self-incrimination, (4) cross-examine witnesses, and (5) present argument. *Id.* at ¶¶ 42(a)(i)-(v).
20 The panel found Golden guilty and sentenced him to three days of disciplinary lockdown. Golden Decl. Ex.
21 22. He asserts that he never received a written rationale for the panel's decision. Golden Decl. ¶ 45.

22 6. Walker

23 Walker has "been in and out of the Mail Jail" since 1982. Walker Decl. Supp. Opp. Mot. Term.
24 Consent Decrees ("Walker Decl.") ¶ 2. Walker claims that he used the Main Jail's law library to file eight
25 civil rights lawsuits between 1991 and 1993. *Id.* at ¶¶ 3-4. According to Walker, the law library was
26 open "24 hours a day, 7 days a week." *Id.* at ¶ 7. Walker asserts that prison authorities permitted him to
27 use the library for two hours each day and "for up to six hours" every other day. *Id.* He claims that access
28 to materials in hard copy was important because they contained indices and tables of contents, and "[a]s an

1 inmate with no legal training, [he] simply would not know what cases or statutes to turn to without the aid"
2 of such resources." *Id.* at ¶ 9. He estimates that a pleading that would have taken him one to two weeks
3 to prepare using a law library takes about six months using LRA. *Id.* at ¶ 14. He also asserts that he finds
4 LRA's disclaimers of the attorney-client relationship confusing. *Id.* He has submitted eighty-eight requests
5 to LRA and received 4,561 pages of research materials, including eighty-six cases, 151 statutes, ninety-one
6 criminal packets, twelve civil packets, ten forms, and seventeen memos. Williams Reply Decl. Ex. I.

7 Walker claims that he received an infraction for allowing another inmate use his pin number for *pro*
8 *per* telephone calls. Walker Decl. ¶ 33. He contends that the DOC notified him of the infraction by letter.
9 *Id.* at ¶ 33(a). He asserts that he met with the sergeant, who asked him how he wanted to plead. *Id.* at ¶
10 33(b). According to Walker, at the time of this meeting, he did not know whether he had the right to
11 present evidence at the hearing. *Id.* at ¶ 33(c). He also contends that prison staff once failed to provide
12 him with access to his lay advocate within twenty four hours of the hearing, which forced the panel "to
13 negate its guilty findings." *Id.* at ¶ 34. He alleges that the County did not allow him to present witnesses at
14 his infraction hearings "[o]n numerous occasions." *Id.* at ¶ 35.

15 Walker also contends that the County failed to provide him with a complete copy of another
16 infraction report dated January 17, 2005. *Id.* at ¶ 36. In addition, he asserts that the County failed to
17 provide him with twenty-four hours notice of his hearing. *Id.* Walker appealed his infraction, noting these
18 alleged problems. Walker Decl. Ex. H.

19 7. Bautista

20 Bautista has been an inmate in the Main Jail since June 17, 2004. Bautista Decl. Supp. Opp. Mot.
21 Term. Consent Decrees ("Bautista Decl.") ¶ 2. He was also in DOC custody from August 2004 to January
22 2005 and April 2002 to January 2003. *Id.* at ¶ 3. He is currently representing himself in a criminal case
23 and two civil rights cases. *Id.* at ¶¶ 4, 7.

24 Bautista submitted 256 research requests and received 19,599 responsive pages. Williams Reply
25 Decl. ¶ 19. He filed over thirty motions in his criminal case and at least partially succeeded on about eight.
26 *Id.* at ¶¶ 6(a)-(x). In addition, he filed four motions in his civil rights cases and succeeded on three. *Id.* at
27 ¶¶ 8(a)-(c). He claims that LRA responds in an average of seven days. *Id.* at ¶ 15. According to
28 Bautista, LRA often takes longer to respond. When this occurs, he receives a "seven day" memo,

1 parties." *Id.* at 1001 (quoting 18 U.S.C. § 3626(g)(1)) (emphasis supplied by *Gilmore*). The court noted
2 that while Congress cannot require an Article III court to set aside a final judgment, Congress "may set a
3 new and retroactively applicable standard for obtaining relief from final judgments which impose forward-
4 looking injunctive remedies." *Id.* at 1001. Thus, the court determined that the termination provisions
5 "simply amend[] Rule 60(b)—the rule that otherwise governs courts' power to modify or terminate relief
6 granted pursuant to a final judgment." *Id.* at 1003.¹¹ Under this "saving construction," the court explained,
7 the termination provisions mandate that courts preserve any portion of a consent decree that remains
8 "necessary to correct a current and ongoing violation of a federal right, so long as that relief is limited to
9 enforcing the constitutional minimum." *Id.* at 1000.

10 The court then rejected the prisoners' argument that the termination provisions unconstitutionally
11 prescribed a rule of decision¹² by "unconditionally direct[ing] federal courts to terminate prospective relief in
12 prison condition cases decided prior to the [PLRA]." *Id.* at 1004-05. "[I]dentifying the degree to which
13 the termination provisions deviate from the general standards for granting and modifying continuing decrees"
14 reveals that they leave "room for adjudication" and "the exercise of traditional equity powers." *Id.* at 1005.
15 The court noted that, in general, courts may only craft equitable remedies that "heel close to the identified
16 violation." *Id.* However, consent decrees, "precisely because of their consensual nature, [may] provide
17 more than the constitutional minimum." *Id.* The court concluded that the termination provisions did not
18 prescribe a rule of decision because they merely required courts to strike any part of a consent decree that
19 imposed obligations that the court could not have properly ordered on its own. *Id.* at 1006.

20 The court then examined whether the termination provisions prescribed a rule of decision with
21 respect to the modification of prospective relief. Under existing law, the party seeking to alter a consent
22

23
24 ¹¹ Rule 60(b) enables courts to "relieve a party . . . from a final judgment" if, *inter alia*, "the
25 judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been
26 reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective
application; or [for] any other reason justifying relief from the operation of the judgment."

27 ¹² The phrase "rule of decision" refers to a congressional attempt to alter the precise results of
28 a pending case: to forbid a court "to give the effect to evidence, which in its own judgment, such evidence
should have" and direct a contrary result. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 136-47
(1871).

1 decree bears the burden of proving that circumstances have changed. *Id.* at 1007. The court drew several
2 conclusions about the termination provisions:

3 First, nothing in the termination provisions can be said to shift the burden of proof from
4 the party seeking to terminate the prospective relief. Second, . . . a district court cannot
5 terminate prospective relief without determining whether the existing relief (in whole or in
6 part) exceeds the constitutional minimum. And, consistent with § 3626(b)(3), a district
7 court cannot terminate or refuse to grant prospective relief necessary to correct a current
and ongoing violation, so long as the relief is tailored to the constitutional minimum
If the existing relief qualifies for termination under § 3626(b)(2), but there is a current and
ongoing violation, the district court will have to modify the relief to meet the Act's
standards.

8 *Id.* at 1007-08. The court held that the termination provisions, read in that manner, "require real
9 adjudication—the careful application of law to fact—not the wooden ratification of a legislatively prescribed
10 conclusion," and were constitutional. *Id.* at 1008. However, the court refused to follow the statute's
11 instruction to invalidate consent decrees that did not include findings that the relief was as narrow and
12 unintrusive as possible. *Id.* at 1007 n.25. The court reasoned that because the law at the time of the
13 consent decree did not require such findings, "relief which was in fact narrowly tailored would be subject to
14 termination," and thus the statute would prescribe a rule of decision. *Id.* According to the court, the proper
15 course was to inquire whether "the record, the court's decision ordering prospective relief, and relevant
16 case law fairly disclose that the relief actually meets the § 3626(b)(2) narrow tailoring standard." *Id.*

17 Finally, the court applied the statute to *Gilmore* and *Thompson* and concluded that both courts
18 erred by terminating the consent decrees. The court held that *Gilmore* improperly placed the onus on the
19 prisoners to establish that the consent decree (1) did not "exceed[] the constitutional minimum" and (2) was
20 necessary to correct "a current and ongoing violation of Federal right." *Id.* at 1008. The court also
21 explained that *Gilmore* incorrectly terminated the consent decree based solely on the fact that it did not
22 contain specific findings as to the narrowness of its remedy. *Id.* Instead, the district court should have
23 "examine[d] the court record and relief granted by the [consent decree] to determine whether it was
24 narrowly tailored and minimally intrusive." *Id.* Similarly, the district court in *Thompson* erred by (1) relying
25 on the consent decree's lack of specific findings to hold that the decree was terminable and (2) not
26 permitting the prisoners to offer evidence about current constitutional violations. *Id.* at 1009-10. The court
27 reversed both decisions and remanded the cases for further proceedings.

1 **1. The Burden of Proof Under § 3626(b)(2) and § 3626(b)(3)**

2 Under *Gilmore*, the County has the burden of proving that (1) the Access to the Courts Decree
3 and the Amended Disciplinary Procedures Decree are terminable under § 3626(b)(2) because they exceed
4 the constitutional minimum and (2) current prison conditions do not constitute a current and ongoing
5 constitutional violation under § 3626(b)(3). *See Gilmore*, 220 F.3d at 1009. However, the County cites
6 *Hallett v. Morgan*, 296 F.3d 732 (9th Cir. 2002) and *Guajardo v. Texas Dept. of Criminal Justice*,
7 363 F.3d 392 (5th Cir. 2004) (per curiam) for the proposition that "if a prisoner class seeks . . .
8 prospective relief under [§] 3626(b)(3), the burden is on the prisoners." Rep. Mot. Term. Consent
9 Decrees at 3:1-13. The court disagrees.

10 In *Hallett*, a district court entered a consent decree relating to a prison's health care policies. The
11 decree provided that the court's jurisdiction would expire in January 1999. However, the decree also
12 allowed the prisoners to apply to extend the court's jurisdiction. As January 1999 approached, the
13 prisoners filed such a motion. The court determined that the prisoners would have to satisfy the PLRA to
14 succeed. That same day, defendants filed a motion under § 3626 seeking to terminate the decree. After an
15 evidentiary hearing, the court denied the prisoners' motion and granted defendants' motion. The Ninth
16 Circuit affirmed. The court rejected the prisoners' argument that "the district court erred by requiring them
17 to prove a 'current and ongoing violation' of their constitutional rights." *Hallett*, 296 F.3d at 743. Yet,
18 contrary to the County's argument, the court did not do so on the ground that the prisoners had failed to
19 meet their "burden" under the *termination provisions*. Instead, the court held that the prisoners had failed
20 to meet their burden under § 3626(a)(1)(A): the provision that restricts the power of federal courts to grant
21 prospective relief in the first instance. The court expressly declined to rule on whether the district court
22 correctly granted defendants' motion to terminate the decree. *See id.* at 749 ("we need not examine
23 whether the district court erred in its analysis of [d]efendants' motion to terminate" because "[t]he
24 [j]udgment expired by its own terms when the district court denied [p]laintiffs' motion to extend").

25 In *Guajardo*, the Fifth Circuit held that a district court correctly required prisoners "to demonstrate
26 ongoing violations and that the relief is narrowly drawn" under § 3626(b)(3). *Guajardo*, 363 F.3d at 395.
27 In the court's view, *Hallett's* "reasoning—placing the burden of proof under [§] 3626(b)(3) on the party
28 opposing termination of a consent decree—is in obvious tension with the earlier reasoning in *Gilmore*." *Id.*

1 The court determined that "a plain reading of the PLRA, including its structure" indicated that prisoners bore
2 the burden under § 3626(b)(3). *Id.* at 396.

