

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

COUNTY OF NEVADA, NEVADA
COUNTY SHERIFF'S OFFICE, AND
SHERIFF-CORONER-PUBLIC
ADMINISTRATOR KEITH ROYAL,
in his official capacity,

Petitioners,

v.

SUPERIOR COURT OF NEVADA
COUNTY,

Respondent.

Case No. C074504

JACOB MICHAEL SIEGFRIED,

Real Party in Interest,

Case No. F11-00317

RAYMOND LEE DUZAN,

Real Party in Interest,

Case No. F12-000450

JONATHAN SCOTT FOOTE,

Real Party in Interest,

Case No. F13-000059

JOSE EDUARDO HENRIQUEZ,

Real Party in Interest,

Case No. F12-000376

CESAR SANTIAGO,

Real Party in Interest,

Case No. F13-000175

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BRENT RAYMOND WILKINS,

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Case No. F12-000175

Nevada County Superior Court
Honorable Thomas M. Anderson, Judge

**APPLICATION OF CALIFORNIA ATTORNEYS FOR CRIMINAL
JUSTICE TO APPEAR AS *AMICI CURIAE* ON BEHALF OF REAL
PARTIES IN INTEREST PURSUANT TO CALIFORNIA RULE OF
COURT, RULE 8.200(c), AND BRIEF IN SUPPORT OF REAL PARTIES**

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APPLICATION OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AND NATIONAL ASSOCIATES OF CRIMINAL DEFENSE LAWYERS TO APPEAR AS *AMICI CURIAE* ON BEHALF OF REAL PARTIES IN INTEREST PURSUANT TO CALIFORNIA RULE OF COURT, RULE 8.200(c), AND BRIEF IN SUPPORT OF REAL PARTIES

TO: THE HONORABLE PRESIDING JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL, THIRD APPELLATE DISTRICT:

California Attorneys for Criminal Justice (hereafter 'CACJ') and the National Association of Criminal Defense Lawyers (hereafter 'NACDL') apply, under California Rules of Court, Rule 8.200(c), for permission to appear as *amici curiae* on behalf of Real Parties in Interest. Under the California Rules of Court, Rule 8.200(c)(1), this brief may be filed by permission of the Presiding Justice of this Court, based on a showing of good cause. CACJ and NACDL respectfully tender their showing of good cause below.

I.

APPLICATION OF CACJ TO APPEAR AS *AMICI CURIAE* ON BEHALF OF REAL PARTIES IN INTEREST

A. Identification of *Amici*

(1) Identification of CACJ¹

CACJ is a nonprofit California corporation. According to Article IV of its bylaws, CACJ was formed to achieve certain objectives including “to defend the rights of persons as guaranteed by the United States Constitution, the Constitution of the State of California and other applicable law.” CACJ is administered by a Board of Governors consisting of criminal defense lawyers practicing within the State of California. The organization has approximately 1,700 members, primarily criminal defense lawyers practicing before Federal and State courts. These lawyers are employed throughout the State both in the public and private sectors.

CACJ has appeared before the United States Supreme Court, the California Supreme Court, and the Courts of Appeal in California on issues of importance to

¹ The undersigned, John T. Philipsborn, as Chair of the *Amici* Committee of CACJ, and as the primary author of this brief, certifies to this Court that no party involved in this litigation has tendered any form of compensation, monetary or otherwise, for legal services related to the writing or production of this brief, and additionally certifies that no party to this litigation has contributed any monies, services, or other form of donation to assist in the production of this brief.

its membership. CACJ's appearance as an *amici curiae* before California's reviewing courts has been recognized in a number of published decisions.

(2) Identification of NACDL

The National Association of Criminal Defense Lawyers (NACDL), a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries – and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes the NACDL as an affiliate organization and awards it representation in the ABA's House of Delegates.

NACDL was founded to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the criminal defense function. In furtherance of

this and its other objectives, NACDL files approximately 50 *amicus curiae* briefs each year, in the United States Supreme Court and others, addressing a wide variety of criminal justice issues.

B. Statement of Interest of *Amici Curiae*

CACJ and NACDL have both a general and specific interest in the subject matter of this litigation. First, CACJ's and NACDL's memberships consist largely of criminal defense lawyers who practice either with defender offices or in private practice. Many California-based criminal defense counsel are members of both CACJ and NACDL. These lawyers are regularly involved in attorney-client meetings, conferences, and discussions that occur within the many local and county jails within the State of California. As a result, CACJ's and NACDL's memberships have an interest in ensuring the vitality of the Constitutionally protected right to counsel preserved in the California and United States constitutions, as well as an interest in ensuring that the procedures used to regulate and facilitate visits and consultations between lawyers and their clients in custodial facilities comply with the requirements of the law and are afforded under the least restrictive and invasive conditions permitted by law.

Second, CACJ and NACDL have specific interests in the issues presented here, as Real Parties in Interest are represented on brief by counsel who is a

member of CACJ and NACDL. *Amici* were contacted by lead counsel for Real Parties in Interest and requested to assert the interests of the defense bar, generally, as it is represented by CACJ and NACDL and their memberships, in the issues presented by this litigation.

