No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

VS.

JOE LEONARD LAMBRIGHT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Did the Ninth Circuit create an improper and unworkable rule by inventing a duty for districts courts to *sua sponte* impose a blanket protective order—absent any request from the privilege holder—at the commencement of any discovery in habeas proceedings in which the habeas petitioner asserts a claim of ineffective assistance counsel?

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OPINION BELOW[1]

The United States Court of Appeals for the Ninth Circuit's opinion is reported as *Lambright v. Ryan*, 698 F.3d 808 (2012); Pet. App. A. The Ninth Circuit's unpublished order denying *en banc* review is attached as Pet. App. B. The relevant district court rulings regarding the protective order are attached as Pet. Apps. C (December 4, 2008, order); D (March 25, 2009, order), and E (May 4, 2010, order). The Arizona Supreme Court's opinion on direct review is set forth in *State v. Lambright*, 673 P.2d 1 (1983). Pet. App. F.

[1] The procedural history, particularly the number of federal court rulings, in this case is voluminous. Only those rulings relevant to the narrow issue presented here are included in the Petitioner's Appendix.

STATEMENT OF JURISDICTION

The Ninth Circuit filed its decision on October 17, 2012. *En banc* review was denied on November 28, 2012. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution states, in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

In 1983, the Arizona Supreme Court affirmed Lambright's conviction and death sentence for the brutal murder, kidnapping and sexual assault of Sandy Owen. *State v. Lambright*, 673 P.2d 1 (Ariz. 1983); Pet. App. F. That court's decision summarized the facts of the crime, in part, as follows. After driving Ms. Owen around in their car and repeatedly raping her, Lambright and his co-defendant, Robert Smith, proceeded to kill her in an isolated area of the desert:

> Smith then began choking Ms. Owen. She collapsed, and Smith retained his grip on her as she fell. Lambright stated the woman had to be killed, or else she could press charges for kidnapping and rape. Lambright took [Lambright's girlfriend Kathy] Foreman's knife out of its sheath and began stabbing the victim in the chest and abdomen, twisting the knife around inside of her. Smith held one of the victim's arms while she was being stabbed, and Foreman held the other arm. Foreman testified that after the stabbing Smith unsuccessfully tried to break Ms. Owen's neck by twisting her head. Then Lambright, Foreman or both began cutting deeply into the victim's neck with a knife; Foreman claimed that only Lambright cut the victim's neck, Smith claimed that it was done by both Lambright and Foreman, and Lambright claimed he could not remember who used

> the knife during the killing. The victim remained alive, and was at least semi-conscious, as she attempted to raise herself up on one arm. Lambright picked up a large rock and hurled it at her head. Foreman testified that as he threw the rock he yelled, "Die, bitch."

673 P.2d at 5; Pet. App. F, at 6-7.

In 1999, the Ninth Circuit reversed the district court's denial of habeas relief, with Judge Thompson dissenting, and remanded the case on the basis of the improper use of dual juries at trial. *Lambright v. Stewart*, 167 F.3d 477 (9th Cir. 1999). However, the en banc court reversed the panel's grant of habeas relief and returned the matter to the panel. *Lambright v. Stewart*, 191 F.3d 1181 (9th Cir. 1999). Subsequently, the Ninth Circuit panel again reversed the district court's denial of habeas relief on different grounds and remanded to the district court for an evidentiary hearing on the issue of ineffective assistance of sentencing counsel. *Lambright v. Stewart*, 241 F.3d 1201 (9th Cir. 2001).

In September of 2003, after more than a year of discovery and disclosure by both parties without a protective order, and in reaction to the Ninth Circuit's decision in *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003) (en banc), *rev'd*, 542 U.S. 348 (2004), holding that this Court's decision in *Ring v. Arizona*, 536 U.S. 583 (2002), applied retroactively to prisoners, such as him, whose direct appeals had been final when *Ring* was decided, Lambright requested a protective order in anticipation of the State deposing him. Relying on

Bittaker v. Woodford, 331 F.3d 715 (9th Cir. 2003) (en banc), and *Bean v. Calderon*, 166 F.R.D. 452 (E.D. Cal. 1996), the district court granted Lambright's request and issued a protective order. Despite the protective order and warning from the court that it could draw an adverse inference should Lambright refuse to answer questions, Lambright refused to answer questions about the crime, and he declined to testify regarding the offense at the evidentiary hearing. Thus, no privileged material was divulged, disclosed or exposed in the November 2003, evidentiary hearing or attendant discovery process. The evidentiary hearing was not conducted under seal, and Lambright never requested that the proceeding be conducted in that manner.