3 The court has serious doubts about *Gilmore's* conclusion that defendants must prove "compliance"
4 with prisoners' constitutional rights under § 3626(b)(3). *See Gilmore*, 220 F.3d at 1009.¹³ *Gilmore*
5 began with the premise that, under Rule 60(b), the party seeking relief from a final judgment must establish
6 "a significant change either in factual conditions or in law." *Id.* at 1007 (quoting *Rufo v. Inmates of*
7 *Suffolk County Jail*, 502 U.S. 367, 377 (1992)). *Gilmore* then reasoned that "nothing in the termination
8 provisions can be said to shift the burden of proof from the party seeking to terminate the prospective
9 relief." *Id.* *Gilmore* may be correct that § 3626(b)(2) tracks Rule 60(b) by requiring defendants to prove
10 that relief is subject to termination because it was not narrowly tailored at its inception. But common sense
11 suggests that defendants should not have to prove a negative—the absence of a "current and ongoing"
12 constitutional violation—under § 3626(b)(3).¹⁴ Moreover, if *Gilmore* is correct that (1) "[t]he general
13 standard for granting prospective relief differs little from the standard set forth in § 3626(b)(2) . . . [and] §
14 3626(b)(3)" and (2) defendants bear the burden of proof under § 3626(b)(2) and § 3626(b)(3), then (3) it
15 would logically follow that defendants also bear the burden when a plaintiff asks a court to "grant[]
16 prospective relief" under 18 U.S.C. § 3626(a)(1)(A). That would be bizarre: of course, plaintiffs normally
17 bear the burden of proof when they seek an injunction. Finally, even if Rule 60(b) places the burden on the
18 party seeking relief from a consent decree, it is unclear why *Gilmore* did not consider whether the PLRA
19 altered this rule. As *Gilmore* itself realized, "the PLRA . . . amends Rule 60(b)" and "creates a more
20 exacting standard for federal courts to follow." *Gilmore*, 220 F.3d at 1003, 1007.

21
22 ¹³ Matters might be different if *Gilmore's* holding with respect to the burden of proof flowed
23 from constitutional considerations. However, *Gilmore* expressly relied on the statute itself to reach this
24 conclusion. *See Gilmore*, 220 F.3d at 1007 ("nothing in the termination provisions can be said to shift
the burden of proof from the party seeking to terminate the prospective relief") (emphasis added). As
Guajardo suggests, this is questionable.

25 ¹⁴ Indeed, "the great majority of courts to address th[e] issue" have assigned the burden under
26 § 3626(b)(3) to the prisoners. *Guajardo*, 363 F.3d at 395-96; *Ruiz v. Johnson*, 154 F. Supp. 2d 975,
27 984 n.12 (S.D. Tex. 2001) ("the burden of showing extant constitutional violations . . . fall[s] on the
prisoners"); *Laaman v. Warden, New Hampshire State Prison*, 238 F.3d 14, 19 (1st Cir. 2001) (holding
that prisoners bear burden of showing that "current and ongoing" constitutional violations "persist");
28 *Imprisoned Citizens Union v. Shapp*, 11 F. Supp. 2d 586, 604 (E.D. Pa. 1998) ("the burden imposed by
the PLRA [is] that inmates prove a 'current and ongoing violation' of a federal right").

1 Nevertheless, this court is bound to follow *Gilmore*. "If a court must decide an issue governed by
2 a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it
3 considers the rule unwise or incorrect." *Hart v. Massanari*, 266 F.3d 1155, 1169-70 (9th Cir.2001). As
4 noted above, *Hallett* held only that the prisoners failed to "establish that the prospective relief 'extend[s] no
5 further than necessary to correct the violation of' their [constitutional] rights" under § 3626(a)(1)(A).
6 *Hallett*, 296 F.3d at 743 (quoting 18 U.S.C. § 3626(a)(1)(A)). *Hallett's* discussion of the burden of
7 proof under § 3626(b)(3) is *dicta*. Despite the fact that several out-of-circuit courts have disagreed with
8 *Gilmore*, "[d]istrict courts are, of course, bound by the law of their own circuit, and 'are not to resolve
9 splits between circuits no matter how egregiously in error they may feel their own circuit to be.'" *Zuniga v.*
10 *United Can Co.*, 812 F.2d 443, 450 (9th Cir. 1987) (quoting *Hasbrouck v. Texaco, Inc.*, 663 F.2d 930,
11 933 (9th Cir. 1981)). The court thus holds that the County must prove that it is complying with prisoners'
12 constitutional rights under § 3626(b)(3).

13 **B. The Access to the Courts Decree**

14 **1. Post-Conviction Prisoners' Rights of Access to the Courts**

15 In *Bounds v. Smith*, 430 U.S. 817, 821-22 (1977), the United States Supreme Court held that
16 prisoners have a constitutional right to "adequate, effective, and meaningful" access to the courts.¹⁵ The
17 Court commented that "[i]t would verge on incompetence for a lawyer to file an initial pleading without
18 researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and
19 defendant, and types of relief available." *Id.* at 825. The Court explained that the right of access to the
20 courts safeguarded prisoners' ability to appeal their convictions and seek redress for civil rights violations.
21 *Id.* at 827. Refusing to adopt an inflexible standard, the Court reiterated that prisons could fulfill prisoners'
22 right of access in myriad ways. *Id.* at 830-31.

23
24
25 ¹⁵ The Court did not explain which constitutional provision gave rise to this right. *See, e.g.,*
26 *Bounds*, 430 U.S. at 839 (Rehnquist, J., dissenting) ("[T]he Court's opinion today . . . proceeds instead to
27 enunciate a 'fundamental constitutional right of access to the courts,' . . . which is found nowhere in the
28 Amendment's Due Process Clause. *See, e.g., Storseth v. Spellman*, 654 F.2d 1349, 1352 (9th Cir.
1981) ("It is well established that inmates have a constitutional right of access to the court. That right is
premised on the Due Process Clause . . .").

1 Several years later, in *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986), the Ninth Circuit
2 held that a "paging" legal research system was unconstitutional under *Bounds*. The system excluded high-
3 risk inmates from the law library and forced them to request books to be delivered to their cells. The Ninth
4 Circuit held that the system was constitutional only if supplemented with hands-on legal research assistance:

5 'Ordinarily, a prisoner should have direct access to a law library if the state chooses to
6 provide a prison law library as its way of satisfying the mandate of *Bounds*. Simply
7 providing a prisoner with books in his cell, if he requests them, gives the prisoner no
8 meaningful chance to explore the legal remedies that he might have. Legal research often
9 requires browsing through various materials in search of inspiration; tentative theories may
10 have to be abandoned in the course of research in the face of unfamiliar adverse precedent.
11 New theories may occur as a result of a chance discovery of an obscure or forgotten case.'

12 *Id.* at 1109-10 (quoting *Williams v. Leeke*, 584 F.2d 1336, 1339 (4th Cir. 1978)).

13 However, *Lewis v. Casey*, 518 U.S. 343 (1996) limited *Bounds* and appeared to overrule
14 *Toussaint*. *Lewis* involved a class action challenging the adequacy of the Arizona Department of
15 Corrections ("ADOC")'s law libraries. The district court entered a broad injunction that "specified in
16 minute detail the times that libraries were to be kept open, the number of hours of library use to which each
17 inmate was entitled . . . , the minimal educational requirements for prison librarians . . . , [and] the content of
18 a videotaped legal-research course for inmates" *Id.* at 347. The Ninth Circuit affirmed, but the
19 Supreme Court reversed. The Court first noted that, under standing principles, an inmate must show
20 "actual injury" to prevail on access to the courts claim. The Court explained that because "*Bounds* did not
21 create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant
22 actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some
23 theoretical sense." *Id.* at 351. The Court also noted that an inmate cannot show "actual injury" by proving
24 that the prison's legal research system frustrated his attempt "to *discover* grievances, [or] to *litigate*
25 *effectively* once in court," as "[i]mpairment of [such] litigating capacity is simply one of the incidental (and
26 perfectly constitutional) consequences of conviction and incarceration." *Id.* at 354-55 (emphasis in
27 original). Instead, the Court held, an inmate must prove that the prison's facilities frustrated his ability to file
28 a nonfrivolous criminal appeal, habeas corpus petition, or civil rights claim challenging the conditions of his
confinement:

 He might show, for example, that a complaint he prepared was dismissed for failure to
satisfy some technical requirement which, because of deficiencies in the prison's legal
assistance facilities, he could not have known. Or that he had suffered arguably actionable

1 harm that he wished to bring before the courts, but was so stymied by inadequacies of the
2 law library that he was unable even to file a complaint Finally, we must observe that
3 the injury requirement is not satisfied by just any type of frustrated legal claim. Nearly all
4 of the access-to-courts cases in the *Bounds* line involved attempts by inmates to pursue
direct appeals from the convictions for which they were incarcerated, or habeas petitions,
[or] 'civil rights actions'—i.e., actions under 42 U.S.C. § 1983 to vindicate 'basic
constitutional rights.'

5 *Id.* at 352-55 (internal citations omitted).¹⁶

6 2. *Pro Per* Criminal Defendants' Right of Access to the Courts

7 In *Faretta v. California*, 422 U.S. 806, 818-20 (1975), the United States Supreme Court held
8 that the Sixth Amendment entitles criminal defendants to decline state-appointed counsel and represent
9 themselves. The general rule is that, merely by offering counsel, the state fulfills its obligation to provide
10 access to the courts to *pro per* criminal defendants.¹⁷ In the Ninth Circuit, however, the state's duties are
11 unclear.

12 In *United States v. Wilson*, 690 F.2d 1267 (9th Cir. 1982), a magistrate denied Wilson's request
13 to represent himself during his criminal trial. Wilson objected. During the first day of trial, the magistrate
14 asked Wilson whether he still wanted to proceed *pro per*. Wilson declined, explaining that he had never
15 received access to a law library. Eventually, Wilson agreed to let appointed counsel handle his trial.
16 Wilson filed a petition for a writ of habeas corpus, arguing that the magistrate's conduct violated his Sixth
17

18 ¹⁶ *Toussaint* seems incompatible with *Lewis* to the extent it did not impose an "actual injury"
19 requirement and "conclude[d] that *all* prisoners are entitled to meaningful access to the courts." *Toussaint*,
20 801 F.2d at 1110 (emphasis in original).

21 ¹⁷ *See, e.g., United States v. Byrd*, 208 F.3d 592, 593 (7th Cir. 2000) ("when a person is
22 offered appointed counsel but chooses instead to represent himself, he does not have a right to access to a
23 law library"); *United States v. Taylor*, 183 F.3d 1199, 1204-05 (10th Cir. 1999) ("a prisoner who
24 voluntarily, knowingly and intelligently waives his right to counsel in a criminal proceeding is not entitled to
25 access to a law library or other legal materials"); *United States v. Kincaide*, 145 F.3d 771, 778 (6th Cir.
26 1998) ("the state does not have to provide access to a law library to defendants in criminal trials who wish
27 to represent themselves") (quotation omitted); *United States v. Pina*, 844 F.2d 1, 5 n.1 (1st Cir. 1988)
28 ("[w]hen a defendant refuses assistance of appointed counsel he has no right to unqualified access to a law
library or the materials therein"); *Degrate v. Godwin*, 84 F.3d 768, 769 (5th Cir. 1986) ("having rejected
the assistance of court-appointed counsel, [the prisoner] had no constitutional right to access a law library
in preparing the *pro se* defense of his criminal trial"); *United States v. Lane*, 718 F.2d 226, 231 (7th Cir.
1983) ("the offer of court-appointed counsel to represent a defendant satisfies the constitutional obligation
of a state to provide a defendant with legal assistance under the Sixth and Fourteenth Amendments");
United States v. Chatman, 584 F.2d 1358 (4th Cir. 1978) ("to the extent that it may be said that *Bounds*
has any application to the instant case, the United States satisfied its obligation under the [S]ixth
[A]mendment when it offered defendant the assistance of counsel").

1 Amendment rights under *Faretta* and his Fifth Amendment rights under *Bounds*. The Ninth Circuit
2 rejected both arguments and held that the state complied with the Fifth and Sixth Amendments simply by
3 appointing a lawyer to represent Wilson. *Id.* at 1271-72.

