



1 during these habeas proceedings is not warranted. Finally, the Court determines that its  
2 protective order should be modified.

### 3 **BACKGROUND**

4 In 2003, during discovery in preparation for an evidentiary hearing on a claim of  
5 ineffective assistance of counsel at sentencing, Petitioner moved for an order of protection  
6 to limit “the scope of questioning of Petitioner at his deposition” to only those matters  
7 relevant to the ineffectiveness claim before the Court. (Dkt. 248 at 1.) In support of the  
8 motion, Petitioner argued that there was no legal basis for questioning him about the crime  
9 for which he was convicted and that inquiries about the crime would violate his right against  
10 self-incrimination under the Fifth Amendment. (*Id.* at 2.) The same day Petitioner filed his  
11 motion, the Ninth Circuit Court of Appeals issued a ruling in *Summerlin v. Stewart*, 341 F.3d  
12 1082 (9th Cir. 2003) (en banc), *rev’d*, 542 U.S. 348 (2004), holding that the Supreme Court’s  
13 decision in *Ring v. Arizona*, 536 U.S. 584 (2002), applied retroactively to prisoners such as  
14 Petitioner whose direct appeals had been final when *Ring* was decided. Believing he was  
15 now entitled to a new sentencing proceeding, Petitioner asserted that Respondents must be  
16 restricted from questioning him about the facts of the crime because “such questioning  
17 provides clear opportunity to the attorneys to gather evidence in aggravation” for use at  
18 resentencing. (Dkt. 256 at 2.)

19 At oral argument on the motion, Petitioner’s counsel asked that the motion for  
20 protective order be considered instead a motion to prohibit Respondents from taking  
21 Petitioner’s deposition “because he is going to be resentenced, and he is entitled to not take  
22 the stand.” (RT 9/9/2003 at 8.) The Court denied the motion but agreed that a protective  
23 order should issue to “preclude the state, absent future order of the court,” from using  
24 “statements made by petitioner during the course of discovery in connection with the habeas  
25 petition.” (*Id.* at 13.) In so ruling, the Court stated that it was guided by two case decisions.  
26 (*Id.* at 12.) The first, *Bean v. Calderon*, 166 F.R.D. 452, 453-54 (E.D. Cal. 1996), recognized  
27 the right of a habeas petitioner to invoke the Fifth Amendment during habeas proceedings  
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1 (albeit at the risk of the court drawing an adverse inference from his refusal to testify). The  
2 second, *Bittaker v. Woodford*, 331 F.3d 715, 727-28 (2003) (en banc), held that a protective  
3 order is necessary to preclude use of privileged attorney-client materials for any purpose  
4 other than litigating a federal habeas claim.

5 At the conclusion of argument, the Court issued the following order:

6 **IT IS FURTHER ORDERED** that all discovery granted to  
7 Respondents, including the requests to depose sentencing counsel Brogna,  
8 Petitioner's experts and Petitioner, shall be deemed to be confidential. Any  
9 information, documents and materials obtained vis-a-vis the discovery process  
10 may be used only by representatives from the Office of the Arizona Attorney  
11 General and only for purposes of any proceedings incident to litigating the  
12 claims presented in the petition for writ of habeas corpus (and all amendments  
13 thereto) pending before this Court. None may be disclosed to any other  
14 persons or agencies, including any other law enforcement or prosecutorial  
15 personnel or agencies, without an order from this Court. This Order shall  
16 continue in effect after the conclusion of the habeas corpus proceedings and  
17 specifically shall apply in the event of a resentencing, except that either party  
18 maintains the right to request modification or vacation of this Order upon entry  
19 of final judgment in this matter.

20 **IT IS FURTHER ORDERED** that Respondents' deposition of  
21 Petitioner must specifically relate to assertions Petitioner has made in his  
22 habeas petition (or amendments thereto), and for which it is likely that  
23 Petitioner has personal knowledge. The questions must be phrased in such a  
24 manner that they are directly linked to the federal claim upon which Petitioner  
25 is being deposed. Petitioner may assert his Fifth Amendment privilege, but the  
26 assertion of that privilege may be cause for the Court to draw an adverse  
27 inference in this habeas proceeding.

28 (Dkt. 258 at 3.)

During the subsequent evidentiary hearing, Petitioner refused to answer Respondents'  
questions regarding the murder and Petitioner's state of mind at the time of the crime. (RT  
11/14/03 at 290-303.) Petitioner ultimately prevailed on his sentencing ineffectiveness claim,  
*Lambright v. Schriro*, 490 F.3d 1103, 1128 (9th Cir. 2007), *cert. denied*, 552 U.S. 1097  
(2008), and this Court entered final judgment in his favor on January 25, 2008. (Dkt. 341.)  
In October 2008, Respondents moved to modify the protective order to allow the Pima  
County Attorney's Office access to habeas depositions and discovery (with the exception of  
Petitioner's own deposition) in preparation for Petitioner's resentencing, then slated to begin  
in April 2009. (Dkt. 345.)

