1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 FOR THE EASTERN DISTRICT OF CALIFORNIA 10 11 THOMAS HOWARD LENART, No. 2:05-cv-1912 MCE CKD 12 Petitioner. **DEATH PENALTY CASE** 13 v. 14 WARDEN, San Quentin State Prison, **ORDER** 15 Respondent. 16 17 As required by the August 15, 2013 order, petitioner filed a proposed protective order regarding respondent's discovery of petitioner's trial attorneys' files. (ECF Nos. 127, 139.) 18 19 Respondent objects to portions of the proposed protective order. (ECF No. 140.) Petitioner did 20 not file a reply. 21 Petitioner's proposed protective order largely mirrors the protective order approved by the 22 Court of Appeals in Bittaker v. Woodford, 331 F.3d 715, 717 n.1 (9th Cir. 2003), with one 23 exception. Petitioner includes a paragraph limiting respondent's use of the discovered materials 24 to the "preparation and conduct of depositions of witness[es] for whom this court has previously 25 granted petitioner leave to depose for purposes of preservation of evidence pursuant to Rule 27." 26 (ECF No. 139 at 2:26-3:3.) For several reasons, this court finds the limitation proposed by 27 petitioner to be appropriate. First, this court permitted respondent to discover petitioner's trial 28 counsel's files solely for the purpose of the depositions of the witnesses whose testimony will be 1

preserved. (ECF No. 127.) This is an unusual situation. It is not the situation that confronted the court in <u>Bittaker</u>. There, the court considered a protective order issued during normal discovery in the federal habeas proceeding. Second, the proceedings in the present case are stayed. That stay was lifted solely for the limited purpose of proceedings related to petitioner's preservation of evidence. (ECF Nos. 120, 127.) Finally, until the standards set out in 28 U.S.C. § 2254(d) are satisfied, this court may not consider evidence that was not before the state court. <u>See Cullen v. Pinholster</u>, 131 S. Ct. 1388, 1398-1401 (2011). Therefore, respondent's argument that he should be permitted to include information gleaned through the discovery in his answer in this court is premature. Accordingly, the court finds petitioner's proposed limitation on respondent's use of the discovered files appropriate at this time.

Respondent further asks this court to rule in advance on any use petitioner might make in state court of the preserved testimony. This court will not rule on a matter that is not before it.

The parties may seek amendments to the protective order if necessary.

For the foregoing reasons, and good cause appearing, IT IS HEREBY ORDERED that the protective order proposed by petitioner in his December 6, 2013 filing (ECF No. 139) is adopted.

Dated: January 13, 2014

CAROLYN K. DELANEY

UNITED STATES MAGISTRATE JUDGE

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