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**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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| PEOPLE OF THE STATE OF CALIFORNIA, | CAPITAL CASE |
| Plaintiff and Respondent, | Case No. S064733 |
| v. | Related Case No. S175275 |
| JOHN CLYDE ABEL, | Orange County Sup. Ct. No. 95CF1690 |
| Defendant and Petitioner. | |

**OPPOSITION TO RESPONDENT'S MOTION FOR ACCESS TO SEALED PENAL CODE SECTION 987.9 MATERIALS, AND SEALED TRANSCRIPT FILED IN CASE NUMBER S0464733 FOR USE IN THE PENDING STATE HABEAS PROCEEDING**

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

On February 24, 2010, respondent filed a "Motion for Access to Sealed Penal Code Section 987.9 Materials, and Transcript Filed in Case Number S064733 for Use in the Pending State Habeas Proceeding" (hereinafter "Motion for

Access"). Petitioner John Clyde Abel opposes respondent's motion on the ground that the request is premature in the absence of an Order to Show Cause (OSC), that Penal Code section 987.9(d)[1] does not apply retroactively, that disclosure is prohibited by attorney client and work product privileges and by principles of equal protection, and that there is no basis for unsealing the confidential *in camera* transcripts.

## I.

## RESPONDENT'S REQUEST FOR DISCLOSURE OF THE TRIAL COURT'S SEALED FUNDING RECORDS IS PREMATURE; DISCLOSURE IS PROHIBITED BY STATUTE AND BY SIXTH AND FOURTEENTH AMENDMENT PRINCIPLES.

Respondent requests "a copy of all Penal Code section 987.9" documents filed in the trial court, contending that petitioner's "pending Habeas Petition challenges the representation provided by counsel, and therefore, places in issue all of counsel's consultation, employment, and use of investigators, consultants and experts," thereby making "the 987.9 documents relevant to resolving appellant's habeas claims." (Motion for Access, at p. 2.)

Respondent seeks this disclosure in order to prepare the informal reply to the petition for writ of habeas corpus before an order to show cause has issued. The request should be denied as premature.

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[1]All further citations are to the California Penal Code unless otherwise indicated.

## A. THE DISCLOSURE REQUIREMENT OF PENAL CODE SECTION 987.9(d) IS NOT TRIGGERED UNTIL AN ORDER TO SHOW CAUSE HAS ISSUED.

Respondent bases the request upon the language of Penal Code section 987.9. Subdivision (a) of that section provides, in pertinent part:

> (a) In the trial of a capital case or a case under subdivision (a) of Section 190.05 the indigent defendant, through the defendant's counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. The fact that an application has been made shall be confidential and *the contents of the application shall be confidential.*

(Pen. Code §987.9, subd. (a), emphasis added.)

Respondent contends that in spite of the foregoing confidentiality guarantee, subdivision (d) of section 987.9 now permits respondent to obtain access to the trial court funding files. Subdivision (d) provides:

> (d) The confidentiality provided in this section shall not preclude any court from providing the Attorney General with access to documents protected by this section when the defendant raises an issue on appeal or collateral review where the recorded portion of the record, created pursuant to this section, relates to the issue raised. When the defendant raises that issue, the funding records, or relevant portions thereof, shall be provided to the Attorney General at the Attorney General's request. In such a case, the documents shall remain under seal and their use shall be limited solely to the pending proceeding.

(Pen. Code §987.9, subd. (d).)

Respondent argues, relying on *People v. Superior Court (Berryman)* (2000) 83 Cal.App.4th 308, that petitioner has "raise[d] an issue" on collateral review, within the meaning of subdivision (d), by filing a state habeas petition which

presents several claims of ineffective assistance of counsel. (Motion for Access, at pp. 2-3.) Respondent is incorrect.

For the reasons set forth below, subdivision (d) must be interpreted as requiring disclosure only after an order to show cause has issued and threshold showings of relevance required by the plain language of the statute have been made.

