

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RONALD L. SANDERS,
Petitioner,
v.
RON DAVIS, Warden of San Quentin
State Prison,
Respondent.¹

Case No. 1:92-cv-05471-LJO-SAB
DEATH PENALTY CASE
ORDER THAT PETITIONER SHOW CAUSE
WHY THE EVIDENTIARY HEARING
TRANSCRIPT SHOULD NOT BE
UNSEALED
Twenty (20) Day Deadline to Respond

This matter is before the court following the parties' supplemental briefing of claim 38, the sole remaining claim in this proceeding. Claim 38 alleges ineffective assistance of trial counsel by acquiescence in petitioner's request to forgo a penalty phase defense.

This court ordered a bifurcated evidentiary hearing on claim 38 following remand from the Ninth Circuit. The first stage evidentiary hearing was held October 28 through 30, and November 3, 2008. The court has not issued a ruling following the first stage evidentiary hearing and is considering vacating the second stage evidentiary hearing.

///

¹ Pursuant to Fed. R. Civ. P. 25(d), Ron Davis, Warden of San Quentin State Prison, is substituted as respondent in place of his predecessor wardens.

1 I. RELEVANT BACKGROUND

2 A. Protective Order

3 The parties stipulated to an October 5, 2007 protective order (“Protective Order”) (*see*
4 Doc. No. 227) which limits the use of privileged information including attorney-client
5 information obtained through discovery (hereinafter “Protected Information”) to respondent and
6 this proceeding. The Protective Order leaves unresolved whether testimony taken in future court
7 hearings may be protected as confidential information.

8 B. Sealed Evidentiary Hearing Transcript

9 At the first stage evidentiary hearing counsel for petitioner proposed that the court,
10 pursuant to the Protective Order seal testimony of defense counsel Hoover, petitioner and experts
11 relying on information from them. Counsel stated his concern was that a member of law
12 enforcement or a government agency present in the courtroom might use the Protected
13 Information in an investigation or at retrial.

14 At the conclusion of the first stage evidentiary hearing, the court ordered the entirety of
15 the transcript to be sealed, but allowed that counsel could request a determination regarding what
16 portions of the transcript should remain under seal.

17 The parties, pursuant to the Protective Order then filed under seal post-hearing briefs
18 including proposed findings of facts and conclusions of law and the noted supplement briefs.

19 II. DISCUSSION

20 A. Legal Authorities

21 1. Implied Waiver of Attorney-Client Privilege

22 A habeas petitioner bringing an ineffective assistance of counsel claim impliedly waives
23 his attorney-client privilege by litigating the habeas petition. *See Bittaker v. Woodford* 331 F.3d
24 715, 721-24 (9th Cir. 2003) (where a habeas petitioner raises a claim of ineffective assistance of
25 counsel, he waives the attorney-client privilege only as to litigation of the habeas petition); *see*
26 *also Riel v. Ayers*, 2010 WL 3835798, at *2 (E.D. Cal. September 30, 2010), *citing Bittaker*, 331
27 F.3d at 727-28 (a waiver that limits the use of privileged communications to adjudicating the
28 effective assistance of counsel claims fully serves the federal interest).

1 2. Public Access to Evidentiary Hearing Transcript

2 Under the common law, “there is a presumption of public access to civil proceedings.”
3 *See Riel*, 2010 WL 3835796, at *4. The common law right of access “is not of constitutional
4 dimension, is not absolute, and is not entitled to the same level of protection afforded
5 constitutional rights.” *Valley Broadcasting Co. v. U.S. Dist. Court for Dist. Of Nevada*, 798 F.2d
6 1289, 1293 (9th Cir. 1986).

7 In applying the common law right of access, courts:

8 [M]ust weigh the interests advanced by the parties in the light of the public interest
9 and the duty of the courts. [Citation] [Among the interests that would overcome
10 the presumption of access are] the likelihood of improper use, including ...
11 infringement of fair trial rights of the defendants or third persons; and residual
12 privacy rights.... [Citation] Where there is a clash between the common law right
13 of access and a defendant's constitutional right to a fair trial, a court may deny
14 access, but only on the basis of articulated facts known to the court, not on the
15 basis of unsupported hypothesis or conjecture....

16 *Id.*, at 1294, citing *United States v. Edwards (In re Video-Indiana, Inc.)*, 672 F.2d 1289, 1294 (7th
17 Cir. 1982).

18 B. Unsealing the Evidentiary Hearing Transcript

19 The court is considering unsealing the evidentiary hearing transcript for the following
20 reasons. As noted, there is a presumption of public access to the evidentiary hearing proceedings,
21 which were conducted in open court, and, relatedly, to any written decision the court may issue
22 related to the evidentiary hearing. The Protective Order continues in full force through any retrial
23 of all or any portion of petitioner’s criminal case. The Protective Order limits petitioner’s implied
24 waiver consistent with *Bittaker*. The Protective Order does not require sealing of the transcript.
25 *See Local Rule 141; see also Riel*, 2010 WL 3835796, at *3 (a protective order covering an
26 evidentiary hearing will only protect information that is actually privileged).

27 Petitioner bears the burden of establishing the privilege he asserts, *see Riel*, 2010 WL
28 3835796, at *3, citing *U.S. v. Martin*, 278 F.3d 988, 999-1000 (9th Cir. 2002), the basis for
continued sealing of the transcript and any prejudice should the transcript be unsealed. *See Local*
Rules 141, 141.1.