1 In lieu of a response to Respondents' motion for modification, Petitioner (now  
2 represented by new habeas counsel substituted during appeal) moved for an order to show  
3 cause for the protective order violation and to stay the time for responding to the  
4 modification motion. (Dkt. 349.) Petitioner's motion asserted, based on an affidavit from  
5 Petitioner's current state court counsel, that the AAGO already had provided the Pima  
6 County Attorney's Office with its file in this matter and, therefore, the protective order had  
7 been violated. According to state defense counsel's affidavit, the Pima County Attorney  
8 indicated in a disclosure that it possessed Petitioner's deposition, transcripts from this Court's  
9 evidentiary hearing, expert evaluations prepared for the hearing, and an affidavit from  
10 Fredrick Neidhardt, one of the witnesses who testified at the hearing. The Court declined to  
11 stay briefing and directed the parties to respond to each other's motions. In their response  
12 to Petitioner's show cause motion, Respondents stated that the AAGO "inadvertently" sent  
13 their entire file to the Pima County Attorney. (Dkt. 354 at 1.) In a supporting affidavit, the  
14 assigned prosecutor avowed that his secretary prepared for defense counsel a list of  
15 documents contained in the file received from the AAGO but that he had not actually  
16 reviewed any of the materials and would not do so absent an order from this Court modifying  
17 the order of protection. (Dkt. 355.)

18 On December 4, 2008, this Court issued an order setting forth in detail the background  
19 behind its September 2003 protection order. (Dkt. 357.) The order noted that, although the  
20 word "privileged" as a modifier to the phrase "information, documents and materials" had  
21 been omitted in the order, it had been the intent of the Court that the order of protection be  
22 so limited. (Dkt. 357 at 3.) Accordingly, the Court directed Petitioner to specifically  
23 identify, by January 5, 2009, the statements or information that he contended were privileged  
24 and should be protected from use at his state court resentencing proceedings. (Dkt. 357.)  
25 Rather than respond as directed or move to stay the Court's order, Petitioner filed a notice  
26 of appeal from the December 2008 order. (Dkt. 358.)

27 In a subsequent order, filed March 24, 2009, the Court determined that its December  
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1 4, 2008 order was not appealable and, therefore, Petitioner’s notice of appeal did not deprive  
2 it of jurisdiction to rule on the pending motions. (Dkt. 362.) The Court then addressed  
3 Respondents’ motion to modify the protective order, ultimately determining that the  
4 protective order should be vacated, and summarily dismissed Petitioner’s motion for an order  
5 to show cause as moot. (*Id.*) Petitioner filed a second notice of appeal. (Dkt. 363.)

6 After briefing and oral argument, the Ninth Circuit determined that it lacked  
7 jurisdiction over Petitioner’s appeal of this Court’s December 4 order because it was not a  
8 final order, did not conclusively determine the modification issue, and was subject to review  
9 on appeal if and when a final modification order was entered. *Lambright v. Ryan*, No. 09-  
10 99000, at 2-3 (9th Cir. Dec. 21, 2009). With regard to this Court’s March 2009 summary  
11 dismissal of Petitioner’s motion to show cause, the Ninth Circuit observed that this Court had  
12 failed to explain the factual and legal basis of its ruling and remanded to resolve any disputed  
13 factual questions, make findings as to any violation of the protective order, and determine  
14 whether sanctions are warranted. The circuit court also remanded to give Petitioner another  
15 opportunity – in view of the one he bypassed by filing a premature notice of appeal – to  
16 provide information relevant to Respondents’ modification request.

17 **MOTIONS TO DISQUALIFY COUNSEL AND FOR**  
18 **DISCOVERY & EVIDENTIARY HEARING**

19 In his original motion for an order to show cause, Petitioner requested that the Court  
20 determine the extent of any violation of its protective order. (Dkt. 349.) In their response,  
21 Respondents acknowledged that a violation of the order had occurred when the AAGO  
22 forwarded all of its files in the case to the county prosecutor. (Dkt. 354.) Consequently, in  
23 his reply, Petitioner stated that a show cause order was unnecessary and moved for an order  
24 “directing that all documents covered by the protective order be returned to Respondents, that  
25 Respondents maintain the confidentiality of such documents, and that the documents not be  
26 used in the re-sentencing proceedings currently ongoing in the state court.” (Dkt. 356 at 3.)  
27 Petitioner now argues that the Court must hold a hearing “at which counsel for Respondents

1 will discuss their actions and Mr. Lambright can prove the prejudice he will suffer as a result  
2 of the violation.” (Dkt. 376 at 3.) Petitioner further asserts that the AAGO should be  
3 disqualified from representing Respondents because its employees are witnesses and are “the  
4 only ones who can provide the factual basis necessary for this Court to assess the nature of  
5 the violation and the scope of any appropriate sanctions.” (*Id.* at 4.)

6 With respect to the disqualification request, the only support cited by Petitioner is  
7 Rule 3.7(a) of the Arizona Rules of Professional Conduct, which provides that a lawyer  
8 “shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness  
9 unless . . . the testimony relates to the nature and value of legal services rendered in the  
10 case.” The Court finds Petitioner’s argument for disqualification based on this rule  
11 unpersuasive. Foremost, there is no “trial” pending in this Court. Even if the Court  
12 construed a sanctions hearing as a trial, any testimony from AAGO lawyers or staff would  
13 be in regard to the “nature . . . of legal services rendered in the case” and thus exempt from  
14 Rule 3.7(a)’s proscription of advocate as witness. It is self evident that a party’s attorney is  
15 not automatically disqualified from representation simply because a court makes inquiry into  
16 a discovery violation. Petitioner’s motion for disqualification of the AAGO is denied.

