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4 IN THE UNITED STATES DISTRICT COURT  
5 FOR THE DISTRICT OF ARIZONA

6  
7 Nicholas Schreiber,  
8 Plaintiff,  
9 v.  
10 Pima County, et al.,  
11 Defendants.

CV-14-2363-TUC-DCB

**FINAL ORDER**

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14 Defendants' Motion for Summary Judgment/Partial Summary Judgment  
15 is before the Court. The Court previously entered an Order dismissing  
16 several Defendants, leaving Pima County, Pima County Sheriff's  
17 Department, and the Pima County Public Defenders Office as the  
18 remaining Defendants.<sup>1</sup> A Second Amended Complaint was filed on June 18,  
19 2015 alleging violations of the ADA, Rehabilitation Act, Arizona Civil  
20 Rights Act, and Arizonans with Disabilities Act. The motion for  
21 summary judgment was filed in February 2017 and the parties requested  
22 oral argument. Oral argument was conducted on August 1, 2017.

23 During oral argument, the Court ruled from the bench that the  
24 motion for summary judgment (Doc. 52) is granted and this written  
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27 <sup>1</sup> Plaintiff does not contest dismissing the Sheriff's Department  
28 and the Public Defender's Office as Defendants, because the proper  
Defendant is Pima County in this instance. Defendants Sheriff's  
Department and Public Defender's Office will be dismissed with  
prejudice.

1 order clarifies and expands on that ruling. In addition, the Court  
2 ruled that the motion to strike the audio CD (Doc. 53) is granted and  
3 the Court indicated for the record that it had never listened to the  
4 audio CD (which will be returned to Defendants) and it does not  
5 constitute any basis for the Court's ruling on the motion for summary  
6 judgment.

7 **SUMMARY**

8 Schreiber is deaf. He was arrested by the Pima County Sheriff's  
9 Office, and appeared in the Superior Court in Pima County. Plaintiff's  
10 ADA/RA civil rights action focuses on the arrest (Sheriff's  
11 Department), the prosecution (Public Defenders Office) and the  
12 incarceration (Pima County Jail) as not having accommodated his  
13 disability and for treating him differently to his detriment than  
14 people with hearing.  
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16 **STANDARD OF REVIEW**

17 Summary judgment is proper where the pleadings, discovery and  
18 affidavits demonstrate that there is "no genuine dispute as to any  
19 material fact and [that] the movant is entitled to judgment as a  
20 matter of law." Fed. R. Civ. P. 56(a). The party moving for summary  
21 judgment bears the initial burden of identifying those portions of the  
22 pleadings, discovery and affidavits that demonstrate the absence of a  
23 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S.  
24 317, 323 (1986). Material facts are those that may affect the outcome  
25 of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248  
26 (1986). A dispute as to a material fact is genuine if there is  
27 sufficient evidence for a reasonable jury to return a verdict for the  
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1 nonmoving party. *Id.* Where the moving party will have the burden of  
2 proof on an issue at trial, it must affirmatively demonstrate that no  
3 reasonable trier of fact could find other than for the moving party.  
4 *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).  
5 On an issue where the nonmoving party will bear the burden of proof at  
6 trial, the moving party can prevail merely by pointing out to the  
7 district court that there is an absence of evidence to support the  
8 nonmoving party's case. *Celotex*, 477 U.S. at 324-25.

9         If the moving party meets its initial burden, the opposing party  
10 must then set forth specific facts showing that there is some genuine  
11 issue for trial in order to defeat the motion. Fed. R. Civ. P. 56(c);  
12 *Anderson*, 477 U.S. at 250. All reasonable inferences must be drawn in  
13 the light most favorable to the nonmoving party. *Olsen v. Idaho State*  
14 *Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004). However, it is not the  
15 task of the Court to scour the record in search of a genuine issue of  
16 triable fact. *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). The  
17 Court "rel[ies] on the nonmoving party to identify with reasonable  
18 particularity the evidence that precludes summary judgment." *Id.*; see  
19 also *Simmons v. Navajo Cty.*, Ariz., 609 F.3d 1011, 1017 (9th Cir.  
20 2010). Thus, "[t]he district court need not examine the entire file  
21 for evidence establishing a genuine issue of fact, where the evidence  
22 is not set forth in the opposing papers with adequate references so  
23 that it could conveniently be found." *Carmen v. S.F. Unified Sch.*  
24 *Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001). If the nonmoving party  
25 fails to make this showing, the moving party is entitled to a  
26 judgment. See *Celotex*, 477 U.S. at 323.  
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1                   **DISCUSSION**

2           **A. General ADA/RA Law**

3           To establish a claim under the ADA, a plaintiff must show that he  
4 or she: (1) is an individual with a disability; (2) is otherwise  
5 qualified to participate in or receive the benefit of some public  
6 entity's services, programs, or activities; (3) was either excluded  
7 from participation in or denied the benefits of the public entity's  
8 services, programs, or activities, or was otherwise discriminated  
9 against by the public entity; and (4) such exclusion, denial of  
10 benefits, or discrimination was by reason of his or her disability.  
11 Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

12           To establish a claim under the Rehabilitation Act, a plaintiff  
13 must show that he or she: (1) is handicapped within the meaning of the  
14 Act; (2) is otherwise qualified for the benefits or services sought;  
15 (3) was denied the benefit or services solely by reason of his or her  
16 handicap; and (4) that the program providing the benefit or services  
17 receives federal financial assistance. Rehabilitation Act of 1973, §  
18 504, 29 U.S.C.A. § 794. In claims for compensatory damages under  
19 either the ADA or the Rehabilitation Act, the law in the Ninth Circuit  
20 requires that a plaintiff show that a defendant had discriminatory  
21 intent. *Id.*

22           A defendant must act with deliberate indifference; plaintiff is  
23 required to show discriminatory intent toward the plaintiff because of  
24 his or her disability, permitting an award of compensatory damages,  
25 only if: (1) the defendant has knowledge from which an inference could  
26 be drawn that a harm to a federally protected right is substantially  
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1 likely, and (2) the defendant actually draws that inference and fails  
2 to act upon the likelihood. *Id.* To show that a public entity had  
3 knowledge from which an inference could be drawn that a harm to a  
4 federally protected right was substantially likely, as required to  
5 demonstrate that the entity acted with deliberate indifference toward  
6 a plaintiff because of his or her disability in violation of the ADA  
7 and Rehabilitation Act, permitting award of compensatory damages,  
8 plaintiff must identify a specific, reasonable, and necessary  
9 accommodation that the entity failed to provide, and that the  
10 plaintiff notified the entity of the need for accommodation. *Id.*

