***** DEATH PENALTY CASE *****

No. _____

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In the Supreme Court of the United States

October Term, 2019

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DAVID KEITH ROGERS, *Petitioner*

vs.

THE STATE OF CALIFORNIA, *Respondent*

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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PETITION FOR WRIT OF CERTIORARI

Question Presented For Review

When a court is presented with admissions of clear juror misconduct is it constitutionally compelled to conduct a hearing to determine the extent and effect of that misconduct or, as the California Supreme Court holds, does it have discretion to refuse to conduct such a hearing?

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Petitioner David Rogers respectfully prays that a writ of *certiorari* issue to review the judgment of the California Supreme Court denying (in pertinent part) Petitioner's application for a writ of *habeas corpus* challenging the State trial court's judgment and underlying jury verdicts finding Petitioner guilty of capital murder and sustaining the "special circumstance" allegations which rendered Petitioner susceptible to the death penalty.

As set forth in his accompanying motion, Petitioner requests leave to proceed *in forma pauperis* as he is indigent and counsel was appointed to represent him in the courts below.

Opinions and Orders Below

The appendix to this Petition contains: (A) the Order to Show Cause issued by the California Supreme Court on December 20, 2007 regarding Petitioner's state *habeas corpus* petition, omitting all juror misconduct claims but noting that three named justices of that

court "would also have include[d] with the order to show cause the ground of juror misconduct on the part of juror Edward Sauer;" (B) the order denying Petitioner's "Motion to Expand Scope of Order to Show Cause," issued by the California Supreme Court on June 24, 2015; and (C) the order of the California Supreme Court, filed on September 25, 2019, denying on the merits all claims "challenging the murder convictions or the jury's special circumstance finding" set forth in Petitioner's state *habeas corpus* petition.

Jurisdiction

This petition arises from a final judgment of the highest court of the State of California. This Court has jurisdiction under 28 U.S.C. § 1257(a).

Constitutional and Statutory Provisions

The Sixth Amendment to the United States Constitution provides, in pertinent part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution, Section 1, provides in pertinent part as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

Introduction

"This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. 209, 215 (1982). In apparent defiance of that venerable rule, the California courts insist that no such hearing need be held, even in the face of uncontroverted evidence of egregious juror misconduct. In so insisting, California has put itself at odds not only with this Court's precedent but with the clear holdings of the vast majority of lower courts, including the federal Courts of Appeal. To resolve that split of authority, pitting the federal courts against largest non-federal jurisdiction in the country, and to vindicate the essential rights to Due Process and a fair jury trial compromised in this death penalty case, this Court is prayed to issue its writ of *certiorari.*

After Petitioner was convicted of capital murder and sentenced to death, several jurors provided declarations, sworn to under penalty of perjury, documenting a variety of forms of jury misconduct that occurred during his trial. One juror – a man named Edward Sauers – admitted that he had discussed the facts and best outcome of the case with his wife, who attended trial proceedings and with whom he regularly watched television news coverage of the trial as it progressed. Mr. Sauers also reported that, contrary to what he had said in *voir dire*, he had prejudged the case. Another juror recounted that a man on the jury (clearly Mr. Sauers) had discussed having visited various locations mentioned in the testimony, including

an alleged murder site.[1] Yet other jurors detailed contacts they had received from the news media and from co-workers who provided information that was not in evidence and who exerted pressure to find Petitioner guilty and return a death sentence.

Presented with this unrebutted evidence of serious constitutional transgressions in a death penalty case, the California Supreme Court chose to do . . . nothing. Although that Court issued an order to show cause regarding other, unrelated (and more limited) claims, it refused even to look into what had happened regarding the jurors.[2] When Petitioner returned a decade later with additional evidence regarding Juror Sauer's misconduct, the state court again refused to expand the scope of its order to show cause.

California's refusal even to investigate well-documented and extreme instances of juror misconduct in a capital case is directly at odds with the federal courts and other state courts. Virtually every other jurisdiction recognizes that, under this Court's precedent, any court that has received credible evidence of juror misconduct "*must* hold a 'hearing' to 'determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial.'" *Godoy v. Spearman*, 861 F.3d 956, 959 (9th Cir. 2016) (*en banc*) [emphasis supplied]; quoting, *Remmer v. United States*, 347 U.S. 227, 229-230 (1945); *accord, Ewing v. Horton,* 914 F.3d 1027, 1031 (6th Cir. 2019); *Barnes v. Joyner*, 751 F.3d 229, 241-242

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[1]Juror Sauer subsequently executed another declaration, in which he admitted to the unauthorized site visits, as well as yet further misconduct.

