IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, v. **RICHARD LEON,** Defendant-Appellant.	Case No. S056766 **CAPITAL CASE** Related to Habeas Corpus Case No. S215554 Los Angeles County Superior Court Case No. PA012903

OPPOSITION TO RESPONDENT'S MOTION FOR ACCESS TO SEALED PENAL CODE SECTION 987.9 MATERIALS FILED IN CASE NUMBER S056766

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

On December 30, 2013, Petitioner Richard Leon Browne Jr.[1] filed a Petition for Writ of Habeas Corpus (hereafter "Petition") in this Court (Case No. S215554). On March 28, 2014, Respondent filed a Motion for Access to Sealed Penal Code Section 987.9, Subdivision (d), Materials Filed in Case Number S056766 (hereafter "Motion").

For the reasons stated below, Mr. Browne, through his habeas corpus counsel, opposes Respondent's request that it be provided access to all of the Penal Code section 987.9 records filed in this case. To the extent any access is granted, it should be limited to protect Mr. Browne's rights under the Fifth and Sixth Amendments to the United States Constitution and California constitutional analogues, the work-product doctrine, and

[1] Defendant-Appellant is known in the automatic appeal as "Richard Leon." As noted in the Petition for Writ of Habeas Corpus, his true name is Richard Leon Browne Jr. His true name will be used in this Opposition.

attorney-client privilege. Such access also should be limited to material that is relevant to the claims in Mr. Browne's Petition. To ensure Mr. Browne's rights and privileges are protected, this Court should conduct an in camera hearing with Mr. Browne's counsel present, or at least provide Mr. Browne with a list of documents the Court intends to release to Respondent so that Mr. Browne may propose specific redactions. Moreover, as required under section 987.9(d), if Respondent is given access to any documents, those documents should remain under seal, and their use should be limited to any habeas corpus proceedings this Court initiates by issuing an order to show cause.

I. THE STATUTORY PROVISIONS PROVIDING FOR DISCLOSURE OF CONFIDENTIAL FUNDING DOCUMENTS ARE UNCONSTITUTIONAL.

Disclosure of the confidential funding material in Mr. Browne's trial pursuant to Penal Code section 987.9(d) violates Mr. Browne's rights to Equal Protection and Due Process of Law. The statute authorizes disclosure of funding records for ancillary services requested by trial counsel who represented an indigent defendant. The statute does not provide for disclosure of information concerning privately funded ancillary services engaged by trial counsel. Thus, a non-indigent defendant whose counsel privately engaged ancillary services is accorded greater protection than an indigent defendant. Similarly, section 987.9(d) does not apply when an indigent defendant is represented by an institutional defender that fully funded the ancillary services using internal office funds. Defendants such as Mr. Browne are singled out because of their poverty and representation by counsel who sought public funding under section 987.9. This distinction is not sufficiently related to the statute's purpose to withstand constitutional Equal Protection scrutiny. *See, e.g., Bearden v.*

Georgia, 461 U.S. 660, 664 (1983); *Schilb v. Kuebel*, 404 U.S. 357, 369 (1971); *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966); *Douglas v. California*, 372 U.S. 353, 356-57 (1963); *Griffin v. Illinois*, 351 U. S. 12 (1956). Moreover, Mr. Browne has a Due Process right to fair adjudication procedures. A procedure permitting discovery of protected and privileged information because of poverty does not comport with Due Process. *See Ake v. Oklahoma*, 470 U.S. 68 (1985).

II. REQUIRING DISCLOSURE OF THE CONFIDENTIAL FUNDING DOCUMENTS IN MR. BROWNE'S CASE CONSTITUTES AN IMPERMISSIBLE RETROACTIVE APPLICATION OF THE STATUTE.

