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FILED
SAN DIEGO SUPERIOR COURT

FEB 13 2013

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7 SCOTT BRADLEY ESPINOSA

CLERK OF THE SUPERIOR COURT
BY K. HOLLAND

8 **SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO**

9 **CENTRAL DIVISION**

10 PEOPLE OF THE STATE OF CALIFORNIA,)

Case No. SCD 239267

D.A. No. ADC991

11 Plaintiff,)

MEMORANDUM OF LAW IN SUPPORT
OF MOTION FOR NEW TRIAL

12 vs.)

13 SCOTT BRADLEY ESPINOSA,)

14 Defendant.)

15
16 **I**

17 **INTRODUCTION AND CONTENTION RE**

18 **INEFFECTIVE ASSISTANCE OF COUNSEL**

19 Defendant stands convicted herein of offenses related to Forcible Oral Copulation, Penal Code
20 section 288(a)(2)(A); Pandering, Penal Code section 266i(a)(2); Pimping, Penal Code section 266h(a);
21 Rape, Penal Code section 261(a)(2); and Kidnapping with Personal Use of a Deadly Weapon, Penal
22 Code section 207(a) and Allegation 12022(b)(1). Defendant's initial and most important assertion
23 for new trial is based on Ineffective Assistance of Counsel. Additional assertions involved Penal
24 Code section 1181, on the subject of new trial motions, states that the court may grant the remedy "in
25 the following cases only." One such ground is section 1181(2), which references when the jury has
26 received any evidence out of court, other than resulting in review of the premises, or of personal
27 property. Citation to this code section is related to defendant's non-statutory ground asserted herein,
28 i.e., that defendant was deprived of effective assistance of counsel at the previous trial of this action.

1 It is now settled that the court may grant the remedy of new trial on a finding of ineffective
2 assistance of counsel. People v. Fosselman, 33 Cal.3d 572, 582-83 (1983); People v. Chavez, 44
3 Cal.App.4th 1144, 1148 (1996). Here, trial counsel failed to properly present a valid defense for Mr.
4 Espinosa by the fact that no witnesses were called and valid impeachment of the victim/witness based
5 on inconsistent testimony from police reports, recordings of interviews and preliminary examination
6 testimony was not presented to the jury at all. It appears that trial counsel simply relied on the police
7 reports to cross-examine the prosecution's witnesses.

8 On the issue of ineffective assistance, Fosselman, supra, cites the prior case of People v. Pope,
9 23 Cal.3d 412, 425 (1979), for the proposition that ineffective assistance is shown when counsel failed
10 to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates,
11 which acts or omissions resulted in withdrawal of a potentially meritorious defense. Fosselman,
12 supra, at 581. Noting that Penal Code section 1181 does not include ineffective assistance as a cited
13 ground for new trial, Fosselman found nonetheless that the remedy may be cited, based upon the trial
14 court's independent duty to accord a defendant due process of law. Fosselman, supra, at 582.
15 Regarding the "meritorious defense" prong of the Pope test for ineffective assistance, it is held that a
16 defendant may satisfy this prong by showing that acts or omissions of counsel prejudiced the ability to
17 defend. Fosselman, supra, at 584, citing People v. Zimmerman, 102 Cal.App.3d 647, 658-59 (1980);
18 People v. Ellers, 108 Cal.App.3d 943, 952 (1980).

19 People v. Martinez, 36 Cal.3d 816, 825-26 (1984), citing Ferrell v. Trailmobile, Inc., 233
20 F.2d 697, 698 (5th Cir. 1955); see Cal. Constitution Article 6, §13.

21 Ultimately, the court's duty to examine and rule upon the assistance of counsel issue herein
22 transcends statutory limitations, in that "upon the trial judge rests the duty of seeing that the trial is
23 conducted with solicitude for essential rights of the accused." Fosselman, supra, at 582, citing
24 Glasser v. United States, 315 U.S. 60, 71 (1942) Counsel respectfully submits that an affirmative
25 answer to both questions constitutes proper ground for a new trial in this action.

26 It is clear that the lack of any affirmative defense being presented by defendant's trial counsel
27 added to this deprivation. This issue should have been explored and raised then. Since it was not
28 raised then it needs to be raised now in fairness to the defendant. The court is directed to defendant's

1 Supplemental Declaration to understand the spirit of the argument being proffered to this court at this
2 time due to defendant's tremendous animosity and conflict that defendant encountered with the way
3 his trial counsel proceeded in his case.

