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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CHARLES D. RIEL,

NO. CIV. S-01-0507 LKK/KJM

Petitioner,

DEATH PENALTY CASE

v.

ROBERT L. AYERS, JR.,
Warden of California State
Prison at San Quentin,

O R D E R

Respondent.

_____ /

Petitioner is before the court on a petition for habeas corpus under 28 U.S.C. § 2254, seeking relief from his state-court conviction and sentence of death. Petitioner has filed a motion to reconsider the magistrate judge's May 17, 2010 order concerning the procedure and substantive standard for determining when it is necessary to seal portions of the evidentiary hearing in order to protect petitioner's attorney-client privilege. Order, ECF No. 354.

I. Background

Petitioner filed a federal habeas petition on March 29, 2002 after exhausting state remedies. Petitioner's primary claims are

1 ineffective assistance of counsel during the guilt and penalty
2 phases, and jury reliance on false evidence. This court ordered an
3 evidentiary hearing on issues raised in those claims, and referred
4 the matter back to the magistrate. Order, March 27, 2009, ECF No.
5 212. The magistrate then instructed the parties to inform the court
6 if they wished to propose an alternative to the to the procedure
7 for sealing portions of the evidentiary hearing ordered in Osband
8 v. Ayers, CIV S 97-0152. Order, April 29, 2009, ECF No. 222. After
9 briefing from the parties, the magistrate declined to depart from
10 the standard from Osband for determining which portions of the
11 evidentiary record should be sealed, and required petitioner to
12 file a brief "describing any potential evidentiary hearing
13 testimony he feels should be taken in a closed courtroom and just
14 how the testimony meets the standards set out in Osband." Order,
15 May 17, 2009, ECF No. 354. Petitioner filed a request for
16 reconsideration of the magistrate's order. The date for the
17 evidentiary hearing has been vacated pending resolution of the
18 issues raised in petitioner's request for reconsideration.

19 **II. Standard of Review**

20 A district judge reviewing a nondispositive order of a
21 magistrate judge must "modify or set aside any part of the order
22 that is clearly erroneous or contrary to law." Fed. R. Civ.
23 Proc. 72(a); 28 U.S.C. 636 (b) (1) (A). The court reviews *de novo*
24 the question of whether the magistrate's order is contrary to
25 law. *Osband v. Woodford*, 290 F.3d 1036 (9th Cir. 2002). In this
26 case, the magistrate's May 17, 2010 order is contrary to the

1 Ninth Circuit's holding in Bittaker v. Woodford, 331 F.3d 715
2 (9th Cir. 2003), and must be modified.

3 **III. Analysis**

4 The Osband test adopted by the magistrate required
5 petitioner to show that information sought to be sealed is
6 covered by the attorney-client privilege or work-product
7 protection, and that the petitioner may suffer prejudice upon
8 retrial if the information is made public. Petitioner can show
9 that he may suffer prejudice by showing "(a) the relevance of
10 the information he seeks to seal to an issue which may be raised
11 on re-trial, (b) the likelihood that the issue may be raised on
12 retrial, and (c) the prejudice he could suffer should that
13 information be revealed." Osband Order, June 13, 2008, ECF No.
14 513. Procedurally, the magistrate in Osband first directed the
15 parties to "cluster questions that might bring out protected
16 information, make an off the record proffer showing what
17 protected evidence might be adduced, and show a compelling need
18 to close that portion of the hearing." The magistrate later
19 abandoned this approach, because of the difficulty of predicting
20 which answers would contain protected information, and because
21 it disrupted the natural flow of questions. Osband Order,
22 October 22, 2007, ECF No. 452. The magistrate then ordered the
23 hearing closed and temporarily sealed the transcript during
24 testimony of the petitioner's trial counsel and a jury
25 consultant. After the conclusion of the hearing, the magistrate
26 directed the petitioner to file a statement identifying the

1 portions of the transcript that should remain under seal, and
2 explaining how it met the test announced previously for showing
3 likelihood of prejudice. Osband Order, June 13, 2008, ECF No.
4 513. Respondents were given twenty days to file a responsive
5 statement, and petitioner had the opportunity to file a reply.
6 The magistrate would then designate those portions of the final
7 transcript to remain under seal, and issue a protective order.
8 The district court judge affirmed the magistrate's procedure,
9 and further ordered that the sealed portions of the record
10 remain sealed until the district court had an opportunity to
11 review the magistrate's final unsealing order. Osband Order,
12 January 30, 2009, ECF No. 529.

13 Petitioner here argues that the magistrate has adopted the
14 substantive standard from Osband but has prescribed a procedure
15 similar to the one discarded as "unworkable" in Osband-a
16 procedure that would require petitioner to predict any testimony
17 that should take place in a closed courtroom in order to avoid
18 unfair prejudice on retrial. Petitioner argues that both the
19 substantive and procedural requirements of the magistrate's
20 order do not adequately protect his attorney-client privilege
21 and are inconsistent with the Ninth Circuit's narrow waiver rule
22 in Bittaker v. Woodford, 331 F.3d 715 (9th Cir., 2003). This
23 court agrees.

