



1 serve a request for production of trial counsel’s files. Mot. for Leave to Serve Req. for Produc.,  
2 ECF No. 126. Petitioner opposed that motion, arguing among other things that he should not be  
3 required to produce documents protected by the attorney-client privilege. Opp. to Mot. for Leave to  
4 Serve Req. for Produc., ECF No. 129. On November 15, 2002, the Court issued an order granting  
5 Respondent’s motion. Order Granting Resp’t’s Mot. Re Produc. of Trial Counsel’s File, ECF No.  
6 136. The Court directed Petitioner to “index any and all documents which he argues are privileged,”  
7 and ordered that “[s]uch indexed documents shall be sealed and presented to the Court for  
8 consideration not later than ten (10) days after receipt of this order.” *Id.* at 2. The Court stated that it  
9 would review the documents *in camera* and determine which documents, if any, would be produced  
10 to Respondent. *Id.* The Court ordered Petitioner to produce the remainder of trial counsel’s files  
11 within ten days after receipt of the order. *Id.* The Court also directed Petitioner to “submit not later  
12 than five (5) days after receipt of this order a proposed protective order that provides that the  
13 documents produced by Petitioner be deemed confidential and may be used solely for the purposes  
14 of the evidentiary hearing in this case.” *Id.*

15 On November 25, 2002, Petitioner filed an unopposed motion seeking a fourteen-day  
16 extension of time to provide the privilege log and accompanying documents to the Court for *in*  
17 *camera* review. Mot. for Extension of Time to Complete Disc., ECF No. 138. Petitioner also  
18 sought a forty-five day extension of time to complete discovery. *Id.* On December 3, 2002, the  
19 Court issued an order granting the unopposed motion, directing that “[c]ounsel for petitioner shall  
20 submit to the Court, under seal, any materials which petitioner argues are privileged by December  
21 13, 2002.” Order of Dec. 3, 2002, ECF No. 140. On the same date, the Court approved a proposed  
22 protective order that had been submitted by Petitioner. Protective Order, ECF No. 139. Despite  
23 seeking and being granted an extension of time to do so, Mr. Giannini never submitted a privilege  
24 log on behalf of Petitioner, nor did he submit any documents to the Court for *in camera* review.  
25 Pet’r’s Notice Re Disclosure of Trial Counsel’s Files at 2, ECF No. 307.

26 On November 6, 2006, Petitioner’s current counsel, James Thomson, was appointed as  
27 second counsel in the case. *See* Order of Mar. 29, 2007 at 1 (reciting circumstances surrounding  
28 Mr. Thomson’s appointment), ECF No. 221. On July 30, 2013, the Court relieved Mr. Giannini as

1 counsel and appointed Mr. Thomson as lead counsel. Order Re Ex Parte Mot. for Substitution of  
2 Counsel at 1, ECF No. 292. On August 19, 2013, Mr. Thomson received forty boxes of documents  
3 from Mr. Giannini. Decl. of Aaron Jones ¶ 4, ECF No. 307-2. The boxes were in disarray – several  
4 were labeled incorrectly, while others contained a mix of trial counsel’s files, appellate counsel’s  
5 files, and habeas counsel’s files. *Id.* It was the understanding of Mr. Thomson’s office that Mr.  
6 Giannini previously had disclosed all of trial counsel’s files to Respondent. *Id.* ¶ 6.

7 On October 15, 2013, Mr. Thomson’s office contacted the office of Respondent’s counsel,  
8 Ronald Matthias, to request an inventory of trial counsel’s files that had been disclosed to  
9 Respondent by Mr. Giannini. Decl. of Aaron Jones ¶ 8, ECF No. 307-2. Mr. Matthias stated that he  
10 had not received an inventory from Mr. Giannini and had not created one himself. *Id.* ¶ 9. On  
11 November 5, 2013, Mr. Thomson’s paralegal went to the Attorney General’s Office in San Jose,  
12 California, and was given access to four boxes of trial counsel’s files that Mr. Giannini had  
13 produced to Mr. Matthias. *Id.* ¶ 11. A comparison of the materials in those four boxes with four  
14 similar boxes in Mr. Thomson’s possession revealed that Mr. Matthias’s four boxes were missing  
15 approximately three hundred pages contained in Mr. Thomson’s four boxes. *Id.* ¶ 12(a). Mr.  
16 Thomson arranged to have those pages copied and sent to Mr. Matthias. *Id.* ¶ 14.

17 Mr. Thomson also determined that he possessed an additional five boxes of trial counsel’s  
18 files that Mr. Matthias apparently did not possess. Decl. of Aaron Jones ¶ 12(b), ECF No. 307-2.  
19 Mr. Thomson arranged to have all “non-privileged” material contained in the additional five boxes  
20 copied and sent Mr. Matthias. Pet’r’s Claim of Privilege at 4, ECF 320. Petitioner withheld sixty  
21 documents on grounds that they contain privileged attorney-client communications, work product,  
22 or self-incriminating statements. *Id.* at 6-8.

