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

RETURN TO PETITION FOR WRIT OF MANDATE BY REAL PARTIES IN INTEREST

Attorney for Real Party in Interest
Jacob Siegfried
STEPHEN A. MUNKELT
Munkelt Law Office (SBN 80449)
206 Providence Mine Rd. Ste. 218
Nevada City, CA. 95959
Tel: (530)265-8508
Fax: (530)265-0881
E-mail: stephen@munkeltlaw.com

Filed Jointly on Behalf of:

Jennifer Granger (SBN 172745)
206 Providence Mine Rd. Ste. 218
Nevada City, CA. 95959
(530)470-0328

William G. Walker III (SBN 109457)
P.O. Box 1127
Nevada City, CA. 95959
(530)478-0675

Tamara Zuromskis (SBN 215331)
Nevada County Public Defender
224 Main St.
Nevada City, CA. 95959
(530)265-1400

Jody Schutz (SBN 209507)
Nevada County Public Defender
224 Main St.
Nevada City, CA. 95959
(530)265-1400

TABLE OF CONTENTS

TABLE OF AUTHORITIES

RETURN TO PETITION FOR WRIT OF MANDATE

TO THE HONORABLE PRESIDING JUSTICE AND HONORABLE ASSOCIATES JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT:

Real Parties in Interest hereby jointly reply to the petition for writ of mandate by the County of Nevada and Nevada County Sheriff seeking a writ directed to Respondent Court, and by this verified Return represent that:

1 Responding parties admit the allegations of paragraph 1 of the Petition.

2 Responding parties admit the allegations of paragraph 2 of the Petition.

3 Responding parties cannot admit or deny paragraph 3, which does not appear in the Petition.

4 Responding parties admit the allegations of paragraph 4 of the Petition.

5 Responding parties admit the allegations of paragraph 5 that Petitioners are the third parties subject to the Respondent Court's Ruling and Order, and that petitioner Sheriff of Nevada County held real parties in interest in custody at Petitioner's jail. Responding parties deny that Respondent court failed to specify what visiting conditions were to be provided by Petitioners. Responding parties have insufficient information or belief to answer the other allegations of paragraph 5, and on that basis deny them.

6 Responding parties admit the allegations of paragraph 6 of the Petition.

7 Responding parties admit the allegations of paragraph 7 that

Petitioners will be materially affected by Respondent's Ruling and Order. Responding parties deny that the attorney-client visits required by the Order are unspecified, and deny that the Ruling interferes with the authority of Petitioner Sheriff-Coroner-Public Administrator Keith Royal. Responding parties further deny that Respondent's Order would jeopardize jail security or undermine budgetary determinations, or interfere with the Sheriff's lawful exercise of discretion regarding use of Petitioner's facilities for attorney-client visitation. Responding parties have insufficient information or belief to answer the other allegations of paragraph 7, and on that basis deny them.

8 Responding parties admit the allegations of paragraph 8 that Petitioner's would have been required to comply with Respondent's Order on August 21, 2013, if this court had not issued a stay. Responding parties deny that the Order was unlawful, or that it was an abuse of Respondent's discretion. Responding parties do not have sufficient information or belief to respond to the remaining allegations of paragraph 8, and on that basis deny them.

PRAYER

WHEREFORE, Real Parties in Interest pray that this Court:

1 Deny the Petition for Writ;

2 Alternatively, issue a writ to Respondent Superior Court requiring modification of the Order requiring Petitioners to provide contact visits for attorneys with inmates in the County of Nevada under the terms and conditions found proper by this Honorable Court;

3 Award Real Parties in Interest Costs in these proceedings;

4 Award Real Parties in Interest Attorney fees in this proceeding

pursuant to Code of Civil Procedure §1021.5 for enforcement of an important right affecting the public interest;

5 Grant such other and further relief as the court deems just.

Dated: October 15, 2013

By: _____

Stephen A. Munkelt, Munkelt Law Office
For Attorneys and Real Parties in Interest

VERIFICATION

I, Stephen A. Munkelt, am the attorney for real party in interest Jacob Siegfried in connection with these proceedings. All facts alleged in the above Return not otherwise supported by citation to the record, exhibits or other documents are true of my own personal knowledge. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed October 15, 2013.

_____

STEPHEN A. MUNKELT

CERTIFICATION OF WORD COUNT

I certify that this Petition and Memorandum submitted on behalf of Real Parties in Interest has a word count of 7,387.

_____

Stephen A. Munkelt, Attorney for Real Parties

MEMORANDUM OF POINTS AND AUTHORITIES ON RETURN TO PETITION FOR WRIT

STATEMENT OF FACTS

About 20 years ago Nevada County opened the Wayne Brown Correctional Facility (hereinafter WBCF or Wayne Brown) to house inmates committed to the custody of the Sheriff. Inmates were no longer housed at the courthouse, except for temporary housing in association with scheduled court appearances at "court holding." (Appendix of Exhibits, Exhibit 1 (hereinafter "Ex. 1") 54:4-16; 77:3-78:13 126:2-12;139:14-140:4)

Throughout the operation of WBCF, until February 4, 2013, the Sheriff accommodated inmate visits with their clients in six areas. (Ex. 1, 18:21-19:21; 26:12-28; Appendix vol. 3 Petitioners' Exhibit "1", p. 416, Respondent's Exhibits "B" and "C" p. 418-419.) Two are glass-partition rooms accessed by attorneys from the lobby at Wayne Brown, with inmates admitted on the opposite side of the barrier from the secure area of the jail. (Ex. 1, 64:2-65:5; vol. 3, 418.)

