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, vs. 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, M12-001672a, M12-001123, M13-000093, M12-001776, M12-001105, and M12-001618b

CESAR SANTIAGO, Real Party in Interest.	Case No. F13-000175
BRENT RAYMOND WILKINS, Real Party in Interest.	Case No. F12-000175

Nevada County Superior Court
Honorable Thomas M. Anderson, Judge

INFORMAL OPPOSITION TO PETITION FOR WRIT OF MANDATE OR OTHER APPROPRIATE RELIEF

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MUNKELT LAW OFFICE

August 29, 2013

Deena Fawcett, Clerk Administrator
Third Appellate District
Court of Appeal of the State of Califol'l1ia
914 Capitol Mall, 4th Floor
Sacramento, CA 95814

RE: County of Nevada et al. v. Superior court of Nevada County, Case No. C074504

Dear Ms. Fawcett,

Petitioners Nevada County and the Nevada County Sheriff have filed a petition for writ of mandate challenging the superior court's ruling that contact visits between attorneys and their clients in the Nevada County jail should be provided except when specific circumstances justify withholding such contacts.

Real Party in Interest Jacob Siegfried opposes the issuance of the writ and files this informal opposition pursuant to Rule 8.487, requesting that the petition be denied, or that the court issue an alternative writ to provide for full development of the arguments and record on the Superior Court's determination that Real Parties' rights under the Fifth, Sixth, and Fourteenth Amendments, and corollary provisions of the State constitution, are at risk unless the order is implemented.

A. BACKGROUND

Contact visits have been routinely provided to attorneys visiting clients in the Wayne Brown Correctional Facility (WBCF) throughout the 20-year life of the facility, until January, 2013. Beginning in February, 2013, attorney-client visits at WBCF have been limited to non-contact meetings through a steel and glass partition with a phone handset on each side. These facilities are adjacent to, and nearly identical to, the public and family visiting stalls of the jail.

Petitioners represent that contact attorney visits are still available on a case-by-case basis upon request of the officer in charge (OIC). However, petitioners concede that only twelve contact visits have been allowed from February to May in a jail with average daily population of approximately 200 inmates.

Beginning in February, 2013, attorneys for a number of individual inmates filed motions requesting an order from the Respondent Superior Court providing for contact visits between attorney and client. Petitioners filed motions opposing such orders, or seeking to vacate orders that had been issued by the respondent court. Respondent consolidated the motion proceedings

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on behalf of the real parties in order to facilitate a single day-long evidentiary hearing, which took place on July 23, 2013.

At the hearing petitioners asserted that there were reasons of institutional security which provided the basis for the new policy on contact visits. Petitioners also asserted that the Sheriff has sole and exclusive authority over inmates in the jail, such that respondent court lacked the power to order that contact visits be provided.

Real parties offered evidence at the hearing that there was no legitimate security interest to justify the denial of contact visits between attorneys and clients. Petitioners could not demonstrate a single incident in the history of the jail where an actual security breach occurred due to a contact attorney visit.[1] Petitioners also admitted that contact meetings are currently taking place at WBCF with drug counselors, religious representatives, teachers, and others. Those civilians traverse the same hallways where attorney contact visits used to take place, and meet with groups of inmates in rooms without security staff present.

Experienced attorney and criminal law specialist Thomas Leupp offered first-hand testimony on the serious impact of non-contact visiting facilities on the attorney-client relationship. (Appendix of Exhibits, hereinafter AppEx, Exhibit 1 p. 137-148.) He relied in part on his extensive experience with contact visits at WBCF and described the significant adverse impacts of the no-contact facilities there.

Experienced forensic psychologist Eugene Roeder, PhD., testified that the adverse impacts on the professional relationship described by Mr. Leupp are part of the human response to barriers. (AppEx Ex. 1 p. 125-135.) Although Dr. Roeder conceded that some relationship can be developed though glass, with time and effort, he opined the impact of separation cannot be completely overcome.

Real parties also offered evidence from a former commander of the WBCF, affirming that the contact visits with attorneys were carried out routinely, with normal security precautions and no additional staff.

B. DISCUSSION

1. Constitutional Right to Contact Visits Between Attorney and Client.

Nowhere in the U.S. Constitution or Bill of Rights is there any mention of shackling the accused during his or her appearance at trial. Yet the U.S. Supreme Court and the California Supreme Court and Courts of Appeal have uniformly and repeatedly held that the Constitution prohibits restraints unless there is a specific showing of manifest need. (See, *e.g. Deck v. Missouri* (2005) 544 U.S. 622 [125 S. Ct. 2007, 2011-2012; 161 L. Ed. 2d 953]; *People v. Duran* (1976) 16 Cal.3d 282, 290-291; *People v. Mar* (2002) 28 Cal. 4th 1201, 1217-1220.) In

[1] Petitioners did claim one incident where a psychotic inmate was placed in a contact visit room with his attorney. That situation would have justified a denial of a contact visit under respondent's order regarding "specific circumstances" to deny contact.

