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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

THOMAS HOWARD LENART,

Petitioner,

No. CIV S-05-1912 MCE CKD

vs.

DEATH PENALTY CASE

WARDEN, San Quentin
State Prison,

Respondent.

ORDER

_____ /

On April 4, 2012, the undersigned heard argument on petitioner’s motion to perpetuate testimony. (Dkt. No. 88.) Lissa Gardner appeared for petitioner. Wesley Van Winkle appeared by telephone for petitioner. Jesse Witt appeared for respondent. After considering petitioner’s motion and the arguments of counsel, the court finds and orders as follows.

Petitioner demonstrates that the witness’s expected testimony is material to his claims of ineffective assistance of counsel and his claim that the public defender’s hiring scheme was constitutionally inadequate, claims 1 and 22 of the amended petition (Dkt. No. 45 at 19-242, 319-323). Petitioner also demonstrates that this testimony may become unavailable if it is not obtained soon. See Penn Mutual Life Ins. Co. v. United States, 68 F.3d 1371, 1375 (D.C. Cir. 1995) (permitting deposition of elderly witnesses to preserve testimony). Recent Supreme Court

1 authority does not bar this court from permitting fact-finding. Cf. Cullen v. Pinholster, 118 S. Ct.
2 1411 n. 20 (“[W]e need not decide . . . whether a district court may ever choose to hold an
3 evidentiary hearing before it determines that §2254(d) has been satisfied.”)

4 Accordingly, and good cause appearing, IT IS HEREBY ORDERED as follows:

5 1. The stay of these proceedings issued in November 2008 (Dkt. No. 56) is lifted
6 for the limited purpose of this motion and the discovery permitted below.

7 2. Petitioner’s motion to perpetuate testimony is granted. (Dkt. No. 88.)

8 Dated: April 6, 2012

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11 CAROLYN K. DELANEY
12 UNITED STATES MAGISTRATE JUDGE
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