For purposes of subdivision (d), an "issue" cannot be said to have been "raised" on collateral review until at least the point at which a prima facie case has been found to exist and an order to show cause has been issued by this court. Until that time, there is no "cause or proceeding" in existence in which a relevant issue can be deemed "raised." Indeed, any other interpretation of the statute would violate equal protection principles, and a statute must be given a construction favoring constitutionality. (See 1 Witkin, *California Criminal Law* (3d ed. 2000) Introduction to Crimes, §27, p. 56, and cases there cited.)

What respondent seeks is court-ordered discovery of confidential funding records pertaining to petitioner's defense. However, the relevant case law establishes that respondent is not entitled to discovery at this stage in the habeas proceedings. California courts have held that a court may not entertain a post judgment discovery motion which is unrelated to any proceeding then pending before the court.

This court has held that the "bare filing of a claim for post-conviction relief cannot trigger a right to unlimited discovery." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1258.)

> A habeas corpus petition must be verified, and must state a "prima facie case" for relief. That is, it must set forth specific facts which, if true, would require issuance of the writ. Any petition that does not meet these standards must be summarily denied, and it creates no cause or proceeding which would confer discovery jurisdiction.

(*Ibid.*)[2]

Thus, at the present time, the "bare filing" of a petition for writ of habeas corpus by petitioner has not yet created a "cause or proceeding which would confer discovery jurisdiction." (*Ibid.*) Respondent therefore cannot obtain discovery until after an order to show cause has been issued in this case.

Respondent may contend that subdivision (d) of section 987.9 confers upon respondent a statutory right to discovery as an exception to the *Gonzalez* rules. However, for reasons set forth below, such an interpretation violates principles of non-retroactivity in this case and would clearly violate equal protection principles and thus violate the rule that statutes must be interpreted in a manner to preserve their constitutionality.

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[2]As this court noted in *In re Steele* (2004) 32 Cal.4th 682, 691, section 1054.9 "modifie[d]" the rule stated in *Gonzalez* to the extent it created a statutory, pre-petition right to post-conviction discovery for capital defendants. The right to post-conviction discovery created by section 1054.9, however, is limited and merely entitles a petitioner to obtain documents he would have been entitled to at the time of trial. (*Id.* at pp. 692, 695.) Moreover, section 1054.9 creates no discovery rights for the state. *Gonzalez* therefore continues to govern discovery in habeas cases that is outside the scope of section 1054.9. (See *Board of Prison Terms v. Superior Court* (2005) 130 Cal.App. 4th 1212, 1241-1242 [general rule in habeas cases is that discovery, other than that provided by section 1054.9, is not available until OSC is issued, citing *Gonzalez, supra,* at p. 1258].)

## B. THE LEGISLATURE DID NOT CONTEMPLATE THAT PENAL CODE SECTION 987.9 SUBD. (d) WOULD HAVE A RETROSPECTIVE EFFECT.

The legislature enacted subdivision (d) of Penal Code section 987.9 in 1998, to become effective on January 1, 1999. The confidential applications filed by petitioner and the orders issued by the trial court in the present case were drafted and filed in 1995, 1996, and 1997. Application of subdivision (d) to petitioner's case accords an impermissible retroactive effect to the statute neither contemplated by the legislature nor appropriate in light of the constitutional and statutory rights implicated by such disclosure.

No portion of the Penal Code is retroactive "unless expressly so declared." (Pen. Code section 3.) Penal Code section 3 is a codification of the principle, "familiar to every law student," (*United States v. Security Industrial Bank* (1982) 459 U.S. 70, 79), that "statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent." (*Aetna Casualty & Surety Co. v. Industrial Accident Commission* (1947) 30 Cal. 2d 388, 393; accord, *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1209 [absent "an express retroactive provision" a statute will not be applied retroactively unless it is "very clear from extrinsic sources" that the Legislature "must have intended" that].) At the time the Legislature enacted Penal Code section 987.9, subd.(d), the judiciary had adhered unanimously to this principle. (See cases collected in

