LOUIS B. GREEN
County Counsel, State Bar #057157
EDWARD L. KNAPP
Chief Assistant County Counsel, State Bar #071520
County of El Dorado
330 Fair Lane
Placerville, CA 95667

Telephone: (530) 621-5770

Attorneys for El Dorado County

FILED
FEB 19 2010
EL DORADO CO. SUPERIOR COURT
BY _____ DEPUTY

IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF EL DORADO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. PHILLIP CRAIG GARRIDO and NANCY GARRIDO, Defendants.	Case No. P09CRF0373 OPPOSITION BY EL DORADO COUNTY SHERIFF MANFRED KOLLAR TO MOTION FOR VISITATION BY DEFENDANT PHILLIP GARRIDO, AND MOTION FOR ORDER SAFEGUARDING PRISONER'S CONSTITUTIONAL RIGHTS BY DEFENDANT NANCY GARRIDO Date: February 26, 2010 Time: 2:00 p.m. Dept: 7

I

INTRODUCTION

The companion motions by co-defendants Phillip Garrido and Nancy Garrido request that this Court order that the El Dorado County Sheriff, in his capacity as the operator of the County Jail, allow one co-defendant charged with the kidnap, false imprisonment, and rape of a young girl to personally visit with the other co-defendant charged in the same case, allegedly so that they can discuss "family decisions" face-to-face. Longstanding and uniformly applied County Jail policy and practice does not allow personal visitation between inmates, particularly by those who are co-defendants in a pending criminal case.

The motion does not ask that the co-defendants be treated the same way that other inmates are treated; rather the motion requests that these co-defendants be given special privileges that no one else gets—the ability to make personal visits with an incarcerated co-defendant. No legal authority is cited mandating the personal visitation requested, because none exists.

The Sheriff has the authority to place restrictions on his prisoner's visitation rights, as long as they are reasonably related to legitimate penological interests. The legitimate penological reasons for restricting personal visits between inmates are self-evident— such meetings facilitate the development of escape plans or other plots, they allow one manipulative co-defendant to coerce or control the other, they allow the creation of phony testimony, *etc.*, *etc.*

The only justification offered by the Garrido co-defendants for their extraordinary request to visit with each other is that they need to make "family decisions." The pseudo-family the Garridos want to discuss was created by the kidnap, false imprisonment and multiple rapes of a young girl, producing two children. While it may be argued that a restoration of family values would improve the quality of American life in general, the assertion of family rights in a case where the "family" was the product of 29 alleged felonies is astonishing.

The El Dorado County Sheriff asks that the two motions be denied on the grounds that this Court has no jurisdiction to interfere with the executive function of operating a jail, and that legitimate penological interests justify the County Jail's policy of not permitting personal visits between inmates, regardless of whether they are married to each other or not. The Garridos do not have any right to make personal visits with each other because the essence of being in jail is that you don't get to visit whoever you please, under the conditions you might prefer. As the California Supreme Court said in *In re Price* (1979) 25 Cal. 3d 448, 452-453: "By the very nature of imprisonment prisoners are separated from their families, their friends, and their business or social associates." In *Block v. Rutherford* (1984) 468 U.S. 576, the U.S. Supreme Court upheld the L.A. County jail's blanket policy prohibiting all contact visitation, including family visitation, saying that "[W]e do not in any sense denigrate the importance of

visits from family or friends to the detainee. . . . We hold . . . that the Constitution does not require that detainees be allowed contact visits when responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility." If all contact visitation can lawfully be prohibited, even visits from those outside the jail, then certainly visits between two incarcerated persons can lawfully be prohibited.

II

A CRIMINAL TRIAL COURT HAS NO JURISDICTION OVER JAIL OPERATIONS

The trial court with jurisdiction over a particular criminal prosecution does not have general jurisdiction to sit as a master jail operations supervisor. In 63 Ops. Cal. Atty Gen. 295 (1980), the California Attorney General concluded that a municipal court did not have jurisdiction to order a sheriff to allow a prisoner in county jail to make telephone calls. More to the point, the Attorney General in 46 Ops. Cal. Atty Gen. 20 (1965) concluded that a criminal trial court had no authority to order a sheriff to allow visitation by a pre-trial detainee with a spouse, saying (citations omitted):

> The responsibility for the safekeeping of a prisoner lies with the officer in whose custody the prisoner is committed. To carry out this responsibility, a custodial officer may regulate communication with a prisoner and in certain circumstances forbid communication between a prisoner and certain classes of visitors. This power is subject only to the condition that the regulations be reasonable and that they do not impair the constitutional right of a prisoner to consult with counsel. . . . Therefore, it appears that a court does not possess the authority to order a custodial officer having custody of a prisoner to permit a prisoner to visit with a spouse, relative, or friend either at jail or at the courthouse when the object of such a visit is purely social.

