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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

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

Case No. 1:92-cv-05471-JLT-SAB
DEATH PENALTY CASE
TENTATIVE ORDER AS TO
RESPONDENT'S NOTIFICATION
REGARDING PROTECTIVE ORDER
OF OCTOBER 5, 2007

Before the Court is the notification filed by counsel for Respondent, Supervising Deputy Attorney General Kenneth Sokoler (Docs. 416, 416-1), regarding the stipulated protective order filed in the case on October 5, 2007 (Doc. 227).

On July 14, 2022, pursuant to the Ninth Circuit's decision on appeal, this Court granted a conditional writ of habeas corpus in the 28 U.S.C. § 2254 proceeding challenging Petitioner's 1982 murder conviction and death sentence rendered in Kern County Superior Court Case No. 22079. Therein, the Court directed that the State of California vacate the death sentence imposed upon Petitioner and sentence him to a penalty other than death in

¹ Ron Broomfield, appointed as warden of San Quentin State Prison in September 2021, is substituted as Respondent in place of his predecessor wardens. Fed. R. Civ. P. 25(d).

1 conformance with state law, or grant him a new penalty phase trial.

2 In the Notification, counsel for Respondent states that: (1) on August 16, 2022,
3 unspecified privileged and confidential Protected Information was disclosed by his office to
4 Kern County Assistant District Attorney Andrea Kohler and her law clerk Michael Strand,
5 contrary to the Protective Order, and (2) Ms. Kohler and Mr. Strand have not themselves
6 disclosed, and will not disclose, the Protected Information to other members of the Kern
7 County District Attorney's Office, or further participate in the state proceeding in this matter.

8 The Protective Order, in pertinent part, provides that:

9 All Protected Information may be used only by counsel for
10 respondent in the Office of the California Attorney General and
11 persons working under their direct supervision and may be used
12 only for purposes of litigating the claims presented in [petitioner's]
13 petition for writ of habeas corpus pending before this Court.
14 Respondent shall keep sealed and confidential all Protected
15 Information. Disclosure of any Protected Information shall not be
16 made to any other persons or agencies, including any law
17 enforcement or prosecutorial personnel or agencies without prior
18 authorization of the Court ordered on a motion by respondent and
19 after [petitioner] has had an opportunity to object. Any such
20 motion by respondent shall be filed and served upon counsel for
[petitioner] with fifteen days' notice, shall state the specific
information respondent it [sic] seeks to disclose and the grounds
for such disclosure, and shall be filed under seal.

17 This order shall continue in effect after the conclusion of these
18 habeas corpus proceedings and specifically shall apply in the event
19 of a retrial of all or any portion of [petitioner's] criminal case. The
20 Court shall maintain continuing jurisdiction over this matter for the
purpose of enforcing the provisions of this order and imposing
appropriate sanctions for any violation.

21 (Doc. 227 at 4-5.) The Protective Order further provides that the following information is
22 "Protected Information":

23 [A]ny item or information to which a claim of privilege attaches,
24 including the following:

25 Any production to respondent of documents from defense
26 counsel's files, whether provided voluntarily or pursuant to
court order;

27 Any discovery statements or deposition testimony made to
28 respondent by [petitioner], his trial attorney, Frank Hoover,
any investigators, experts, or other ancillary personnel
employed or retained by or appointed to assist them before

1 or during trial (hereafter referred to collectively as the “trial
2 defense team”), or any other attorneys, investigators or
3 experts who have represented or consulted with [petitioner]
4 at any time in connection [sic] his legal claims in this case
5 and any other ancillary personnel employed or appointed to
6 assist then since trial, who are called by [petitioner] as
7 witnesses (hereafter referred to collectively as the “post-
8 conviction defense team”);

9 Any interviews of any member of the trial defense team or
10 post-conviction defense team, including but not limited to
11 any audio or video recordings, notes, memoranda or other
12 tangible thing(s) memorializing or purporting to
13 memorialize any part of such interview(s);

14 Any declarations served by [p]etitioner on [r]espondent by
15 any witness who is or was at any time a member of the trial
16 defense team or post-conviction defense team; and

17 Any information contained in these documents, discovery
18 statements, interviews, declarations or deposition
19 testimony or derived directly or indirectly from them.

20 (*Id.* at 1-3.)