23 Petitioner’s Claim of Privilege

24 On January 26, 2014, Petitioner filed a document entitled “Petitioner’s Claim of Privilege  
25 and Privilege Log,” indexing the documents as to which privilege is asserted. *Id.* Respondent  
26 objected to that filing. Resp’t’s Opp’n and Obj., ECF No. 322. On February 3, 2014, Petitioner  
27 filed a “Notice of Compliance with this Court’s Order Granting Respondent’s Motion Regarding  
28 Production of Trial Counsel’s File.” Notice of Compliance, ECF No. 329. Petitioner’s Notice of

1 Compliance references the Court's Order Granting Respondent's Motion Re Production of Trial  
2 Counsel's File dated November 15, 2002.

3 Petitioner's Administrative Motion to File Under Seal

4 On January 26, 2014, concurrently with his privilege log, Petitioner filed an administrative  
5 motion to file under seal the sixty documents as to which he asserts privilege. Pet'r's Mot. to Seal,  
6 ECF No. 321. Respondent filed opposition to that motion on January 28, 2014. Resp't's Opp'n and  
7 Obj., ECF No. 322. Petitioner filed a reply on January 29, 2014. Pet'r's Reply, ECF 324.

8 Respondent's Motion to Strike

9 On January 30, 2014, Respondent moved to strike Petitioner's reply, arguing that the reply is  
10 not authorized by the Civil Local Rules. Resp't's Mot. to Strike, ECF 326. In the alternative,  
11 Respondent requested leave to file a response to the reply. *Id.* On February 2, 2014, Petitioner filed  
12 opposition to Respondent's motion to strike his reply and a statement of non-opposition to  
13 Respondent's alternative motion for leave to file a response. Pet'r's Resp., ECF No. 328. On  
14 February 3, 2014, Mr. Matthias filed a reply regarding his motion to strike. Resp't's Reply, ECF  
15 No. 330.

16 **II. DISCUSSION**

17 **A. Procedural Issues**

18 Before turning to the substantive issues raised by these filings, the Court addresses a  
19 procedural matter. The Civil Local Rules provide that any opposition to an administrative motion to  
20 seal must be filed within four days and that the motion is deemed submitted on the day after the  
21 opposition is due. Civ. L.R. 7-11(b), (c). The rule does not contemplate or authorize the filing of a  
22 reply. As noted above, Petitioner nonetheless filed a reply. Respondent moved to strike the reply  
23 or, in the alternative, for leave to file a response to the reply, which sparked additional filings by  
24 both sides. The Court prefers strongly not to receive briefing in this piecemeal manner, particularly  
25 on the eve of a hearing. However, because the briefs presented substantive information and  
26 argument regarding the issue of privilege, and because the Court perceives no prejudice to either  
27 party, the Court in the exercise of its discretion has considered all of the briefs filed to date.  
28 Accordingly, although Respondent points out correctly that Petitioner's reply filed on January 29,

1 2014 was not authorized by the Civil Local Rules, Respondent’s motion to strike will be denied.  
2 Respondent’s alternative motion for leave to file a response to Petitioner’s reply will be granted.

3 **B. Substantive Issues**

4 With respect to the motion to seal, Respondent asserts that Petitioner has misapprehended  
5 the Court’s November 2002 order, in which the Court directed that any documents as to which  
6 privilege is claimed “shall be sealed and presented to the Court for consideration.” Order Granting  
7 Resp’t’s Mot. Re Produc. of Trial Counsel’s File at 2, ECF No. 136. Respondent contends that by  
8 using the word “sealed,” the Court did not mean to suggest that Petitioner *file* the documents under  
9 seal, but rather that Petitioner present them to the Court for *in camera* review. The Court agrees  
10 with Respondent. Although the wording of the order arguably is ambiguous, the Court’s intention  
11 was not that Petitioner file the documents as to which privilege is asserted, but rather that  
12 Respondent present those documents to the Court for *in camera* review. Petitioner has done so.  
13 Accordingly, because there is no need to file the documents at this time, Petitioner’s administrative  
14 motion to seal will be denied.

15 With respect to the assertion of privilege itself, Respondent points out that Petitioner has  
16 missed the deadline for making such assertion by more than a decade. Resp’t’s Opp’n and Obj. at 2,  
17 ECF No. 322. Respondent also argues that Petitioner has waived the attorney-client privilege by  
18 claiming ineffective assistance of trial counsel. *Id.* at 2. Finally, Respondent indicates that at least  
19 some of the documents listed in the privilege log have been disclosed. Resp’t’s Opp’n and Obj. at 2,  
20 ECF No. 322. As to the latter point, Petitioner acknowledges that two of the documents listed in the  
21 privilege log were disclosed previously, and he withdraws the assertion of privilege as to those  
22 documents.

