

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

NELSON ZELEDON — PETITIONER
(Your Name)

VS.

SHAWN HATTON "WARDEN" — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Ninth Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Nelson Zeledon, CDC NO. F-45723

(Your Name)

RA-204Low, Correctional Training Facility

(Address)
P.O. BOX 705

Soledad, CA 93960

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1.) Does Trial Attorney's admittance of an error so egregious that it undermines the outcome of trial, of one whom is actually innocent, sufficient to meet the threshold set forth in *Strickland v. Washington*, 466 U.S. 668, 688 (1984), for Ineffective Assistance of Counsel? If So? Petitioner received Ineffective Assistance of counsel when trial counsel failed to object to the use of tape recordings in which Petitioner's wife recounted private conversations she had with her husband which would implicate him if missinterpreted and taken out of context, as they were by the Prosecution, after they had closed their case and the Defense opened theirs, in violation of Evidence Code Section 980, and relying on confidential marital communication, in order to sway a dead-locked jury, And if Trial Counsel was ineffective should a new trial be granted? See: Appendix "B" (Defendant's Motion For A New Trial CA. P.C. Sec. 1181), or at minumum hbeas relief granted on this ground.

2.) The Issue Relating To A Juror's Observation Of Petitioner's Behavior While Not Testifying.

Did the Trial Court err, and was defense counsel ineffective after a juror expressed the view that it did not seem "right" for Petitioner to "stare" at the complaining witness during her testimony, where the juror was not instructed that he could not consider Petitioner's demeanor in Court other than when Petitioner was testifying?

QUESTIONS PRESENTED

3.) Was the Trial Court correct when it did not give access of Juror Confidential Information due to "Juror Bias", for vote swapping, When the Trial Court denied Defenses motion for a hearing, with notice to jurors, regarding release of confidential juror information, which involves significant subsidiary questions regarding the breadth of Evidence Code Section 1150 and correct procedures of code of Civil Procedure Section 237 in terms of a prima facia showing and a hearing with notice to jurors?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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APPENDIX C Supreme Court of California, Petition for Review, Denied En Banc CASE No. S-231981 , Dated: MARCH 16, 2016

APPENDIX D

APPENDIX E United States District Court for the Northern District of California, CASE No. 3:16cv02767-VC, denying petition Dated May 12, 2017.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix F to the petition and is

☐ reported at Case No. 17-16145, Ninth Circuit Ct. of App.; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the United States district court appears at Appendix E to the petition and is

☐ reported at Case No. 3:16cv02767-VC U.S. Dist. N. Dist. CA; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

☐ reported at Case No H038366, 6th App. Dist. CA Ct. of App.; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the ~~Superior Ct. of CA, Santa Clara County~~ Motion for New Trial court appears at Appendix B to the petition and is

☐ reported at Motion for New Trial; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was January 31, 2018.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: March 9, 2018, and a copy of the order denying rehearing appears at Appendix F.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix C.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL AMENDMENTS

Fifth, Sixth, Eighth, Fourteenth Amendments to the U.S. Const.
And Article 1 Section 16 of the California const.

CALIFORNIA STATUTES

Civil Code Section 206; 237

Evidence Code Sections 1150; 400-403; 800; 802; 803; 1200

Penal Code Section 2933.1; 4019

CALIFORNIA RULES OF COURT

Rule 8.500, subd.(b)(1)

BRIEF IN SUPPORT OF PETITION FOR REVIEW

STATEMENT OF THE CASE

Mr. Zeledon was convicted by a jury of two counts of violation of Penal Code section 269, subdivision (a)(1), based on rape in violation of section 261, subdivision (a)(2).¹ Those convictions occurred after *People v. Zeledon* (2010) 2010 Cal.App. Unpub. LEXIS 283 [H030760] reversed three of five counts of conviction and remanded the case for retrial of those counts.

Jury trial commenced on February 8, 2012. 1CT 87.² The jury began deliberating on March 9, 2012. 1CT 267. The jury deliberated further on March 12 and 13, until it announced a deadlock. 1CT 271, 275, 280. Further instructions were given, and deliberations resumed. 1CT 280. The jury continued deliberating on March 14 and 15, 2012, until the verdicts were returned. 2CT 282, 288. Mr. Zeledon was found *guilty* on Counts 1 and 2 but *not guilty* on Count 3. 1CT 283-285.

On April 27, 2012, the defense filed a Motion for a New Trial and Petition for Release of Juror Identifying Information. 2CT 369. On May 17, 2012, the Motion and Petition were denied, and Mr. Zeledon was sentenced. 2CT 448, 465. The trial court allowed actual *and* conduct credits for local custody until the original judgment on October 6, 2006, and actual credits for time in custody thereafter. However, the court allowed no conduct credits for time in local custody after remand. 2CT 265; 6RT 1570.³ Notice of Appeal was timely filed. 2CT 468.