The Legislature added subdivision (d) to section 987.9 in 1998, and it became effective on January 1, 1999. Cal. Stats. 1998, Chap. 235 § 2. The confidential applications filed by Mr. Browne's trial counsel, the invoice documents, and the orders issued by the trial court in the present case were filed between 1993 and 1996. Applying section 987.9(d) to Mr. Browne's case would give a statute that did not exist at the time of Mr. Browne's trial impermissible retroactive effect 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." Cal. Penal Code § 3. Section 3 is a codification of the principle, "familiar to every law student," *United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982), that "statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent." *Aetna Cas. & Surety Co. v. Industrial Accident Comm'n*, 30 Cal. 2d 388, 393 (1947); *accord Evangelatos v. Super. Ct.*, 44 Cal. 3d 1188, 1209 (1988) (absent "an express retroactivity 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(d), the judiciary had adhered repeatedly and without deviation to this principle. *See* cases collected in *Evangelatos*, 44 Cal. 3d at 1207-08; *Buttram v. Owens-Corning Fiberglass Corp.*, 16 Cal. 4th 520, 532, 536 n.6 (1997); *see also Landgraf v. USI Film Prod.*, 511 U.S. 244, 265 (1994) (presumption against retroactivity is "deeply rooted" in American jurisprudence and "embodies a legal doctrine centuries older than our Republic").

A statute has a retroactive 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*, 16 Cal. 4th at 536 n.6; *accord Evangelatos*, 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 Cas. & Surety Co.*, 30 Cal. 2d at 391 (same); *see also Landgraf*, 511 U.S. at 269-70 & n.23 (collecting prior United States Supreme Court decisions and emphasizing considerations of fair notice, reasonable reliance, and settled expectations).

Disclosure of confidential funding documents in Mr. Browne's case under section 987.9(d) constitutes an impermissible retroactive application. When Mr. Browne's counsel drafted and filed their applications and when related documents for ancillary funding were filed, the existing law offered and promised the defendant 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 reason to craft their requests to reveal only the minimal information necessary to obtain the requested funding for ancillary services. Counsel could reasonably have relied on the absolute confidentiality of their applications in revealing information developed in

confidence. Counsel had no notice and no reason to suspect that their applications might later be disclosed wholesale to opposing counsel and used to Mr. Browne's detriment in litigation.

If Mr. Browne 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. Applying subdivision (d) to allow disclosure of applications that counsel crafted in light of a statute that granted an absolute assurance of confidentiality unfairly gives an "effect to acts or conduct" that counsel "did not contemplate" when counsel filed their applications. *Union Pac. R.R. Co. v. Laramie Stock Yard*, 231 U.S. 190, 199 (1913); *see also People v. Collins*, 42 Cal. 3d 378, 388-89 (1986) (retrospective application of waiver rule that changed the rules "after contest was over;" and resulted in "the brutal absurdity of commanding a man today to do something yesterday" creates "intolerable unfairness" where the "contest" is a criminal prosecution) (internal citations and quotations omitted).

There is no reason to depart from these well-established rules. Nothing in the legislative history or the wording of the provision suggests an intent to depart from well-known and previously established rules of construction. The statute contains no express retroactivity provision, and there is no other language in section 987.9(d) on which this Court could rely to find that such intent is "very clear" or that the Legislature considered retroactivity in amending section 987.9. *Evangelatos*, 44 Cal. 3d at 1209 & n.13 (setting forth the governing mode of analysis of statutory language and legislative history).

The "presumption against statutory retroactivity is founded upon sound considerations of general policy and practice," and it "accords with long held and widely shared expectations about the usual operation of legislation." *Landgraf*, 511 U.S. at 293. Here, that firmly-rooted

presumption is not contradicted by any legislative history. Consequently, this Court should not apply Penal Code section 987.9(d) to the funding documents in Mr. Browne's case.