4 Yet in *Milton v. Morris*, 767 F.2d 1443 (9th Cir. 1985), the Ninth Circuit construed
5 *Wilson* narrowly. *Milton* granted a habeas corpus petition when a prisoner invoked his *Faretta* right of
6 self-representation, but the state denied him "access to research materials, advisory counsel, means to serve
7 subpoenas, or effective use of a telephone." Judge Schroeder's majority opinion distinguished *Wilson* on
8 the grounds that while the prisoner there ultimately received counsel's assistance, the prisoner in *Milton*
9 "lacked all means of preparing and presenting a defense, and was unjustifiably prevented from contacting a
10 lawyer or others who could have assisted him." *Id.* at 1446. In addition, Judge Schroeder declined to
11 consider the extent to which *Bounds*, "plac[ed] an affirmative duty upon the state to provide a library for
12 the defendant who has rejected the assistance of counsel for trial" because "*Faretta* controls this case." *Id.*
13 at 1446. Judge Schroeder concluded that *Faretta* requires states to provide "some access . . . to law
14 books, witnesses, or other tools to prepare a defense." *Id.* (emphasis added). Judge Schroeder noted,
15 however, that "this right is not unlimited" and that "[s]ecurity considerations and avoidance of abuse by
16 opportunistic or vacillating defendants may require special adjustments." *Id.* Judge Hug concurred with
17 Judge Schroeder, but wrote separately to emphasize that although the state must provide criminal
18 defendants who proceed *pro per* "reasonable access to resources," the state enjoys substantial leeway in
19 meeting this standard. *Id.* at 1447-48 (Hug, J., concurring).¹⁸

20 Similarly, in *Taylor v. List*, 880 F.2d 1040 (9th Cir. 1989), the Ninth Circuit distinguished *Wilson*.
21 Because Taylor had been involved in a riot, prison officials precluded him from visiting the law library.
22 Taylor obtained a court order permitting him access to inmate law clerks and the opportunity to check out
23 books from the library. Taylor sued, arguing that prison officials violated his Sixth Amendment rights by
24 ignoring this order. Relying on *Wilson*, the district court granted defendants' motion for summary judgment.

26 ¹⁸ Judge Beezer also concurred, but on the "much narrower ground" that a state court had
27 ordered prison officials to provide "a certain number of local and long distance phone calls, and to have
28 access to a runner, investigator, and expert witness" and then "expressly found" that they had not complied.
Milton, 767 F.2d at 1448 (Beezer, J., concurring).

1 The Ninth Circuit reversed, noting that *Wilson* "did not conclusively resolve th[e] issue" of whether *Faretta*
2 "place[s] an affirmative duty upon the state to provide access to a law library for a pre-trial detainee who
3 has rejected counsel and chosen to represent himself" because the prisoner in *Wilson* "had ultimately
4 accepted representation by counsel at trial." *Taylor*, 880 F.2d at 1047 & n.4. In addition, the court cited
5 *Milton* for the proposition that the Sixth Amendment "includes a right of access to law books, witnesses,
6 and other tools necessary to prepare a defense." *Id.* at 1047. The court thus determined that factual issues
7 remained as to whether certain defendants violated this right by preventing Taylor from "access[ing] law
8 books and witnesses." *Id.* at 1048-49.

9 In *United States v. Robinson*, 913 F.2d 712 (9th Cir. 1990) the court struck a middle ground
10 between *Wilson* and *Milton*. Robinson, who faced drug charges, accumulated six large boxes and three
11 bags of legal materials. However, because Robinson had accepted counsel, the district court denied his
12 motion to access these materials. Robinson then elected to represent himself. The district court allowed
13 Robinson to access "one large storage box" of materials. *Id.* at 717. On appeal, Robinson argued that his
14 *Faretta* waiver was "involuntary" because the district court "forced him to choose between his right to
15 counsel and his 'right' of access to case documents and other legal materials." *Id.* The Ninth Circuit
16 disagreed, noting that "a criminal defendant may be asked to choose between waiver and another course of
17 action, so long as the course of action offered is not constitutionally offensive." *Id.* The court reasoned that
18 "*Wilson* suggests [both that] there is nothing constitutionally offensive about requiring a defendant to choose
19 between appointed counsel and access to legal materials [and that] the [S]ixth [A]mendment is satisfied by
20 *the offer of professional representation alone.*" *Id.* (emphasis added). The court then cited Judge Hug's
21 concurrence in *Milton* for the contention that "[a] *pro se* defendant's right of 'some access' to resources to
22 aid the preparation of his defense must, however, be balanced against security considerations and the
23 limitations of the penal system." *Id.* The court affirmed the district court's order that Robinson had to pare
24 down his materials because it stemmed from logistical considerations. *Id.* at 717-18.

25 Finally, in *U.S. v. Sarno*, 73 F.3d 1470 (9th Cir. 1995), Nash, a law school graduate who had not
26 passed the bar examination, appealed his conviction for white collar offenses. Nash chose to represent
27 himself at trial even though he was serving time for a prior, unrelated offense. Nash contended that the
28 prison officials had denied him reasonable access to the law library. The court began by "agree[ing] that

1 the Sixth Amendment demands that a *pro se* defendant who is incarcerated be afforded reasonable access
2 to 'law books, witnesses, or other tools to prepare a defense.'" *Id.* at 1491 (quoting *Milton*, 767 F.2d at
3 1446). The court was "troubled" by the fact that Nash only had access to the library for about five hours
4 per week during trial. *Id.* However, the court noted that the law library was only open during business
5 hours, which was also when Nash was in trial. *Id.* The court reasoned that "while a prison must take steps
6 to provide incarcerated defendants with reasonable access to legal materials, the rights of a *pro se*
7 defendant must be balanced against institutional resource constraints" and held that Nash's constitutional
8 rights were not violated. *Id.*

9 *Lewis* requires that a post-conviction inmate must show "actual injury" to prevail on a
10 *Bounds* claim. *See Lewis*, 518 U.S. at 352. Although *Bounds* is rooted in the Fifth Amendment and
11 *Milton* stems from the Sixth Amendment, *Lewis*' "actual injury" requirement seems to contradict the Ninth
12 Circuit's repeated declarations that denial of access to the courts *itself*—regardless of whether it prejudices
13 a *pro per* criminal defendant's case—works a legally cognizable harm. *Compare Lewis*, 518 U.S. at 530
14 ("the distinction between the [political branches and the courts] would be obliterated if, to invoke
15 intervention of the courts, no actual or imminent harm were needed, but merely the status of being subject
16 to a governmental institution that was not organized or managed properly") with *Milton*, 767 F.2d at 1446
17 (*Faretta* requires states to provide "some access . . . to law books, witnesses, or other tools to prepare a
18 defense") and *Taylor*, 880 F.2d at 1047 (*Faretta* "includes a right of access to law books, witnesses, and
19 other tools necessary to prepare a defense") and *Sarno*, 73 F.3d at 1491 (*Faretta* "demands that a *pro se*
20 defendant who is incarcerated be afforded reasonable access to law books, witnesses, or other tools to
21 prepare a defense") (quotation omitted).¹⁹ Thus, there is some tension between *Lewis* and *Milton*.²⁰

22
23
24
25 ¹⁹ In fact, before *Lewis v. Casey*, the Ninth Circuit did not impose an 'actual injury'
26 requirement" for claims asserting "core" *Bounds* violations. *See Sands v. Lewis*, 886 F.2d 1166, 1171
(9th Cir. 1989).

27 ²⁰ In addition, *Lewis* defined "actual injury" as the inability to file a non-frivolous criminal
28 appeal, habeas petition, or civil rights claim—but *not* the inability to "litigate effectively once in court." *Id.*
at 354. A *pro per* criminal defendant's *Faretta* claim, by definition, seeks redress for the inability to
"litigate effectively once in court."

1 The court believes that *Lewis* narrowed the scope of the Ninth Circuit's *Faretta* access to the
2 court cases to the extent they suggest that prison officials can violate *pro per* criminal defendants' Sixth
3 Amendment rights simply by providing inadequate libraries or legal assistance. *See Lewis*, 518 U.S. at 351
4 (there is no "an abstract, freestanding right to a law library or legal assistance"). In fact, no case of which
5 this court is aware has held that officials violated an inmate's *Faretta* rights in such a manner. Instead,
6 courts have only found *Faretta* violations where the state engaged in egregious obstructionist conduct. *See*
7 *Milton*, 767 F.2d at 1444-45 (prison officials violated *pro per* criminal defendant's Sixth Amendment
8 rights when they (1) forced him to use law books that were at least twenty-seven years old and (2)
9 misinterpreted a court order and thus deprived him of ability to obtain investigator or witnesses); *Taylor*,
10 880 F.2d at 1042-43 (*pro per* criminal defendant raised triable issue of fact on *Faretta* claim by
11 contending that jail officials ignored court order permitting him to request law books and visit with inmate
12 law clerks). This reading—that the state cannot deprive a *pro per* criminal defendant of "all means of
13 preparing and presenting a defense," *Milton*, 767 F.2d at 1446—is consistent with *Lewis*. *See Lewis*, 518
14 U.S. at 353 n.4 (acknowledging that constitutional violations likely occur "[w]here the situation is so
15 extreme as to constitute an *absolute* deprivation of access to *all* legal materials") (quotation marks omitted)
16 (emphasis in original). In addition, after *Lewis*, a *pro per* criminal defendant can bring a Sixth Amendment
17 claim if he proves that flaws in the prison's research system affected his case in an outcome-determinative
18 manner. A prisoner who contends that he was unable to research a tangential matter or pursue an issue that
19 could not possibly have exonerated him may have been "injured" in a metaphysical sense, but cannot state a
20 claim for "*relevant* injury in fact, *i.e.*, injury-in-fact *caused by the violation of the legal right.*" *Id.*
21 (emphasis in original). By the same token, a prisoner who establishes that the prison's research system
22 ruined an arguably exculpatory motion has been "injured" even under *Lewis*' restrictive interpretation. *See*
23 *id.* at 353 n.3 ("actual injury" includes "being deprived of something of value").

24 In their sur-reply, prisoners raise two arguments about the relationship between *Lewis* and *Milton*.
25 First, prisoners cite *Benjamin v. Fraser*, 264 F.3d 175 (2d. Cir. 2001) for the proposition that "*Lewis* is
26 inapplicable to Sixth Amendment claims of pretrial detainees." Sur-Reply at 10:9-11 (quoting *Benjamin*,
27 264 F.3d at 185). *Benjamin* held that prospective relief was necessary under the PLRA to remedy the
28 fact that lawyers often experienced substantial delays when they tried to meet with pretrial detainees. The

1 Second Circuit rejected prison officials' argument that *Lewis* required inmates to show "actual injury"—that
2 the burden on the attorney-prisoner relationship manifested itself in "an identifiable detrimental effect."
3 *Benjamin*, 264 F.3d at 185. Nevertheless, *Benjamin* reached this conclusion in a manner that does not
4 support prisoners' contention. *Benjamin* explained that, unlike the *Bounds* right of access to the courts, the
5 right to legal representation does not require "actual injury" because it is a textual constitutional right:

6 *Lewis's* reasoning is premised on the distinction between the standing required to assert
7 direct constitutional rights versus the standing required to assert claims that are derivative
8 of those rights. Because law libraries and legal assistance programs do not represent
9 constitutional rights in and of themselves, but only the means to ensure a reasonably
10 adequate opportunity to present claimed violations of fundamental constitutional rights to
the courts, prisoners must demonstrate "actual injury" in order to have standing By
contrast, where the right at issue is provided directly by the Constitution or federal law, a
prisoner has standing to assert that right even if the denial of that right has not produced an
"actual injury."

11 *Id.* at 184-85. Unlike the right to legal representation, the right of "some access . . . to law books,
12 witnesses, or other tools to prepare a defense," *Milton*, 767 F.2d at 1446, is *not* a textual Sixth
13 Amendment right. Under *Benjamin's* logic, *Milton's* "some access" requirement is "derivative" of a "direct
14 constitutional right" and, like *Lewis*, requires "actual injury."²¹ Therefore, *Benjamin* does not change the
15 court's conclusion that it must view *Milton* with an eye toward *Lewis*.