11       “To recover monetary damages under Title II of the ADA or the  
12 Rehabilitation Act, a plaintiff must prove intentional discrimination  
13 on the part of the defendant.” *Duvall v. County of Kitsap*, 260 F.3d  
14 1124, 1138 (9th Cir.2001). In order to show intentional discrimination  
15 in the Ninth Circuit, the plaintiff must show that the defendant acted  
16 with       “deliberate       indifference.” *Id.* at 1138-39. “Deliberate  
17 indifference requires both knowledge that a harm to a federally  
18 protected right is substantially likely, and a failure to act upon  
19 that ... likelihood.” *Id.* at 1139.; *Suarez v. Superior Court of*  
20 *California*, 283 Fed.Appx. 470, 471 (9<sup>th</sup> Cir. 2008). To show that a  
21 public entity inferred that harm to a federally protected right was  
22 substantially likely and failed to act upon the likelihood, as  
23 required to demonstrate that the entity acted with deliberate  
24 indifference toward a plaintiff because of his or her disability in  
25 violation of the ADA and Rehabilitation Act, permitting award of  
26 compensatory damages, plaintiff must show that the entity deliberately  
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1 failed to fulfill its duty to act in response to a request for  
2 accommodation. *Duvall; Updike v. City of Gresham*, 99 F.Supp.3d 1279  
3 (D.Or. 2015)(failure to show deliberate indifference when preferred  
4 accommodation was not available, but alternative accommodation worked  
5 just as well).

6 **B. Arrest**

7 This lawsuit arises originally from Plaintiff's arrest and  
8 incarceration for domestic violence. (DSOF 1). Plaintiff ultimately  
9 plead guilty to the domestic violence charge. (DSOF 2).

10 On October 4, 2013, Plaintiff was at 4129 Alexandrite Avenue,  
11 where Plaintiff's wife, children and step children reside. (DSOF 3 &  
12 4). Plaintiff was not living at the residence because of a pending  
13 child protection services investigation. (DSOF 5). Plaintiff had been  
14 accused of sexually assaulting one of his step daughters. (DSOF 6).  
15 Plaintiff was convicted of sexual abuse of a step daughter in June  
16 2016. (DSOF 7). Plaintiff is currently in prison serving his sentence  
17 for the conviction. (DSOF 8).

18 On October 4, 2013, Plaintiff showed up at the residence without  
19 invitation or prior invite from his ex-wife, Cecilia Schreiber. (DSOF  
20 9). At some point, there was an altercation between Plaintiff and his  
21 wife. (DSOF 11). During the altercation, Plaintiff threw his cell  
22 phone on the ground, which caused it to break into pieces. (DSOF 12).  
23 The altercation continued and at some point, Plaintiff slammed his  
24 wife against the wall, struck her and placed his hands around her  
25 throat causing red marks. (DSOF 13). These red marks were still  
26 visible 20-30 minutes after the incident, when viewed by the Pima  
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1 County Sheriff's Department. (DSOF 14). Based upon Cecilia Schreiber's  
2 report and the physical evidence at the scene, the Pima County  
3 Sheriff's Department determined that there appeared to be probable  
4 cause to arrest Plaintiff for domestic violence/criminal damage and  
5 domestic violence/assault. (DSOF 17).

6 Plaintiff argues that the Pima County Sheriff Department's  
7 Administrative Policies and Procedures require that when arresting a  
8 hearing impaired individual, the arresting officer "shall procure a  
9 qualified interpreter in order to properly do any of the following: 1.  
10 Administer *Miranda* warnings; 2. Interrogate the hearing impaired  
11 person; and 3. interpret the hearing impaired person's statements."  
12 Exhibit C, Administrative Policies and Procedures. When Plaintiff was  
13 placed in police custody, his hands were handcuffed behind him,  
14 preventing him from signing or writing. Exhibit A, pg. 35, ln. 23-24;  
15 pg. 46, ln. 2-5. The Pima County Sheriff's Department's internal  
16 investigation into a complaint filed by Plaintiff found that  
17 Correction Sergeant Crystle Prosser, who was working as a housing  
18 liaison at the time of Plaintiff's incarceration, believed that the  
19 TTY machine at the jail was "not working." Exhibit D, Pima County  
20 Sheriff's Department Memorandum. Plaintiff complained in writing on  
21 at least three separate occasions that the TTY machines were not  
22 working. *Id.* at pg. 3. Plaintiff communicated with Sean Bruner, his  
23 public defender, primarily by exchanging written notes back-and-forth  
24 on paper and on Mr. Bruner's iPad. *Id.* pg. 81, ln. 11-15. Plaintiff  
25 asked Mr. Bruner repeatedly to get an ASL interpreter for their  
26 meetings, but Mr. Bruner refused. *Id.* ln. 16-20; pg. 83, ln. 11-14;  
27  
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1 Exhibit B, pg. 30, ln. 2-8; pg. 31, ln. 8-13; pg. 33, ln 2-17. Because  
2 of this, Plaintiff alleges that he did not understand the plea deal  
3 that was offered to him by the prosecutor. Exhibit A, pg. 82, ln. 1 -  
4 pg. 83, ln. 14. Plaintiff felt pressured and rushed to sign the plea  
5 agreement, despite not fully understanding it. *Id.* pg. 85, ln. 15 -  
6 pg. 88, ln. 25.