At the conclusion of the evidentiary hearing, the district court denied relief, however, the Ninth Circuit panel once again reversed the district court's decision and remanded the case for issuance of the writ. *Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007).

In October 2008, after the Ninth Circuit returned the case to the district court, the State filed a motion to modify the protective order—as permitted by the wording of the order itself—to allow the Pima County Attorney's Office access to the materials produced during the federal habeas proceedings. The district court granted the motion in part, explaining that taking into account the original motion and oral arguments, the court had intended the order to track *Bittaker* and had inadvertently omitted the modifier "privileged" before the phrase "information, documents and materials," in the original order. Pet. App. C,

at 5-7. In other words, the protective order was intended to protect only *privileged* materials, thus insulating Lambright from any prejudice at any potential resentencing from the State's use of any statements he made during his deposition and/or testimony concerning the crime and/or any information the State received that was protected by the attorney-client privilege.

The district court modified the protective order accordingly and invited Lambright to identify materials that met that description and should thus remain protected. Pet. App. C, at 8. Instead of responding, however, Lambright appealed to the Ninth Circuit. Because it was not divested of jurisdiction by Lambright's improper appeal, in 2008, the district court issued a detailed ruling granting the State's motion to modify the protective order in accordance with *Bittaker* and the factual and procedural history of this case. Pet. App. D.

The Ninth Circuit dismissed Lambright's premature appeal, but still remanded to the district court, ordering it to further explain the factual or legal basis for its ruling modifying the protective order. The district court noted that Lambright had sought only a *limited* protective order; had not relied on the protective order in conducting discovery previous to its issuance; still refused to answer any incriminating questions; and, further, did not seek to seal any material submitted and testified to in open court at the evidentiary hearing. Pet. App. E.

On appeal, the panel majority of the Ninth Circuit, Judges Reinhardt and Schroeder, concluded that the

district court abused its discretion by correcting and modifying its own protective order and also found that the protective order applied retroactively. *Lambright*, 698 F.3d at 817-18; Pet. App. A, at 17-23. The majority further concluded that *Bittaker* imposes a duty on a district court (without benefit of a motion by the party asserting a privilege) to enter a protective order at the commencement of any discovery. 698 F.3d at 818-20; Pet. App. A, at 18-21. The majority of the panel additionally held that the evidence presented in the public federal evidentiary hearing was nonetheless also protected, even though Lambright had never sought to have the hearing sealed. 698 F.3d at 820-22; Pet. App. A, at 23-25.

Judge Callahan dissented because the "majority, in finding that the district court abused its discretion in modifying its protective order, distorts the applicable law as set forth in . . . *Bittaker* . . . , and misperceives the facts in this case." 698 F.3d at 827; Pet. App. A, at 39. Judge Callahan continued:

> An implied waiver, as *Bittaker* explains, arises only once a specific claim of privilege is presented to a court and any resulting protective order is forward-looking. Lambright did not seek a protective order until September 2003, after 15 months of discovery, the protective order sought only to limit the scope of Lambright's deposition, and Lambright subsequently declined to testify. Accordingly, there was no implied waiver prior to the district court's

> September 2003 order, and that order does not cover the discovery that took place before it was entered. Moreover, Lambright has not shown that any rights he may have had to a protective order were not waived, or that the State should be denied access on resentencing to materials that were revealed during Lambright's habeas proceedings that were open to the public.

