No. 12-1190

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, Director of the
Arizona Department of Corrections, et al., Petitioners,

vs.

JOE LEONARD LAMBRIGHT, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Pursuant to Rule 39, Respondent Joe Leonard Lambright hereby moves for leave to proceed *in forma pauperis* in the above-captioned case on the ground that he lacks sufficient funds to pay for fees and expenses. Although the district court vacated his death sentence in January 2008, *see Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007), *cert. denied*, 552 U.S. 1097 (2008), he remains in state custody awaiting the penalty-phase retrial ordered by the court of appeals. By order dated October 14, 1988, the United States District Court for the District of Arizona appointed counsel for Respondent under 21 U.S.C. § 848(q)(4)(B), *recodified at* 18 U.S.C. § 3599 *as stated in Harbison v. Bell*, 556 U.S. 180, 190 (2009). Accordingly, Respondent respectfully asks the Court to grant him leave to proceed *in forma pauperis*.

Respectfully submitted: May 1, 2013.

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the district court, in 2010, abuse its discretion when it dissolved the protective order that it entered in 2003, before it held a hearing on respondent's claim of ineffective assistance of counsel during the penalty phase of his capital-murder trial?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed on the cover of this document. The respondent is not a corporation.

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TABLE OF AUTHORITIES

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OPINIONS BELOW

There are four relevant opinions in this case, which will be referred to in this document as follows:

Lambright v. Stewart, 241 F.3d 1201 (9th Cir. 2001)	*Lambright I*
Lambright v. Schriro, 490 F.3d 1103 (9th Cir. 2007)	*Lambright II*
Lambright v. Ryan, 359 F. App'x 838 (9th Cir. 2009)	*Lambright III*
Lambright v. Ryan, 698 F.3d 808 (9th Cir. 2012)	*Lambright IV*

Lambright IV is the decision that petitioner is asking this Court to review.

STATEMENT OF JURISDICTION

The court of appeals issued its opinion in this case on October 17, 2012. The court of appeals denied a timely filed motion for rehearing and petition for rehearing en banc on November 28, 2012. On February 21, 2013, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including March 28, 2013. The petition is timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISION OF LAW INVOLVED

Rule 501 of the Federal Rules of Evidence:

> The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:
>
> - the United States Constitution;
> - a federal statute; or
> - rules prescribed by the Supreme Court.
>
> But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

STATEMENT OF THE CASE

Respondent Joe Leonard Lambright was convicted in 1982 of first-degree murder and other crimes. *Lambright I*, 241 F.3d at 1202. His girlfriend, also an accomplice to the crime, was given complete immunity in exchange for her testimony against him and his co-defendant at trial. *Id.* After a sparse penalty hearing, *see id.* at 1202–03, the trial judge[1] sentenced Lambright to death for the murder and to two consecutive 21-year sentences for the other crimes. *See State v. Lambright*, 673 P.2d 1, 4 (Ariz. 1983). In 1987, after unsuccessfully pursuing state post-conviction relief, Lambright filed a petition for a writ of habeas corpus in the district court, which the court denied in 1996. *See Lambright v. Lewis*, 932 F. Supp. 1547 (D. Ariz. 1996).[2]

In 2001, the court of appeals vacated the district court's denial of Lambright's penalty-phase ineffective-assistance claim and remanded for an evidentiary hearing. *See Lambright I*, 241 F.3d at 1208. That hearing took place in the fall of 2003. The district court supervised the discovery process that preceded the hearing, and allowed Petitioners to depose Lambright and his counsel in anticipation of the hearing. *See Lambright IV*, 698 F.3d at 812.

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[1] Before this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), Arizona did not involve juries in the capital sentencing process. This Court has held that death-row prisoners in Arizona whose convictions and sentences became final on direct review before *Ring* was decided, as Lambright's did, need not receive new sentencing hearings due to the lack of jury involvement in the determination of aggravating factors. *See Schriro v. Summerlin*, 542 U.S. 348 (2004).

[2] Because Lambright filed his § 2254 petition before the effective date of the Anti-Terrorism and Effective Death Penalty Act of 1996, the amendments to 28 U.S.C. § 2254 effected by that statute do not apply to this case. *See Lindh v. Murphy*, 521 U.S. 320, 336–37 (1997).