16 Second, prisoners argue that they do not need to prove "actual injury" because they "do not need to
17 prove that they have standing to *defend* themselves against the County's attempt to strip them of their
18 constitutional rights." Sur-Reply at 9:18-19 (emphasis in original). A close reading of *Lewis* undermines
19 this argument. "Actual injury" is not just an aspect of the standing inquiry. It is also a necessary element of
20 prisoners' *substantive* claims. *Lewis* makes clear that *certain kinds* of "injuries" are *not* "actual": for
21 example, when an inadequate prison law library causes a prisoner to file a defective securities action or fail
22 to litigate effectively in court. *See id.* at 354 ("the injury requirement is not satisfied by just any type of
23 frustrated legal claim"). These types of claims constitute *damnum sine injuria*: "harm of which the law
24 takes no account." Black's Law Dictionary 420-21 (8th ed. 2004) (quotation omitted). Thus, even though
25

26 ²¹ Also, *Benjamin* noted that *Lewis* did not control because a previous Supreme Court case
27 was directly on point. *See Benjamin*, 264 F.3d at 186 ("denial of access to counsel for consultation 'is not
28 subject to [] prejudice analysis') (quoting *Perry v. Leeke*, 488 U.S. 272, 280 (1989)) (alteration supplied
by *Benjamin*). Here, there is no such authority.

1 prisoners do not have to establish standing, the "actual injury" requirement shapes the contours of their
2 constitutional rights. Without evidence that LRA has harmed prisoners in the specific ways contemplated
3 by *Lewis* and this court's reading of *Milton*, the court cannot conclude that there is "a current and ongoing
4 violation of . . . the Federal right." 18 U.S.C. § 3626(b)(3).

5 With these principles in mind, it is helpful to clarify what is not at issue in this case. Prisoners set
6 forth numerous criticisms of LRA as a legal research system. For example, according to prisoners' experts,
7 LRA compares unfavorably to a physical law library.²² In addition, each prisoner offers generalized
8 complaints about LRA: that (1) it does not maintain prisoner confidentiality,²³ *see* Hopkins Decl. ¶ 15;
9 Lyons Decl. ¶ 7; Reyes Decl. ¶ 29; Golden Decl. ¶ 6; Walker Decl. ¶ 28(a); Bautista Decl. ¶ 31; (2) it
10 takes too long to respond, *see* Hopkins Decl. ¶ 9 Capela Decl. ¶ 10(c); Lyons Decl. ¶ 6; Reyes Decl. ¶ 8;
11 Golden Decl. ¶ 8; Walker Decl. ¶ 14; Bautista Decl. ¶ 15; (3) it does not offer tables of contents or
12 indexes, *see* Golden Decl. ¶ 11; Walker Decl. ¶¶ 8-11; (4) it fails to offer specific secondary sources, *see*
13 Capela Decl. ¶ 10(a); Reyes Decl. ¶ 14; Golden Decl. ¶ 12; Bautista Decl. ¶¶ 21(a)-(z); (5) it does not
14 provide a master list of available materials, *see* Hopkins Decl. ¶ 16; Walker Decl. ¶ 13; (6) it sometimes
15 fails to understand the inmate's request, *see* Hopkins Decl. ¶ 10; Bautista Decl. ¶ 17, and (7) the back-
16 and-forth between LRA and inmate is frustrating, *see* Hopkins Decl. ¶ 12; Reyes Decl. ¶ 27; Bautista Decl.
17 ¶ 14. These alleged inadequacies—unconnected to claims of total preclusion from legal research, the denial
18 of an important criminal trial motion or non-frivolous criminal appeal, request for habeas corpus, or civil
19 rights complaint—are not constitutional deficiencies. After *Lewis*, an inmate can only succeed on an access
20 to the courts claim by showing that a library's flaws affected specific aspects of his case.²⁴

22 ²² These individuals are Steven Manchester ("Manchester"), a criminal law expert, Amy Hale-
23 Janeke ("Hale-Janeke"), a professional law librarian, and Michael Sullivan ("Sullivan"), who performed an
24 analysis of LRA's response time to prisoners' research requests.

25 ²³ Prisoners note that, in *People v. DeMarco*, 2001 WL 1215851 (Cal. Ct. App. 2001),
26 LRA "produced inmate request forms to a district attorney and [Williams] personally testified during the
27 inmate" in order to rebut his assertion of the insanity defense. Opp. Mot. Term. Consent Decrees at 17:16-
28 21. This is troubling. However, this inmate was incarcerated in Alameda County, and does not appear to
be properly within the scope of this motion.

²⁴ Accordingly, the court need not rule on the County's motion to exclude Manchester and
Hale-Janeke's declarations.

1 **3. Whether the PLRA Mandates Termination of the Access to the Courts**
2 **Decree**

3 The court cannot terminate the Access to the Courts Decree merely because Judge Peckham did
4 not make "explicit findings" that "the relief is narrowly drawn, extends no further than necessary to correct
5 the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the
6 Federal right." *Gilmore*, 220 F.3d at 1007 n.25 (quoting 18 U.S.C. § 3626(b)(2)).²⁵ The court must
7 inquire whether any part of the Decree requires the County to do more than the Constitution mandates. If
8 so, the Decree "qualifies for termination" under § 3626(b)(2). *Id.* at 1007 ("a district court cannot
9 terminate prospective relief without determining whether the existing relief (in whole or in part) exceeds the
10 constitutional minimum"). The court must eliminate superfluous sections while preserving provisions
11 necessary to prevent constitutional violations. *Id.* at 1007 n.25 ("[i]f the existing relief qualifies for
12 termination under § 3626(b)(2), but there is a current and ongoing violation, the district court will have to
13 modify the relief to meet the Act's standards"). When it performs this task, the court may impose
14 obligations upon the County that exceed the constitutional floor—whether in the form of modifying or
15 upholding existing provisions—if doing so is the only way to "craft[] an effective remedy" for ongoing
16 violations. *Id.* at 1006 n.23.

17 **a. Whether the Access to the Courts Decree Qualifies for Termination**
18 **Under § 3626(b)(2)**

19 The Access to the Courts Decree is terminable under § 3626(b)(2). The Decree is not "narrowly
20 drawn," does "extend[] . . . further than necessary to correct the violation of the Federal right," and is not
21 "the least intrusive means necessary to correct th[is] violation." *Id.* The Decree requires the County to
22 "establish" and "maintain" a law library and legal assistance program. Schmid Decl. Ex. A at 2, 8. As
23 *Lewis* illuminates, there is no absolute constitutional right to either. *See also Kane v. Garcia Espita*, --S.
24 Ct.-- 2005 WL 2838601 *1 (Oct. 31, 2005) (per curiam) (reversing grant of habeas petition because
25 there is no clearly-established Sixth Amendment right to a law library). Instead, jail officials enjoy the
26

27 ²⁵ This requirement is known as the "need-narrowness-intrusiveness" test. *See Benjamin v.*
28 *Fraser*, 343 F.3d 35, 49 (2d Cir. 2003).

1 freedom to fulfill their constitutional obligations as they see fit.²⁶ Also, nothing in the Decree limits the
2 availability of the library or legal assistance programs to the discrete categories of inmates who are entitled
3 to them. Because the Decree saddles the County with duties that the Constitution does not require, it
4 "qualifies for termination." *Gilmore*, 220 F.3d at 1008.

5 **b. Whether Portions of the Access to the Courts Decree Remain**
6 **Necessary to Correct Ongoing Constitutional Violations**

7 The County has met its burden of demonstrating the absence of "a current and ongoing violation of
8 [f]ederal right." 18 U.S.C. § 3626(b)(3). First, with respect to criminal *pro per* issues, the County
9 conclusively proves that it did not deprive prisoners of "all means of preparing and presenting a defense."
10 *Milton*, 767 F.2d at 1446.²⁷ Instead, each prisoner meaningfully participated in his criminal trial. *See*
11 Hopkins Decl. ¶¶ 6(a)-(y) (Hopkins "made over 100 requests to LRA for legal research materials" as a
12 criminal *pro per*, filed over thirty motions, and succeeded at least in part on about thirteen); Capela Decl.
13 ¶¶ 11(a)-(g); Williams Reply Decl. Ex. D (Capela submitted eighteen requests to LRA as a criminal *pro*
14 *per*, received 827 pages of material, filed two *Pitchess* motions, a motion for an investigator, a motion to
15 dismiss, a motion to set aside the information, two motions to reduce bail, and two motions for advisory
16 counsel); Lyons Decl. ¶¶ 13(a)-(j); Williams Reply Decl. ¶ 19 (Lyons submitted thirty research requests,
17 received 1,055 pages of material, filed a *Pitchess* motion, a motion to set aside the information, and
18 motions requesting an investigator, a reduction in bail, and the appointment of an expert); Reyes Decl. ¶¶
19 13(a)-(j); Williams Reply Decl. ¶ 19 (Reyes submitted twenty-nine requests, received 1,501 pages of
20 material, filed a motion for discovery, a *Pitchess* motion, a motion for sentencing transcripts, a motion to
21 dismiss, and two motions for a continuance); Golden Decl. ¶¶ 14(a)-(o) (Golden filed approximately

22 ²⁶ Prisoners assert that LRA "does not resemble" any of the "various 'alternatives'" that courts
23 have indicated may properly take the place of a law library. Opp. Mot. Term. Consent Decrees at 33:14.
24 However, in *Lewis*, the Supreme Court suggested that prison officials might "experiment" by "replac[ing]
25 libraries with some minimal access to legal advice and a system of court-provided forms . . . that asked the
26 inmates to provide only the facts and not to attempt any legal analysis." *Lewis*, 518 U.S. at 352. LRA
27 resembles *Lewis*' hypothetical research system. *See* Williams Reply Decl. ¶ 11 (LRA "enable[s] an inmate
to obtain extensive information on a topic of interest without knowing the technical name of a procedure or
subject, a specific code section, or a specific research resource"); *see also Kaiser v. County of*
Sacramento, 780 F. Supp. 1309, 1315 (E.D. Cal. 1991) (refusing to enjoin legal research system similar
to LRA).

28 ²⁷ It is undisputed that the County offered to appoint counsel for each defendant.

1 sixteen motions as a criminal *pro per* and succeeded on two); Bautista Decl. ¶¶ 6(a)-(x) (Bautista filed over
2 thirty motions as a criminal *pro per* and at least partially succeeded on about eight). Even under the Ninth
3 Circuit's pre-*Lewis* authority, the County fulfilled its Sixth Amendment obligations by facilitating prisoners'
4 active self-representation.

5 Second, as discussed in detail below, the record reveals that the County has provided prisoners
6 with reasonable access to the courts. Only some of prisoners' criticisms of LRA relate to important criminal
7 motions, criminal appeals, habeas petitions, or civil rights complaints. Even with respect to those types of
8 filings, prisoners fail to offer concrete evidence that LRA's flaws, and not some other factor, frustrated their
9 claims. The court is cognizant of the fact that the County, not prisoners, must "prove its compliance with
10 inmates' right of access to the courts." *Gilmore*, 220 F.3d at 1008. However, there is one important
11 respect in which *Gilmore* does not seem to assign the burden of proof entirely to the County.
12 *Gilmore* notes that the lower court "correctly read [*Lewis v.*] *Casey* to require evidence of actual injury . .
13 . ." *Id.*²⁸ Whether construed as prisoners' failure of proof or the County's successful negation of an
14 essential element of prisoners' constitutional claims, the lack of "evidence of actual injury" dooms prisoners'
15 attempt to establish that prospective relief remains necessary to correct violations of their right of access to
16 the courts.

17 i. Hopkins

18 Hopkins claims that LRA failed him on three motions he filed as a criminal *pro per*. First,
19 Hopkins asserts that he filed a motion seeking to release documents produced pursuant to a subpoena
20 *deuces tecum*. Hopkins Decl. ¶ 6(d). Hopkins contends that the court denied the motion. *Id.* According
21 to Hopkins, he later discussed this motion with Traci Owens ("Owens"), his public defender, who informed
22 him that (1) the court would have granted the motion if he "had . . . used the proper legal terminology" and
23 (2) he could not bring the motion again because the court had already denied it. *Id.* at ¶ 20. However, the
24 County correctly argues that Hopkins' version of what Owens told him is inadmissible hearsay: it is an out-
25 of-court statement offered to prove the truth of the matter asserted. *See* Fed. R. Evid. 802. In addition,
26

27 ²⁸ *Gilmore* then quoted *Lewis* for the proposition that "'the inmate therefore must go one step
28 further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his
efforts to pursue a legal claim.'" *Id.* at 1008 n.26 (quoting *Lewis*, 518 U.S. at 351)).