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Deck the court explained "this rule forms part of the Fifth and Fourteenth Amendments' due process guarantee." (*Deck, supra*, 544 U.S. at 627.)

Three fundamental principles have been cited in favor of the rule. Two of them may inform the discussion on attorney-client visitation. First: "[T]he Constitution, in order to help the accused secure a meaningful defense, provides him with a right to counsel. [Citation omitted] The use of physical restraints diminishes that right. Shackles can interfere with the accused's 'ability to communicate' with his lawyer." (*Deck, supra*, 544 U.S. at 631.) Secondly: "The removal of physical restraints is also desirable to assure that 'every defendant is . . . brought before the court with the appearance, dignity, and self-respect of a free and innocent man." (*People v. Duran, supra,* 16 Cal. 3d at 290.)

It is manifest that if shackles interfere with a defendant's ability to communicate with counsel in a constitutionally significant way, separating the attorney and the accused by glass, walls and telephones raises concerns of constitutional import. Nor does one have to reflect long on the experience of transactions conducted through a window at a bank, ticket office or currency exchange to recognize the distrust and dehumanizing atmosphere that is fostered by such barriers. The impact on communication between attorney and client is readily apparent.

Likewise, if physical restraints have an unconstitutional impact on human dignity and self-respect, physical separation of the accused from counsel is also unconstitutional. Free persons speak to their attorneys face-to-face and expect to be treated with professional respect and courtesy. When an incarcerated person is told they can't be allowed in the same room with counsel it insults their dignity and necessarily reduces the trust and confidence they hold for the attorney.

An additional constitutional dimension exists where contact with counsel is restricted, not applicable in shackling cases. That is the ability of counsel to perform as an effective advocate, meeting responsibilities to the court and the client in a timely and professional way.

The American Bar Association, for one, understands these issues. The "ABA Standards for Criminal Justice: Treatment of Prisoners," Third Edition © 2011, (American Bar Association) provide: "For meetings between counsel and a prisoner absent an individualized finding that security requires otherwise, counsel should be allowed to have direct contact with a prisoner who is a client, prospective client, or witness, and should not be required to communicate with such a prisoner through a glass or other barrier." (Standard 23-9.4(c)(ii)(A).) Respondent Superior Court did nothing more than order practices consistent with this ABA standard, while accommodating the legitimate penological concerns of Petitioners.

It is worth noting, too, that the ABA standard for visits with counsel is framed in language very similar to the restriction on shackles and restraints. "[T]he Constitution prohibits restraints unless there is a specific showing of manifest need." versus "[A]bsent an individualized finding that security requires otherwise, counsel should be allowed to have direct contact with a prisoner."

It appears no California court has ever held that inmates *do not* have a constitutional right to contact visits with their attorney. Decisions involving a factual issue of attorney-client visits

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and their privacy, confidentiality, or conditions of contact appear to assume inmate rights are implicated, and reach a holding based on whether the specific factual showing regarding an inmate warrants a restriction based on institutional concerns. (See, *e.g. In re Roark* (1996) 48 Cal. App. 4th 1946; *Cf. Keker v. Procunier*, 398 F. Supp. 756 (E.D. Cal. 1975).

Neither Respondent court nor Real Parties has asserted the right to contact visits is absolute or unqualified. (See AppEx, Exhibit 20, p. 348; *Small v. Superior Court* (2000) 79 Cal. App. 4th 1000, 1013, fn 13.) However, Real Parties believe the Fifth Amendment due process rights to liberty and to access to the courts, and the Sixth Amendment right to effective assistance of counsel, as applicable to the states through the additional guarantees of the Fourteenth Amendment, give inmates at the Nevada County jail the right to contact visits with counsel, except where individual facts show manifest need for more secure arrangements. (See *Ching v. Lewis*, 895 F.2d 608, 610 (9th Cir. 1990); *Villegas Lopez v. Brewer*, (9th Cir. 2012) 680 F.3d 1068, 1081, Berzon, J. Concurring and dissenting.)

2. Petitioner's Policy to Deny Contact Attorney visits is not Supported by Legitimate Penological Interests

Real Parties believe Respondent's Ruling and Order are supported by the record and satisfy the criteria applicable under Penal Code §2600, *Thompson v. Department of Corrections* (2001) 25 Cal. 4th 117, 130, and *Turner v. Safley* (1987) 482 U.S. 78 [107 S. Ct. 2254, 96 L. Ed. 2d 64].

a. There is no valid, rational connection between the visit policy and a legitimate governmental interest.

