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## E-DISCOVERY IN CRIMINAL DEFENSE: CHALLENGES OF PRETRIAL DETAINEE ACCESS

*Emilee A. Sahli*<sup>\*</sup>

### INTRODUCTION

Imagine that you are a criminal defense attorney and your client is being charged with a felony, denied bail, and held in pretrial detention on federal drug charges. It could be years before your client has an opportunity for trial. In the rare event that your client decides to hold out against pressures to accept a plea agreement, your client's ability to participate in their own defense is extremely limited by the conditions of their confinement. Any reasonable penological explanation for restricting their access to calls or meeting with you to review evidence in the law library and otherwise participate in the investigation process will be constructively unchallengeable in court.

Imagine, instead, that you have another client—one facing various federal charges for fraud and embezzlement—who has been granted, and was able to post bail. This client may also wait years for trial. However, they will not have the same restrictions on their ability to participate in their own defense as your client held in pretrial detention. This client would have the freedom of movement and the time and resources to communicate more openly with you and your staff, to review discovery, and to overall assist in the investigation and discovery review process. This discrepancy in the rights of those detained pretrial and those who are offered and able to post

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bail is especially stark in complex cases involving large amounts of discovery, often taking the form of electronic discovery.

The original purpose of pretrial detention and the setting of bail was to ensure that the person return to court to face the charges against them. However, pretrial detention has evolved out of concerns for public safety based upon the judge's assessment of the defendant's dangerousness. Regardless of the purpose for pretrial detention, this imbalance of opportunity for the accused to participate in their own defense ought to be challenged in order to preserve constitutional due process rights. If our criminal justice system is to preserve any meaning to the presumption of innocence, legal counsel must be aware of the unique challenges faced by their clients that are detained pretrial.

This article gives an introduction to electronic discovery in federal criminal litigation and explores the unique challenges that pretrial detainees face in accessing electronic discovery. The rise of electronic discovery requires that attorneys become aware of the complexities surrounding this form of discovery in order to adequately represent their clients' interests.

First, the article provides background information as to what electronic discovery is and the current state of pretrial detention in federal criminal cases. Second, the article lays out some of the various challenges in accessing electronic discovery for pretrial detainees. Finally, the article opens a discussion surrounding potential solutions by exploring efforts by the facilities themselves as well as potential legal strategies for litigation over the unique challenges of pretrial detainees in accessing electronic discovery.

## I. BACKGROUND

### A. *What is Electronic Discovery*

Electronic discovery (e-discovery) is any electronic data that is located and secured for the purpose of use in either civil or criminal litigation.<sup>2</sup> Electronically stored information (ESI) is especially prominent in our daily lives and therefore has become increasingly utilized in litigation.<sup>3</sup> Every phone call, text message, email, and blog post has become an incredibly accessible, and often pertinent, source of information used to pursue litigation. This information can be subpoenaed or otherwise collected by various local, state, and federal agencies that collect information that is often used for criminal prosecution. In the context of criminal litigation, this information is eventually produced to defense

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<sup>2</sup> See JERRY M. CUSTIS, LITIGATION MANAGEMENT HANDBOOK § 7:30 (2014).

<sup>3</sup> *Id.*

counsel by the prosecution in the form of discs and hard drives. These discovery productions often contain investigative reports, court records, criminal history, witness statements, forensic tests, and forensically preserved information from a variety of electronic devices such as cell phones, flash drives, and computer hard drives.

The format of this information will range from scanned paper to electronic files such as emails and audio and video files, often including proprietary files that are inaccessible without a designated program. The volume of the discovery can range from a few dozen files to millions of pages of scanned paper and hundreds of thousands of electronic files. For example, a wiretap of a single cell phone for sixty days can result in thousands of audio files, text messages, and GPS coordinates to review.<sup>4</sup> Consider an investigation lasting months or often years, requiring the collection of data from dozens of cell phones, the search of several homes, and the fruits of investigation of various law enforcement agencies. From this, one can begin to understand the vast scope of e-discovery in the federal criminal litigation context.