698 F.3d at 827; Pet. App. A, at 39-40.)

REASONS FOR GRANTING THE WRIT

The panel majority created an unworkable requirement that, at the commencement of discovery in a habeas proceeding in which the petitioner has alleged ineffective assistance of counsel, district courts must automatically impose a blanket protective order precluding use of discovery and evidence from the federal proceedings in any subsequent state court proceeding. This duty created by the panel majority applies to district courts regardless of any actual request, or lack thereof, by the privilege holder. The panel majority's holding misapplies this Court's implied waiver jurisprudence because it allows habeas petitioners alleging ineffective assistance of counsel to use the attorney-client privilege (or other similar privileges such as work product and the Fifth Amendment right against self-incrimination) as both a shield and a sword, converting all discovery and evidence produced in a federal habeas proceeding—whether privileged or not—into protected, privileged

material for purposes of any future proceedings in state court resulting from a remand. The result here, and in cases to which this rule would apply, also precludes evidence admitted in public federal hearings from use by the State in any subsequent state court proceedings. This is an anathema to this Court's implied waiver jurisprudence, as well as an unwarranted additional discovery burden on state agencies forced to "re-discover" non-privileged and public information.

ARGUMENT

THE NINTH CIRCUIT IMPROPERLY HELD THAT FEDERAL DISTRICT COURTS HAVE A DUTY TO *SUA SPONTE* IMPOSE A BLANKET PROTECTIVE ORDER PREVENTING FUTURE USE IN STATE COURT, IN THE EVENT OF A REMAND, OF ALL DISCOVERY AND EVIDENCE PRODUCED IN THE COURSE OF ANY LITIGATION IN WHICH A HABEAS PETITIONER ASSERTS A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The Implied Waiver Doctrine.

This Court has long recognized that when a party injects the advice of counsel as an essential part of a claim or defense, that party waives the privilege as to all advice regarding that subject matter. *See Hunt v. Blackburn*, 128 U.S. 464, 470-71 (1888) ("When Mrs. Blackburn entered upon a line of defense which

involved what transpired between herself and [her lawyer,] she waived her right to object to his giving his own account of the matter.").

This "implied waiver" doctrine is broadly acknowledged by federal courts as a "fairness" issue because "the attorney-client privilege cannot at once be used as a shield and a sword." *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2nd Cir. 1991). As the Second Circuit further explained:

> A defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes. Thus, the privilege may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications.

Id. (internal citation omitted). *See also Tasby v. United States*, 504 F.2d 332, 336 (8th Cir. 1974) ("A client has a privilege to keep his conversations with his attorney confidential, but that privilege is waived when a client attacks his attorney's competence in giving legal advice, puts in issue that advice and ascribes a course of action to his attorney that raised the specter of ineffectiveness or incompetence."). The Fifth Circuit elaborated:

> The privilege is not an inviolable seal upon the attorney's lips. It may be waived by the client; and where, as here, the client alleges a breach of duty to him by the attorney, we have not the slightest

> scruple about deciding that he thereby waives the privilege as to all communications relevant to that issue.

Laughner v. United States, 373 F.2d 326, 327 (5th Cir. 1967).

This is particularly true in the context of a habeas petitioner alleging ineffective assistance of counsel. *See United States v. Pinson*, 584 F.3d 972, 978 (10th Cir. 2009) ("Given the ample, unanimous federal authority on point, we hold that when a habeas petitioner claims ineffective assistance of counsel, he impliedly waives attorney-client privilege with respect to communications with his attorney necessary to prove or disprove his claim."); *United States v. Lott*, 424 F.3d 446, 453 (6th Cir. 2005) ("[I]n the habeas context, courts have found implied waiver of these privileges when the petitioner 'injects into [the] litigation an issue that requires testimony from its attorneys or testimony concerning the reasonableness of its attorneys' conduct.'"); *Johnson v. Alabama*, 256 F.3d 1156, 1179 (11th Cir. 2001) (" . . . there should be no confusion that a habeas petitioner alleging that his counsel made unreasonable strategic decisions waives any claim of privilege over the contents of communications with counsel relevant to assessing the reasonableness of those decisions in the circumstances.").

Scope of the Implied Waiver.