III. THE DISCLOSURE PROVISIONS OF SECTION 987.9(d) DO NOT APPLY BEFORE THIS COURT ISSUES AN ORDER TO SHOW CAUSE.

"[T]he work product doctrine is applicable to criminal cases as well as civil cases," *Hobbs v. Mun. Ct.*, 233 Cal. App. 3d 670, 693 (1991), and prohibits the compelled disclosure of work-product information in the absence of specific statutory rules mandating such discovery. *See, e.g., In re Jeanette H.*, 225 Cal. App. 3d 25, 33 (1990). Pursuant to this Court's habeas corpus jurisprudence, there is no authority to compel such disclosure at this juncture.

A. The disclosure provisions cannot be implemented absent a cause of action, which does not exist until the Court issues an Order to Show Cause.

The filing of the Petition did not constitute an exception to or a waiver, express or implied, of any applicable privilege or protection including, but not limited to, the privilege against self-incrimination, the attorney-client communication privilege, and the work-product protection. *See* Cal. Evid. Code § 955; *People v. Ford*, 45 Cal. 3d 431 (1988); *In re Gallego*, Cal. Sup. Ct. Case No. S042737 (Order filed Aug. 14, 1996). This Court must therefore determine whether and to what extent section 987.9(d) allows for the release of section 987.9 material despite those rights and privileges.

No such determination can (or should) be made at this preliminary stage since the Court has not yet created a cause of action. *See People v. Romero*, 8 Cal. 4th 728, 740 (1994) (issuance of either the writ of habeas corpus or order to show cause creates a cause; the writ or order is the means

by which issues are joined). Under this Court's jurisprudence, "the petition itself serves a limited function," *In re Lawler*, 23 Cal. 3d 190, 194 (1979), and as "an application for the writ," it is "preliminary in nature," *People v. Pacini*, 120 Cal. App. 3d 877, 883-84 (1981). The return to an order to show cause is the principal pleading in a habeas corpus proceeding. *Lawler*, 23 Cal. 3d at 194; *see also In re Serrano*, 10 Cal. 4th 447, 454-56 (1995) (describing generally the process by which issues are joined). Any order disclosing confidential documents whose content implicates Mr. Browne's privileges and protections prior to this Court's concluding which, if any, of Mr. Browne's allegations, if taken as true, would warrant relief and therefore the creation of a cause of action, is premature and unjustified at this preliminary stage in the process.

Moreover, the Legislature did not intend disclosure under 987.9(d) to occur at this stage of the litigation. When the Legislature crafted the statute in 1998 it is assumed that it did so with awareness of and in conformity with important relevant precedents. *See People v. Weidert*, 39 Cal. 3d 836, 844 (1985); *see also Cannon v. Univ. of Chicago*, 441 U.S. 677, 698-99 (1979). At the time the Legislature enacted section 987.9(d), this Court had already determined that the filing of a habeas corpus petition in state court did not confer jurisdiction on a court to grant discovery, *People v. Gonzalez*, 51 Cal. 3d 1179, 1256-58 (1990), or even to grant a request to simply preserve documents and records not introduced or used at trial for future litigation, *People v. Johnson*, 3 Cal. 4th 1183, 1256-58 (1992). The Court found it lacked inherent power to do so because there was no cause before it.

Thus, despite the existence of statutory mechanisms for discovery and record preservation, as well as general statutes authorizing courts to exercise their inherent power to do justice, this Court has determined that filing a habeas corpus petition does not confer jurisdiction on the Court to

exercise that power. As the Court explained in *Gonzalez,* this result follows from the fact that the filing of a petition "creates no cause or proceeding which would confer discovery jurisdiction" until the Court determines that the allegations state a prima facie case for relief. *Gonzalez*, 51 Cal. 3d at 1258. Similarly, in *Durdines v. Super. Ct.*, 76 Cal. App. 4th 247, 252 (1999), the court of appeal held that the trial court lacked the power under former California Rules of Court 60 or 260 to compel trial counsel to submit a declaration in response to a habeas petition alleging ineffective assistance of counsel, before it issues an order to show cause. The declaration in *Durdines* was deemed akin to discovery because it would demand information from a reluctant witness. The court relied on *Gonzalez* for the proposition that until the writ or order to show cause issues there is no "cause" pending sufficient to confer jurisdiction on the court to authorize discovery. *Durdines*, 76 Cal. App. 4th at 252.

