IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

COUNTY OF NEVADA, THE NEVADA COUNTY SHERIFF'S OFFICE, AND SHERIFF-CORONER-PUBLIC ADMINISTRATOR KEITH ROYAL, in his official capacity, Petitioners, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF NEVADA, Respondent. JACOB MICHAEL SIEGFRIED, RAYMOND LEE DUZAN, JONATHAN SCOTT FOOTE, JOSE EDUARDO HENRIQUEZ, CESAR SANTIAGO, BRETT RAYMOND WILKINS Real Parties in Interest.	CASE NO.: C074504 Hon. Thomas M. Anderson Judge of the Nevada County Superior Court (530) 265-1311 Case No: F11-00317 [*People of the State of California v. Jacob Siegfried*] Case No: F12-000450 [*People of the State of California v. Ray Lee Duzan*] Case No: F13-000059 [*People of the State of California v. Jonathan Scott Foote*] Case No: F12-000376, M12-001672A, MI2-001123, M13-0093, M12-001776, M12-1105, and M12-001618B [*People of the State of California v. Jose Henriquez*] Case No: F13-000175 [*People of the State of California v.Cesar Santiago*] Case No: F12-000504B [*People of the State of California v.Brent Raymond Dennis Wilkins*]

BRIEF OF AMICI CURIAE *CALIFORNIA STATE SHERIFFS' ASSOCIATION, CALIFORNIA POLICE CHIEFS ASSOCIATION*, and *CALIFORNIA PEACE OFFICERS' ASSOCIATION*

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The California State Sheriffs' Association ("CSSA"), the California Police Chiefs Association ("CPCA"), and the California Peace Officers' Association ("CPOA") request leave to file the attached Amici Curiae Brief in support of Petitioners, to assist this Court in resolving the important issues of law presented in this matter. CSSA represents each of the 58 Sheriffs in California. CPCA represents the municipal police chiefs of over 330 police departments statewide. Finally, CPOA represents over 3000 sworn peace officers statewide. These Associations are interested in this case because the legal issues presented have a profound impact on each of the Associations' members.

The Applicant endeavors to provide this Court with a brief that represents the interests of the Associations, which have custody, control and legal obligations relating to incarcerated pre-trial and post-conviction inmates, and are therefore impacted by the decisional law of the Court of Appeal pertaining to inmate contact visits. Therefore, Applicant respectfully requests leave to file the attached Amici Curiae brief addressing the issues in this case.

Dated: November 22, 2013

Respectfully submitted,

By: _____

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California Police Chiefs Association,
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BRIEF OF AMICI CURAE

INTRODUCTION.

Amici curiae are three nonprofit, professional associations working together in support of the Petitioners.

The California State Sheriffs' Association (CSSA) is an organization made up of the 58 constitutionally elected sheriffs in the State of California. The sheriff in each county is responsible for keeping the jails of the counties in which they are located. (Cal. Pen Code § 4000) More specifically, each sheriff is responsible for taking charge of and being the sole and exclusive authority for keeping a county jail, and the prisoners in it. (Cal. Gov. Code § 26605). Additionally, "[t]he sheriff of any county which maintains a jail in another county has the same control and supervision of the property, personnel, and inmates that he would have if the jail were located within the boundaries of the county which maintains it." (Cal. Gov. Code § 26610). Inasmuch as this Court's ruling in this case will affect the ability of all 58 sheriffs to control and supervise the property, personnel, and inmates of their respective jails, it is critical for this Court to consider the perspective of the CSSA, which represents the perspective of those legally responsible for ensuring constitutionally appropriate jail facilities.

The California Police Chiefs' Association (CPCA) was established in 1966 to represent municipal law enforcement agencies in California. The CPCA's

objectives are to promote and advance the science and art of police administration and crime prevention; and to develop and disseminate professional administrative practices, and to promote their use in the police profession; to foster cooperation and the exchange of information and experience among and between law enforcement agencies throughout California. Pursuant to the California Penal Code, a city police department may operate a city jail to be used for holding persons for examination or during trial, or persons who have been transferred from the county jail. (Cal. Pen Code § 4004.5) Inasmuch as this Court's ruling in this case will affect the functioning of city operated jail facilities, it is critical for this Court to consider the perspective of the CPCA, which represents the perspective of those legally responsible for ensuring constitutionally appropriate city jail facilities.

The California Peace Officers' Association (CPOA) serves the needs of professional law enforcement through issue exploration, resource development, educational opportunities, and advocacy. The CPOA has more than two thousand members of all ranks from municipal, county, state, and federal law enforcement agencies from throughout California. Many of the CPOA's members work in jails located throughout the state of California. The CPOA is committed to developing progressive leadership for the California law enforcement community.