7 On November 13, 2013, Plaintiff filed a complaint with the Pima  
8 County Sheriff's Department, complaining that he was arrested and  
9 jailed for 25 days without benefit of an ASL interpreter except in  
10 Court. Exhibit D. He complained that the TTY machines in the jail did  
11 not work. *Id.* pg. 2. He complained that his public defender attempted  
12 to meet with him over the jail's telephone/video system. *Id.* He  
13 complained that he should have been granted an interpreter for his  
14 statement to police and during the booking process. *Id.* He complained  
15 that he did not have access to a functioning TTY machine at the jail.  
16 *Id.* An investigation into Plaintiff's complaint determined that that  
17 Pima County Sheriff's Department employees involved in his case "took  
18 reasonable measures to communicate" with him. Exhibit E, December 24,  
19 2013 letter from David Peru to Nicholas Schreiber.

21 Plaintiff alleges a violation occurred at the scene of the arrest  
22 when he was interviewed by Deputy Mitchell. Deputy Mitchell had asked  
23 to speak with Plaintiff (DSOF 31). At the start of the communication  
24 with Plaintiff, Deputy Mitchell showed Plaintiff his Pima County  
25 Sheriff Department Quick Reference Guide which contains the *Miranda*  
26 Rights. (DSOF 32). While Plaintiff was reading the *Miranda* Rights,  
27 Deputy Mitchell verbally went through each right with Plaintiff. (DSOF  
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1 33). When necessary Deputy Mitchell would explain or give examples to  
2 Plaintiff. (DSOF 34). Plaintiff told Deputy Mitchell that he  
3 understood his rights and was willing to speak with Deputy Mitchell.  
4 (DSOF 35). Deputy Mitchell was of the opinion that he was able to  
5 effectively communicate with Plaintiff while discussing the *Miranda*  
6 Rights. (DSOF 36). Deputy Mitchell noticed that Plaintiff had a  
7 hearing aid in his left ear (DSOF 21). Deputy Mitchell also noticed  
8 that during the conversation, Plaintiff would put his left ear toward  
9 Deputy Mitchell but was also concentrating on his face (DSOF 22). It  
10 was Deputy Mitchell's opinion that Plaintiff was reading lips and  
11 listening to him at the same time. (DSOF 23). Deputy Mitchell  
12 testifies that Plaintiff understood his statements and responded  
13 appropriately to those statements. (DSOF 37). At no time did Plaintiff  
14 ask for an interpreter or to communicate in any other manner. (DSOF  
15 38). At no time did Plaintiff ask that his handcuffs be removed so he  
16 could use sign language. (DSOF 39). Plaintiff did ask that the air  
17 conditioning be turned off so he could hear better. (DSOF 40). Deputy  
18 Mitchell turned the vent off as requested by Plaintiff. (DSOF 41). It  
19 is Deputy Mitchell's opinion that during the entirety of the  
20 statement, he was able to effectively communicate with Plaintiff.  
21 (DSOF 42).

22  
23 Sheriff's deputies made a decision to arrest Plaintiff based on  
24 his wife's statements to them about what happened. CSOF ¶ 17. They  
25 went in search of Plaintiff, located him, took custody of him, and  
26 brought him back to the residence. SOF ¶¶ 18-19. They handcuffed his  
27 hands behind his back, such that he could neither communicate in his  
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1 first language, American Sign Language ("ASL"), nor by way of written  
2 notes. AMF ¶ 138. He tried to communicate verbally with the officers,  
3 but he struggled to speak more than a few words. CSOF ¶ 20. He felt  
4 "really frustrated" with his inability to communicate with the  
5 officers. AMF ¶ 140. Sometime later, when he saw a transcript of his  
6 recorded conversation with officers, the words in the transcript  
7 attributed to him did not reflect what he tried to say. AMF ¶ 141.  
8 Plaintiff attempted to request an ASL interpreter during questioning.  
9 CSOF ¶ 25. Plaintiff did not understand his Miranda rights as they  
10 were explained to him in English by Deputy Mitchell. CSOF ¶¶ 32-34.

11  
12 Nonetheless, Pima County asserts that Plaintiff does not have any  
13 rights to auxiliary aids at the scene of the arrest. It has been held  
14 that police are not required to provide auxiliary aids prior to  
15 arrival at the stationhouse or prison. *Rosen v. Montgomery County*, 121  
16 F. 3d. 154 (4th Cir. 1997). It would be impractical and an undue  
17 burden to require others to retain an interpreter at the scene of a  
18 crime.

19 Plaintiff may not substitute this civil action for an appeal from  
20 his criminal conviction, consequently harm or injury derived from the  
21 allocution and during the plea agreement negotiation are not the kind  
22 of harm contemplated by the ADA or RA.<sup>2</sup> "Disappointed state court  
23 litigants sometimes attempt to overturn state court rulings in federal  
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26 <sup>2</sup> Judge Bernini questioned Plaintiff to make sure that he  
27 understood the charges, the terms and conditions of the plea  
28 agreement, the possible consequences thereof and the constitutional  
rights he waives by entering the plea. (Exhibit 15). Judge Bernini  
found that Plaintiff knowingly, voluntarily and intelligently entered  
into a plea agreement for domestic violence and that there was a  
factual basis for the plea. (Exhibit 15).

1 court § 1983 actions." 1 Martin A. Schwartz, *Section 1983 Litigation* §  
2 1.07[B] (4th ed.2003). "This endeavor is frequently doomed to  
3 failure." *Id.* Under the *Rooker-Feldman* doctrine, lower federal courts  
4 do not have subject matter jurisdiction to conduct appellate review of  
5 state court proceedings. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413,  
6 416 (1923); *D.C. Ct.App. v. Feldman*, 460 U.S. 462, 482 (1983). The  
7 doctrine applies not only to claims that were actually raised before  
8 the state court, but pursuant to res judicata and collateral estoppel,  
9 also to claims that are "inextricably intertwined" with state court  
10 determinations. *Feldman*, 460 U.S. at 483 n. 16; see also *Noel v. Hall*,  
11 341 F.3d 1148 (9th Cir.2003). *Rooker-Feldman* requires a party seeking  
12 review of a state court judgment to pursue relief through the state  
13 court system and ultimately to the United States Supreme Court.<sup>2</sup> See 28  
14 U.S.C. § 1257; *Rooker*, 263 U.S. at 416; *Feldman*, 460 U.S. at 476. The  
15 doctrine stems in part from a recognition of the fact that "a decision  
16 by a state court, however erroneous, is not itself a violation of the  
17 Constitution actionable in federal court." Plaintiff's claims are a *de*  
18 *facto* appeal of the proceedings in state court, which he could have  
19 appealed. Any challenge he had to the reading of his rights, failure  
20 to knowingly and intelligently enter a plea could have been raised on  
21 appeal but were not and barred here under *Rooker-Feldman*. As to the  
22 ADA/RA claims, there are no material questions of fact precluding  
23 resolution by summary judgment here.