The proper manner for a defendant held in a county jail to challenge the conditions of his or her pre-trial detention is through an application for a writ of habeas corpus following the procedures in Penal Code §1473 *et seq.* and California Rules of Court Rule 4.550 *et seq.* An example of this principle is given in *Robin J. v. Superior Court* (2004) 124 Cal. App. 4th 414, where it was held that a juvenile court with jurisdiction over a minor child's parental visitation rights stepped outside of its jurisdictional boundaries when it ordered a prison to allow the child to visit an incarcerated parent in contravention of the prison's regulations. The juvenile court

could not treat its petition as a petition for a writ of habeas corpus because of the dissimilarities between the two proceedings.

Criminal trial courts exist to adjudicate guilt or innocence. A criminal trial court can order a defendant into jail, or order him out of jail, but this does not mean that the trial court also has the power to manage the jail.

III

SEPARATION OF POWERS

The El Dorado County Sheriff has full authority and sole responsibility for the operation of the County Jail. Penal Code §4000 ("The common jails in the several counties of this State are kept by the Sheriffs of the counties in which they are respectively situated . . .."); Government Code §26605 ("Notwithstanding any other provision of law . . . the Sheriff . . . shall take charge and be the sole and exclusive authority to keep the county jail and the prisoners in it. . . . "). The Sheriff's authority specifically includes making rules limiting prisoner communications. Penal Code §4570 (misdemeanor for any person to communicate with an inmate in a county jail without the permission of the officer in charge of the facility); *Davis v. Superior Court* (1959) 175 Cal. App. 2d 8, 19-21. ("To censor and in certain instances to forbid communication to and from a prison is inherent in its administration.")

Operation of a jail or prison facility is an executive branch function, not a judicial branch function, and the difference between these functions has a constitutional dimension. The U.S. Supreme Court in *Bell v. Wolfish* (1979) 441 U.S. 520, pages 547-548, noted this separation of powers, stating (citations and internal quotations omitted):

> [T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. Such considerations are peculiarly within the province and professional expertise of corrections officials and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters. . . . But judicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is

> peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial.
>
> . . .
>
> [Many courts have] become increasingly enmeshed in the minutiae of prison operations. Judges are, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination. But under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the government is lodged the authority to initially devise the plan. The wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.

Many other courts have recognized that the separation of powers mandates that courts stay out of jail operations. *See, e.g., Mauro v. Arpaio*, 188 F.3d 1054, 1058 (9th Cir. 1999). "Running a prison 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. . . . Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint." *Id.* Thus as a legal matter, courts in the judicial branch of government should give jail operators in the executive branch due deference, and not become involved in the management of a jail.

IV

THE JAIL POLICY DOES NOT VIOLATE STATE LAW OR THE CONSTITUTION

Even assuming that this Court has the authority to entertain the current motions complaining about an internal jail visitation policy, which the Sheriff does not concede, the Court should decide that the policy does not violate any rights of the Garridos.

The constitutional rights of sentenced prisoners are adjudicated under the Eighth Amendment's "cruel and unusual punishment" clause, whereas the rights of pre-trial detainees are adjudicated under the Fifth or Fourteenth Amendment's Due Process Clause, *Bell v. Wolfish* (1979) 441 U.S. 520. However, in reality the ultimate standard ends up being the same.

The reason that courts apply the same standard is that the penological concerns are the same with sentenced prisoners and pre-trial detainees. Courts have recognized that, in terms of jail security, "[t]here is no basis for concluding that pre-trial detainees pose any lesser security risk than convicted inmates," and indeed "it may be that in certain circumstances [detainees] present a greater risk to jail security and order." *Bell, supra* at 546, n. 28; *Block v. Rutherford* (1984) 468 U.S. 576, 587.

The current test for determining if a jail policy is constitutional was established in the U.S. Supreme Court case of *Turner v. Safly* (1987) 482 U.S. 78, which held that if a jail restriction is reasonably related to a legitimate penological interest, then it passes muster. For example in its recent decision in *Overton v. Bazzetta* (2003) 539 U.S. 126, the U.S. Supreme Court used the *Turner* test to uphold a prison policy that restricted, and in some instances prohibited, family visitation. As demonstrated below, the *Turner* test is also used to determine if a jail policy violates a state law. The El Dorado County Jail policy disallowing pre-trial detainees from visiting each other face-to-face easily passes the *Turner* test.