Amici have an interest in the outcome of this case because the issue presented will have a profound impact on the members of each association, as well as other employees under the command of the state's sheriffs and police chiefs. In short, the outcome of this case may impact the majority of peace officers in the State of California and their agencies. It is with their collective interests in mind that this brief of amici curiae is offered on this matter.

I.
AN INMATE DOES NOT HAVE A CONSTITUTIONAL RIGHT TO AN ATTORNEY CONTACT VISIT.

The Sixth Amendment to the Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall...have the assistance of counsel for his defense." The U.S. Supreme Court has previously held that the right of access to the courts includes the right to talk in person and on the telephone with counsel in confidential settings. (See Procunier v. Martinez, 416 U.S. 396 (1974) (overruled on other grounds))

The preliminary, and possibly determinative, issue in this case is whether the right of access to the courts includes the right of an inmate, in a county jail, to have contact visits with his or her attorney.[1] On this matter, the California Court of Appeal, Fourth Appellate District has already determined that it does not. In

[1] For the purpose of this brief, the term "contact visit" is meant to refer to "a meeting space without any physical barrier between the attorney and client," as defined by the Superior Court in its Ruling and Order.

Small v. Superior Court (Barrett), 79 Cal. App. 4th 1000, 1013 (2000), the Court of Appeal stated that "[i]t is important to recognize that although the law jealously guards the right to effective assistance of counsel and the concomitant right to confidential communications with counsel, the law does not give prison inmates the absolute right to have contact visits with their counsel. What the law does require is that the inmate's meeting with his or her attorney be private."

Even before the United State Supreme Court decided Turner v. Safley, 492 U.S. 78 (1987), the seminal case pertaining to rules and regulations that may be imposed by a correctional facility, California Courts of Appeal had concluded that personal contact visits with attorneys could be terminated and substituted with noncontact visits in the interest of institutional security and public protection. (Department of Corrections v. The Superior Court of Marin County, 131 Cal. App. 3d 245 (1982).)

The Turner case explicitly gave correctional administrations wide latitude and significant deference in running correctional facilities. It reflects a philosophy that correctional administrators, not judges, are in the best position to determine how best to manage a correctional facility. In that vein, not every decision by a correctional administrator infringes upon a constitutional right. Before a court begins a Turner analysis, the inmate challenging the restriction must establish that the rule being challenged interferes with the inmate's constitutional rights. Only

then, after this initial threshold has been met, does the court apply the highly deferential Turner analysis to determine whether the challenged restriction is permissible.

Put another way, the court does not sit in judgment of every restriction imposed by a correctional administrator. The U.S. Supreme court has made it "quite clear that the standard of review....adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights." (Emphasis added). Washington v. Harper, 494 U.S. 210, 224 (1990). Thus, it is only those restrictions that interfere with an inmate's constitutional rights that are subject to Turner review.

It is this constitutional threshold that is of concern to Amici Curiae. While Amici believe that the trial court failed to apply the Turner factors, Amici also believe that for the trial court to have even subjected the Sheriff's decision to limit contact visits to an analysis under Turner would have been, in and of itself, error, because there is no constitutional right of a jailed inmate to an attorney contact visit. Amici readily acknowledge that inmates have a right to legal counsel pursuant to the Sixth Amendment of the United States Constitution, and that this right to counsel necessarily includes the right of an inmate to meaningful consultation with counsel. However, Amici do not believe that Real Parties in Interest have established that the right of an inmate to meaningful consultation

includes a constitutional right to a barrier free attorney contact visit. Simply put, a contact visit with an attorney, in and of itself, is not a constitutional right.

II.
FAILURE TO PROVIDE AN ATTORNEY CONTACT VISIT DOES NOT IMPINGE UPON THE SIXTH AMENDMENT RIGHT TO COUNSEL.

Because there is no constitutional right to an attorney contact visit while in jail, Real Parties in Interest have the burden of establishing that the failure to provide contact visits interferes with the Sixth Amendment right to counsel. Before a court can embark on a Turner analysis to determine whether restrictions on contact visits are a permissible restriction that may be imposed by a correctional administrator, the party challenging the restriction must demonstrate that, in the absence of contact visits, an inmate cannot meaningfully confer and consult with counsel in preparation for trial. A mere preference for a contact visit is not sufficient. Nor would it be sufficient to demonstrate that a contact visit would be more convenient or less onerous than other means provided by the facility that allow for consultation. Real Parties in Interest must demonstrate that the absence of a contact visit impinges on their Sixth Amendment right to meaningfully confer with their counsel. Not only did Real Parties in Interest fail to make this showing, they cannot do so.

Even without contact visits, inmates in county jails operated by Amici Curiae maintain a right to visit and consult confidentially with their attorneys.

They may do so at face-to-face visits, and they may do so through telephone visits. They are also free to pass documents to their attorneys. Quite literally, the only thing that prohibiting contact visits prevents is physical touching between an inmate and his counsel. Manifestly, physical touching is not an integral, expected, or even desired component of an attorney-client relationship. An inmate, as well as anyone else who retains an attorney, has a right to expect loyalty, diligence, and confidentiality from that attorney. An inmate also has a right to expect that he will able to consult with that attorney in a way that allows him to speak with his or her attorney candidly, confidentially, and in a way that permits meaningful preparation for trial. However, there is no expectation whatsoever that an inmate, or any other person using the services of an attorney, has a right to physical touching with that attorney. Amici are unaware of any case in United States jurisprudence in which an attorney has been found to have provided ineffective assistance of counsel to his or her client for failing to engage in any physical touching with his or her client.

Real Party in Interest may claim that the purpose and benefit of a "contact visit" is not physical touching, but rather, to facilitate communication and consultation, which is at the core of an attorney's representation of a client. However, the focus on the inability of an attorney and client to physically touch each other absent a contact visit is entirely appropriate and necessary, given that

physical touching is the only type of contact that is outright prohibited by not allowing contact visits. An inmate is not prohibited from seeing his attorney or making eye contact. That type of contact can be, and is, accomplished through non-contact visits. An inmate is not prohibited from speaking confidentially with his or her counsel. The jail provides confidential telephone calls. An inmate is not prohibited from reviewing documents with his or her counsel. Anything and everything that an attorney needs to be able to do to effectively, competently, and confidentially represent a client can be accomplished through means that are currently provided by all Sheriffs who operate county jails. The only thing that Petitioner's rule against contact visits prohibits is physical touching between an attorney and a client. Therefore, if Real Parties in Interest are claiming that the prohibition against contact visits impinges upon their Sixth Amendment right to counsel, then they bear the burden to explain why the need for physical touching between an attorney and client is so fundamental to effective representation that to prohibit it in a jail is to impinge on an inmate's Sixth Amendment right to counsel.

III.
THE RIGHT TO AN ATTORNEY CONTACT VISIT IS FUNDAMENTALLY INCONSISTENT WITH INCARCERATION.

Even assuming, arguendo, that there is some tangible benefit to an attorney and client by having the ability to physically touch each other, the loss of such a

benefit would not necessarily constitute an "impingement" that necessitated Turner scrutiny, as the Turner case itself demonstrates.

In Turner, one of the two restrictions being challenged by inmates was the restriction on the right to marry. The existence of the fundamental right to marry had been identified eight years prior to Turner in Zablocki v. Redhail, (1978) 434 U.S. 374. In that case, the State of Wisconsin had passed a law preventing a person from marrying if he or she were behind in their court-ordered child support payments. The United States Supreme Court found that the law violated a person's right to marry, which was guaranteed by the Due Process clause of the Fourteenth Amendment.

The prison administrator in Turner argued that the restriction on marriage in a correctional facility did not impinge on an inmate's right to marry because Zablocki did not apply to prison inmates. The Supreme Court analyzed this argument as follows:

> We disagree with petitioners that Zablocki does not apply to prison inmates. It is settled that a prison inmate "retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." Pell v. Procunier, *supra*, at 822. The right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration. Many important attributes of marriage remain, however, after taking into account the limitations imposed by prison life. First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual

> significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a pre-condition to the receipt of government benefits (e. g., Social Security benefits), property rights (e. g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e. g., legitimation of children born out of wedlock). These incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals. [P] Taken together, we conclude that these remaining elements are sufficient to form a constitutionally protected marital relationship in the prison context.
> Turner, 482 U.S. at 95-96.

Having first established that there was a constitutional right to marry, and then finding that the Missouri regulation did, in fact, impinge on the rights of inmates to marry, the Supreme Court then proceeded to analyze the regulation under Turner, and found that it was not reasonably related to penological interests. Turner, 482 U.S. at 97-99.

What is significant about the Court's reasoning is that it analyzed the right to marry not as it may have existed generally, but as it exists in a correctional facility. The Court specifically acknowledged that "[t]he right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration." The Court then analyzed whether the regulation impinged on the inmate's right to marry, making an allowance for the fact that the inmate did not possess the same degree of liberty as non-incarcerated individuals. Only after finding that "incidents

of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate correctional goals," (Turner, 482 U.S., at 96) did the Court then apply the four-factor Turner analysis.

This approach was utilized by the Ninth Circuit Court of Appeal in Gerber v. Hickman, 291 F.3d 617 (2002). In Gerber, a California State Prison inmate alleged that he had a constitutional right to provide a semen sample to his wife so that she may use the same to impregnate herself. In its analysis, the Ninth Circuit initially acknowledged that the right to procreate was a "fundamental element of personal liberty." Gerber, 291 F.3d at 621. But that, in and of itself, was not enough to subject the jail's restriction to a Turner analysis. The Ninth Circuit went on to state that

> First, we must determine whether the right to procreate while in prison is fundamentally inconsistent with incarceration. Turner, 482 U.S. at 94-96. If so, this ends our inquiry. Prisoners cannot claim the protection of those rights fundamentally inconsistent with their status as prisoners.
>
> Only if we determine that the asserted right is not inconsistent with incarceration do we proceed to the second question: Is the prison regulation abridging that right reasonably related to legitimate penological interests? Turner, 482 U.S. at 96-99.
> Gerber, 291 F.3d at 620.

The Ninth Circuit then proceeded to analyze the right of marriage not as a whole, but unpacking each of the "aspects of marriage" to determine whether those aspects of marriage were "superseded by the fact of confinement." Gerber, at 621.

> We begin our analysis by inquiring whether the right to procreate is fundamentally inconsistent with incarceration. Incarceration, by its very nature, removes an inmate from society. Pell, 417 U.S. at 822-23. A necessary corollary to this removal is the separation of the prisoner from his spouse, his loved ones, his friends, family, and children. *Cf.* Montanye v. Haymes, 427 U.S. 236, 242 n.4, 49 L. Ed. 2d 466, 96 S. Ct. 2543 (noting that among the hardships that may result from a prison transfer are separation of the inmate from home and family). Once released from confinement, an inmate "can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life." Morrissey v. Brewer, 408 U.S. 471, 482, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972). But not until then.
>
> During the period of confinement in prison, the right of intimate association, "a fundamental element of personal liberty," Roberts v. United States Jaycees, 468 U.S. 609, 618, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984), is necessarily abridged. Intimate association protects the kinds of relationships "that attend the creation and sustenance of a family - marriage, childbirth, the raising and education of children, and cohabitation with one's relatives ...." 468 U.S. at 619 (citations omitted). The loss of the right to intimate association is simply part and parcel of being imprisoned for conviction of a crime.
>
> "Many aspects of marriage that make it a basic civil right, such as cohabitation, sexual intercourse, and the bearing and rearing of children, are superseded by the fact of confinement." Goodwin v. Turner, 702 F. Supp. 1452, 1454 (W.D. Mo. 1988). Thus, while the basic right to marry survives imprisonment, Turner, 482 U.S. at 96, most of the attributes of marriage - cohabitation, physical intimacy, and bearing and raising children - do not. "Rights of marital privacy, like the right to marry and procreate, are necessarily and substantially abridged in a prison setting." Hernandez v. Coughlin,

> 18 F.3d 133, 137 (2d Cir. 1994) (citing Turner, 482 U.S. at 95-96). Incarceration is simply inconsistent with the vast majority of concomitants to marriage, privacy, and personal intimacy.

Using this framework, the Ninth Circuit framed the issue as whether the right to procreate was fundamentally inconsistent with incarceration. Concluding that it was, the Ninth Circuit found that it was not necessary to apply the four-factor Turner analysis, and upheld the restriction

This analytical framework should guide this Court's analysis. Pursuant to Turner and Gerber, the question for the Court is not whether the right to counsel survives incarceration (plainly, it does), but whether contact visits with an attorney are an aspect of the Sixth Amendment right to counsel that survive incarceration (to the extent that contact visits are an aspect of the right-to-counsel to begin with).

Based on the above, a court reviewing a correctional regulation must, even before it applies the four-factor Turner analysis, first determine whether there is a constitutional right at issue. If not, no Turner analysis is performed. If so, the court must then determine whether the identified constitutional right is fundamentally inconsistent with incarceration. If it is, then no Turner analysis is conducted. If the constitutional right is not fundamentally inconsistent with incarceration, then and only then should the court perform a Turner analysis.

Here, the questions that the trial court should have asked were 1) whether there was a constitutional right to a contact visit, 2) if not, whether the Sixth Amendment right to counsel included the right to physical contact between an attorney and his or her client, and 3) if so, whether that component of the right to counsel was fundamentally inconsistent with incarceration.

For the reasons previously stated in this brief, Amici Curiae believe that the Sixth Amendment's right to counsel plainly does not include the right to physical contact between an attorney and a client, however, even if it did, any "right" to physical contact that exists between an attorney and a client must clearly be inconsistent with an inmate's incarceration. Correctional facilities exist largely (perhaps primarily) for the purpose of preventing inmates from physically harming members of the population at large. The Sixth Amendment right to counsel must necessarily co-exist with the overriding penological goal of preventing inmates from being able to assault members of the public.

The same logic applies to inmates who are not serving sentences for crimes of violence. Another significant purpose of a correctional facility is to prevent inmates from having access to the illegal narcotics that caused many of them to be sentenced to a period of incarceration, or that can be used to further illegal activity within jails. The Sixth Amendment right to counsel must necessarily co-exist with the legitimate penological goal of preventing the passage of contraband to inmates

by contact visits in which a visitor and an inmate have the ability to pass contraband.

Finally, every correctional institution has a primary goal of preventing escapes. The Sixth Amendment right to counsel must necessarily co-exist with the legitimate penological goal of preventing escapes by disallowing contact visits, where a visitor has the ability to pass to an inmate items that will aid in an inmate's escape.

These three penological goals: the prevention of assaults, the prevention of contraband in the facility, and the prevention of escapes, are the very core penological goals of jail facilities operated by Amici Curiae. A contact visit has the potential to undermine all three of these penological goals. Accordingly, an order that Petitioner, or any elected Sheriff, must provide contact visits has ramifications that significantly impact jail operations, and usurp management responsibility away from a Sheriff who is statutorily obligated to keep the county jail and the prisoners in it. (Cal. Gov. Code § 26605; Cal. Pen Code § 4000). This is because a Sheriff cannot allow contact visits without putting in place additional security measures that require additional manpower to effect, or that may create security risks that cannot be fully or efficiently mitigated even with additional security measures.

Sheriffs do not enjoy unlimited resources. A Sheriff must direct his or her limited resources in a way that best accomplishes the mission of running a safe and secure jail. This means that choices must be made, and that every procedure, program, and benefit needs to be considered in light of the security measures needed to safely affect that procedure, program, or benefit, and weighing competing interests in achieving the overall goals of the jail.

This is true especially for contact visits. Since the potential exists for a visitor to smuggle in contraband, good security practices would dictate that there be some kind of a background investigation to determine whether the visitor represents a significant security risk. This, of course, requires that jail resources be expended. In addition to the resources needed to transport an inmate to a visit room, the inmate would need to be searched before and after the visit to make sure that contraband is not being passed. The attorney might also need to be searched. A permanent law enforcement presence near the visit room is also required for a contact visit. Specifically, at least one correctional officer who is focused on the task of being able to intervene should there be an attack, and who is able to visually monitor the visit for signs of increased agitation, or the passing of contraband.

These increased security measures, necessary to safely conduct contact visits, come at a price. When correctional officers are performing tasks relating to

the provision of contact visits, they are not performing the mission-critical tasks related to the running of a jail, such as the transport of inmates to and from their court appearances, performing security checks, being available to provide assistance in the event of an assault or a riot, delivering mail, responding to inmate grievances, or performing any of the thousands of tasks that must be done in order for a jail to run effectively and safely. Every jail system is staffed at a different level. It is up to each Sheriff to decide what programs, procedures, and benefits are appropriate given the facility's security needs, and the level of staffing necessary to safely implement a particular program, procedure, or benefit.

If the trial court's determination that the Sixth Amendment right to counsel carries with it the right to have a contact visit with an attorney while in jail is allowed to stand, it will usurp the authority of the Sheriff to determine how best to provide for the safety and security of a jail, because it will elevate the provision of attorney contact visits to the same level of "must be done" jail tasks such as feeding the inmates, providing medical care, allowing for exercise time, and transportation to and from the courts. A Sheriff who is faced with limited resources must then look for other areas in which to cut back in order to insure that there are always deputies available to perform the tasks needed to affect an attorney contact visit. After all, if providing attorney contact visits is something that must be done, then the human resources needed to provide these visits safely

must come at the expense of another program, procedure, or benefit that is less of a priority.

Turner, of course, did not contemplate this type of management usurpation by the courts. The Supreme Court intended in Turner for jail administrators to have the flexibility and judgment needed to decide how best to safely manage a correctional facility. The Supreme Court recognized that this obviously could not be done if every constitutional right that could be exercised in free society had to be permitted to be exercised to the identical degree while a person was in jail. This is why the Ninth Circuit stated that certain aspects of constitutionally guaranteed rights were "superseded by the fact of confinement" if those aspects of constitutionally guaranteed rights were inconsistent with incarceration. (Gerber, at 621). Plainly, the ability to meet in a barrier-free environment with an attorney while confined in jail is not an aspect of the Sixth Amendment right to counsel that is consistent with incarceration.

Accordingly, even if the Sixth Amendment right to counsel does somehow incorporate the right of an attorney and client to physically touch each other (a contention that Amici Curiae do not concede, and vigorously dispute), the "right to physically touch" cannot possibly be said to be "unaffected by the fact of confinement or the pursuit of legitimate correctional goals." Simply put, if such a right exists within the Sixth Amendment, it plainly does not exist in the jails.

Therefore, a jail restriction on contact visits does not impinge on any constitutional right, and must be upheld even without resorting to analysis under Turner.

IV.
THE SUPERIOR COURT MISAPPLIED THE TURNER/PC 2600 FACTORS.

The trial court clearly and obviously used the wrong analysis in ordering the Plaintiff to provide attorney contact visits. In coming to its conclusion, the trial court relied on California Penal Code §2600. Unfortunately, the trial court relied on verbiage which was changed nearly 20 years ago. According to the trial court, Penal Code §2600 reads that a confined person may "be deprived of such rights, and only such rights as is necessary to provide for the reasonable security of the institution...and for the reasonable protection of the public." However, Penal Code §2600 now actually indicates that a confined person "may during that period of confinement be deprived of such rights, and only such rights, as is reasonably related to legitimate penological interests." This change results in a completely different analysis than the trial court used in this case.