[2]Three (of the seven) members of the state Supreme Court indicated for the record that they would have included the claims concerning Juror Sauer's misconduct in the show cause order that was issued. (App. A.)

(4th Cir. 2014), *cert denied*, ___ U.S. ___, 135 S.Ct. 2643 (2015); *Stouffer v. Trammell,* 738 F.3d 1205, 1213–1214 (10th Cir. 2013); *United States v. Vitale* 459 F.3d 190, 197-198 (2d Cir. 2006); *Wisehart v. Davis*, 408 F.3d 321, 326 (7th Cir. 2005), *cert. denied*, 547 U.S. 1050 (2006); *U.S. v. Sylvester,* 143 F.3d 923, 932 (5th Cir. 1998); *State v. Jenner,* 236 W.Va. 406, 417, 780 S.E.2d 762, 773 (2015); *State v. Brown*, 235 Conn. 502, 526, 668 A.2d 1288, 1303 (1995). California, however, has steadfastly maintained the view that a court faced with credible allegations of jury misconduct has the untrammeled discretion to conduct an evidentiary hearing – or to refuse to do so – as it alone sees fit. See, *e.g.*, *People v. Carter*, 30 Cal.4th 1166, 1216–1218 (2003); *People v. Hayes,* 21 Cal.4th 1211, 1256-1261 (1999); *People v. Cox,* 53 Cal.3d 618, 697 (1991).

Petitioner submits that, when presented with sworn evidence of juror misconduct as egregious as that here, a court is required by the constitutional imperatives of Due Process and the right to a fair jury trial to hold a hearing, and it lacks discretion to summarily deny misconduct claims without one. In its insistence to the contrary, California – which has the nation's largest criminal justice system outside of the federal government's, and the most prisoners on death row – has placed itself clearly in conflict with virtually every other jurisdiction. Petitioner respectfully prays this Court to issue its writ of *certiorari* in order to resolve that conflict and vindicate the Sixth and Fourteenth Amendment principles that underlie the Court's precedent forbidding juror misconduct.

Statement of the Case

Petitioner David Keith Rogers was convicted of the murders of two women and was sentenced to death in 1988.[3] From the time of his arrest, he admitted to committing one of those homicides, but he did so in response to an attack from the victim; he denied killing the other victim.

In 1999, Petitioner filed a state court Petition for Writ of Habeas Corpus, setting forth six enumerated claims for relief, the first of which was a claim of juror misconduct committed by, or in relation to, various jurors.

The petition was accompanied by, *inter alia*, a sworn declaration executed by Juror Edward Sauer, in which Juror Sauer admitted that he and his wife – who attended parts of the proceedings – watched television coverage of the trial as it was going on and discussed the case. Juror Sauer also averred that he and his wife had pre-judged the ultimate determination before the guilt phase concluded. In his words:

> The trial was televised, with cameras in the court room, and I saw some of the coverage on my television set at home. My wife and children were interested in the trial because I was on the jury and we would watch it together. Sometimes I turned it on to see if they showed me. We get three local channels and I flipped back and forth to see the trial coverage. I never saw the jury, but I saw David Rogers and I heard the announcers talk about the case.

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[3] The California Supreme Court denied Petitioner's direct appeal and affirmed the judgment against him on August 21, 2006. *People v. Rogers*, 39 Cal.4th 826 (2006).

> I believe in the death penalty, and that if you kill someone, you should die. So after David Rogers confessed on the witness stand to killing that woman, I thought there was no point in us (the jury) being there. As my wife put it, it was a waste of the taxpayer's money.[4]

Although Juror Sauer believed that the murder of a single person, regardless of the circumstances, warranted a death sentence, he concealed this biased view during voir dire.