1 Owens did not file a declaration in this case. Thus, the court could not conclude that Hopkins' lack of
2 success stemmed from LRA's flaws without engaging in speculation.

3 Second, Hopkins asserts that he filed a motion to dismiss the prosecution against him under the *ex*
4 *post facto* clause. Hopkins Decl. ¶ 17(a). Hopkins claims that he "withdrew the motion before the court
5 ruled on it" because he "was unable to properly research it using LRA's services." *Id.* Although Hopkins
6 argues that LRA's "response . . . was unhelpful," he has failed to provide any research requests or
7 responses from LRA with respect to this motion. *Id.* Hopkins also testified that he never discussed the
8 merits of the motion with his lawyer, and does not know whether it would have been successful. Hopkins
9 Depo. at 73:7-18. Without more, the court cannot determine whether Hopkins' motion had any merit
10 whatsoever.

11 Third, Hopkins claims that he filed a motion to compel a witness to appear for cross-examination
12 during his preliminary examination. Hopkins Decl. ¶ 17(b). At the preliminary examination, a police officer
13 testified that Nicholas Burns ("Burns"), a loss prevention officer at Home Depot, had observed Hopkins
14 walk out of the store without paying for a set of power tools. Request for Judicial Notice Supp. Mot.
15 Term. Consent Decrees ("RJV") Ex. AA at 8-10.²⁹ The officer then testified that Hopkins admitted that
16 "he had an expensive drug habit and stole the tools to buy drugs." *Id.* at 12. The officer claimed that he
17 searched Hopkins and found a crack pipe in his jacket pocket. *Id.* Burns did not appear at the preliminary
18 hearing, preventing Hopkins from cross-examining him. *Id.* at 20. Hopkins asserts that, after the
19 preliminary hearing, he tried to use LRA to file a motion to compel Burns to testify. Hopkins Decl. ¶ 17(b).
20 According to Hopkins, however, LRA's "cumbersome nature" prevented him from filing the motion for
21 approximately one month. *Id.* The criminal trial court denied the motion because it was neither properly
22 served nor timely. Hopkins Decl. Ex. 1. However, the one piece of tangible evidence Hopkins has offered
23 in support of this claim—the court's denial of the motion—indicates that Hopkins sought to hold Burns in
24 contempt, not to compel his appearance. *Id.* Thus, even if Hopkins had succeeded on the motion, he
25 would not necessarily have received the opportunity to cross-examine Burns. Moreover, the criminal trial
26

27 ²⁹ The prisoners do not oppose the County's request for judicial notice to the extent it pertains
28 to records from their criminal trials.

1 court (1) found Hopkins' offer of proof insufficient to call Burns at the preliminary hearing and (2)
2 determined that there was probable cause to charge Hopkins. RJN Ex. AA at 21-29. In light of the other
3 evidence presented at the preliminary hearing—including Hopkins' damaging admission—it is highly unlikely
4 that Hopkins' failure to cross-examine Burns contributed to the court's probable cause determination.

5 Hopkins also argues that LRA impaired his ability to file two habeas petitions. First, Hopkins
6 asserts that he "requested information from LRA to help" with a motion for access to the courts, but "LRA
7 failed to provide [him] with any useful information." Hopkins Decl. ¶ 17(c). Yet Hopkins does not allege
8 that he ever filed the motion or that the court denied it. In addition, in April 2004, Hopkins filed a motion
9 for access to the courts that included detailed points and authorities, including a citation to *Bounds*. RJN
10 Ex. EE. at 3.

11 Second, Hopkins claims that he was unable to properly argue a habeas petition that sought an
12 order compelling the DOC to provide him with a hernia operation. *Id.* at ¶ 17(d); RJN Ex. BB. The court
13 denied the motion because of a *factual* defect: Hopkins failed to corroborate his claim that the operation
14 was necessary with independent evidence that the hernia could be life-threatening. RJN Ex. CC at 1.
15 There is no evidence that LRA was responsible for the court's denial of Hopkins' motions. Accordingly,
16 Hopkins has failed to show that LRA "actual[ly] injured" him.

17 **ii. Capela**

18 Capela's most serious allegation is that LRA prevented him from challenging a charge that the
19 district attorney improperly added after the preliminary hearing in his criminal case.³⁰ Capela Decl. ¶ 9.
20 The hearing took place on September 15, 2003. Capela Depo. at 17:25-18:2. At this time, a public
21 defender represented him. Capela Decl. ¶ 3. On September 29, 2003 the district attorney filed an
22
23
24

25 ³⁰ In addition, Capela contends that he was unable to review potential jury instructions or
26 "legal issues related to my charges such as motive." Capela Decl. at ¶¶ 13-16. However, he did not recall
27 ever submitting a request to LRA for information on jury instructions or motive. Capela Depo. at 143:19-
28 ¶ 15. Yet he does not name this individual in his declaration nor state what his testimony would have
revealed. Likewise, he could not answer these questions at his deposition. Capela Depo. at 197:13-
203:11.

1 information that included an additional a felony attempted robbery charge. RJN Ex. A.³¹ On November
2 19, 2003 the district attorney filed a first amended information, which also included this charge. RJN Ex.
3 B. That same day, Capela filed a request to proceed *pro per*. Capela Depo. at 19:18-23:4; Capela Decl.
4 ¶¶ 2-4.

5 Capela requested research materials on how to strike the late-filed charge three times. According
6 to Capela, LRA's first response "was unhelpful, as it simply set forth the [d]istrict [a]ttorney's procedures
7 for filing charges." *Id.* at ¶ 9(a). However, Capela admits that he made this request when the public
8 defender still represented him. *Id.* Because Capela was not *pro per*, the County was under no obligation
9 to provide him access to the courts. *See Wilson*, 690 F.2d at 1271-72 (state fulfills its duties under both
10 Fifth and Sixth Amendments by appointing lawyer to represent criminal defendant). Capela argues that he
11 then drafted a request that specifically asked "whether it was legal for the [d]istrict [a]ttorney to file felony
12 charges after the preliminary hearing without new evidence." *Id.* at ¶ 9(b). Again, LRA "failed to provide
13 [him] with useful information. *Id.* Capela claims that he finally received helpful information in response to
14 his third request. *Id.* at ¶ 9(c). Capela contends that the information LRA produced revealed both that the
15 charge was improper and that he had waived any objection to the district attorney's conduct by proceeding
16 with the trial. *Id.* Nevertheless, Capela has failed to provide any tangible evidence of his requests or
17 LRA's responses. Moreover, a district attorney may properly add charges against a defendant so long as
18 they are "shown by the evidence taken at the preliminary hearing," Cal. Pen. Code § 1009, or "aris[e] out
19 of the transaction upon which the commitment was based." *People v. Burnett*, 71 Cal. App. 4th 151,
20 165-66 (1999). Without more evidence about Capela's preliminary hearing, the court cannot conclude that
21 the district attorney's conduct was, in fact, improper.

22 **iii. Lyons**

23 Lyons contends that LRA's flaws caused the criminal trial court to reject two motions. First, he
24 requested information on how to file a *Pitchess* motion on May 4, 2004. Lyons Decl. ¶ 10.
25 He asserts that LRA sent him a sample motion, which he used. *Id.* According to Lyons, the judge asked
26 him to re-file the motion because "it was incomplete." *Id.* Lyons alleges that he then asked LRA "how to [
27

28 ³¹ The district attorney also added two additional felony assault charges. These court later
reduced these charges to misdemeanors. Capela Decl. at ¶¶ 9(a)-(d).

1 jfile a complete motion." *Id.* He claims that LRA then re-sent the same sample motion that the judge had
2 previously rejected. *Id.* However, other than his original request to LRA, Lyons offers no evidence to
3 substantiate his claims. Lyons testified that the judge instructed him to "file more for the motion." Lyons
4 Depo. at 74:17-21. Yet because the motion consists entirely of case citations, it is likely that the judge
5 wanted more factual—as opposed to legal—support. RJN Ex. T. In any event, Lyons cannot
6 demonstrate that the criminal trial court's denial of his *Pitchess* motion affected the outcome of his case.

7 Second, Lyons claims that, on May 16, 2004, he requested research on setting aside an
8 information for the improper addition of a charge after the preliminary hearing. Lyons Decl. ¶ 11. On the
9 request, he indicated that he had a hearing in two days. Lyons Decl. Ex. C. He claims that he received a
10 response from LRA shortly before the filing deadline, which led the court to reject the motion as untimely.
11 Lyons Decl. ¶ 11. However, in his deposition, he testified both that (1) he was eventually able to re-file the
12 motion and (2) he was aware of the additional charge approximately one month before he first requested
13 information from LRA:

14 Q. Okay. Is there any reason why you didn't go ahead and file this motion, refile it timely?

15 A. I did refile it.

16 Q. But did you ever refile it giving the 15 days notice?

16 A. Yes.

17 Q. Could you have requested the information on the . . . motion at any time from April 7th
until May 16th?

18 A. Yes, I could.

18 Q. But you did not?

19 A. No.

19 Q. That was your choice?

20 A. Yes.

21 Lyons Depo. at 95:2-7; 97:10-17. Thus, it is unclear whether Lyons was able to present this claim to the
22 criminal trial court. In addition, it appears that the untimely filing stemmed more from Lyons' delay in
23 requesting information than any delay on the part of LRA.³²

24 iv. Reyes

25 Reyes, who represented himself in three criminal cases, claims that LRA's responses were often
26 inadequate. On November 7, 2003, he requested information (1) on time limits for receiving a police
27

28 ³² Lyons also claims that he requested research on Proposition 115 and never received an
answer. Lyons Decl. ¶ 12. However Lyons does not indicate why he was researching this issue.

1 report and discovery and (2) for California Penal Code sections 1203.07(a)(11) and 148(A)(1). Reyes
2 Decl. Ex. A. LRA's response contained only "a printout of . . . section 148(A)(1) [and] a crossed-out
3 copy of [his] request." *Id.* at ¶ 10. However, he admits that he was represented by a public defender at
4 this time. *Id.* at ¶ 3 ("[f]rom approximately September 2003 to December 2003, I was represented by a
5 public defender in my criminal cases"). Thus, he made this request at a time when he had no constitutional
6 right to court access beyond that available through his appointed counsel.

7 On December 2, 2003, after Reyes was certified *pro per*, he filed a request for "a full complete
8 discovery pkg [sic] points & authorities and also time limits and deadlines on receiving a police report and
9 discovery" and California Code of Civil Procedure "100 through 1350." Reyes Decl. Ex. B. Reyes claims
10 that, despite the fact that he faced drug charges, he received a packet that related only to conducting
11 discovery in a robbery case. *Id.* at ¶ 11. In addition, he asserts that the packet "contained no points or
12 authorities or sample motions." *Id.* However, LRA's records indicate that he received a 71-page criminal
13 packet in response to this request. Williams Reply Decl. Ex. G. In addition, during his deposition, he
14 testified that he could not remember whether the discovery packet contained points and authorities. Reyes
15 Depo. at 79:24-80:15. Finally, it is not clear that he ever filed a motion for discovery in his drug case.

16 On January 29, 2004 Reyes requested information on a motion to suppress evidence under
17 California Penal Code section 1538.5, specifically asking for "case law where evidence [was] suppressed
18 for failure to establish and maintain the chain of evidence." Reyes Decl. Ex. E. He claims that LRA
19 provided him with a sample motion for suppression of evidence but "no information regarding the chain of
20 custody." *Id.* at ¶ 20. LRA's records indicate that it responded with a seventy-three page criminal packet
21 on February 4, 2004. Williams Reply Decl. Ex. E. However, it does not appear that Reyes ever filed a
22 motion to suppress.