The format and volume of e-discovery presents steep challenges for the prosecution and the defense alike. Assessing how to organize, store, review, analyze, and utilize this information requires resources and planning. Given the volume of the data and the unique knowledge of the facts of those implicated in the purported criminal activity reflected in the e-discovery, the assistance of the accused is essential to the defense's review of this information and identification of the pertinent information necessary to prepare a defense. While free individuals awaiting trial often encounter the same challenges faced by their counsel in accessing e-discovery, such as volume, unfamiliar formats, etc., these challenges are magnified in the context of pretrial detention.<sup>5</sup> The next section of this article discusses the state of pretrial detention in the United States for those facing federal criminal charges.

### *B. Current State of Pretrial Detention in Federal Court*

Considering its incredibly high rate of incarceration, it is not surprising

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<sup>4</sup> *Id.*

<sup>5</sup> DEP'T OF JUST. (DOJ) & ADMIN. OFF. OF THE U.S. CTS. (AO) JOINT WORKING GROUP ON ELECTRONIC TECH. IN THE CRIM. JUST. SYS. (JETWG), RECOMMENDATIONS FOR THE PRODUCTION OF ELECTRONIC DISCOVERY IN FEDERAL CRIMINAL CASES 11 n.6 (Feb. 2012) (hereinafter JETWG Recommendations) (“(T)here are no uniform practices or rules for pretrial detainees’ access to ESI discovery. Resolution of the issues associated with such access is beyond the scope of the Recommendations and Strategies.”), <http://www.fd.org/docs/litigation-support/final-esi-protocol.pdf>.

that the United States boasts the largest number of pretrial detainees in the world.<sup>6</sup> Of the 98,786 federal criminal cases activated in 2013, over 70% of defendants were held in pretrial detention.<sup>7</sup> Pretrial detention was adopted by the English Colonies, where bail was accepted in the form of property to secure the release of the accused prior to trial, with capital crimes as the only exception.<sup>8</sup> The purpose of pretrial detention as adopted from England still holds true today: to ensure that the accused returns to court. However, the court is also empowered to deny bail out of public safety concerns by assessing the dangerousness of the accused. Today, judges enjoy an incredible range of deference in both bail amounts and whether to allow for bail at all.<sup>9</sup> In some instances the accused are detained at pretrial simply because of inability to make bail.<sup>10</sup>

These bail determinations not only have serious implications for the detainee's freedom, families, community, and their own personal safety while detained, but pretrial detention also significantly impairs their ability to participate in their own defense.<sup>11</sup> The barriers to accessing e-discovery, which often contains the pertinent information being used by the prosecution, are exceptionally high for those held in pretrial detention. The next section of this article will briefly discuss some of the various challenges pretrial detainees face in accessing e-discovery.

## II. CHALLENGES OF PRETRIAL DETAINEE ACCESS TO E-DISCOVERY

Along with their counsel, detainees prepare for their defense strategy while they await trial or some other form of disposition to their case. Detention is an immensely restrictive environment where access to

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<sup>6</sup> OPEN SOC'Y FOUND., THE SOCIOECONOMIC IMPACT OF PRETRIAL DETENTION 22 (2011), <https://www.opensocietyfoundations.org/sites/default/files/socioeconomic-impact-pretrial-detention-02012011.pdf>.

<sup>7</sup> THE FED. DEFENDERS OF E. WASH. & IDAHO, U.S. District Courts — Pretrial Services Release and Detention For the 12-Month Period Ending December 31, 2013, <http://www.fdewi.org/Docs/CJA/Pre-trial%20detention%20rates%202013.pdf>.

<sup>8</sup> Laura I. Appleman, *Justice in the Shadowlands*, 69 WASH. & LEE L. REV. 1297, 1325 (2012).

<sup>9</sup> Lindsey Carslon, *Bail Schedules: A Violation of Judicial Discretion?*, PRE-TRIAL JUSTICE INST. (Dec. 6, 2010), <http://www.pretrial.org/download/risk-assessment/PJI%20Bond%20Schedule%20Review%202010.pdf>.

