Stephen A. Munkelt, SBN 80449
MUNKELT LAW OFFICE
206 Providence Mine Road, Suite 218
Nevada City, CA 95959
Tel: (530) 265-8508
Fax: (530) 265-0881
stephen@munkeltlaw.com

Attorneys for Jacob Siegfried

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF NEVADA

People of the State of California, Plaintiff, v. JACOB SIEGFRIED, Defendant.	Case No. F11-00317 **JOINT BRIEF IN SUPPORT OF ORDER FOR ATTORNEY-CLIENT CONTACT VISITS** DATE: 7/23/13 TIME: 9:00 DEPT: 4

STATEMENT OF THE CASE

In January 2013 the sheriff posted notice at the Wayne Brown Correctional Facility "To All Attorneys" that "professional contact visits" between attorney and client were going to be curtailed. After the policy was implemented defendant Siegfried obtained a court order for contact visits with his attorney. The sheriff moved to vacate the order.

Other defendants moved through counsel for contact visits. Some orders were granted, others were opposed by the sheriff, who asserted the right to notice and an opportunity to be heard before the motion was granted.

In time a number of defendants who had raised the issue were consolidated for hearing in one court. After a conference with the court did not produce any resolution of the issue the matter was set for argument and evidence on July 23, 2013. This brief is submitted on behalf of Mr. Siegfried and all other defendants presently before this court on the issue of contact visits between attorney and client.

///

ISSUES AND ARGUMENT

I.
THE COURT SHOULD DETERMINE THE DEFINITION OF THE TERM "CONTACT VISIT" TO SIMPLIFY COMMUNICATION.

The Sheriff has expressed confusion about the meaning of the term "contact visit" in the initial briefing concerning the attorney-client visits at the jail. The term has been placed in quotes as "contact visit" (Siegfried Motion to Quash) and it has been asserted the Sheriff "permits what [he] considers contact visits, in that an attorney, and his or her client, may have face-to-face meetings in confidential, private and secure meeting rooms, separated only by a glass partition." (County Brief for Conference, 5-24-13.)

It is not entirely clear when the terminology became confusing to the Sheriff. The notice posted at the jail to advise attorneys of the change in visit policies on January 17, 2013, used the term "professional contact visits" to describe face-to-face meetings without glass. (Copy attached as Exhibit "A" and incorporated here by reference.) But clarity can be attained quite easily for the purpose of this litigation. Moving parties ask the court to find that the term "contact visit" shall refer to face-to-face in person meetings between attorney and client. The court should also determine that meetings separated by a barrier or glass are not "contact visits", even if there is a pass-through slot to exchange papers. This usage is consistent with most of the published cases and opinions dealing with the subject. (See *e.g. Small v. Superior Court* (2000) 79 Cal. App. 4th 1000, 1005; *Villegas Lopez v. Brewer*, (9th Cir. 2012) 680 F.3d 1068, 1081; *Department of Corrections v. Superior Court (Marin County)* (1982) 131 Cal. App. 3d 245; *Block v. Rutherford* (1984) 468 U.S. 576 [104 S. Ct. 3227; 82 L. Ed. 2d 438].)

II.
THE SHERIFF IS NOT A PARTY TO THE CASES BEFORE THE COURT AND HAS NOT BEEN DENIED THE PROCESS DUE.

In the Sheriff's motion to vacate the Siegfried order for contact visits he repeatedly complains that the court issued the order without giving the Sheriff "notice or an opportunity to be heard". As was recently confirmed in a Nevada county case, the parties to a criminal action are the People and the Defendant. (Penal Code §684; *Dix v. Superior Court* (1991) 53 Cal. 3d 442, 451-452; *People v. Eubanks* (1996) 14 Cal. 4th 580; and See Silva v. Superior Court of Nevada County (Third Appellate

District 2012, Case # C071769; People vs. Louis John Silva, Jr., Case # F11-0130.)

Since the Sheriff was not a party, he did not have any right to notice or hearing of the application for an order concerning the conditions of attorney-client contact in these criminal cases. Rather, as would be the case if the Sheriff were served with a subpena to appear or to produce records, his remedy is to raise any objections to the court's order by motion to quash or vacate before complying. In other words, the Sheriff received all the process that was due in this case.

III.
THE COURT HAS THE POWER TO CONTROL CONDITIONS OF CONFINEMENT OF THE PERSONS IT HAS COMMITTED TO THE CUSTODY OF THE SHERIFF.

