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5 UNITED STATES DISTRICT COURT
6 NORTHERN DISTRICT OF CALIFORNIA
7

8 JOHN JOE LARA,

No. C 06-3138 MHP (pr)

9 Petitioner,

**ORDER LIFTING STAY,
REOPENING ACTION, AND
SETTING BRIEFING SCHEDULE ON
AMENDED PETITION**

10 v.

11 JAMES A. YATES, warden,

12 Respondent.
13 _____/

14 A. The Stay Is Lifted Because State Exhaustion Efforts Have Concluded

15 Petitioner filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. §
16 2254 to challenge his 2003 Santa Clara County Superior Court conviction for several sex
17 offenses. At petitioner's request, this action was stayed so that he could exhaust state court
18 remedies as to one or more new claims he had discovered. Petitioner has now completed his
19 efforts to exhaust state court remedies. This action is now before the court for consideration
20 of several motions petitioner has filed.

21 Petitioner's application for enlargement of time to file a petition for rehearing in the
22 California Supreme Court and/or an amended federal petition is DENIED. (Docket # 23.)
23 To the extent he sought an extension of a deadline in the California Supreme Court, this court
24 has no authority to extend any deadline in that state court; to the extent he sought an
25 extension of time to file his amended federal petition, the request was unnecessary as he later
26 did file his amended petition within a reasonable time of concluding his habeas activities in
27 the state courts. At the time he filed the application for an enlargement of time, petitioner's
28 most recent habeas petition in the California Supreme Court had been denied on July 9, 2008,
and he was trying to decide whether to file a petition for rehearing in the California Supreme

1 Court or to file an amended habeas petition in this court. He later chose the former, and tried
2 to file a petition for rehearing in the California Supreme Court. That effort failed; the
3 petition for rehearing was returned unfiled on August 21, 2008, with a letter from the
4 California Supreme Court explaining that the order denying the habeas petition "was final
5 forthwith and may not be reconsidered or reinstated." See Amended Petition, Exh. A. On
6 September 16, 2008, petitioner mailed to this court an amended habeas petition that was
7 stamped "filed" on September 22, 2008. Petitioner returned to federal court within thirty
8 days of concluding his state court habeas efforts, so he did not need the extension of time he
9 had requested.

10 Petitioner's second motion for appointment of counsel to represent him in this action is
11 DENIED for the same reasons stated when the court denied his first motion. (Docket # 25.)

12 As mentioned earlier, petitioner filed an amended petition in this action and served it
13 on respondent's counsel. Attached to the amended petition was a motion to reopen and lift
14 the stay, which respondent did not oppose. Upon due consideration, the court GRANTS the
15 motion to lift the stay. The stay is lifted. The clerk will REOPEN this action that had been
16 closed administratively.

17 B. Review Of Amended Petition

18 The amended petition lists the following claims: (1) the application of California
19 Evidence Code § 1108 to petitioner's case violated the Ex Post Facto Clause of the U.S.
20 Constitution; (2) the application of California Penal Code § 803(a) to allow prosecution for
21 otherwise time-barred counts 18, 19, and 20 violated the Ex Post Facto Clause; (3) the
22 sentences imposed violated the Apprendi rule, see Apprendi v. New Jersey, 530 U.S. 466
23 (2000); Cunningham v. California, 549 U.S. 270 (2007); (4) there was jury misconduct in
24 that the jurors decided the case before the presentation of the defense; (5) the restitution order
25 violated due process; (6) petitioner received ineffective assistance of trial and appellate
26 counsel in that counsel (a) failed to challenge the legality of the search and seizure done at
27 petitioner's apartment, (b) failed to do an independent investigation, (c) offered a meritless
28 involuntary intoxication defense, and (d) pressured petitioner into committing perjury during

1 his testimony; (7) the evidence was insufficient to support the conviction on count 1, in
2 violation of due process; (8) the conviction on count 25 violated petitioner's right to due
3 process because the statute of limitations had expired for that count; (9) the evidence was
4 insufficient to support the convictions on counts 4 through 9, in violation of due process; (10)
5 prosecution for the same incident on three different counts violated due process; and (11)
6 admission of a "tainted recording" violated petitioner's rights to due process and proof
7 beyond a reasonable doubt. Liberally construed, these claims are cognizable in a federal
8 habeas proceeding and warrant a response.

9 C. Scheduling

10 Having determined that the stay will be lifted and the action reopened, the court now
11 sets the following briefing schedule on the amended petition:

12 1. Respondent must file and serve his response to the amended petition no later
13 than **April 3, 2009**.

14 2. Petitioner must file and serve his traverse in support of the amended petition no
15 later than **May 15, 2009**.

16 IT IS SO ORDERED.

17 DATED: January 26, 2009


Marilyn Hall Patel
United States District Judge

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