No. 19-7451

In the Supreme Court of the United States

DAVID KEITH ROGERS,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION

XAVIER BECERRA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
LANCE E. WINTERS
Chief Assistant Attorney General
AIMEE FEINBERG
Deputy Solicitor General
KENNETH N. SOKOLER*
Supervising Deputy Attorney General
HENRY J. VALLE
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-7751
Fax: (916) 324-2960
Kenneth.Sokoler@doj.ca.gov
**Counsel of Record*

QUESTION PRESENTED[1]

Whether, on postconviction review, the California Supreme Court erred in denying petitioner's juror misconduct claim without holding an evidentiary hearing.

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[1] Although the cover of the petition designates this as a "death penalty case," respondent omits the capital case designation because, as discussed below, the California Supreme Court recently vacated petitioner's death sentence. Petitioner is thus not "under a death sentence that may be affected by the disposition of the petition[.]" Sup. Ct. R. 14.1(a).

DIRECTLY RELATED PROCEEDINGS

California Supreme Court:

People v. David Keith Rogers, No. S005502 (Aug. 21, 2006) (judgment affirmed).

In re David Keith Rogers, No. S084292 (July 15, 2019) (vacating death sentence) (this case below).

Supreme Court of the United States:

David Keith Rogers v. California, No. 06-8936 (Apr. 30, 2007) (certiorari denied).

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STATEMENT

1. Petitioner David Keith Rogers, a Kern County deputy sheriff, murdered 20-year-old Janine Benintende in 1986 and 15-year-old Tracie Clark in 1987. *In re Rogers*, 7 Cal. 5th 817, 823 (2019). Both women had been working as prostitutes in Bakersfield, California when they disappeared. *Id.*

The bodies of Benintende and Clark were recovered from a local canal about a year apart; each had been shot multiple times. *In re Rogers*, 7 Cal. 5th at 823-824. The bullets retrieved from the bodies matched those issued to deputy sheriffs in Kern County, and tire tracks and shoe prints found at the scene of Clark's murder matched those of petitioner's truck and shoes. *Id.* at 824. In an interview with investigators following his arrest, petitioner confessed to killing Clark but said he could not remember having anything to do with Benintende. *Id.*

In 1988, a jury in the Kern County Superior Court found petitioner guilty on one count of first-degree murder and one count of second-degree murder, in violation of California Penal Code section 187(a). *In re Rogers*, 7 Cal. 5th at 819. In addition, the jury found the special circumstance allegation of multiple murder to be true, making petitioner eligible for the death penalty. *Id.*; Cal. Penal Code § 190.2(a)(3). Following the penalty-phase trial, the jury returned a death verdict, and petitioner was sentenced to death. *In re Rogers*, 7 Cal. 5th at 819. On direct appeal, the California Supreme Court affirmed petitioner's

conviction and sentence. *People v. Rogers*, 39 Cal. 4th 826, 835 (2006). This Court denied certiorari. *Rogers v. California*, 127 S. Ct. 2129 (2007).

2. a. In 1999, petitioner filed a petition for writ of habeas corpus in the California Supreme Court. *In re Rogers*, 7 Cal. 5th at 819. The petition included numerous challenges to the guilt and penalty judgments, including several claims of juror misconduct supported by juror declarations. Pet. 6. Petitioner argued that multiple "instances of juror misconduct and improper influences on jurors in this case, taken individually and cumulatively, were presumptively and irrebuttably prejudicial, and deprive[d] [him] of rights guaranteed him under the Sixth, Eighth and Fourteenth Amendments . . . and cognate provisions of state law . . . ."[2] Petitioner did not claim that the federal Constitution compelled the California Supreme Court to order an evidentiary hearing.

To support his claim of juror misconduct, petitioner included declarations from individuals who had served as jurors at his trial, including Edward Sauer. Pet. 6; Opp. App. A.[3] In his 1996 declaration, Sauer stated that during the trial, he and his wife, "would watch television coverage together" to see if he appeared on television. Pet. 6; Opp. App. A. Sauer added, "I never saw the

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[2] Petition for Writ of Habeas Corpus at 8-25, In re David Keith Rogers, No. S084292 (Cal. Dec. 14, 1999) *available at* https://www.courts.ca.gov/documents/1a-s084292-petitioner-pet-writ-hc-vol-one-of-two-121499.pdf.