Before engaging in a war over the meaning of words, it may be useful to define the field of battle: "Semantics is about the relation of words to reality—the way that speakers commit themselves to a shared understanding of the truth, and the way their thoughts are anchored to things and situations in the world." (Steven Pinker, *The Stuff of Thought: Language as a Window Into Human Nature.)* In order to make sense of the *Turner* criteria, and apply them in a consistent way, the words need to be anchored to reality - to things and situations in the real world.

The "real world" of the Nevada County jail - WBCF - is a small jail facility in a semi-rural county with a population under 100,000. Jail capacity is about 250. Clearly this is a different world than San Quentin state prison (*Dep't of Corr. v. Superior Court of Marin County* (1982) 131 Cal. App. 3d 245.) or the massive Los Angeles County jail system. (*Block v. Rutherford* (1984) 468 U.S. 576 [104 S. Ct. 3227; 82 L. Ed. 2d 438].)

Nor have Petitioners presented any evidence of frequent acts of violence by inmates, presence of gang members, conflicting minority populations, frequent disruptions of the secured areas of the jail, smuggling of contraband into the facility or any other evidence of real ongoing security concerns. More specifically, Petitioners did not present any evidence of smuggling, violence or any other breach of security involving attorney visits with inmates. Although Lieutenant Paul Schmidt submitted a declaration stating that he had personal knowledge of an attack on an attorney in 2005, in testimony it was learned he only heard about it from another

correctional officer. From that hearsay it appears that an attorney was admitted for a contact visit with a mentally ill inmate known to be actively psychotic. If there were any attack in that situation, it does not reflect on security interests of contact visits with the general population. The specific facts present a 'manifest need' to restrict contact visits, no matter what the general policy may be.

Captain Pettitt, Lieutenant Schmidt, and the retired Captain Malim each articulated "security concerns" with the contact visit rooms for attorneys. Using the language of *Turner*, the potential problems they identified were rational, *i.e.* the words made sense applied to the physical layout of the jail. But the security issues they rely on are not legitimate - there were no facts presented of any incident over the 20 year life of the jail where the circumstances they imagined have actually occurred.

At the same time, Mr. Malim conceded that no jail or prison can ever be made in such a way that there are no potential security issues. (AppEx Ex. 1 p. 164:4-10.) Captain Pettitt agreed that contact visit rooms which can be opened from the inside could be viewed as a safety feature - an attorney who was attacked can get out - or as a security risk - an attorney or inmate could exit into a hallway where other inmates are present. (AppEx Ex. 1 p. 27:1 - 28:15.) Malim even grudgingly conceded that the complete absence of any security incident over many years could show that jail staff (and visiting attorneys) are managing the risks appropriately. (AppEx Ex. 1 p. 162:21-28.)

Real Parties believe - and Respondent court ruled - that although Petitioner's did articulate potential security concerns arising from the facility design and location of contact visit rooms, they failed to present evidence sufficient to show their concerns are anchored to things in the real world of WBCF. The Sheriff's opinions about security for the jail are entitled to some deference, but that does not relieve Petitioners of the obligation to present facts which tie the opinions to reality. Thus, the record fails the first test for issuance of the writ.

b. There is no reasonable alternative to contact visits between inmate and attorney.

Petitioners seemingly fail to understand the real-world meaning of the term "attorney-client relationship". This is not the type of relationship where two people are chatting over coffee, or deciding whether to hold hands on a first date. "The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation." (Standard 4-1.2(b), *ABA Standards for Criminal Justice: Prosecution and Defense Function*, 3d ed., ©1993 American Bar Association.) To fulfill that duty counsel undertakes the difficult task of developing a relationship: "Defense counsel should seek to establish a relationship of trust and confidence with the accused and should discuss the objectives of the representation .... Defense counsel should explain the necessity of full disclosure of all facts known to the client for an effective defense, and defense counsel should explain the extent to which counsel's obligation of confidentiality makes privileged the accused's disclosures." (Standard 4-3.1(a) *ABA Standards for Criminal Justice, supra*.)

It seems obvious that it is more difficult for counsel to fulfill these duties when the client is incarcerated, deprived of liberty and freedom of movement, in an environment where she is

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told all communication is being recorded. Dr. Roeder testified as an expert that imposing a glass barrier between the attorney and client does impact communication and comprehension, confidentiality and trust, and the development of intimacy. (AppEx Ex. 1 p. 122:11 - 124.13.) According to his testimony these components of the professional - not social - relationship are crucial in developing a level of trust where the inmate can discuss what are often the most personal, embarrassing and shameful events of their life. (*Id.)* In fulfilling the duties of representation under Business and Professions Code §6068, the Rules of Professional Conduct, and the Standards of the ABA personal, contact visits are an irreplaceable asset.