### 24 25 26 **C. Prosecution**

27 Plaintiff admits that the State provided him with an ASL  
28 interpreter when he appeared in Arizona Superior Court. (Doc. 24, ¶

1 32.) Plaintiff's complaint with the State was that Superior Court  
2 Judge Deborah Bernini could not order that an interpreter be provided  
3 at the Pima County Jail or at the Pima County Public Defender's  
4 Office.<sup>3</sup> The Superior Court provided him with an ASL interpreter in the  
5 courtroom. Plaintiff claims he was entitled to an interpreter outside  
6 of the courtroom setting.

7 ADA, Title II and its implementing regulations require that a  
8 public entity "furnish appropriate auxiliary aids and services" to  
9 individuals with disabilities so that they have "an equal opportunity  
10 to participate in, and enjoy the benefits of, a service, program, or  
11 activity of a public entity." 28 C.F.R. § 35.160(b)(1); see also 42  
12 U.S.C. § 121312 ("[N]o qualified individual with a disability shall,  
13 by reason of such disability, be excluded from participation in or be  
14 denied the benefits of the services, programs, or activities of a  
15 public entity."). The Ninth Circuit has interpreted the phrase,  
16 "services, programs, or activities" to include "anything a public  
17 entity does." *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th  
18 Cir. 2002) (quoting *Lee v. City of L.A.*, 250 F.3d 668, 691 (9th Cir.  
19 2001)). "Whether a particular public function is covered by the ADA  
20 turns simply on whether it is 'a normal function of a governmental  
21 entity.'" *Fortyune v. City of Lomita*, 766 F.3d 1098, 1102 (9th Cir.  
22 2014) (quoting *Bay Area Addiction Research & Treatment v. City of*  
23 *Antioch*, 179 F.3d 725, 731 (9th Cir. 1999)). Title II requires that  
24 the State make its courtrooms accessible to individuals with  
25 disabilities, including by providing auxiliary aids and services where  
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28 <sup>3</sup> All state and judicial defendants have been dismissed from this  
action.

1 appropriate to allow those individuals to participate fully in  
2 courtroom proceedings. Plaintiff admits that the Superior Court agreed  
3 to provide him with the auxiliary aid and service of sign language  
4 interpretation in the courtroom. (Doc. 24, ¶ 32.) And he does not  
5 allege that he was ever denied an interpreter in court. Ensuring that  
6 parties can adequately prepare with their counsel outside the  
7 courtroom, however, is not a normal function of the Arizona Superior  
8 Court.

9 In sum, Title II does not require the State to provide sign  
10 language interpretation for Plaintiff's meetings with counsel at the  
11 Pima County Jail or at the Pima County Public Defender's Office.  
12 Plaintiff has cited no legal authority for a different conclusion.  
13 Attorney Bruner made clear that he opined his communications with  
14 Plaintiff were reasonable and effective and that an interpreter was  
15 not needed. Plaintiff complains that without an interpreter that he  
16 did not understand the plea agreement. However, Plaintiff was given a  
17 copy of the plea agreement prior to the hearing. It is uncontroverted  
18 that Plaintiff could read, write, graduated from high school and in  
19 fact, took classes at Pima County. Further, Plaintiff met with Bruner  
20 and an interpreter at the courthouse, prior to his entering a guilty  
21 plea. Attorney Sean Bruner testified that in general costs are a  
22 factor in defending a case. However, Mr. Bruner consistently testified  
23 that he did not retain an interpreter for this case because in his  
24 opinion there was always effective communication between himself and  
25 Plaintiff. (Exhibit 13, P. 46 L. 10 to P. 48 L. 4).

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28 Even taken in a light most favorable to the nonpleading party,

1 the evidence is such that communications with Plaintiff's attorney  
2 were not so lacking as to cause injury. Again, any claims here that  
3 are a substitute for a criminal appeal are barred by *Rooker-Feldman*.

4 **D. Incarceration**

5 Plaintiff complains that he was unable to use the telephone while  
6 incarcerated at Pima County Jail. However, Plaintiff did not make such  
7 a complaint for the last two weeks of his incarceration. Further,  
8 Plaintiff was offered help to use the TTY machine and refused (DSOF  
9 91). The call log shows that Plaintiff successfully made telephone  
10 calls while in prison. (DSOF 134). The corrections officers helped  
11 Plaintiff get in contact with his public defender. (DSOF 95). There is  
12 no evidence or claim that Plaintiff was unable to contact anyone else  
13 other than his wife, who he was prohibited from speaking with. (DSOF  
14 92-93).  
15

16 The evidence shows that the County jail had multiple TTY machines  
17 and Plaintiff has not provided any evidence that the TTY machines did  
18 not work for any other hearing impaired prisoner. Further, Plaintiff  
19 only complained three times within the first few days of his  
20 incarceration. Plaintiff never complained after that time that the TTY  
21 machines were not working including during his second incarceration.  
22 The evidence also shows that numerous detention center employees tried  
23 to help him use the TTY machine. For example, Ms. Hyman testified that  
24 Plaintiff was not interested in using the TTY machine and only wanted  
25 a cell phone to call his wife. (DSOF 91). Further, the Call Log from  
26 the PCADC indicates that Plaintiff successfully made telephone calls  
27 on several occasions including on October 8 and 11, 2013. (DSOF 134).  
28

1 Therefore, Plaintiff either successfully used the TTY machine or used  
2 the regular telephone to make such calls.

3 On October 8, 2013, Plaintiff complained to Sergeant Gomez that  
4 the TTY machine was not working. (DSOF 83). Also present was Sergeant  
5 C.W. Cooper. Sergeant Cooper observed Gomez and Plaintiff using  
6 written communication. (DSOF 84). In Sergeant Cooper's opinion, the  
7 communication between Cooper and Plaintiff seemed reasonable  
8 effective. (DSOF 85). Sergeant Cooper observed that at no time did  
9 Plaintiff request an interpreter or ask to use any other time of  
10 communication. (DSOF 86). Sergeant Cooper attempted to help Plaintiff  
11 use the TTY machine. (DSOF 87). Cooper recalls that the TTY machine  
12 was not working on that occasion but recalls that the problem was that  
13 they could not get sufficient power to it. (DSOF 88). Since the  
14 officers were not able to get the machine to work on that occasion,  
15 Sergeant Gomez took Plaintiff to Specialist Hyman so that Plaintiff  
16 could make a phone call. (DSOF 89).