<sup>10</sup> *Id.*

<sup>11</sup> *Farretta v. California*, 422 U.S. 806, 819 (1975) (“The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants the accused personally the right to make his defense.”). While this case specifically addresses the right of an individual to represent themselves, pro se, the rationale of the court holds true even where the individual has been appointed or retains counsel.

resources to assist in their defense is extremely limited.<sup>12</sup> The constraints in mounting a defense for pretrial detainees include the psychological and physical restrictions on their ability to function and think rationally about their case, lack of time with their attorney, and lack of ability and access to review discovery. Consider, again, the difference of experience for those detained pretrial and those released pending trial: phone calls, emails, and in-person meetings with counsel, as well as personal time and access to review discovery and legal filings, are nearly unrestricted for the released individual while pretrial detainees suffer the burden of facility restrictions and therefore are far more limited in their ability to participate in their own defense.<sup>13</sup>

A. *E-discovery, the Law Library, and Obligations of Federal Detention Facilities*

Law libraries in detention facilities have become the main avenue for detainees to access e-discovery materials. However, because this is an evolving function of the law library in detention facilities, these facilities are often ill-equipped to address the various challenges presented by e-discovery.

Libraries in facilities have not always been utilized for legal research. In fact, the first facility libraries were exclusively for the purpose of moral and religious education.<sup>14</sup> The facility law library began to emerge in the 1900's, with the earliest recorded being at San Quentin prison in California.<sup>15</sup> Over one hundred years later, the law library has evolved into an essential resource in effectuating access to the courts.<sup>16</sup> Today, the law

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<sup>12</sup> This is especially true for individuals who choose to represent themselves, pro se. This article does not address pro se litigants specifically, although many of the challenges are applicable. For example, the Metropolitan Correctional Center (MCC) in New York City allows for two three-hour periods for discovery review only one day per week. While this facility notes additional allowance for pro se inmates, it is also noted that this is subject to staff availability, security, etc. These restrictions are not applicable to those released pending trial. Fed. Bureau of Prisons, U.S. Dep't of Just., Attorney's Guide to the Metropolitan Correctional Center, New York, New York 15-16 (Apr. 2008) (hereinafter "MCC Guide"), [https://www.bop.gov/locations/institutions/nym/mcc\\_ny\\_attny\\_guide\\_april\\_2008.pdf](https://www.bop.gov/locations/institutions/nym/mcc_ny_attny_guide_april_2008.pdf).

<sup>13</sup> MCC GUIDE, *supra* note 12, at 15-16. It is also challenging for counsel to develop the same level of rapport and working relationship with detained clients as they can with clients awaiting trial out of custody.

<sup>14</sup> Jonathan Abel, *Ineffective Assistance of Library: The Failings and the Future of Prison Law Libraries*, 101 GEO. L.J. 1171, 1179-80 (2013).

<sup>15</sup> *Id.* at 1181.

<sup>16</sup> *Id.*

library is no longer exclusively filled with law books, but now contains computers with legal databases to facilitate legal research by detainees. Due to this technical advancement, law libraries have also become a central point of access for detainee access to e-discovery. While the facility library has evolved with the times, facility law libraries are often extremely limited in their ability to accommodate detainees. For example, the library computers and their software are often out of date, which can inhibit substantive review of discovery.<sup>17</sup> Additionally, because law libraries are often located in parts of the facility not accessible to counsel it is challenging for counsel to assess and advocate for their clients.

As the purpose for facility law libraries has changed, so have the policies and procedures of the agencies charged with operating them. As part of the Department of Justice, the Bureau of Prisons (BOP) is the agency responsible for the operation of federal detention facilities. The BOP laid out its obligation regarding inmate legal activities as follows:

The Bureau of Prisons affords an inmate reasonable access to legal materials and counsel, and reasonable opportunity to prepare legal documents. The Warden shall establish an inmate law library, and procedures for access to legal reference materials and to legal counsel, and for preparation of legal documents.<sup>18</sup>

The characterization of this obligation grants individual facilities and their wardens considerable discretion in establishing and operating law libraries. However, the BOP has also released an Institution Supplement to assist in establishing local procedures.<sup>19</sup> In this supplement, the BOP addresses e-discovery, establishing a process by which the facility *may* accept electronic storage media, such as CD's or DVD's, and by which the inmate may gain access to the materials.<sup>20</sup> It is therefore still within the discretion of the individual facilities to implement protocols for e-discovery review. As a consequence of this discretion, the protocol at individual federal detention facilities varies greatly, creating added challenges for detainees and their counsel.<sup>21</sup>

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<sup>17</sup> For example, the MCC in New York advises that various forms of discovery media and file formats are not acceptable or otherwise inaccessible on the facility computers due to equipment and licensing limitations. MCC Guide, *supra* note 12, at 16.