This is not to say that the dedicated, diligent attorneys who serve as counsel for the inmates of jails and prisons all around the state will simply throw in the towel if it is impossible to secure a contact visit with the client. Attorneys have and will continue to make the best of adverse conditions imposed on the attorney-client relationship, whether at Guantanamo, San Quentin, or L.A. Central. It does say that in the real world there is no substitute for private, confidential, barrier-free conversations between attorney and client. The record before this court demonstrates quite clearly that the Nevada County jail has facilities to provide contact visits between attorneys and inmates with a reasonable degree of safety and a reasonable level of security.

Retired Captain Lee Osborne testified that barrier-free visits had been routinely provided, and did not report any problems with staffing or security. (AppEx Ex 1 p. 99:8-28.) Attorney visits were routinely provided at all hours except during meal and sleep periods, every day of the week. (*Id.*) No evidence was presented of any reasonable alternative to providing those visits at WBCF. There was testimony about the opportunity for contact visits in the "jail holding" area at the courthouse where inmates await court appearances. (AppEx Ex 1 p. 77:1 - 78:13.) However, that facility has only one visiting room, and is operational only during court hours. (*Id.*) Therefore it is not adequate to serve the needs of all inmates and their attorneys.

For these reasons, Petitioner fails the second standard of the "legitimate penological interests" analysis - there is no reasonable, available alternative means of providing for the inmates' constitutional rights to access to the court and representation by effective counsel.

c. Accommodation of the right to contact visits will have negligible impact

The third analytical test is whether accommodation of the prisoners' asserted constitutional rights will adversely impact guards, other inmates or the allocation of resources. Captain Osborne's testimony established that the jail had always been able to provide attorney contact visits without a significant impact on staff or resources. Corrections personnel were simply required to pay attention to the presence of attorneys, and respond to any special security issues with a particular inmate. (AppEx Ex. 1 p. 99 - 104.)

Petitioners offered opinions, through Captain Pettitt, Lieutenant Schmidt and Mr. Malim, that there are potential security issues with contact visits in the A/B hallway and the interview rooms in the booking section. But there was no evidence of any fact tending to show adverse impact on guards, other inmates, or jail resources at WBCF for granting attorney contact visits, at any time during the life of the facility. Petitioners' fail the third test.

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d. There is a ready alternative to the proposed regulation - return to the *status quo ante.*

If this court were to find, contrary to the arguments above, that there is a rational basis for a legitimate change in policy, the record demonstrates that relatively minor changes to the facility would permit a return to routine contact visits for attorneys. Concerns about doors which can be opened from the inside could be addressed by changing the locks to central control. This modification was recently made to the inmate side of the public visit rooms, and could be applied to the attorney visit room and booking interview rooms, as well. If some surveillance of visits is desired, external video can be installed with a view of the visiting rooms, similar to the surveillance of the classrooms where teachers, drug counselors and religious advisers currently have contact visits with inmates.

Another resource for limiting security risks connected with attorney-client visitation is the attorneys themselves. Provide counsel with training and/or written guidelines. Make them partners in the security process, instead just risk factors and presumed adversaries. This would be a low-cost high-value improvement to the routine provision of barrier free communication between attorneys and their incarcerated clients.

3. CONCLUSION

The Nevada County jail provided routine contact visitation for attorneys over the life of the facility until February, 2013. Petitioners did not show even one incident where a security breach took place due to an attorney visit with sane inmates over a twenty year span. In the absence of any facts justifying the policy change to visiting through glass, Petitioner's offer only general security concerns, without anchoring those concerns to the actual conditions and history of the facility.

Respondent court and Real Parties believe the policy change deprives inmates at WBCF of rights under the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution, and the comparable guarantees of the California Constitution. The ABA standards for criminal justice and for counsel support this view. For the reasons above, Petitioners have failed to establish a legitimate reason for burdening the rights of inmates in this way.

Respondent court and Real Parties concede that this is not an absolute or unconditional right. When there are specific circumstances which establish a need to restrict contact visits, the Sheriff has the authority to offer alternative facilities for private, confidential, communication with counsel. Under all the circumstances, then, Respondent's Order is reasonable and well-founded, and the writ should be denied. In the alternative the court should issue an alternative writ with formal briefing and a hearing to show cause.

Respectfully Submitted,

August 30, 2013

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