The other four attorney-client visiting areas were rooms within the secure areas of WBCF. One is located in the hall to the "A" and "B" housing pods, referred to as the A/B hallway. (Ex. 1, 26:12-28.) An attorney going to visit in this room is given a key, and is passed through the "air lock" by central control into the A/B hall. (*Id.*) The attorney opens the visit room, and waits for the client to be given access to the hall by Central. (Ex. 1, 140:17-24; 143:14-27.) They meet in a small room with table and chairs. (*Id.*) The door to this room can be opened from the inside, and is not under Central control. (Ex. 1, 26:18-28; 33:18-34:6.)

Two of the rooms are located in what is generally referred to as the

booking area. (Ex. 1, 33:5-22, vol. 3 Respondent's Exhibit "C", 419.) An attorney going to visit in these rooms would be released from the air lock into the A/B hall by central, and then central would unlock the adjacent door to booking to allow entrance. (Ex. 1, 22-12-24:13.) Staff in booking would unlock one of two interview rooms, and the inmate client would be given access to the A/B hall and then to booking by central control. (Ex. 1, 33:11-22.) Attorney and client meet in a small room with table and chairs. (Ex. 1,143:14-27, Ex. 5, 212:12-23.)

The final contact visiting area at WBCF was adjacent to "N" section. (See Appendix vol. 3 p. 416, Petitioner's Exhibit "1"; Entry, sally port and visiting adjacent to Dayroom N109; Declaration of Jody Schutz, Ex. 5, 209:10-12.) Attorneys would be admitted to the secure area by central control, and meet in a secure visiting area with a table and chairs. (*Id.*)

Normally no staff is required to escort inmates to or from contact visits with their attorney. (Ex. 1, 116:5-117:24.) (For purposes of this brief the two glass-partition rooms are referred to as "noncontact' visiting rooms, while the A/B room, booking interview rooms, "N" section visiting and court holding provide "contact" visits with no barrier between attorneys and their client.)

It has also been the practice at WBCF to have inmate programs for education, addiction recovery and other purposes provided in the multi-purpose rooms in A pod and B pod. (Ex. 1, 41:18-45:13; See Vol. 3 p. 416, rooms B112 and C112.) Some of the activities are listed on the Inmate Program Schedule. (*Id.*; Appendix, vol. 3 p. 420, Real Parties' Exhibit "D".) Teachers, church members or pastors, AA and NA leaders, and other civilians are admitted to the secure area of Wayne Brown to conduct group meetings with inmates in these locations. (*Id.*)

In order to reach the multi-purpose rooms the group leaders must go through the airlock into the A/B hall, under central control. (*Id.*) After walking the length of the hall, central must unlock the door to either A or B pod to give the person access to the appropriate area. The leader then meets in the multi-purpose room with a group of inmates, without barriers, and without the presence of security staff. (*Id.*)

Up to January of 2013 attorney requests for a contact visit with clients at WBCF were routinely accommodated in the A/B room, the booking interview rooms, and sometimes the N section visiting room. (Ex. 1, 19:10-21; 20:25-21:1; 99:8-25.) In January 2013, however, Captain Jeff Pettitt, at the time the Commander of Corrections, posted a letter indicating that professional contact visits in the future would be limited, and that all attorney-client visits would normally take place in the noncontact rooms with glass partitions and phone handsets. (Ex. 1, 20:4-17; vol. 3 respondent's Exhibit "A", 417.) Between February 4, 2013 when the change was implemented and May only about 12 contact visits were approved for attorneys and clients, at the time the average daily population of the jail was about 200 inmates. (Ex. 1, 71:21-72:11; vol. 3, Respondent's exhibit "E", 422-457.)

This drastic change in availability of contact visits with clients at WBCF led to several attorneys filing motions for a court order requiring the Sheriff to provide contact visits with inmate clients. (Ex. 4, Ex. 5, Ex. 6, Ex. 7, Ex. 20.) Included among them are the real parties in interest. As to real parties, the Respondent Superior Court consolidated the cases for hearing Petitioner's objections to the orders. An evidentiary hearing was held on July 23, and after taking the matter under submission Respondent filed a Ruling and Order requiring the Sheriff to provide confidential contact visits

for attorneys, except where specific circumstances require otherwise. (Ex. 2, 193-198.)

At the hearing the court heard Petitioners' evidence that security concerns about the A/B hall and the booking area made it necessary to restrict the access of attorneys. (Ex. 1, 55:2-62:20; Ex. 8, 246-250.) However, the unlicensed civilians admitted to the secure areas to lead classes, addition recovery meetings, and religious services are still being admitted to the secure area and meeting in the multi-purpose rooms. (Ex. 1, 42:9-45:13.)

Evidence about claimed security issues focused primarily on the booking interview rooms. Close proximity to the booking area with unclassified inmates, lack of central control over door locks, and the safety of attorneys visiting with clients were all mentioned. (Ex. 1, 55:2-62:20; Ex. 8, 246-250; 156:2-159:19.) The A/B room is in a secure hallway, so the issues there are lack of central control over the door lock, and lack of constant visual observation of the room. (The door was upgraded to having a window, but it can't be seen from central, only from nearby in the A/B hall. (Ex. 1, 102:1-4.)

