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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

DALE W. EATON,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Civil Action No. 09CV261-ABJ**
	)	
EDDIE WILSON, et al.	)	
	)	
Respondents.	)	
	)	

PETITIONER'S REPLY TO RESPONSE IN OPPOSITION TO PETITIONER'S MOTION FOR PROTECTIVE ORDER

COMES NOW, Petitioner Dale W. Eaton, and in reply to Respondent's Response in Opposition to Petitioner's Motion for Protective Order (Doc. 295) states as follows.

1. Respondent concedes that this Court may properly construe as a Rule 59(e) motion Mr. Eaton's motion for a protective order as to the evidence necessarily produced in support of his habeas claims, both in discovery and pretrial disclosure to Respondent, and in the evidence

actually presented to this Court at the evidentiary hearing held. See Respondent's Opposition (Doc. 295), p. 2. Respondent in turn simply cites to Respondent's Opposition to Petitioner's Rule 59(e) Motion (Doc. 294) for his argument that this Court is without authority to grant Mr. Eaton the protective relief. See Respondent's Opposition (Doc. 295), p. 2. Respondent's position ignores any number of realities necessary associated with these Federal capital habeas proceedings: absent this Court granting habeas relief to Mr. Eaton, the question of what to do about the evidence necessarily presented in pursuit of that relief was not ripe or otherwise appropriate for resolution by this Court; 28 U.S.C. § 2243 expressly directs this Court to dispose of Mr. Eaton's habeas petition "as law and justice require" and Federal habeas corpus practice indicates that this Court has broad discretion in conditioning a judgment granting habeas relief; Federal habeas proceedings, by their very nature, present special problems and are of a unique character; this Court possesses power to grant any form of relief necessary to satisfy the requirement of justice; and Rule 59, F.R.C.P., provides this Court with substantial discretion, reviewed only for a manifest abuse of that discretion, in amending its Order granting Mr. Eaton conditional habeas relief to include the protective order now sought. Further, the relief requested is specifically authorized by Rule 26(b)(5)(B), F.R.C.P. which provides that a party in receipt of privileged material "must promptly return, sequester, or destroy the specified information and any copies it has." Further, Rule 26(c) authorizes this Court "where the action is pending" to order a broad array of measures to protect the legitimate interests of a party making disclosures.

2. Respondent doesn't dispute or otherwise question Mr. Eaton's assertion that had no meaningful choice, or alternative, but to make those disclosures and present the evidence supporting his constitutional claims, were he to have had any hope of success on his habeas claims. Instead, Respondent makes the rather surprising assertion that the State of Wyoming, on

remand, somehow would be deprived of a fair trial were this Court to enter its protective order. See Respondent's Opposition (Doc. 295), p. 3. As proffered support for his assertion, Respondent makes the hyperbolic claim that "[Mr.] Eaton will have the benefit of a federally funded mitigation investigation that exceeds any mitigation case ever seen in a Wyoming courtroom before[,]" that "[t]he prosecution cannot match the resources that have been made available to [Mr.] Eaton in the habeas corpus proceedings, the fruits of which will continue to be available to him in the state court[,]" and that "[t]his Court should not hobble the prosecution by allowing [Mr.] Eaton to deploy his federally funded mitigation under cover of the requested protective order." *Id.* These assertions do not withstand scrutiny. First, the work product produced on Mr. Eaton's behalf by habeas counsel is consistent with prevailing standards of performance, as this Court necessarily found as a condition of granting habeas corpus relief. It is beyond dispute that Mr. Skaggs was functioning well below accepted norms in his defense of Mr. Eaton, as evidenced by his 0-4 track record in the defense of these cases. This Court found that "[t]he mitigation investigation by Mr. Skaggs and the trial team resulted in only a "rudimentary knowledge . . . from a narrow set of sources," and as a result "fell short of the standards for capital defense work," Order, p. 192, and that "The depth and scope of the mitigation presentation on behalf of Petitioner would most assuredly have been much different had Mr. Skaggs and the trial team performed up to prevailing professional standards." *Id.,* at 227.