In their motions, the Defendants assert a different standard by arguing that since the purpose of pre-trial detention is to insure the defendant's presence at trial, then the Sheriff must justify any jail restriction as being related to that single narrow purpose. This argument was rejected by the U.S. Supreme Court in the seminal case concerning the constitutional rights of pre-trial detainees, cited by each co-defendant in their motion, *Bell v. Wolfish, supra.* The Court agreed that the purpose of pre-trial detention is insuring the defendant's presence at trial, but held that once the detainee was in jail, he or she was subject to all of the operating and management rules of that facility.

> The petitioners assert, and respondents concede, that the "essential objective of pretrial confinement is to insure the detainees' presence at trial." . . . While this interest undoubtedly justifies the original decision to confine an individual in some manner, we do not accept respondents' argument that the Government's interest in ensuring a detainee's presence at trial is the *only* objective that may justify restraints and conditions once the decision is lawfully made to confine a person. "If the government could confine or otherwise infringe the liberty of detainees only to the extent necessary to ensure their presence at trial, house arrest would in the end be the only constitutionally justified form of detention." *Campbell* v. *McGruder*, 188 U.S. App. D.C., at 266, 580 F.2d, at 529. The Government also has legitimate interests that stem from its need to manage the facility in which the individual is detained. These legitimate operational concerns may require administrative measures that go beyond those that are,

> strictly speaking, necessary to ensure that the detainee shows up at trial. For example, the Government must be able to take steps to maintain security and order at the institution and make certain no weapons or illicit drugs reach detainees. Restraints that are reasonably related to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they are discomforting and are restrictions that the detainee would not have experienced had he been released while awaiting trial. We need not here attempt to detail the precise extent of the legitimate governmental interests that may justify conditions or restrictions of pretrial detention. It is enough simply to recognize that in addition to ensuring the detainees' presence at trial, the effective management of the detention facility once the individual is confined is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment.

Bell v. Wolfish (1979) 441 U.S. 520, pages 539-540. Thus the ultimate standard for analyzing visitation rights in a county jail is the same for pre-trial detainees as it is for sentenced prisoners: if the visitation rule is reasonably related to a legitimate penological interest, then it is constitutional.

IV

A PRISONER DOES NOT HAVE THE CONSTITUTIONAL RIGHT TO VISIT ANOTHER PRISONER

There is no constitutional right to visitation in jail. The U.S. Supreme Court in *Kentucky Dep't of Corrections v. Thompson* (1989) 490 U.S. 454 said that "[r]espondents do not argue -- nor can it seriously be contended, in light of our prior cases -- that an inmate's interest in unfettered visitation is guaranteed directly by the Due Process Clause." The Court also said that "[t]he denial of prison access to a particular visitor is well within the terms of confinement ordinarily contemplated by a prison sentence . . . and therefore is not independently protected by the Due Process Clause." The Supreme Court in *Pell v. Procunier* (1974) 417 U.S. 817 upheld a prison prohibition against face-to-face meetings between inmates and the media, saying:

> When . . . the question involves the entry of people into the prisons for face-to-face communication with inmates, it is obvious that institutional considerations, such as security and related administrative problems, as well as the accepted and legitimate policy objectives of the corrections system itself, require that some limitation be placed on such visitations. So long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved, we believe that, in drawing such lines, prison officials must be

> accorded latitude. . . . The "normal activity" to which a prison is committed -- the involuntary confinement and isolation of large numbers of people, some of whom have demonstrated a capacity for violence -- necessarily requires that considerable attention be devoted to the maintenance of security. Although they would not permit prison officials to prohibit all expression or communication by prison inmates, security considerations are sufficiently paramount in the administration of the prison to justify the imposition of some restrictions on the entry of outsiders into the prison for face-to-face contact with inmates. *Pell, supra*, 417 U.S. at 826-827 (citations and quotation marks omitted).

Mr. Garrido asserts that the County Jail visitation policy violates his First Amendment rights of "expression, association and privacy," but whatever constitutional associational rights a free citizen may have are exactly the things that are lost during incarceration. The U.S. Supreme Court made this clear in *Jones v. Prisoner's Labor Union, Inc.* (1977) 433 U.S. 119. Prisoners claimed the right to meet with each other face-to-face for the purpose of organizing into a prisoner's union, an associational right that free people have under the First Amendment. However, the Court held that it is not a right that imprisoned people have because it is essentially inconsistent with the status of being in jail. Two years later the California Supreme Court followed *Jones* with its own decision that First Amendment associational rights were lost in prison, and therefore inmates had no right to meet personally with each other face-to-face. *In re Price* (1979) 25 Cal. 3d 448, 452-453.