*Evangelatos* at 1207 & 1208; *Buttram v. Owens-Corning Fiberglass Corporation* (1997) 16 Cal.4th 520, 532, 536, n. 6; see also, *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 265 [presumption against retroactivity is "deeply rooted" in American jurisprudence and "embodies a legal doctrine centuries older than our Republic"].) A statute has a retroactive or retrospective effect whenever the new law "attaches new legal consequences to 'events completed' before its enactment, and that such a determination must include consideration of fair notice, reasonable reliance, and settled expectations." (*Buttram v. Owens-Corning Fiberglas Corporation*, *supra*, 16 Cal.4th at 536, n.6; accord, *Evangelatos v. Superior Court*, *supra*, 44 Cal.3d at 1206 [law is retroactive if it affects acts or transactions performed prior to its enactment or conditions and rights existing prior to its adoption]; *Aetna Casualty & Surety Co. v. Ind. Acc. Com*, *supra*, 30 Cal.2d at 391 [same]; see also, *Landgraf v. USI Film Products*, *supra*, 511 U.S. at 269-70 and n. 23 [collecting prior United States Supreme Court decisions and emphasizing considerations of fair notice, reasonable reliance and settled expectations].)

Section 987.9 subd. (d) operates retroactively in petitioner's case. At the time petitioner's counsel drafted and filed their applications for ancillary funding, the existing law offered and promised petitioner and counsel absolute confidentiality. Therefore, counsel could reveal attorney-client confidences and counsel's work product secure in the knowledge that none of it would be revealed

to the State. As a result, counsel had no need to self-censor, edit, or carefully craft their applications to reveal only that minimal information which was necessary to obtain the desired funding. Counsel reasonably relied on the absolute confidentiality of his applications in revealing information learned in confidence. They had no notice and no reason to suspect that at any time thereafter, their applications might be distributed and ultimately relied upon to petitioner's detriment in litigation. Had petitioner and counsel had fair notice of such a possibility they could have limited their showing to reveal as little confidential information as necessary to obtain investigative and expert assistance. Application of subdivision (d) to provide for disclosure of applications that counsel crafted in light of an absolute assurance of confidentiality unfairly gives an "effect to acts or conduct" that counsel "did not contemplate" when they filed their applications. (*Union Pacific Railroad Co. v. Laramie Stock Yard* (1913) 231 U.S. 190, 199.)

There is no reason to depart from the well-established rule that prevents the attachment of unforeseen consequences to past actions. Nothing in the legislative history or the wording of the provision suggests an intent to depart from this principle. The statute contains no express retroactivity provision, there is no other language in subdivision (d) on which this Court may rely in finding that such an intent is "very clear," and the legislative history demonstrates that the legislature did not consider the matter in amending section 987.9. (See *Evangelatos v.*

*Superior Court*, *supra*, 44 Cal.3d at 1209 and n.13, [setting forth the governing mode of analysis of the statutory language and legislative history].)

Because the "presumption against statutory retroactivity is founded upon sound considerations of general policy and practice[,] . . . accords with long held and widely shared expectations about the usual operation of legislation," (*Landgraf v. USI Film Products*, *supra*, 511 U.S. at 293), and is not contradicted by any legislative history, this Court should not apply Penal Code section 987.9, subd. (d) to the funding requests and orders in petitioner's case.

### C. EQUAL PROTECTION PRINCIPLES PROHIBIT DISCLOSURE OF RECORDS OF AN INDIGENT DEFENDANT WHEN A PRIVATELY FUNDED DEFENDANT WOULD NOT BE REQUIRED TO MAKE A COMPARABLE DISCLOSURE.

Petitioner also objects to the request because respondent's broad interpretation would render the statute unconstitutional. Because discovery of a privately funded, non-indigent defendant's expenditures for experts and investigators could not be compelled at this stage in the habeas proceedings, equal protection principles prohibit the courts from compelling disclosure of similar records of petitioner's expenditures solely because he is indigent.