Anticipating that Petitioners would ask Lambright questions about his involvement in the crime, Lambright asked the district court to enter a protective order to protect his rights at a new sentencing hearing. The district court heard oral argument on the request and, four days after doing so, entered a protective order that contained the following terms:

> IT IS FURTHER ORDERED that all discovery granted to Respondents, including the requests to depose sentencing counsel Brogna, Petitioner's experts and Petitioner, shall be deemed confidential. Any information, documents, and materials obtained vis-a-vis the discovery process may be used only by representatives from the Office of the Arizona Attorney General and only for the purposes of any proceedings incident to litigating the claims presented in the petition for writ of habeas corpus (and all amendments thereto) pending before this Court. None may be disclosed to any other persons or agencies, including any other law enforcement or prosecutorial personnel or agencies, without an order from this Court. This Order shall continue in effect after the conclusion of the habeas corpus proceedings and specifically shall apply in the event of a resentencing, except that either party maintains the right to request modification or vacation of this Order upon final entry of judgment in this matter.
>
> IT IS FURTHER ORDERED that Respondents' deposition of Petitioner must specifically relate to assertions Petitioner has made in his habeas petition (or amendments thereto), and for which it is likely that Petitioner has personal knowledge. The questions must be phrased in such a manner that they are directly linked to the federal claim upon which Petitioner is being deposed. Petitioner may assert his Fifth Amendment privilege, but the assertion of that privilege may be cause for the Court to draw an adverse inference in this habeas proceeding.

The district court did not solicit any information from the parties about the terms of the order. Instead, it drew heavily on the court of appeals's decision in *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir.) (en banc) (Kozinski, J.), *cert. denied*, 540 U.S. 1013 (2003), and the Eastern District of California's decision in *Bean v.*

Calderon, 166 F.R.D. 452 (E.D. Cal. 1996). *See Lambright IV*, 698 F.3d at 813. Petitioners did not object to the terms of the protective order.

The district court denied Lambright's ineffective-assistance claim after the hearing, but the court of appeals reversed that decision and ordered a new sentencing hearing. *See Lambright II*, 490 F.3d at 1128, *cert. denied*, 552 U.S. 1097 (2008). Accordingly, Lambright's case returned to the county superior court.

As the superior court was preparing for the new sentencing hearing, Petitioners' counsel sent their entire file to the Pima County Attorney's Office, the agency responsible for prosecuting the resentencing proceedings. This action was in direct violation of the protective order. After becoming aware of the violation, Petitioners asked the district court to dissolve the protective order, but failed to inform the district court that they had violated the order prior to filing the motion. Following additional litigation, the district court granted Petitioners' motion, but allowed Lambright to identify any documents that should remain subject to the protective order owing to a claim of privilege. Lambright instead filed a notice of appeal from the order granting Petitioners' motion, which led the district court to conclude that Lambright had forfeited his claims of privilege. The court of appeals vacated the district court's rulings and remanded for further proceedings. *See Lambright III*, 359 F. App'x at 841.

On remand, the district court adhered to its original rationale for dissolving the protective order. Rewriting the history of the case, and ignoring both the plain language of the order and the verbal assurances that the court had personally given

to Lambright, the district court concluded that the protective order did not apply "retroactively" to cover materials exchanged via the court-supervised discovery process before the order was entered. It characterized Lambright's request for a protective order as envisioning only a "narrow" order, even though it expressly patterned the order it entered on the orders discussed in *Bean* and *Bittaker*. It thus concluded that only privileged materials should remain subject to the protective order. Lambright had, at the district court's request, identified documents that should remain subject to the order on account of a claim of privilege, and had previously identified numerous documents that were not confidential or privileged and thus could be removed from the strictures of the protective order. But the district court faulted Lambright for failing to explain when the identified privileged document had been exchanged (to see if the document qualified under the district court's retrospective temporal limitation) and exactly how each document qualified for the privilege he asserted. It also faulted Lambright for not asking to seal the evidentiary hearing, and concluded that Lambright had forfeited his privileges for that reason. In the end, the district court concluded that nothing except for the transcript of Lambright's deposition remained subject to the protective order, and modified the order accordingly.