More specifically, it has been held many times that there is no right to family visits in jail, and if family visitation is allowed, it is a privilege that may be withdrawn by prison authorities. As noted above in the Introduction, in *Block v. Rutherford* (1984) 468 U.S. 576, the U.S. Supreme Court upheld the L.A. County jail's blanket policy prohibiting all contact visitation with pre-trial detainees, including family visitation. The California Supreme Court in *In Re Cummings* (1982) 30 Cal. 3d 870 held that a prison family visitation program "is not legally compelled" and authorities therefore have the power to restrict or terminate it. The court in *Pro-Family Advocates v. Gomez* (1996) 46 Cal. App. 4th 1674, 1681-1682 recognized that the California Supreme Court had previously held in *Cummings* "that prison officials may ban family visits altogether" and summarized the law as follows:

> Restrictions on an inmate's right of association are an inevitable product of confinement. By the very nature of imprisonment, inmates are necessarily separated from their families and friends. No legislation or case law makes

these restrictions invalid. More relevant to the specific issues presented in this appeal, there is no substantive "right" to family visits.

There is no legal right to marital visits either. Defendants claim that since prisoners have the right to be married, they must have all of the rights of married people, including the right to meet face-to-face, but that is not the case. While an incarcerated person has the constitutional right to get married while in jail, *Turner v. Safly* (1987) 482 U.S. 78, 97-99 (and in California has the statutory right to get married in jail under Penal Code §2601(e)), the various activities that are typically associated with matrimony may be eliminated upon incarceration. For example, a married prisoner does not have the right to conjugal visits, *Hernandez v. Coughlin*, 18 F. 3d 133 (2nd Cir. 1994), nor the right to contact visits, *In Re Gallego* (1982) 133 Cal. App. 3d 75; *Toussaint v. McCarthy*, 801 F. 2d 1080, 1113-1114 (9th Cir. 1986); nor the right to procreate, *Gerber v. Hickman*, 291 F. 3d 617 (9th Cir. 2002) (a prisoner does not have the right to consummate the marriage nor to "enjoy the other tangible aspects of marital intimacy.").

It has been held that the ability of one spouse to personally visit the other spouse in jail may also be eliminated. Almost 60 years ago, the court in *Akamine v. Murphy* (1951) 108 Cal. App. 2d 294, upheld a San Francisco jail rule prohibiting visits to an inmate by a former inmate, even if the visitor is married to the inmate. In *In re Carrafa* (1978) 77 Cal. App. 3d 788, the Third District Court of Appeal said that an inmate at Folsom State Prison may have the right to get married while incarcerated, but "we draw a clear distinction . . . between the right to marry and the right to visitation." While the right to marry may not be denied, "[v]isitation rights are another thing altogether," and the "mere fact of marriage does not preclude the Department from excluding the marriage partner if it believes there is a legitimate security risk." If it is legitimate to prohibit a non-prisoner spouse from visiting an inmate spouse (which infringes the ability of both a free person to make a visit as well as an inmate to receive a visit), then certainly it is even more legitimate to deny visitation by an incarcerated spouse to another incarcerated spouse charged with the same criminal conduct, both of whose rights are curtailed by the fact of their imprisonment.

Mr. Garrido's motion relies upon *In re Smith* (1980) 112 Cal. App. 3d 956, but that case deals with an inmate's right to receive visits from his child. *Smith* does not involve spouses, nor does it say anything about a right of one inmate to make visits to another inmate, and is therefore irrelevant to the instant motions. Even if a prisoner has a generalized right to visitation from a child, under proper circumstances a prison administrator can eliminate such visits. *Wirsching v. Colorado*, 360 F. 3d 1191 (10th Cir. 2004).

VI

NO STATE LAW REQUIRES VISITATION BETWEEN CO-DEFENDANTS

There is no state statute or regulation granting one prisoner the right to make a personal visit in jail with another prisoner who is currently a co-defendant with the first in a pending criminal case, and no state law granting a prisoner the right to make face-to-face visits with a spouse. A former version of Penal Code §2601(d) gave State prison inmates the statutory right "to have personal visits" subject to any restrictions that are necessary for the reasonable security of the institution. This subsection was eliminated by the Legislature in 1996, and since then there has been no statutory right to visitation in California.[1]

The only California statute arguably giving rise to general prisoner's rights is Penal Code §2600, which currently states that a person sentenced to a state prison may be deprived "of such rights, and only such rights, as is reasonably related to legitimate penological interests." The Third District Court of Appeals has held that under Penal Code §2600, a person "seeking to visit an inmate of a custodial institution, is exercising a privilege, not a right," and that "[p]rison officials may regulate communications and visitation." *Mathis v. Appellate Department* (1972) 28 Cal. App. 3d 1038, 1041.