18 On the contrary, Plaintiff claims he tried to call his public  
19 defender, Sean Bruner, using a TTY at the jail, but it did not work,  
20 despite repeated attempts. CSOF ¶ 73. Plaintiff complained in writing  
21 about the TTY machines not working at least three times before finally  
22 giving up on making a call from jail. AMF ¶¶ 143-45.

23 Ms. Hyman recalls seeing Plaintiff on October 8, 2013. Ms. Hyman  
24 recalls that she was told that Plaintiff was being brought to her  
25 office because they were having trouble getting power to the TTY  
26 machine. (DSOF 90). Ms. Hyman offered to set up the TTY machine but it  
27 appeared to her that Plaintiff was not interested in using the TTY  
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1 machine. (DSOF 91). Plaintiff only requested a cell phone and wanted  
2 to call his wife, Cecelia. Ms. Hyman informed Plaintiff that he was  
3 not able to call his wife because of the charges for domestic  
4 violence. (DSOF 92). Ms. Hyman asked Plaintiff if he wanted to contact  
5 any other family members or friends. Plaintiff did not give her any  
6 other names to call. (DSOF 93). Plaintiff did ask her to call his  
7 public defender. (DSOF 94). Ms. Hyman called the Public Defender's  
8 Office but Plaintiff's lawyer was not available. Ms. Hyman left a  
9 message for the lawyer to contact Plaintiff. (DSOF 95).

10 Initially, it should be noted that Plaintiff has not provided any  
11 written custom or policies from Pima County. Further, Plaintiff has  
12 not provided any evidence or testimony from a policymaker at Pima  
13 County. Plaintiff's only two allegations are that the TTY machine  
14 didn't work for Plaintiff and that the Pima County Defender's Office  
15 did not retain the services of an interpreter for him. However, the  
16 evidence shows that the PCADC had multiple TTY machines and Plaintiff  
17 has not provided any evidence that the TTY machines did not work for  
18 any other hearing impaired prisoner. Further, Plaintiff only  
19 complained three times within the first few days of his incarceration.  
20 Plaintiff never complained after that time that the TTY machines were  
21 not working including during his second incarceration. The evidence  
22 also shows that numerous detention center employees tried to help him  
23 use the TTY machine. For example, Ms. Hyman testified that Plaintiff  
24 was not interested in using the TTY machine and only wanted a cell  
25 phone to call his wife. (DSOF 91). Further, the Call Log from the  
26 PCADC indicates that Plaintiff successfully made telephone calls on  
27  
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1 several occasions including on October 8 and 11, 2013. (DSOF 134).  
2 Therefore, Plaintiff either successfully used the TTY machine or used  
3 the regular telephone to make such calls.

4 **E. ADA Claim against the County (Count I)**

5 At issue is whether Pima County effectively communicated with  
6 Plaintiff without the assistance of an auxiliary aid. Sign language  
7 interpreters are not required when lip reading or other accommodations  
8 are sufficient. *Board of Educ. of Hendrick Hudson Sch. Dist. v. Rowley*,  
9 458 U.S. 176 (1982). Plaintiff argues that whether the communication  
10 was effective is a fact intensive inquiry not resolvable by a  
11 dispositive motion. While that may be so, that does not mean that  
12 summary judgment cannot be granted when the facts show effective  
13 communication. See *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072 (11th  
14 Cir. 2007) (the court found summary judgment warranted on the issue of  
15 effective communication even though factual issues existed whether the  
16 prisoner asked for an interpreter). Effective communication does not  
17 mean identical results, just meaningful interaction.  
18

19 In the case at hand, Defendants argue that the audio recording<sup>4</sup>  
20 and the testimony from the Pima County employees conclusively  
21 establishes that Plaintiff effectively communicated with Pima County  
22 employees. There is no evidence of deliberate discrimination when  
23 Deputy Mitchell took a statement from Plaintiff. Plaintiff's self-  
24 serving statements at deposition do not create a material issue of  
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27 <sup>4</sup> The audio CD lodged and filed in this action will be stricken  
28 from the record. It was not heard by the Court and does not provide  
any basis for this Court's ruling. The audio CD will be held in the  
event of appellate review even though was not used as part of the  
Court's decision making process.

1 fact to prevent entry of summary judgment. The evidence supports that  
2 Plaintiff was responsive to Mitchell's questions and statement,  
3 proving effective communication.

4 Despite Nick's repeated requests for an interpreter for his  
5 meetings with Mr. Bruner, the public defender's office refused to  
6 provide one, in part because of the cost. AMF ¶¶ 148-49, 162-64. Mr.  
7 Bruner, believing that Nick was entitled to an interpreter for his  
8 meetings with his attorney, did file a motion requesting that the  
9 Court provide an interpreter, but the motion failed. AMF ¶¶ 163-65.  
10 Plaintiff testified that because of all this, he felt pressured to  
11 sign a plea agreement he did not fully understand. AMF ¶¶ 150-51.

12 There is no evidence that an interpreter was not at any meetings  
13 with Bruner because of cost. Bruner testified that he spoke with Ms.  
14 Lefferts, who stated in her experience she had been able to  
15 effectively communicate with hearing-impaired individuals without an  
16 interpreter. (DSOF 118 & 119) Bruner continually testified that he  
17 communicated effectively with Plaintiff and that an interpreter was  
18 not necessary. (DSOF 109, 110, 111, 112, 113, 117, 120, 124, 127).  
19 Bruner did acknowledge that budgetary concerns were always present at  
20 his office; however, he nor Ms. Lefferts ever testified that an  
21 interpreter was not hired in this case because they did not want to  
22 spend the money. (DSOF 169).