24 **A. Bittaker's narrow waiver rule applies to privileged**
25 **information disclosed throughout litigation of a habeas claim.**

26 In Bittaker, the Ninth Circuit addressed the question of

1 "the scope of the habeas petitioner's waiver [of attorney-client
2 privilege, i.e. d]oes it extend only to litigation of the
3 federal habeas petition, or is the attorney-client privilege
4 waived for all time and for all purposes—including the possible
5 retrial of the petitioner?" 331 F.3d 715, 717 (9th Cir. 2003).
6 The court adopted a narrow waiver rule, holding that the waiver
7 implied when a petitioner asserts an ineffective assistance of
8 counsel claim is limited only to the litigation of the habeas
9 claim. The court affirmed the district court's use of a
10 protective order precluding the use of privileged materials
11 turned over during discovery for any purpose other than
12 litigating the habeas claim. Bittaker directed district courts
13 to "ensure that the party given such access [to privileged
14 materials] does not disclose these materials, except to the
15 extent necessary in the habeas proceeding, i.e., to ensure that
16 such a party's actions do not result in a rupture of the
17 privilege. Id., at 727-28.

18 The June 13, 2008 Osband order that announced the standard
19 adopted by the magistrate in this case stated that Bittaker
20 addressed only the discovery question, and not the public's
21 access to trial records that contain privileged information.
22 Although the facts in the Bittaker case involved only discovery
23 documents, the language of the decision clearly contemplates
24 that the narrow waiver rule extends to privileged information
25 disclosed throughout litigation of the habeas claim. The court
26 distinguished between the waiver implied by the court when a

1 habeas petitioner brings an ineffective assistance of counsel
2 claim, and the express waiver that would result from some other
3 conduct by the petitioner. "The courts of California remain
4 free, of course, to determine whether Bittaker waived his
5 attorney-client privilege on some basis *other than* his
6 disclosure during the course of the federal litigation." *Id.*, at
7 726 (emphasis in the original). The clear implication of this
8 distinction is that any disclosures made throughout the course
9 of federal litigation are subject to the narrow waiver rule, in
10 contrast to disclosures made outside the course of litigation,
11 which give rise to a more broad waiver. In determining the scope
12 of the implied waiver, the court again referred to litigation of
13 a habeas claim, and not only discovery. "We can think of no
14 federal interest in enlarging the scope of the waiver beyond
15 what is needed to *litigate* the claim of ineffective assistance
16 of counsel in federal court. A waiver that limits the use of
17 privileged communication to *adjudicating* the effective
18 assistance of counsel claims fully serves the federal interest."
19 Bittaker, 331 F.3d at 722 (emphasis added).

20 There is, of course, one important factor that
21 distinguishes the discovery phase from the evidentiary hearing
22 phase with respect to protection of the attorney-client
23 privilege: the public's right of access to trials, which does
24 not exist with respect to discovery documents. In this case, the
25 magistrate has issued a protective order that deemed all
26 documents produced during discovery to be confidential. The

1 order limited the use of those documents to the habeas
2 proceedings, and specifically prohibited use of the documents in
3 the event of retrial. Protective Orders, ECF Nos. 128, 263.
4 Because of the public's right of access to trials, a protective
5 order covering the evidentiary hearing will necessarily be more
6 narrow than the magistrate's discovery phase protective order.
7 The protective order covering the evidentiary hearing will only
8 protect information that is actually privileged, and the
9 petitioner has the burden of establishing the elements of the
10 privilege. U.S. v. Martin, 278 F.3d 998 (9th Cir. 2002).
11 However, the protective order for the evidentiary hearing phase
12 need not be so narrow as to only cover those portions of the
13 hearing that meet the Osband test.

14 **B. Requiring petitioner to predict in advance any testimony that**
15 **should remain under seal deprives him of the opportunity to**
16 **protect his attorney-client privilege.**

17 Central to Bittaker's reasoning is the principle that the
18 privilege-holder must know the extent of the waiver in advance,
19 and have the opportunity to preserve confidentiality by
20 abandoning his claim that would give rise to a waiver, if he
21 chooses to do so. 331 F.3d at 720. The magistrate's order, which
22 requires petitioner to predict, before the evidentiary hearing
23 is held in open court, any privileged and prejudicial
24 information that might be disclosed does not give petitioner the
25 opportunity to protect his privilege. Once a statement revealing
26 privileged information that petitioner did not predict is made

1 in open court, petitioner will be "unfairly surprised in the
2 future by learning that [he] actually waived more than [he]
3 bargained for in pressing its claims," a result prohibited by
4 Bittaker. Id. Once testimony is given in open court, petitioner
5 can no longer protect his privilege even by abandoning his
6 ineffective assistance of counsel claim.