The petition also included the sworn declaration of an alternate juror, Deborah Jane Morton, who averred that:

> Not long after the trial began, during a break in the guilt phase trial, I overheard two men who were regular jurors talking together. I [heard] one man tell the other that he had gone to the scene of the crime. I heard him say he gone to the El Don Motel and had seen what room a woman victim involved in the trial had stayed in. The juror went on to say that he had driven out to the Arvin-Edison canal to "see where he dumped the body at."[5]

Ms. Morton's description of the juror closely resembled Juror Edward Sauer.[6]

In another sworn declaration attached to the petition, Juror Debra Tegebo reported the following:

> During the trial, I made every effort to avoid the media coverage about the case. When a story about the case came on television, I would get up and leave the room, and I did not read the newspaper articles about it. The coverage was so extensive, however, that the whole community was discussing the case – including my colleagues at work.

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[4]Juror Sauer's (first) declaration is included as Exhibit 8 in support of the Petition for Writ of Habeas Corpus filed in the California Supreme Court.

[5]Alternate Juror Morton's declaration is included as Exhibit 6 in support of the Petition for Writ of Habeas Corpus filed in the California Supreme Court.

[6]As will be reviewed presently, Juror Sauer subsequently confirmed that he made at least some of the forbidden crime scene visits.

> Every Friday during the trial I would go to back to my place of work, and I also went to my office during lunch recesses and after court, late in the day. When I was in the office, my co-workers frequently made comments to me about the case. They knew that I was a juror on the Rogers trial, and several of them commented that David Rogers was guilty and should get the death penalty. They said things like: "Why don't you just get it over with?", and some of them talked about hanging David Rogers.
>
> Through comments from my co-workers, I became aware that the Kern County Sheriff had called for the death penalty for David Rogers. My co-workers remarked that they expected that police would stick together, so when the Sheriff called for the death penalty, they thought David Rogers must really be bad.[7]
>
> Hearing all of this community opinion made it much easier for me to vote for death, and it would have been very difficult for me to vote for life without possibility of parole, even though that was the sentence I would have preferred. [¶] . . . . I knew that there was tremendous pressure of public opinion about the case all over Bakersfield, and that any vote for less than a death verdict would subject me to a great deal of community disapproval.[8]

Similarly, in yet another sworn declaration accompanying the petition, Juror Darryl Johnson reported that his co-workers knew he was a juror on Petitioner's case and "repeatedly tried to discuss the case with [him]."[9]

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[7] The report was particularly freighted in that Petitioner had worked as a Deputy Sheriff prior to his arrest. In the event, the"news item" passed along to Juror Tegebo was not quite accurate – the Sheriff in fact said he did not care if Petitioner was put to death. But what is significant is what Juror Tegebo heard from her co-workers regarding extra-record "evidence" (as filtered through their interpretations of that evidence), rather than what the Sheriff actually said.

[8] Juror Tegebo's declaration is included as Exhibit 7 in support of the Petition for Writ of Habeas Corpus filed in the California Supreme Court.

[9] Juror Johnson also declared that, "[o]n weekends during the trial I saw more Sheriff's cars drive by my car in Oildale than usual, and I assumed it was because I was serving on the Rogers jury." Juror Johnson's declaration is included as Exhibit 9 in support of the Petition for Writ of Habeas Corpus filed in the California Supreme Court.

On December 19, 2007, the California Supreme Court issued an Order to Show Cause pertaining to various claims related to the prosecution's principal penalty phase witness, who had since recanted her testimony. On June 24, 2009, the California Supreme Court ordered the trial court to select a referee to conduct an evidentiary hearing and make findings of fact regarding questions pertaining to the recanting witness.

The California Supreme Court did not require the Attorney General to show cause with regard to the juror misconduct claims; however, its Order to Show Cause included the following notation:

> Kennard, Werdegar, and Moreno, JJ., would also include within the order to show cause the ground of juror misconduct on the part of juror Edward Sauer, as alleged in claim I.

(App. A.)

On December 30, 2014, Petitioner filed a "Motion to Expand Scope of Order to Show Cause," based in part on California Supreme Court opinions issued after the filing of the habeas petition which confirmed that Juror Edward Sauer's actions constituted blatant juror misconduct. Petitioner's motion was accompanied by new declarations executed in 2014 by Juror Sauer and his wife, Shirley Sauer.

Juror Sauer's new declaration reiterated his original admissions: that he – together with his wife and children – would watch the television coverage of the trial; that his wife sometimes came to watch the proceedings; that they discussed the case, including what they viewed as the appropriate outcome; and that (as Juror Sauer put it in 2014) "[o]nce Rogers took the stand and confessed [to one of the homicides], I stopped paying attention to the trial

because I felt I already had enough information to convict him." But the former juror added some new evidence of misconduct on his part. First, he confirmed Ms. Morton's report that he had visited the locations germane to the trial:

> I do not remember how we got to the scene, but I remember visiting the scene in East Bakersfield with the other jurors during the trial. The Prosecutor told us that Rogers had dumped her body in the canal there.[10] I remember being disturbed when I saw the scene. I also drove to another area near White Lane and Pacheco, in my own time during the course of the trial, to see for myself where Rogers picked up his victims.