Under the plain language of the statute, and under *Gonzalez* and its progeny, this court has neither the authority nor the jurisdiction to grant respondent discovery of the expenditures for experts and investigators of a privately funded, non-indigent defendant until an order to show cause has been issued and a "cause or proceeding" has been created. Accordingly, equal protection principles prohibit the forced disclosure of such records on behalf of an indigent defendant until a similar juncture in the litigation. Any statute which requires disclosure of only the expenditures of an indigent defendant, and not similar expenditures of a privately funded defendant, is unconstitutional.

It is axiomatic that in post-conviction proceedings, a state may not discriminate against indigent convicted defendants on account of their poverty. (*Douglas v. California* (1963) 372 U.S. 353, 355; *Griffin v. Illinois* (1956) 351 U.S. 12, 19; *Smith v. Bennett* (1961) 365 U.S. 708, 709.) There can be no equal justice where the kind of post-conviction proceedings a defendant enjoys "depends on the amount of money he has." (*Douglas v. California, supra*, 372 U.S., at p. 355; *Griffin v. Illinois*, *supra*, 351 U.S., at p. 19.) "[T]o interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws." (*Long v. District Court of Iowa* (1966) 385 U.S. 192, 194, citing *Smith v. Bennett, supra*, 365 U.S. at p. 709.)

Thus, the United States Supreme Court has held that an indigent defendant must be given a free transcript on appeal if a non-indigent defendant could obtain one by purchase. (*Griffin, supra*, 351 U.S. at p. 19; see also, *People v. Hosner* (1975) 15 Cal.3d 60, 66.) By the same reasoning, an indigent defendant cannot be jailed for non-payment of a fine because of his inability, due solely to his indigency, to pay the fine and penalty assessment imposed upon him as a condition of probation, and state statutes to the contrary will be held unconstitutional. (*Williams v. Illinois* (1970) 399 U.S. 235, 243; *Bearden v. Georgia* (1983) 461 U.S. 660, 670; *In re Antazo* (1970) 3 Cal.3d 100, 115.)

Similar reasoning has also been applied in cases where the prosecution or the state attempts to compel discovery of some aspect of the defense case when it could not do so if the defendant were not indigent. (See, e.g., *United States v. Meriwether* (1973) 486 F.2d 498, 506 [prosecution should not be entitled to discover identity of adverse witnesses for whom subpoenas are sought by indigent defendant when it is not able to do so in the cases of defendants able to pay witness fees]; *Ex parte Lexington County* (S.C. 1994) 314 S.C. 220, 228 [disclosure of defense request for expert witness fees would force defense to reveal defenses only because defendant is indigent]. Thus, respondent is not entitled to use subdivision (d) of section 987.9 to compel discovery of trial court funding records until the point that a court could compel similar disclosure of the records of a non-indigent

defendant. Any interpretation to the contrary would render the statute unconstitutional.

*Berryman, supra*, on which respondent relies, is both distinguishable and questionable authority and in any event does not support respondent's position. In *Berryman*, the Court of Appeal for the Fifth Appellate District reversed the trial court's order denying disclosure of 987.9 funding records and granted the requested discovery because a *federal* habeas corpus petition had been filed. (*Berryman, supra*, 83 Cal.App.4th 308, 311.)[3] The case is therefore distinguishable from the instant situation, both because respondent bases its request upon the filing of petitioner's *state* petition and because the *Gonzalez* reasoning (i.e., that the mere filing of a *state* habeas petition does not create a "cause or proceeding") does not apply to a pending federal petition. Moreover, *Berryman* is questionable authority because there is no indication in that case that the Fifth Appellate District ever considered either this court's jurisdictional rationale for *Gonzalez*, the issue of retroactivity, or the equal protection problem, and consequent unconstitutionality of the statute, which would be created if respondent's interpretation of section 987.9, subdivision (d), were to be adopted. "It is axiomatic that cases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10.)

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[3] In addition to facts stated in *Berryman*, a review of this court's electronic docket confirms that no state habeas petition was pending in this court at the time *Berryman* was decided.