23 Also on January 29, 2004 Reyes requested information on California Penal Code section 1047 to
24 file a *Pitchess* motion. Reyes Decl. Ex. F. He indicated that he had a hearing on March 9, 2004. *Id.* He
25 claims that he did not receive a response for ten days and that it took two months to prepare the *Pitchess*
26 motion, which the court denied. Reyes Decl. ¶ 17. However, LRA's records show that it received Reyes'
27 request on March 3 and provided forty-one pages, including one statute and two criminal packets, on
28

1 March 4. Williams Reply Decl. Ex. G. In addition, Reyes does not indicate why the court denied the
2 motion.

3 On February 2, 2004 Reyes requested "a notice of motion to hold defaulting [a] witness in
4 contempt, information regarding filing a motion for a continuance, and a sample motion for the "non-
5 arresting officer exemption" under California Penal Code section 1047. Reyes Decl. Ex. I. He indicated
6 that his next court date was February 10. *Id.* According to Reyes, he received LRA's response
7 "approximately ten days later," and the court denied his motion for a continuance. *Id.* at ¶ 21. However,
8 LRA's records reveal that it sent Reyes three statutes and one criminal packet comprised of sixteen pages
9 on February 6: four days after his request. Williams Reply Decl. Ex. G. Moreover, Reyes again does not
10 explain why the court denied the motion.

11 Reyes' remaining complaints suffer from similar flaws. On March 2, 2004 he asked for information
12 on how "to strike prior violent or serious felony convictions . . . 'in the furtherance of justice['] pursuant to
13 California Penal Code section 1385. Reyes Decl. Ex. J. He claims that LRA's response contained "only
14 the statutory text of [s]ection 1385." *Id.* at ¶ 23.³³ According to LRA's record, however, Reyes received
15 a twenty-four page criminal packet in response to this request. Williams Reply Decl. Ex. G. Also on
16 March 2, 2004 Reyes sought points and authorities on "bail" and being released on one's "own
17 recognizance." Reyes Decl. Ex. I. He alleges that he received "a small packet of information pertaining to
18 bail, only twenty or thirty pages." *Id.* at ¶ 24.³⁴ LRA's records indicate that it sent Reyes eighty pages of
19 material. Williams Reply Decl. Ex. G. On April 1, 2004 Reyes sought a packet on the ABA Standards of
20 Professional Responsibility. Reyes Decl. Ex. L. Reyes claims that he never received a response from
21 LRA. *Id.* at ¶ 24. LRA's records show that it sent Reyes twenty-four pages of material that same day.
22 Williams Reply Decl. Ex. G. Therefore, it appears that Reyes' criticisms of LRA are overstated. More
23 importantly, however, Reyes fails to link LRA's responses to any particular prejudice.³⁵

24
25 ³³ Reyes' declaration contains two paragraphs numbered "21" and "22." This particular
26 paragraph purports to be paragraph 21 but is, in fact, number 23.

27 ³⁴ This paragraph is erroneously numbered "22."

28 ³⁵ Reyes also asserts that he requested information about changing venue and habeas corpus
on March 15, 2005. Reyes Decl. ¶ 25. Although Reyes denies receiving any information, Reyes Depo. at
281:15-283:20, LRA's records indicate that he received two criminal packets. Williams Reply Decl. Ex.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

v. Golden

Golden claims that, during his criminal trial, he attempted to move a report authored by the district attorney's investigator into evidence. Golden Decl. ¶ 9(a). According to Golden, the report was crucial to his case. *Id.* He asserts that the district attorney successfully prevented him from introducing the report on hearsay grounds. *Id.* at ¶ 9(b). Yet Golden does not explain what this evidence was, or how LRA was responsible for his inability to oppose the district attorney's motion.

In addition, Golden claims that LRA often refused to provide secondary sources. On November 10, 2004 he requested Model Penal Code section 2.13(2)(b) and a footnote from an article in the *Harvard Law Review*. Golden Decl. Ex. 10. LRA responded nine days later by refusing to provide either source. Golden Decl. ¶ 21(a)-(c), Ex. 11. On January 28, 2005 he requested two petitions for *certiorari* identified by Westlaw citation. Golden Decl. Ex. 5. LRA responded five days later with a memorandum stating that the information was not available. Golden Decl. ¶ 16(a), Ex. 6. He claims that he needed these briefs to draft a petition for *certiorari* in his criminal case. Golden Decl. ¶ 16(c). However, he provides no details about the issue for which he sought *certiorari* or whether he did file such a petition.

On February 25, 2005 Golden asked LRA to Shepardize the case citation "99 F.3d 1151." Golden Decl. Ex. 1. LRA responded on March 1 that the case was "not certified for use in court and cannot be cited." Golden Decl. Ex. 2. Golden claims that he submitted a grievance and then received the case. *Id.* at ¶ 15(e). On April 7, 2005 Golden requested a Shepardized copy of California Penal Code section 667(d) and a summary of the cases. Golden Decl. Ex. 7. LRA responded five days later with the text of California Penal Code sections 667(a)-(b), a list of cases that had cited the section, but no summary. Golden Decl. Ex. 8. Again, he asserts that it was only after he submitted a grievance that he received an adequate response. Golden Decl. ¶ 17(f). On April 17, 2005 he asked for "any and all information on the most common line of questioning a witness in a criminal or civil action." Golden Decl. Ex. 19. LRA responded with an excerpt from *California Criminal Defense Practice*. Golden Decl. Ex. 20. Golden then followed up by requesting an article cited in this response. *Id.* at ¶ 29(c). LRA refused to provide this

1 article on the grounds that it was a secondary source. Golden Decl. Ex. 21.³⁶ However, Golden simply
2 does not explain how LRA's refusal to provide these sources led to any particular harm.

3 **vi. Walker**

4 On September 2, 2004 the court certified Walker *pro per* in his criminal case. RJN Ex. DDD.
5 However, during his deposition, Walker testified that he did not file a request with LRA while he was *pro*
6 *per*. See Walker Depo. at 36:25-37:1 ("[t]he only thing[s] I [have] request[ed] from LRA [we]re for my
7 civil cases"). Walker claims that during a May 2005 hearing for an order to direct service on defendants in
8 a civil case, a judge "asked [him] to provide legal authority for a point that arose." Walker Decl. ¶ 18.
9 According to Walker, the judge refused to grant a continuance so Walker could use LRA to find the
10 answer. *Id.* However, under *Lewis*, the County is not required to enable Walker "to litigate effectively
11 once in court." *Lewis*, 518 U.S. at 354-55 (emphasis omitted).

12 On August 19, 2004 Walker requested the California's Prisoners' Rights Handbook to pursue a
13 civil rights claim. Walker Decl. Ex. E. He contends that LRA did not comply. Walker Decl. ¶ 26.
14 However, he does not specify the specific prejudice that flowed from LRA's refusal. Moreover, the record
15 indicates that his civil rights claim against the County and several DOC employees has survived a motion to
16 dismiss in federal court. RJN Ex. JJJ.

17 **vii. Bautista**

18 Bautista asserts that LRA once sent him a "seven day" memo when he was trying to appeal a civil
19 matter to the Ninth Circuit. Bautista Decl. ¶ 16(a). According to Bautista, because he only had ten days to
20 file a notice of appeal, he was unable to submit the appeal. *Id.* However, under *Lewis*, the County is not
21 required to enable Bautista to appeal civil matters. See *Lewis*, 318 U.S. at 354-55.

22
23
24 ³⁶ Golden also contends that DOC personnel "conducted improper shakedowns" of his cell,
25 often disturbing his legal materials. Golden Decl. ¶ 31. He asserts that after these shakedowns, his legal
26 materials sometimes went missing. *Id.* Similarly, Bautista claims that he finds legal documents missing after
27 officers perform "walk throughs" of his cell, and Walker alleges that jail personnel (1) erase legal documents
28 from the DOC computer, (2) destroy legal research during "arbitrar[y] cell searches, (3) increase the
number and length of lock-downs, and (4) mishandle the mail. Bautista Decl. ¶ 21(e); Walker Decl. ¶ 41.
These allegations could give rise to federal civil rights claims. However, because the Access to the Courts
Decree does not regulate the manner in which officers conduct searches, maintain the DOC computer,
manage lock-downs, or handle mail, Golden, Bautista, and Walker's claims are outside the scope of this
motion.

1 Bautista argues that LRA's failure to provide secondary source material caused the California court
2 of appeals to deny a petition for a writ of prohibition that he filed on December 20, 2004. Bautista claims
3 that the court denied the petition because it was not properly bound and because he did not file a sufficient
4 number of copies. Bautista Decl. ¶ 6(r). However, the appellate court's ruling indicates that it rejected the
5 petition on the merits. RJN Ex. SSS. Bautista also contends that his motion would have been more
6 compelling if LRA had not denied his request for certain secondary sources. Bautista Decl. ¶¶ 21(a) ("I
7 eventually filed a writ without the requested materials, and the writ was denied"); *id.* at ¶ 21(g) ("[i]f I had
8 access to the requested materials, then there is a better chance that my writ would have been granted"); *id.*
9 at ¶ 21(n) ("[i]f LRA had provided me with the requested materials, then I would have file a better petition
10 that might have been granted"). Yet the DOC fulfilled its constitutional duties to Bautista merely by enabling
11 him to file the writ. *See Lewis*, 318 U.S. at 354-55. Bautista also does not allege that the denial stemmed
12 from LRA's flaws. Instead, he merely posits that he would have had a "better chance" of success.

13 Bautista also claims that because LRA refused to provide a secondary source, *Police Misconduct*
14 *and Civil Rights*, he has been unable to file a lawsuit stemming from an incident where officers allegedly
15 destroyed his legal research. Bautista Decl. ¶ 21(e). Yet he does not explain why this source is an
16 absolute necessity for filing any such complaint. In addition, he has filed a similar lawsuit against the County
17 and a DOC employee for alleged retaliation. RJN Ex. XXX.

18 Bautista also contends that LRA has refused to provide several secondary sources. Nevertheless,
19 he either fails to explain the context of each refusal or simply alleges that he would have preferred to use
20 another source. *See* Bautista Decl. ¶ 21(f) (lawsuit was dismissed for failure to state a claim but no
21 indication as to why); *id.* at ¶ 21(i) ("LRA attempted to provide me with substitute information from another
22 publication" but "[t]he other publication has not provided me with the same amount of guidance that the
23 requested material would have given me"); *id.* at ¶ 21(j) ("[i]f LRA had provided me with the requested
24 materials, I would have been able to prepare the motion properly and there would be a greater chance that
25 it would have been granted"); *id.* at ¶ 21(k) ("there would have been a greater chance that the claim would
26 not have been dismissed"); *id.* at ¶ 21(w) ("[t]he briefs that I have filed would be more compelling and have
27 greater likelihoods of succeeding if LRA provided me with the requested material"). These allegations are
28 insufficient.

1 Finally, Bautista claims that several LRA responses were especially galling. First, he requested a
2 section of Witkin & Epstein, *California Criminal Law*. Bautista Decl. Ex. 37. LRA's response indicated
3 that the book's section numbers had changed and asked him to submit a new request. Bautista Decl. Ex.
4 38. Second, he requested a "Santa Clara County tort claim form." Bautista Decl. Ex. 39. LRA's response
5 did not include such a form but stated that Bautista could receive one if he requested it. Bautista Decl. Ex.
6 40. Third, he requested a Judicial Council form to sue his landlord for stealing his "[p]ersonal [p]roperty."
7 Bautista Decl. Ex. 39. LRA responded by asking him to "state the type of loss or injury (for example, loss
8 of property or personal injury") and how it happened. Bautista Decl. Ex. 40. Fourth, on January 21, 2005
9 he requested the index to the *California Criminal Law Forms Manual*. Bautista Decl. ¶ 25. LRA
10 replied by asking him what issues he was researching and how they related to his current case. Bautista
11 Decl. Ex. 45. Fifth, on January 24, 2005 he asked for information and a sample motion regarding
12 severance and joinder. Bautista Decl. ¶ 26. LRA responded by asking "[s]everance and [j]oinder—of
13 what? Offenses or defendants?" Bautista Decl. Ex. 47. Sixth, on September 22, 2004 and February 22,
14 2004 he requested specific chapters of practice guides. *Id.* at ¶ 27. LRA's responses again asked him to
15 describe the issues he was researching and how they related to his current case. Bautista Decl. Exs. 49,
16 51. Nevertheless, he fails to explain how he suffered "actual injury." *See* Bautista Decl. ¶ 22 ("[i]f I had
17 direct access to the publication itself, I would have easily found the new section and not [have] been forced
18 to go through this time-consuming process with guarantee of getting the proper section at the end of the
19 day"); *id.* at ¶ 23 (not specifying prejudice that flowed from landlord request); *id.* at ¶ 25(a) ("I fear there
20 may be some motions that would help me prevail in my criminal case that I have not filed simply because I
21 am not aware of them"); *id.* at ¶ 26(a) (asserting without explanation that "I must sever these counts in
22 order to properly defend myself"); *id.* at ¶ 28(b) ("I cannot determine how I should defend myself and
23 whether I should accept a plea bargain"). Thus, there is no evidence that LRA violated Bautista's
24 constitutional rights.