Testimony also established that the visiting area for inmate social visits, which includes the two partitioned professional visit rooms, had recently been retrofitted with locks under central control on the inmate side. Prior to that change inmates were given a key, admitted to the hall outside visiting, and opened the door with the key. (Ex. 1, 24:4-22.) When a visit ended the inmate could open the door into the hall. (Ex. 1, 26:12-21;) This was the same procedure used by attorneys for the contact visits in the A/B room. (Ex. 1, 25:4-11; 26:12-17.)

No reason was given for upgrading the locks at inmate social

visiting, while omitting to change the lock at the A/B attorney visit room. No reason was given for failure to install video surveillance. However the A/B room and booking rooms were retrofitted with a "panic button" to alert corrections staff if a problem arose during a visit.

Respondent court also received evidence from the attorneys for real parties by declarations of counsel. Each attorney represented that in their experience glass barriers and phones have adversely affected the ability to communicate with clients. (Ex. 4, 205-206; Ex. 5, 209-213; Ex. 6, 222-229; Ex. 7, 242-243; Ex. 25, 402-404.) They have experienced great difficulty in establishing sufficient trust to obtain full and accurate disclosures from clients, especially concerning sensitive, embarrassing, and potentially dangerous information. (*Id.*) These experiences informed the opinions of counsel that the absence of contact visitation adversely effects the ability to represent their clients effectively. (*Id.*)

Real parties also presented testimony from Thomas Leupp, a certified criminal law specialist in practice for thirty-five years. (Ex. 1, 137"11-138:9.) Mr. Leupp reported his experience with contact visits at WBCF from the opening of the facility. (Ex. 1, 139:3-20.) In addition to the adverse impact of noncontact visits on effective communication with his clients, he discussed the practical difficulties in the noncontact rooms with handling files, reviewing documents with clients and making notes. (Ex. 1, 141:7-143:28.) In his opinion noncontact visits are not an adequate alternative to contact with the client, and adversely affect the quality of representation. (Ex. 1, 147:25-148:11.)

Lee Osborne testified as a retired Captain from the Nevada County Sheriff's Office. (Ex. 1, 95:2-96:6.) His last position was jail commander, ending in 2007. (*Id.)* Prior to that he served a number of years as

administrative lieutenant for the jail, and in other corrections positions. (Ex. 1, 95:10-28.) Captain Osborne confirmed that throughout his corrections career attorney contact visits were routinely allowed at WBCF. (Ex. 1, 99:8-100:1.) The security risks were handled by staff training and awareness of the traffic in the facility. (Ex. 1, 103:5-104:8.) Security issues in the booking area are handled by use of the seven holding cells, which can be used to segregate potential problem inmates. (Ex. 1, 35:2-27; 111:23-113:2.) Normally, no staff was required to escort inmates to or from visits with attorneys. (Ex1, 116:25-117:24.)

In Captain Osborne's opinion the exclusion of attorney contact visits At WBCF would not have a significant impact on safety or security of the facility. (Ex. 1, 109:2-8; 114:5-25.)

Eugene Roeder, PhD., testified as a psychologist with a practice exclusively in forensic issues. (Ex. 1, 125:20-23) Like Mr. Leupp his experience with Nevada County inmates predates the construction of Wayne Brown and included the courthouse jail facility. (Ex. 1, 126:2-12.) Dr. Roeder indicated there are three aspects to formation of an effective attorney-client relationship which are impacted by a barrier. (Ex. 1, 127:11-129:13.) These are communication/comprehension, confidentiality and trust, and intimacy - defined as the quality that allows disclosure of very personal, embarrassing or shameful things. (Ex. 1 129:1-13.)

In Dr. Roeder's opinion a glass barrier and use of phone handsets has a significant impact in each of these areas. (*Id.*) There is an even greater effect if the inmate has emotional or psychological issues. (Ex. 1, 129:9-12.) Even where there are efforts to compensate for the effects of noncontact visits, for example by spending more time with the client, it is not the same. (Ex. 1, 133:6-23.) In his experience the relationship between

attorney and client is always very important to the quality of representation. For incarcerated clients it is even more crucial, as the communication with the attorney becomes almost a lifeline to the world outside, and even reality itself. (Ex. 1, 133:26-135:1.)

The expert presented by Petitioners was George Malim, retired Captain of the Placer County Sheriff's Office. Captain Malim retired in December 2012, and spent his last six years as Corrections Commander for Placer County. (Ex. 1, 151:13-28.) During that time he supervised the planning and construction of a new $100 million jail, in addition to supervising the existing Auburn Jail. (Ex. 1, 163:10-25.)

Captain Malim testified that it is not possible to build a jail without any security or safety issues. (Ex. 1, 149:1-14; 164:4-27.) Although the planning mantra is that "if it's predictable, it's preventable", he knows that you are still going to have inmates escape and inmates die. (Ex. 1, 159:1-14.) This is true no matter how well you design your policy and your procedures. (*Id.*)

The Placer County jail has two rooms designated for attorney-client contact visits. (Ex. 1, 159:22-160:9.) The are located in the central hallway adjacent to the booking area. (*Id.*) The central control position has a view of the hallway, and into one of the rooms, but no direct sight into the other. (*Id.*) Both visit rooms have a panic button, and a call button to let central know that a visit is completed. Both are secured by locks under central control. (*Id.*)

At Wayne Brown Captain Malim identifies the lack of controlled locks, lack of sight into the visit rooms, and proximity to the booking area of two rooms as security issues. (Ex. 1, 156:21-158:17.) On cross examination he agreed that central control at WBCF has the A/B hall under

visual observation, and the ability to control traffic. (Ex. 1, 166:3-22.) Central can make adjustments based on traffic conditions, for example by delaying the entry of an attorney until other persons leave the hall. (Ex. 1, 166:23-167:12.) Malim also agreed that installing locks under central control and video surveillance equipment would mitigate the concerns for attorney contact visits. (Ex. 1, 164:28-165:8.)

