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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ROGELIO CUEVAS ESPINOZA,

Espinoza,

v.

MATTHEW CATE, SECRETARY, California
Department of Corrections and Rehabilitation,

Respondent.

Civil No. 10cv0397 WQH (BGS)

**ORDER: (1) GRANTING MOTION TO
CONSIDER AMENDED TRAVERSE; (2)
DENYING REQUEST FOR JUDICIAL
NOTICE**

[Doc. Nos. 35, 38]

INTRODUCTION

Rogelio Cuevas Espinoza (“Espinoza”) is a state prisoner proceeding pro se with a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Before the Court is Espinoza’s motion to amend his traverse (Doc. No. 35), and “Notice/Motion for Judicial Notice of Amended Traverse to be Considered by the Court” (Doc. No. 38). Espinoza requests that this court look to his amended traverse (Doc. No. 35-1), instead of his traverse (Doc. No. 33). For the reasons outline below, this Court **GRANTS** Espinoza’s motion to consider his amended traverse and **DENIES** his “Notice/Motion for Judicial Notice of Amended Traverse to be Considered by the Court.”

PROCEDURAL HISTORY

Espinoza was convicted in California state court of mayhem involving the intentional and personal discharge of a firearm that caused great bodily injury, California Penal Code sections 203 and 12022.53(d), and assault with a semi-automatic firearm involving the personal use of the firearm and personal infliction of great physical injury under California Penal Code sections 245(b), 12022.5(a)(1),

1 12022.7(a). (Lodg. 6, at 1.) The jury deadlocked on a count of attempted murder, and the court declared
2 a mistrial on that count. (*Id.*) On March 3, 2006, the trial court sentenced Espinoza to a four year middle
3 term for mayhem and a consecutive term of twenty-five years to life for personally discharging a firearm
4 and causing great bodily injury during the mayhem. (Pet. 1, ECF Doc. No. 1; Lodg. 6, at 1–2.)

5 Thereafter, Espinoza appealed the convictions in the Fourth District of the California Court of
6 Appeal. (Lodgs. 3–5.) According to Espinoza, reversal was required because the trial court:

7 (1) erroneously admitted audio tape recordings of police interviews of witnesses as prior inconsistent
8 statements; (2) allowed the jury to listen to these tapes during deliberation, constituting receipt of
9 extraneous matters not in evidence, and instructed the jury on the use of the prior statements; and
10 (3) denied his motion for a new trial on an erroneous basis. (Lodg. 3, at 18, 38, 50; Lodg. 6, at 2.)

11 Espinoza’s reply brief concluded: “The entire judgment should be reversed on multiple grounds of
12 federal constitutional due process and jury error” (Lodg. 5, at 24.) The state appellate court
13 unanimously affirmed the trial court’s decision. (Lodg. 6, at 16.)

14 Subsequently, Espinoza sought review of the appellate court’s decision before the California
15 Supreme Court. (Lodg. 7.) Espinoza maintained that review was warranted because: (1) the “case
16 presents a unique opportunity . . . to delineate the boundaries of cases in which use of batches of tapes
17 can deny federal constitutional due process”; and (2) “[e]xtraneous evidence heard by even one juror
18 denies a defendant his Sixth Amendment right to an unbiased jury,” and therefore, “the treatment of even
19 accidental slips in what is given the jury [i]s federal constitutional error.” (*Id.* at 24, 31–32.) On June 25,
20 2008, the California Supreme Court denied Espinoza’s state petition without comment. (Lodg. 10.)
21 Espinoza has raised both of these grounds for relief in his federal petition. (Pet. at 6-7; Pet. 1, ECF Doc.
22 No. 1.)

23 On August 31, 2009, Espinoza filed a Petition for Writ of Habeas Corpus with the California
24 Supreme Court (“Sate Petition”). (Lodg. 9.) The state habeas petition raised claims alleging ineffective
25 assistance of trial and appellate counsel. The California Supreme Court denied the state petition without
26 comment. (Lodg. 10.) Espinoza also included these claims in his federal petition. (Pet. 8–9; Lodg. 9, at
27 3–4.)

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1 On February 18, 2010, Espinoza filed a Petition for Writ of Habeas Corpus in this court. (Pet. 1;
2 ECF Doc. No. 1) Espinoza asserted six grounds for review: (1) whether the trial court denied Espinoza
3 due process and a fair trial by admitting, over objection, audio recordings and corresponding transcripts
4 of police interviews of witnesses; (2) whether supplying the jury with the tapes during deliberation
5 constitutes reversible error as receipt of extraneous matters under federal law; (3) whether Espinoza's
6 Sixth Amendment right to effective counsel and Fourteenth Amendment due process rights were
7 violated when trial counsel failed to interview eyewitnesses; (4) whether Espinoza's Sixth Amendment
8 right to effective assistance of counsel and Fourteenth Amendment due process rights were violated
9 when appellate counsel refused to raise an ineffective assistance of counsel claim against trial counsel;
10 (5) whether the prosecution's alleged failure to comply with the requirements of *Brady v. Maryland*
11 violated Espinoza's due process rights, warranting a reversal of the conviction; and (6) whether Espinoza
12 was denied his Sixth Amendment right to effective counsel when trial counsel failed to investigate,
13 consult, or otherwise utilize a ballistics expert at trial. (*Id.* at 6–9.)

14 Respondent filed an answer on May 28, 2010. (Ans., ECF Doc. No. 16.) Respondent stated that
15 Espinoza has exhausted state-court remedies and asks that Espinoza's petition be denied on the merits.
16 (*Id.* at 2.) In addition to arguing that the court should deny Espinoza's petition because the state court
17 decisions are entitled to deference, Respondent submitted that ground one and ground two must be
18 dismissed because they are not cognizable federal claims. (*Id.*)

19 On September 7, 2010, Espinoza filed a motion for stay and abeyance pursuant to *Rhines v.*
20 *Weber*, 544 U.S. 269 (2005). (Pet'r's Mot. Stay and Abey., ECF Doc. No. 21.) Espinoza contended that
21 grounds one and two were not cognizable federal claims because he did not exhaust these claims before
22 filing his federal petition. (*See Id.* at 2.) In order to avoid running afoul of the applicable statute of
23 limitations, Espinoza asked that his petition be stayed and held in abeyance while he fully and fairly
24 presents these claims to the highest state court. (*Id.* at 4.)

25 On August 16, 2011, this Court issued a Report and Recommendation recommending that
26 Espinoza's motion for stay and abeyance be denied because his petition was fully exhausted and that
27 Respondent's request to dismiss grounds one and two for failure to present a federal question also be
28 denied. (Doc. No. 27 at 7.) This Court further recommended that the district court allow Espinoza the

1 opportunity to file a traverse to Respondent’s answer before deciding the petition on the merits. (*Id.*)
2 On September 14, 2011, the Report and Recommendation was adopted in its entirety in an Order by
3 United States District Judge William Q. Hayes. (Doc. No. 28.) The Court noted that Espinoza could file
4 a traverse to Respondent’s answer no later than forty-five days from the date of its Order. (*Id.* at 3.)

5 On October 14, 2011, Espinoza filed a “Motion for Reconsideration for Second Report and
6 Recommendation.” (Doc. No. 30.) He contended that he did not receive a copy of the Magistrate Judge’s
7 Report and Recommendation. (*Id.*) In an Order by Judge William Q. Hayes, Petitioner was given until
8 no later than November 14, 2011 to file any objection or any traverse to Respondent’s answer. (Doc. No.
9 31.)

10 On November 14, 2011¹, Espinoza filed a traverse. (Doc. No. 33.) On January 10, 2011,
11 Espinoza filed the instant motion to amend his traverse (Doc. No. 35) and attached an amended traverse
12 (Doc. No. 35-1). In his motion, Espinoza included a declaration from himself and Mark Bonds
13 (“Bonds”), the individual who has prepared all Espinoza’s legal documents since his arrival at the
14 Correctional Training Facility in Soledad, California. (Doc. No. 35 at 3-4.) The declarations state that
15 Espinoza was sick when the traverse was due, and Bonds prepared the traverse for filing. (*Id.*) The
16 declarations further state that Bonds did not thoroughly prepare the traverse and that the amended
17 traverse better challenges the issues presented by the Respondent. (*Id.*)

18 On February 6, 2011, Espinoza filed the pending “Notice/Motion for Judicial Notice of Amended
19 Traverse to be Considered by the Court” (Doc. No. 38). Espinoza asks this Court to consider his
20 amended traverse pursuant to Federal Rules of Evidence 201(c) & (f). (*Id.* at 3.)

21 **DISCUSSION**

22 Espinoza asks this Court to consider his amended traverse pursuant to Federal Rules of Evidence
23 201(c) & (f). However, his request is in error because these rules refer to judicial notice of adjudicative
24 facts and thus are not relevant to his amended pleading. Accordingly, Espinoza’s request for judicial
25 notice is **DENIED**. Rather, this Court will take guidance from Federal Rules of Civil Procedure

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¹The mailbox rule holds that an incarcerated pro se prisoner’s pleading is deemed filed at the moment of delivery to prison officials. *Miles v. Prunty*, 187 F.3d 1104, 1106 n.2 (9th Cir. 1999).

1 15(a)(2) which pertains to amended pleadings and states, “courts should freely give leave when justice
2 so requires.”

3 In the case at hand, no responsive pleading is required nor has this Court taken any action.
4 Furthermore, this Court is mindful that pro se pleadings should be liberally construed. *See Resnick v.*
5 *Hayes*, 200 F.3d 641, 644 (9th Cir. 2000) (indicating that under 28 U.S.C. § 1915, a court must construe
6 pro se complaints liberally and in the light most favorable to the plaintiff). Thus, in the exercise of
7 discretion, this Court will consider Espinoza’s amended traverse when evaluating the petition.

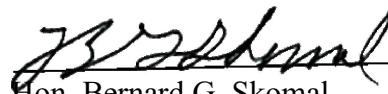
8 **CONCLUSION**

9 **IT IS HEREBY ORDERED** Espinoza’s amended traverse (Doc. No. 35-1) will be considered
10 in its entirety.

11 **IT IS FURTHER ORDERED** that Espinoza’s request that the Court to take judicial notice
12 pursuant to Federal Rules of Evidence 201(c) & (f) is **DENIED**.

13 **IT IS SO ORDERED.**

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15 DATED: April 18, 2012

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17 Hon. Bernard G. Skomal
18 U.S. Magistrate Judge
19 United States District Court
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