¹/ All code references are to Penal Code, unless otherwise noted.

²/ Clerk's Transcript.

³/ Reporter's Transcript.

REASONS REVIEW SHOULD BE GRANTED

A. The Ineffective Assistance Issue Relating to the Marital Communication Privilege, Hearsay Rule, and Personal Knowledge Rule.

In this case, it was alleged by the complaining witness Karla Doe that Mr. Zeledon had committed sex offenses against her on occasions when he had picked her up *alone* from a youth club after Mr. Zeledon's daughter Stacy had changed schools and stopped attending the club. Mr. Zeledon and his wife, however, testified that Mr. Zeledon had never picked up Karla from the youth club after his daughter Stacy had stopped attending. All of this bore on the issues of opportunity and of Karla and Mr. Zeledon's credibility.

At the eleventh hour of trial, the prosecutor proffered a statement given many months earlier by Mr. Zeledon's wife that she had been told by Mr. Zeledon *and* unspecified other people that Mr. Zeledon had continued to pick up Karla after Stacy stopped attending the club. Defense counsel sought to exclude this evidence based on delayed discovery, but counsel never objected under the marital communication privilege to what Mr. Zeledon allegedly told his wife, or under the hearsay/personal knowledge rules as to what other people allegedly told Mr. Zeledon's wife. Mr. Zeledon submits that his counsel was ineffective in these omissions, and he asks that review be granted.

B. The Issue Relating to a Juror's Observation of Mr. Zeledon's Behavior While Not Testifying.

During trial, one juror expressed to the trial court a concern that Mr. Zeledon had stared at Karla during her testimony. It continues to be surprising that trial courts and counsel are unaware that jurors are not to

consider a criminal defendant's in-court behavior and attitude on the issue of guilt, *except* as may occur while the defendant is on the witness stand. As a result of the court and counsel's lack of awareness of the rule, no proper admonition was given to the juror. Mr. Zeledon asks this court to grant review and to reinforce this rule which has been lost on the trial courts.

C. The Issue of Access to Confidential Juror Information.

In this case, the defense sought a Code of Civil Procedure section 237 hearing on release of confidential juror information. The trial court understood neither "juror bias" in terms of "vote swapping," Evidence Code section 1150 ("section 1150") in terms of what may be established independent of "mental process," nor Code of Civil Procedure section 237 ("section 237") in terms of standards and procedures when it denied the motion.

As for "juror bias," the trial court did not believe that jurors willing to trade votes to reach verdicts had exhibited bias. In relation to section 1150, the trial court did not accept that an expressed willingness and/or offer to trade votes to achieve a verdict could be establish by juror testimony of affidavits. Review should be granted to hold that error occurred in these views.

As for section 237, *People v. Rhodes* (1989) 212 Cal.App.3d 541 was decided before section 237 was enacted. In seeking "an appropriate middle ground which can harmonize and satisfy the competing societal interests" in relation to post-trial access to juror information, *Rhodes* held that a defendant's motion for disclosure of the names, addresses, and telephone numbers of the jurors had to be accompanied by "a sufficient showing to support a reasonable belief that jury misconduct occurred, that

diligent efforts were made to contact the jurors through other means, and that further investigation is necessary to provide the court with adequate information to rule on a motion for new trial." *Id.*, at 551-552; emphasis added. The *Rhodes* "good cause" showing -- established out of whole cloth in a case tried before there were statutes to govern access to confidential juror information -- has come to dominate trial courts' thinking when such petitions are presented.

However, section 237, as amended in 1995, has effected major changes: First, personal information is sealed *automatically*, and the juror's "right to privacy" is protected, *whether or not the juror would have asserted it*. Second, a new "prima facie good cause" concept has been created, which is not *Rhodes*'s "good cause for disclosure" but "good cause to hold a hearing." Third, the jurors receive notice of the hearing, at which the trial court would know whether the juror objected to disclosure. Fourth and finally, disclosure would not occur -- irrespective of "good cause" -- if the juror indicated he or she was "unwilling to be contacted. . . ."

The initial inquiry is no longer whether to reveal juror information. The issue is whether a *prima facie* showing of "good cause" exists sufficient to require a hearing, and this *prima facie* level of inquiry creates questions not under consideration in trials prior to 1996. Where a hearing on disclosure has been scheduled, notice has been given, and a juror has come to the hearing and asserted that he or she will refuse to speak with the defense, a "compelling interest against disclosure" has been demonstrated. This court should grant review and hold that it is section 237, and not *Rhodes*, which is the controlling authority in this context.