At the conclusion of the hearing the Honorable Thomas Anderson inquired whether the parties accepted his personal familiarity with the WBCF, so that a judicial visit was not required. (Ex. 1, 171:10-21.) All parties agreed. (*Id.*)

ARGUMENT

I.
PETITIONERS HAVE FAILED TO SHOW AN ABUSE OF DISCRETION.

The record before Respondent Superior Court established a recent and dramatic change in the procedures for attorney-client contacts at the Nevada County jail (Wayne Brown Correctional Facility). Until February 4, 2013, during the entire life of the facility attorneys were allowed to have contact visits with inmate clients in the A/B room, in two interview rooms adjacent to the booking section, and in N section visiting. Although there were also two noncontact visit rooms with glass dividers within the family visit area of WBCF, evidence was clear that attorneys rarely used them by choice because they were inadequate for effective communication and representation.

Petitioners offered no evidence of any improper conduct by either attorneys or inmates during contact visits. They offered no evidence of any attack by or against an inmate during a contact attorney visit, or on the way to or from the attorney. They offered only incompetent evidence of an alleged attack on an attorney in the A/B room in 2005, but conceded the inmate was actively psychotic - a factor which should have caused denial of the visit by staff.

Petitioners alleged that they decided to deny virtually all contact visits between attorneys and inmate clients for security of the facility and to protect the attorneys from potential harm. Their expert, retired Captain George Malim from Placer County indicated there were security issues with attorney contact visits, but conceded that a twenty-year history without incident shows the staff was managing the risks well, “or that you’re just

lucky" (Ex. 1,)[1]

However, after helping to design a massive new jail, Captain Malim acknowledged that there are always security risks in every correction facility. It is impossible to eliminate them. He described the attorney contact visit rooms in his own Placer jail, and indicated they were an acceptable risk. Yet the only differences between the Placer and Nevada County contact rooms was the addition of controlled locks, a "call" button, and visual observation of one of the rooms in Placer.

On this record - and with the explicit acknowledgment that the court would also consider its own experience at WBCF - Respondent ordered Petitioners to reinstate contact visits for attorneys "absent specific circumstances" that justify denial in the individual case. The order is founded on the rights to counsel, to access to the courts, and to fair proceedings found in the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I Section 15 of the California Constitution, and Penal Code §2600. It gives appropriate deference to the judgment of corrections staff, without abdicating responsibility to safeguard the rights of the humans committed to the Sheriff's care.

Petitioners failed to establish a legitimate penological interest supporting the decision to deny virtually all contact visits. They suggested that staff is decreasing; but the evidence showed staff is not required for attorney contact visits, as attorneys and inmates both walk unescorted in the secure areas of the jail. They suggested they were protecting the attorneys; but the evidence showed attorneys who feel the need for protection can request a noncontact visit.

---

[1] In management of thousands of people over 20 years "there is no such thing as luck"

The focus of Petitioner's concern was reported to be security of the contact visit locations. But their own expert said the risks were acceptable in his Placer jail, and the rooms at WBCF can be brought to the same standard - or better - by retrofitting controlled locks, a "call" button and video surveillance. Since other areas of WBCF have been retrofitted with similar equipment, including the controlled locks for inmate social visiting, the failure to address attorney contact facilities at the same time raises questions about the sincerity of Petitioners' claims for security and safety.

In fact, the record would support a conclusion that the denial of attorney visits is a reflection of animosity toward attorneys, or their inmate clients, rather than valid, legitimate, security concerns. How else to explain that teachers, church members, twelve-step leaders and all manner of other civilians are allowed through the same A/B hallway now denied to attorneys? And they are allowed to meet with multiple inmates without corrections staff present and only external video surveillance. Any rational consideration points to the conclusion that these inmate programs in the multi-purpose rooms present greater security risks than the attorney contact visits.

In sum, the record supports Respondent's exercise of discretion, and the Petition should be denied.

II.
THERE IS A QUALIFIED RIGHT TO CONTACT VISITS BETWEEN ATTORNEYS AND INMATE CLIENTS.

It may be that Respondent failed to articulate the reasons for its Ruling and Order in the form approved since the most recent amendment to Penal Code §2600. However, Petitioners must still meet their burden to

show the court's order is an abuse of discretion.

Petitioner's begin that effort by setting up a strawman argument to knock down: "There is simply no constitutional right to unrestricted contact visits with counsel." (Petition, p. 17, citing *Mann v. Reynolds* (10th Cir. 1995) 46 F.3d 1055, 1060 (*Mann*).) Real parties have not argued, and Respondent did not rule, that there is an "unrestricted right" to contact visits. Throughout proceedings it has been recognized that the Sheriff and corrections staff should be given a great deal of deference, especially with determinations of security in the individual case. But "the courts cannot abdicate their responsibility to protect inmate's rights to adequate contact with their attorneys and to disapprove of visitation requirements that place a chilling on attorney visitation, especially when the security risk in a given case is ephemeral." (*In re Parker* (1984) 151 Cal. App. 3d 583, 590.)