17 Petitioner next argues that discovery and an evidentiary hearing are necessary because  
18 the Ninth Circuit remarked in its remand order that the factual circumstances surrounding the  
19 violation were not clear, despite the affidavits proffered by Respondents in the record. He  
20 requests that Respondents “provide a list of all attorneys and staff with any link to the  
21 improper disclosure” and asserts that the exact matter of who had knowledge and when they  
22 had it must be addressed. (Dkt. 376 at 6.) The Court disagrees and finds that neither  
23 discovery nor a hearing are necessary because there are no disputed issues of material fact.

24 Respondents have provided several affidavits explaining the circumstances of the file  
25 transfer and protective order violation. At oral argument, Petitioner asserted that the avowals  
26 of counsel for Respondents are “outside the record” and cannot be verified without further  
27 proceedings. However, the proffered statements are sworn affidavits from officers of the  
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1 court that set forth their personal knowledge of the events. The Court understands that  
2 Petitioner’s counsel would like the opportunity to cross-examine the affiants. However, the  
3 Court concludes that there is no basis for questioning the affiants’ veracity and holding a  
4 hearing to have counsel restate what is already in their affidavits would be a waste of time  
5 and resources.

6 The only specific credibility challenge Petitioner makes is to the affidavit of Patricia  
7 Nigro, a former Assistant Arizona Attorney General. Ms. Nigro avowed that she was not  
8 employed by the AAGO at the time of Petitioner’s 2003 evidentiary hearing and, although  
9 she was responsible for the case at the time the file was turned over to the Pima County  
10 Attorney’s Office in 2008, was unaware that it “contained materials arguably covered by a  
11 protective order.” (Dkt. 373, Ex. B.) Petitioner argues that Ms. Nigro’s statement is not  
12 credible because “her assertions that she was unaware of the existence of the protective order  
13 are simply incorrect.” (Dkt. 378 at 4.) However, Ms. Nigro did not deny knowledge of the  
14 protective order. Rather, she stated only that she was unaware the file forwarded to  
15 prosecutors contained protected materials. This is hardly a “material misstatement” given  
16 the fact (discussed more fully below) that there is disagreement over the scope of the  
17 protective order and the materials it covered.

18 Petitioner also argues contradictorily that there is a factual dispute over whether he  
19 was prejudiced by the violation but that prejudice is not a factor the Court should consider  
20 in determining sanctions. (*Compare* Dkt. 376 at 3 *with* Dkt. 378 at 7.) Regardless, there is  
21 no dispute that the materials disclosed to the Pima County Attorney’s Office have yet to be  
22 used as evidence at Petitioner’s resentencing. (Dkt. 355-2 (affidavit of Rick Unklesbay);  
23 Dkt. 378 at 2 n.2 (explaining that resentencing proceedings have been essentially stayed  
24 pending outcome of the instant litigation).) In addition, Petitioner does not contend that the  
25 materials released to the county attorney contain confidential information that could not have  
26 been obtained simply from reading the public transcripts of this Court’s habeas evidentiary  
27 hearing. Thus, it appears that transfer of the file has not resulted in any prejudice and a  
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1 hearing to determine prejudice is unnecessary.

2 Finally, Petitioner argues that the Court should hold a hearing simply to determine  
3 whether there are any factual disputes. The Court declines to do so and finds that it has  
4 sufficient knowledge of the facts to consider Petitioner’s motion for sanctions. Given the  
5 absence of any factual dispute, Petitioner’s motions for discovery and an evidentiary hearing  
6 are denied.

7 **MOTION FOR SANCTIONS**

8 Rule 37(b) of the Federal Rules of Civil Procedure authorizes a district court to  
9 impose a wide range of sanctions if a party fails to comply with a discovery order, including  
10 a protective order. *United States v. Nat’l Med. Enters., Inc.*, 792 F.2d 906, 910 (9th Cir.  
11 1986); *contra Lipscher v. LRP Publ’n, Inc.*, 266 F.3d 1305, 1323 (11th Cir. 2001)  
12 (concluding that violation of protective order not sanctionable under Rule 37(b)(2) because  
13 protective order is not “an order to provide or permit discovery”). Sanctions include  
14 prohibiting a party from introducing designated matters into evidence or treating the violation  
15 as contempt of court. Fed. R. Civ. P. 37(b)(2)(A)(ii), (vii). A district court has wide  
16 discretion in deciding whether to impose sanctions under Rule 37. *Lew v. Kona Hosp.*, 754  
17 F.2d 1420, 1425-26 (9th Cir. 1985). Factors to be considered in crafting an appropriate  
18 sanctions order include ensuring that a party complies with a specific order, is deterred  
19 generally from similar conduct, and is unable to “profit” from its failure to comply. *United*  
20 *States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1369 (9th Cir. 1980).

21 In their responsive pleading, Respondents assert that the AAGO “inadvertently” sent  
22 their entire file to the Pima County Attorney without realizing that some of the materials  
23 contained in the file may have been subject to this Court’s protective order. (Dkt. 354 at 1;  
24 Dkt. 373 at 6.) The county prosecutor first brought the issue to the attention of the AAGO  
25 after Petitioner’s state court counsel received in disclosure an index of materials contained  
26 in the file that was prepared by the prosecuting attorney’s secretary. (Dkt. 355-2 (Affidavit  
27 of Rick Unklesbay).) State court defense counsel alerted the prosecutor that some of the

1 materials identified in the index were protected by this Court’s order, and the prosecutor  
2 assured both opposing counsel and the Pima County Superior Court that he would not review  
3 the documents absent an authorization order from this Court. (*Id.*) Respondents then  
4 initiated these proceedings to seek modification of the protective order. The modification  
5 request did not state that transfer of the file had already occurred.

6 The attorneys of record who represented Respondents at the habeas evidentiary  
7 hearing and initial litigation of the protective order were no longer employed at the AAGO  
8 when the file was transferred five years later. (Dkt. 373 at 8.) Kent Cattani, the Criminal  
9 Appeals/Capital Litigation Section Chief, avows that it was his understanding that the  
10 protective order was limited to any testimony from Petitioner concerning the facts and  
11 circumstances of the offense. (*Id.*, Ex. A.) Because Petitioner ultimately chose not to testify  
12 in this regard, “it did not occur” to Mr. Cattani that the AAGO file contained protected  
13 materials. (*Id.*) Cattani further avows that he did not intentionally disclose privileged  
14 material and has implemented a new policy at the AAGO to ensure that materials subject to  
15 a protective order are not released to any third parties. (*Id.*)

16 These facts are straightforward, and the Court finds no basis to question the veracity  
17 of Respondents’ explanation concerning the protective order violation. Although the Court  
18 intended for its protective order to apply only to privileged materials, the plain language of  
19 the order prohibited Respondents from disclosing to a prosecutorial agency “[a]ny  
20 information, documents and materials obtained vis-a-vis the discovery process . . . without  
21 an order from this Court.” (Dkt. 258 at 3.) Thus, the Court finds that Respondents violated  
22 the plain language of the protective order when they provided materials obtained through the  
23 discovery process to the Pima County Attorney without first seeking modification of the  
24 protective order from this Court.<sup>1</sup> The remaining question is whether Respondents should

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26 <sup>1</sup> The Court notes that the transcripts from the 2003 federal evidentiary hearing  
27 are public records and were not “obtained” through the discovery process. Indeed, Petitioner  
28 does not identify the transcripts as documents he asserts are subject to the protective order.

1 be sanctioned.

2 In his supplemental reply brief, Petitioner asserts summarily that sanctions are  
3 warranted. He does not address or suggest an appropriate sanction, reiterating instead that  
4 an evidentiary hearing is necessary to “ascertain the circumstances surrounding Respondents’  
5 violation of the protective order.” (Dkt. 378 at 7.) As already noted, the circumstances are  
6 straightforward and there are no factual disputes requiring a hearing.

7 In his original reply brief, Petitioner requested that the Court direct Respondents to  
8 retrieve from the Pima County Attorney all documents covered by the protective order. (Dkt.  
9 356 at 3.) Petitioner further requested that the Court prohibit the Pima County Attorney from  
10 using any of these materials at his resentencing. (*Id.*) The Court concludes that an order  
11 directing return of materials subject to the protective order is appropriate. Because  
12 Petitioner’s resentencing has not yet taken place, such sanction will restore the parties to the  
13 position they were in had Respondents not violated the protective order. *See Sumitomo*  
14 *Marine*, 617 F.2d at 1369 (“Rule 37 strictures . . . seek to secure compliance with the  
15 particular order at hand.”).

16 The Court further finds that additional sanctions are not warranted. Petitioner requests  
17 preclusion of all materials developed in these habeas proceedings. However, a proper  
18 sanction should be no more severe than is necessary to prevent prejudice to the victimized  
19 party. *Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 504 (4th Cir. 1977); *see also* James  
20 Wm. Moore et al., *Moore’s Federal Practice*, Ch. 37.41 (“[S]anctions should be tailored to  
21 fit the circumstances in which the disobedience occurs.”). In cases where a party has acted  
22 in “flagrant bad faith” and its counsel have “callous[ly] disregard[ed] their responsibilities,”

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25 (See Dkt. 375 (listing discovery materials).) Therefore, Respondents’ provision of the  
26 transcripts to the Pima County Attorney was not a violation of the protective order.  
27 Similarly, as more fully discussed *infra*, the protective order did not issue until September  
28 23, 2003. Thus, any discovery materials obtained prior to that date are outside the scope of  
the protective order and Respondents committed no violation providing them to prosecutors.

1 more extreme sanctions than mere prevention of prejudice to the victimized party are  
2 warranted. *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (per  
3 curiam).

