

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NELSON ZELEDON,¹
Petitioner,

v.

SHAWN HATTON,
Respondent.

Case No. 16-cv-02767-VC (PR)

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS;
DENYING MOTION FOR
CERTIFICATE OF APPEALABILITY**

Dkt. No. 14

Nelson Zeledon has filed a *pro se* petition for a writ of habeas corpus challenging the validity of his state criminal conviction. Zeledon seeks habeas relief based on the following claims: (i) ineffective assistance of trial counsel for failing to assert the marital communication privilege or to object to Zeledon's wife's testimony; (ii) trial court error and ineffective assistance of counsel in dealing with a juror's comment about Zeldon's demeanor; and (iii) trial court error in denying defense motion for a hearing on release of juror information. Zeledon also requests an evidentiary hearing. Because the claims lack merit, the petition and request for an evidentiary hearing are denied.

PROCEDURAL BACKGROUND

Previously, the California Court of Appeal reversed a criminal judgment on three of the five counts Zeledon had appealed. In the case at issue, Zeledon was re-tried on the three counts: two counts of aggravated sexual assault on a child under 14 by rape and one count of aggravated sexual assault on a child under 14 by oral copulation. *People v. Zeledon*, 2015 WL 9272011, *1

¹ The Clerk incorrectly entered Petitioner's name in the Court's docket as Zeledon Nelson rather than Nelson Zeledon. The Clerk is directed to enter the correct name on the docket.

(Cal. Ct. App. Dec. 18, 2015) (unpublished). The jury convicted Zeledon on the two counts of aggravated sexual assault by rape and acquitted him of the third count of aggravated sexual assault by oral copulation. On May 17, 2012, Zeledon was sentenced to thirty years to life on the two rape counts consecutive to an eight-year term on the previous convictions. Reporters' Transcript ("RT") at 1570, ECF No. 11-8 at 71.

Zeledon appealed the judgment from his second trial to the California Court of Appeal. The court affirmed the judgment in an unpublished decision. *See Zeledon*, 2015 WL 9272011, at *11. On March 16, 2016, the California Supreme Court denied, without comment, Zeledon's petition for review. Ex. 5. On May 23, 2016, Zeledon filed this timely federal habeas petition.

STANDARD OF REVIEW

A federal court may entertain a habeas petition from a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a district court may not grant habeas relief unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 412 (2000). This is a highly deferential standard for evaluating state court rulings: "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

When there is no reasoned opinion from the highest state court to consider the petitioner's claims, the court looks to the last reasoned opinion of the highest court to analyze whether the state judgment was erroneous under the standard of § 2254(d). *Ylst v. Nunnemaker*, 501 U.S. 797, 801-06 (1991). In this case, the California Court of Appeal is the highest court to

issue a reasoned decision on Zeledon's claims.

DISCUSSION

The trial proceedings and the evidence presented against Zeledon are described thoroughly by the California Court of Appeal in its opinion affirming the judgment on direct appeal. *See Zeledon*, 2025 WL 9272011, *1-4. This Court now rules on the claims presented by the habeas petition.

I. Ineffective Assistance of Counsel

Zeledon claims he received ineffective assistance of counsel because counsel failed to: (1) assert the marital communication privilege regarding the testimony of Zeledon's wife, Sandra; (2) object to the admission of Sandra's statements based on lack of personal knowledge; and (3) request that Juror No. 4 be instructed to ignore Zeledon's courtroom demeanor except when Zeledon was testifying.

A. Legal Standard

To prevail on a Sixth Amendment claim for ineffectiveness of counsel, a petitioner must establish two things. First, he must establish that counsel's performance was deficient, i.e., that it fell below an "objective standard of reasonableness" under prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). The general rule of *Strickland*, i.e., to review a defense counsel's effectiveness with great deference, gives the state courts greater leeway in reasonably applying that rule, which in turn "translates to a narrower range of decisions that are objectively unreasonable under AEDPA." *Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010). A "doubly" deferential judicial review is appropriate in analyzing ineffective assistance of counsel claims under § 2254. *Harrington v. Richter*, 562 U.S. 86, 105 (2011); *Premo v. Moore*, 562 U.S. 115, 122-23 (2011). Second, a petitioner must establish that he was prejudiced by counsel's deficient performance, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

B. Marital Privilege

1. Background

The relevant facts are as follows:

Zeledon was on trial for the rape of K. Previously, he was accused of a lewd act upon K.'s friend, S. In the investigation of the lewd act, Officer Tran interviewed Sandra Zeledon. In the interview, Sandra said that Zeledon and other people had told her that Zeledon continued to pick up K. from the boys and girls club after S. stopped attending. *Zeledon*, 2015 WL 9272011, at *3-4.

In the rape trial, Sandra testified that Zeledon never picked up K. from the club after S. stopped going. During the presentation of rebuttal evidence, Sandra was called to the stand and asked whether she remembered telling Officer Tran about Zeledon continuing to pick up K. from the club after S. stopped attending. When she denied memory of making the statement, the relevant portions of her taped interview with Officer Tran were played for the jury. *Id.* at *4.

The jury heard the following interchange between Sandra and Officer Tran:

OFFICER TRAN: Now, earlier, you—you had told me that you had a concern because he was continuing to pick her up; to take her to Girl Scouts.

SANDRA ZELEDON: Yes, yes....

OFFICER TRAN: Okay. But you were concerned about your husband having continued contact with [K.]—

SANDRA ZELEDON: Because I felt [S.] was angry you know, because Daddy was pick[ing] her up[,] [K.]—

SANDRA ZELEDON: Kissing my husband and everything, you know? And it was a time that [K.]—my husband used to come and pick her up, [K.], to the Boys and Girls Club. My daughter wasn't going anymore, but [K.]'s mom insist [*sic*] for my husband to go and get her all the time.

SANDRA ZELEDON: But it's not right for my husband to come and go get your daughter because, you know—

OFFICER TRAN: 'Cause [S.] had stopped going—

SANDRA ZELEDON: So and I knew that because my husband tell me, 'Oh, I went to pick up [K.],' and I didn't say anything.

Zeledon, 2015, WL 9272022, *4.

The issue of whether Zeledon continued to pick up K. alone from the club after S. stopped attending was important because K. testified that it was on these occasions that Zeledon would take her to his house and rape her. *Id.* at *5. After Zeledon was convicted of two counts of rape, defense counsel filed a motion for a new trial, arguing that he provided ineffective representation because, in regard to Sandra's statements, he had not asserted the marital privilege or objected that they were not based upon her personal knowledge. *Id.*

The trial court found only one sentence in Sandra's interview possibly came within the marital privilege, the statement that Zeledon told her he continued to pick up K. *Id.* The court found that the inclusion of this statement did not prejudice Zeledon because the jury could properly consider other statements from the interview and they showed that Sandra was dishonest when she testified that Zeledon never picked up K. alone from the club. *Id.*

The Court of Appeal held the marital privilege did not even apply to Sandra's statement about what Zeledon told her because no evidence suggested that Zeledon made that statement in confidence. *Id.* at *6. The court also found no prejudice resulted from the admission of that statement (assuming the privilege did apply) because other evidence amply supported Zeledon's rape convictions. *Id.*

2. Analysis

The spousal communication privilege is found in California Evidence Code § 980, which provides, in relevant part: "a spouse . . . has a privilege during the marital or domestic partnership relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he or she claims the privilege and the communication was made in confidence between him or her and the other spouse while they were spouses." To make a marital communication "in confidence" a party must both intend nondisclosure and have a reasonable expectation of privacy. *People v. Von Villas*, 11 Cal. App. 4th 175, 220-21 (1992).

The Court of Appeal reasonably concluded that the evidence failed to show that the communication between Zeledon and his wife was made in confidence. Zeledon testified that

the only reason he told Sandra he had picked up K. was that his daughter, who was jealous of K., had already mentioned it to Sandra. RT at 1079-80, ECF No. 11-6 at 180-81. Because Zeledon was aware that his daughter knew he had picked up K. from the club, his statement to his wife could not have been made in confidence. Furthermore, according to Sandra's statement, other people, specifically K.'s mother, knew that Zeledon was picking up K. from the club. *See also*, ECF No. 11-203 (Sandra told Officer Tran her mother-in-law knew that Zeledon continued to pick up K.). Because the statement was not made in confidence, it was not privileged and counsel was not ineffective for failing to invoke the marital communication privilege. *See Juan v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005) (counsel's failure to make futile objection not deficient performance).

Furthermore, even if Sandra's last statement, that Zeledon told her he continued to pick up K., was omitted on the basis of privilege, Sandra's other statements—that she was angry at K.'s mother for asking Zeledon to pick up K. and that her daughter was jealous because Zeledon continued to pick up K.—were admissible. The admissible statements were sufficient to damage the credibility of Sandra's direct testimony that Zeledon did not pick up K. from the club after S. stopped going. Therefore, Zeledon has not shown that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.

C. Personal Knowledge

Zeledon argues counsel should have objected to Sandra's statements to Officer Tran on the ground that they were not within her personal knowledge. The record shows Sandra's statements were based on her personal knowledge. On cross-examination, Sandra testified that she did not want Zeledon to continue to pick up K. because her daughter would "feel left behind." RT at 1036, ECF No. 11-6 at 137. Sandra also testified that she was aware that her husband was continuing to pick up K. because K.'s mother would call Zeledon to help her for everything, including picking up K. RT at 1037-38, ECF No. 11-6 at 138-39. Sandra also knew about Zeledon picking up K. because she talked to K. and S. about it. RT at 1041, ECF No. 11-6 at 142.

Because Sandra's own testimony shows that her statements to Officer Tran were based on her personal knowledge, counsel's failure to object on lack of personal knowledge was not ineffective assistance. *See Juan*, 408 F.3d at 1273 (counsel's failure to make futile objection not deficient performance).

D. Juror Admonition

1. Background

The Court of Appeal summarized the facts relevant to this claim as follows:

Juror No. 4 talked to the bailiff, and a hearing was conducted outside of the presence of the other jurors. During this hearing, Juror No. 4 told the court: "Yeah, I asked if it was usual for the defendant to stare at the witness. It didn't seem right to me." In an effort to determine whether the juror could be fair in evaluating the case, the court asked the juror if he had made his decision about whether defendant was guilty or not. Juror No. 4 said that he would base his decision on the evidence presented and that he had an open mind and would keep an open mind throughout the trial.

After meeting with both counsel, the trial court told Juror No. 4 not to discuss the case with anybody, and not "to form an opinion until the end of the trial." The court also stated that defense counsel "said that based on what the juror said I don't believe that there is any issue."

Zeledon, 2015 WL 9272011, at *7.

2. Analysis

Zeledon argues that counsel was ineffective because he should have requested the court to admonish the juror not to consider *Zeledon*'s demeanor except when he was testifying.

A court confronted with a colorable claim of juror bias will generally conduct a hearing involving all interested parties to explore the issue of juror bias and provide the defendant an opportunity to prove actual bias. *Hedlund v. Ryan*, 815 F.3d 1233, 1247 (9th Cir. 2016). This is the remedy provided by the Supreme Court. *Id.* (citing *Smith v. Phillips*, 455 U.S. 209, 215 (1982)). So long as the fact-finding process is objective and reasonably explores the issues presented, the state trial judge's findings based on that investigation are entitled to a presumption of correctness. *Id.* at 1248

Here, the trial court followed Supreme Court authority in holding a hearing to explore

possible juror bias. The hearing involved all interested parties and objectively explored whether the juror could keep an open mind in regard to Zeledon's guilt or innocence throughout the trial. The juror responded that his decision would be based on the evidence and he would keep an open mind throughout the trial. This satisfied the court that the juror was not biased and this finding of fact is entitled to a presumption of correctness. Zeledon points to no evidence suggesting that the juror was biased to rebut the presumption. Zeledon's citations to cases addressing the prosecutor's commenting on the defendant's nontestifying demeanor are inapplicable.

Because no evidence suggested the juror was biased, counsel was not ineffective for failing to request an additional admonition from the court. *See Juan*, 408 F.3d at 1273.

II. Release of Juror Information

On appeal, Zeledon argued that the trial court erred by denying his motion for release of juror contact information under state law and under United States Supreme Court authority addressing juror bias.² This Court only addresses the constitutional claim regarding juror bias. *See Williams*, 529 U.S. at 412 (2000)(federal habeas courts review only federal claims). Because the California Court of Appeal and the California Supreme Court did not address the juror bias claim, this Court independently reviews the record to determine if the state court's denial of the claim was objectively reasonable. *See Plascencia v. Alameida*, 467 F.3d 1190, 1197 (9th Cir. 2006) (when state court gives no reasoned explanation of its decision on a federal claim, federal court should conduct "an independent review of the record" to determine whether state court's decision was an objectively unreasonable application of clearly established federal law).

After the jury's verdict, Zeledon filed a motion for the release of juror contact information. The relevant facts regarding this claim were provided in the California Court of Appeal decision, as follows:

The motion was based on the jury foreman's report that the jury

²The respondent argues that the juror bias claim is unexhausted. However, Zeledon submitted this claim in his petition for review in the California Supreme Court. *See* ECF No. 11-12 at 36.

was deadlocked nine to three for guilt as to counts one and two, and 10 to two for not guilty on count three. Defendant argued that the final verdict of guilt on counts one and two, and not guilty for count three “suggest the possibility that there was a compromise verdict, with the holdouts for acquittal on counts 1 & 2 trading guilty votes for those counts for not guilty votes by the hold outs on count 3.”

Zeledon, 2015 WL 9272011, at *8.

Zeledon argues that, because he has made a “prima facie” showing of good cause under California Code of Civil Procedure section 237, he was entitled to a hearing in which the jurors are asked for their opinion about whether their personal information should be disclosed to the defense. Section 237 states that, after a verdict, juror identifying information shall be sealed but the court shall set the matter for a hearing if a person petitions the court with a declaration establishing a prima facie showing of good cause for the release of personal juror information. The trial and appellate courts found that Zeledon did not make a prima facie showing of good cause under section 237 and, as discussed above, this decision is not reviewable in a federal habeas proceeding.