In analyzing the constitutionality of the regulation, the Court relied upon California case law interpreting Penal Code section 2600. Specifically, the court relied on People v. Aria, 42 Cal 3d 667 (1986), citing DeLancie v. Superior Court, 31 Cal. 3d 865 (1982) for the proposition that PC 2600 applied to pre-trial inmates in local jails. The Aria case reflected the DeLancie interpretation of PC 2600 which held that "prisoners retain the rights of free persons, including the right of privacy, except to the extent that restrictions are necessary to insure the security of the prison and the protection of the public."

However, DeLancie was specifically overruled by the California Supreme Court in People v. Loyd, 27 Cal. 4th 997 (2002), which held that the 1994 legislative amendments to Penal Code section 2600 changed the analysis. Under PC 2600 as interpreted by the California Supreme Court in Loyd, the standard was made much more deferential. "A person sentenced to imprisonment in a state prison may . . . be deprived of such rights, and only such rights, as is reasonably related to legitimate penological interests." The California Supreme Court observed that this legislative change brought PC 2600 analysis in line with Turner. (Loyd, 27 Cal. 4th 997 at 1109) This has been affirmed by California courts in cases subsequent to Loyd. (See Snow v. Woodford, 128 Cal. App. 4th 383 fn. 3 (2005) ("The Legislature adopted the Turner rule when it amended Penal Code section 2600 to provide in part: 'A person sentenced to imprisonment in a state

prison may during that period of confinement be deprived of such rights, and only such rights, as is reasonably related to legitimate penological interests.'"))

The trial court in this case cited DeLancie and Arias for its analysis, indicating that the trial court was applying the wrong standard.[2]

Regardless of whether Turner or the correct application of PC 2600 is employed, the court's analysis cannot withstand appellate scrutiny. The court declared that "there have not been any incidents or significant problems connected with the permitting and accommodating attorney client visits prior to or since the change in permitting such visits in January of 2013" in order to find that contact visits do not present a security problem. Here, the court simply ignored the undisputed testimony that there was a recent (within 10 years) incident in the jail where an inmate attacked his attorney during a contact visit. Moreover, the court's inference that there exists no reasonable security problem as a result of allowing attorney contact visits simply runs afoul of common sense. Even if there had been no instances whatsoever of an inmate attacking an attorney during a contact visit, contact visits by their very nature present a security problem that must be addressed. Regardless of whether such attacks have happened in the past, the lack of any barrier between an inmate and a professional visitor makes the possibility

[2] Tellingly, the trial court's order made no reference to and no citation of Snow v. Woodford in its analysis, although the trial court did manage to cite two cases on the subject (De Lancie and Arias) that have since been overruled.

of an attack a real danger, and one which must be accounted for in staffing and positioning sworn deputies inside the jails. It would be unreasonable to assume that no security problems exist as a result of contact visits, because "there have not been any incidents or significant problems."

A Sheriff's Department that is doing its job and protecting the public does not wait until an inmate murders or attacks a professional visitor to realize that having an inmate in a position where he can attack a professional visitor poses a security problem, nor does Turner require that a Sheriff wait until a calamity has occurred before it can be recognized as a legitimate problem. "Turner requires that courts allow prison officials 'to *anticipate* security problems and to adopt innovative solutions to the intractable problems of prison administration.'" Friedman v. Arizona, 912 F.2d 328, 332-333 (1990) (citing Turner, 482 U.S. at 89) By any logical analysis, an inmate being in a position where he can attack a professional visitor is a security threat that must be addressed. When a facility is short on resources, and having to accommodate an ever-growing and more criminally sophisticated inmate population, it is entirely reasonable for a jail administrator to decide, as the Petitioner did here, that professional contact visits without barriers are a security risk that cannot be effectively handled without unacceptably diverting manpower away from other areas of the jail. The trial

court's inference that no reasonable security problem exists cannot be reconciled with the record, or common sense.