[3] "Opp. App." refers to the appendix to this brief in opposition.

jury, but I saw David Rogers and I heard the announcer talk about the case, although I don't remember what they said." Opp. App. A. He further stated, "I believe in the death penalty, and that if you kill someone, you should die. So after David Rogers confessed on the 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 taxpayer's money." *Id*.

Besides Sauer's declaration, petitioner included declarations from three other jurors. In a 1999 declaration, alternate juror Deborah Morton stated that she overheard a juror say "he had driven out to the Arvin-Edison canal to 'see where [petitioner] dumped the body at.'" Opp. App. B. Morton also stated that this juror claimed to have visited the El Don Motel. *Id*. According to the trial evidence, petitioner had picked up victim Clark near the El Don Motel before driving to a secluded area and murdering her. *People v. Rogers*, 39 Cal. 4th at 838.

The two remaining declarations were from jurors Debra Tegebo and Darryl Johnson. Tegebo and Johnson both stated that coworkers had attempted to discuss the case with them, but they honored their oaths to avoid extraneous information as much as possible. Opp. App. C at 1; Opp. App. D at 1. Tegebo stated 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 [her] to a great deal of community disapproval," which "made it much easier for [her] to vote for death, and it would have been very

difficult for [her] to vote for life without possibility of parole, even though that was the sentence [she] would have preferred." Opp. App. C at 2. She further stated that her coworkers "frequently" made comments to her about the case, and that several of them commented "that David Rogers was guilty and should get the death penalty." *Id.* at 1. She recalled that "[t]hey said things like: 'Why don't you just get it over with?', and some of them talked about hanging David Rogers." *Id.* at 1-2. Tegebo explained, however, that she "made every effort to avoid the media coverage about the case." *Id.* at 1. And Juror Johnson stated that "[a]lthough I told them not to do so, my co-workers repeatedly tried to discuss the case with me." Opp. App. D at 1.

b. The California Supreme Court issued an order to show cause for several of petitioner's penalty-phase claims. Pet. App. A. Under California law, an order to show cause signifies the court's "*preliminary assessment*" that if a petitioner's factual allegations were proved, he would be entitled to relief on those claims. *People v. Duvall*, 9 Cal. 4th 464, 475 (1995). The court's order to show cause in petitioner's case did not encompass his juror misconduct claims or any other guilt-phase claims. Pet. App. A. Three justices indicated that they would have included the claim of juror misconduct by Sauer in the show-cause order. *Id.*

In 2014, after an evidentiary hearing had been held on the issues designated in the order to show cause, petitioner filed a motion to expand the order to include the claim of juror misconduct by Sauer. *See* Pet. App. B. The

motion included a second declaration from Sauer that stated: "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. I remember being disturbed when I saw the scene." Opp. App. E at 1. The declaration also stated that a witness who testified at trial, whose name Sauer believed was "Johnny Ward," was his "father's best friend." *Id.* In addition to Sauer's new declaration, the motion included a declaration from Sauer's wife, Shirley Sauer, who stated that she and Sauer watched some of the television coverage of the trial with their teenage children because the children wanted to "get a glimpse of their father." Opp. App. F. Petitioner asserted in the motion that based on Juror Sauer's alleged misconduct, he was "entitled (at a minimum) to an evidentiary hearing" at which the State had the burden of rebutting the presumption of prejudice. Motion to Expand Scope of Order to Show Cause at 2-3, *In re Rogers*, 7 Cal. 5th 817 (No. S084292). Petitioner did not assert that the federal Constitution required the California Supreme Court to hold a hearing on collateral review.

The court construed petitioner's motion as a request to supplement his original juror misconduct claim involving Juror Sauer with the new factual allegations and argument contained in the motion, and in that form, the court granted the motion. Pet. App. B. The court declined, without recorded dissent, to expand the order to show cause to include this juror misconduct claim. *Id.*

c. In 2019, the California Supreme Court granted in part and denied in part petitioner's habeas corpus petition. *In re Rogers*, 7 Cal. 5th at 851. The court vacated petitioner's death sentence on the ground that one of the prosecution's penalty-phase witnesses had testified falsely when she identified petitioner as the person who had sexually assaulted her. *Id*. at 819.[4] In a subsequent unpublished summary order, the court denied as moot all of petitioner's penalty-phase challenges that were not addressed in its published decision. Pet. App. C.

