

1 10, 2011. Following the Court’s resolution of issues pertaining to equitable tolling, the Court
2 directed Petitioner to file a finalized petition by August 10, 2012.

3 On August 9, 2012, Petitioner lodged with the Court a complete, unredacted version of
4 his Petition and exhibits, as well as a proposed redacted version of the documents. He also filed
5 an Administrative Motion to File Under Seal Portions of the Petition, which filing is the subject
6 of a separate order.

7 By the instant motion, Petitioner requests the Court issue a *Bittaker* protective order, *see*
8 *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir. 2003), to ensure that all privileged attorney-client
9 communications and work product information disclosed in his Petition be used only for
10 purposes of litigating his Petition. He argues that without a protective order, Respondent may
11 potentially benefit from a windfall of information and unfair advantage should he be retried.

12 Respondent contends the *Bittaker* decision has no application outside the confines of
13 court-compelled discovery, that a protective order is not necessary because California law
14 affords Petitioner adequate protection, and the public’s right of access would be infringed if a
15 protective order were issued. Respondent further contends Petitioner’s request for a protective
16 order is foreclosed under *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011).

17 **Discussion**

18 In *Bittaker*, the Ninth Circuit upheld a protective order that precluded the use of the
19 petitioner’s privileged materials “for any purpose other than litigating the federal habeas petition,
20 and barr[ed] the Attorney General from turning them over to any other persons or offices,
21 including, in particular, law enforcement or prosecutorial agencies.” *See Bittaker*, 331 F.3d at
22 717. In approving the protective order, the Ninth Circuit recognized that while the “fairness
23 principle” requires a litigant to make a limited waiver of the attorney-client privilege when he
24 puts the lawyer’s performance at issue during the course of litigation, *id.* at 718-19, courts must
25 “closely tailor[] the scope of the waiver to the needs of the opposing party in litigating the claim
26 in question,” *id.* at 720. The Ninth Circuit explained that two prevailing considerations justified
27 extending protections to privileged information disclosed during habeas litigation. First, the
28 Ninth Circuit noted that a broad waiver rule, i.e., one that does not protect privileged

1 information, “would no doubt inhibit the kind of frank attorney-client communications and
2 vigorous investigation of all possible defenses that the attorney-client and work product
3 privileges are designed to promote.” *Id.* at 722. Second, the Ninth Circuit wanted to ensure that
4 both the prosecution and defense would be put “back at the same starting gate” if the petitioner
5 won habeas relief, *id.* at 722-23, and “allowing the prosecution at retrial to use information
6 gathered by the first defense lawyer – including the defendant’s statements to his lawyer – would
7 give the prosecution a wholly gratuitous advantage,” *id.* at 724.

8 Although *Bittaker* dealt with a protective order in the context of court-compelled
9 discovery, the Ninth Circuit has since made clear that *Bittaker*’s holding “extends to the entire
10 habeas litigation, not to pretrial discovery only.” *See Lambright v. Ryan*, 698 F.3d 808, 820, 822
11 (9th Cir. 2012) (holding, for purposes of Fifth Amendment protection, “[i]t was not necessary for
12 [petitioner] to show that his testimony was compelled”).

13 Respondent’s other arguments advocating the denial of a protective order likewise are
14 unavailing. To the extent respondent argues that California law already affords Petitioner
15 adequate protection, *see People Ledesma*, 39 Cal. 4th 641 694-95 (2006), the grant of a
16 protective order would simply reinforce any protections accorded to Petitioner under state law.
17 Next, Respondent’s reliance on *Pinholster* is misplaced. *Pinholster* dealt with a narrow issue –
18 the scope of the record appropriate for review under 28 U.S.C. § 2254(d)(1). *See Pinholster*, 131
19 S. Ct. at 1398 (describing issue as “whether review under § 2254(d)(1) permits consideration of
20 evidence introduced in an evidentiary hearing before the federal habeas court”). The decision
21 has no bearing on the propriety of Petitioner’s request for a protective order. Finally, the
22 public’s right of access does not favor the denial of a request for a protective order. *See Bittaker*,
23 331 F. 3d at 725 n.9 (noting narrow waiver of privilege strikes appropriate balance among
24 interests of habeas petitioner, prosecution, and public).

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1 **Conclusion**

2 For the foregoing reasons, Petitioner's Motion is hereby GRANTED.

3 **IT IS SO ORDERED.**

4 Dated: December 10, 2012

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6 MAXINE M. CHESNEY
7 United States District Judge