Although section 987.9(d) provides for limited access under specified conditions to confidential documents, a court cannot grant a free-floating right of access, but must exercise its authority in the context of an existing cause of action. Had the Legislature intended to provide otherwise, it would have done so. *See* Cal. Penal Code § 1054.9 (providing for a right of reasonable access to criminal defendants under sentence of death or life without parole to material specified in that section). Absent such an indication, this Court must assume that the Legislature meant to harmonize section 987.9(d) with existing law. Mr. Browne's interpretation provides a harmonized interpretation of the law.

This Court's habeas corpus jurisprudence requires first that a court evaluate the petition by asking whether, "assuming the petition's factual allegations are true, the petitioner would be entitled to relief." *People v. Duvall*, 9 Cal. 4th 464, 475 (1995) (internal citations omitted). If the court concludes that petitioner has failed to state a prima facie case for relief, the

court will summarily deny the petition. If the court finds that the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an order to show cause (OSC). *Id.* When the court issues an OSC, '"it is limited to the claims raised in the petition and the factual bases for those claims alleged in the petition. It directs the respondent to address only those issues."' *Id.* (quoting *In re Clark*, 5 Cal. 4th 750, 781 n.16 (1993)). An OSC is issued only on the claims for which the petitioner has stated a prima facie case, and "the order, and the new cause thereby created, is limited to that specific claim or claims . . ." *People v. Super. Ct. (Pearson)*, 48 Cal. 4th 564, 572 (2010). The issuance of an OSC indicates the court's preliminary assessment that the petitioner would be entitled to relief on certain claims if his factual allegations are proved. *Id.* Then, and only then, is respondent entitled to access the confidential materials that are related to those claims on which the OSC has issued, and only to those claims. Disclosure before such a time is thus premature and improper.

Finally, as a matter of statutory construction, the language of section 987.9(d) unambiguously anticipates that a "proceeding" must exist before its disclosure provisions may be permitted to come into play. The statute provides "the documents shall remain under seal and their use shall be limited solely to the *pending proceeding*." Cal. Penal Code § 987.9(d) (emphasis added). A "judicial proceeding" in a habeas corpus action "is instituted" by the "issuance of the writ (or order to show cause) . . . ." *Romero*, 8 Cal. 4th at 740. This view of habeas corpus writ procedure is consistent with this Court's description of the limited function served by a petition for writ of habeas corpus in *Lawler*, and by its view in *Gonzalez* that "the bare filing of a claim for postconviction relief cannot trigger a right to unlimited discovery," because until a determination is made that the petition states a prima facie case for relief, there is "no cause or

proceeding" which would confer discovery jurisdiction. *Gonzalez*, 51 Cal. 3d at 1258.

Respondent summarily argues that access to the sealed documents is appropriate because Mr. Browne has raised claims challenging "the representation provided by his trial attorney, and therefore, places in issue all of counsel's consultation, employment, and use of investigators, consultants, and experts." Motion at 1; *see also* Motion at 3 ("petitioner alleges that his trial attorney was ineffective during the guilt and penalty phases of the trial because, among other things, he failed to adequately investigate the case and to retain or adequately prepare medical, mental health, or social history experts"). Respondent, however, does not explain with any particularity why it needs the confidential 987.9 materials to address the allegations of ineffectiveness of trial counsel, or even assert that whatever need it may have at this juncture in the process trumps Mr. Browne's constitutional and statutory protections supporting nondisclosure of the funding documents. Nor would any argument of necessity be availing, if it were made, in light of the preliminary stage of the case and the limited nature of the informal response. *Romero*, 8 Cal. 4th at 741 (explaining that the informal response and return are distinct and intended to serve different purposes; response serves a screening function, is not a pleading and does not establish a cause).