The question of whether Penal Code §2600 forbids a particular jail policy requires an analysis derived from the U.S Supreme Court decision in *Turner v. Safly* (1987) 482 U.S. 78, which held that "when a prison regulation impinges on an inmates' constitutional rights, the

---

[1] Even at a time when Penal Code §2601(d) was in force, the California Supreme Court in *In re Cummings* (1982) 30 Cal. 3d 870 held that prison authorities had the power to ban family visits altogether if prison officials felt they were being abused.

regulation is valid if it is reasonably related to legitimate penological interests." *Thompson v. Department of Corrections* (2001) 25 Cal. 4th 117, 130; *Snow v. Woodford* (2005) 128 Cal. App. 4th 383, 390 ("The Legislature adopted the *Turner* rule when it amended Penal Code section 2600 . . ."). As discussed above, this is the same test applied to determine if a jail policy is constitutional. Thus the analysis of the visitation policy under Penal Code §2600 is precisely the same as the analysis under the Constitution. As demonstrated below, the County Jail policy prohibiting visits between co-defendant inmates (whether married or not) meets this reasonable relationship test.[2]

VII

THE VISITATION RESTRICTION MUST BE UPHELD AS REASONABLY RELATED TO LEGITIMATE PENOLOGICAL INTERESTS

Appropriate Standard For Jail Restrictions

The standard for determining whether jail policies violate statutory or constitutional rights is whether the policy is reasonably related to a legitimate penological interest, *i.e.*, the *Turner v. Safly* test noted above. This is not a "balancing test," as Defendant Nancy Garrido's motion suggests. In *Block v. Rutherford* (1984) 468 U.S. 576, the U.S. Supreme Court overturned a District Court decision that the blanket prohibition in the L.A. County Central Jail against any kind of contact visit was unconstitutional, saying at page 589:

> When the District Court found that many factors counseled against contact visits, its inquiry should have ended. The court's further 'balancing' resulted in an impermissible substitution of its view on the proper administration of Central Jail for that of experienced administrators of that facility.

---

[2] Both motions cite to a California Supreme Court decision decided under a former version of Penal Code §2600, *DeLancie v. Superior Court* (1982) 31 Cal. 3d 865. Mrs. Garrido cites it for its holding that although Penal Code §2600 by its terms applies only to prisoners in state prisons, it also applies to county jail inmates. Mr. Garrido cites it for the proposition that pre-trial detainees are entitled to at least as many rights as those actually convicted. Mr. Garrido's motion notes that *DeLancie* was "overruled on other grounds" but it might be more accurately said that *De Lancie* is no longer operative on any grounds. The California Supreme Court in both *People v. Lloyd* (2002) 27 Cal. 4th 997 and in *People v. Davis* (2005) 36 Cal. 4th 510, held that the 1994 amendment to Penal Code §2600 "restored the pre-*DeLancie* state of the law."

Nor is there any "least restrictive alternative" test where the mere availability of a less restrictive alternative means that a more restrictive regulation fails. *Turner v. Safly* (1987) 482 U.S. 78, 90-91 ("Prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint."); *Snow v. Woodford* (2005) 128 Cal. App. 4th 383, 393 ("This is not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint."). Once it is shown that a jail policy is reasonably related to a legitimate penological interest, the court's inquiry ends. *Block, supra* at 589.

To be reasonably related to a penological interest, the visitation policy does not have to respond to a problem actually experienced in the past, or likely to occur in the future, nor does it have to actually solve a problem, nor does it have to actually advance the identified penological interest, nor does the court have to agree with the Sheriff that the policy *might* advance a penological interest. As long as the visitation policy is not arbitrary or irrational, it is lawful. *Snow v. Woodford* (2005) 128 Cal. App. 4th 383. In *Snow*, a policy forbidding the possession of sexually explicit magazines in prison was alleged to violate both the First Amendment and Penal Code §2600, but it was upheld as reasonably related to legitimate penological interests. The court said at page 391 (citations and quotation marks omitted):

> [W]e must determine if there is a rational relationship between the regulation and the penological interest. To show a rational relationship between a regulation and a legitimate penological interest, prison officials need not prove that the banned material actually caused problems in the past, or that the materials are 'likely' to cause problems in the future. Moreover, it does not matter whether we agree with the defendants or whether the policy in fact advances the jail's legitimate interests. 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.

Even if the "fit" between the jail policy and the penological interest can be criticized as inexact, the policy still passes muster. *Mauro v. Arpaio*, 188 F. 3d 1054, 1060 (9th Cir. 1999).

A prison regulation restricting familial visitation is presumed valid, and a person challenging it has the burden of establishing that the regulation fails the *Turner v. Safly* test.

Robin J. v. Superior Court (2004) 124 Cal. App. 4th 414, 425; *Casey v. Lewis*, 4 F.3d 1516, 1520 (9th Cir. 1993).