4 Here, the Court finds that the AAGO acted erroneously but without willful intent to  
5 disobey this Court's order. Petitioner appears to argue that nefarious intent should be implied  
6 because Respondents "*should* have known" about the scope of the protective order, have  
7 failed to "admit responsibility," and neglected to state in their modification motion that  
8 protected materials had already been disclosed to prosecutors. (Dkt. 378 at 3, 5.) While it  
9 is true that counsel for Respondents should have known and should have been more  
10 forthright with the Court in their initial request for modification that the file transfer had  
11 already taken place, they have also admitted that a violation occurred and have implemented  
12 new procedures to ensure that unintended disclosure of protected materials does not occur  
13 in future cases. Nothing in Respondents' behavior calls for more severe sanctions.

14 Moreover, prejudice from the violation is minimal. None of the materials have been  
15 introduced as evidence at Petitioner's resentencing. In addition, the violation did not result  
16 in the disclosure of confidential materials that were otherwise unknowable; Petitioner does  
17 not dispute that the information developed during discovery was introduced into evidence  
18 at a public hearing. Thus, the prosecution has not gained an unfair advantage by having the  
19 AAGO's entire file in its possession – the same information is available simply by reading  
20 the public transcripts of this Court's evidentiary hearing on Petitioner's ineffectiveness claim.  
21 For all these reasons, the Court will direct Respondents to retrieve from the Pima County  
22 Attorney all materials subject to this Court's September 2003 protective order but denies  
23 Petitioner's request for more severe sanctions.

24 **MOTION TO MODIFY PROTECTIVE ORDER**

25 Respondents request that the Court modify its September 2003 protective order to  
26 allow prosecutors access to the depositions and discovery obtained during federal habeas  
27 proceedings for use in Petitioner's resentencing. (Dkt. 345 at 2.) "A party subject to a  
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1 protective order is generally free to return to the issuing court to seek modification of the  
2 order.” *Osband v. Woodford*, 290 F.3d 1036, 1039 (9th Cir. 2002). Modification is  
3 appropriate where, for example, “the protected discovery is sufficiently relevant to the  
4 collateral litigation that a substantial amount of duplicative discovery will be avoided by  
5 modifying the protective order.” *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122,  
6 1132 (9th Cir. 2003). In addition, a court considering modification should assess whether  
7 the material in question was produced in reliance on the protective order. *Id.* at 1137; *see*  
8 *also Beckman Indus. v. Int’l Ins. Co.*, 966 F.2d 470, 475-76 (9th Cir. 1992) (finding minimal  
9 reliance on a blanket protective order). Finally, while a court has authority to limit the  
10 dissemination of information gathered through discovery, materials submitted to a court  
11 during a public hearing or as part of a dispositive motion “lose their status of being raw fruits  
12 of discovery.” *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213  
13 (9th Cir. 2002) (quoting *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252 (4th Cir.  
14 1988)); *Foltz*, 331 F.3d at 1134-35.

#### 15 **A. Scope of Protective Order**

16 In his post-remand supplemental response to the motion, Petitioner first asks the Court  
17 to determine precisely what documents are covered by the protective order. Counsel for  
18 Petitioner assert that prior counsel, who represented Petitioner during this Court’s evidentiary  
19 hearing, failed to maintain a discovery log or index of documents subject to the protective  
20 order. (Dkt. 374 at 3.) To this end, new counsel have compiled a list of documents they  
21 believe should be subject to the order, which include all expert reports, interviews,  
22 depositions, and testing data; all medical, military, school, prison, and vital records; and all  
23 fact witness declarations, depositions, and interviews. (Dkt. 375.) However, Petitioner does  
24 not identify *when* these documents were disclosed to Respondents.

25 Petitioner’s motion for a protective order – addressed only to the scope of questioning  
26 during his own deposition by Respondents – was filed on September 2, 2003. (Dkt. 248.)  
27 Prior to that, beginning in June 2002, Petitioner willingly engaged in discovery and  
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1 disclosure without the benefit of a protective order. Indeed, he was examined by his own  
2 experts on October 28 and December 3, 2002, and Respondents' experts on July 25 and 30,  
3 2003. (Dkts. 197, 204, 232, 235.) The Court's protective order, entered on September 23,  
4 2003, does not state that it applied retroactively. Thus, the only materials that fall within the  
5 scope of the order are those that were disclosed after the order issued on September 23, 2003.

6 **B. Need for Modification**

7 Petitioner opposes Respondents' motion on several grounds. He argues that the order  
8 should not be modified or vacated because Respondents failed to provide notice that they  
9 would attempt to modify the terms of the protective order and because modification "would  
10 violate the trust Lambright placed in the Court during his deposition and testimony at the  
11 hearing." (Dkt. 352 at 3, 5.) Petitioner also asserts that he relied on the broad language of  
12 the Court's protective order in litigating his case and contends that modification is  
13 inappropriate because the Court gave him verbal assurances during the habeas evidentiary  
14 hearing that his testimony would not be used against him at a later resentencing. (*Id.* at 7  
15 (citing RT 11/14/03 at 292).) The Court is unpersuaded.

16 First, the Court expressly stated in its protective order that either party could seek  
17 modification or vacation of the order upon entry of final judgment; therefore, Petitioner's  
18 argument that Respondents' modification request is tardy and that he lacked notice that  
19 modification would be sought is unavailing. In addition, as noted by the Ninth Circuit in  
20 *Osband*, "A party subject to a protective order is generally free to return to the issuing court  
21 to seek modification of the order." 290 F.3d at 1039. Petitioner's implicit argument – that  
22 a protective order can never be modified – necessarily fails.

