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# Death Penalty

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SERGIO OCHOA,

Petitioner,

v.

VINCENT CULLEN, Warden of  
California State Prison at  
San Quentin,

Respondent.

CASE NO. CV 02-7774 RSWL

**DEATH PENALTY CASE**

PROTECTIVE ORDER

DOCKET ENTRIES #77, 81, 82

On January 19, 2011, Petitioner filed an *ex parte* application for a protective order as countenanced by *Bittaker v. Woodford*, 331 F.3d 715. Respondent and Petitioner both filed subsequent briefing. This Court by order of February 25, 2011, directed the parties to meet and confer so as to settle a joint protective order, or, if unable to do so, for petitioner to file a proposed protective order and Respondent to file his objections thereto. The parties were unable to reach agreement, and have taken the latter option. The Court has read and considered the papers before it, and now rules.

Respondent urges this Court to limit the protective order to the discovery stage of this case, saying to do otherwise could require holding proceedings in a

1 closed court or holding evidence under seal. The Court is aware of those  
2 possibilities and will deal with them if they arise. To lift the protection on sensitive  
3 materials after completion of discovery would put Petitioner in the same jeopardy  
4 of having them used against him at any possible retrial as if no protective order ever  
5 existed. The Court is sensitive to the need for the public's access to these  
6 proceedings, but they must be balanced against Petitioner's right to a fair retrial.  
7 The primary purpose of the seal order is to keep the state from unfairly accessing  
8 material developed for habeas purposes at a retrial. It should have been routine to  
9 address that concern. Instead, having failed to agree with Petitioner upon a  
10 protective order more limited in time and scope, Respondent now argues against the  
11 form the order takes because reshaping it later to address other concerns will  
12 require more work. The Court will revisit the particulars of the seal order as  
13 necessary, unless the parties are yet able to settle an order that addresses  
14 Respondent's concerns.

15 Accordingly, this Court enters the following Protective Order regarding (1)  
16 documents and materials from trial counsel's files that Petitioner provides to  
17 Respondent during this habeas action; (2) any related testimony provided at a  
18 deposition or an evidentiary hearing in this matter; and (3) any reference to such  
19 documents or testimony in the parties' pleadings submitted to the Court:

20 1. To the extent that the Court will order the production of documents and  
21 discovery in this matter that Petitioner contends are subject to claims of privilege or  
22 protected from disclosure by the attorney work product doctrine, and to the extent  
23 that this Court will order Petitioner's trial counsel's file, including the files of other  
24 defense team members, be produced to the Respondent (or Petitioner turns over  
25 such documents voluntarily by filing any part of the material as supporting  
26 evidence in this action), such discovery shall be subject to this Protective Order and  
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1 shall remain confidential and sealed.<sup>1</sup> Further, to the extent that this Court will  
2 order the taking of the depositions of trial counsel, other members of the defense  
3 team, Petitioner, if such deposition is granted, and Petitioner’s experts, such  
4 discovery shall be subject to this Protective Order and shall remain confidential and  
5 sealed. If an evidentiary hearing is held in this case, any testimony by Petitioner,  
6 Petitioner’s experts, trial counsel, and any trial defense team member shall be  
7 subject to this Protective Order and shall remain confidential and sealed. Petitioner  
8 contends that the testimony provided by these witnesses is subject to claims of  
9 privilege and/or protected from disclosure by the attorney work product doctrine.<sup>2</sup>

10 2. All privileged documents and testimony produced to Respondent in this  
11 action may be used only for purposes of litigating this habeas corpus proceeding  
12 by: a) Petitioner and the members of the legal team, i.e., lawyers, paralegals,  
13 investigators, and support staff, assigned to Ochoa v. Cullen by the Office of the  
14 Federal Public Defender, and persons retained by Petitioner’s counsel to litigate  
15 this matter, including, but not limited to, outside investigators, consultants and  
16 expert witnesses; and (b) Respondent and the members of the legal team, i.e.,  
17 lawyers, paralegals, investigators, and support staff, assigned to Ochoa v. Cullen by  
18 the California Department of Justice, Attorney General’s Office, and persons  
19 retained by Respondent’s counsel to litigate this matter, including, but not limited  
20 to, outside investigators, consultants and expert witnesses. This Protective Order  
21 extends to members of the legal teams and all persons retained by the parties to  
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23 <sup>1</sup> To the extent that portions of trial counsel’s files have already been turned  
24 over to Respondent informally, this protective order shall also apply to those  
25 documents.