Moreover, even the more exacting pleading requirements for a return and traverse that apply after the issuance of an order to show cause, "where access to critical information is limited or denied to one party," the court has fashioned a remedy in lieu of forced disclosure. *Duvall*, 9 Cal. 4th at 483-86. Respondent does not allege that the alternative method of proceeding offered in *Duvall* is inapplicable or inadequate. Indeed, rather than ordering depositions, discovery, or the issuance of subpoenas, this Court in *Duvall* held that if a party (either respondent in a return or

petitioner in a traverse) is unable to obtain information that it deems useful in responding to the other party's pleading, that party should allege that it acted with due diligence, explain why crucial information is not available, and explain why there is good reason to dispute the other party's allegations. If this procedure is deemed sufficient and appropriate after a proceeding has been instituted, it is necessarily appropriate and adequate for respondent here in lieu of forced disclosure of privileged and confidential information before such a proceeding is instituted and at a time when the Court has no power to authorize generalized discovery.

Consequently, there is no basis on which to order any disclosure at this stage in the process.

B. The statute contemplates a determination of relevance which cannot take place until a cause of action has been created.

As discussed above, at the time of Mr. Browne's trial, Penal Code section 987.9 permitted counsel for a capitally accused defendant to request funds for ancillary services confidentially and no provision for disclosure existed. In 1998, the Attorney General requested the statute provide for disclosure. As a result, section 987.9 was amended to add subdivision (d). The history of the statutory language from introduction to enactment is instructive and supports Mr. Browne's reading of the statute. As originally introduced, Senate Bill 1441 automatically would have terminated confidentiality of 987.9 documents upon finality of direct review or upon the filing of a post-conviction pleading to which the contents of the confidential file relates.[2] The bill was amended twice.

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[2] 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

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[d]" to pending post-conviction claims.[3] The amendment also provided for continued "confidentiality." The second amendment inserted the words "relevant" and "relevant portion" into the final version. These two amendments make it clear that the Legislature intended a prior judicial determination of relevancy by way of in camera review before the release of any records and eliminated any possibility that the statute would be self-executing.

Looking at the plain meaning of the statute, 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 in an in camera hearing. *See Corenevsky v. Super. Ct.*, 36 Cal. 3d 307, 321, 325-26 (1984). For the reasons detailed above, such a hearing can happen

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Jan. 28, 1998, http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_1401-1450/sb_1441_bill_19980128_introduced.html.

[3] As amended on April 27, 1998, subsection (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 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, http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_1401-1450/sb_1441_bill_19980427_amended_sen.html.

only after a cause of action has been created by this Court through the issuance of an order to show cause.

This reading of the statute is further consistent with the principle that "[d]iscovery on habeas corpus is necessarily directed at issues raised or potentially raised on habeas corpus, which may or may not relate to any of the evidence presented or not presented in the underlying criminal trial," *Pearson*, 48 Cal. 4th at 572, and accordingly "the nature and scope of discovery in habeas corpus proceedings has generally been resolved on a case-by-case basis." *In re Scott*, 29 Cal. 4th 783, 813 (2003). In the event that this Court finds that disclosure is warranted at this pre-OSC stage, the statutory language still requires that an in camera hearing precede any disclosure.

C. Respondent is not entitled to any discovery, as no statutory or decisional law authorizes such discovery prior to the institution of a proceeding.

The principles set forth above, as well as additional principles articulated below, strictly limit the extent to which this Court can order disclosure of any material previously sealed for Mr. Browne's benefit at this stage of the process. Penal Code section 1054.9 (statutorily granting access to specified documents and evidence to capital defendants) is the only statute that explicitly allows disclosure of information in advance of drafting claims in a habeas corpus petition or upon "the bare filing of a claim for postconviction relief." *Gonzalez*, 51 Cal. 3d at 1258; *Pearson*, 48 Cal. 4th at 571-72. In contrast, section 987.9(d) was not made explicitly applicable at this early stage and its reach is limited.