<sup>18</sup> 28 C.F.R. § 543.10 (2015).

<sup>19</sup> Fed. Corr. Inst., Fed. Bureau of Prisons, Institution Supplement No. OTV 1315.071: Legal Activities, Inmate (2013), [https://www.bop.gov/locations/institutions/otv/OTV\\_legal\\_activities.pdf](https://www.bop.gov/locations/institutions/otv/OTV_legal_activities.pdf).

<sup>20</sup> *Id.* at 4.

<sup>21</sup> While it is understandable that each detention facility has their own unique concerns regarding order and security, the patchwork of protocols across detention centers throughout the country present challenges that could be overcome by implementing

While facilities themselves are often a barrier to access, some of the challenges of access to e-discovery for detainees originate with the initial production of discovery by the government to defense counsel. Some of these issues include the volume and format of discovery, strict protective orders restricting distribution, and more. However, courts have made efforts to begin to address some of these issues. In 1998, the Director of the Administrative Office of the U.S. Courts and the Attorney General of the United States founded the Joint Electronic Technology Working Group (JETWG) for the purpose of making recommendations for managing ESI discovery in federal criminal cases.<sup>22</sup> The goal of the working group is to benefit all parties by making ESI discovery more efficient, secure, and less costly.<sup>23</sup> In 2012, the JETWG finalized recommendations for the production of e-discovery in federal criminal cases.<sup>24</sup> These recommendations acknowledge the institutional requirements and limitations presented in the review of e-discovery while in pretrial detention, recommending that the parties consider how the detention will affect the defendant's access.<sup>25</sup> The working group's recommendations and strategies lay out essential information for both the prosecution and the defense to engage in a more efficient discovery process. Some of their suggestions include a "meet and confer" between parties to address the specific issues related to the case and the needs of the parties involved, including the detainee.<sup>26</sup> The next section of this article discusses some of the common challenges faced by pretrial detainees in accessing e-discovery.

### B. Common E-discovery Challenges for Pretrial Detainees

This article addresses two main categories of challenges to meaningful review of e-discovery materials for those in pretrial detention: technical limitations of facilities and insecurity of housing location and status.<sup>27</sup>

First, due to the lack of consistency in facility computer equipment and

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uniform protocols. The Bureau of Prison's suggestions for adoption of local procedures is an effort to streamline procedures while recognizing the necessary discretion of each facility. *See id.*

<sup>22</sup> JETWG Recommendations, *supra* note 5, at 2.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 10.

<sup>26</sup> *Id.* at 13.

<sup>27</sup> One of the biggest challenges is with technical literacy and barriers. *See Abel, supra* note 14, at 1174. Other issues include censorship of e-discovery containing contraband and court-imposed protective orders restricting distribution. *See George L. Blum, Annotation, Sufficiency of Access to Legal Research Facilities Afforded Defendant Confined in State Prison or Local Jail, § 3(a)*, 98 A.L.R.5th 445 (2002).

software technology, it is challenging to create uniform protocols that address the needs of both detainees and the facilities. Computer equipment is often aged or not kept up to date due to fiscal constraints and restricted Internet access. As a result, frequent and critical updates to software may not be made.<sup>28</sup>

One of the most prominent challenges of distributing discovery to detainees is the sheer volume. Often times there may be hundreds to millions of electronic files of various sizes, some of which may fit on a simple disc while others will require large hard drives. These files may include various formats of audio and video and forensically preserved images that require special programs to review. Often this voluminous discovery has to be converted to more universal formats to be accessible on facility computers. These types of conversions are time consuming, costly, and require specialized knowledge;<sup>29</sup> however, more often the facilities accept only discs. Finally, because it is difficult to ascertain the exact programs and specs of the computers available, even where the resources are available to make such accommodations, it is often difficult to meet the needs of each individual detainee.

Next, these files must be sent to the facilities in a medium deemed acceptable by the facility. Sometimes external hard drives or flash drives are allowed;<sup>30</sup> however, more often the facilities accept only discs,<sup>31</sup> essentially blocking review of files that are often pertinent to the defense.