3. This Court's findings regarding prevailing standards of performance are buttressed by the fact that during the pendency of Mr. Eaton's trial and habeas corpus proceedings, Wyoming public defenders successfully defended at least ten capital prosecutions with no resulting death

sentences.[1] Some of those cases involved crimes of equal or greater magnitude than Mr. Eaton's crime. Professor Craig Haney, a lawyer and psychologist who has studied the system of capital punishment extensively, observed:

> Given the fact that the appellate court reviews the penalty records of only those cases in which death verdicts were rendered, there is no reason to believe that judges have any special expertise or range of experience in reaching conclusions about how background and social history actually affect the life course of a capital defendant, or the way in which evidence about these factors can influence the decisionmaking of (especially) life-sentencing capital jurors. Appellate courts are in need of education about both, otherwise their judgments may approximate those of lay persons, threatened by stereotypes and misconceptions, but absent any meaningful exposure to powerful penalty phase evidence designed to challenge or counterbalance them.

Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 606-07 (1995). Respondent's attempt to draw performance standards exclusively from Mr. Skaggs' abysmal record of failure is analogous to the medical field drawing performance standards almost exclusively from cases in which the

[1] A jury rejected the death penalty and sentenced Andrew Yellowbear to life imprisonment for the torture and murder of 22-month-old Marcela Hope Yellowbear. Anthony Lane, *Defiant Yellowbear Gets Life Sentence*, CASPER STAR-TRIBUNE, June 2, 2006. Floyd DeWayne Grady was convicted of murder and attempted sexual assault for raping and killing Tammy Sue Watts at the Wyoming Honor Farm when he was incarcerated there. Although his crime was similar to Mr. Eaton's, and involved the compelling aggravating circumstance that he committed it while in custody serving a sentence, a Wyoming jury on May 2, 2006, voted to spare his life. Whitney Royster, *Grady Gets Life in Prison*, CASPER STAR-TRIBUNE, May 3, 2006. A Natrona County jury on September 30, 2008 spared the life of Donald Rolle, who was convicted of first degree murder of Jennifer Randel, despite Mr. Blonigen arguing to that jury "that Rolle beat, strangled and stabbed Randel in a torturous attack that likely lasted hours . . . [and that] Rolle was a threat to commit more violence in prison." Joshua Wolfson, *Jury Spares Rolle's Life*, CASPER STAR-TRIBUNE, October 1, 2008. A Laramie County jury on March 14, 2014, spared the life of Nathaniel Castellanos, who was convicted of a triple-shooting which killed Corey Walker and Megan McIntosh. A third victim, Amber McGuire, survived in spite of being shot twice in the face. *Life Without Parole*, Wyoming Tribune-Eagle, March 15, 2014. In addition to these four jury trials, Wyoming Public Defenders successfully negotiated non-capital guilty pleas on behalf of at least six other defendants charged with death-eligible crimes, three in Park County, two in Fremont County, and one in Platte County in just the sixteen months between July 1, 2012, and October 31, 2013. Joan Barron, *Batch of death penalty cases drains Wyoming Public Defender's Office budget*, CASPER STAR-TRIBUNE, January 16, 2014.

patient died. *See* Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation,* 41 HOFSTRA L. REV. 635, 676-681 (2013) (discussing the implications of the fact that appellate courts never see capital cases in which the defendant avoids the death penalty). Indeed, Ms. Moree testified that her work on other Wyoming capital defense teams involved a level of methodical investigation and preparation more akin to that employed by Mr. Eaton's current representation team. Mr. Eaton's was the only case in which she was expected to do the work of two people. Hrg. Tr. Vol. 2, p. 452-53. In contrasting Mr. Skaggs' work on this case with her work with a different team on behalf of Brian Collins, Ms. Moree explained, "It was a difference in dynamics. It was a difference in,…quality of our meetings… [I]t was … a difference in how we all worked together and formed the unit trying to save Brian's life. It was very different." *Id.,* p. 462. There was also a vast difference in time and resources:

> Q. We've talked a little bit about the difference in staffing, but was there also a difference in the time that you took to develop Mr. Collins' mitigation case?
>
> A. Yes.
>
> Q. And how much -- do you remember how much time it took you to develop the mitigation case to be ready for trial?
>
> A. Well, as I said, uh, it was Ruth that did most of the mitigation work and the interviewing and things of that sort, but I never felt pushed, uh, as far as, as Brian's case went. I never felt constrained. It was, it was just -- it was different. I didn't feel like the clock was always running. Of course it was running, but, but we weren't pressured that much.
>
> Q. All right. Were you able to take a methodical approach to reviewing the documents and following up with investigation?
>
> A. Yes.
>
> Q. All right. Does that contrast with your work on the Eaton case?
>
> A. Very much so.
>
> Q. Explain how your work on the Eaton case compares to that.

> A. Well, I was, I was constrained by not only the, my hours, money spent, uh, and just the time. We had, we had a trial date set, and that was the way it was going to be, and, uh, so you're working against the calendar, and you -- I felt like I was working against, uh, my expenses.

Hrg. Tr. Vol. 2, pp. 461-62. On its facts, the Brian Collins case presented a compelling a case for the death penalty. Collins was serving a lengthy sentence for a burglary and shooting when he stabbed Wyoming Department of Corrections Corporal Wayne Martinez to death while trying to escape from the maximum security unit of the Wyoming State Penitentiary, yet the team that defended Collins was able to persuade a jury to spare his life. *Id.*¸at 458. Respondent's claim that denying the relief requested by Mr. Eaton would put him on a level playing field with the prosecutor should be rejected.

4. Similarly, Respondent's complaint loses sight of the fact that the State of Wyoming obtained Mr. Eaton's death sentence in the first instance by depriving Mr. Eaton of his constitutional guarantees of representation by competent legal counsel and due process of law; that the mitigation case – the case for life – actually presented by Mr. Eaton to this Court, is the mitigation case that a competent legal team *would* have presented were they acting in accordance with the Sixth and Fourteenth Amendments to the United States Constitution. Mr. Eaton had no choice but to present that mitigation case, were he to hope to obtain any habeas relief in this Court. It is the State of Wyoming, by its own actions and/or inactions depriving Mr. Eaton of his constitutional guarantees, that placed Mr. Eaton in the position he held coming to this Court for relief from his state sentence of death. It is the State of Wyoming that, before this Court, first opposed all efforts Mr. Eaton made to have this Court consider his constitutional claims on their merits, obtaining summary judgment dismissal of a number of those constitutional claims, and then in turn opposed all efforts Mr. Eaton made, at evidentiary hearing, to persuade this Court to grant him relief on his three constitutional claims which survived summary judgment. By

opposing each and every constitutional claim advanced by Mr. Eaton in these Federal capital habeas proceedings, the State of Wyoming necessarily forced Mr. Eaton to develop and present the mitigation evidence and life story that would have been developed and presented in 2003 and 2004 had Mr. Eaton been allowed a constitutional capital sentencing hearing in the first instance. Further, it is *only* the State of Wyoming, in its pursuit of another death sentence at resentencing[2], that would be provided the windfall – in essence, Mr. Blonigen having in hand Mr. Eaton's mitigation case before it is presented at that resentencing – allowing Mr. Blonigen and his prosecution team the opportunity to review, study, and prepare from, further investigate from, and otherwise enjoy the harvested fruits of that mitigation investigation Mr. Eaton necessarily laid out before both this Court and Respondent. Even more important, Respondent moved for discovery of significant work-product privileged information, *Respondent's First Motion to Conduct Discovery* (Doc. 175), and, Mr. Eaton ultimately disclosed Mr. Eaton's trial, appeal and postconviction files in their entirety in digital format, and arranged for on-site inspection by Respondent's counsel of the original files, which remain in the possession of the Wyoming Public Defender. *Petitioner's Reply to Respondent's First Motion to Conduct Discovery* (Doc. 177), p. 8. At that time, Petitioner notified Respondent and the Court that this motion would be forthcoming:

[2] Although the Respondent has yet to notify this Court of the resumed state court capital proceedings involving Mr. Eaton, the undersigned hereby advises this Court that the State of Wyoming on January 5, 2015, filed its *Notice Of Intent To Seek Death Penalty* in Wyoming's Seventh Judicial District Court, Natrona County, Criminal Action No. 15913-A, along with the State's *Motion To Determine Fitness To Proceed Pursuant To W.S. § 7-11-303*, the State's *Request For Setting* on that motion, and the State's *Request For Appointment Of Counsel* for Mr. Eaton. On January 20, 2015, Terry J. Harris entered his limited appearance in that matter by filing, on January 20, 2015, a *Notice Of Stay And Of Pending Federal Capital Habeas Proceedings, Still Ongoing At This Time, In The United States District Court For The District Of Wyoming*.

> An important consideration is that a successful claim of ineffective assistance of counsel will result in a capital sentencing trial. *If Mr. Eaton prevails in his attempt to win a new sentencing trial, this Court should aim to restore him to the position he would have occupied, had the first trial been constitutionally error-free.* It would therefore be untenable to give the prosecution the advantage of having access to Mr. Eaton's case file and forcing his attorneys to divulge work product and privileged communications about evidence, witnesses and strategy. This would not put the parties back at the same starting gate. *Bittaker v. Woodford*, 331 F.3d 715, 722-23 (9th Cir. 2003) (en banc); accord *United States v. Nicholson*, 611 F.3d 191, 216-217 (4th Cir. 2010) (applying *Bittaker* to preclude use at resentencing of privileged material revealed in connection with the successful IAC claim).

Petitioner's Response to Respondent's First Motion for Discovery (Doc. 177), p. 7 (emphasis added). In summary, Respondent's "fairness" arguments simply ring hollow and conveniently overlook the State of Wyoming's responsibility for the constitutional violations that resulted in a death sentence in the Seventh Judicial District Court, Natrona County.

5. Respondent's opposition to Mr. Eaton's request for protective order fails to acknowledge that the relief requested flows not only from this Court's power and duty to fashion a remedy that purges the taint of Mr. Skaggs' ineffectiveness, but also from the limited nature of Mr. Eaton's waiver of attorney-client and work product privilege, which, as noted in the preceding paragraph, Mr. Eaton specifically asserted in connection with his disclosure. Judge Alex Kozinsky explained the limitations of the implied waiver of privileges that sometimes follows an allegation of ineffective assistance of counsel. "The court thus gives the holder of the privilege a choice: If you want to litigate this claim, then you must waive your privilege *to the extent necessary to give your opponent a fair opportunity to defend against it*." *Bittaker v. Woodford*, 331 F.3d 715, 720 (9th Cir. 2003) (emphasis added). That necessity dissolved upon the completion of the parties' post-hearing briefs and the filing of this Court's Order Granting Conditional Writ of Habeas Corpus. Because of the important interests protected by attorney-client and work product privilege, "the court must impose a waiver no broader than needed to

ensure the fairness of the proceedings before it." *Id.* Of course, a party can limit waiver by withdrawing claims that gives rise to the implied waiver. Further, if a party turns over privileged materials, "it is entitled to rely on the contours of the waiver the court imposes, so that it will not be unfairly surprised in the future by learning that it actually waived more than it bargained for in pressing its claims." *Id.,* at 721. Because the implicit waiver of privilege is limited, the party accepting the benefit of the implicit waiver "implicitly agrees to the conditions of the waiver; if it does not wish to be bound, it is free to reject the materials and litigate without them, but it must do so before any disclosure is made." *Id.* In requiring the State of California to seal the privileged material from disclosure to the prosecutors who might be responsible for Bittaker's retrial, and requiring return or destruction of the disclosed materials at the conclusion of habeas proceedings, the court could "conceive of no federal interest in enlarging the scope of the waiver beyond what is needed to litigate the claim of ineffective assistance of counsel in federal court." *Id.,* at 722. Mr. Eaton and his counsel proceeded in good faith to make disclosures of privileged matters requested by Respondent, without needless litigation and expenditure of this Court's time and resources, specifically advising the Court and Respondent of the limited scope of his waiver, and reserving his rights as articulated in *Bittaker v. Woodford. Petitioner's Response to Respondent's First Motion for Discovery* (Doc. 177), p. 7.