Second, Juror Sauer admitted that:

> During the trial my father's best friend took the stand as a witness in the case. ... I disclosed to another juror that I knew the witness very well, but I did not notify the Attorneys or the Judge because I did not think I had an obligation to do so.[11]

For her part, Shirley Sauer confirmed that she had attended the trial; that the whole family watched coverage of the trial on television; that she and Juror Sauer discussed the case during the trial; and that she shared her husband's view that once Petitioner had confessed to killing one of the victims, "the whole trial was a waste of taxpayers' money." Shirley Sauer further stated that she was "familiar with defense counsel Gene Lorenz through his ex-wife, and knew that he had a reputation as someone who represented guilty clients."[12]

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[10]The trial court did not conduct or authorize any legitimate jury visits to the scene during the course of Petitioner's trial.

[11]Juror Sauer's 2014 declaration is attached to Petitioner's Motion to Expand Scope of Order to Show Cause, filed in the California Supreme Court, as Exhibit A.

[12]Shirley Sauer's declaration is attached to Petitioner's Motion to Expand Scope of Order to Show Cause, filed in the California Supreme Court, as Exhibit B.

On June 24, 2015, the California Supreme Court denied Petitioner's "Motion to Expand Scope of Order to Show Cause," but ordered that the new declarations be made part of the record. (App. B.)

After an evidentiary hearing the referee appointed by the state supreme court found that the prosecution's principal penalty phase witness had testified falsely when she identified Petitioner as a man who had sexually assaulted her. On July 15, 2019, the California Supreme Court accepted the referee's findings, granted Petitioner relief on his claim that material false evidence had been used against him, and overturned his sentence of death. *In re Rogers*, 7 Cal.5th 817, 833-851 (2019).

In a separate order, filed on September 25, 2019, the California Supreme Court remanded Petitioner's case for a new penalty phase trial and summarily denied, on the merits, "[a]ll claims challenging the murder convictions or the jury's special circumstance finding." (App. C.)

Why a Writ of Certiorari Should Issue

The instant case demonstrates how critical constitutional protections, propounded by this Court, are rendered nugatory when inferior courts arrogate to themselves the power to ignore the procedures put in place by the Court to make those rights effective.

"The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner v. Louisiana*, 379 U.S. 466, 471-472 (1965), quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). There is no context in which this principle is

of higher importance than when the death penalty is in play; as this Court held well over a century ago:

> It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated. Hence, the separation of the jury in such a way as to expose them to tampering may be reason for a new trial, variously held as absolute; or prima facie, and subject to rebuttal by the prosecution; or contingent on proof indicating that a tampering really took place.
>
> Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.

Mattox v. United States, 146 U.S. 140, 149-150 (1892).

As the Court later observed, however, this substantive guarantee is meaningless absent a way to enforce it: "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Dennis v. United States*, 339 U.S. 162, 171-172 (1950). Thus the Court subsequently reaffirmed the principles set out in *Mattox* and prescribed the proper procedure to effectuate them: When presented with declarations credibly alleging juror misconduct, a court is required to "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Remmer,* 347 U.S. at 229-230. "[T]he required hearing is often referred to as a *Remmer* hearing" (*Ewing v. Horton*, 914 F.3d at 1030), and is regarded as mandatory by the lower federal and state courts.

Except California.

Rather, the California Supreme Court takes the view that, "when a criminal defendant moves for a new trial based on allegations of jury misconduct, the trial court has discretion to conduct an evidentiary hearing to determine the truth of the allegations. *We stress, however, that the defendant is not entitled to such a hearing as a matter of right.*" *People v. Hedgecock*, 51 Cal.3d 395, 415 (1990) [emphasis supplied]. Thus, under the California Supreme Court's rule, a court confronted with clear evidence of juror misconduct may, as a matter of its sole discretion, choose not to conduct a hearing "sufficient to decide allegations of juror partiality" or "preserv[e] . . . the opportunity to prove actual bias," *Smith*, 455 U.S. at 212-213, 218, nor would such a court be required to "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial." *Remmer*, 347 U.S. at 229-230.

It cannot be gainsaid that a violation of the constitutional protections was placed squarely at issue before the California Supreme Court. As in *Remmer*, the petitioner in this case presented affidavits attesting to misconduct – but here they were sworn to (repeatedly) by the miscreant juror himself, as well as his spouse and other jurors. And it cannot reasonably be denied that the conduct described in those declarations was sufficiently serious as to give rise to a presumption of prejudice under *Remmer* and to require (at a minimum) the holding of a *Remmer* hearing.

Most obviously, Juror Sauer's extensive discussions with his wife regarding the issues in the trial – and the appropriate outcome – present a prototypical example of

egregious misconduct. *Remmer*, 347 U.S. at 229 ["any private communication, contact or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial"]; *see, e.g., Stouffer v. Trammell*, 738 F.3d at 1213–1214 [non-verbal communication between juror and spouse mandated holding of *Remmer* hearing]. The same prohibition comes into play in regard to the communications between Jurors Tegebo and Johnson and their co-workers, as well as Juror Wahl and the media, related to the ultimate issues before the jury – namely, petitioner's guilt and the choice of penalty. See, *Godoy v. Spearman*, 861 F.3d at 967 ["regardless of the outside party's identity – communications 'about the matter pending before the jury,' . . . greatly increase the risk of prejudice"].

But that is not the only sort of recognized misconduct credibly reported in this case. Juror Sauer's extensive exposure to extrinsic evidence, in the form of media reports, constituted another classic form of misconduct. See, *e.g., United States v. Bristol-Martir*, 570 F.3d 29, 42 (1st Cir. 2009). The (inaccurate) "news item" passed along to Juror Tegebo from her co-workers similarly constituted improper extraneous communication warranting a *Remmer* hearing. See *Wisehart v. Davis*, 408 F.3d at 326 [affidavit from a juror stating that she learned during trial petitioner had been given a lie detector test mandated a hearing]. And unauthorized and unsupervised visits to crime scenes – precisely like those made by Juror Sauer – constitute yet another form of blatantly improper conduct . See, *e.g.*, *Pyles v. Johnson*, 136 F.3d 986 (5th Cir. 1998), *cert. denied*, 524 U.S. 933 (1998) [juror's "unauthorized visit to the crime scene . . .

constituted constitutional error"]; *Sherman v. Smith*, 89 F.3d 1134 (4th Cir. 1996), *cert. denied*, 519 U.S. 1091 (1997).

Finally, Juror Sauer's failure to disclose both the strength of his pro-death bias and his relationship with a prosecution witness clearly raises a credible claim of juror bias that requires an evidentiary hearing. See *Williams v. Taylor*, 529 U.S. 420, 441-442 (2000) [petitioner entitled to evidentiary hearing on claim of juror bias when juror failed to reveal on voir dire she had been married to a prosecution witness]; see also, *Sampson v. United States*, 724 F.3d 150, 163-166 (1st Cir. 2013) [finding bias based on juror's lies during voir dire]; *English v. Berghius*, 900 F.3d 804 (6th Cir. 2018) [same]; *Porter v. Zook*, 898 F.3d 408 (4th Cir. 2018) [petitioner entitled to evidentiary hearing on claim of juror bias based on false voir dire].

Were it not for the California Supreme Court's determination that it had the discretion to summarily dismiss credible claims of juror misconduct without a hearing, a *Remmer* hearing would surely have been held in petitioner's case – and in all likelihood he would have been granted a new trial. Yet in the face of uncontroverted – and seemingly incontrovertible – evidence of several forms of flagrant juror misconduct, the California Supreme Court exercised the "discretion" that it has awarded to courts of its state to simply do nothing.