23 Any discovery permitted by the Court in a capital habeas case must comply with the Federal  
24 Rules of Civil Procedure and this Court’s Civil Local Rules. Habeas L.R. 2254-29(h). Under  
25 Federal Rule of Civil Procedure 16(b), the Court’s scheduling orders with respect to discovery and  
26 other case management issues may be modified only for “good cause.” Fed. R. Civ. P. 16(b)(4); *see*  
27 *also Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087(9th Cir. 2002) (“In general, the pretrial  
28 scheduling order can only be modified upon a showing of good cause.”) (internal quotation marks

1 and citation omitted). “The pretrial schedule may be modified if it cannot reasonably be met despite  
2 the diligence of the party seeking the extension.” *Id.* (internal quotation marks and citation  
3 omitted). “If the party seeking the modification was not diligent, the inquiry should end and the  
4 motion to modify should not be granted.” *Id.* (internal quotation marks and citation omitted).

5 As set forth above, the Court’s 2002 order governing the discovery schedule required  
6 Petitioner to produce trial counsel’s files to Respondent or, to the extent that Petitioner claimed  
7 privilege as to particular documents, to submit those documents to the Court for *in camera* review  
8 by December 13, 2002. Although Petitioner’s recently filed “Claim of Privilege and Privilege Log”  
9 and “Notice of Compliance” are not styled as motions to modify the Court’s 2002 order, Petitioner  
10 in effect seeks a modification of that order, i.e., an after-the-fact extension of the deadline for  
11 asserting privilege as to trial counsel’s files. Petitioner has not even attempted to show good cause  
12 for such an extension. He offers no explanation whatsoever as to why he did not and could not have  
13 submitted a privilege log within the time allowed and extended by the Court or at least within some  
14 reasonable period of time thereafter. Instead, Petitioner’s present attorney, Mr. Thomson, argues  
15 that he should not be held responsible for the failure of Petitioner’s former attorney, Mr. Giannini, to  
16 comply with the deadline. Mr. Thomson does not cite any legal authority on point, provide any  
17 evidence as to Mr. Giannini’s conduct, or explain his own lack of action since his appointment as  
18 counsel in 2006. Instead, he notes that under California Civil Code § 3531, “The law never requires  
19 impossibilities.” Petitioner’s citation to this maxim of California law is insufficient to excuse more  
20 than a decade of noncompliance with a court order.

21 Petitioner also claims that Mr. Matthias was “complicit” in Mr. Giannini’s failure to disclose  
22 trial counsel’s files. As the Court understands Petitioner’s argument, Mr. Matthias must have  
23 known that Mr. Giannini had not produced all of trial counsel’s files because at one point Mr.  
24 Giannini stated that those files were stored in “nine” banker’s boxes while Mr. Giannini produced  
25 only four banker’s boxes. Speculation as what inferences Mr. Matthias may have drawn from this  
26 asserted discrepancy is insufficient to establish that Mr. Matthias was complicit in Mr. Giannini’s  
27 failure to comply with the Court’s order. The Court notes that, once again, Petitioner does not cite  
28 any legal authority on point.

1 Accordingly, the Court concludes that Petitioner has failed to show good cause to modify the  
2 deadline for claiming privilege. The Court also agrees with Respondent that any claim of privilege  
3 based upon attorney-client privilege has been waived in any event given Petitioner's claim that trial  
4 counsel rendered ineffective assistance. *See Bittaker v. Woodford*, 331 F.3d 715, 716 (9th Cir.  
5 2003) ("It has long been the rule in the federal courts that, where a habeas petitioner raises a claim  
6 of ineffective assistance of counsel, he waives the attorney-client privilege as to all communications  
7 with his allegedly ineffective lawyer."). Petitioner acknowledges this rule, but argues that because  
8 the Court has phased the proceedings such that Petitioner's mental health claims will be addressed  
9 first, any waiver of the attorney-client privilege is limited to mental health claims at this time. Yet  
10 again, Petitioner cites no legal authority for this proposition, nor is the argument logical.  
11 Petitioner's allegations regarding ineffective assistance of trial counsel are quite broad. Thus even if  
12 Petitioner were entitled to assert privilege at this late date (which he is not), the Court would  
13 conclude that the attorney-client privilege has been waived with respect to all of trial counsel's files.

14 **III. ORDER**

15 Accordingly, and good cause therefor appearing,

- 16 (1) Petitioner is precluded from asserting privilege as to trial counsel's files;  
17 (2) Petitioner's administrative motion to file documents under seal is denied;  
18 (3) Respondent's motion to strike is denied; Respondent's alternative motion for leave to file  
19 a response to Petitioner's reply is granted; and  
20 (4) Petitioner shall produce to Respondent a complete set of trial counsel's files identical to  
21 that possessed by Petitioner; such production shall be completed on or before February 25,  
22 2014.

23 DATED: February 11, 2014

24   
25 JEREMY FOGEL  
26 United States District Judge