Thus, if the Court construes Respondent's request as a general request for discovery, it cannot take the novel and unauthorized step at this stage of the litigation of granting Respondent's request.

IV. ANY DISCLOSURE MUST BE NARROWLY TAILORED, AND A PROTECTIVE ORDER SHOULD BE ENTERED TO ENSURE CONFIDENTIALITY OF THE MATERIAL AND TO PREVENT VIOLATIONS OF MR. BROWNE'S CONSTITUTIONAL RIGHTS TO COUNSEL AND AGAINST SELF-INCRIMINATION.

Even assuming that any disclosure is appropriate at this time and that filing a habeas corpus petition including claims of counsel's prejudicial ineffectiveness constituted an implied waiver of the attorney-client privilege or the work-product doctrine, that waiver is limited in scope. *See Bittaker v. Woodford*, 331 F.3d 715, 720-21, 722 n.6 (9th Cir. 2003); *In re Gray*, 123 Cal. App. 3d 614, 617 (1981).

Mr. Browne has not expressly waived any privileges or protections. Consequently, in addressing Respondent's request, this Court first must determine the parameters of any implied waiver and then "strictly police those limits." *Bittaker*, 331 F.3d at 728; *see also Webster v. Ornoski*, No. 93-cv-0306-LKK-DAD-DP, 2007 WL 1521048, at *2-3 (E.D. Cal. May 22, 2007) (in camera review of withheld trial material ordered in habeas proceeding to "closely tailor the scope of the implied waiver so that only those documents, or portions of documents, relating to the ineffective assistance of counsel claim are disclosed"); *People v. Super. Ct. (Laff)*, 25 Cal. 4th 703, 720 (2001) (court obligated to consider and determine attorney-client privilege and work-product protection for material seized pursuant to a search warrant from attorneys; the material should not be inspected by or disclosed to law enforcement authorities); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 10-456 (2010) ("Permitting disclosure of confidential client information outside of court supervised proceedings undermines important interests protected by the confidentiality rule."). Moreover, any disclosure order must be consistent with the Court's own pronouncements in *Gonzalez* that it lacks generalized powers to permit

discovery and in *Duvall* that Respondent has an available alternative and available remedy for its inability to access information.

The absence of any court-ordered proceedings at this juncture further underscores the necessity of limiting the scope of disclosure. Indeed, without this Court's tailored determination as to which claims, if any, may warrant relief, and judicial oversight as to how those claims may be adjudicated in a hearing, this Court should accord protection to Mr. Browne's rights and privileges.

A. Documents relating to funding for ancillary services are subject to work-product protection until the Court determines which materials are related to those claims, if any, that the Court has preliminarily assessed warrant relief.

Defense requests for ancillary funding in a capital case constitute work product, and contain counsel's thought processes and information disclosed by the defendant to counsel. They describe defense counsel's activities and intentions with respect to the investigation and expert consultations, and how the investigation and consultations relate to the defense theory of the case. *See, e.g.*, 12 CT 2625-27, 2689, 2694-96, 2711-12, 2805, 2817-19. Accordingly, these requests reveal defense impressions, strategies, opinions, theories, and tactics. Compelled broad and unmitigated access to material regarding ancillary funding violates the work product doctrine as set forth in section 1054.6. Section 1054.6 expressly provides that attorney work product is non-discoverable. Protected work product is defined by reference to Code of Civil Procedure section 2018.030(a) which provides that "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances." While section 1054.6 permits a court to impose limitations on discovery to protect a defendant's rights under the federal Constitution, *Izazaga v. Super. Ct.*, 54 Cal. 3d 356,

383 (1991), it lists no circumstances under which a court may expand such disclosure.