Virtually every other jurisdiction interprets this Court's precedent to require a court in receipt of such serious evidence of juror misconduct to hold a hearing. As the Ninth Circuit recognized, "the Supreme Court has unequivocally and repeatedly held that

due process requires a trial judge to endeavor to 'determine the effect' of occurrences tending to prejudice the jury when they happen." *Tarango v. McDaniel*, 837 F.3d 936, 947 (9th Cir. 2016), *cert. denied,* ___ U.S. ___, 137 S. Ct. 1816 (2017); citing *Smith*, 455 U.S. at 217. The federal courts are clear on the basis for that imperative: "the Fourteenth Amendment Due Process Clause forbids a trial judge from remaining idle in the face of evidence indicating probable juror bias." *Sims v. Rowland*, 414 F.3d 1148, 1156 (9th Cir. 2005). Thus the federal courts require, with some uniformity, that "a defendant is entitled to a hearing when he or she presents a credible allegation of communications or contact between a third party and a juror concerning the matter pending before the jury," and "[o]nce the defendant presents such a 'genuine allegation,' the 'presumption of prejudice must be applied, and . . . a hearing must be held.'" *Hurst v. Joyner*, 757 F.3d 389, 396-398 (4th Cir. 2014), *cert. denied*, ___ U.S. ___, 135 S.Ct. 2643 (2015); quoting *Barnes v. Joyner*, 751 F.3d 229; *accord*, *e.g.*, *Clark v. Chappell,* 936 F.3d 944, 969–972 (9th Cir. 2019); *Ewing v. Horton,* 914 F.3d 1027, 1031 (6th Cir. 2019); *Stouffer v. Trammell,* 738 F.3d 1205, 1213–1214 (10th Cir. 2013); *United States v.* Bristol-Martir, 570 F.3d 29, 42 (1st Cir. 2009); *United States v. Vitale* 459 F.3d 190, 197-198 (2d Cir. 2006); *Wisehart v. Davis*, 408 F.3d 321, 326 (7th Cir. 2005); *U.S. v. Sylvester,*143 F.3d 923, 932 (5th Cir. 1998) ["The failure to hold a hearing in such a situation constitutes an abuse of discretion and is reversible error"]; *see also, e.g., State v. Jenner,* 236 W.Va. at 417; *Ramirez v. State*, 7 N.E.3d 933, 939-940 (Ind. 2014); *Dowdye v. Virgin Islands,* 55 V.I. 736, 765-766 (2011); *State v. Brown*, 235 Conn. at 526.

Petitioner recognizes that the Court generally reserves its grants of *certiorari* in such cases for pronounced splits of authority in the lower courts. But this is not merely a matter of some outlier jurisdiction choosing to march to its own drummer. As noted, California has the largest judicial system in the country outside of the federal government itself, and maintains by far the largest Death Row in the nation, with more than twice the number of inmates facing death as the state with the next largest population.[13] For California to go its own way in disregarding a pivotal federal constitutional guarantee – particularly in cases in which the consequence could be an unlawful execution – is enough in itself to present a split of authority that should command this Court's attention.

In short, the Court should grant certiorari to make clear that when a court receives credible claims of juror bias, due process requires a hearing to examine that misconduct, and a court lacks discretion to refuse to hold such a hearing.

[13]As of July 1, 2019, California had 729 persons on Death Row; the next largest condemned population was 348, in Florida. Death Penalty Information Center, *Death Row Prisoners by State*, http://www.deathpenaltyinfo.org/state-and-federal-info/state-by-state.

Conclusion

Petitioner is now facing a penalty re-trial thirty years after he was sentenced to death. He has spent the last three decades on the Death Row at San Quentin State Prison – a "long wait between the imposition of sentence and the actual infliction of death" that, in itself, exacts a "frightful toll" on the psyche "often so degrading and brutalizing to the human spirit as to constitute psychological torture." *Furman v. Georgia*, 408 U.S. 238, 288 (1972) (Brennan, J., concurring). In light of the extraordinary punishment petitioner has already endured, the prospect of a re-imposed death sentence, and California's blithe disregard for this Court's precedent, petitioner respectfully prays the Court to issue its writ of *certiorari*.

Dated: January 27, 2020 Respectfully submitted,

/s AJ Kutchins
AJ KUTCHINS
Attorney for Petitioner DAVID ROGERS

OCTOBER TERM, 2019

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DAVID KEITH ROGERS, *Petitioner*

vs.

THE STATE OF CALIFORNIA, *Respondent*

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the United States Supreme Court bar. On February 27, 2020, I served the enclosed Petition for Writ of *Certiorari* , Appendix thereto, and Motion to Proceed *in Forma Pauperis* on the parties by placing a copy of said documents in the United States Mail, in an envelope with first-class postage thereon fully prepaid, addressed as follows:

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Executed on February 27, 2020, at Berkeley, California.

/s AJ Kutchins
AJ Kutchins