In *Bittaker*, an en banc panel of the Ninth Circuit followed the "fairness principle," holding that an implied waiver of the privilege arises when a habeas

petitioner raises a claim of ineffective assistance of counsel "as to all communications with his allegedly ineffective lawyer." 331 F.3d at 716. The en banc panel recognized that a habeas petitioner cannot use the privilege as "both as shield and a sword," so the implied waiver prevents a party from abusing the privilege "by asserting claims the opposing party cannot adequately dispute unless it has access to the privileged materials." *Id.* at 719. The court then went on to analyze the scope of that waiver, meaning: "Does it extend only to litigation of the federal habeas petition, or is the attorney-client privilege waived for all time and all purposes—including the possible retrial of the petitioner, should he succeed in setting aside his original conviction or sentence?" *Id.* at 716-17.

Looking to the doctrine of implied waiver, the en banc court noted that the doctrine "allocates control of the privilege between the judicial system and the party holding the privilege." 331 F.3d at 720. The court explained:

> The court imposing the waiver does not order disclosure of the materials categorically; rather, the court directs the party holding the privilege to produce the privileged materials *if* it wishes to go forward with its claims implicating them. 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.

Id. The court then identified three "important implications that flow from this regime:" 1) the court must impose a waiver no broader than needed to ensure the fairness of the proceedings before it; 2) the holder of the privilege may preserve the confidentiality of the privileged communications by choosing to abandon the claim that gave rise to the waiver condition; and 3) if a party complies with the court's conditions and 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 720-21.

A narrow waiver of privileged materials serves both the federal interest of habeas proceedings and the state interest in preserving the attorney-client privilege:

> A waiver that limits the use of privileged communications to adjudicating the ineffective assistance of counsel claim fully serves federal interests. At the same time, a narrow waiver rule—one limited to the rationale undergirding it—will best preserve the state's vital interest in safeguarding the attorney-client privilege in criminal cases, thereby ensuring that the state's criminal lawyers continue to represent their clients zealously.

Bittaker, 331 F.3d at 722. As such, the en banc court limited any waiver to *privileged* statements or materials disclosed in association with litigation of a habeas claim of ineffective assistance of counsel to use solely in the habeas proceedings, because to do otherwise would prejudice a defendant in the event of a successful habeas petition resulting in a new trial. *Id.* at 722-23.

That this limitation of the narrow waiver to the habeas proceedings is intended to cover privileged material—and only privileged material—was emphasized by the en banc court:

> Nor would a narrowly tailored waiver unfairly prejudice the prosecution. State law precludes access to materials in the defense lawyer's casefile and commands the lawyer to stand mute if he has information damaging to his client. The fortuity that defendant's initial trial was constitutionally defective gives the prosecution no just claim to the lawyer's casefile or testimony. To the contrary, allowing 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, 331 F.3d at 724. Thus, as applied in the habeas setting, the fairness principle—the rule that a litigant waives the attorney-client privilege by putting the lawyer's performance at issue during the course of litigation—demands *only* the extended assurance that, in the event of a remand, the state not be able to use in state court any *privileged* information disclosed in federal court that it would otherwise not have been privy to, but for the issue raised in federal court by the habeas petitioner. Other circuits have cited and followed this narrow rule outlined in *Bittaker* . *See United States v. Nicholson*, 611 F.3d 191, 217-18 (4th Cir. 2010); *Pinson*, 584 F.3d at 978-79; *Lott*, 424 F.3d at 453-54.

The Majority's Expansion of Bittaker.

As Judge Callahan correctly pointed out in her dissent, "[u]nder the regime set forth in *Bittaker* the doctrine of implied waiver does not arise when a habeas petition is filed, but only once a defendant brings a question of privilege to the court's attention." 698 F.3d, at 835; Pet. App. A, at 59-50. Judge Callahan further reasoned, "Thus, in a federal habeas petition an implied waiver arises only when the petitioner affirmatively asserts a privilege before the court and the court then issues a forward-looking protective order." *Id.* Additionally, "not all discovery undertaken is privileged." *Id.*

The majority ignored these aspects of *Bittaker*, converting it from authorizing an implied, limited waiver of privilege into a mandatory, comprehensive protection by imposing on district courts "a duty to enter a protective order prior to ordering the disclosure

of privileged materials." 698 F.3d at 818, 835; Pet. App. A, at 61. Judge Callahan rightly concluded that "[a]ny suggestion that the filing of a habeas petition itself, or commencement of discovery in a habeas petition, somehow invokes an implied waiver would make implied waivers the rule, rather than an exception to more traditional express waivers." 698 F.3d at 835 (*quoting Bittaker*, 331 F.3d at 719); Pet. App. A, at 61.

