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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARTIN JAMES KIPP,
Petitioner,
v.
ROBERT L. AYERS, JR.,
Warden, California State Prison
at San Quentin,
Respondent.

CASE NO. CV 99-4973 ABC
DEATH PENALTY CASE

PROTECTIVE ORDER

Petitioner and respondent are unable to agree on the language of a protective order to effectuate the principle that “district courts have the obligation, whenever they permit discovery of attorney-client materials as relevant to the defense of ineffective assistance of counsel claims in habeas cases, to ensure that the party given such access does not disclose these materials, except to the extent necessary in the habeas proceeding, i.e., to ensure that such a party’s actions do not result in a rupture of the privilege.” *Bittaker v. Woodford*, 331 F.3d 715, 727-28 (9th Cir. 2003) (en banc). Accordingly, after considering the parties’ arguments, and their various proposed orders, the Court hereby enters the following protective order regarding (1) privileged¹ documents and other materials from trial counsels’ files in

¹ In this order, “privileged” means communications or information protected from disclosure by the attorney-client privilege or the work product doctrine. *See Bittaker*, 331 F.3d at 721-22 & n.6.

1 the Orange County and Los Angeles County cases² that petitioner is ordered to
2 produce to respondent in this habeas corpus action; (2) any privileged testimony
3 provided at the evidentiary hearing in this matter; and (3) any reference to such
4 privileged material or testimony in any document submitted to the Court that
5 reveals the substantive content of the privileged matter:

6 1. Petitioner shall produce the Orange County and Los Angeles County
7 trial counsels' files, including the files of other defense team members, to
8 respondent, and such discovery shall be subject to this Protective Order and shall
9 remain confidential. The Court has not ordered that the evidentiary hearing in this
10 action be closed to the public, but any privileged testimony at the hearing by
11 petitioner, petitioner's experts, trial counsel, or any trial defense team member or
12 other witness shall be subject to this Protective Order and shall remain confidential
13 and sealed.

14 2. All privileged material produced to respondent in this action, Case
15 No. CV 99-4973-ABC, and all privileged testimony, may be used only for
16 purposes of litigating this habeas corpus proceeding by (a) petitioner and the
17 members of his legal team, i.e., lawyers, paralegals, investigators, and support
18 staff, assigned to this habeas case, Case No. CV 99-4973-ABC, by the Office of
19 the Federal Public Defender, and persons retained by petitioner's counsel to litigate
20 this matter, including, but not limited to, outside investigators, consultants and
21 expert witnesses; and (b) respondent and the members of his legal team, i.e.,
22 lawyers, paralegals, investigators, and support staff, assigned to this habeas case,
23 Case No. CV 99-4973-ABC, by the California Department of Justice, Attorney
24

25
26 ² The "Orange County case" refers to this federal habeas action, Case No. CV 99-4973-ABC,
27 challenging the judgment rendered in Orange County Superior Court Case No. C-56472, which
28 was affirmed on appeal in *People v. Kipp*, 18 Cal. 4th 349, 75 Cal. Rptr. 2d 716 (1998). The "Los
Angeles County case" refers to petitioner's other federal habeas action, Case No. CV 03-8571-
PSG, challenging the judgment rendered in Los Angeles County Superior Court Case No.
A028286, which was affirmed on appeal in *People v. Kipp*, 26 Cal. 4th 1100, 113 Cal. Rptr. 2d 27
(2002).

1 General's Office, and persons retained by respondent's counsel to litigate this
2 matter, including, but not limited to, outside investigators, consultants, and expert
3 witnesses. This Protective Order extends to members of the legal teams and all
4 persons retained by the parties to litigate this matter. All such individuals shall be
5 provided with a copy of this Protective Order.

6 3. Except for disclosure to the persons and agencies described in
7 Paragraph 2, disclosure of the contents of the privileged documents and testimony
8 and the documents and testimony themselves shall not be made to any other
9 persons or agencies, including, but not limited to, prosecutorial agencies and law
10 enforcement personnel, without a prior order from this Court authorizing such
11 disclosure. If respondent contends that he needs to disclose petitioner's privileged
12 material to outside prosecutorial agencies, outside law enforcement personnel,
13 experts, consultants, deponents or witnesses in order to investigate or respond to
14 petitioner's habeas claims in this action, Case No. CV 99-4973-ABC, respondent
15 shall provide to petitioner's counsel (a) the identity of the individual(s) to whom
16 access is going to be provided and (b) respondent's reasons therefore. Petitioner
17 shall then notify respondent within three court days of his non-opposition or
18 objection to respondent's proposal. If petitioner objects to respondent's proposal,
19 and if the parties cannot resolve their differences within four additional court days,
20 petitioner shall provide his written objection to respondent within four further
21 court days. Respondent shall file and serve a document containing petitioner's
22 objections and respondent's responses within four additional court days. The
23 Court shall rule on petitioner's objections before the privileged materials are
24 disclosed. Any person obtaining access to the privileged material pursuant to this
25 process shall also be given a copy of this Protective Order and shall sign a
26 statement agreeing to be bound by the terms of this Protective Order.