The California Supreme Court in *Thompson v. Department of Corrections* (2001) 25 Cal. 4th 117 held that a proper analysis of a restriction on prisoners should address the 4 factors identified by the U.S. Supreme Court in *Turner v. Safly, supra.* First, there must be a rational connection between the prison regulation and the legitimate governmental interest put forward to justify it. Second, the court should consider whether there are alternative means of exercising the right that remain open to prison inmates, in which case the court "should be particularly conscious of the 'measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.'" Third is the "impact [that] accommodation of the asserted constitutional right will have on guards and other inmates and on the allocation of prison resources generally." When such accommodation "will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." Fourth, the "absence of ready alternatives is evidence of the reasonableness of a prison regulation."

In many cases, courts have recognized the penological reasons underlying a jail policy because they are self-evident reflections of common sense. *Block v. Rutherford* (1984) 468 U.S. 576, 586 (1984) ("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."). In *Overton v. Bazzetta* (2003) 539 U.S. 126, the Court upheld a 2 year ban on family visitation, saying: "[The Prison's] regulation prohibiting visitation by former inmates bears a self-evident connection to the State's interest in maintaining prison security and preventing future crimes. We have recognized that 'communication with other felons is a potential spur to criminal behavior.'" *Id.* at 134.

The County Jail Restriction Prohibiting Inmate-To-Inmate Visits Is Reasonably Related To Legitimate Penological Interests

The legitimate penological reasons supporting the El Dorado County Jail's longstanding and uniformly applied policy of not permitting one inmate to personally visit with another are

set forth in detail in the Declaration of Pam Lane filed concurrently herewith, and also in the "People's Opposition to Defendant's Motion to Compel Discovery, Opposition to Request for Defendant Visitation, and Request for Protective Order" filed by the District Attorney, along with its supporting declarations, which are incorporated herein by this reference. Face-to-face meetings between inmates would have to be specially arranged in a facility that is not set up for them so it would disrupt jail operations, would require a significant re-allocation of scarce jail resources just for the Garridos, would create significant security risks for all concerned, and would facilitate the ability of one manipulative co-defendant to coerce the other in order to tamper with their pending prosecution.

These reasons are obviously legitimate, and have been recognized as legitimate by courts for over 50 years. In *Akamine v. Murphy* (1951) 108 Cal. App. 2d 294, the court upheld a longstanding jail policy in San Francisco that forbade visitation to an inmate by a former inmate, even though the two were married. The two were co-defendants in the same case, and both were detained in jail awaiting trial until the wife bailed herself out. She then returned to visit with her spouse/co-defendant, but was denied. The court noted the obvious reasons for restrictive visitation policies: "the jail in which petitioner is confined is a maximum security one; that among the persons awaiting trial therein are those accused of the most serious offenses; that in addition federal prisoners are confined there; that the conduct of such a jail requires very careful and specific rules; that the rule denying persons who have been inmates the right of visiting co-inmates for 30 days is a reasonable one for the conduct of a maximum security jail."

The court also noted that the rule prohibiting inmate-to-former inmate visitation was not unusual: "this rule has been in effect in the San Francisco city and county jails for more than 30 years; that such a rule, or a rule of similar import, has been and now is enforced in most, if not all, of the jails in California."

The court accepted the specific penological reasons for prohibiting visitation between inmates and former inmates: "such rule is necessary to prevent the fraternizing of those charged with crime by keeping them away from each other for at least 30 days; to avoid the exchange of

knowledge while confined in jail that might lead to an attempted escape; to avoid the comparing of knowledge of the physical set-up of the jail, the particularities of the jail routine, and the promptings for an escape; to avoid the getting together of those who have become acquainted with others whom they will aid and abet in an escape, or an attempted escape; to avoid arranging smuggling contraband and narcotics into jail; to avoid the communing with other inmates for financial gain, one to the other; to avoid the contact of a runner for either an attorney or a bail bond broker; to avoid the carrying of messages between partners in crime or their transmission to or from others who are in hiding from the police, and are or may have been charged with the same offense."

Finally, the court upheld the rule as reasonable: "While perhaps not every one of the reasons given for the rule is sound, we are unable to find that the rule is an unreasonable one. The fact that it has existed, apparently unchallenged, in the San Francisco jails for many years, is the rule of most jails in the state, and is approved by the Federal Bureau of Prisons, while not conclusive, is some indication of its reasonableness. Perhaps, in the case of husband and wife, it may work somewhat of a hardship; still that fact alone does not make the rule unreasonable."