6. The relief requested is supported by fundamental tenets of evidentiary privileges and habeas corpus litigation:

> A narrow waiver rule is also consistent with the interests of the habeas petitioner in obtaining a fair adjudication of his petition and securing a retrial untainted by constitutional errors. Here, Bittaker is claiming that he was denied a constitutionally adequate criminal trial because he had ineffective counsel and for many other reasons as well. If he succeeds on any of these claims, it will mean that his trial was constitutionally defective. Extending the waiver to cover Bittaker's retrial would immediately and perversely skew the second trial in the prosecution's favor by handing to the state all the in-formation in petitioner's first

> counsel's casefile. If a prisoner is successful in persuading a federal court to grant the writ, the court should aim to restore him to the position he would have occupied, had the first trial been constitutionally error-free. *Giving the prosecution the advantage of obtaining the defense case-file--and possibly even forcing the first lawyer to testify against the client during the second trial--would assuredly not put the parties back at the same starting gate.*
>
> What's more, requiring the petitioner to enter such a broad waiver would force him to the painful choice of, on the one hand, asserting his ineffective assistance claim and risking a trial where the prosecution can use against him every statement he made to his first lawyer and, on the other hand, retaining the privilege but giving up his ineffective assistance claim. This would violate the spirit, and perhaps the letter, of *Simmons v. United States*, 390 U.S. 377, 394, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968). 7 It is no answer to say that Bittaker created this dilemma for himself-- that he was the one who voluntarily "chose" to challenge his conviction on grounds of ineffective assistance. The Constitution guarantees Bittaker the right to effective assistance of counsel at trial, *Strickland v. Washington*, 466 U.S. 668, 686 (1984), and Congress has provided him an avenue to claim that his constitutional rights were violated, 28 U.S.C. § 2254. As one of our sister circuits has recognized in a different context, one may be "a 'voluntary' party only because there is no other means of protecting legal rights . . . . The scope of required disclosure should not be so broad as to effectively eliminate any incentive to vindicate [one's] constitutional right[s] . . . ." *Greater Newburyport Clamshell Alliance*, 838 F.2d [13, 21-22 (1st Cir. 1988)].

Bittaker v. Woodford, supra, at 722-24 (footnotes omitted) (emphasis added). Allowing the prosecution at retrial unfettered access to Mr. Eaton's trial, appeal and postconviction files "would raise a nontrivial question whether [he] would still be getting *effective* assistance [of counsel]." *Id.,* at 723, n. 7, citing *Black v. United States*, 385 U.S. 26 (1966).

7. While the protective order Petitioner now seeks cannot completely purge the advantage that the State will enjoy at a resentencing hearing, it should, to the extent humanly possible, mitigate the unfair advantage that the State has attained by denying Mr. Eaton a constitutional capital sentencing trial in the first instance. Again, however, Petitioner believes the most appropriate resolution of the constitutional violations in this matter is a bar to any resentencing hearing. *See Petitioner Dale W. Eaton's Motion To Modify Judgment Pursuant To Rule 59(e),*

F.R.C.P. (Doc. 289) and *Suggestions In Support Of Petitioner Dale W. Eaton's Motion To Modify Judgment Pursuant To Rule 59(e), F.R.C.P.* (Doc. 290).

