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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

OCTAVIO VIVANO,
Plaintiff,
v.
JOE A. LIZARRAGA,
Defendant.

Case No. [18-cv-00028-JSC](#)

ORDER TO SHOW CAUSE NO. 2

Re: Dkt. Nos. 1, 2, 6

Petitioner, a prisoner of the State of California, filed a habeas corpus petition pursuant to 28 U.S.C. § 2254 and a motion for stay and abeyance. (Dkt. Nos. 1, 2.) Petitioner has paid the \$5.00 filing fee. His petition sets forth five claims challenging the constitutionality of Petitioner's conviction in state court: (1) Petitioner's right to cross examination of the victim under the Fifth and Sixth Amendments, (2) ineffective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments due to counsel's failure to object to the trial court's limitation on cross examination of the victim, (3) ineffective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments due to counsel's failure to explain facts pertinent to the Las Vegas assault to the trial court, (4) ineffective assistance of appellate counsel in violation of the Fourteenth Amendment, and (5) violation of the Confrontation Clause due to the admission of the victim's statement from the sexual assault report identifying the assailant's race through the testimony of a non-testifying sexual assault nurse.

The Court issued an Order to Show Cause directing Respondent to respond to the motion for a stay or to file a statement of non-opposition by March 12, 2018. (Dkt. No. 6.) On February 26, 2018, counsel for Petitioner filed a letter stating the California Supreme Court has denied the habeas corpus petition and therefore administrative remedies have been exhausted. (Dkt. No. 7.) Accordingly,

1 Petitioner's motion for a stay is DISMISSED as moot and the Court's previous Order to Show to
2 Cause, Dkt. No. 6, is VACATED.

3 Petitioner's five claims, when liberally construed, are cognizable and potentially
4 meritorious. Good cause appearing, Respondent is hereby ordered to show cause why the petition
5 should not be granted.

6 1. Consistent with Habeas Local Rule 2254-6, Respondent shall file with the Court and
7 serve on Petitioner, within 60 days of service of the petition and this order, an answer conforming
8 in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of
9 habeas corpus should not be granted based on the claims found cognizable herein. Respondent
10 shall file with the answer and serve on Petitioner a copy of all portions of the state trial record that
11 have been transcribed previously and that are relevant to a determination of the issues presented
12 by the petition.

13 If Petitioner wishes to respond to the answer, he shall do so by filing a traverse with the
14 court and serving it on Respondent within 30 days of the date the answer is filed.

15 2. Respondent may file, within 60 days, a motion to dismiss on procedural grounds in lieu
16 of an answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing
17 Section 2254 Cases. If Respondent files such a motion, Petitioner shall file with the court and
18 serve on Respondent an opposition or statement of non-opposition within 30 days of the date the
19 motion is filed, and respondent shall file with the court and serve on Petitioner a reply within 14
20 days of the date any opposition is filed.

21 3. The Clerk shall send a notice to Respondent regarding consenting to the jurisdiction of a
22 magistrate judge. Petitioner has consented to this Court's jurisdiction. (Dkt. No. 5.)

23 This Order disposes of Docket No. 2 and 6.

24 **IT IS SO ORDERED.**

25 Dated: February 28, 2018

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JACQUELINE SCOTT CORLEY
United States Magistrate Judge