21 Federal courts have discretion whether to impose sanctions for violation of a protective
22 order. Such violations may, but do not necessarily, constitute sanctionable conduct. Fed. R.
23 Civ. P. 37(b)(2)(A) ([T]he court “may issue further just orders” in response to violations of a
24 discovery order); *see also Mahboob v. Educ. Credit Mgmt. Corp.*, No. 15-CV-0628-TWR-
25 AGS, 2021 WL 818971, at *3 (S.D. Cal. Mar. 2, 2021), *report and recommendation*
26 *adopted*, No. 15-CV-628 TWR (AGS), 2021 WL 7448532 (S.D. Cal. Mar. 31, 2021) (citing
27 Fed. R. Civ. P. 16(f)) (“[I]f a party or its attorney . . . fails to obey a scheduling or other pre-
28 trial order,” “the court may issue any just orders, including those authorized by Rule
37(b)(2)(A)(ii-vii).” In order to determine whether or not a protective order has been
violated, courts focus on the terms of the order itself. *Apple, Inc. v. Samsung Elecs. Co.*, No.
511CV01846LHKPSG, 2014 WL 12596470, at *4 (N.D. Cal. Jan. 29, 2014) (citing *Biovail*
Labs., Inc. v. Anchen Pharm., Inc., 463 F. Supp. 2d 1073, 1080 (C.D. Cal. 2006)).

Federal courts are charged with strictly policing and studiously enforcing protective
orders covering trial counsel’s files during habeas proceedings. *See Bittaker v. Woodford*,
331 F.3d 715, 728 (9th Cir. 2003) (*en banc*). Federal courts also have inherent power to

1 manage their cases and impose sanctions for improper conduct. *See Chambers v. Nasco, Inc.*,
2 501 U.S. 32, 43-46 (1991); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980); *Fink v.*
3 *Gomez*, 239 F.3d 989, 991 (9th Cir. 2001); *Thompson v. Housing Auth.*, 782 F.2d 829, 831
4 (9th Cir. 1986); *Jackson v. Microsoft Corp.*, 211 F.R.D. 423, 430 (W.D. Wash. 2002)
5 (citing *Anheuser-Busch, Inc. v. Nat. Beverage Distribs.*, 69 F.3d 337, 348 (9th Cir. 1995)); *see*
6 *also* Local Rule 110 (“[The] failure of counsel or of a party to comply with these Rules or
7 with any order of the Court may be grounds for imposition by the Court of any and all
8 sanctions authorized by statute or Rule or within the inherent power of the Court.”).

9 The Ninth Circuit has repeatedly held that Rule 37 “provide[s] comprehensively for
10 enforcement of all [discovery] orders, including Rule 26(c) protective orders.” *United States*
11 *v. Nat’l Med. Enters., Inc.*, 792 F.2d 906, 911 (9th Cir. 1986) (affirming Rule 37 sanctions
12 for violation of a protective order); *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d
13 770, 784 (9th Cir. 1983) (same); *see also Apple, Inc.*, 2014 WL 12596470, at *5 (“[P]rotective
14 order violations may, but do not necessarily, constitute sanctionable conduct . . . a court must
15 look to the totality of the circumstances surrounding each violation.”); *Westinghouse Elec.*
16 *Corp. v. Newman & Holtzinger, P.C.*, 992 F.2d 932, 934-35 (9th Cir. 1993) (“[T]he power of
17 a court to make an order carries with it the equal power to punish for a disobedience of that
18 order, and the inquiry as to the question of disobedience has been, from time immemorial, the
19 special function of the court.”).

20 Although the court has broad discretion to fashion remedies to the misconduct, the
21 harshest sanctions, such as exclusion of evidence or dismissal, are to be reserved for cases of
22 bad faith or willful misconduct. *See United States v. Sumitomo Marine & Fire Ins. Co., Ltd.*,
23 617 F.2d 1365, 1369 (9th Cir. 1980); *I.F. v. City of Vallejo*, No. 2:18-CV-0673-JAM-CKD,
24 2021 WL 601054, at *9 (E.D. Cal. Feb. 16, 2021).

25 Counsel for Respondent has presented evidence that the disclosure of Protected
26 Information to Ms. Kohler and Mr. Strand was inadvertent and unintentional and that there
27 has not been and will not be any unauthorized use of the disclosed Protected Information by
28 the Kern County District Attorney’s Office. The Court observes that Respondent’s counsel

1 has not identified the specific Protected Information disclosed to Ms. Kohler and Mr. Strand
2 without notice to petitioner and authorization from the Court.

3 Based upon the facts and the current evidence and the applicable legal standards, the
4 Court finds tentatively that neither remedial nor deterrent sanctions are warranted at this time.
5 *See Apple, Inc.*, 2014 WL 12596470, at *5–6 (sanctions may not be warranted where innocent
6 conduct does not result in harm). However, **within 15 days** of the service date of this order,
7 Petitioner **may** file a response to the tentative ruling. **Within 15 days thereafter,**
8 Respondent’s counsel **may** file a reply. If Petitioner fails to file a timely response, then the
9 Court’s tentative ruling shall become its final ruling on the matter. Any filing by the parties
10 that discloses Protected Information shall be filed under seal.

11 The Clerk of the Court is directed to serve copies of this order upon counsel for
12 Petitioner, Nina Rivkind, and counsel for Respondent, Supervising Deputy Attorney General
13 Kenneth Sokoler and Assistant Attorney General Lewis Martinez.

14
15 IT IS SO ORDERED.

16 Dated: **November 7, 2022**


UNITED STATES DISTRICT JUDGE

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