Respondent's Order strikes an appropriate balance, on the facts before us. It protects the right to adequate attorney client contacts, and specifically reserves to Petitioners the right to restrict contact visits based on specific facts and circumstances.

This is entirely consistent with the approach in cases cited by Petitioners, such as *Small v. Superior Court* (2000) 79 Cal. App. 4th 1000, 1013 (*Small*) [no absolute right to contact visit with attorney, and specific history of inmate justified restriction to meeting with glass partition] and *Mann, supra* 46 F.3d at1060 [no right to completely unfettered contact with counsel]. Petitioners emphasize these comments that there is no absolute right to attorney contact visits. (Petition, pp. 17-18.) However, Real Parties believe each of these cases supports the issuance of Respondent's Order. All that is required is to examine the full context of the cases, rather than an isolated quotation.

In *Mann* death row and high-maximum inmates filed a class action civil rights suit challenging a policy prohibiting barrier-free or contact visits between inmates and legal counsel, alleging the policy violated Inmates' Sixth and Fourteenth Amendment rights. (46 F.3d at 1056.) The federal district court found the policy at issue violated inmates' rights, but that changes made during litigation satisfied the Sixth and Fourteenth Amendments, and denied relief.

The Tenth circuit reversed as to the district court's conclusion the modified policy was constitutionally permissible. (*Mann, supra,* 46 F.3d at 1057.) The specific policy at issue was the limitation of attorney-client visitation to communication through a plexiglass and wire partition, with a two-inch hole to pass documents. (46 F.3d at 1057.)

The Court of Appeal indicated that it "agreed in large measure with the district court's analysis". (*Id.* At 1060.) That analysis began with the recognition that "inmates do not forfeit their constitutional rights by virtue of their incarceration" and that the "access to counsel assured by the Sixth Amendment is essential." (*Mann, supra* 46 F.3d at 1059)

The Circuit Court's disagreement arose where the district court held that it was not required to examine the policies at issue under *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987) (*Turner*). The Tenth Circuit determined that under *Turner* "*any* burden placed upon a prisoner's constitutional rights requires a federal court to take the next step to determine whether it is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns." [emphasis in original][citation omitted](*Mann, supra* 46 F.3d at 1060.

The court also found it "disturbing in the *Turner* context" that

defendants had not explained why attorneys were singled out for restricted contact. (*Id.*) Inmates had "unfettered personal contact with virtually all those with whom they interact *except* their lawyers." (*Id.*)

The circuit court then conducted a *Turner* analysis, both because the right to counsel was burdened by the Plexiglas barriers, and because of the failure to explain why counsel was singled out for this burden. Aware of the "critical balance that must be preserved between 'the 'policy of judicial restraint regarding prisoner complaints and . . . the need to protect constitutional rights,'" [*Turner*] at 2259 (quoting *Procunier v. Martinez*, 416 U.S. at 406)" the Court of Appeal found there was a lack of rational connection between the policy denying contact visits with counsel and a legitimate government interest.

Of note, the *Mann* court observed that the case was in alignment with *Ching v. Lewis*, 895 F.2d 608 (9th Cir. 1990) and the "analysis in *Dreher v. Sielaff*, 636 F.2d 1141 (7th Cir. 1980), which recognized that while prison administrators are given deference in developing policies, they will not be upheld if they unnecessarily abridge the defendant's meaningful access to his attorney and the courts. (*Mann, supra*, 46 F.3d at 10612, citing *Ching,* 895 F.2d at 609.)

Placing this analysis in *Mann* in the context of the present case, Petitioner's decision to severely limit contact attorney visits is a burden on the rights to counsel and access to the courts. Although they claim it was simply the "adherence to an existing policy" (Ex. 1, 17:) to deny access to contact visit rooms, Petitioners have not established what the policy may be. They have not offered a written copy of the purported policy. Their evidence was that Captain Pettitt gave "verbal guidelines" to jail staff, and contact visit requests were denied unless they met the guidelines. (Ex. 1,

46:10-47:22.)

An analysis of *Turner* factors is required here, then, both because there is a burden on the inmates' constitutional rights, and because the specter of arbitrary deprivation of rights is raised by the absence of evidence that a policy even exists.

Applying *Turner* as explained in *Mann,* Petitioners have failed to prove a valid, legitimate, penological interest for singling out attorneys from all the other persons allowed to have barrier-free contacts with inmates in the secure areas of the jail.

Small considered in context provides similar support for Respondent's Order. In that case inmate Barrett was classified in a SHU (Security Housing Unit) at Calipatria State Prison, and charged with murder of a cellmate. (*Small, supra*, 79 Cal. App. 4th at 1005.) Regulations for the SHU allowed only visits through glass or another barrier, with no physical contact. (*Id.*) Nevertheless, the attorney for Barrett got a court order for contact visits. Contact visits were provided for months, but eventually terminated by prison administration. Barrett's counsel then pursued motions in Superior Court. (79 Cal. App. 4th at 1006.)

During the hearings the prison constructed a special visiting room for Barrett and his attorney. It was confidential, but had a plexiglass barrier with holes to allow communication. Exchange of documents was allowed only after inspection by a corrections officer. In court, Warden Small documented Barrett's extensive history of prison violence, and the making and use of weapons. Barrett and his attorney testified that contact visits were necessary to protect confidentiality.

The general SHU regulation restricting contact visits was not before the court. The trial court order addressed only Barrett and the special room,

and required replacing the glass barrier with wire mesh and a pass-thru for documents. Warden Small filed a Petition for writ seeking to invalidate that order.