STATEMENT OF FACTS

For the purposes of this Petition, Mr. Zeledon refers the court to the factual summary at pages 2 through 8 of the ^{Appendix "E"} Slip opinion. In brief, the case involved allegations by Karla Doe of rape and forcible oral copulation. Karla testified that she had been thirteen at the time of the incidents. Mr. Zeledon testified and denied improper conduct.

An important question at trial was the issue of Mr. Zeledon's opportunity, or lack thereof, to have picked up Karla from her after-school youth club, taken her to his house, and done the acts alleged.

Karla alleged that Mr. Zeledon had picked her up by herself from the after-school club after Mr. Zeledon's daughter Stacy had stopped attending the club, while Mr. Zeledon and his wife testified that he had never picked up Karla except when he was also picking up Stacy. Thus was the issue of "opportunity" to have committed the offenses important at trial.

The prosecution at the last minute discovered a police interview of Mr. Zeledon's wife in a related matter. In that interview, Mr. Zeledon's wife stated that she had heard from Mr. Zeledon and other persons that he had continued to pick up Karla from the after-school club after his daughter Stacy had stopped attending. The introduction of this evidence was a serious setback for the defense.

Nonetheless, the jury announced a deadlock during its deliberations. The jury's note described the "sticking points" in the deliberations: "Lack of believability in Karla's testimony"; and "No evidence on forcible vs consensual." ICT 275. The jury then exercised Solomon-like wisdom in convicting on two but not on all three of the counts which had been based on Karla's testimony.

I

MR. ZELEDON RECEIVED INEFFECTIVE ASSISTANCE WHEN DEFENSE COUNSEL FAILED TO ASSERT THE MARITAL COMMUNICATION PRIVILEGE AND OTHER VALID OBJECTIONS TO REBUTTAL EVIDENCE BEARING ON A CRITICAL ISSUE AT TRIAL.

A. Introduction.

At the retrial of Counts 1 and 2, as in the original trial, a major issue surrounded whether Mr. Zeledon had continued to pick up Karla from the youth club after Stacy had stopped attending. Karla in her testimony alleged that she had been raped by Mr. Zeledon after he had picked her up alone in early 2004. Mr. Zeledon in his testimony denied having picked up Karla after Stacy stopped attending the club in December 2003, and he denied any wrongful acts against Karla.

Very late in the trial, after the prosecution had rested, an officer searched a separate investigation file and found a tape of a 2005 interview of Mr. Zeledon's wife Sandra in which Sandra stated that Mr. Zeledon and others had told her he had continued to pick up Karla after Stacy had stopped attending the club. The trial court denied a defense motion to exclude the new evidence on the basis of delayed discovery.

Officer Tran was called to identify portions of Sandra's statement in which she reported that she knew Mr. Zeledon had continued to pick up Karla because Mr. Zeledon and others had told her. Sandra was recalled and denied memory of such a statement, and portions of the tapes were played for the jury. *No marital communication privilege, hearsay, or foundation objections were advanced by the defense.*

After Mr. Zeledon's conviction on Counts 1 and 2, defense counsel filed a motion seeking a new trial. One ground was counsel's failure to advise Mr. Zeledon of the marital communication privilege and omission to advance the privilege on Mr. Zeledon's behalf. In denying the motion, the trial court found that the privilege had been waived.

The motion and appellate record establish that defense counsel was ineffective. If advanced, privilege, hearsay, and foundation objections would have been sustained.

B. The Proceedings in the Trial Court, in Greater Detail.

The prosecution rested on February 29, 2012, the eighth day of trial. 1CT 178; 2RT 512. Apparently on March 6, 2012, the tenth day of trial, the prosecutor provided defense counsel with copies of recordings of police interviews of Sandra and Stacy Zeledon. See, 1CT 211. On March 7, 2012, when the final defense witnesses were scheduled, the prosecutor advised defense counsel of his intention to introduce portions of the interview of Sandra Zeledon as prior inconsistent statements. *Ibid.*

Defense counsel filed a motion to exclude the evidence based on delayed discovery. 1CT 210; 4RT 996. On March 8, 2012, the trial court identified sections of Sandra's statement which were inconsistent with her testimony. 4RT 996-1004. Some inconsistencies were based on things Mr. Zeledon and other people had told his wife. 4RT 1000, 1002-1003. The trial court ruled that the inconsistent statements would be admitted. 4RT 1019.

Officer Tran was then called to introduce portions of the statements made to him by Sandra on April 13, 2005. 4RT 1026-1027, 1030. Sandra was called (4RT 1032), and portions of her statement to Officer Tran were played for the jury. 4RT 1034.

After the jury's verdicts were returned on March 15, 2012, defense counsel on April 27, 2012 filed a motion seeking a new trial. 2CT 369. One contention was that Sandra's statements to Officer Tran, in which she reported that Mr. Zeledon had admitted continuing to pick up Karla after Stacy stopped attending the club, represented "confidential marital communications and therefore privileged under Evidence Code section 980" 2CT 377. The motion argued that "the failure to claim the privilege resulted from oversight on the part of Mr. Zeledon's counsel." 2CT 379.

The defense's reply memorandum, filed March 17, 2012 (2CT 399), referred to the jury's declaration of a deadlock during its deliberations. 2CT 406. On March 13, 2012, the jury had sent out a note reading as follows:

We the jury are currently deadlocked and ask for your recommendation and guidance on next actions.
(Same result since yesterday)

- (1) Lack of believability in Karla's testimony.
- (2) No evidence on forcible vs consensual.

1CT 275.

When questioned regarding the deadlock, the foreman advised that the votes had been 9-3 on two counts and 10-2 on the third. 4RT 1200A-1200B. A modified "*Moore*⁴ instruction" was given (4RT 1200B-1200D), and deliberations resumed. 4RT 1200E. On March 15, 2002, Mr. Zeledon was found guilty on Counts 1 and 2, but found not

⁴/ *People v. Moore* (2002) 96 Cal.App.4th 1105.

guilty on Count 3. 1CT 283. Based on those events, the defense's March 17, 2012 reply memorandum argued that "all 12 of the jurors ultimately voted not guilty as to Count 3, indicating that even the 9 who originally voted guilty on Counts 1 & 2 must have had some significant doubts about the credibility of Karla Doe's testimony." 2CT 405.

When the motion for new trial was addressed on May 17, 2012, the trial court noted that neither Mr. Zeledon nor Sandra had asserted the marital communication privilege, which constituted a waiver. *Ibid.* The court found it not to be a confidential communication, since Sandra had no recollection of her husband telling her he was continuing to pick up Karla. 6RT 1518.

Finally, the court found no prejudice, because Sandra in her statement to police had said that "people in the community" were bringing to her attention that Mr. Zeledon was picking up Karla after Stacy stopped attending. 6RT 1519-1520. The trial court reasoned that, if one sentence were excluded, the jurors would still know that Sandra was "dishonest" in her testimony that her husband never picked up Karla from the after-school club after Stacy stopped going. 6RT 1520.

Mr. Zeledon now submits that the record establishes ineffective assistance of counsel. In one respect, the trial court was correct: things Sandra had been told by "people in the community" were not within the marital communication privilege. However, what Sandra had learned from "people in the community" was nonetheless inadmissible under hearsay and personal knowledge rules. Defense counsel was ineffective in failing to advance the proper objections to keep this evidence from the jury.

C. None of the Evidence Would Have Been Admitted, if Proper Objections Had Been Advanced.

Evidence Code section 980 states the marital communication privilege, and Evidence Code section 912, subdivision (a), provides for waiver of that privilege. When Sandra revealed a marital communication to Officer Tran, that constituted a waiver as to her, albeit not as to Mr. Zeledon. *See* Law Revision Comments to section 980 [". . . [s]uch conduct would constitute a waiver only as to the spouse who made the disclosure."]. There was also a waiver when Mr. Zeledon and his counsel failed to assert the privilege at trial, even though it was valid.

Another aspect to the ineffective assistance issue was not explored in the new trial motion and not considered by the trial court in denying the motion. One view of the matter is that all of Sandra's statements of belief concerning Mr. Zeledon picking up Karla were based on the following: ". . . I knew that because my husband tell me, 'Oh, I went to pick up Karla'"

Yet even if Sandra's opinion on this issue came from someone else -- Stacy, Karla, or "members of the community" -- Sandra's assertions of belief by Sandra were objectionable on hearsay and foundation grounds, because Sandra lacked *personal knowledge* on the question. *See* Evidence Code sections 400-403, 702, 800, 802, 803, and 1200, subdivision (a). In particular, Evidence Code section 702, subdivision (a) provides in part that "the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter."

In particular, Sandra told the officer on tape: ". . . I knew that because my husband tell me, 'Oh, I went to pick up Karla,'" 2CT 377. However, Evidence Code section 917, subdivision (a) provides in

relevant part that husband-to-wife communications are "presumed to have been made in confidence and the *opponent* of the claim of privilege has the *burden of proof* to establish that the communication was *not confidential*." Emphasis added.

It was explained in *People v. Gomez* (1982) 134 Cal.App.3d 874, 879, as follows: "While a communication between a husband and wife is presumed to be confidential, *if the facts show that the communication was not intended to be kept in confidence*, the communication is not privileged. [Citation.]" Emphasis added. While the evidence in *People v. Cleveland* (2004) 32 Cal.4th 704, 744 (cited at RB 15) convinced this court that the communication at issue in *Cleveland* had not been "intended" to be confidential, neither *Cleveland* nor any other case has undermined section 917(a), in terms of which party bears the "burden of proof." The shortfall in the record was the prosecutor's problem and not Mr. Zeledon's.

In short, Sandra knew what Mr. Zeledon had said to her, although that was protected by the marital communication privilege. Beyond that, Sandra had no other "personal knowledge" to share on the issue.

D. Mr. Zeledon Received Ineffective Assistance of Counsel.

This court stated in *People v. Pope* (1979) 23 Cal.3d 412, 424-425 that "the Sixth Amendment and Article I, § 15 require counsel's 'diligence and active participation in the full and effective preparation of his client's case.' [Citation.]" "To render reasonable competent assistance, an attorney in a criminal case must perform certain basic duties. [Citations.]" *People v. Pope, supra*, 23 Cal.3d at 424. In particular, counsel has an obligation to apprise himself or herself of the applicable law. "*Pope, supra*, specifically states that failure to research the law satisfies

the first prong of the incompetence test, i.e., whether 'trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates.' (*People v. Pope, supra*, 23 Cal.3d 412, 425)." *People v. Rosales* (1989) 153 Cal.App.3d 353, 361.

It is inexplicable that counsel omitted to advance valid objections where counsel clearly wanted damaging evidence excluded. There was no "reasonable" and/or "knowledgeable" tactic for having failed to do so.

E. Prejudice Resulted.

When there is a claim of ineffective assistance of counsel, it is the defendant's burden to demonstrate the prejudicial effect of the errors of his counsel. *Strickland v. Washington* (1984) 466 U.S. 668, 694; and *People v. Fosselman* (1983) 33 Cal.3d 572, 584. Here there were objective and subjective indicia that the case was close on the trial evidence.

First, there were lengthy deliberations spanning five days. Compare *People v. Rucker* (1980) 26 Cal.3d 368, 391 [deemed close based on deliberations over nine hours]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [six hours]; and *People v. Collins* (1968) 68 Cal.2d 319, 332 [eight hours]. Second, there was the jury's note regarding a deadlock, based in part on "[l]ack of believability in Karla's testimony." See *People v. Figueroa* (1986) 41 Cal.3d 714, 722. Third, the acquittal on Count 3 -- despite testimony from Karla -- indicates that her inconsistencies had caused the jury to question her as a witness. Fourth, Mr. Zeledon testified -- denying guilt -- and he explained much of the incriminating evidence in a logical manner. Fifth, his cause was supported by witnesses who deemed him honest and incapable of the crimes charged.

Viewed from this perspective, the defense case was acutely damaged by the receipt of prior assertions from Sandra Zeledon that Mr. Zeledon had continued to pick up Karla after Stacy had stopped going to the club. That evidence impeached not only Sandra but Mr. Zeledon on that important question.

In sum, prejudice resulted, under any standard of prejudice, from defense counsel's failures with respect to exclusion of this evidence.

II

THE TRIAL COURT ERRED, AND DEFENSE COUNSEL WAS INEFFECTIVE, IN THE RESOLUTION OF AN ISSUE WHEN A TRIAL JUROR EXPRESSED THAT IT DID NOT SEEM "RIGHT" FOR MR. ZELEDON TO STARE AT KARLA DURING HER TESTIMONY.

A. Introduction.

On February 27, 2012, during the testimony of Karla Doe, Juror No. 4 expressed concern that Mr. Zeledon had been staring at the witness. There was inquiry of the juror, but the trial court deemed it inappropriate to instruct the juror not to consider Mr. Zeledon's demeanor other than when he was testifying.

This was the opposite of the correct resolution of the issue. The juror should have been specifically instructed not to consider Mr. Zeledon's courtroom demeanor except when he was testifying. Whether viewed as trial court error, or as another oversight by defense counsel, reversal should be ordered.

B. The Issue with Juror No. 4.

After Juror No. 4 had spoken to the bailiff, a hearing was held outside the presence of the other jurors. 1RT 220. Juror No. 4 advised the court: "Yeah, I asked if it was usual for the defendant to stare at the witness. It didn't seem right to me." *Ibid.*

The court informed the juror that it needed to be determined "whether that affects your ability to be fair in this case," and the juror was asked whether he had "made up your decision about whether he's guilty or not." 1RT 220. The juror responded: "No, I was just wondering if that was standard." *Ibid.* The juror answered affirmatively when

asked whether he would base his decision "on all of the evidence presented and on nothing else," whether he would "keep an open mind throughout the rest of the trial," and whether he had "an open mind right now."

Ibid.

The court and counsel met at the bench. 1RT 220-221. The juror was then reminded not to "discuss the case with anybody" and not "to form an opinion until the end of the trial," and the juror was excused. 1RT 221. The court memorialized that defense counsel had "said based on what the juror said I don't believe there is any issue."