25 4. Conclusion

26 There is no evidence that prisoners have suffered "actual injury" because of LRA. Accordingly, the
27 Access to the Courts Decree is not necessary to prevent constitutional violations. The court does not
28 suggest that LRA is immune from improvement or that individual prisoners cannot bring claims against the

1 County for inadequate research responses in specific cases. However, the record here utterly fails to reveal
2 legally-cognizable injuries widespread enough to warrant systematic relief. The court thus terminates the
3 Access to the Courts Decree.

4 **C. The Amended Disciplinary Procedures Decree**

5 In *Wolff*, 418 U.S. at 564-66, the United States Supreme Court held that the Due Process Clause
6 of the Fourteenth Amendment entitles certain inmates facing disciplinary charges (1) twenty-four hour
7 advance written notice of the hearing and the claimed violation, (2) the opportunity to call witnesses and
8 present evidence, if doing so would "not be unduly hazardous to institutional safety or correctional goals,"
9 and (3) "a written statement of the factfinders as to the evidence relied upon and the reasons for the
10 disciplinary action taken." However, the Court declined to require prison officials to permit inmates to
11 cross-examine witnesses. *Id.* at 567-68. In addition, the Court held that inmates did not have the right to
12 counsel, but might seek the assistance of a fellow prisoner or staff member under special circumstances. *Id.*
13 at 570. Subsequent cases have made clear that these protections apply to (1) all pretrial detainees, *see*
14 *Mitchell v. Dupnik*, 75 F.3d 517, 524 (9th Cir. 1996) and (2) convicted prisoners whose potential
15 punishments constitute "atypical, significant deprivation." *Sandin v. Conner*, 515 U.S. 472, 486 (1995).

16 **1. Whether the PLRA Mandates Termination of the Amended Disciplinary
17 Procedures Decree**

18 **a. Whether the Amended Disciplinary Procedures Decree Qualifies for
19 Termination Under § 3626(b)(2)**

20 The parties agree that the Amended Disciplinary Procedures Decree "qualifies for termination"
21 under § 3626(b)(2). *See* Opp. Mot. Term. Consent Decrees at 44:21-22 ("aspects of the order . . .
22 marginally exceed constitutional minimums"). The decree permits inmates "to confront and cross-examine
23 any witnesses present at the hearing." Schmid Decl. Ex. D at 7. Because "[c]onfrontation and cross
24 examination are not generally required and are left to the sound discretion of the prison official," *Zimmerlee*
25 *v. Keeney*, 831 F.2d 183, 187 (9th Cir. 1987), the decree is overbroad. In addition, the decree requires
26 one member of the panel to be an attorney. However, panels may lawfully consist entirely of prison staff.
27 *See Wolff*, 418 U.S. at 570-71; Opp. Mot. Term. Consent Decrees at 45 n.66 ("it is clear that the
28 provisions of the [amended disciplinary procedures decree] requiring attorney members o[n] the hearing
panels exceed the constitutional minimum").

1 **b. Whether Portions of the Amended Disciplinary Procedures Decree Remain**
2 **Necessary to Correct Ongoing Constitutional Violations**

3 Prisoners' opposition to the County's motion to terminate the Access to the Courts Decree featured
4 detailed declarations from seven prisoners about LRA's flaws. However, only Golden, Walker, and
5 Bautista claim to have suffered due process violations. The majority of the prisoners' opposition with
6 respect to the Amended Disciplinary Procedures Decree concerns alleged injuries to other members of the
7 inmate population. As a threshold matter, the County argues that "[p]laintiffs cannot carry their burden by
8 pointing to injury by some unidentified member of the class." Rep. Supp. Mot. Term. Consent Decrees at
9 17:21-23.

10 The County's argument is not persuasive. It is true that "named plaintiffs who represent a class
11 must allege and show that they personally have been injured, not that injury has been suffered by other,
12 unidentified members of the class to which they belong and which they purport to represent." *Lewis*, 518
13 U.S. at 357 (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 40 n. 20
14 (1976)). But the current motion is one to terminate a consent decree. The parties merely stipulated to let
15 seven prisoners offer evidence. The court is aware of no authority that suggests that a court cannot consider
16 evidence of injuries suffered by the inmate population at large when ruling on a motion to terminate a
17 consent decree. Indeed, courts may order—or refuse to terminate—prospective relief based upon a single
18 inmate's proof of a pervasive or intractable problem. *See Ashker v. California Dept. of Corrections*,
19 350 F.3d 917, 924 (9th Cir. 2003) (affirming district court's order granting single plaintiff's motion for an
20 injunction under the PLRA against prison's policy requiring books to contain a stamp from an approved
21 vendor). It is § 3626(b)(3)'s needs-narrowness-intrusiveness requirement, and not a *per se* rule of
22 evidence, that ensures that the "court's exercise of equitable discretion . . . heel[s] close to the identified
23 violation." *Gilmore*, 220 F.3d at 1005.

24 The County insists that "[w]ithout actual injury[, prisoners] cannot seek relief on behalf of him or
25 herself or any member of the class." Rep. Supp. Mot. Terminate Consent Decrees at 26:6-11. However,
26 unlike the right to court access, it is well-established that there is no "actual injury" requirement for
27 procedural due process violations:

28 Even if respondents' suspensions were justified, *and even if they did not suffer any other*
actual injury, the fact remains that they were deprived of their right to procedural due
process Common-law courts traditionally have vindicated deprivations of certain

1 'absolute' rights that are not shown to have caused actual injury through the award of a
2 nominal sum of money. By making the deprivation of such rights actionable for nominal
3 damages without proof of actual injury, the law recognizes the importance to organized
4 society that those rights be scrupulously observed; but at the same time, it remains true to
the principle that substantial damages should be awarded only to compensate actual injury
or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations
of rights.

5 *Carey v. Piphus*, 435 U.S. 247, 266 (1978) (emphasis added). "*Lewis* simply requires that in order to
6 show actual injury prisoners must identify an actual right that has been violated." *Armstrong v. Davis*, 275
7 F.3d 849, 865 (9th Cir. 2001). No actual right has been violated unless a law library's inadequacies cause
8 a certain kind of harm. Conversely, being denied adequate process is legally-cognizable harm itself. Thus,
9 the mere fact that prisoners offer no evidence of a further injury flowing from the alleged constitutional
10 deprivation does not doom their due process claims.³⁷

11 **i. Whether the County Fails to Provide Twenty-Four Hour**
12 **Written Notice of the Hearing and Claimed Violation**

13 The Amended Disciplinary Procedures Decree requires supervisors to "inform the prisoner of the
14 alleged violation, together with a copy of the violation, and inform the prisoner of his/her right to a hearing."
15 Schmid Decl. Ex. D at 3-4. Jail staff must then set a hearing date "not more than five judicial days from the
16 date of the written notice of the violation, and not more than ten judicial days from the discovery of the
17 violation." *Id.* at 4-5.

18 Prisoners make two factual arguments in support of their claim that the County does not comply
19 with the written twenty-four hour notice requirement. First, they assert that the County produced infraction
20 notices from Elmwood in discovery. On 167 such notices, jail personnel failed to check a box that states

21
22
23
24 ³⁷ The County argues that *Mitchell*, 75 F.3d at 517 holds otherwise. In that case, Shabazz,
25 an inmate, sued under 42 U.S.C. § 1983, claiming that Robare, a correctional officer, failed to tape record
26 a disciplinary hearing. According to Shabazz, Robare's wrongdoing "resulted in his unjustified assignment
27 to nineteen days of segregation." *Id.* at 520. The district court granted Shabazz's summary judgment
28 motion and awarded him \$1,000. The Ninth Circuit reversed. The court reasoned that Shabazz had failed
to link Robare's conduct to the specific harm at issue. *Id.* at 526. However, contrary to the County's
contention, *Mitchell* does not hold that no constitutional violation occurred. Instead, *Mitchell* holds that
the constitutional violation could not have caused the harm for which the court intended the damage award
to compensate. *See id.* ("we conclude that the district court erred in finding a sufficient showing of
causation"). Thus, *Mitchell* does not mandate an "actual injury" requirement for due process claims.

1 "copy of explanation of charges to prisoner." Hua Decl. Ex. 1.³⁸ Nevertheless, the probative value of
2 officers' failure to check a tiny box on a complex form is limited. As the County explains, this form contains
3 a second page that pertains directly to the interaction between the sergeant and the inmate. This page
4 contains a box in which the sergeant must log the time and date when the "[i]nmate [is] first given [a] copy
5 of [the] infraction." Fischer Decl. Ex. D. Both the inmate and the sergeant must sign the form. After
6 reviewing these forms, the court concludes that prisoners' assertion is unpersuasive. For one, a large
7 percentage of these "unchecked box" forms actually involve prisoners who *admit* the alleged infraction.
8 *See, e.g.*, Hua Decl. Ex. 1 at Bates Nos. C4527; C4554; C4556; C4458; C4560; C4562; C4564;
9 C4566; C4568; C4757; C4794; C4601; C4608; C4614; C4802; C4863; C4869; C4875; C4878;
10 C4914-16; C4931; C4947-50. Because these prisoners never receive a hearing, advance written notice is
11 irrelevant. Moreover, several other forms relate to prisoners who expressly waived their right to twenty-
12 four hour notice. *See, e.g., id.* at C4570; C4829; C4963. In addition, prisoners exaggerate the number of
13 "unchecked box" forms by counting several forms stemming from a single incident as distinct examples of
14 lack of written notice. *See, e.g., id.* at Bates Nos. C4947-50 (pertaining to one infraction). Finally, the
15 overwhelming majority of forms with an unchecked box on the first page contain the inmate's signature
16 attesting to the fact that he received twenty-four hour written notice on the second page. The second page
17 is more likely to be accurate than the "unchecked box": presumably, any inmate who did not receive written
18 notice could refuse to endorse the sergeant's assertion that he did. Therefore, the court rejects this aspect
19 of prisoners' argument.

20 Second, prisoners contend that Hernandez, Officer Joan Conner, ("Conner") and Lieutenant
21 Kristine-Marie Irene Pantiga ("Pantiga"), have "admitted that some inmates have not been provided with
22 written notice of . . . charges." Opp. Mot. Term. Consent Decree at 39:17-23. Hernandez testified that he
23 remembered an incident where an inmate "wasn't even aware of the infraction until the sergeant went to see
24 him" and did not receive a copy of the charges before the hearing. Hernandez Depo. at 123:9-23.
25 However, although Conner acknowledged that she did know of instances where inmates "have not received
26 their copy" of the infraction, she also asserted that "the infraction is dismissed" and "[t]he process stops right

27 ³⁸ The County moves to strike Hua's declaration under Federal Rule of Civil Procedure
28 37(c)(1), arguing that prisoners did not disclose Hua as an expert or lay witness. The court declines to do
so because it has denied the prisoners' motion to strike Fischer's declaration on similar grounds.

1 there." Conner Depo. at 29:9-19.³⁹ Similarly, Pantiga testified only that she knew of a few inmates who
2 claimed that they did not receive written advance notice:

3 Q. Do you know of any occurrences where inmates have not received a copy of their
4 infraction notices at Elmwood?

5 A. Do I—I know of cases where an inmate states that he did not receive it.

6 Q. Okay. And do you know of such occurrences when an inmate states they didn't
7 receive their copy?

8 ***

9 A. Yes.

10 ***

11 Q. Okay. And how many times does that occur at Elmwood?

12 ***

13 A. Based on what the paperwork I've reviewed and that would include grievances and
14 the hearings, it doesn't occur that often.