The court of appeal granted the writ. Acknowledging that inmates have "the right to effective assistance of counsel", and that "[a]dequate legal representation requires a full disclosure of the facts" the court focused on the confidentiality of contact with counsel, the only issue raised by Barrett. Using the *Turner* factors, and mindful of Penal Code §2600, the court observed that "that restriction of an inmate's constitutional rights may not extend beyond that which is reasonably necessary for prison security concerns...." (*Small, supra*, 79 Cal. App. 4th 1011.) The specific facts in the record satisfied the first three criteria of *Turner*, and the court then turned to the final question: was the security measure an exaggerated response?

The court explained that this standard is different than a "least restrictive alternatives" approach. (79 Cal. App. 4th at 1012.) "'[W]hen prison officials are able to demonstrate that they have rejected a less restrictive alternative because of reasonably founded fears that it will lead to greater harm, they succeed in demonstrating that the alternative they in fact selected was not an 'exaggerated response' under Turner.' (*Thornburgh v. Abbott* (1989) 490 U.S. 401, 419 [109 S. Ct. 1874, 1884-1885, 104 L. Ed. 2d 459].)" (*Small, supra*, 79 Cal. App. 4th at 1013.)

In this case Petitioners have failed to establish that the "less restrictive alternative" of modifications to contact visit rooms was rejected because of a reasonably founded fear of greater harm. In the language of *Turner,* it appears that the denial of contact attorney visits is an exaggerated response to theoretical concerns which are purely speculative as to WBCF, and on the record before this court. There is no justification offered for

singling out attorney contact with inmates, when a wide range of other civilians are given access to groups of inmates in the secure areas. There is no explanation why the alternative of retrofitting door locks, call buttons and surveillance cameras was impractical, ineffective, or too expensive in meeting the security concerns. In fact, as noted above, Petitioner's own corrections expert testified that Placer jail contact rooms with those features are acceptable for attorney visits.

Stepping away from the details of *Mann* and *Small*, we see a sub-text emerging. These courts accept, without needing to explain, that attorneys meet with clients who are *not* in custody in an office setting, privately, and develop a relationship of trust and communication directed toward effective representation in defending a criminal case.[2] The incarcerated client has an equal right to representation, and fair access to the courts under the Fifth, Sixth, and Fourteenth amendments, and the state analog. So when that attorney-client relationship is burdened by correctional policies or practices the burden must be balanced against the reasons, with due deference to the expertise of corrections officials.

In other words, there is no absolute right to contact visits between attorney and client, but if the right to counsel is burdened by the deprivation of contact with counsel there is a sufficient constitutional interest to require evaluation and balancing under the *Turner* factors.

///

///

---

[2] Real parties have never heard of an attorneys office with glass-partitioned rooms for client conferences.

III.
PETITIONERS HAVE FAILED TO ESTABLISH A LEGITIMATE PENOLOGICAL REASON FOR DENIAL OF CONTACT ATTORNEY VISITS.

"[T]here must be a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it. *Block v. Rutherford, supra*, at 586. Thus, a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational. Moreover, the governmental objective must be a legitimate and neutral one." (*Turner v. Safley, supra*, 482 U.S. at 89-90, 107 S.Ct. at 2262.)

Petitioners' proffered justification for the drastic change in access to counsel is the security and safety of the inmates, staff and attorneys. In the abstract, this is a legitimate motive and an appropriate goal. But what evidence is there that the security concerns expressed are legitimate?

Captain Osborne testified that contact visits were provided routinely, without additional staff, without incident, for the history of the facility through his retirement in 2007. Captain Pettitt confirmed that this unblemished safety record continued through February 4, 2013, when contact visits with attorneys were effectively ended.

Petitioners offered testimony of "security concerns" about locks and surveillance but not one incident where the concerns were realized. Captain Malim testified that Placer jail rooms differing from WBCF only by the use of controlled locks and call buttons provided adequate security for attorney contact visits.

There was a suggestion that population has gone up, but all of the increase between 2007 and 2013 (Average Daily Population going from 157 to 207 (Ex. 1, 119 ; 71) can be explained by the 50 - 60 federal inmates

accepted at the jail under contract. (Ex. 1, 84) We are told that staff has gone down, but not what measures have been taken to correct that problem. Between the federal inmates and realignment funds Petitioners didn't even know how much additional funding they received for operation of the jail. (Ex. 1, 80:17-24; 85:22-25.)

Also troubling is the failure to limit the contact visits with all manner of unlicensed teachers and group leaders, at the same time visits with attorneys are deemed too risky to continue. (Ex. 1, 42:9-45:13) It is not lost on counsel for real parties that the denial of contact visit rooms also reduced the number of attorney visit rooms at WBCF from six to two. This factor will impose its own burden on attorney-client communication as attorneys, psychologists, drug program evaluators and others queue up for hours to have access to their clients. (See *Benjamin v. Fraser* (2nd Cir. 2001) 264 F.3d 175, 185 [unreasonable interference with the accused person's ability to consult counsel is itself an impairment of the right.].)

Like the Tenth Circuit in *Mann*, "we agree in large measure" with the Respondent court's Ruling and Order. Petitioners have burdened real parties' rights to counsel, to access to the courts and to fair proceedings. They have not, however, presented sufficient evidence to meet their burden of showing a legitimate penological reason, or that Respondent acted in excess of jurisdiction.