C. Application to File

For the reasons explained immediately above, CACJ and NACDL respectfully urge the Court to find that there is sufficient good cause for this Court to permit them to file a joint brief on the merits.

II.

BRIEF ON THE MERITS

A. Introduction

CACJ and NACDL (hereafter '*amici*') submit the following arguments in support of the positions taken by Real Parties in Interest (hereafter 'Real Parties') in their opposition to the Petition and in their defense of Respondent Superior Court's Order. *Amici* are aware that both the United States and California Supreme Courts have recognized that the rights of pretrial detainees and sentenced prisoners can be regulated and curtailed, especially where limitations on their rights is 'reasonably related to legitimate penological interests.' *Turner v. Safley* (1987) 482 U.S. 78, 89-90; accord. *Thompson v. Department of Corrections*

(2001) 25 Cal.4th 117, 130-131. But limitation of certain rights cannot be undertaken whimsically, or because a jailer formulates a new policy where jail policy collides with a right that has been afforded to prisoners and pretrial detainees by existing law. Here, Petitioner announced a policy that impinges on attorney-client communications in a situation in which neither security concerns nor legitimate penological interests are being addressed or advanced. This much is made clear by the analysis offered by the Tenth Circuit when it considered a somewhat similar issue in *Mann v. Reynolds* (10th Cir., 1995) 46 F.3d 1055, 1059-60, and decided that unjustified limitations on the right of access to counsel and to the courts had to give way.

It is worth noting that many of the decisions cited by both parties, including *Mann* (which involved prisoners at the Oklahoma State Penitentiary and not detainees in a County Jail), are focused on the analysis of curtailment of rights, policies, and procedures in purely correctional facilities – as distinguished from facilities like a County Jail that houses both detainees pending trial (and thus actively consulting with counsel) as well as sentenced inmates (who also may be litigating on appeal or in post-conviction litigation). While the decision was rendered in a different context, the U.S. Supreme Court has recently reiterated the assumption that individuals facing trial, when competent to do so, will be able to

discuss trial strategy and other matters with their counsel – a reminder that trial level attorney-client communications are recognized as highly important. *Ryan v. Gonzales* (2013) 568 U.S. ____; 133 S.Ct. 696, 703-04 [discussing the characteristics of a competent individual’s trial level communications with counsel].

The record presented to Respondent clearly indicated that the facility at issue here was designed in part with the understanding that there would need to be room for confidential consultations between lawyers and clients. Respondent court heard from one former Nevada County Jail commander (retired Captain Osborne) who noted that attorney client contact visits would not have significant security impact on the institution in his opinion. (Real Parties’ Exhibit 1.) Other testimony supported the same proposition.

Indeed, and this is one of *amici*’s concerns in appearing in this case, county jails in California have attorney-client consultation rooms that allow full contact between counsel and their clients. Particularly when counsel are preparing for evidentiary hearings or are interviewing clients in preparation for various aspects of the case, as indicated during the presentation of testimony in this case by Dr. Roeder, relatively unencumbered, personal, full-contact conversations enhance

preparation and allow greater compliance with the Constitutional command of effective representation.

Amici are concerned that Petitioner pays little attention to the connection between the requirements of the law connected with the operation of detention facilities and the protection of inmates' right of access to counsel, to legal advice, and to courts, and to the basis on which Respondent's order can and should be upheld and Real Parties' arguments dignified.

B. The Law and the Case Specific Evidence Support Respondent's Order and the Position Argued by Real Parties

While Petitioner County of Nevada focuses on the power and prerogative of government officials to regulate detention and penal institutions, Petitioner is unable, given the evidence presented, to explain how this County Jail and its staff have justified the curtailment of contact visits given the law that protects the right of access to counsel and the right of access to the courts. Individuals facing criminal court sanctions and seeking to address criminal cases (even during the appellate phase) must have the right of access to counsel and to the courts. *Ross v. Moffitt* (1974) 417 U.S. 600. These rights impose on the State, through the Fifth, Sixth, and Fourteenth Amendments, the need to provide meaningful access to the courts and an adequate opportunity to present claims. Indeed, in custodial

settings, the right of access to the courts has been of sufficient concern that an absolute ban on jailhouse lawyers was struck down in *Johnson v. Avery* (1969) 393 U.S. 483.

The Tenth Circuit described the protection of the right of incarcerated individuals to have access to the legal system, noting that: “The opportunity to communicate privately with an attorney is an important part of that meaningful access [to the courts].” *Mann v. Reynolds, supra*, 46 F.3d 1055, at 1061; relying on *Ching v. Lewis* (9th Cir., 1990) 895 F.2d 608, 609. As the Ninth Circuit pointed out in *Ching, supra*, even in a state prison setting: “This apparently arbitrary policy of denying a prisoner contact visits with his attorney prohibits effective attorney-client communication and unnecessarily abridges the prisoner’s right to meaningful access to the court.” *Id.*, at 610; see also, *Bach v. Illinois* (7th Cir., 1974) 504 F.2d 1100, 1102, recognizing an inmate’s need for confidentiality in communications with counsel. Elsewhere, the United States Supreme Court has recognized that the protection of the attorney-client privilege is of importance in promoting “...broader public interest in the observance of law and administration of justice.” *Swidler and Berlin v. U.S.* (1998) 524 U.S. 399, 403.