26 <sup>2</sup> Materials and testimony subject to a privilege and/or subject to the attorney  
27 work product doctrine is referred to collectively hereinafter as “privileged”  
28 materials.

1 litigate this matter. All such individuals shall be provided with a copy of this  
2 Protective Order.

3 3. Except for disclosure to the persons and agencies described in Paragraph  
4 2, disclosure of the contents of the documents and testimony and the documents  
5 and testimony themselves shall not be made to any other persons or agencies,  
6 including, but not limited to, prosecutorial agencies and law enforcement personnel,  
7 without the Court's order. If Respondent contends that he needs to disclose  
8 Petitioner's privileged material to outside prosecutorial agencies, outside law  
9 enforcement personnel, experts, consultants, deponents or witnesses in order to  
10 investigate or respond to Petitioner's habeas claims, Respondent shall provide to  
11 Petitioner's counsel (a) the identity of the individual/s to whom access is going to  
12 be provided and (b) Respondent's reasons therefor. Petitioner shall notify  
13 Respondent within three court days of his non-opposition or objection to  
14 Respondent's proposal. If Petitioner objects to Respondent's proposal, and if the  
15 parties cannot resolve their differences within three additional court days, Petitioner  
16 shall provide his written objection to Respondent within three further court days.  
17 Respondent shall file and serve a document containing Petitioner's objections and  
18 Respondent's responses within three additional court days. The Court shall rule on  
19 Petitioner's objections before the privileged materials are disclosed. Any person  
20 obtaining access to the privileged material pursuant to this process shall also be  
21 given a copy of this Protective Order and shall sign a statement agreeing to be  
22 bound by the terms of this Protective Order.

23 4. Documents and testimony that Petitioner contends are privileged shall be  
24 clearly designated as such by labeling the documents or testimony in a manner that  
25 does not prevent reading the text of the document.

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

9 **TO BE FILED UNDER SEAL**  
10 **THIS PLEADING OR DOCUMENT CONTAINS CONFIDENTIAL**  
11 **INFORMATION SUBJECT TO A PROTECTIVE ORDER AND IS**  
12 **NOT TO BE OPENED NOR ITS CONTENTS DISPLAYED OR**  
13 **DISCLOSED**

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

26 7. Previously Filed or Lodged Papers: No later than sixty (60) days after the  
27 filing of this Protective Order, Petitioner shall identify any other previously filed or  
28 lodged pleading, order, declaration, transcript or other document or item, or any  
part thereof, that contains or discloses the substance or content of the privileged

1 matter. For each such item, following consultations with Respondent, Petitioner  
2 shall file a redacted version of the item, blocking out the matter comprising the  
3 privileged matter; and for each such originally filed item, Petitioner shall supply the  
4 clerk with a “To Be Filed Under Seal” caption page and envelope that conform to  
5 the Privileged Caption, and the clerk shall insert the filed or lodged item in the  
6 envelope, seal the item and re-file it.

7 8. Petitioner’s disclosure of documents from trial counsel’s file in this  
8 action, and any related testimony by Petitioner or members of Petitioner’s trial team  
9 at a deposition or evidentiary hearing in this case, does not constitute a waiver of  
10 Petitioner’s rights under the Fifth and Sixth Amendments to the United States  
11 Constitution in the event of any retrial.

12 9. This order shall continue in effect after the conclusion of the habeas  
13 corpus proceedings and specifically shall apply in the event of a retrial of all or any  
14 portion of Petitioner’s criminal case. Any modification or vacation of this order  
15 shall only be made upon notice to and an opportunity to be heard from both parties.  
16 Respondent or any other person may apply to have the sealing order lifted  
17 following decision in this case and completion of all appeals thereof.

18 In addition, the parties have asked for direction from the Court regarding the  
19 deposition of Petitioner’s trial counsel, who is terminally ill. Having resolved the  
20 issue of the applicable protective order, the Court now addresses the scheduling of  
21 the deposition. Petitioner has offered to delay the deposition until three weeks from  
22 the date he turns over seven boxes of trial counsel’s files to Respondent, but reports  
23 that Respondent has stated that he cannot agree to any time frame until he has  
24 actually reviewed the files. Given the press of time, the Court finds that

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1 Petitioner's proposal is reasonable. Petitioner may schedule the deposition of trial  
2 counsel for any date that is at least **three weeks** after Petitioner provides  
3 Respondent with trial counsel's files.

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5 **IT IS SO ORDERED.**

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7 Dated: April 12, 2011

RONALD S.W. LEW

The Honorable Ronald S.W. Lew  
Senior, U.S. District Court Judge