IV.
THERE ARE NO ADEQUATE ALTERNATIVE MEANS OF FULFILLING THE RIGHTS TO COUNSEL AND ACCESS TO THE COURTS.

"A second factor relevant in determining the reasonableness of a prison restriction ... is whether there are alternative means of exercising the

right that remain open to prison inmates." (*Turner*, 482 U.S. at 90, 107 S.Ct. at 2262.)

In the fifty years since *Gideon v. Wainwright* evidence has only continued to mount that the right to counsel is fundamental to due process for the accused in criminal cases. According to our evolving standards, it is not just counsel, but *effective* counsel that is required. (See *Strickland v. Washington*, 446 U.S. 668 [80 L.Ed. 2d 674; 104 S.Ct. 2052].)

Petitioner's have chosen to deny contact visits with counsel to the great majority of inmates at WBCF. They have offered the alternative of a single contact room at court holding, during court hours when many other inmates and counsel are coping with court appearances. Other than that, the 200 or so incarcerated persons in Nevada County must make do with two noncontact attorney rooms, yelling through glass or over the phone while trying not to be overheard by other inmates and their social visitors. This is not an adequate alternative to barrier-free meetings with counsel.

A better alternative would be meetings in the multi-purpose rooms used for classes and religious meetings. But Petitioners have not made that option available, and doing so would probably burden other rights of the inmates by interfering with religious meetings and education.

Petitioners seek to devalue the attorney-client relationship and view communication as solely the ability to hear a word. But "relationship" covers a wide range of human interactions, from the "Hi!" of the Starbucks Barista you see every morning, to the breadth and depth of a life-long marriage and romance. "Communication" can be as spare as an "OK" sign with the fingers, or as rich and thought provoking as the soliloquy from "Hamlet".

It is true that attorney and client can "communicate" through a glass

barrier, word-by-word and with all the repetition required. But they don't have the "communication" essential to the attorney-client relationship, and without which counsel is only effective in representing the client's interests by accident, since the true circumstances of the client and the case are obscured behind the barriers.

In *Turner* terms, two visiting rooms with glass barriers and phones are not an adequate alternative to contact visits, and do not relieve the burden on the inmates' rights imposed by the change in visitation practices at Wayne Brown.

V.
ACCOMMODATION OF THE RIGHT TO CONTACT VISITS WILL HAVE NEGLIGIBLE EFFECT ON GUARDS, OTHER INMATES, OR PRISON RESOURCES.

As described in the testimony, from the opening of Wayne Brown to February 4, 2013, contact visits were routinely provided to attorneys, psychologists and other professionals. Normally, no guards were required to escort either attorneys or inmates through the secure hallways. Only once was there an incident where staff had to respond, and that involved a known psychotic inmate.

The A/B and booking area interview rooms have been fitted with panic buttons, and a door with a window was installed in the A/B room. Inmate social visit rooms were recently fitted with locks under central control, but were not added to the interview rooms. There is no evidence that installation of locks and call buttons, and perhaps video surveillance, would strain the Sheriff's resources.

The only effect on other inmates of accommodating real parties'

request for contact visits would be the happy anticipation of meeting their own attorneys "in person".

In other words, accommodation of contact visits with attorneys in this facility would have negligible adverse impact.

VI.
THE BARRIER TO CONTACT VISITS IS AN EXAGGERATED RESPONSE TO PETITIONERS' CONCERNS.

To borrow a phrase from a brilliant marketing campaign: "Where's the beef?" Petitioners have offered a short list of hypothetical security concerns to justify the restriction burdening inmates' rights. But as Captain Malim indicated, playing out hypotheticals and worst-case scenarios is the job of corrections administrators: "if it's predictable, it's preventable". This is essentially a game of trying to beat Murphy's Law. Even then, Malim admits that bad things will happen.

This built-in bias of security personnel, although useful, also ensures that they will periodically overreach to protect against the remote possibility of harm. In other words, make an unreasonable intrusion on inmates rights to prevent a possible harm that is not reasonably likely to occur. Accordingly, it is up to judges and courts to apply a more objective evaluation of what is a risk, what is a burden on inmate rights, and what is an exaggerated response. The expertise of security administrators entitles them to deference, but if their inherent tendency to excesses is not restrained the whole world will eventually be confined to a SHU.

Since Petitioners have proven it is not possible to make a jail absolutely safe, the question is always what is safe enough, and what risks are acceptable. Real parties submit that a practice of contact visits in the

secure areas of WBCF which produced no injuries, harm, smuggling or other adverse events in two decades is safe enough. Respondent reached that conclusion after hearing the evidence and with the court's own knowledge of the facility. The order to resume contact visits was not an abuse of discretion.

In addition, although Petitioners have claimed they are simply adhering to a long-established policy, they have not proven what the policy may be. Captain Pettitt testified he gave verbal direction to his staff from February on, but never offered a copy of any written policy. This leaves far too much to the discretion of individual officers, and ensuing arbitrary and inconsistent application. How would an inmate challenge a violation of a verbal "policy"? In colloquial terms, "if it isn't written, it doesn't exist".

Petitioners' arguments in support of the Petition also seem exaggerated at times. For example, there is an attack on Respondent for even hearing the testimony of Captain Osborne. (Petition, p. 51.) Although the history of security and contact visits at WBCF was clearly in issue, Petitioners state that his opinions about conditions up to 2007 were improper and even "absurd."