23  
24 Taking all of the facts as true, there is no violation of the ADA  
25 or RA, particularly because there is no direct or inferred evidence of  
26 deliberate indifference and discrimination on the part of the public  
27 entities named in this action and there is evidence that the  
28

1 Defendants acted reasonably under the circumstances. This resolves  
2 Counts I and III.

3 **F. Section 1983: Sheriff's Office, County Jail, Public Defender**  
4 **(Count II)**

5 In order to sustain a claim under 42 USC § 1983, Plaintiff "must  
6 show that the [Defendants] acted under color of law, and that their  
7 conduct deprived him of a constitutional right." *Duffy v. Riveland*, 98  
8 F.3d 447, 456 (9th Cir. 1996) (reversing summary judgment against a  
9 deaf inmate on his ADA, Rehabilitation Act and Section 1983 claims).  
10 In order to prevail on his section 1983 claim, Plaintiff will also  
11 need demonstrate that Defendants have customs or policies which amount  
12 to deliberate indifference to his constitutional rights. *Lee v. City*  
13 *of L.A.*, 250 F.3d 668, 681 (9th Cir. 2001). Deliberate indifference  
14 occurs when the need for more or different action is so obvious, and  
15 the inadequacy of the current procedure so likely to result in a  
16 violation of constitutional rights, that the policymakers can  
17 reasonably be said to have been deliberately indifferent. *Id.* at 682  
18 (citation omitted). Whether a local government entity has displayed  
19 such a policy of "deliberate indifference" is generally a question of  
20 fact for the jury. *Id.* Here, Plaintiff alleges that he requested an  
21 interpreter at virtually every turn - when he was arrested and his  
22 statement was taken, when he was booked, when he met with his public  
23 defender - and he was consistently denied. He alleges that he  
24 complained repeatedly about the TTY machines not working and nothing  
25 was done to remedy the situation. From this evidence, Plaintiff argues  
26 that there is enough material evidence that a jury could conclude that  
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1 Defendants displayed a pattern of "deliberate indifference" toward the  
2 hearing impaired.

3 A Section 1983 claim cannot be used to enforce rights under the  
4 ADA or the Rehabilitation Act since both contain statutory schemes  
5 that already include comprehensive remedial measures. *Vinson v.*  
6 *Thomas*, 288 F.3d 1145 (9th Cir. 2002). The *Vinson* court relied on the  
7 holding in *Holbrook v. City of Alpharetta*, 112 F.3d 1522 (11th Cir.  
8 1997), which found that a plaintiff, who was suing a city, could not  
9 maintain a Section 1983 in lieu or in addition to a Rehabilitation/ADA  
10 cause of action when the alleged violation is covered by the  
11 Rehabilitation Act and the ADA. Other district courts have agreed with  
12 this reasoning. See *Hill v. Baca*, No. CV 08-03834 CAS (C.D. Cal 2006).  
13 Section 1983 does not provide a cause of action to vindicate statutory  
14 rights under the ADA. *Save Our Summers v. Wash. State Dep't. of*  
15 *Ecology*, 132 F. Supp. 2d 896 (Wash. 1999) (Section 1983 cannot be used  
16 to enforce rights created by a statutory scheme that already included  
17 comprehensive remedial measures).

18  
19 In the Section 1983 claim, Plaintiff asserts that he is a  
20 qualified individual under Title II of the ADA. (DSOF 154). Plaintiff  
21 complains that his constitutional rights were violated because he was  
22 not given the services of an interpreter. (DSOF 155). Finally,  
23 Plaintiff alleges the same damages as in the causes of action pursuant  
24 to alleged violations of the ADA and 504 of the Rehabilitation Act.  
25 (DSOF 152). Plaintiff is asserting rights under his Section 1983 claim  
26 that are covered by the ADA and Rehabilitation Act. As such, the  
27 Section 1983 claims are precluded by the ADA and Rehabilitation Act.  
28

1 Plaintiff does not respond to this case authority.

2 Even assuming that a Section 1983 cause of action exists in  
3 conjunction with ADA/RA claims, Plaintiff has not provided any  
4 evidence to prove his 1983 claim. Since Pima County is the defendant  
5 in this case, Plaintiff must show a policy or custom and practice of  
6 the alleged violation of denying interpreters to hearing impaired  
7 persons. *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978).  
8 Plaintiff has produced no evidence to support any policy or custom and  
9 practice on behalf of Pima County. Plaintiff has not provided any  
10 written custom or policies from Pima County. Plaintiff has not  
11 provided any evidence or testimony from a policymaker at Pima County.  
12 Plaintiff's only two allegations are that the TTY machine did not work  
13 for Plaintiff and that the Pima County Defender's Office did not  
14 retain the services of an interpreter for him.

15  
16 Plaintiff's allegations do not support a claim for deliberate  
17 indifference. Deliberate indifference requires that a different action  
18 be obvious and that the inadequacy of the current procedure is likely  
19 to result in a violation of constitutional rights. Any problems with  
20 the TTY machine appeared to be an isolated incident and cannot  
21 constitute a policy or procedure. Especially, since Pima County  
22 actually had a policy to provide the use of the TTY machine, had  
23 multiple TTY machines and continually attempted to help Plaintiff to  
24 use the machine. Also, there is no evidence that there was non-  
25 effective communication between Plaintiff and his lawyer. Plaintiff's  
26 only complaint that he didn't understand his plea agreement is dubious  
27 since he read a copy prior to the hearing, met with his attorney prior  
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1 to the hearing, met with his attorney and interpreter prior to  
2 changing his plea and that the court noted that Plaintiff understood  
3 and accepted the plea agreement. Therefore, there is no evidence of  
4 deliberate indifference.