A correctional facility's legitimate interest in limiting contact visits in furtherance of jail security has been emphatically recognized by the United States Supreme Court in Block v. Rutherford, 468 U.S. 576 (1984). In Block, the Court wrote as follows:

> That there is a valid, rational connection between a ban on contact visits and internal security of a detention facility is too obvious to warrant extended discussion.....Contact visits invite a host of security problems. They open the institution to the introduction of drugs, weapons, and other contraband. Visitors can easily conceal guns, knives, drugs, or other contraband in countless ways and pass them to an inmate unnoticed by even the most vigilant observers. And these items can readily be slipped from the clothing of an innocent child, or transferred by other visitors permitted close contact with inmates.
>
> Contact visitation poses other dangers for a detention facility, as well. Detainees -- by definition persons unable to meet bail -- often are awaiting trial for serious, violent offenses, and many have prior criminal convictions. Exposure of this type person to others, whether family, friends, or jail administrators, necessarily carries with it risks that the safety of innocent individuals will be jeopardized in various ways. They may, for example, be taken as hostages or become innocent pawns in escape attempts. It is no answer, of course, that we deal here with restrictions on pretrial detainees rather than convicted criminals. For, as we observed in [*Bell v.] Wolfish*, in this context, "[the]re is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates." [*Bell v. Wolfish*], 441 U.S., at 546, n. 28. Indeed, we said, "it may be that in certain circumstances [detainees] present a greater risk to jail security and order." Ibid.
> Block, 468 U.S. at 586-597.

The Block case also put to rest the idea[3], adopted by the trial court in the instant case, that it is excessive for a jail administrator to impose a "blanket" policy of denying contact visits. The lower courts in Block, as the trial court did in this case, found that a blanket prohibition was excessive. The United States Supreme Court held otherwise.

> The District Court and Court of Appeals held that totally disallowing contact visits is excessive in relation to the security and other interests at stake. We reject this characterization. There are many justifications for denying contact visits entirely, rather than attempting the difficult task of establishing a program of limited visitation such as that imposed here. It is not unreasonable to assume, for instance, that low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates who are denied contact visits. Additionally, identification of those inmates who have propensities for violence, escape, or drug smuggling is a difficult if not impossible task, and the chances of mistaken identification are substantial. The burdens of identifying candidates for contact visitation -- glossed over by the District Court -- are made even more difficult by the brevity of detention and the constantly changing nature of the inmate population. Or a complete prohibition could reasonably be thought necessary because selectively allowing contact visits to some -- even if feasible -- could well create tension between those allowed contact visits and those not.
>
> Block, 468 U.S. at 587.

[3] The trial court's order fails to acknowledge in any way the *Block* case, let alone explain why it is not applicable.

The Block case[4], along with Kentucky Department of Corrections v. Thompson, 490 U.S 454 (1989), was cited by the Ninth Circuit Court of Appeal in Gerber v. Hickman (9th Cir. 2002) 291 F.3d 617, 621 for the proposition that "[i]t is well settled that prisoners have no constitutional right while incarcerated to contact visits...." While these cases did not deal specifically with attorney contact visits, the reasoning applies with equal force.[5]

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[4] The Ninth Circuit in Block affirmed the practice of a "blanket prohibition", recognizing that "a complete prohibition could reasonably be thought necessary because selectively allowing contact visits to some -- even if feasible -- could well create tension between those allowed contact visits and those not." The Ninth Circuit's concerns were entirely correct. But perhaps an even greater problem with selectively allowing contact visits is that it encourages the kind of "second guessing" and ultimately, legal challenges to which the Supreme Court in Turner found jail administrators should not be susceptible. Allowing contact visits for some inmates but not others would invariably lead to a jail administrator having to spend more resources justifying his or her decisions to a court because the decision to grant or deny as to a particular individual is a separate and distinct decision, which is subject to legal challenge. Therefore, ten inmates each making a request for a attorney contact visit would potentially subject a jail administrator to ten separate and distinct individual challenges. (Even if the claims were consolidated in one proceeding, at issue would be ten separate and distinct decisions, with ten different sets of competing factors to be weighed). A jail cannot function if every decision by a jail administrator has the potential to subject the administrator to a trial over whether the Turner factors have been met.

[5] In Ching v. Lewis, 895 F.2d 208 (9th Cir.1992), the Ninth Circuit wrote that "the right of access to the courts includes contact visitation with counsel". Ching, 895 F.2d at 610. However, this pronouncement must be read in the context of the facts presented in Ching. In Ching, the inmate's only opportunity to speak in person with his counsel was one in which, he alleged, he was required to "yell through a hole in the glass." The Ninth Circuit found that because the jail had "failed to give any justification to support their decision to deny contact visits to Ching", and because "the opportunity to communicate privately

When determining whether there is a rational relationship between a jail regulation and a penological interest, the only question for the court[6] is whether the judgment of the jail administrator in imposing the regulation, was "rational." Snow v. Woodford, 128 Cal. App. 4th 383, 391. "Moreover, it 'does not matter whether we agree with' the defendants or whether the policy 'in fact advances' the

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with an attorney is an important part of meaningful access", the denial of contact visits "unnecessarily abridge[d] the prisoner's right to meaningful access to the courts."