23 Second, the Court finds that Petitioner did not rely on the Court's protective order in  
24 conducting discovery in this matter. As already noted, Petitioner willingly engaged in  
25 discovery prior to requesting a protective order regarding his deposition. Although it appears  
26 depositions of lay and expert witnesses may have occurred after the protective order was  
27 requested and issued, the experts' evaluations were undertaken without the benefit of any  
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1 protective order. (*See* Dkts. 197, 204, 232, 235.) In addition, despite the protective order,  
2 Petitioner refused to answer questions during the deposition that related to his role in the  
3 crime. (Evid. Hrg. Ex. 21 at 59-65.) There is simply no evidence to support Petitioner’s  
4 claim that he relied on the protective order in litigating this case.

5 Further, Petitioner sought only a narrow protective order. The Court chose for  
6 expediency’s sake to provide blanket protection and did not require Petitioner to make a  
7 “good cause” showing under Rule 26(c) of the Federal Rules of Civil Procedure for  
8 protection of every document obtained through discovery. Instead, the Court provided that  
9 the order would be subject to modification or vacation if and when Petitioner faced a  
10 resentencing proceeding. Accordingly, Petitioner’s reliance was clearly minimal, and, other  
11 than providing the prosecution a “preview” of his case, he does not allege specific prejudice  
12 or harm from use of the habeas discovery materials at his resentencing. *See Beckman Indus.*,  
13 966 F.3d at 475-76 (noting there is less reliance on a blanket protective order and stating that  
14 broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do  
15 not satisfy the Rule 26(c) test).

16 Third, Petitioner’s alleged reliance on the Court’s verbal assurances during the  
17 evidentiary hearing that “the *information in question* would not be used against him at a later  
18 resentencing” misstates the record. (Dkt. 352 at 7 (emphasis added).) During the evidentiary  
19 hearing, Petitioner refused to answer Respondents’ questions regarding the murder and his  
20 state of mind at the time of the crime. (RT 11/14/03 at 290-303.) Consequently, the Court  
21 reiterated that it had issued a protective order so that, in the event the petition was granted  
22 and Petitioner was subjected to a new sentencing hearing, “*your testimony concerning the*  
23 *crimes in this case* that you would not otherwise answer but decide to answer could not be  
24 used against you in connection with that hearing.” (*Id.* at 292 (emphasis added).)  
25 Petitioner’s counsel remarked that he thought the protective order applied only to Petitioner’s  
26 deposition testimony but nonetheless advised his client against testifying. (*Id.*) The record  
27 is clear that the Court offered during the evidentiary hearing an extension of the discovery  
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1 protective order solely to protect any testimony by Petitioner concerning the underlying  
2 crime.

3         Because the Court inadvertently omitted the word “privileged” in its protective order,  
4 a literal reading of the order states that it applies to “[a]ny information, documents and  
5 materials obtained vis-a-vis the discovery process.” (Dkt. 258 at 3.) However, it is apparent,  
6 when considered in context with the original motion and oral argument in support of the  
7 motion, that the Court intended its protective order to address only the concerns set forth in  
8 *Bean* and *Bittaker*. The second paragraph of the protective order tracks *Bean* and protects  
9 Petitioner’s Fifth Amendment right against self-incrimination, the only real concern raised  
10 by Petitioner in his motion for a protective order. The first paragraph was intended to track  
11 *Bittaker*. Although the Court did not include the word “privileged” as a modifier to the  
12 phrase “information, documents and materials,” it is evident from a reading of *Bittaker* that  
13 a protective order’s necessity derives solely from the need to protect the attorney-client  
14 privilege.

15         In *Bittaker*, the court recognized the tension between the rule that a petitioner waives  
16 his attorney-client privilege by making an ineffectiveness claim against his attorney and the  
17 important policy behind the privilege – that of encouraging “frank attorney-client  
18 communications.” 331 F.3d at 722. “If the federal courts were to require habeas petitioners  
19 to give up the privilege categorically and for all purposes, attorneys representing criminal  
20 defendants in state court would have to worry constantly about whether their casefiles and  
21 client conversations would someday fall into the hands of the prosecution.” *Id.*  
22 Consequently, the *Bittaker* court held that a petitioner’s waiver should be drawn as narrowly  
23 as possible so that if the petitioner were successful on his ineffectiveness claim, he would not  
24 be prejudiced upon any retrial by giving the prosecution the advantage of using information  
25 gathered by the first defense lawyer. *Id.* at 722-23. Thus, a protective order under *Bittaker*  
26 limits use during retrial only of *privileged* materials obtained by invoking a federal habeas  
27 court’s power of compulsory discovery.



