

1 **WO**

2

3

4

5

6

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

7

8

9

Michael Ray White,

) No. CV 08-8139-PCT-GMS

10

Petitioner,

) DEATH PENALTY CASE

11

v.

) **PROTECTIVE ORDER**

12

Charles L. Ryan, et al.,

13

Respondents.

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

Petitioner has moved for a protective order to limit use of privileged information disclosed in connection with litigation of his competency to communicate rationally with counsel in these proceedings. (Dkt. 91.) In particular, the Court’s expert, Dr. Sally Johnson, has asked to observe Petitioner interact with his counsel. Respondents do not oppose a protective order for privileged information disclosed to the Court’s expert during her competency evaluation but contend that Petitioner’s proposed order is unnecessarily broad. (Dkt. 95 at 3.) Respondents also contend that information developed with respect to Petitioner’s competency may be relevant to some of Petitioner’s underlying habeas claims and that, if the Court finds Petitioner competent to proceed with his habeas petition, this information should not be precluded from use in defending against these claims. (*Id.* at 4-5.)

On April 19, 2010, the Court heard argument on Petitioner’s motion. Petitioner’s counsel acknowledged that disclosure of “the data or other information” considered by their testifying expert was required under Rule 26(a)(2)(B) of the Federal Rules of Civil

1 Procedure. After extensive discussion, the parties stipulated that any privileged  
2 communications between Petitioner and his counsel overheard by Dr. Johnson during the  
3 course of her observation of Petitioner's conference(s) with his counsel should be protected  
4 from use for any purpose other than determining Petitioner's competency. With respect to  
5 other materials disclosed during litigation of Petitioner's competency, the parties agreed that  
6 Petitioner reserved the right to both assert that such materials are privileged and that such  
7 information should not be used to litigate Petitioner's habeas claims or in any future state  
8 court proceedings, pursuant to *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir. 2003) (en banc).

9 Based on the foregoing,

10 **IT IS HEREBY ORDERED** that the Motion for Protective (Dkt. # 91) Order is  
11 granted in part and denied in part.

12 **IT IS FURTHER ORDERED** that any communications between Petitioner and his  
13 counsel overheard by the Court's expert, Dr. Sally Johnson during the course of her  
14 observation of Petitioner's conference(s) with his counsel, shall be used only in the context  
15 of determining Petitioner's present competency to assist habeas counsel and for no other  
16 purpose. Any such privileged statement or communications documented or testified to by  
17 Dr. Johnson shall not be offered or admitted into evidence by or against Petitioner on any  
18 issue other than Petitioner's current competency. This Order shall continue in effect after  
19 the conclusion of these habeas proceedings and shall specifically apply in connection with  
20 any future state court proceedings, except that either party maintains the right at any time to  
21 request modification or vacation of this Order.

22 **IT IS FURTHER ORDERED** that, with respect to any other information disclosed  
23 during the litigation of Petitioner's current competency, the parties retain the right to seek  
24 its use or to preclude its use in either the litigation of his underlying habeas claims or any  
25 future state court proceedings.

