

No. \_\_\_\_\_

**IN THE SUPREME COURT OF THE UNITED STATES**

DAVID KEITH ROGERS, *Petitioner*

v.

STATE OF CALIFORNIA, *Respondent*.

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[SUPPLEMENTED] APPLICATION FOR EXTENSION OF TIME TO FILE  
PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE STATE OF CALIFORNIA  
**(DEATH PENALTY CASE)**

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No. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 2019

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DAVID KEITH ROGERS, Petitioner,  
v.  
STATE OF CALIFORNIA, Respondent.

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**(DEATH PENALTY CASE)**

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the  
United States and Circuit Justice for the Ninth Circuit:

Petitioner David Rogers requests a 40-day extension of time to and including  
February 3, 2020, to file his petition for a writ of certiorari in this Court. The jurisdiction  
of this Court is invoked under 28 U.S.C. § 1257(a).

Certiorari is being sought from the Supreme Court of California’s denial of *habeas corpus* in regard to the judgment of guilt and “special circumstance” findings entered in  
Petitioner’s capital case, rendering him eligible for the death penalty. On July 15, 2019,  
the Supreme Court of California issued an opinion granting Petitioner relief as to the  
penalty phase of his trial, vacating the death judgment but reserving disposition of  
Petitioner’s claims regarding the judgment finding him guilty of capital murder. *In re Rogers*, 7 Cal.5th 817 (2019). On September 25, 2019, the Supreme Court of California

filed a separate order stating that “[a]ll claims challenging the murder convictions or the jury’s special circumstance finding are denied on the merits. Petitioner is remanded to the Superior Court of Kern County for further proceedings.” A copy of that order is attached hereto as Appendix A.

### **Timeliness**

The time to petition for a writ of certiorari in this Court expires on December 24, 2019. This application for an extension of time of 40 days, to and including February 3, 2020, in which to file the petition, was initially submitted on December 7, 2019 – thus more than 10 days before the petition’s due date, in compliance with Supreme Court Rule 30.2. Unfortunately, the California Supreme Court’s order (Appendix A hereto) was not attached to that initial filing, and I was informed today that the application was rejected for that reason. Also unfortunately, the Court did not advise me that the application had been rejected, either via electronic service or by mail; I first learned of it when I called the Court this afternoon to inquire about the status of the application. (I was then informed that the Court’s clerk mailed back the paper copies of the application on December 13, 2019, but I have yet to receive them.) This is thus the earliest opportunity I have had to correct the error and resubmit the application. Accordingly, I respectfully request that it be treated as having been timely filed.

## **The Issue on Certiorari**

This capital case raises a significant federal constitutional issue regarding which the lower courts are split. Petitioner presented the California Supreme Court with undisputed (and seemingly indisputable) evidence of blatant juror misconduct in the form of sworn declarations from several of the jurors themselves, as well as a declaration from the wife of one of the jurors. Those declarations chronicle repeated instances of conversations, that occurred while the case was being tried, between the jurors and third parties, regarding the defendant, the evidence in the case and how it should be decided. Perhaps most notable were declarations from juror Edward Sauer (confirmed by a declaration from Mr. Sauer's wife) admitting that he had discussed the case with his wife throughout the course of the proceedings; that they had together viewed media coverage of the case and the trial as it proceeded; and that they had prejudged the appropriate outcome of the case. A declaration from another juror stated that Juror Sauer told her that he had visited various locations discussed in the testimony, including the crime scene. Other jurors submitted declarations stating that they had been approached by co-workers and others, urging them to find Petitioner guilty and to vote for death.

Despite this evidence, the state Supreme Court refused even to order an evidentiary hearing in regard to juror misconduct.<sup>1</sup> That refusal was but the most recent example of a conflict between the California court and numerous federal and state courts,

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<sup>1</sup> Three of the seven Justices of the state supreme court made special note on the record that they would have issued an order to show cause so that an evidentiary hearing could be held in regard to the allegations of Juror Sauer's misconduct.

which have held that – under this Court’s precedent in *Smith v. Phillips*, 455 U.S. 209 (1982) and *Remmer v. United States*, 347 U.S. 227 (1954) – when a court receives a colorable claim of juror misconduct it is constitutionally compelled to hold a hearing to investigate the facts and determine the resulting prejudice. *See, e.g., Godoy v. Spearman*, 861 F.3d 956, 959-960 (9<sup>th</sup> Cir. 2016) (*en banc*); *State v. Osimanti*, 6 A.3d 790, 811 (Conn. 2010); *compare, People v. Hedgcock*, 51 Cal.3d 395, 415 (1990) [holding that court need not hold evidentiary hearing].

### **Why the Extension of Time Should Be Granted**

An extension of time is justified in petitioner’s case in part by the nature of the issue described above and because of time constraints due to petitioner’s counsel’s responsibilities in several other capital cases. The question to be raised in petitioner’s case is substantial and warrants careful scrutiny and resolution. Preparation of the petition, moreover, requires exhaustive review of the current state of the law on the issue in all of the federal circuits and state and territorial jurisdictions.

In addition, Petitioner’s attorney is counsel in three other capital appeals currently pending before the California Supreme Court as well as other (non-capital) murder cases, and has devoted a substantial amount of his time to meeting ongoing responsibilities, including briefing deadlines, in those other cases since the state supreme court’s decision in this case became final.

Despite counsel's best efforts, he will be unable to meet the December 24, 2019, due date, and respectfully request an extension of 40 days, to and including February 3, 2020, in which to file the petition for writ of certiorari on petitioner's behalf.

Accordingly, petitioner respectfully requests that an order be entered extending his time to petition for a writ of certiorari by 40 days, to and including February 3, 2020.

Dated: December 17, 2019.

Respectfully submitted,

/s/ AJ Kutchins

AJ KUTCHINS

Counsel for Petitioner David Rogers

## **CERTIFICATE OF SERVICE**

I, AJ Kutchins, a member of the Bar of this Court, certify that on December 17, 2019, a copy of this Application for Extension of Time to File Petition for Writ of Certiorari to the Supreme Court of the State of California was mailed, first class postage prepaid, to counsel for respondent, Office of the Attorney General for the State of California and Petitioner, David Rogers. I further certify that all parties required to be served have been served.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Signed on December 17, 2019.

/s/ AJ Kutchins

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# **APPENDIX A**

## **Order of the California Supreme Court**