One issue that courts have considered when upholding a visitation restriction is its duration. As noted above, the *Akamine* case upheld a 30 day prohibition on visitation by a former inmate with an incarcerated spouse. The Supreme Court in *Overton v. Bazzetta* (2003) 539 U.S. 126, upheld a state prison policy imposing a two year ban on visitors (other than attorneys and members of the clergy) as punishment for breaking prison rules, suggesting however that it "might reach a different conclusion" if it was dealing with a "permanent ban on all visitation for certain inmates." *Id.* at 134. Similarly, the federal court in *Carabello-Sandoval v. Honsted*, 35 F.3d 521 (11th Cir. 1994) used the *Turner* test to uphold a two-year suspension on visitation that prevented a wife who was a former correctional employee from visiting her husband in jail, in order to prevent two people with knowledge of jail procedures, layout and security from plotting with each other. All three of these cases dealt with restrictions on visits from a free, non-incarcerated spouse with their incarcerated partner, and they were justified by limited interests that dissipate over time The County Jail policy at issue

herein has a more obvious penological justification than the cases discussed above because it deals with visits between two incarcerated persons, each of whose freedom is legitimately curtailed, and it is justified by reasons that are not themselves time-limited. It is in effect only for as long as the justification for it lasts— while both persons are incarcerated in the County Jail. The Jail policy is therefore well within constitutional standards.

The same legitimate penological interests as expressed in the Declaration of Pam Lane have been sufficient to uphold restrictive jail visitation policies between spouses in other cases. In *Ayers v. Rhone*, 852 F. Supp. 18 (E.D. Mo. 1994), the District Court upheld a ban on visitation between husband and wife inmates in the same jail because "[c]ommunications between prisoners can pose a threat to the security of the jail, the safety of jail employees and to other prisoners," and consequently the denial of interspousal visitation "was rationally related to valid penological concerns of the New Madrid jail." *Id.* at 20. An example of the legitimate penological interest in maintaining economic and efficient jail operations is *Mauro v. Arpaio*, 188 F. 3d 1054, 1060 (9th Cir. 1999), in which inmates suggested that their need to read sexually explicit magazines in jail should be accommodated by having the jail build them a reading room. This was rejected by the Ninth Circuit on the basis that "the creation of such a reading room would impose a significant administrative burden on the jail: inmates from different custody levels would need to be escorted to and from the reading room; strip searches of the inmates leaving the reading room would have to be conducted; and the reading room would have to be monitored."

The same objections doom any proposal to have the County Jail use the existing visiting room to accommodate non-contact visitation between the Garridos. To allow the Garridos to visit each other in the regular visiting room would mean that one of them would be in the relatively high security inmate area but the other would have to be in the lower security public visitor area. That obviously cannot be done while other visitors are there, so it would have to be done outside of normal visitation hours. Furthermore, one of the Garridos would have to be escorted into the public portion of the visiting room, an area which is not normally maintained with as high a security level as the inmate area, and their presence would have to be carefully

monitored. A previous visitor could secrete a weapon in part of the public visiting room so that one of the Garridos could obtain it later. All of this means that 4 correctional officers would have to be diverted from their normal duties, and their normal duty hours, to move the Garridos around the Jail in order to accommodate their extraordinary request for special privileges. The diversion of officers to this unusual task, at an unusual time, would disrupt the normal schedule of the Jail, and any time the normal routine is disrupted, security decreases and the chance for problems, caused by the Garridos or by other opportunistic inmates, increases. At a time when all jails, including the El Dorado County Jail, are suffering from reduced budgets and reduced staffing levels, this additional administrative burden simply cannot be sustained without seriously jeopardizing the security of the Jail as a whole.

The situation with the Garridos presents a special illustration of one out of the many reasons for prohibiting face-to-face visits between inmates who are co-defendants in a pending criminal case: one may try to intimidate, coerce or otherwise manipulate the other to influence the course of the pending case in ways that cannot be easily detected or prevented. The District Attorney's opposition presents evidence that Mr. Garrido is a "master manipulator" who knows how to use concealed messages to threaten and coerce his victims. In 1972 he successfully coerced his minor rape victim into not testifying by threatening her. In 1977 he was convicted of raping another woman, and was sentenced to 50 years in federal prison, but in 1988 talked his way into being released from federal prison after serving only 11 years. He then tracked down his rape victim from 12 years before and used the cryptic phrase "I haven't had a drink in 11 years," interpreted by that victim to mean he hadn't raped in 11 years.

He trained the people involved in his recent alleged crimes to tell certain stories if caught, with alternate stories if necessary, and trained them to communicate secretly with each other after they were arrested, through attorneys if necessary. The victim of the crimes he is currently charged with, Jane Doe, is apparently not following his prearranged plan, and it appears as if he may be trying to manipulate her through coded messages. Since he cannot contact her directly, he is using alternate means. Through the media he claimed that Jane Doe's rights were being violated because she did on have an attorney, a cryptic way to remind her to

start using his pre-arranged communication scheme using lawyers. Furthermore, he told the media that his story was "heartwarming," which could also be interpreted as a coded message to his victim to follow the pre-arranged story that they were a happy family.