## D. REQUIREMENTS FOR DISCLOSURE OF PRIVILEGED MATERIALS MUST BE INTERPRETED AS NARROWLY AS POSSIBLE WHILE STILL PROVIDING FAIRNESS FOR THE OPPOSING PARTY.

The material respondent requests is protected not only by the specific provisions of section 987.9, subdivision (a), but also by the attorney-client and work product privileges, which are rooted in both statutory and fundamental constitutional rights. For example, state law imposes upon every attorney the duty "'[t]o maintain inviolate the confidence, and at every peril to himself or her-self to preserve the secrets, of his or her client.'" (Bus. & Prof. Code § 6068(e).) Penal Code section 1054.6 also provides:

> Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined in subdivision (a) of Section 2018.030 of the Code of Civil Procedure, or which are privileged pursuant to an express statutory provision, or are privileged as provided by the Constitution of the United States.

(Pen Code §1054.6.)

Code of Civil Procedure section 2018.030, subdivision (a), prohibits the discovery "under any circumstances" of core work product, defined as "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories . . ." Subdivision (b) then provides that work product *not* described in subdivision (a) may only be disclosed if "the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that

party's claim or defense or will result in an injustice." (Code Civ. Proc. §2018.030, subd. (b).)

Improper disclosure of privileged communications would violate not only the foregoing rights, but also petitioner's Sixth Amendment right to counsel and Fourteenth Amendment due process right to a fair proceeding. (*Prince v. Superior Court* (1992) 8 Cal.App.4th 1176, 1180 [under Sixth Amendment, defense may not be compelled to disclose results of pretrial DNA testing unless expert is called to testify]; *Torres v. Municipal Court* (1975) 50 Cal.App.3d 778, 784 [under Sixth and Fourteenth Amendments, appointment of expert for indigent defendant must be confidential]; *United States v. Rosner* (2d Cir. 1973) 485 F.2d 1213, 1224 [essence of Sixth Amendment right to counsel is privacy of communication with counsel].)

The important constitutional interests protected by the attorney-client and work product privileges must still be protected when fairness to a litigant requires limited disclosure of privileged documents. Thus, when litigation of a claim of ineffective assistance of counsel or another issue requires disclosure of material subject to the attorney-client or work-product privileges, the scope of the waiver must be interpreted as narrowly as possible, and the actual disclosure limited as much as possible, in order to protect the privilege while still providing the

opposing party with a fair opportunity to defend against the claim. (*Bittaker v. Woodford* (9th Cir. 2003) 331 F.3d 715, 720-721.)

One reason such a narrow interpretation is required is that otherwise a criminal defendant would be placed in the impossible position of having to choose between two constitutional rights, i.e., the Sixth and Fourteenth Amendment right to the effective assistance of counsel, on the one hand, versus the Sixth and Fourteenth Amendment right to protection of client confidences, on the other. (*Id.* at pp. 723-724; see also *Simmons v. United States* (1968) 390 U.S. 377, 394; *Greater Newburyport Clamshell Alliance v. Public Service Co.* (1st Cir. 1988) 838 F.2d 13, 21-22 ["the scope of required disclosure should not be so broad as to effectively eliminate any incentive to vindicate [a] constitutional right . . ."].)

For these reasons, the disclosure requirement of subdivision (d) of Penal Code section 987.9 must be interpreted as narrowly as possible while still permitting opposing litigants a fair opportunity to defend against claims. Moreover, because the confidential 987.9 materials will include documents as to which the privilege has *not* been waived, it is essential, as argued below, that disclosure be permitted, if at all, only after a careful in camera review.

## II.

## IF THE COURT DETERMINES THE REQUEST SHOULD BE GRANTED, AN IN CAMERA PROCEEDING SHOULD BE HELD TO PERMIT THIS COURT TO DETERMINE WHETHER AND WHICH RECORDS SHOULD BE RELEASED AND TO COMPEL RECIPROCAL DISCOVERY.

