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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

Rogelio Cuevas Espinoza,

Petitioner,

v.

Shawn Hatton, Warden,

Respondent.

Case No.: 10cv397-WQH-BGS

**ORDER DENYING JOINT MOTION  
FOR ENTRY OF STIPULATED  
PROTECTIVE ORDER**

**[ECF No. 119]**

The parties' Joint Motion for Stipulated Protective Order (ECF No. 119) filed on April 12, 2018 is currently before the Court. In conversations with the Court, the parties stated a Protective Order was to be entered pursuant to *Bittaker v. Wodoford*, 331 F.3d 715 (9th Cir. 2003) (en banc) for the purpose of protecting privileged information that could be disclosed during appellate defense counsel Barbara Smith's testimony during the May 2, 2018 evidentiary hearing.

However, unlike in *Bittaker*, the categories of documents and testimony required to be deemed confidential and submitted under seal per the proposed Protective Order are overly broad. Critically, the proposed Protective Order fails to provide a nexus between (1) the privileged nature of the documents or testimony at issue and (2) the resultant need

1 for such documents or testimony to be marked as confidential and/or submitted under seal.  
2 This systemic error must be corrected throughout the proposed Protective Order; only  
3 documents or testimony containing privileged information should be permitted to be  
4 sealed. A determination regarding the existence of privilege and whether such a privilege  
5 has been waived will be subject to notice and an opportunity to be heard from the parties  
6 if contested.

7       The overly broad nature of the proposed Protective Order is apparent on its face. For  
8 example, the proposed Protective Order would encompass: “(1) any and all testimony,  
9 documents and materials, including declarations, that are presented, discovered, filed or  
10 admitted during this habeas action; (2) any and all testimony provided at an evidentiary  
11 hearing or through discovery, and any statements made in pre-hearing investigation in this  
12 matter; and (3) any reference to such documents, testimony, or statements in pleadings and  
13 briefings submitted to the Court.” (ECF No. 119 at 2.) However, the proposed Protective  
14 Order should only apply to: (1) documents and materials from appellate defense counsel’s  
15 files regarding her representation of Petitioner; (2) any related testimony provided at a  
16 deposition or an evidentiary hearing in this matter and (3) any reference to such documents  
17 or testimony in the parties’ pleadings submitted to the Court.

18       Further, in the proposed Protective Order, the parties would require all “testimony  
19 or statements made [at the evidentiary hearing] by Petitioner, Petitioner’s experts, appellate  
20 defense counsel, and any appellate defense team member or expert [to] be deemed  
21 confidential and sealed.” (ECF No. 119 ¶ 5.) However, it is only testimony and statements  
22 made during the evidentiary hearing by Petitioner, Petitioner’s experts, appellate defense  
23 counsel, and any appellate defense team member regarding privileged matters that should  
24 be deemed confidential and sealed. Sealing the entirety of appellate defense counsel and  
25 Petitioner’s testimony from the evidentiary hearing would be overly inclusive.

26       Similarly, the proposed Protective Order limits the use of “any and all of the above  
27 mentioned documents, statements, testimony, and privileged materials” by the parties to  
28 this federal habeas litigation. (ECF No. 119 ¶ 6) However, it is only privileged documents

1 produced to Respondent and privileged testimony in this action that should be limited to  
2 use by the parties in this habeas corpus proceeding, or any related federal or state habeas  
3 corpus proceeding regarding the same conviction.

4 Further, Paragraph 2 is overbroad and ambiguous. It states that “[a]ny and all  
5 discovery granted by this Court, including requests to depose appellate defense appellate  
6 defense counsel, and other appellate defense team members or experts, shall be deemed  
7 confidential.” (ECF No. 115 ¶ 2.) This means, that “any and all discovery granted by this  
8 Court . . . shall be deemed confidential.” Nowhere in the proposed Protective Order is the  
9 term “confidential” defined. As some paragraphs state that materials “shall be deemed  
10 confidential and sealed”, it appears that confidential documents are not required to be filed  
11 under seal. The parties must define what protections should be afforded confidential  
12 documents.

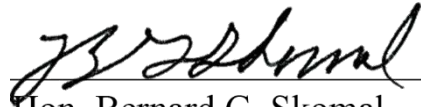
13 For the reasons stated above, the Joint Motion for Stipulated Protective Order (ECF  
14 No. 119) is **DENIED WITHOUT PREJUDICE**. Given that the evidentiary hearing is  
15 set to recommence on May 2, 2018 at 9:30 a.m., the parties must submit a revised joint  
16 motion for a stipulated protective order no later than the **close of business on Thursday,**  
17 **April 26, 2018.** The revised joint motion for a stipulated protective order should be  
18 consistent with the following protective orders: Protective Order, Bittaker v. Woodford,  
19 No. 91-cv-1643-WMB (C.D. Cal. May 10, 2002) (ECF No. 423), Supplement to Protective  
20 Order, Bittaker v. Woodford, No. 91-cv-1643-WMB (C.D. Cal. Nov. 17, 2003) (ECF No.  
21 467), and Protective Order, Scott v. Ylst, No. 03-cv-978-VAP (C.D. Cal. Aug. 8, 2006)  
22 (ECF No. 54) (use of protective order approved sub nom in Scott v. Chappell, 547 Fed.  
23 App’x 815 (2013)).

24 Additionally, upon review of the prior Protective Order (ECF No. 74) entered in this  
25 action, it appears the parties intended to limit that Protective Order to privileged testimony  
26 and communications only per Bittaker. However, upon review, it also appears overbroad  
27 for the same reasons discussed above. (See, e.g., ¶ 5 ECF No. 74 ¶¶ 3, 6) The parties  
28 should resubmit a modified protective order consistent with Bittaker to the extent the

1 existing Protective Order (ECF No. 74) should apply to only privileged material and  
2 testimony.

3 **IT IS SO ORDERED.**

4 Dated: April 25, 2018

5   
6 Hon. Bernard G. Skomal  
7 United States Magistrate Judge  
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