Petitioners note that when asked how to improve the security of the contact room Osborne responded "Put a lock on it." That answer is both elegant and succinct - following the testimony of Captains Pettitt and Schmidt that one security concern was opening the door from inside, Captain Osborne was clearly referring to installing a lock under central control, as had already been done for the inmate visiting rooms in the A/B hall. In fact, Petitioners' expert made the same suggestion.

Likewise, it is eminently reasonable to suggest that if staff numbers are going down the first response should be to attempt to increase staff. One

of the duties of a Sheriff is to assure there is adequate staff to meet the housing, feeding, medical and legal needs of the persons entrusted to his care. What would be absurd is to suggest that if the Sheriff were to terminate or furlough all of the staff their absence would excuse the inevitable harm to the unsupervised inmates.

Rather than effective criticism of Captain Osborne's testimony, these comments highlight what appears to be Petitioners' total disregard of the rights of persons committed to their care by the courts, and an unrestrained desire to deprive them of counsel, and their rights under the U.S. and California constitutions.

VII.
CONCLUSION

Respectfully, Real Parties suggest that respect for the humanity of persons incarcerated by the justice system is a necessity, not a luxury. If we wish to maintain the principle that "all persons are equal under law" we can't afford the hypocrisy of treating inmates as something less than a "person". To that end, when the constitutional rights of inmates to counsel and access to the courts are burdened by corrections officials the courts have a duty to balance the weight of legitimate security needs against the impact on the rights and human dignity of those affected.

Petitioners' claim seems to be that any plausible articulation of security reasons for the infringement of the right to counsel is immune to judicial scrutiny. But that is not the lesson of *Turner v. Safley,* or its progeny. As restated in Penal Code §2600, a prisoner may "be deprived of such rights, and only such rights, as is reasonably related to legitimate penological interests."

The courts have a duty to scrutinize the reasons given to justify impairment of inmate rights in order to ensure that only legitimate and substantial needs of the institution are being served. That scrutiny is informed by respect for the expertise of corrections officials, but is not limited to deference alone.

Respondent Superior Court of Nevada consolidated multiple challenges to the denial of contact visits for attorneys at Wayne Brown Correctional Facility into a single hearing. Petitioners and real parties were given an opportunity to develop evidence of the extent of the burden placed on the inmates' right to counsel, on the one hand, and the legitimacy of the security needs for the restriction on the other.

Clearly aware of the deference due to corrections officials, and equally cognizant of its responsibility to protect inmates' rights to adequate contact with counsel, (Ex. 1, 194:24-195:15) Respondent found insufficient evidence that elimination of attorney contact visits would significantly improve security at the jail. (Ex. 1, 198:6-9.) With no evidence to support the burden imposed on the right to counsel, Respondent ordered the resumption of contact visits with attorneys as in the *status quo ante*.

This determination and order is supported by the record, and the Petitioners have failed to show any abuse of discretion. Real Parties respectfully request that the Petition for Writ be denied.

Dated: October 15, 2013

By: _____
STEPHEN A. MUNKELT

PROOF OF SERVICE

I am over the age eighteen (18) and not a party to the within entitled action. I am employed by Munkelt Law Office, 206 Providence Mine Road, Suite 218, Nevada City, CA 95959. October 15, 2013, I served the document(s) named below on the party(ies) listed below as follows:

DOCUMENT(S) SERVED:

Return to Petition for Writ of Mandate

SERVED UPON:

Nevada County Superior Court
Criminal Division
201 Church Street
Nevada City, CA 95959

Nevada County Sheriff's Office
950 Maidu Ave.
Nevada City, CA 95959

Keith Royal
Nevada County Sheriff
950 Maidu Ave.
Nevada City, CA 95959

JONES & MAYER
Martin J. Mayer
James R. Touchstone
Krista MacNevin Jee
3777 North Harbor Blvd.
Fullerton, CA 92835

Jody Schutz
Nevada County Public Defender
220 Main St.
Nevada City, CA 95959

Tamara Zuromskis
Public Defender
224 Main St.
Nevada City, CA 95959

Jennifer Granger
206 Providence Mine Rd., #218
Nevada City, CA 95959

William G. Walker III
P.O. Box 1127
Nevada City, CA 95959

Hon. Thomas Anderson
Nevada County Superior Court
201 Church St., Suite 7
Nevada City, CA 95959

x **BY MAIL** I served the above-named document on the following party(ies) in said action, in accordance with **Code of Civil Procedure § 1013(a),** by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth above. In the ordinary course of business at the Munkelt Law Office, mail placed in that designated area is given the correct amount of postage, and is deposited that same day in a United States mailbox in Nevada City, California.

☐ **BY FACSIMILE TRANSMISSION**. I served the above-referenced document(s) on the above-named party(ies) in said action in accordance with **Code of Civil Procedure § 1013(e)**, by transmitting a true copy thereof to a facsimile machine maintained by the person(s) on whom it is served at the facsimile machine telephone number last given by that person(s).

☐ **BY PERSONAL SERVICE** I served a true copy thereof, in accordance with **Code of Civil Procedure § 1011,** to the person(s) and at the address(es) set forth above.

☐ **BY OVERNIGHT EXPRESS SERVICE** - I caused such envelope(s) to be deposited in a box or other facility regularly maintained by the express service carrier or delivered to a courier or driver authorized by the express service carrier with delivery fees paid or provided for to the person(s) at the address set forth above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that service was made under the direction of an active member of the State Bar of California who is not a party to the cause.

Lisa J. Lehr