The issue was discussed further at the end of the day. The trial court noted that there had been a discussion in chambers after Juror No. 4 had spoken to the bailiff. 1RT 247. The trial court stated, *inter alia*: ". . . I did not want to be in the position of telling the juror that you can't take into consideration the demeanor of the defendant during the trial." *Ibid.* Defense counsel had stated that Mr. Zeledon was "probably looking at the witness because [counsel] instructed him to do that," and counsel had requested that the issue be explored with the juror. 1RT 248. The court also noted the side-bar discussion in Juror No. 4's presence in which neither counsel "thought that there was any issue which the court needed to address. . . ." *Ibid.*

Mr. Zeledon submits that the trial court and defense counsel missed the important point which was raised by all of this. Jurors are not to consider a defendant's in-court demeanor, except when the defendant is testifying. Juror No. 4 should have been instructed to that effect.

C. The Law Is Clear on This Issue.

As this court has stated, in relation to prosecutorial comment on a defendant's demeanor:

In criminal trials of guilt, prosecutorial references to a nontestifying defendant's demeanor or behavior in the courtroom have been held improper on three grounds: (1) Demeanor evidence is cognizable and relevant only as it bears on the credibility of a witness. (2) The prosecutorial comment infringes on the defendant's right not to testify. (3) Consideration of the defendant's behavior or demeanor while off the stand violates the rule that criminal conduct cannot be inferred from bad character. (*People v. Garcia* (1984) 160 Cal.App.3d 82, 90-92 []; *United States v. Pearson* (11th Cir. 1984) 746 F.2d 787, 796; *United States v. Carroll* (4th Cir. 1982) 678 F.2d 1208; *United States v. Wright* (D.C. Cir. 1973) 489 F.2d 1181, 1185-1186 [].)

People v. Heishman (1988) 45 Cal.3d 147, 197.

The Ninth Circuit went further in *United States v. Schuler* (9th Cir. 1985) 813 F.2d 978, identifying the federal constitutional element of the issue:

We also conclude that, in the absence of a curative instruction from the court, a prosecutor's comment on a defendant's off-the-stand behavior constitutes a violation of the due process clause of the fifth amendment. That clause encompasses the right not to be convicted except on the basis of evidence adduced at trial. The Supreme Court has declared that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds . . . not adduced as proof at trial." *Taylor v. Kentucky*, 436 U.S. 478, 485, . . . (1978).

Schuler, supra, 813 F.2d at 980.

In this case, of course, it was the juror himself -- and not the prosecutor -- who brought Mr. Zeledon's in-court conduct into question.

However, the problem was the same, and a curative instruction should have been given. Whether viewed as trial court error, or as ineffective assistance of counsel, Mr. Zeledon's cause was damaged.

Mr. Zeledon submits that, with any standard of prejudice, reversal is required. The jury demonstrated through its lengthy deliberations, its note indicating skepticism regarding Karla's credibility, and its "split decision" between Counts 1 and 2 versus Count 3 that this was a "close case."

III

THE TRIAL COURT ERRED IN DENYING THE DEFENSE'S MOTION FOR A HEARING REGARDING RELEASE OF JUROR INFORMATION, WITH NOTICE TO THE JURORS.

A. Introduction to the Argument.

As this court knows, the California Legislature has erected barriers to post-verdict access to jurors. As the court also knows, Evidence Code section 1150 precludes impeachment of a jury verdict with evidence as to the effect of objective events on a juror's decision or mental processes, while the objective events themselves are not out of bounds.

The question now is whether these restrictions were enforced too strenuously in this case. Mr. Zeledon submits that they were.

B. The Defense Motion and Its Denial.

The defense filed on April 27, 2012 a joint Motion for a New Trial and Petition for Release of Juror Identifying Information. 2CT 369. In the portion of the motion relating to confidential juror information, it was contended as follows: *See: Appendix B*

The extended nature of the deliberations indicates that there was some reasonable doubt in the minds of at least those initially voting not guilty.

Initially, the jury foreman indicated that the jury was hung 9-3 on two counts and 10-2 on one count. Given the nature of the evidence, it seemed likely at that time that the 9-3 vote was on counts 1 & 2, while the 10-2 vote was on count 3.

This supposition was borne out in counsel's discussions with several of the jurors, including the jury foreman,

after the trial. These discussions also revealed that the 9-3 split on counts 1 & 2 was in favor of conviction, while the 10-2 split on count 3 was in favor of acquittal. Ultimately, of course, the jury voted to convict on counts 1 & 2 and to acquit on count 3.

These verdicts suggest the possibility that there was a compromise verdict, with the holdouts for acquittal on counts 1 & 2 trading guilty votes on those counts for not guilty votes by the hold outs on count 3.

This possibility was also suggested by the reactions of two of the jurors during the polling of the jury after the verdicts were announced. Defense counsel noted that jurors #8 and #11 looked down when responding to the jury poll and appeared to be unhappy about the verdicts. During the discussion with jurors after they were released, the jury foreman confirmed that jurors #8 and #11 were two of the three jurors who had voted not guilty on counts 1 & 2.

2CT 380-381.

On May 17, 2012, the trial court announced that it had read Code of Civil Procedure section 237, subdivision (b), along with a set of cases, including *People v. Rhodes* (1989) 212 Cal.App.3d 541. 6RT 1514-1515. The trial court noted as follows: (i) "There is no evidence before the court that the jury traded votes"; (ii) "Even if the jurors did trade votes, the defendant cites no authority that trading votes amount[s] to juror misconduct"; and (iii) "There is no case that specifically holds that 'compromise' is juror misconduct." 6RT 1515-1516.

The court found that "[d]efendant failed to produce evidence suggesting that any compromise, vote trading or impropriety by the jurors occurred." At the same time, however, the court noted that *People v. Lewis* (2001) 25 Cal.4th 610 and *People v. Santa Maria* (1994) 8 Cal.4th

903 had observed that inconsistency in verdicts "may show no more than jury lenity, compromise, or mistake, none of which undermine the validity of a verdict." 6RT 1516. Because a *prima facie* showing had not been made, the court found no reason to hold a hearing, and the petition for confidential juror information was denied. 6RT 1516.

Mr. Zeledon submits that, in its approach to the defense's petition, the trial court focused on the wrong questions. Evidence of mental processes in reaching a set of verdicts, whether through compromise or otherwise, is not admissible to impeach a verdict. However, the defense can rely on verifiable events to demonstrate that misconduct occurred or that one or more jurors harbored a forbidden "bias" against the defendant.

C. Section 1150 Is Not as Broad as Some Courts Believe.

Juror affidavits are admissible under section 1150 when they describe "overt acts, objectively ascertainable," rather than the subjective deliberative processes of jurors. *People v. Hutchinson* (1969) 71 Cal.2d 342, 347-349. *In re Boyette* (2013) 56 Cal.4th 866 ("*Boyette*") concerned a juror having encouraged two holdout jurors at the death penalty phase to watch a film about life in prison. This court said the following:

Evidence of a juror's mental process -- how the juror reached a particular verdict, the effect of evidence or argument on the juror's decision-making -- is inadmissible. (Evid. Code, § 1150, subd. (a).) Hence, in determining whether there is a substantial likelihood the jurors' misconduct caused them to become biased against petitioner, *we look to what the jurors said* about their viewing of the film, *and what discussion* of the film, if any, *took place* when the jury resumed deliberations the following morning.

Boyette, supra, 56 Cal.4th at 894; emphasis added.

Mr. Zeledon was entitled to look for acts, words, and conduct which would have reflected misconduct and/or bias. All that section 1150 precluded was an attempted showing as to the effect of those acts, words, and conduct on the mental processes of the jurors.

D. Mr. Zeledon Was Entitled to Pursue the Issue of Juror Bias.

Under the Fifth, Sixth, and Fourteenth Amendments, and under Article 1, § 16 of the California Constitution, a criminal defendant has the right to a verdict rendered by twelve unbiased and impartial jurors. *See Irvin v. Dowd* (1961) 366 U.S. 717, 722; and *In re Hitchings* (1993) 6 Cal.4th 97, 110. The due process and jury trial guarantees require that the defendant be judged solely upon evidence developed in court. *People v. Nesler* (1997) 16 Cal.4th 561, 578 ("*Nesler*"), quoting *Turner v. Louisiana* (1965) 379 U.S. 466, 472-473.

"Bias can appear in two different ways." *In re Carpenter* (1995) 9 Cal.4th 634, 653. "Actual bias" is defined as "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." *Id.*, at 581. *See, also, People v. Wheeler* (1978) 22 Cal.3d 258, 273-274. "'Impartiality is not a technical conception. It is a state of mind.'" *Nesler, supra*, 16 Cal.4th at 579, quoting *United States v. Wood* (1936) 299 U.S. 123, 145-146. Where "actual bias" is found, there is no further "prejudice" analysis. *In re Carpenter, supra*, 9 Cal.4th at 654.