"The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record." (Cal. Const. Art VI §1.) That power is not strictly limited by statute or court rule. As the supreme Court noted in *Walker v. Superior Court* (1991) 53 Cal. 3d 257:

> "We have often recognized the "inherent powers of the court . . . to insure the orderly administration of justice." (*Hays v. Superior Court* (1940) 16 Cal.2d 260, 264 [105 P.2d 975]; see also *Bauguess v. Paine* (1978) 22 Cal.3d 626, 635-636 [150 Cal.Rptr. 461, 586 P.2d 942] [discussing "supervisory or administrative powers which all courts possess to enable them to carry out their duties"]; *Millholen v. Riley* (1930) 211 Cal. 29, 33-34 [293 P. 69].) Although some of these powers are set out by statute (§ 128, subd. (a)), it is established that the inherent powers of the courts are derived from the Constitution (art. VI, § 1 [reserving judicial power to courts]; see *Millholen, supra*, 211 Cal. at p. 34; Rice v. Superior Court (1982) 136 Cal.App.3d 81, 89 [185 Cal.Rptr. 853]), and are not confined by or dependent on statute (see, *e.g., Bauguess, supra*, 22 Cal.3d at pp. 635-636; *Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 287 [245 Cal.Rptr. 873]; *cf. James H. v. Superior Court* (1978) 77 Cal.App.3d 169, 175-175 [143 Cal.Rptr. 398] [court has inherent power to hold competency hearing despite absence of express statutory authorization for such hearing].)"
> *Walker, supra*, 53 Cal. 3d at 266-267.

However, there are several statutes which shed light on the question raised by the Sheriff in these cases. First among these is Code of Civil Procedure §128, which provides that " Every court shall have the power to do all of the following: (4) To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein; (5) To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner

connected with a judicial proceeding before it, in every matter pertaining thereto.

Although Government Code §26605 gives the Sheriff command of the jail, he may only receive those persons committed to his care by a court. (Penal Code §§ 4000, 4015(a).) While persons are in the sheriff's care awaiting trial they may not be subjected to any punishment, nor deprived of more rights than necessary to secure their presence to answer the charges. (Penal Code §§ 681, 688.) And all inmates of the jail, whether pre- or post-trial have specific statutory protection of their constitutional and fundamental rights. (Penal Code § 2600(a); *People v. Loyd (Loyd)* (2002) 27 Cal. 4th 997, 1007 fn 9.) Specifically, during a "period of confinement" a person may not be deprived of any rights unless the restriction is "reasonably related to legitimate penological interests." (*Id.*)[1]

The Sheriff, as the ministerial officer designated to maintain the jail and care for the persons committed to him by the court is clearly "a person connected with the judicial proceeding" in a criminal case. Article VI of the Constitution, CCP §128, and the inherent power of the court to assure that the court is able to carry out its own duties provide a firm foundation for the court's order controlling conditions for attorney-client visits. In fact, it can be argued that the court has a duty to ensure that the sheriff does not interfere with the efficient administration of justice by depriving defendants of the right to counsel. "The right to counsel is guaranteed to a defendant in a criminal case by both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution. This right is a "fundamental constitutional right, which has been carefully guarded by the courts of this state." [citations omitted] "Meaningfully applied, the right to counsel includes the opportunity to receive 'effective aid [of counsel] in the preparation and trial of the case. [citations omitted]" (*Barber v. Municipal Court* (1979) 24 Cal. 3d 742, 750.)[2]

The legislature has expressly provided the court with power over jail inmates in some of the situations which could impact court proceedings, or which touch on fundamental rights. For example, "during the pendency of a criminal proceeding, the court before which said proceeding is pending may make a legal order, good cause appearing therefor, for the removal of the prisoner from the county jail in custody of the sheriff." (Penal Code §4004.) Penal Code §4011.6 allows any judge who believes an

[1] The scope of those penological interests is addressed in Part IV, *infra*.

[2] Trial and appellate counsel for Petitioners was Richard Frishman, currently of Nevada City.

inmate is mentally disordered to order removal from the jail to a mental health facility. Also, if the sheriff transports an inmate to the hospital for immediate medical care, he needs the approval of the court for the absence from jail to go beyond 48 hours. (Penal Code §4011.5.)