In this case, Real Party in Interest did not argue, and the court did not find, that the non-contact visitation arrangements offered by Petitioner failed to afford sufficient privacy, or failed to provide the opportunity for effective attorney-client communication. The Ching court's focus on the need for effective and confidential communication suggests that a proper analysis of the denial of contract visits should focus on the degree, if any, to which non-contact visits prevent effective and confidential attorney-client communication. As has been pointed out, there has been no finding that the visitation arrangements offered by Petitioner were deficient in this respect.

[6] The full test for determining a rational connection is set forth in Snow as follows:

"In order to determine whether there is a rational connection between a prison regulation and a governmental interest justifying the regulation, a court must find the following: (1) the governmental interest is legitimate; (2) the governmental interest is neutral; and (3) the logical connection between the regulation and the interest is close enough to be rational and not arbitrary."

Snow, 128 Cal. App. 4th at 390, citing Turner, 42 U.S. at 89-90).

However, the first two of these prongs are not at issue in this case. Prison safety and security are, as a matter of law, legitimate penological interests. Snow, 128 Cal. App. 4th at 391, citing Turner 482 U.S. at 91. Moreover, "prison regulations enacted to enhance prison security are neutral." Snow, 128 Cal. App. 4th at 391 citing Thornburgh v. Abbott, 490 U.S. 401, 415-416 (1989)

jail's legitimate interests. [Citation.] The only question that we must answer is whether the defendants' judgment was 'rational,' that is, whether the defendants might reasonably have thought that the policy would advance its interests." Snow, 128 Cal. App. 4th at 391 (citing Mauro v. Arpaio 188 F.3d 1054, 1060 ((9th Cir. 1999).

The issue of the reasonableness of the restriction can be (and should have been) simply reduced to this question: Does the policy of prohibiting (with exceptions) attorney contact professional visits with inmates rationally advance the jail's legitimate penological interest in providing institutional security, as well as for the security of visiting attorneys, jail staff, and inmates? The answer to this question is clearly yes. This ends the analysis.

Assuming, *arguendo*, that the court had validly found that a fundamental constitutional right was impacted by Petitioner's failure to provide attorney contact visits, the appropriate analysis should have taken place under the four Turner factors. The first factor to be addressed under Turner was whether there was a rational connection between the jail regulation and the legitimate county interest put forward to justify it. Here, Petitioner justified the no inmate contact visits regulation by citing to the burdens placed on jail administration and security. As set forth above, a direct correlation exists between contact visits and the burden

on jail administration in accommodating the visits while trying to ensure the safety of all persons within jail facilities.

The second factor is whether there are alternative means of exercising the right that remain open to jail inmates. In this case, the only fundamental right would be the right to counsel. As set forth above, inmates have numerous alternative means of exercising their right to counsel. In this case, they can communicate through mail, telephone, or face to face during non-contact visits within the jail, as well as, full barrier free contact visits which are permitted in court holding rooms.

The third factor is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of jail resources generally. As set forth above, deputies are necessary to accommodate attorney contact visits to ensure the safety of the attorneys, to transport the inmates, and to ensure that no contraband is introduced into the facilities.

The final Turner factor to be considered is whether there are ready alternatives. The Court in Turner stated that "the absence of ready alternatives is evidence of the reasonableness of a [jail] regulation." Turner at 90. Here, Real Parties in Interest have failed to set forth any ready alternatives that take into consideration the Petitioner's concerns with inmate movement, staffing, and security, all of which support the regulation at issue, nor have they set forth that

any such alternatives could be implemented or could be done in a way that minimally impact jail resources.

Amici Curiae believe that trial "courts are ill equipped to deal with the increasingly urgent problems of [jail] administration and reform." Procunier at 405. "Running a [jail] is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." Turner at 85. As a result, trial courts should not interfere with the policy decisions made by those most qualified to address the competing interests involved with providing institutional security.

V.
CONCLUSION.

For all the foregoing reasons, Amici Curiae urge this Court to grant the requested writ of mandate by the Nevada County Sheriff's Office and Sheriff Keith Royal. Granting of the writ will ensure that California Sheriffs continue to have the lawful and statutory authority for keeping a county jail, and the prisoners in it.

Dated: November 22, 2013

Respectfully submitted,

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CERTIFICATE OF WORD COUNT PURSUANT TO RULE 8.360

The text of *Amici Curiae*'s Brief consists of 7,694 words as counted by Microsoft Word 2010 used to generate this brief.

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County of Nevada et al. v. The Superior Court of Nevada County
Case Number C074504

I, Sanford A. Toyen, declare that:

I am a citizen of the United States and a resident of the County of San Diego, State of California. I am over the age of 18 years and not a party to the within action. My office address is 9621 Ridgehaven Ct. San Diego,CA 92123

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service, and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

On November 26, 2013, a copy of the attached brief was mailed as reflected on the page that follows.

In addition, I filed an electronic copy of the brief with the Third District Court of Appeal pursuant to Rule of Court 8.212(c)(2)(A).

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

Executed this 26th day of November, at San Diego, California.

Sanford A. Toyen

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