5 In cases involving hearing impairment, the issue is whether the  
6 communication was effective. A public entity needs only to take  
7 appropriate steps to ensure that the communication with members of the  
8 public with disabilities are as effective as communications with  
9 others. 28 CFR 35.160(a). Although a public entity may be required to  
10 make available appropriate auxiliary aids where necessary for  
11 effective communications, the type of auxiliary aid necessary to  
12 ensure effective communication will vary in accordance with the length  
13 and complexity of the communication involved. 28 CFR 35, 160(a)(2);  
14 *Department of Justice Technical Assistance Manual on the Americans*  
15 *with Disabilities Act* III-4-3200. Auxiliary aids include the use of  
16 written communication. *Id.* Further, the reasonable modification  
17 principle does not require a public entity to employ any and all means  
18 to make auxiliary aids accessible but only make reasonable  
19 modifications that would not fundamentally alter the nature of the  
20 service of the public entity or impose an undue burden.

22 Pima County contends that at all times they effectively  
23 communicated with Plaintiff either verbally or through written means  
24 Plaintiff admits that he reads well and has been reading books most of  
25 his life. (DSOF 135). Plaintiff indicates that he communicates with  
26 his family through verbal and written methods. (DSOF 136). Plaintiff  
27 also acknowledges that he communicates through text and through e-mail  
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1 (DSOF 137, 139). Plaintiff has a high school degree and went to Pima  
2 College for a year and a half studying writing and reading (DSOF 140,  
3 141). Nonetheless, Plaintiff alleges that he should have been given an  
4 interpreter. However, the Supreme Court has held that sign language  
5 interpreters are not required when lip reading or other accommodations  
6 are sufficient. Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v.  
7 Rowley, 458 US 176, 102 S. Ct. 3034 (1982).

8 Pima County contends that there was effective communications at  
9 all times while Plaintiff was in the Pima County Adult Detention  
10 Center. Plaintiff was incarcerated in the Pima County Adult Detention  
11 Center from October 5, 2013 through October 24, 2013. (DSOF 66).  
12 Prisoner use of the telephone during incarceration is allowed but  
13 limited. (DSOF 67). The procedure for using the telephone is contained  
14 in the *Prisoner Handbook* (DSOF 68). The handbook also informs a  
15 prisoner that if they have trouble using the telephone that the  
16 prisoner should either submit a phone trouble report, speak with a pod  
17 officer or submit an assistance request form. (DSOF 69). Additionally,  
18 for hearing impaired prisoners, the detention complex has TTY  
19 machines. (DSOF 70). A TTY machine allows the hearing-impaired person  
20 to type his communications to the other person and to receive the  
21 other person's communication by text. (DSOF 71). Pima County had a  
22 procedure regarding the use of TTY machines. (DSOF 72). Plaintiff did  
23 make some complaints regarding the use of the TTY machine on October  
24 6th and 8th. (DSOF 73). Plaintiff did not make any complaints  
25 regarding the use of telephones or the TTY machine after October 8,  
26 2013. (DSOF 74).  
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1           The evidence shows that at all times while at the Pima County  
2 Adult Detention Center Plaintiff was able to effectively communicate  
3 with the correction officers. Additionally, there was no evidence that  
4 Plaintiff suffered any injury as a result of any lack of  
5 communication. Plaintiff was in communication with his lawyer. He was  
6 prohibited from contacting his wife and children. Plaintiff has not  
7 alleged that he was unable to contact anyone else.

8           Pima County also contends that Plaintiff was able to communicate  
9 effectively at all times with his public defender Sean Bruner. It was  
10 determined that Plaintiff would be represented by the Public  
11 Defender's Office and attorney Sean Bruner was assigned to Plaintiff's  
12 case. (DSOF 99). Mr. Bruner cannot recall whether he received notice  
13 on October 7th or the next day, October 8th. (DSOF 100). Mr. Bruner  
14 sent out a letter of representation on October 8, 2013. (DSOF 101).  
15 Mr. Bruner visited Plaintiff in person on October 9, 2013. (DSOF 104).  
16 On October 9, 2013, Mr. Bruner filed a GAP motion requesting that  
17 Plaintiff be released from jail. (DSOF 105). The motion was set to be  
18 heard on October 24, 2013. (DSOF 106). At the hearing on October 24th,  
19 the GAP motion was granted and Plaintiff was released from jail. (DSOF  
20 107).

21  
22           Mr. Bruner used both verbal and written communication with  
23 Plaintiff. (DSOF 108). (DSOF 109). Mr. Bruner opines that Plaintiff  
24 speaks very well. (DSOF 110). Mr. Bruner assumed Plaintiff understood  
25 him because Plaintiff would respond appropriately. (DSOF 111). Mr.  
26 Bruner recalls that at the first meeting the communication was  
27 primarily verbal. (DSOF 112). Mr. Bruner recalls that Plaintiff  
28



1 verbally asked a lot of questions during the first meeting. (DSOF  
2 113).

3 After Plaintiff was released from jail, the primary communication  
4 between Plaintiff and Mr. Bruner was written through e-mail. (DSOF  
5 114). However, there were times that the two would meet in person and  
6 use both verbal and written communication. (DSOF 115). On October  
7 29th, Plaintiff sent an e-mail to Mr. Bruner's secretary requesting an  
8 interpreter at their next meeting. (DSOF 116). Mr. Bruner responded  
9 that he did not think an interpreter was necessary because he had  
10 "communicated quite well at the jail and could always write notes."  
11 (DSOF 117).

12 On October 31, 2013, Mr. Bruner sent Plaintiff correspondence  
13 which also contained a copy of a plea agreement. (DSOF 121). The two  
14 met on November 5, 2013 to discuss the case including the plea  
15 agreement. (DSOF 122). The two communicated both verbally and written.  
16 (DSOF 123). Mr. Bruner was of the opinion that the communications were  
17 reasonable and effective. (DSOF 124). Plaintiff was unsure whether to  
18 accept the plea agreement. (DSOF 125). The two exchanged e-mails  
19 discussing the acceptance of the plea agreement. (DSOF 126). Again,  
20 Mr. Bruner thought the e-mail communication was reasonable and  
21 effective. (DSOF 127). Mr. Bruner opined that Plaintiff's e-mails were  
22 articulate and well thought out. (DSOF 128). Plaintiff admits that he  
23 communicated with attorney Bruner through e-mail and was able to  
24 understand the contents of the e-mail. (DSOF 149).