In regard to bias, apparently Zeledon is arguing that evidence of juror bias under federal law will establish good cause for the release of juror information under California law. The Court does not have to address whether this is a cogent argument because Zeledon has not shown even a possibility of bias.

Zeledon argues that an inference of bias is shown because of the inconsistent verdicts on the rape and oral copulation counts and because the deadlock on all three counts shows “some sort of compromise.” ECF No. 1-2 at 17. He adds to this that the behavior of jurors number 8 and 11 during polling was troubling because defense counsel noted they looked down when responding to the jury poll and appeared to be unhappy about the verdicts. *Id.* at 12.

However, the fact that the jury was deadlocked and may have reached a compromise verdict does not suggest juror bias under federal law. *See United States v. Marques*, 600 F.2d 742, 747 (9th Cir. 1979) (no case holds compromise verdict invalid per se); *see also United States v. Green*, 523 F.2d 229, 235-36 (2nd Cir. 1975) (evidence that jurors reached a

compromise verdict on their own does not warrant new trial). To show juror bias, the claimant must show that the verdict resulted from improper outside influence which prejudiced him.

Marques, 600 F.2d at 747. The only other “evidence” Zeledon submits is defense counsel’s speculation that two jurors were troubled by the verdict because they looked down when they were polled about the verdict. This speculation is not evidence and cannot be considered.

Zeledon cites four Supreme Court cases to support his argument. However, they are all inapplicable. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961), merely stated the rule that every defendant is entitled to a fair trial by impartial jurors. *Turner v. Louisiana*, 379 U.S. 466, 472 (1965), stands for the general proposition that a jury’s verdict must be based upon evidence submitted to the jury in the courtroom. *Johnson v. California*, 545 U.S. 162, 164 (2005), addressed whether a party’s peremptory challenge was based on impermissible group bias. *United States v. Wood*, 299 U.S. 123, 130 (1936), addressed whether government employees are implicitly biased as jurors.

Habeas relief is denied because the rejection of this claim by the California courts was not contrary to or an unreasonable application of Supreme Court authority. *See Lopez v. Smith*, 135 S.Ct. 1, 4 (2014) (per curiam) (in absence of clearly established Supreme Court authority, habeas relief is unavailable).

III. Request for Evidentiary Hearing

Zeledon has not shown he is entitled to an evidentiary hearing in connection with his federal habeas petition. *See Cullen v. Pinholster*, 563 U.S. 170, 183 (2011) (when state court record precludes habeas relief under § 2254(d), district court not required to hold evidentiary hearing).

CONCLUSION

Zeledon’s petition for a writ of habeas corpus is denied. A certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c). This is not a case in which “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

IT IS SO ORDERED.

Dated: May 12, 2017

A handwritten signature in black ink, appearing to read 'VCH', is positioned above a horizontal line.

VINCE CHHABRIA
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ZELEDON NELSON,
Plaintiff,

v.

SHAWN HATTON,
Defendant.

Case No. 16-cv-02767-VC

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on May 12, 2017, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Zeledon Nelson ID: F45723
Correctional Training Facility CTF RA 204L
Highway 101 North
P.O. Box 705
Soledad, CA 93960-0705

Dated: May 12, 2017

Susan Y. Soong
Clerk, United States District Court



By: _____
Kristen Melen, Deputy Clerk to the
Honorable VINCE CHHABRIA

APPENDIX "F"

1p. COURT ORDER DENYING COA U.S. COURT OF APPEAL NINTH CIRCUIT
DATED January 31, 2018

1p. COURT ORDER DENYING EN BANC REVIEW U.S. COURT OF APPEAL
NINTH CIRCUIT DATED March 9, 2018

Appendix F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 31 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NELSON ZELEDON,

Petitioner-Appellant,

v.

SHAWN HATTON, Warden,

Respondent-Appellee.

No. 17-16145

D.C. No. 3:16-cv-02767-VC
Northern District of California,
San Francisco

ORDER

Before: NGUYEN and OWENS, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 9 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NELSON ZELEDON,

Petitioner-Appellant,

v.

SHAWN HATTON, Warden,

Respondent-Appellee.

No. 17-16145

D.C. No. 3:16-cv-02767-VC
Northern District of California,
San Francisco

ORDER

Before: CANBY and SILVERMAN, Circuit Judges.

Appellant's motion for reconsideration en banc (Docket Entry No. 5) is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

**Additional material
from this filing is
available in the
Clerk's Office.**