E. It Was Not Correct That Improper Compromise and "Vote Swapping" Could Not Establish Misconduct or Bias.

Vote bartering cannot be an appropriate form of deliberation, whether viewed as misconduct or as evidence of actual bias. See *People v. Guzman* (1977) 66 Cal.App.3d 549, 556 ["proposing that the jury barter an acquittal of [one defendant] for a conviction of [a co-defendant] constituted misconduct"]; and *Rose v. Melody Lane* (1952) 39 Cal.2d 481, 488-490. If Mr. Zeledon had been able to unearth evidence of vote bartering, that evidence would have been admissible to support a new trial motion based on misconduct and/or bias. The trial court erred in concluding otherwise.

F. The Evolution of Code of Civil Procedure Sections 206 and 237.

In 1988, the Trial Jury Selection and Management Act became law in September 1988 created Code of Civil Procedure sections 190 through 236. *People v. Rhodes, supra*, 212 Cal.App.3d 541 was then decided with regard to a trial before section 206 took effect. *Rhodes* established prerequisites of "good cause" and "diligent efforts." *Id.*, at 551-552; emphasis added.

Matters were altered substantially in 1992, when section 237 was enacted. Stats. 1992, ch. 971. As the new section 237 then read, juror information was available unless it had been ordered sealed on the request of the juror. A party must petition for access to information only if the juror had asked that it be sealed.

In 1995, the Legislature opted for a more rigorous set of statutes. After fine-tuning in 1996, Section 237, subdivisions (a), (b), and (c) now provide, in relevant part:

(2) Upon recording of a jury's verdict in a criminal jury proceeding, the court's record of personal juror identifying information of trial jurors ... *shall be sealed* until further order of the court as provided by this section.

* * *

(b) Any person may petition the court for access to these records. The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information. The court shall set the matter for hearing if the petition and supporting declaration *establish a prima facie showing of good cause* for the release of the personal juror identifying information, but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure ... *If the court does not set the matter for rehearing, the court shall by minute order set forth the reasons and make express findings either of a lack of a prima facie showing of good cause or the presence of a compelling interest against disclosure.*

* * *

(c) If a hearing is set pursuant to subdivision (b), the petitioner shall provide notice of the petition and the time and place of the hearing at least 20 days prior to the date of the hearing to the parties in the criminal action. The court shall provide notice to each affected former juror by personal service or by first-class mail

(d) After the hearing, the records shall be made available as requested in the petition, unless a former juror's protest to the granting of the petition is sustained. The court shall sustain the protest of the former juror if, in the discretion of the court, the petitioner fails to show good cause, the record establishes the presence of a compelling interest against disclosure as defined in subdivision (b), or the juror is unwilling to be contacted by the petitioner.

Emphasis added.

After the 1995 amendments, personal information is sealed automatically. A new "prima facie good cause" concept was created, which is not *Rhodes's* "good cause for disclosure" but "good cause to hold a hearing." Jurors receive notice of the hearing, and disclosure would not occur -- irrespective of "good cause" -- if the juror was "unwilling to be contacted. . . ." The initial inquiry is now whether a *prima facie* showing of "good cause" exists sufficient to require a hearing, and this *prima facie* level of inquiry creates questions not under consideration in trials prior to 1996.

G. *Prima Facie* Showing Determinations Have a Low Threshold and Generally Involve No "Credibility" Determinations.

Section 237 authorizes no "credibility determinations" at the first stage. *Prima facie* means literally "on the face of it," with the facts "presumed to be true unless disproved" *Black's Law Dictionary* (Rev. 4th ed.) p. 1353. See, also, *Johnson v. California* (2005) 545 U.S. 162, 170 [a *prima facie* showing is established if a party produces "evidence sufficient to permit the trial judge to draw an inference . . .]."

The question before Mr. Zeledon's trial court was not whether to disclose juror information, which arguably would have required balancing of interests. The question was whether to schedule a hearing and find out what the jurors had to say about disclosure.

H. A "*Prima Facie* Showing Was Made.

Mr. Zeledon's assertions established a *prima facie* case. A reasonable jurist could have concluded that there had been juror misconduct or bias.

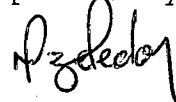
The procedural context was unique. There was a deadlock on all three counts, with the splits being 9-3 and 10-2. After further deliberations, a set of confounding verdicts were returned which seemed clearly to have represented, at the very least, some sort of compromise. The behavior of Jurors Nos. 8 and 11 during polling as to the verdicts was troubling. Under these circumstances, a *prima facie* showing had been made, as an "inference" existed to enable a reasonable jurist to suspect bias and/or misconduct. It was error to have denied the petition without holding a hearing.

CONCLUSION:

FOR ALL THE FORGOING PETITIONER PRAYS THAT THIS HONORABLE COURT GRANT THE INSTANT PETITION FOR WRIT OF CERTIORARI ON ONE OR MORE OF THE CLAIMS PRESENTED.

Respectfully submitted,

Dated: April 26, 2018

X 

Nelson Zeledon,
Petitioner
Pro Per