- 1 • Transcribed interview of Wanda Hadley (lay witness)
- 2 • Deposition of Lambright
- 3 • Declaration of habeas counsel re: meetings with Brogna & Higgins
- 4 • Trial counsel Brogna's affidavits/requests for payment
- 5 • 1981 letter from Brogna to Pima County Superior Court Judge

6 Fifth Amendment Privileged Materials

- 7 • Interviews/depositions of Petitioner's & Respondents' habeas experts (Drs. French, Lang, Morenz, and Hinton)
- 8 • Depositions/interviews of trial counsel Brogna and Higgins
- 9 • Deposition of Lambright
- 10 • Transcribed interview and affidavit of Frederick Neidhardt (lay witness)
- 11 • Transcribed interview and affidavit of Sylvia Scott (lay witness)
- 12 • Declaration of habeas counsel re: meetings with Brogna & Higgins

13  
14 Petitioner argues that each of the above-listed items were produced in furtherance of  
15 his ineffective assistance of counsel claim and in reliance on the protective order and thus  
16 should remain protected. However, “[a] party claiming privilege must identify specific  
17 communications and the grounds supporting the privilege as to each piece of evidence over  
18 which privilege is asserted. *United States v. Martin*, 278 F.3d 988, 1000 (9th Cir. 2002)  
19 (citing *United States v. Osborn*, 561 F.2d 1334, 1339 (9th Cir. 1977)). Besides failing to  
20 identify specific communications or the relevant date of disclosure, it is simply not clear from  
21 Petitioner's brief how or why the attorney-client or work-product privilege applies to these  
22 materials. Nor has Petitioner identified any compelled testimony from Petitioner or  
23 otherwise explained how the Fifth Amendment right against self-incrimination is relevant to  
24 the above-listed documents. As Respondents note, “[t]he privilege against self-incrimination  
25 is only properly invoked when the communication is testimonial, incriminating, and  
26 compelled.” (Dkt. 377 at 4.)

27 Excluding Petitioner's deposition (which Respondents assert should remain subject

1 to the protective order absent a request for further modification), the only items that may  
2 arguably contain privileged attorney communications or work product are the interviews and  
3 depositions of trial counsel. However, Petitioner has failed to identify what in these  
4 transcripts is privileged; thus, the Court cannot ascertain whether use of any of these  
5 materials at his resentencing would result in prejudice.

6 It is also unclear how interviews and depositions of lay and expert witnesses during  
7 habeas proceedings are subject to the attorney-client/work-product privilege at issue in  
8 *Bittaker*. Indeed, it appears that Petitioner misapprehends the scope of *Bittaker* by asserting  
9 that the protective order applies to attorney-client communications and work product from  
10 his *habeas* proceedings, not his trial and sentencing. It is clear from a reading of *Bittaker* that  
11 the privilege at issue is the one between Petitioner and the attorney(s) against whom he has  
12 alleged ineffectiveness, not his subsequent collateral counsel. The *Bittaker* court expressly  
13 noted that waiver of the privilege accompanying litigation of an ineffectiveness claim must  
14 be limited to adjudication of the claim because “extending the waiver to cover [Petitioner’s]  
15 retrial would immediately and perversely skew the second trial in the prosecutor’s favor by  
16 handing to the state *all of the information in petitioner’s first counsel’s casefile*.” 331 F.3d  
17 at 722 (emphasis added). *Bittaker* does not address non-privileged materials developed by  
18 habeas counsel; it is concerned only with privileged communications that would not have  
19 been revealed but for the allegation of ineffectiveness.

20 Petitioner appears to acknowledge this but argues nonetheless that non-privileged  
21 documents also should be protected from use in subsequent state proceedings because  
22 *Bittaker* requires this Court to “restore” him “to the position he would have occupied had the  
23 first trial been error-free.” (Dkt. 374 at 9.) This argument was first introduced by the Ninth  
24 Circuit in its order remanding the case:

25 [Because of his premature appeal,] Lambright had no opportunity to explain  
26 whether, in his view, *non-privileged* material or materials that did not emerge  
27 through the discovery process warranted protection, given this court’s rationale  
28 in *Bittaker v. Woodford*: “If a prisoner is successful in persuading a federal  
court to grant the writ [of habeas corpus], the court should aim to restore him

1 to the position he would have occupied, had the first trial been constitutionally  
2 error-free.”  
3 *Lambright v. Ryan*, No. 09-99000, at 5-6 (9th Cir. Dec. 21, 2009). Petitioner essentially  
4 reads this part of the remand order to require, as a matter of equity, that the unintentionally  
5 broad protective order remain in effect solely to return him to the *status quo* and prevent the  
6 Pima County Attorney’s office from getting “a free preview of his case at resentencing.”  
7 (Dkt. 374 at 10.) This Court can find no support for such an expansive reading of *Bittaker*.  
8 Furthermore, taken to its logical conclusion, such an interpretation of *Bittaker* would also  
9 require that materials developed by Petitioner’s federal habeas counsel be precluded from use  
10 at resentencing, forcing his state court counsel to enlist new experts and reinvestigate  
11 mitigation. Because the materials Petitioner seeks to maintain under the protective order are  
12 “sufficiently relevant to the collateral [resentencing] litigation that a substantial amount of  
13 duplicative discovery will be avoided by modifying the protective order,” the Court  
14 concludes that modification is appropriate. *Foltz*, 331 F.3d at 1132.