7 **C. The magistrate's requirement that petitioner show a**
8 **likelihood of prejudice if certain privileged information is**
9 **revealed is contrary to Bittaker.**

10 In affirming the district court's protective order covering
11 all privileged information disclosed during discovery, the
12 Bittaker court acknowledged that any use of privileged
13 information would lead to unfair prejudice against the
14 petitioner, and would give prosecutors and unfair advantage. "If
15 petitioner relies on the protective order by releasing
16 privileged materials and it turns out to be invalid, he will
17 suffer serious prejudice during any retrial." Bittaker, 331 F.3d
18 at 718. Similarly, use by prosecutors of privileged information
19 disclosed during a habeas proceeding would presumptively violate
20 the fairness principle that governs implied waivers in
21 ineffective assistance of counsel claims. The court explained
22 that "allowing the prosecution at retrial to use information
23 gathered by the first defense lawyer—including defendant's
24 statements to his lawyer—would give the prosecution a wholly
25 gratuitous advantage." Id., at 724.

26 The magistrate's requirement that petitioner meet the

1 three-part standard announced in Osband is contrary to the
2 presumption, expressed in Bittaker, that the use of any
3 privileged information on retrial would result in unfair
4 prejudice.

5 **D. Petitioner's interest in preventing privileged information to**
6 **be used on retrial justifies maintaining portions of the**
7 **evidentiary hearing records under seal.**

8 The Osband standard adopted by the magistrate is based on
9 the common law, rather than the First Amendment, standard for
10 sealing evidentiary hearing transcripts and exhibits from public
11 access. While a First Amendment right of public access to
12 criminal trials is established, see e.g., Globe Newspaper Co. v.
13 Superior Court for Norfolk County, 457 U.S. 596 (1982), no such
14 right to hearing transcripts and civil cases is firmly
15 established, as noted in the Osband order. See, e.g. Hagestad v.
16 Tragesser, 49 F.3d 1430, 1434 (9th Cir. 1995) (noting that
17 "neither the Supreme Court nor this Circuit has ruled on the
18 issue in the context of a civil trial or records in civil
19 cases.").

20 Nonetheless, under the common law, there is a presumption
21 of public access to civil proceedings. Additionally, Local Rule
22 141.1 establishes a presumption of public access to information
23 provided to the court. "Yet the common-law right is not of
24 constitutional dimension, is not absolute, and is not entitled
25 to the same level of protection afforded constitutional rights."
26 Valley Broadcasting Co. V. U.S. Dist. Court for Dist. Of Nevada,

1 798 F.2d 1289, 1293 (9th Cir. 1986). The right of access must be
2 weighed with interests advanced by the parties. Among the
3 interests that would overcome the presumption of access are "the
4 likelihood of improper use, including publication of scandalous
5 ... materials" or "great public embarrassment of a third party."
6 Id. at 1294. At the weightier end of the spectrum of interests
7 that would outweigh the public's common-law right of access is
8 "a defendant's constitutional right to a fair trial," for the
9 protection of which "a court may deny access, but only on the
10 basis of articulated facts known to the court, not on the basis
11 of unsupported hypothesis or conjecture." Id.

12 In this case, the right of public access to hearing
13 transcripts and exhibits is outweighed by petitioner's
14 constitutional right to a fair trial if he is retried. Because
15 Bittaker acknowledged that any release of privileged information
16 would result in unfair prejudice to the petitioner on retrial,
17 the fact that the hearing records contain privileged information
18 is an adequate factual basis for denying public access as to
19 those portions of the record. The common-law presumption in
20 favor of public access must give way to petitioner's interest in
21 protecting his attorney-client privilege so that he may secure a
22 fair trial if he succeeds on his habeas claim.

23 **IV. Conclusion**

24
25 For the foregoing reasons, it is hereby ORDERED:

26 [1] Petitioner's motion for reconsideration of the

1 magistrate's May 17, 2010 order is GRANTED.

2 [2] The testimony of trial defense personnel shall
3 take place in a closed hearing, and the entire transcript shall
4 temporarily remain under seal.

5 [3] Within twenty (20) days following the closing of
6 the evidentiary hearing, petitioner shall file under seal a
7 statement identifying each portion of the evidentiary hearing
8 transcript and each portion of any exhibit that he believes is
9 protected by the attorney-client or work-product privilege.

10 [4] Within twenty (20) days of the filing of
11 petitioner's statement, respondent shall file a responsive
12 statement, also under seal.

13 [5] Within ten (10) days of the filing of respondent's
14 response, petitioner may file a reply.

15 [6] Thereafter, the magistrate judge will designate
16 those portions of the final transcript that shall remain under
17 seal and set a post-hearing briefing schedule.

18 [7] The magistrate judge will keep sealed all
19 currently sealed transcripts and exhibits either until the time
20 for a motion for reconsideration has passed or as ordered by the
21 district judge if such motion is filed. At that time, the court
22 will issue a protective order for the sealed information that
23 will, specify that the information will be protected throughout
24 the proceedings incident to the petition for writ of habeas
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1 corpus pending before this court, and through any retrial of all
2 or any portion of petitioner's criminal case.

3 IT IS SO ORDERED.

4 DATED: September 30, 2010.

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LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT