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

JOSE LUIS LUNA,)	No. C 02-4045 SBA (PR)
)	
Petitioner,)	
v.)	<u>ORDER</u>
)	
ANTHONY LAMARQUE, Warden,)	
)	
Respondent.)	
_____)	

Petitioner, Jose Luis Luna, filed a petition for a writ of habeas corpus challenging his 2000 conviction of six counts of sexual assault and ten counts of committing a lewd act on a minor arising from a series of encounters he had with a twelve-year-old girl. Petitioner was sentenced to a total of 170 years to life in prison, including consecutive fifteen-years-to-life terms for each of the six acts of sexual assault and consecutive eight-year determinate sentences for each of the ten acts of committing a lewd act on a minor. See Cal. Penal Code §§ 269(a)(4)-(5), 288(b)(1).

Petitioner listed only two claims in his federal petition. The first claim alleged that the trial court erred in admitting into evidence the audiotape-recording of the police interrogation after Petitioner allegedly unambiguously invoked his right to counsel, in violation of Miranda v. Arizona, 384 U.S. 436 (1966). Petitioner's second claim alleged that the imposition of consecutive sentences imposed for the ten counts of committing a lewd act on a minor required a finding that the acts occurred on separate occasions which the jury did not make, in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000).

On March 31, 2006, the Court denied the habeas corpus petition as to both claims and entered judgment for Respondent. Petitioner appealed the Court's denial of his petition. The Court granted a certificate of appealability as to Petitioner's two claims.

The Ninth Circuit Court of Appeals reviewed this Court's decision to deny the petition. The Ninth Circuit originally issued a Memorandum on April 28, 2008. However, Respondent filed a petition for a rehearing and a petition for rehearing en banc. On October 15, 2010, the Ninth Circuit withdrew and replaced its April 28, 2008 Memorandum with the October 15, 2010 Memorandum, in which this Court's judgment was affirmed in part, reversed in part and remanded. (See Ninth Circuit

1 Oct. 15, 2010 Memorandum at 7.) Also on October 15, 2010, the Ninth Circuit denied Respondent's
2 petition for a rehearing and a petition for rehearing en banc. The Ninth Circuit affirmed this Court's
3 judgment as to Petitioner's "conviction for one count of a lewd act on a minor, for which he was
4 sentenced to eight years in prison." (Id.) On remand, the Ninth Circuit ordered this Court to issue
5 the writ of habeas corpus as to Petitioner's remaining counts. (Id.) The Ninth Circuit concluded that
6 the state court unreasonably applied Miranda and its progeny in holding that Petitioner failed to
7 unambiguously invoke his right to counsel during the later part of his interrogation. (Id. at 3.) The
8 Ninth Circuit determined that its decision "obviates [Petitioner's] Apprendi challenge." (Id. at 7.)

9 On November 8, 2010, the Ninth Circuit issued its mandate.

10 Pursuant to the mandate, Petitioner is DENIED habeas corpus relief as to one count of
11 committing a lewd act on a minor; however, he is GRANTED habeas corpus relief as to the
12 remaining counts. No later than **sixty (60) days** from the date of this Order, the State shall release
13 Petitioner because the eight-year sentence for one count of a lewd act on a minor has been fully
14 served, or it may elect to commence proceedings as to the remaining counts. No later than **seventy**
15 **(70) days** from the date of this Order, the State is directed to file a report informing this Court
16 whether Petitioner has been released, or whether state court proceedings have commenced on the
17 remaining counts.

18 The Clerk of the Court shall send copies of: (1) this Order; (2) the Order Denying Petition for
19 a Writ of Habeas Corpus dated March 31, 2006; (3) the Order Granting Petitioner's Request for a
20 Certificate of Appealability on All Claims dated September 1, 2006; (4) the Ninth Circuit's
21 Memorandum as well as its Order Withdrawing Disposition and Denying Rehearing, both issued on
22 October 15, 2010; and (5) the Ninth Circuit's mandate issued on November 8, 2010 to Petitioner,
23 Respondent, Respondent's counsel, and Petitioner's federal appellate counsel, J. Bradley O'Connell,
24 First District Appellate Project, 730 Harrison Street, San Francisco, California 94107.

25 The Clerk shall enter judgment and close the file.

26 IT IS SO ORDERED.

27 DATED: 11/16/10

28 
SAUNDRA BROWN ARMSTRONG
United States District Judge