Second, the lack of control and stability in the movement of pretrial detainees significantly impacts their ability to access and review electronic discovery. Again, considering the comparison to an out-of-custody defendant, pretrial detainees have no control over the location where they will be detained, the factors impacting their need to be segregated for their own safety or for the purpose of discipline, or the BOP's plans to move them in preparation for trial. This instability means that even where arrangements have been made to overcome the barriers to their access at one facility, these arrangements can fall apart simply because the BOP and its staff find it in their logistical interest to move that individual or restrict

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<sup>28</sup> MCC GUIDE, *supra* note 12, at 16.

<sup>29</sup> Seth Eichenholtz, *Pricing Processing in E-Discovery: Keep the Invoice from Being a Surprise*, 19 PRETRIAL PRAC. & DISCOVERY (Winter/Spring 2011) ("Of all the major hurdles in any e-discovery engagement, perhaps the biggest challenge is being able to foresee the costs of processing the data."), <http://www.americanbar.org/content/dam/aba/uncategorized/litigation-pretrial-winterspring11-pricing-processing.authcheckdam.pdf>.

<sup>30</sup> For example, the MCC in New York only accepts e-discovery in CD format, not DVD or hard drive format. MCC Guide, *supra* note 12, at 16.

<sup>31</sup> *Id.*

their access.<sup>32</sup> Individuals detained in rural areas where there is limited capacity, or too great a distance, to a federal detention facility, are often held in state or local facilities, many of which lack experience with e-discovery and have limited ability to accommodate.<sup>33</sup> For these individuals, their counsel may be a great distance from their detention facility, straining their counsel's ability to assess their individual needs and coordinate their access to discovery.

These two sets of barriers are important issues for legal counsel to be aware of to adequately represent their clients' interests.<sup>34</sup> With the increasing use of e-discovery in criminal prosecutions, these issues are ripe for litigation. The next section of this article addresses opportunities for improvements, including technical solutions by the facilities themselves. Finally, the article will introduce technical solutions to these issues as well as one possible litigation strategy for challenging e-discovery access.

### III. OPPORTUNITIES FOR IMPROVEMENT

As discussed above, there are various barriers to pretrial detainees' access to e-discovery. This section lays out two avenues of solutions: first, there are technical solutions to some of these issues that the BOP is actively

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<sup>32</sup> See *Gray v. State*, 923 So. 2d 812, 822 (La. Ct. App. 2006) (holding that where the movement of an inmate deprives them of access to legal research materials and where they were also denied access to a law library, a pro se inmate states a sufficient claim for violation of the right to meaningful access to the courts).

<sup>33</sup> See *Heitman v. Gabriel*, 524 F. Supp. 622, 628 n.5 (W.D. Mo. 1981) (finding that an understaffed rural jail violated detainees' due process rights by failing to inform them of grievance procedures and the availability of current law books, among other shortcomings).

<sup>34</sup> JETWG RECOMMENDATIONS, *supra* note 5, at 2 ("Today, most information is created and stored electronically. The advent of electronically stored information (ESI) presents an opportunity for greater efficiency and cost savings for the entire criminal justice system, which is especially important for the representation of indigent defendants. To realize those benefits and to avoid undue cost, disruption and delay, criminal practitioners must educate themselves and employ best practices for managing ESI discovery."). Recently, the State Bar of California made knowledge of e-discovery an ethical requirement. See State Bar of Cal. Comm'n on Prof'l Responsibility & Conduct, Formal Op. 2015-193 (2015) ("An attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law. Attorney competence related to litigation generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, including the discovery of electronically stored information ('ESI'). On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a matter, and the nature of the ESI."), <http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202015-193%20%5B11-0004%5D%20%2806-30-15%29%20-%20FINAL.pdf>.

exploring; second, while there are various legal strategies that could be utilized to challenge these barriers, this paper lays out an access-to-courts argument.<sup>35</sup>

*A. Improving BOP Technology and Implementing Uniform Procedures*

The BOP recognizes its obligation to facilitate legal activities of inmates, including the need to maintain a law library.<sup>36</sup> Through directives, the BOP has laid out procedures that facilities are to follow in an effort to meet their obligations to facilitate inmate legal activities.<sup>37</sup> Constructively recognizing the technical patchwork of inconsistent or non-existent equipment and technical expertise within facilities, as well as a lack of consistent protocol within each facility and across all facilities, the BOP's Information Technology Planning and Development Branch has sought information from outside vendors to find a secure computing device for inmate discovery review. In a solicitation entitled "Inmate e-discovery solution" on July 7, 2014 the BOP issued a request for information (RFI) to address support services, hardware, and software for e-discovery.<sup>38</sup> The RFI includes both fixed desktops as well as mobile devices to address the various housing scenarios, noting the differing needs for those accessing discovery from the law library and those confined to their cell.<sup>39</sup>

