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

MARTIN TAPIA,

Petitioner,

No. CIV S-08-1291 DAD P

vs.

LARRY SMALL, Warden,

Respondent.

ORDER

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Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges a judgment of conviction entered against him on May 24, 2005, in the San Joaquin County Superior Court on charges of kidnapping (Cal. Penal Code § 207); forcible rape including kidnapping (Cal. Penal Code §§ 261(a)(2)); and making criminal threats (Cal. Penal Code § 422).

On September 8, 2008, petitioner filed the second amended petition upon which this action is now proceeding. In his first claim for relief, petitioner contends that his conviction was “obtain (sic) by a violation of the privilege against and to disclose to the defendant evidence favorable to defendant.” (Sec. Am. Pet. at consecutive p. 15.) In the “supporting facts” section of the second amended petition, petitioner explains that there was a witness who could have supported his testimony that he did not assault the victim. (Id.) This witness apparently was not

1 called to testify at petitioner's trial.

2           Petitioner's second claim for relief is that his conviction was obtained in violation  
3 of the Double Jeopardy Clause. Petitioner also mentions "recantation of witness" in connection  
4 with this claim. (Id.) In the "supporting facts" section of the second amended petition, petitioner  
5 appears to be claiming either that the evidence introduced at his trial did not support the jury's  
6 verdict or that relevant evidence was not introduced at his trial. (Id.)

7           In his third claim for relief, petitioner alleges that his trial counsel rendered  
8 ineffective assistance by failing to fully investigate his case and by failing to introduce relevant  
9 evidence at trial. (Id. at consecutive p. 16.) Petitioner's fourth claim for relief is described as  
10 "self defense." (Id.) In the "supporting facts" section of the second amended petition, petitioner  
11 appears to be claiming that he slapped the victim in self-defense. Petitioner also states that  
12 evidence the victim was "due in court on a DUI" on "the day in question" was suppressed. (Id.)  
13 Petitioner has attached several exhibits to his second amended petition, including: the state court  
14 transcript of his motion for appointment of substitute counsel; several letters from his trial  
15 counsel to himself; and portions of the trial transcript involving the defense closing argument and  
16 the judgment and sentencing proceedings.

17           As explained in a prior court order, the claims raised in the second amended  
18 petition now pending before the court are extremely difficult to decipher, but do not appear to be  
19 the same as the claims raised by petitioner in his state court appeal. The issues raised by  
20 petitioner on appeal in state court were the following: (1) the evidence introduced at his trial was  
21 insufficient to support his conviction on the rape charge; (2) the trial court erred in failing to  
22 instruct the jury on lesser included offenses; (3) the trial court violated his right to due process by  
23 instructing the jury on witness credibility in a biased manner; (4) the admission into evidence at  
24 his trial of prior acts of domestic violence violated his constitutional rights; and (5) the trial court  
25 violated his right to due process by permitting the jury to consider the evidence of prior acts of  
26 domestic violence in connection with a count as to which the evidence was irrelevant. (Lod.

1 Doc. No. 3.)

2 In his original answer filed on December 16, 2008, respondent addressed the  
3 issues presented by petitioner to the state courts on appeal but did not in any way address the  
4 claims petitioner has raised in the second amended petition now pending before this court.  
5 Accordingly, by order filed March 19, 2010, respondent was directed to file an amended response  
6 to the second amended petition in the form of a motion or an amended answer. On that same  
7 date, respondent filed an amended answer. Therein, respondent again merely addresses  
8 petitioner's claims raised on appeal in state court. The only addition in the amended answer was  
9 respondent's brief statement that, generally, all claims made by petitioner which did not "renew  
10 the same factual allegations made in the California Court of Appeal" are unexhausted or subject  
11 to a procedural bar. (Am. Answer at 1-2.) Respondent's latter statement in the amended answer  
12 are insufficient and suggest arguments more appropriately raised in a motion to dismiss.

13 Accordingly, IT IS HEREBY ORDERED that within thirty days from the filed  
14 date of this order, respondent shall file a fully-briefed motion to dismiss the second amended  
15 petition now pending before the court based on the suggested arguments that petitioner's claims  
16 are unexhausted and/or subject to a procedural bar. Failure to do so will be deemed a waiver of  
17 such arguments on the part of respondent.

18 DATED: April 14, 2010.

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22 DALE A. DROZD  
23 UNITED STATES MAGISTRATE JUDGE

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