15 ***

16 Q. You'd say it's less than 10 times that an inmate's complained that they have not
17 received a copy of their infraction[?]

18 ***

19 A. It's less than five times that I've been made aware of.

20 Pantiga Depo. at 84:10-85:14. Thus, even interpreted in the light most favorable to prisoners, the evidence
21 shows that the County is largely complying with *Wolff's* twenty-four hour written notice requirement. The
22 court declines to modify the Amended Disciplinary Procedures Decree in this respect. Because of the
23 paucity of evidence of constitutional violations, any amendment would just reiterate *Wolff's* rule. As
24 prisoners themselves observe, the County must already meet this standard. *See* Opp. Mot. Term. Consent
25 Decrees at 32:23-25 ("orders stating simply 'obey the Constitution' . . . would, of course, be redundant,
26 since government officials are already bound to do so").

27 **ii. Whether the County Fails to Inform Prisoners of Their Right
28 to Call Witnesses and Present Evidence**

29 The Amended Disciplinary Procedures Decree states that prisoners (1) "shall be entitled to confront
30 and cross-examine any witnesses present at the hearing" and (2) "shall have the right to present relevant
31 evidence on his/her behalf, at no expense to the County." Schmid Decl. Ex. D at 6. Although the decree
32 thus does not expressly give prisoners the right to call witnesses, arguably this right is implicit in the decree's

33 ³⁹ Although there is no "actual injury" requirement for a due process violation, an inmate who
34 does not attend a hearing for which he received defective notice fails to prove that any "process was due"
35 and thus has no procedural due process claim. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)
36 ("Whether any procedural protections are due depends on the extent to which an individual will be
37 'condemned to suffer grievous loss.'") (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341
38 U.S. 123, 168 (1951)).

1 acknowledgment that witnesses may be "present" and its broad statement that inmates may "present
2 relevant evidence."

3 *Wolff* opined that "it would be useful for [a disciplinary panel] to state its reason for refusing to call
4 a witness, whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases."
5 *Wolff*, 418 U.S. at 566. However, the Court refused to make this comment a rule of constitutional law.
6 *Id.* In *Bartholomew v. Watson*, 665 F.2d 915, 917 (9th Cir. 1982), the Ninth Circuit invalidated a policy
7 that forbade inmates from calling other inmates or staff members who worked within the prison as
8 witnesses. The court reasoned that "a blanket proscription against the calling of certain types of witnesses
9 in all cases involving institutional security is an overreaction which violates minimal due process." *Id.* at
10 918. In addition, the court determined that the policy "violates the suggestion of the Supreme Court in
11 *Wolff* that the decision to preclude the calling of a witness should be made on a case-by-case analysis of
12 the potential hazards which may flow from the calling of a particular person." *Id.*

13 Several years after *Wolff*, in *Mitchell*, 75 F.3d at 525, the Ninth Circuit held that a jail violated an
14 inmate's due process rights when its stated policy permitted inmates to call witnesses during disciplinary
15 hearings, but it never actually allowed them to do so. Although the court noted that *Wolff* requires neither
16 that (1) "jail officials . . . afford inmates an unrestricted right to call witnesses" nor that (2) "officials . . . state
17 their reasons for refusing to call a witness," it held that prison officials improperly refused to "evaluate inmate
18 requests to call witnesses on a case-by-case basis." *Id.*

19 Prisoners assert that jail personnel often (1) fail to inform inmates that they may call witnesses, (2)
20 deny inmates' requests to call witnesses, and (3) do not provide reasons for denials. Prisoners again rely on
21 deposition testimony from Hernandez, Pantiga, and Conner.⁴⁰ Hernandez explained that officers sometimes

23 ⁴⁰ Walker alleges that the DOC did not allow him to present witnesses at his infraction
24 hearings "[o]n numerous occasions." Walker Decl. ¶ 35. However, Walker does not provide enough
25 detail for the court to determine whether the panel denied his requests arbitrarily or due to security reasons.
26 The County notes that Walker "is double-red who is in special housing." Rep. Mot. Term. Consent
27 Decrees at 23:9-10 (citing Walker Depo. at 15:11-12). Prisoners move to strike this statement on the
28 grounds that it is substantially more prejudicial than probative under Federal Rule of Evidence 403. The
court denies the motion. Walker's security status is highly probative of the issue of whether the County can
properly forbid him from calling witnesses.

Bautista claims that, when he received an infraction in 2004, the panel did not advise him of his right
to call witnesses or get a continuation if witnesses are unavailable. Bautista Decl. ¶ 37. Bautista contends
that he was found guilty, but successfully appealed because, *inter alia*, because the panel did not advise
him of his right to witnesses. *Id.* at ¶¶ 41-42. Although Bautista's allegation may state a procedural due

1 refuse to let inmates call witnesses, often citing safety concerns, but sometimes giving no reason at all. *See*
2 Hernandez Depo. at 125:14-25. But despite prisoners' protestations, this is not objectionable: no case
3 holds that prison officials must explain why they are declining an inmate's request to call witnesses. *See*
4 *Mitchell*, 75 F.3d at 725 ("*Wolff* does not require jail officials . . . to state their reasons for refusing to call
5 a witness, although the Court would deem such notice useful"). In addition, the bulk of Hernandez's
6 testimony describes a system that, although imperfect, functions adequately:

7 Q. Are you aware of any hearing that you attended where a witness that the inmate
wanted to call didn't testify?

8 A. No.

9 [However,] in particular at Elmwood at times, I go and speak to the witness that the inmate
10 might have. When we go to the panel. I'm asked if I spoke to the witness. I said, Yes.
And then they go, Okay. They tell the panel to take that into account. And the witness
is not brought forth.

11 ***

12 Q. [Y]ou tell the panel members that "We want to present this witness, but"—and they
say, No you can't. You say; Okay, that's fine?

13 A. No. Like last week, we argued the point. They brought the witness.

14 Hernandez Depo. at 125:15-130:8.

15 Likewise, prisoners cite Pantiga's deposition for the proposition that "DOC confirmed that there
16 were several instances at both [the] Main Jail and Elmwood . . . where inmates were refused the
17 opportunity to call witnesses." Opp. Mot. Term. Consent Decrees at 37:24-26. The County
18 contends—and the court agrees—that this misrepresents Pantiga's testimony. Pantiga actually explained
19 that every refusal was justified:

20 Q. Do you know of any occasions where an inmate was refused the opportunity to call
witnesses?

21 A. Yes.

22 Q. And how many times did that occur?

A. At Elmwood I can think of one time at least that that's occurred.

23 Q. Okay. And at the Main Jail?

24 A. Going back many years, but I would say—I would say at least ten times. And then
25 the Main Jail specifically the witnesses *it was because of the dynamics of the facility*
26 *and the security level of the inmates*. So if the advocate would come and tell us that
they wanted a witness we'd say can you interview the witness and speak for the witness
on the witness' behalf? Because it's a big security issue for us to bring some of those level
4s together for a hearing so that does occur. *At Elmwood I believe the time I'm*
thinking of, the inmate didn't tell us he wanted a witness until he got there.

27 _____
28 process claim, it also suggests that the County is aware that it cannot punish prisoners unless it follows
Wolff.

ORDER ON MOTION TO TERMINATE CONSENT DECREES

C-71-2017-RMW

DOH

1 Pantiga Depo. at 180:4-24 (emphasis added).⁴¹ Thus, although it appears that the County refuses to let
2 inmates call witnesses, the lion's share of such decisions stem from safety concerns. Unlike the improper
3 blanket exclusionary policies in *Bartholomew* or *Mitchell*, the County does not completely forbid inmates
4 from calling witnesses. The evidence does not warrant a continued injunction.

5 **iii. Whether the Panel Fails to Give Prisoners a Written**
6 **Explanation of the Decision and the Evidence Upon Which It**
7 **Relied**

8 The Amended Disciplinary Procedures Decree requires the panel to "indicate in writing its decision
9 and the facts [on which it] relied." Schmid Decl. Ex. D at 6. According to the prisoners, seventy-five
10 percent of decisions contain no rationale. Hua Decl. ¶ 5. The County contends that prisoners "selectively
11 chose disciplinary documents to copy" and that "[i]t is not clear that they copied all disciplinary actions."
12 Schmid Reply Decl. ¶ 26. However, prisoners assert that they "did not select disciplinary hearing records
13 for copying" and believe that they reviewed these documents "en masse." Kaushik Decl. Supp. Sur-Reply
14 Mot. Term. Consent Decrees ¶ 15. Prisoners did not submit these documents to the court, but indicated
15 their willingness to do so. *See* Hua Decl. ¶ 2 n.1.

16 To resolve this issue, the court orders the parties to meet and confer by December 2, 2005.
17 Prisoners must make accessible to the County the records from which they derived their seventy-five
18 percent figure. The County shall inform the court if it believes that prisoners' estimate is inaccurate or
19 pertains to individuals who do not fall within the two classes entitled to *Wolff* protection. Otherwise,
20 prisoners have established a "current and ongoing" constitutional violation widespread enough to warrant
21 systematic relief. The parties shall then have until December 16, 2005 to propose a decree concerning
22 disciplinary procedures, if any, that should remain in effect. Any proposed continuing decree should be
23 limited only to the issue of a prisoner's rights to receive a written decision of a disciplinary panel
24 determination.⁴² The court understands that it may properly order relief that exceeds the constitutional

25 ⁴¹ Prisoners also argue that the County improperly denies an inmate's request to call witnesses
26 based on the panel's unilateral determination that the witness is not relevant. Opp. Mot. Term. Consent
27 Decrees at 38:15-19. However, Conner testified that the panel makes relevance decisions after "conferring
28 with the inmate" and assessing "security" and "accessib[ility]" concerns. Conner Depo. at 104:3-022.

⁴² Prisoners also argue that (1) panel members are not properly trained, (2) lay advocates
provide poor service, and that inmates are not entitled to (3) cross-examine witnesses or (4) receive a self-
incrimination warning. *See* Opp. Mot. Term. Consent Decrees at 39:24-42:13. Because these issues are

1 floor; however, prisoners must be mindful of the fact that any such relief must also pass the needs-
2 narrowness-intrusiveness requirement. In addition, the court would like the parties to discuss an
3 appropriate remedy for the County's prior contempt for implementing a change to the Access to the Courts
4 Decree without court approval.

5
6 **III. ORDER**

7 For the foregoing reasons, the court:

- 8 1. Terminates the Access to the Courts Decree;
9 2. Terminates the Amended Disciplinary Procedures Decree in its entirety except to the extent that
10 it entitles inmates to a written statement of the evidence upon which the panel relied;
11 3. Orders the parties to meet and confer as described herein.

12
13
14 DATED: 11/15/05 /s/ Ronald M. Whyte

15 RONALD M. WHYTE
16 United States District Judge

17
18
19
20
21
22
23
24
25
26
27
28 neither compelled by the Constitution nor within the scope of the Decree, the court declines to consider
them. Prisoners' proposed amendment should also not include these issues. However, prisoners are free
to seek class certification and move for an injunction under 18 U.S.C. § 3626(a) on these issues.

ORDER ON MOTION TO TERMINATE CONSENT DECREES

C-71-2017-RMW

DOH

1 **Notice of this document has been mailed to:**

2 **Counsel for Plaintiff(s):**

3 James McManis
4 William Faulkner
5 McManis Faulkner & Morgan
6 50 West San Fernando St., 10th Floor
7 San Jose, CA 95113

8 James Zahradka
9 Kyra Kazantzsis
10 Public Interest Law Firm
11 Law Foundation of Silicon Valley
12 111 West Saint John Street, Suite 315
13 San Jose, CA 95113

14 **Counsel for Defendant(s):**

15 Ann Miller Ravel
16 Steve Schmid
17 Aryn P. Harris
18 Office of the County Counsel
19 70 West Hedding St., East Wing, Ninth Floor
20 San Jose, CA 95110

21 **Dated:** 11/15/05

DOH
Chambers of Judge Whyte

22
23
24
25
26
27
28