25 On November 13, 2013, Plaintiff filed a formal complaint with the  
26 Pima County Sheriff's Department. AMF ¶ 167. He complained that he was  
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1 not provided with an ASL interpreter when arrested, booked and  
2 incarcerated, and that the TTY machines at the jail did not work. Id.  
3 An investigation by the department concluded that its employees took  
4 "reasonable measures to communicate" with Plaintiff, and so no  
5 additional action was taken. AMF ¶ 168.

6 On November 15, 2013, Mr. Bruner filed a motion with the superior  
7 court seeking an interpreter for any meetings between the two. (DSOF  
8 129). Mr. Bruner did not feel that an interpreter was necessary. (DSOF  
9 130). The superior court denied the motion and stated that an  
10 interpreter was only required in court and not for meetings outside of  
11 court between counsel and the client. (DSOF 131). The court did  
12 provide interpreters at the court hearings. (DSOF 132). Mr. Bruner  
13 acknowledged that use of the interpreter sped up the communications  
14 but Mr. Bruner opined that use of the interpreter did not improve the  
15 quality of the communications. (DSOF 133).

17 In sum, summary judgment will be granted on the Section 1983  
18 claim.

19 **G. Rehabilitation Act against County (Count III)**

20 A cause of action under 504 of the Rehabilitation Act essentially  
21 parallels an ADA cause of action. *Olmstead v. Zimring*, 527 U.S. 581  
22 (1999). Importantly, in the prison context, both Title II of the ADA  
23 and 504 of the Rehabilitation Act must be applied with consideration  
24 to legitimate penological interests. *Gates v. Rowland*, 39 F.3d 1349  
25 (9th Cir. 1994). To prevail on a claim that a prisoner's rights have  
26 been violated, the inmate must show that the challenged prison policy  
27 or regulation is unreasonable. *Pierce v. County of Orange*, 526 F.3d  
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1 1190 (9th Cir. 2008). Accordingly, the resolution of Count III mirrors  
2 the resolution of Count I.

3 **H. State rules and statutes (Counts IV and V)**

4 In Counts Four and Five of the Second Amended Complaint,  
5 Plaintiff alleges violation of the Arizona Civil Rights Act  
6 (hereinafter "ACRA") and the Arizonans with Disabilities Act, which is  
7 a subsection of the ACRA. These counts basically contain the same  
8 cause of action. Further, these counts are the same as the violations  
9 alleged in the ADA and Rehabilitation Act allegations. The courts have  
10 noted that analysis of the ARCA is the same as the standards under the  
11 ADA and Rehabilitation Act, since the Arizona statutes are patterned  
12 on the federal law and that federal law is persuasive. *Matos v. City*  
13 *of Phoenix*, 176 Ariz. 125 (Ariz. App. 1993). Since the analysis and  
14 standards are the same, Counts IV and V may be dismissed for the same  
15 reasons as dismissal Count I, ADA, and Count III, Rehabilitation Act.

16  
17 Further, a private cause of action does not exist under ARS §12-  
18 242 since the statute does not provide a private cause of action and  
19 that when a state creates rights for an individual against the state,  
20 it is not bound to provide a remedy in the courts and may withhold a  
21 remedy in its entirety. *Guibault v. Pima County*, 161 Ariz. 446 (Ariz.  
22 App. 1989). Plaintiff does not address or distinguish *Guibault*.  
23 Instead, Plaintiff solely relies on *Cort v. Ash*, 422 U.S. 660 (1975).  
24 However, the Arizona Supreme Court has expressly rejected *Cort* and the  
25 federal standard for determining legislative intent in creating or  
26 denying a private right of action. *Guibault* at 157-58 (citing  
27 *Transamerica Financial Corp. v. Superior Court*, 158 Ariz. 115, 761  
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1 P.2d 1019 (1988)). Plaintiff did not counter Defendants' argument that  
2 he waived any rights under the statute by waiving his *Miranda* rights  
3 and agreeing to speak with Deputy Mitchell. Again any claims made in  
4 lieu of a criminal appeal are barred by *Rooker-Feldman*.

5 **RULING**

6 Based on the foregoing,

7 IT IS ORDERED that the Defendants' Motion for Summary Judgment  
8 (Doc. 52) is GRANTED on all counts. The Clerk's Office is DIRECTED to  
9 enter a Final Judgment in accordance with this Order in favor of  
10 Defendants. This action is dismissed with prejudice as to all claims,  
11 but for the claims made in lieu of a criminal appeal which are  
12 dismissed without prejudice as is required by *Rooker-Feldman*. This  
13 action is terminated.  
14

15 IT IS FURTHER ORDERED that Defendants Pima County Sheriff's  
16 Department and Pima County Public Defenders Office are both dismissed  
17 with prejudice.

18 IT IS FURTHER ORDERED that the Motion to Strike (Doc. 53) the  
19 audio CD is GRANTED. The Clerk's Office is DIRECTED to HOLD the audio  
20 CD (Doc. 52, Ex. 3) (DSOF, Ex. 3, a hard copy of the audio CD marked  
21 Exhibit 3 to the Separate Statement of Facts in support of the Motion  
22 for Summary Judgment. Ex. 3 was not considered by the Court in  
23 rendering this Ruling) as part of the record in this action for  
24 purposes of appellate review.

25 IT IS FURTHER ORDERED that the documents delivered to Chambers  
26 for in camera review to resolve a discovery dispute as directed by a  
27 Civil Minute Order (Doc. 48) are to be HELD by the Clerk's Office as  
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1 part of the record in this action for purposes of appellate review.  
2 Those documents accompany this Order.

3 IT IS FURTHER ORDERED that the documents delivered to chambers  
4 (Doc. 47) for in camera review to resolve a discovery dispute as  
5 directed by a Civil Minute Order (Doc. 49) are to be HELD by the  
6 Clerk's Office as part of the record in this action for purposes of  
7 appellate review. Those documents accompany this Order.

8 IT IS FURTHER ORDERED that the Motion to Strike (Doc. 64) the  
9 supplemental statement of facts is GRANTED. The supplemental  
10 statement of facts (Doc. 61) was filed without leave of Court and will  
11 be STRICKEN as such.

12 Dated this 9th day of August, 2017.

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Honorable David C. Bury  
United States District Judge