8. Respondent's assertions to the contrary, ample authority exists and has been cited by Petitioner for the additional remedy now sought. Congress has directed the courts to dispose of habeas corpus petitions "as law and justice require." *Burton v. Johnson*, 975 F.2d 690, 693 (10th Cir. 1992), quoting 28 U.S.C. § 2243; see also *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) ("Federal habeas corpus practice, as reflected by the decisions of this Court, indicates that a court has broad discretion in conditioning a judgment granting habeas relief. Federal courts are authorized, under 28 U. S. C. § 2243, to dispose of habeas corpus matters 'as law and justice require.'"). Granting the protective order now sought also is consistent with this Court's authority set forth in 28 U.S.C. § 2243 and the Federal habeas authority cited. Because "habeas corpus is, at its core, an equitable remedy," a district court is vested with substantial discretion to appropriately redress any violation of an order granting habeas corpus relief. *Schlup v. Delo*, 513 U.S. 298, 319 (1995). In exercising this discretion, a remedy for a Sixth Amendment right to counsel violation "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364 (1981). This is achieved by "[identifying] and then [neutralizing] the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." *Id.* at 365. Remedying a constitutional violation requires restoring the petitioner to a position as if the error had not occurred. *Lafler v. Cooper*, 132 S.Ct. 1376 (2012). As the Tenth Circuit has recognized, a federal court "possesses power to grant *any form of relief necessary* to satisfy the requirement of justice." *Burton v. Johnson*, 975 F.2d 690, 693 (10th Cir. 1992) (emphasis in *Burton*), quoting *Levy v. Dillon*, 415 F.2d 1263, 1265 (10th Cir. 1969). Mr.

Eaton's requested protective order does not inject new claims into the case, or seek to relitigate old matters or advance new legal theories, but simply seeks to enforce the understanding that he communicated to Respondent when voluntarily disclosing thousands of pages of privileged material. While Mr. Eaton has argued in his Rule 59(e) motion (Doc. 289) and Supplemental Rule 59(e) motion (Doc. 298) that he cannot be put in the position he would have been in had Mr. Skaggs performed competently because of the unavailability of compelling mitigation witnesses and the apparently never-ending poisoning of the jury pool, his present motion is necessary for reasons beyond those asserted in those motions:

> [A]llowing the prosecution at retrial to use information gathered by the first defense lawyer--including defendant's statements to his lawyer-- would give the prosecution a wholly gratuitous advantage. It is assuredly not consistent with the fairness principle to give one side of the dispute such a munificent windfall for use in proceedings unrelated to the matters litigated in federal court.

Bittaker v. Woodford, supra, at 724. Protecting Mr. Eaton's privilege from any further incursion is a minimum step necessary to "as much as possible restore[ ] the defendant to the circumstances that would have existed had there been no constitutional error." *United States v. Carmichael*, 216 F.3d 224, 227 (2d Cir. 2000). The Tenth Circuit Court of Appeals would agree that the State's options after the grant of habeas relief must be limited if the failure to do so "would not vitiate the prejudice" caused by the underlying constitutional violation. *Hannon v. Maschner*, 981 F.2d 1142, 1145 (10th Cir. 1992).

9. For habeas relief to be meaningful, Mr. Eaton must be afforded every opportunity to return to his position at the time of his original prosecution. "If a prisoner is successful in persuading a federal court to grant the writ, the court should aim to restore him to the position he would have occupied, had the first trial been constitutionally error-free." *Bittaker v. Woodford*, 331 F.3d 715, 722 (9th Cir. 2003); *see also United States v. Barnes*, 948 F.2d 325, 330 (7th Cir.

1991) (Effect of motion to vacate is to "nullify [defendant's] sentence" such that he appears before the Court "with a clean slate as far as sentencing [is] concerned; his previous sentence [is] not to be rubber stamped, but instead a new sentencing determination [is] to be made."). It takes little or no imagination to recognize that a truly "clean slate" would leave the Mr. Blonigen and the prosecution team knowing little or nothing of Mr. Eaton's potential mitigation themes and the signs and symptoms of his mental disorders and impairments; the prosecution team would have no preview of Dale Eaton's biography beyond what it knew from criminal records, presentence reports, and its own investigation; and the prosecution team would not be entitled to discovery of Mr. Eaton's mental health experts and supporting documentation and history; the prosecution would not have access to Mr. Skaggs', Mr. Neubauer's, or Mr. Roden's handwritten notes of attorney-client conferences with Mr. Eaton or potential witnesses. Yet, without the protective order, the prosecution team now is fully aware of Mr. Eaton's mitigation case and supporting expert witness findings; trial counsel's investigation and work product impressions; attorney-client communications; and the fruits of the competent mitigation investigation performed by Mr. Eaton's habeas counsel, prior to that mitigation being presented to Mr. Eaton's capital resentencing jury.