Mr. Browne thus requests that, should this Court permit Respondent access to any materials, it hold an in camera review of the requested records with Mr. Browne's counsel present to prevent disclosure of protected information, and that prior to any disclosure the records be redacted to prevent the unlawful exposure of confidential and privileged information. In camera review is the proper method for determining whether specific items are protected by the work product doctrine. *See, e.g., Dowden v. Super. Ct.*, 73 Cal. App. 4th 126, 135 (1999). Such an item-by-item in camera review is particularly important to ensure that information in the sealed funding documents not be used affirmatively by Respondent in future formal proceedings or in preparation for a hearing, rather than used simply to challenge Mr. Browne's allegations.

B. Mr. Browne's Sixth Amendment right to maintain the confidentiality of defense counsel's trial preparations mandates that any disclosure of 987.9 materials be limited.

Section 987.9(d) provides that if Respondent is provided access to documents, those documents "shall remain under seal and their use shall be limited solely to the pending proceeding." Mr. Browne's Sixth Amendment right to counsel includes the right to maintain the confidentiality of defense counsel's trial preparations. *See Weatherford v. Bursey*, 429 U.S. 545 (1977); *People v. Benally*, 208 Cal. App. 3d 900, 909 (1989). If defense documents are to be disclosed, any order disclosing the requested confidential materials must be carefully crafted and narrowly drawn to protect Mr. Browne's Fifth and Sixth Amendment and statutory rights.

If the Court orders disclosure, Mr. Browne requests that it issue a protective order prohibiting use of the information in the 987.9 material in

any matter other than habeas proceedings in this Court. The protective order should apply to any subsequent retrial of the underlying charges. *See Osband v. Woodford*, 290 F.3d 1036, 1042-43 (9th Cir. 2002); *McDowell v. Calderon*, 197 F.3d 1253, 1255-56 (9th Cir. 1999). The order should also maintain the sealed status of the documents and limit access to them accorded only to those persons directly representing Respondent as required by section 987.9(d).

CONCLUSION

For the reasons set forth above, Respondent's motion for access to records related to funding of ancillary services under section 987.9 should be denied.

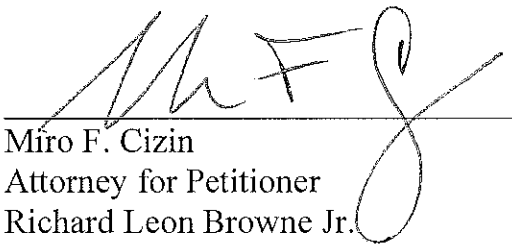
If access to 987.9 records is granted, in order to protect Mr. Browne's rights under the Fifth and Sixth Amendments to the United States Constitution and state constitutional analogues, his attorney-client privilege, and work-product protections, an in camera hearing must be held, outside the presence of Respondent's counsel, at which Mr. Browne's counsel may individually review each document that the Court is considering providing to Respondent and make specific arguments regarding whether such access is appropriate and what redactions, if any, may be required. In the alternative, the Court should provide Mr. Browne with a list of documents that it is considering allowing Respondent to access so that he can make specific objections to those documents or propose redactions to those documents.

Finally, any documents to which Respondent is provided access must, pursuant to section 987.9(d), remain under seal and their use must be limited solely to any habeas corpus proceeding in this Court.

Dated: April 7, 2014

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: 

Miro F. Cizin
Attorney for Petitioner
Richard Leon Browne Jr.

PROOF OF SERVICE

I, Carl Gibbs, declare that I am a citizen of the United States, employed in the City and County of San Francisco, I am over the age of 18 years and not a party to this action or cause, my current business address is 303 Second Street, Suite 400 South, San Francisco, California 94107.

On April 8, 2014, I served a true copy of the following document:

Opposition to Respondent's Motion for Access to Sealed Penal Code Section 987.9 Materials filed in Case Number S056766

on the following in said cause by placing true copies thereof in a sealed envelope, with first class postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

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As permitted by Policy 4 of the California Supreme Court's Policies Regarding Cases Arising from Judgments of Death, counsel intends to complete service on Petitioner by hand-delivering the document(s) within thirty calendar days, after which counsel will notify the Court in writing that service is complete.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on April 8, 2014.

Carl Gibbs