Lambright appealed from the district court's order, and the court of appeals affirmed it in part and vacated it in part. As to non-privileged materials, the court of appeals agreed that the protective order could be modified so as not to cover them. *See Lambright IV*, 698 F.3d at 825. But as for privileged materials, the court

of appeals rejected each of the district court's rationales for excluding them as an abuse of discretion. As to the revisionist limitation on the temporal scope of the order to cover only those materials exchanged after the protective order was entered, the court of appeals held that the district court acted "illogical[ly]" and contrary to *Bittaker*. *See Lambright IV*, 698 F.3d at 818. As to the district court's conclusion that Lambright had forfeited his privileges by failing to ask to seal the evidentiary hearing, the court of appeals held that material introduced at the evidentiary hearing could remain subject to the protective order if that material was "of a type that ha[s] traditionally been kept secret for important policy reasons." *Lambright IV*, 698 F.3d at 820 (quoting *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1134 (9th Cir. 2003)). And the court of appeals held that the district court abused its discretion by concluding that Lambright had forfeited his privileges when, as the district court had ordered, he identified certain documents that should remain subject to the protective order based on a claim of privilege. *See Lambright IV*, 698 F.3d at 822–24.

REASONS FOR DENYING THE PETITION

This Court should deny the petition because Petitioners have not identified either a difference of opinion among the lower federal courts or an overarching question of national importance that this Court should resolve. *See* Sup. Ct. R. 10. The court of appeals's ruling was based on a straightforward application of a legal rule that this Court has recognized for 125 years—the implicit waiver of the attorney-client privilege that comes into play when a litigant's claim depends on the

propriety of his lawyer's advice. *See, e.g.*, *Hunt v. Blackburn*, 128 U.S. 464, 470–71 (1888). What Petitioners characterize as an unwarranted "expansion" of this rule, *see* Pet. for Cert. at 16, is in fact a simple disagreement with the court of appeals's decision to partly vacate the district court's order. The fact-bound inquiry that Petitioners are asking this Court to conduct is one that this Court routinely refuses to engage. *See Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320–21 (1994) (Rehnquist, C.J., in chambers).

The proceedings below did not present any occasion for the court of appeals to revisit its decision in *Bittaker*. The propriety of entering the protective order in the first instance was not properly before the court of appeals in this case. *See McDowell v. Calderon*, 197 F.3d 1253, 1254–55 (9th Cir. 1999) (en banc). The court below accordingly accepted the terms of the protective order at face value, *see Lambright IV*, 698 F.3d at 818, and correctly assessed whether the district court's post hoc rationalizations for modification of the order were consistent with the fairness principle articulated in *Bittaker*.

Although Petitioners continue to insist that the protective order should not cover discovery material exchanged before the date on which the order was entered, they have not articulated any reason why the *Bittaker* procedure is unworkable. Discovery in habeas cases is available only on a showing of good cause, and then only to the extent permitted by the district court. *See Bracy v. Gramley*, 520 U.S. 899, 909 (1997). Petitioners have no quarrel with the general proposition that if a district court authorizes discovery in a habeas case, "it must ensure compliance

with the fairness principle." *Bittaker*, 331 F.3d at 728, *cited in Lambright IV*, 698 F.3d at 819 n.4. There is simply no reason to believe that a district court, as part of managing the discovery process generally, could not properly dictate the terms of the implied waiver that arises whenever a habeas petitioner raises an ineffective-assistance claim. *See Lambright IV*, 698 F.3d at 819 ("Subsequent orders by the district court merely serve to clarify the scope of the waiver.").

Finally, Petitioners assert, as did the dissenting judge below, that "everything filed with the court, or admitted, or testified to in the [evidentiary] hearing, is now a matter of public record." Pet. for Cert. at 18–19 (citing *Lambright IV*, 698 F.3d at 837–39). But that is not what the court of appeals held. Relying on its decision in *Foltz*, the court of appeals held that privileged materials subject to the protective order did not become part of the public record when they were aired at the evidentiary hearing because of the long-recognized "important policy reasons" that the attorney-client privilege is designed to protect. *See Lambright IV*, 698 F.3d at 820; *see also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1980). The contrary view of the only judge to dissent from either the court of appeals's opinion or its decision not to call for rehearing en banc does not suggest legal error, let alone a question of national importance that calls for this Court's certiorari review.

CONCLUSION

Because Petitioners have failed to articulate any reason why this Court should exercise its discretionary power of review, this Court should deny their petition.

Respectfully submitted: May 1, 2013.

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