Instead of ensuring that the state cannot use privileged material to which it would not otherwise be privy in a resentencing or retrial, the panel below authorized Lambright (and future habeas petitioners) to experiment with unsuccessful claims in federal court while preventing the state from using non-privileged discovery unearthed in defense of those claims, as well as evidence presented in a public federal hearing, in any subsequent proceedings in a continuing prosecution in state court. The panel accomplished this by misconstruing the record and improperly divesting the district court of the discretion to modify its own protective order in accordance with the record and the original purpose for its narrow protective order. 698 F.3d at 833; Pet. App. A, at 55-56. As noted by Judge Callahan:

> A fair reading of the record discloses that: (a) the parties did not request any court order to commence discovery; (b) Lambright's counsel knew how to file motions to seal documents and successfully made such motions, and (c) Lambright did not make any assertion of

> privilege or request for a protective order prior to his September 2003 motion. Accordingly, as a matter of fact and law, there was no implied waiver or protective order prior to the fall of 2003.

698 F.3d at 836; Pet. App. A, at 71-72.

Lambright had engaged in discovery for more than a year before seeking a narrow protective order in anticipation of his being deposed by the state. Additionally, the state conducted its own discovery. The district court's 2008 finding in modifying its protective order that it had inadvertently omitted the modifier "privileged" in the order did not change Lambright's original narrow grounds for seeking a protective order—protection from prejudice by the use, primarily, of *his own statements*, or any information subject to the attorney-client privilege obtained during discovery, against him. 698 F.3d at 829; Pet. App. A, at 46; Pet. App. C, at 4.

Moreover, the protective order was clearly prospective, as illustrated by the fact that by September 2003—when the protective order was sought and granted—the bulk of the discovery in conjunction with the habeas proceeding was already completed. Further, even with the protective order in place, Lambright did not rely on it—refusing to testify about the crime in the evidentiary hearing. Thus, no privileged material was ever actually disclosed during discovery or at the public evidentiary hearing.

Additionally, again as articulated by Judge Callahan, everything filed with the court, or admitted,

or testified to in the hearing, is now a matter of public record. 698 F.3d at 837-39; Pet. App. A, at 66-70. *See Foltz v. State Farm Mutual Insurance Co.*, 331 P.3d 1122, 1134 (9th Cir. 2003) ("When discovery material is filed with the court, however, its status changes."); *see also Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002); *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006) ("Unlike private materials unearthed during discovery, judicial records are public documents almost by definition, and the public is entitled to access by default."). *See also Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) (public has a common law right of access to judicial documents).

Further, the panel majority below compounded its error by concluding that, although in its estimation the district court's protective order was retroactive and all evidence presented at the public federal hearing was protected under it, the parties are nevertheless ordered to return to district court to argue what discovery and/or evidence remained non-privileged and thus not subject to the over-arching, comprehensive protective order. 698 F.3d at 826-27. The panel majority's conclusions are illogical and misrepresent the record, and also rely on a misreading of the en banc opinion in *Bittaker*. Moreover, the majority's holding results in duplicative and costly discovery following a hearing in federal court that would now not be permissible under this Court's opinion in *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011).

Judge Callahan distilled the consequences of the majority's misguided conclusions succinctly:

> By distorting the doctrine of implied waiver and misreading the facts in this case, the majority delays and increases the expense of resentencing Lambright without offering him any substantive protection. The public and the State have knowledge of all the documents that the majority would protect. Thus, all the majority's opinion accomplishes is to force the State to conduct additional discovery in the resentencing proceeding to formally gather information that it has already seen. The district court recognized the inefficiency of such a course when it granted the motion to modify the protective order. Moreover, the majority's unique interpretation of *Bittaker* is likely to generate considerable litigation as parties and courts argue over whether a court order at the beginning of a federal habeas proceeding somehow seals all discovery beyond any attorney's ability to waive the privilege.

698 F.3d, at 840; Pet. App. A., at 72-73.

CONCLUSION

For these reasons, this Court should grant certiorari review.

Respectfully submitted

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