10. Mr. Eaton's successful pursuit of habeas relief on his Sixth and Fourteenth Amendment claims should not come at the expense of his Fifth and Fourteenth Amendment rights at any resentencing. It is abundantly clear that the dilemma Mr. Eaton faced – pursuing his constitutional claims in these Federal habeas proceedings only to then find another constitutional right surrendered – shares much in common with the dilemma found "intolerable" by the Court in *Simmons v. United States*, 390 U.S. 377, 393-94 (1968), *with the noted exception that here we know now that Mr. Eaton's constitutional claims were upheld*. Mr. Eaton's hard-fought federal

habeas success should not come at a cost of his Fifth Amendment privilege against self-incrimination and his Fourteenth Amendment right to due process at any resentencing hearing. See *Estelle v. Smith,* 451 U.S. 454, 462 (1981) ("Just as the Fifth Amendment prevents a criminal defendant from being made 'the deluded instrument of his own conviction,' *Culombe v. Connecticut*, *supra*, at 581, quoting 2 Hawkins, Pleas of the Crown 595 (8th ed. 1824), it protects him as well from being made the 'deluded instrument' of his own execution."). The requested protective order helps to fulfill this Court's required aim to restore Mr. Eaton "to the position he would have occupied, had the first trial been constitutionally error-free." *Bittakker v. Woodford,* 331 F.3d 715, 722 (9th Cir. 2003). This principle both narrows the scope of information which the court can order a habeas petitioner to disclose to the state and obligates the Court to enter appropriate protective orders in the event that disclosure is made. *Id.,* at 728; accord *United States v. Nicholson,* 611 F.3d 191, 216-217 (4th Cir. 2010) (applying *Bittaker* to preclude use at resentencing of privileged material revealed in connection with the successful IAC claim).

For the reasons discussed Mr. Eaton respectfully requests that this Court enter its order that Respondent be prohibited from sharing with the state prosecution in any state resentencing proceeding any and all evidence or discovery Mr. Eaton has produced to Respondent in these federal habeas proceedings, including but not limited to:

- All of Petitioner's evidentiary hearing exhibits produced and made available to Respondent pursuant to order of this Court;
- All of those materials obtained by Respondent pursuant to Petitioner having provided Respondent with a digital copy of the entirety of trial, appellate and postconviction counsels' files or by reason of Respondent's counsel having availed themselves of the

opportunity to inspect the original files on site at the Wyoming State Public Defender Office. (Doc. 177);

- Any other attorney-client or work product privileged materials obtained by Respondent due to Petitioner's efforts at pursuing habeas relief in this matter; and
- Any notes, memoranda or other material summarizing any part of any of the aforementioned materials.

Additionally, Mr. Eaton respectfully requests that this Court order that Respondent return to Petitioner, or destroy, any and all such materials presently in Respondent's possession, and report to this Court and Petitioner confirmation of the same. Finally, Mr. Eaton respectfully requests that this Court order sealed the transcript of the evidentiary hearing and all of Petitioner's exhibits received into evidence at that hearing.

Petitioner respectfully requests that this Court hold a hearing on this matter, combined with the hearing on Petitioner's Rule 59(e) motion (Doc. 289) and suggestions in support (Doc. 290), and order such further relief as the Court deems just and appropriate.

DATED this 26th day of January, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to:

David Delicath, Deputy Attorney General
John Michael Causey, Senior Assistant Attorney General
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s/Terry J. Harris_____
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