Real Parties, and their counsel, are taking a responsible approach and making highly supportable, moderate, legal claims based on a record that is devoid

of any clear security concerns that would distinguish the Nevada County Jail facility from the many other facilities that make attorney-client visiting rooms available for contact visits – regardless of the extent to which the visits are subject to constant supervision (or even periodic supervision) by jail staff. Indeed, in this case, Petitioner’s own expert, Captain Malin conceded that there were ways to allow surveillance of the attorney-client visiting rooms if need be.

California’s statutory scheme, which includes Business and Professions Code 6068, requires lawyers to communicate with clients on matters of importance to the representation. The *ABA Standards for Criminal Justice: Prosecution and Defense Function*, Third Edition, published in 1993 by the American Bar Association, contains specific standards and emphasizes the need for attorney-client communication, the establishment of a relationship (Standard 4-3.1), client interviews (Standard 4-3.2), and adherence to the duty to keep the client informed (Standard 4-3.8). The *ABA Standards*, while not held to be required duties of counsel, nonetheless are considered informative to the assessment of allegations of the deprivation of effective defense counsel. *Strickland v. Washington* (1984) 466 U.S. 668, 687-688. As the *Strickland* court notes: “Counsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.” *Id.*, at 691.

In this case, it was pointed out during the hearings that are part of the record before this Court that for counsel to obtain information in confidence from a client depends in part on the level of trust as well as other aspects that are involved in an effective attorney-client relationship (see testimony of Dr. Eugene Roeder). The opportunity for direct, person-to-person communication unencumbered by the appearance of barriers is a matter of importance to the frank exchange of confidential communications.

Amici are concerned to respectfully encourage this Court to avoid encouraging the erosion of the right of access to counsel based on trivial concerns and on mere preference or convenience for jailers. There was a lengthy evidentiary hearing in this case. Respondent concluded that there was no evidence to demonstrate that there was a security problem in the Nevada County Jail that warranted the curtailment and deprivation of Constitutional rights suffered by Real Parties here. *Amici* submit that Respondent's conclusion should be upheld by this Court.

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CONCLUSION

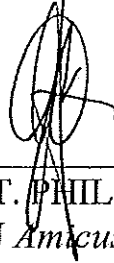
For all of the reasons advanced by Real Parties and discussed here, this Court should uphold Respondent's order and deny the Petition.

Dated: October 22, 2013

Respectfully submitted,

NACDL
David M. Porter, Esq.

CACJ
John T. Philipsborn, Esq.



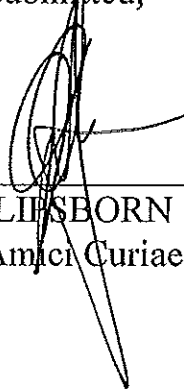
By: JOHN T. PHILIPSBORN
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CERTIFICATE OF COMPLIANCE

I certify that the attached **APPLICATION OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AND NATIONAL ASSOCIATES OF CRIMINAL DEFENSE LAWYERS TO APPEAR AS *AMICI CURIAE* ON BEHALF OF REAL PARTIES IN INTEREST PURSUANT TO CALIFORNIA RULE OF COURT, RULE 8.200(c), AND BRIEF IN SUPPORT OF REAL PARTIES** uses a 14 point Times New Roman font and contains 2,152 words.

Dated: October 22, 2013

Respectfully submitted,



JOHN T. PHILLIPSBORN
Attorney for Amici Curiae CACJ
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PROOF OF SERVICE BY MAIL

I, Melissa Stern, declare:

That I am over the age of 18, employed in the City and County of San Francisco, California, and am not a party to the within action; my business address is 607 Polk Street, Suite 350, San Francisco, California 94102.

On October 22, 2013, I served the attached:

APPLICATION OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AND NATIONAL ASSOCIATES OF CRIMINAL DEFENSE LAWYERS TO APPEAR AS *AMICI CURIAE* ON BEHALF OF REAL PARTIES IN INTEREST PURSUANT TO CALIFORNIA RULE OF COURT, RULE 8.200(c), AND BRIEF IN SUPPORT OF REAL PARTIES

in an envelope with postage thereon fully prepaid in the United States mail at San Francisco, California, addressed as follows:

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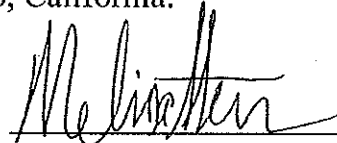
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 22, 2013, at San Francisco, California.


Melissa Stern