4 It is at least available now upon the granting of a new trial especially if the test is whether the
5 defendant was denied due process of the law.

6 **II**
7 **THE ISSUE OF DEFENDANT'S MOTION FOR**
8 **RIGHT TO TESTIFY AT THE PREVIOUS TRIAL**

9 As noted in the declaration of defendant Espinosa, submitted herewith, defendant announced
10 his desire to testify in his own behalf, despite counsel's contrary advice.

11 It is settled under pertinent authority that a defendant has an absolute right to self-testify
12 despite the contrary position of his counsel. See People v. Robles, 2 Cal.3d 205, 214-15 (1970).
13 Based upon the court's comments, defendant reluctantly waived his right to testify. There is
14 authority for the proposition that a court's comments can deprive a defendant of a fair trial, where such
15 comments are uttered in the presence of the jury. People v. Hooper, 91 Cal.App.2d 524, 527 (1949).
16 Pertinent authority does not hold, however, that activist comments by the court are only prejudicial
17 when made in the presence of the jury. Hooper, supra, at 530, notes that "... it is impossible to apply
18 a fixed rule to determine just what conduct or comments of a trial judge may amount to a prejudicial
19 invasion for the rights of a defendant." Such comments, however, must be free from partisanship or
20 advocacy. Hooper, supra, at 530. Moreover, the concept of "miscarriage of justice" includes a
21 situation where the rights of a defendant are "disregarded or denied." Hooper, supra, at 531.

22 It is clear that with the defendant not testifying and his attorney not presenting any witnesses or
23 evidence to his defense that the prosecution was free to argue without interpretation from the
24 defendant whatever it wanted as to the nature of defendant's relationship with the alleged
25 victim/witness, the unchallenged text messages as to their place of origin and his actions on the night
26 in question.

27 In that regard, the prosecution was as well able to put into evidence certain testimony by the
28 alleged victim/witness without defendant's trial counsel countering and impeaching that witness with

1 inconsistent statements that were never brought to the jury's attention which, according to juror's
2 comments after the trial, (see attached exhibit A, statement from assisting counsel, Laura Wilson),
3 would have made a difference in their deliberations. The prosecution was also able to paint a picture of
4 the defendant that was inaccurate and highly damaging without any rehabilitation from numerous
5 defense witnesses who were never called and no testimony from the defendant himself, which is often
6 necessary in a case of this nature. This inaction by trial counsel deprived the defendant of a fair trial
7 by not having taken the stand to explain what he had learned and to explain to the jury his actions in
8 question. The jury was left with only the prosecution's case in chief.

9 Without presenting any defense and within it appears that there was a combination of factors
10 that contributed to the defendant's conviction in this case that resulted from trial counsel's inability to
11 present an adequate defense for the defendant that fell below the minimum standard as required under
12 case law. As in the previous argument regarding ineffective assistance where an attorney does not
13 even try to bring necessary witnesses who could testify on defendant's behalf, or is unprepared to
14 know what were the numerous inconsistent statements by the victim/witness by not having listened to
15 available discovery from the prosecution containing those inconsistent statements and failing to call
16 any of the witnesses to present a adequate defense and where counsel did not spend enough time on the
17 case is unconscionable and thus leads to disastrous results as occurred in this case.

18 The conflict between the defendant and his trial counsel at the time when defendant's desire to
19 testify in his own behalf when he saw that in his opinion no defense was provided by his counsel is
20 clearly a violation of his due process rights under the 5th Amendment. Conflicts of that nature should
21 not occur in any trial.

22 Regardless of what trial counsel might say regarding trial strategy or an Appellate Court might
23 engage in there is no doubt that regardless of the defendant's past and what crimes would have been
24 allowed in to attack his credibility is was unlikely to be successful in this case unless the defendant did
25 testify since this is the type of case where he needed to explain his actions. It was always his intent to
26 testify until trial counsel told him that is would harm his case. Such a conflict between he and his
27 counsel does not alleviate the fact that his 5th Amendment rights were violated by not allowing him to
28 testify.

III

THE TRIAL CONSTITUTES
A MISCARRIAGE OF JUSTICE

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4 Considerable authority authorizes a court to order new trial where the previous trial has
5 resulted in a miscarriage of justice. See People v. Cardenas, 114 Cal.App.3d 643, 647 (1981); People
6 v. Oliver, 46 Cal.App.3d 747, 751 (1975); People v. Whittington, 74 Cal.App.3d 806, 821 n.7 (1977);
7 People v. Sherrod, 59 Cal.App.4th 1168 (1997). Such claim is presented herein, based upon a claim
8 that defendant was deprived of effective assistance of counsel, over and above that which pertained to
9 lack of proper investigation, failure to call any witnesses for the defendant, failure to present damning
10 evidence of inconsistent statements of the alleged victim for the jury to hear including failure to obtain
11 proper transcripts of the recorded statements made by the alleged victim, failure to call an expert to
12 explain the method and technological processes and inconsistencies of how text messages are
13 processed through the system, and failure to allow the defendant to present his own testimony to the
14 jury.

15 Generally speaking effective assistance comprises a number of factors, including counsel's
16 active participation in case preparation, investigation of all available defenses, conferring with
17 defendant without undue delay and as often as necessary to elicit matters of defense, and taking all
18 necessary actions to preserve a defendant's rights. People v. Locklar, 84 Cal.App.3d 224, 229 n.1
19 (1978); Pope, supra, at 424-25; People v. Shaw, 35 Cal.3d 535, 541-42; People v. Horning, 150
20 Cal.App.3d 1015, 1019 (1984). The attached supplemental declaration of defendant Espinosa notes
21 that trial counsel never conferred with defendant on any strategy of defense, and conferred with
22 defendant only at trial. Moreover, counsel refused to discuss witness questions proposed by
23 defendant and refused to pose those questions in court. As noted previously, Mr. Espinosa adamantly
24 continued to assert his intention to testify in his own behalf. Counsel never subpoenaed defense
25 witnesses. For example, defendant's father was never subpoenaed or questioned by the defense about
26 how this victim came into Mr. Espinosa's life and how he came to know her. Additionally,
27 prosecution witnesses were not properly cross-examined in regard to false or inconsistent statements.
28 Note that after trial when some of the jurors gathered outside the courtroom, the jurors seemed

1 surprised when hearing about inconsistent statements by the alleged victim and that their opinion as to
2 a verdict may have made a difference in their deliberations. During the trial, the prosecution was
3 allowed to play allegedly incriminating phone calls involving defendant, while defense counsel never
4 attempted to introduce other tapes of exculpatory content.

5 IV

6 ASSISTING COUNSEL'S DECLARATION AGAINST TRIAL COUNSEL

7 In this trial, trial counsel allowed an associate attorney, Laura Wilson, who sat as an assistant
8 counsel and not counsel of record, submitted a damning and highly critical declaration to the court on
9 behalf of defendant, Espinosa. In that declaration she supports the fact that trial counsel simply
10 seemed to rely on the initial police reports and did not review recorded statements, failed to obtain
11 transcripts of the victim's recorded statements to allow the recordings to be heard by the jury, failed to
12 present even one single defense witness even though a list of defense witnesses was presented to the
13 court, and failing to allow the defendant to testify on his own behalf. Additionally, associate counsel
14 heard statements by the jurors outside the courtroom after the verdict expressing surprise that none of
15 the inconsistent statements by the alleged victim were presented to the jury and that they would have
16 considered such evidence during deliberation had it been received at trial.

17 Ultimately, defendant contends that the trial herein was a sham and a farce in terms of a
18 rigorous defense to the charges. Accordingly, it is submitted that the prior trial resulted in a
19 miscarriage of justice rendering it necessary for a new trial herein.

20 IV

21 CONCLUSION

22 By virtue of the foregoing, it is submitted that defendant Espinosa's trial herein was tainted and
23 rendered fundamentally unfair by virtue of the facts that exculpatory evidence was not presented by
24 failure of defense counsel to call any defense witnesses, failure to bring forth exculpatory evidence
25 and numerous inconsistent statements of the alleged victim/witness and the complete failure to present
26 relevant defense evidence. Thus, trial counsel's actions in this case fell below the minimum standard
27 required in the case law cited herein, and as a result of trial counsel's actions likely, given the
28 statements by juror's after trial, would have affected the outcome and the verdict of this case which

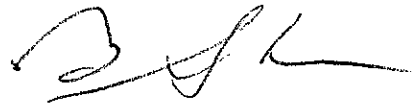
1 resulted in a miscarriage of justice. Therefore, the two prongs pursuant to case law have been met and
2 the court has a duty to vacate this judgment and order to new trial for this defendant.

3 This combination of factors, taken together, renders the remedy of new trial necessary and
4 appropriate herein.

5 Date: February 12, 2013

Respectfully submitted,

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7 By:


8 BRUCE H. SOBEL
9 Attorney for Defendant
10 SCOTT BRADLEY ESPINOSA
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