Most chillingly, he sent the coded message to his victim that "he does not harbor any ill will" toward her. This seemingly innocuous message had a hidden meaning, no doubt not obvious to those who carried it for him. Jane Doe, however, understood it as a warning that she was not following his pre-arranged plan. The point is that was a coded message, so no one other than possibly his victim could know for sure what was really meant. Prisoners in jail are often adept at using coded messages, such as the types of messages that Mr. Garrido has used, plus other types of messages like gestures, facial expressions and body language with special meanings that need to be delivered in person. The Jail is concerned that Mr. Garrido wants to talk face-to-face with Nancy Garrido so that he can influence her testimony in the upcoming trial. Avoiding giving one co-defendant inmate the opportunity to manipulate another co-defendant in the same pending case while both are in jail, and protecting one inmate from such pressure from another, are among the many legitimate penological reasons supporting the Jail's policy of not permitting personal visits between inmates. The Garrido case is a special example of the legitimacy of that policy.

Thus the County Jail policy barring personal visits between co-defendants is clearly seen to be reasonably related to a variety of legitimate penological interests, so the first *Turner* factor is satisfied. The second factor, the existence of alternate means of communication, is also easily satisfied because the Garridos have other means to communicate. The third factor is the effect of their request on guards, other inmates, and the allocation of scarce prison resources. The facts before the Court demonstrate that the Garrido's request for special privileges would have a significant negative effect on each one of these factors. The last *Turner* factor is the absence of alternatives to the Jail policy; if there are no ready alternatives that solve the problems attendant to inmate-to-inmate communication, then this absence of alternatives can be taken as evidence of the reasonableness of the Jail's visitation policy. There

are no alternatives that avoid face-to-face manipulation other than eliminating that possibility entirely. The lack of ready alternatives mandates that the Court not meddle with the Jail policy.

VIII

CONCLUSION

The El Dorado County Jail operates in full compliance with constitutional and other applicable standards. The Constitution "does not mandate comfortable prisons," *Rhodes v. Chapman* (1981) 452 U.S. 337, 349, and does not mandate that an inmate gets to visit his or her incarcerated co-defendants, whether married or not. Furthermore, courts must be wary of prisoner's creative attempts to disrupt the functioning of the jail.

> The courts are and should be reluctant to interfere with or to hamper the discipline and control that must exist in a prison. Petitions containing such charges must be carefully scrutinized and the facts carefully weighed with the thought in mind that they are frequently filed by prisoners who are keen and ready, on the slightest pretext, or none at all, to harass and to annoy the prison officials and to weaken their power and control. These prisoners include many violent and unscrupulous men who are ever alert to set law and order at defiance within or without the prison walls.

In re Riddle (1962) 57 Cal. 2d 848, 852.

The instant motions should be denied because the Garridos already have the ability to communicate with each other by writing and through other visitors, and they do not need, nor are they entitled to, the additional ability to make personal visits with each other face-to-face. The Garridos seek a privilege that is not granted to any other inmate, claiming the need to make "family decisions." In the circumstances of this case, where the alleged "family" was created by 29 felony counts of kidnapping, false imprisonment and rape, the Garridos' invocation of the sanctity of the "family" is breathtaking in its audacity.

///

///

///

There is no legal support for their extraordinary request, and their motions must be denied.

Dated: February 19, 2010

LOUIS B. GREEN
COUNTY COUNSEL

By _____
Edward L. Knapp
Chief Ass't. County Counsel

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the County of El Dorado. I am over the age of eighteen (18) years and not a party to the within action. My business address is 330 Fair Lane, Placerville, California.

On February 19, 2010, I served the within

OPPOSITION TO MOTION FOR VISITATION
DECLARATION OF PAM LANE

in said action, by placing a true copy thereof enclosed in a sealed envelope at Placerville, California, addressed as follows:

OFFICE OF THE PUBLIC DEFENDER
630 Main Street
Placerville, CA 95667
530-642-9205 (fax)

STEPHEN A. TAPSON
309 Placerville Drive
Placerville, CA 95667
530-622-1832 (fax)

OFFICE OF THE DISTRICT ATTORNEY
515 Main Street
Placerville, CA 95667
530-621-1280 (fax)

X **By U. S. Mail)** I placed each such envelope(s) for collection and mailing VIA First Class Mail, following ordinary business practices. I am readily familiar with El Dorado County's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U. S. Postal service on that same day with postage thereon fully prepaid at Placerville, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing an affidavit.

X (**By Facsimile** I caused such document(s) to be transmitted by Facsimile machine to the number indicated after the address(es) noted above.

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

Executed this 19th day of February, 2010, at Placerville, California.

Kathryn Martin