27 4. Documents and testimony that petitioner contends are privileged shall
28 be clearly designated as such by labeling the documents or testimony in a manner

1 that does not prevent reading the text of the document.

2 5. All documents and testimony designated as privileged by petitioner
3 that are submitted to this Court in this case shall be submitted under seal in a
4 manner reflecting their confidential nature and designed to ensure that the
5 privileged material will not become part of the public record. At the evidentiary
6 hearing in this matter, privileged testimony shall be clearly designated as such by
7 marking the transcripts of the proceeding. Any pleading, deposition transcript,
8 discovery response or request, or other papers served on opposing counsel or filed
9 or lodged with the Court that contains or reveals the substantive content of the
10 privileged matter shall be filed under seal, and shall include a separate caption page
11 that includes the following confidentiality notice or its equivalent:

12 “TO BE FILED UNDER SEAL

13 THIS PLEADING OR DOCUMENT CONTAINS CONFIDENTIAL
14 INFORMATION SUBJECT TO A PROTECTIVE ORDER (DKT. NO.
15 _____) AND IS NOT TO BE OPENED NOR ITS CONTENTS DISPLAYED
OR DISCLOSED”

16 6. If privileged documents or documents containing privileged matters
17 are filed with this Court, they shall be filed with the Clerk of this Court in sealed
18 envelopes prominently marked with the caption of the case and the foregoing
19 confidentiality notice. The Clerk of the Court is directed to maintain the
20 confidentiality of any documents filed in accordance with the above. Insofar as
21 reasonably feasible, only confidential portions of the filings shall be under seal,
22 and the parties shall tailor their documents to limit, as much as is practicable, the
23 quantity of material that is to be filed under seal. When a pleading or document
24 contains only a limited amount of privileged content, a party may file a complete
25 copy under seal and at the same time file in the public record an additional,
26 redacted version of the document, blocking out the limited matter comprising the
27 confidential portions.

28 7. Petitioner’s disclosure of the Orange County and Los Angeles County

1 trial counsels' files in this action, and any privileged testimony by petitioner or
2 members of petitioner's trial team or other witnesses at the evidentiary hearing in
3 this case does not constitute a waiver of the attorney-client privilege or the work
4 product doctrine in the event of any retrial in the Orange County or Los Angeles
5 County cases, or a waiver regarding production of these files in the Los Angeles
6 County habeas action, Case No. CV 03-8571-PSG.

7 8. This Protective Order does not apply to material previously disclosed
8 in any unsealed document that petitioner lodged or filed in this Court before entry
9 of this order.

10 9. When the Court rules on petitioner's habeas claims, it will be required
11 to balance petitioner's need to maintain the confidentiality of privileged material
12 against the public's right of access to court records. *See Foltz v. State Farm*
13 *Mutual Auto. Ins. Co.*, 331 F.3d 1122, 1134-36 (9th Cir. 2003); *San Jose Mercury*
14 *News v. United States District Court*, 187 F.3d 1096, 1101-1103 (9th Cir. 1999).
15 Even if there are compelling reasons to maintain the confidentiality of the parties'
16 documents and testimony that were filed under seal, *cf. Foltz*, 331 F.3d at 1136,
17 "the public interest in understanding the judicial process," *id.* at 1135, must be
18 taken into consideration when the Court issues dispositive orders. The Court must
19 publicly explain its reasons when it rules on petitioner's claims of federal
20 constitutional error. In doing so, the Court will not disclose confidential material
21 unnecessarily. *Cf. Anderson v. Calderon*, 232 F.3d 1053, 1097 (9th Cir. 2000)
22 (declining to quote from record of sealed hearing). However, it is impossible at
23 this juncture, before seeing the evidence, to estimate the extent to which the Court
24 will need to discuss privileged material in future orders. Before issuing orders that
25 publicly discuss material covered by this protective order, the Court will give the
26 parties an opportunity to be heard on this issue.

27 10. This order shall continue in effect after the conclusion of these habeas
28 corpus proceedings and specifically shall apply in the event of a retrial of all or any

1 portion of either of petitioner's criminal cases, Orange County Superior Court Case
2 No. C-56472 and Los Angeles County Superior Court Case No. A028286. Any
3 modification or vacation of this order shall only be made upon notice to and an
4 opportunity to be heard from both parties.

5 IT IS SO ORDERED.

6
7 Dated: October 31, 2008



8 AUDREY B. COLLINS
9 United States District Judge