Although petitioner submits that respondent's request is at best premature, in the event that this court should determine that the request should be granted and disclosure ordered, this court must conduct an in camera inspection of the requested records to determine whether "the recorded portion of the record, created pursuant to [] section [987.9], relates to the issue[s] raised," as required by the subdivision (d) of the statute, to compel reciprocal discovery of expenditures by the prosecution and law enforcement for experts and investigation, and to craft the necessary protective orders limiting disclosure of the material to the pending litigation.

Respondent seeks "a copy of *all* Penal Code section 987.9 documentation" filed in this case. (Motion for Access, at p. 2, emphasis added.) By its plain language, however, Penal Code section 987.9 subdivision (d), permits disclosure of the confidential funding records only "when the defendant raises an issue on appeal or collateral review where the recorded portion of the record, created pursuant to this section, *relates* to the issue raised." (*Ibid.*, emphasis added.) Even when such an issue has been raised, the statute provides that only "the funding records, *or relevant portions thereof*, shall be provided to the Attorney General." (*Ibid.*, emphasis added.) Accordingly, because the records are confidential, this court must conduct an in camera review of the 987.9 files to determine as a threshold matter whether petitioner has raised an issue to which the 987.9 files

relate and, if so, which portions of the records are relevant to the issue or issues. (See, e.g. *In re National Mortg. Equity Corp. Mortg. Pool Certificates Sec.* (C.D. Cal. 1988) 120 F.R.D. 687, 692 [in camera inspection conducted to determine the extent to which materials protected by the attorney-client privilege were necessary to former attorney's defense against fraud charge, and only selected documents were released].)

The history of the statutory language from introduction to enactment supports petitioner's literal reading of the statute. As originally introduced, Senate Bill 1441 would have added Penal Code section 987.9 (d) terminating confidentiality upon finality of direct review or upon the filing of a post-conviction pleading to which the contents of the confidential file relates.[4] The bill was amended twice.

The first amendment eliminated the automatic termination provision by requiring the Attorney General to obtain judicial permission to view the documents. The statute authorized the court to release records that it found "relate" to pending post conviction claims.[5] The amendment also provided for continued

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[4]The relevant portion of SB 1441 originally read, "(d) The confidentiality provided in this section shall exist only until the judgment is final on direct review or until the defendant raises an issue on appeal or collateral review where the record created pursuant to this section relates to the issue raised." (*Sen. Bill No. 1441* (1997-1998 Reg. Sess.) As introduced Jan. 28, 1998.)

[5]As amended on April 27, 1998 sub section (d) read, "The confidentiality provided in this section shall not preclude any court from providing the Attorney General with access to documents protected by this section when the defendant raises an issue on appeal or collateral review where the recorded portion of the record, created pursuant to this section relates to the issue raised. When the defendant raises that issue, the funding records, or portions thereof, shall be provided to the Attorney General at the Attorney General's request. In such a case, the documents shall

"confidentiality." The second amendment inserted the word "relevant" before "portions" in the final version.

The inclusion of the words "relates to the issues raised " and "relevant portions" mean that the statute is not self executing and any disclosure must be based on a judicial determination of the relevancy of each specific sealed item to a specific disputed claim or allegation. The preferred method of determining relevancy in California is by way of an in camera hearing. (See *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 321, 325-26 [where county sought access to confidential defense funds requests, trial court alone has authority to determine - in camera - whether reasonable need for defense services has been shown].) By requiring the documents to remain under seal it is clear that the preferred method for determining relevancy remains by way of an in camera hearing, lest the horse be let out of the barn before the door is closed.[6]

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remain under seal and their use shall be limited solely to the pending proceeding." (*Sen. Bill No. 1441* (1997-1998 Reg. Sess.) as amended April 27, 1998.)