15 Moreover, it is well settled that the public has a common law right of access to judicial  
16 documents. *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978); *San Jose Mercury*  
17 *News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1102 (9th Cir. 1999). Because Petitioner did not  
18 seek to seal any of the materials submitted and testified to during the evidentiary hearing in  
19 support of his habeas claim, those materials became a matter of public record. As the Ninth  
20 Circuit in *Foltz* recognized:

21 When discovery material is filed with the court, however, its status changes.  
22 If the documents are not among those which have traditionally been kept secret  
23 for important policy reasons, then the public policy reasons behind a  
24 presumption of access to judicial documents (including judicial accountability,  
25 education about the judicial process etc.) apply.

26 331 F.3d at 1134 (internal citations and quotations omitted); *see also Phillips*, 307 F.3d at  
27 1213. Thus, although discovery in a civil case is ordinarily treated as private among the  
28 parties, a hearing in federal court is a public proceeding and, absent a request to seal,  
information filed in connection with such a hearing is outside the scope of a Rule 26(c)

1 protective order. *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1180 (9th Cir.  
2 2006) (“Unlike private materials unearthed during discovery, judicial records are public  
3 documents almost by definition, and the public is entitled to access by default.”).<sup>2</sup>

#### 4 **D. Conclusion**

5 In *Phillips v. General Motors Corp.*, the Ninth Circuit held that the public is permitted  
6 “access to litigation documents and information produced during discovery unless the party  
7 opposing disclosure shows ‘good cause’ why a protective order is necessary.” 307 F.3d at  
8 1210. It follows, then, that a party who has never made a “good cause” showing under Rule  
9 26(c) may not rely solely on a protective order to justify refusal to modify that order in  
10 response to a request for disclosure. Petitioner has made no effort to establish good cause  
11 for any specific materials or information obtained by Respondents during pre-hearing  
12 discovery in this case. Nor has he identified privileged materials uncovered during discovery  
13 or asserted any specific prejudice arguments concerning the use of the discovery materials  
14 during resentencing. On this record, the Court concludes that its September 2003 protective  
15 order should remain in effect only as to the transcript of Petitioner’s deposition.

#### 16 **STAY OF MODIFICATION ORDER**

17 The aspect of this order modifying the September 2003 order of protection will be  
18 stayed pending any appeal. The Court’s order directing Respondents to retrieve from the  
19

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20 <sup>2</sup> In *Kamakana*, the Ninth Circuit recognized an exception to the right of public  
21 access for documents that have “traditionally been kept secret for important policy reasons.”  
22 447 F.3d at 1178 (citing *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir.  
23 1989)). At argument, Petitioner argued that attorney-client materials fall into this category.  
24 The *Kamakana* court, however, identified only two types of documents that are exempt from  
25 public access: grand jury transcripts and warrant materials in the midst of a pre-indictment  
26 investigation. *Id.* at 1178, 1185. The court further observed that classes of documents are  
27 not added to the “traditionally kept secret” category “simply because such documents are  
28 usually or often deemed confidential” and rejected an argument that documents subject to  
“privacy, law enforcement, and official information privileges” are traditionally kept secret.  
*Id.* at 1185. Thus, it does not appear that attorney-client materials are *per se* exempt from  
the presumption of public access.

1 Pima County Attorney all “information, documents and materials obtained vis-a-vis the  
2 discovery process” in these federal habeas proceedings after entry of the protective order on  
3 September 23, 2003, is effective immediately and will not be stayed.

4 Based on the foregoing,

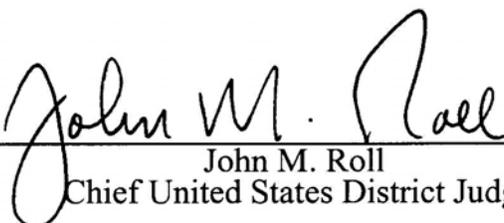
5 **IT IS ORDERED** that Petitioner’s Motion for Discovery and an Evidentiary Hearing  
6 Relating to Petitioner’s Motion for an Order to Show Cause and Motion to Disqualify the  
7 Office of the Arizona Attorney General (Dkt. 376) is **DENIED**.

8 **IT IS FURTHER ORDERED** that Petitioner’s Motion for Order to Show Cause  
9 (Dkt. 349) is **DENIED IN PART AND GRANTED IN PART**. Respondents shall  
10 immediately retrieve from the Pima County Attorney all “information, documents and  
11 materials obtained vis-a-vis the discovery process” in these federal habeas proceedings after  
12 entry of the protective order on September 23, 2003, and shall expeditiously file notice with  
13 the Court identifying these materials and indicating compliance with this Order. To the  
14 extent Petitioner seeks further sanctions for Respondents’ violation of the Court’s protective  
15 order, that request is denied.

16 **IT IS FURTHER ORDERED** that Respondents’ Motion to Modify Protective Order  
17 (Dkt. 345) is **GRANTED**. Absent further order of the Court, the protective order entered  
18 September 23, 2003, shall remain in effect only as to the transcript of Petitioner’s deposition.

19 **IT IS FURTHER ORDERED** that this Court’s modification of the September 23,  
20 2003 protective order shall be stayed in the event appellate review of this Order is sought.

21 DATED this 4<sup>th</sup> day of May, 2010.

22  
23  
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25 \_\_\_\_\_  
26 John M. Roll  
27 Chief United States District Judge  
28