The absence of an express provision regarding conditions of attorney-client visitation does not show the court lacks such authority. In fact, many of the authorities cited by the sheriff expressly acknowledge that the court's power with respect to visits between attorney and client is greater than in family visits, or other situations outside the attorney-client relationship. For example, the Attorney General's opinion at 46 Ops. Cal. Atty. Gen. 20 is cited by the sheriff for the proposition that the court lacks the power to order a custodial officer to deliver an inmate to a certain place for a social visit. (Siegrfied Motion to Vacate, p. 3:5-9.) But the A.G. expresses that opinion this way:

> "A court has no power to make an order regarding communication with a prisoner **except** where the regulations set up by the custodial officer are not reasonably related to safeguarding the prisoner **or where such regulations violate a prisoner's right to counsel**." (46 Ops. Atty. Gen. at 23.) (Emphasis added)

Expressing the idea without the double negative construction, the Attorney General believes that the court does have the power to make orders concerning regulations which violate the right to counsel. Moving parties agree.

Government Code §26605 does state that the "sheriff shall take charge of and be the sole and exclusive authority to keep the county jail and the prisoners in it...." But our constitutional system and the statutory framework do not allow this language to be taken literally, or to be applied as an absolute. No official or institution in our system has absolute power. Where the conditions of confinement interfere with the business of the court or the rights of inmates, the court necessarily has the power under the constitution, CCP §128 and inherent in the institution itself to order the "ministerial official" in charge to modify those conditions. "No person charged with a public offense may be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge." (Penal Code §688.) When the sheriff oversteps that boundary, the court must have the power to rein him in and prevent abuses which may jeopardize the court proceedings.

///

///

IV.
DEFENDANTS HAVE A RIGHT TO PRESENT EVIDENCE TO SUPPORT THEIR REQUEST FOR CONTACT VISITS WITH COUNSEL.

Defendants believe that there is a right to contact visits between attorney and client under the state and federal constitutions. (See *Ching v. Lewis* ('*Ching*'), 895 F.2d 608 (9th Cir. 1990); *Casey v. Lewis* ('*Casey*'), 4 F.3d 1516 (9th Cir. 1993); *Barber v. Municipal Court (Barber), supra.)* In *Ching* the 9th Circuit held that "a prisoner's right of access to the courts includes contact visitation with his counsel," *(Ching* at 610.) *Casey* reaffirmed that "the right of access to the courts includes contact attorney visitation," (*Casey* at 1520.)

However, that right is not absolute. After the U.S. Supreme Court decisions in *Bell v. Wolfish*, 441 U.S. 520 (1979), *Block v. Rutherford* (1984) 468 U.S. 576, and *Turner v. Safley*, 482 U.S. 78 (1987) both the state and federal rights of inmates are reviewed under a standard which gives deference to the legitimate security needs of the institution. (Penal Code § 2600; *Ching, supra*, *Loyd, supra*; *Thompson v. Department of Corrections ('Thompson')*, 25 Cal.4th 117, 129 (2001).) As developed in *Turner* the review balancing inmate rights involves a four-part inquiry:

> (1) whether there is a valid, rational connection between the prison policy and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right; (3) the impact that accommodation of the constitutional right will have on guards, on other inmates, or on the allocation of prison resources; and (4) whether the regulation or policy is an "exaggerated response" to prison concerns. (*Casey* at 1520 citing *Turner* at 89-90)

It is readily seen that this is a fact-based inquiry. Starting with a challenged policy, the court determines whether it is rationally supported by a government interest, the impact accommodation of inmate rights would have on the institution, and whether the policy is an excessive response. Therefore, the parties should be allowed a hearing to develop the record before the court.

Once the facts are before the court it will be possible for both sides to brief the issues with more specificity. With a fact-driven balancing of competing interests, all the briefing and analogies to existing case law may turn out to be irrelevant once the facts are before the court. However, moving parties think a good deal of perspective can be obtained by reviewing the magistrate's recommendation in Basciano v. Martinez, 2007 U.S. Dist. LEXIS 56913 (Recommendations on Habeas for inmate indicted for RICO

mafia crimes). *(Basciano v. Lindsay*, 530 F. Supp. 2d 435 (E.D.N.Y. 2008) aff'd sub nom. *Basciano v. Martinez*, 316 F. App'x 50 (2d Cir. 2009).) The decision applies the test from *Turner v. Safely* in the context of attorney contact visits, and distinguishing the right to such visits from other security requirements. It is useful, if not binding, authority. (A copy of the relevant portions is attached as Exhibit "B".)

Respectfully Submitted,

July 11, 2013

Stephen A. Munkelt