[6]Consistent with section 987.9 subdivision (d)'s guarantee of continued confidentiality, documents should be disclosed only subject to protective order. In *Bittaker*, the federal court of appeals cited this court's order in *In re Gallego* as a model of an appropriate protective order:

> S042737 In re Gerald Gallego
> on Habeas Corpus
>
> Regarding the documents provided by petitioner to respondent on July 17, 1996, in conjunction with this court's order to respondent to show cause (dated July 10, 1996):
>
> 1. Respondent shall limit its use of the documents, and the information contained therein, to rebuttal of petitioner's habeas corpus claims, including responding to the order to show cause.
>
> 2. Respondent shall not use the documents, or the information contained therein, against petitioner in any manner during any future proceeding, including any possible retrial; and

In addition, the California Constitution and case law, as well as federal equal protection and due process principles, have made quite clear that discovery in criminal cases must be reciprocal, with any imbalance favoring the defendant as required by reciprocity under the due process clause. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 475-76.) The California Constitution also calls for reciprocal discovery. "In order to provide for fair and speedy trials, discovery in criminal cases shall be reciprocal in nature, as prescribed by the legislature or by the people through the initiative process." (Cal. Const Art. I § 30 (c).) Thus, if the prosecution is permitted to obtain discovery of defense counsel's funding records, petitioner must be provided similarly broad discovery of prosecution records of expenditures for experts and investigators. (See *Wardius*, *supra*, 412 U.S., at p. 475-476; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 371.)

For example, in *Wardius*, the U.S. Supreme Court held unconstitutional a discovery statute which required the defense to provide the names of alibi witnesses to the prosecution pre-trial, but did not require the prosecution to disclose the names of its rebuttal witnesses to the defense's alibi witnesses. (*Wardius*, *supra*, 412 U.S., at p. 476.) The statute did not provide for reciprocal

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3. Respondent shall treat the documents, and the information contained therein, as confidential and not disseminate them or disclose their contents other than in the course of its litigation of this habeas corpus proceeding.

(*In re Gallego*, No. S042737 (Cal. Aug.14, 1996), quoted in *Bittaker, supra* 331 F.3d at p. 725 fn. 8.)

discovery. The Court reasoned that although the due process clause "has little to say regarding the limits of discovery which the parties must be afforded,...it does speak to the balance of forces between the accused and his accuser." (*Wardius*, *supra*, 412 U.S., at p. 474.) The Court mandated reciprocity as an element of fundamental fairness in any criminal discovery scheme. Thus, in *Wardius*, the defendant could not, consistent with due process, be required to reveal his alibi defense if he did not have the opportunity to learn the identities of the State's rebuttal witnesses. The Due Process Clause requires that any discovery procedure adopted must be a two- way street. (*Wardius*, *supra*, 412 U.S., at p. 475.)

## III.

## THE PARTIES LOOKING TO HAVE THE SEALED TRANSCRIPTS OPENED ARE NOT PARTIES PERMITTED TO EXAMINE THE SEALED TRANSCRIPTS UNDER CALIFORNIA RULE OF COURT 8.328(c)(6)

Respondent's motion requests to view any portions of the *in camera* hearing that are relevant to show "petitioner objecting to the presentation of mitigating evidence or refusing to cooperate with investigation and preparation for the penalty phase..." (Respondents Motion for Access, at p. 5) Under California Rules of Court, rule 8.328(c), only a reviewing court justice and parties and their attorneys

who had access to the material in the trial court may have access to confidential records of *in camera* proceedings.[7]

The party and their attorneys who had access to the confidential records of the *in camera* proceeding in the trial court were Abel and his counsel. Respondents do not fall under the parties allowed to view transcripts of the *in camera* proceedings under rule 8.328 and therefore should not be allowed access.

## IV.

## PETITIONER'S WAIVER OF HIS PERSONAL PRESENCE DURING THE PRESENTATION OF EVIDENCE DURING THE PENALTY PHASE DOES NOT SUPPORT RESPONDENT"S ARGUMENT TO UNSEAL THAT PORTION OF THE TRIAL TRANSCRIPT

Respondents assert they should be allowed access to the sealed transcript of the *in camera* proceeding to the extent that it relates to the petitioner objecting to the presentation of mitigating evidence or refusing to cooperate with the investigation and preparation for the penalty phase. The cases cited by respondents, *Snow, Kirpatrick*, and *Lang*, are all used to show that when a defendant objects to the presentation of mitigating evidence, a lawyer is not required to put on mitigating evidence in the penalty phase. They argue that because of this, any statements made by Abel in the sealed transcripts that show he objected to the penalty phase should be released to them; however, Abel's actions clearly show