As the BOP's recent actions suggest, there is a need for all facilities within the BOP's authority to streamline procedures for access to e-discovery. Where facilities lack protocol or are otherwise not open to accommodating pre-trial detainees' access to e-discovery, court orders are often required to resolve these issues.<sup>40</sup> While technical solutions to access will assist all parties in better assessing the needs of pretrial detainees, there currently are, and will continue to be, barriers to access that cannot be overcome by improving the computer and software technology in facilities. The next part of this article addresses just one of many potential litigation strategies that defense counsel can utilize to overcome these barriers.

*B. Potential Litigation Strategy: Access to the Courts*

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<sup>35</sup> Further research is required to develop other strategies. This article simply explores one litigation strategy.

<sup>36</sup> See 28 C.F.R. § 543.10 (2015).

<sup>37</sup> *Id.*

<sup>38</sup> See *Request for Information for E-Discovery Solution for Inmates*, FED. BUS. OPPORTUNITIES, [https://www.fbo.gov/index?s=opportunity&mode=form&id=11501fa9ae2824683f6f1c82c2fbc72a&tab=core&\\_cview=1](https://www.fbo.gov/index?s=opportunity&mode=form&id=11501fa9ae2824683f6f1c82c2fbc72a&tab=core&_cview=1) (last modified Dec. 16, 2014).

<sup>39</sup> *Id.*

<sup>40</sup> See JETWG RECOMMENDATIONS, *supra* note 5.

Given the relatively successful history of pro se litigants challenging their access to the courts by contesting their access to law libraries and legal research materials, this avenue of litigation is promising for pretrial detainees to contest their challenges to e-discovery access. While the access-to-the-courts cases have thus far been filed by pro se litigants, pretrial detainees are similarly situated to pro se inmates in their barriers to access.

In 1977 the Supreme Court decided *Bounds v. Smith*, holding that the constitutional right to access the courts requires prison officials to assist inmates by providing meaningful access to adequate law libraries.<sup>41</sup> *Bounds* was an action brought by state prison inmates challenging the state's inadequate legal library facilities as denying them reasonable access to the courts and equal protection guarantees.<sup>42</sup> However, because *Bounds* did not create the right to a law library while detained, but instead required that state facilities provide the necessary resources to access courts through the law library or other alternative means.<sup>43</sup> Yet, the *Bounds* court did recognize that it was "established beyond doubt that prisoners have a constitutional right to access to the courts" and that legal research facilities were necessarily tied to this right.<sup>44</sup>

*Bounds* focused on access to the courts for appeal and habeas petitions; however, the rationale that access to the law library was essential because those petitions were the "first line defense against constitutional violations" holds equally true for pretrial detainees, whose access and review of e-discovery is also a first line of defense.<sup>45</sup> Perhaps this argument is even more compelling for detainees than for convicted individuals because pretrial detainees are still awaiting their day in court. The accused's review of e-discovery may uncover legal defenses or mitigating information that may never come to light without the detainee's active review of the e-discovery. Review of these materials assists the detainee as well as their counsel in locating pertinent evidence to engage in investigation, negotiations with the prosecution in seeking a disposition, points of issue for pre-trial motions, and their overall defense strategy for trial.<sup>46</sup>

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<sup>41</sup> See *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

<sup>42</sup> *Id.*

<sup>43</sup> *Lewis v. Casey*, 518 U.S. 343, 351 (1996) ("Because *Bounds* did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense.").

<sup>44</sup> *Bounds*, 430 U.S. at 821.

<sup>45</sup> See *id.* at 828.