[7] California Rules of Court, rule 8.328(c)(6) provides, "Unless the reviewing court orders otherwise, confidential material sent to the reviewing court under (4) may be examined only by a reviewing court justice personally; but parties and their attorneys who had access to the material in the trial court may also examine it.

that he understood the purpose and nature of the evidence to be introduced during the penalty phase and did not object to the proceedings. Therefore, the confidential *in camera* transcripts do not need to be unsealed.

In the trial court transcript, Abel merely waives his right to be present during the penalty phase. (RT 1754-1755) The judge mentioned that waiver of Abel's presence might hurt his case and that during the presentation of the evidence during the penalty phase, the prosecution might use his absence to their advantage. (RT 1754-1755) Abel listened to all this and still decided to waive his right to be present. This clearly shows that Abel was told and was aware that there would be a penalty phase and that he was not objecting to the presentation of evidence at the penalty phase. He merely expressed his desire to not be present during it. Therefore, the fact that he waived being present at the penalty phase shows that he knew and did not object to the penalty phase.

Waiving the right to be present at the penalty phase does not show that Abel objected to the presentation of mitigating evidence during the penalty phase. On the contrary, the waiver he made of his right to be present at the penalty phase shows he was fully aware of the fact that a penalty phase was going to occur. Because there is no evidence to show that Abel objected to the presentation of evidence at the penalty phase or that he refused to cooperate, Respondents argument for review of the sealed transcripts fails.

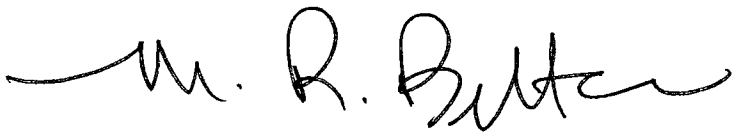
## V.

## CONCLUSION

Respondent's request for access to "all" confidential 987.9 materials filed in this case is premature and overbroad and may not constitutionally be granted until such time as respondent could obtain comparable discovery from a non-indigent defendant in the same procedural posture. However, if the court does order that respondent be given access to confidential 987.9 materials, such documents should be disclosed only be after careful in camera review to ascertain the relevance of the documents to petitioner's claims and whether disclosure is appropriate, given the very limited waiver of privilege occasioned by petitioner's allegations of ineffective assistance of counsel. Additionally, any disclosure should be subject to a protective order, as contemplated by the statute and consistent with the order this court entered in *Gallego,supra*. Finally, respondents are not permitted to review the in camera transcripts based on California Rule of Court 8.328(c)(6) and there is no evidence showing that Abel objected to the penalty phase so respondents argument to unseal the transcript is without merit.

Dated: April 20, 2010

Respectfully Submitted,



Michael R. Belter, Esq.

Attorney for Defendant/Petitioner

PROOF OF SERVICE

I am over the age of 18 years, and am employed in the County of Los Angeles. My business address is: 16 North Marengo Ave., Pasadena California 91101. On April 22, 2010, I served the document described as Opposition to Motion for Access to Sealed Penal Code 987.9 Materials and Sealed Transcript, on all interested parties in this action by placing a copy of said Opposition in an envelope addressed as follows and affixing the appropriate postage on each and personally delivering said envelopes to the United States Post Office and depositing same with an employee of said United States Postal Service at Pasadena, California.

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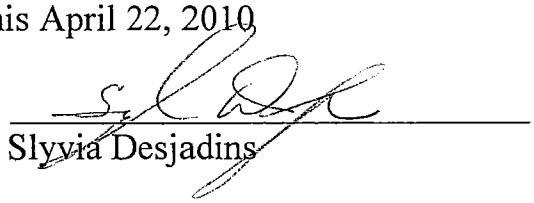
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this April 22, 2010



Slyvia Desjadins