<sup>46</sup> For example, consider a drug distribution case with tens of thousands of wiretap audio files containing phone calls between the accused and various other participants. The

Nearly two decades later, a newly composed Court appeared to undercut the *Bounds* holding when, in *Lewis v. Casey*, it overturned the Ninth Circuit's order mandating detailed and system-wide changes in the Arizona Department of Corrections' (ADOC) law libraries and legal assistance programs.<sup>47</sup> However, because the underlying rationale for the *Lewis* decision is grounded in the evolving standing doctrine and the more states-rights oriented court, it should not be read to undermine the constitutionally recognized right of access to the courts laid out in *Bounds*.<sup>48</sup>

In *Lewis*, the district court found that the ADOC facilities were not in compliance with *Bounds*, specifically identifying two groups that were particularly affected by the ADOC's system for accessing the law library: prisoners in segregation (either for disciplinary purposes or otherwise) and illiterate or non-English-speaking inmates.<sup>49</sup> The Supreme Court held that the district court's order requiring improvements to access were outside the scope of the holding of *Bounds* due to the court's failure to "identify anything more than an isolated instance of actual injury."<sup>50</sup>

The application of access-to-courts doctrine to the issue of access to a law library has taken a huge blow in light of *Lewis*, although *Bounds* continues to be good law.<sup>51</sup> Because access to the law library is as necessary for the review of e-discovery as it is to perform legal research, the Court's holdings in these cases will frame future litigation on challenges to restrictions on access to the library for e-discovery review. However, e-discovery access has great potential for litigation in proving the actual injury requirement imposed by *Lewis*. *Lewis* created an especially high standard to prove that an actual injury was incurred due to inadequate legal

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accused may assist their counsel in reviewing these files and identifying cooperating witnesses, which may help facilitate a strategy to impeach that witness at trial or otherwise perhaps give leverage to the defense in negotiating a plea deal.

<sup>47</sup> See *Lewis v. Casey*, 518 U.S. 343 (1996).

<sup>48</sup> See Joseph L. Gerken, *Does Lewis v. Casey Spell the End to Court-Ordered Improvement of Prison Law Libraries?*, 95 L. LIBR. J. 491, 497 (2003).

<sup>49</sup> *Lewis*, 518 U.S. at 356.

<sup>50</sup> *Id.* at 390. The order of the lower court included requirements for when the library would be open, the number of hours of library use each inmate is entitled to, the minimum requirements for librarians, and a legal research course for inmates. *Id.*

<sup>51</sup> The practical implications to this application of standing doctrine in this case effectively requires that inmates who suffer restrictions on their ability to access the law library first demonstrate an actual or concrete injury as a result of those restrictions. Although Justice Scalia lays out two examples of claims that could be brought, this requirement is wholly impractical, as in order to establish injury, the inmates would need to access the very resources of which they claim they are being deprived. As Justice Stevens suggests in his dissent, the Court did not have to go as far as it did in eviscerating *Bounds*, but could have instead simply remanded to develop a less burdensome order upon the state. See *id.* at 409-10 (Stevens, J., dissenting).

research.<sup>52</sup> However, demonstrating lack of access to review the very evidence the prosecution is using to secure conviction could satisfy this standard.

Although the *Bounds* decision stands for the proposition that either legal representation, access to law libraries, or some hybrid of the two suffice to satisfy the constitutional requirement of access to the courts, in the context of discovery, the two are not interchangeable. While legal representation may actually offer more benefits to the prisoner because of the skills and experience of their counsel, the substance of discovery contains factual elements where the client's opportunity to assist in review can actually have a significant impact on their ability to mount a full defense due to their unique factual knowledge of the case. For pro se detainees, access to e-discovery is undeniably essential. The underlying rationale cited by the Court in finding a constitutional right to access to the courts via facility law libraries for pro se litigants is also applicable to those held in pretrial detention.

#### CONCLUSION

Whether the purpose for the pre-trial detention is a concern for public safety or simply securing the accused's return to court, neither of these rationales outweigh the constitutional rights of the accused. Defense attorneys must be aware of the challenge presented by e-discovery for both their own ability to prepare a defense for their client, but also to advocate for their client's access to e-discovery. The volume of e-discovery, and the unique knowledge of the accused in reviewing such materials, demands that pretrial detainees have adequate access to review e-discovery. Given the United States' culture of mass incarceration and high rates of pretrial detention, the presumption of innocence demands no less.

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<sup>52</sup> Examples offered by the court that would satisfy standing could not be litigated without access the very information and facilities that the petitioner is claiming caused his injury. "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 harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint." *Lewis*, 518 U.S. at 351.