In that same order, the court denied on the merits all of petitioner's challenges to his convictions and to the special circumstance finding, including petitioner's juror misconduct claims, and it remanded the matter to the superior court for further proceedings. Pet. App. C. By summarily denying the guilt-phase claims, the court signified that those claims did not make a prima facie showing of entitlement to relief. *See People v. Duvall*, 9 Cal. 4th at 475.

ARGUMENT

1. Petitioner asks this Court to consider the circumstances under which, on state postconviction review, an evidentiary hearing is required under the

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[4] In granting petitioner's false evidence claim, the court did not find that the witness was intentionally false or that the prosecution knew her testimony was false. *In re Rogers*, 7 Cal. 5th at 819-851. The claim was based on California law, which does not require a showing that the witness intentionally gave false testimony or that the prosecution knew the testimony was false. *Id*. at 833-834; *In re Richards*, 55 Cal. 4th 948, 961 (2012).

Sixth and Fourteenth Amendments when a defendant learns of evidence suggesting juror misconduct. Pet. 3-4, 11-17. In denying petitioner's claims of juror misconduct, the California Supreme Court did not address this federal constitutional question. It declined to issue an order to show cause or order an evidentiary hearing in this postconviction challenge, and it rejected petitioner's misconduct claim on the merits. That decision does not conflict with this Court's precedents or with the other decisions petitioner cites. Further review is not warranted.

a. The California Supreme Court has long recognized that a criminal defendant "has a constitutional right to a trial by an impartial jury," which means a jury "in which no member has been improperly influenced and every member is capable and willing to decide the case solely on the evidence before it . . . ." *In re Hamilton*, 20 Cal. 4th 273, 293-294 (1999) (internal citations and quotation marks omitted). The court has explained that "[j]uror misconduct generally raises a rebuttable presumption of prejudice," but the presumption is rebutted "if the entire record . . . including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors were actually biased against the defendant." *In re Lucas*, 33 Cal. 4th 682, 696 (2004) (internal quotation marks omitted). Such bias can take two forms: First, "if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror," and second,

if "the nature of the misconduct and the surrounding circumstances" make it "substantially likely the juror was actually biased against the defendant." *Id.* at 697 (internal quotation marks omitted). Thus, in petitioner's case, the California Supreme Court would have issued an order to show cause—and ordered an evidentiary hearing to resolve any disputed material factual allegations—if petitioner had made a prima facie showing that juror misconduct occurred and the record did not demonstrate that there was no substantial likelihood of bias. *See People v. Duvall*, 9 Cal. 4th at 478-479.

Petitioner asserts that the California Supreme Court's decision to resolve his juror misconduct claim without an evidentiary hearing conflicts with this Court's decisions in *Remmer v. United States*, 347 U.S. 227 (1954), and *Smith v. Phillips*, 455 U.S. 209 (1982). *See* Pet. 3, 12-16. That is not correct. In *Remmer*, after the jury had rendered guilty verdicts, the defendant learned that someone had told a juror that the juror could profit by a verdict in the defendant's favor. *Remmer*, 347 U.S. at 228. The juror reported the incident to the judge, who in turn held an ex parte meeting with the prosecutor. *Id.* The matter was investigated without the defense's knowledge. *Id.* When the defense learned of the misconduct and the investigation, it moved for a new trial and requested a hearing to determine whether the misconduct had any effect on the jury. *Id.* The trial court denied the motion without holding a hearing. *Id.* at 229. This Court reversed, concluding that the trial court should not have denied the new trial motion without holding a hearing to determine

the circumstances of the misconduct, its effect on the juror, and whether it was prejudicial. *Id*. at 229-230.

Even assuming that *Remmer* articulates a federal constitutional rule, the California Supreme Court's denial of petitioner's claim without a hearing does not conflict with that decision.[5] *Remmer* concluded that any unauthorized "private communication, contact, or tampering . . . with a juror during a trial about the matter pending before the jury" is deemed presumptively (but not conclusively) prejudicial. 347 U.S. at 229. That is similar to California's rule that "[j]uror misconduct generally raises a rebuttable presumption of prejudice" but the presumption is rebutted "if the entire record . . . indicates there is . . . no substantial likelihood that one or more jurors were actually biased against the defendant." *In re Lucas*, 33 Cal. 4th at 696 (internal quotation marks omitted).

The decision below likewise does not conflict with *Smith v. Phillips*. In *Phillips*, the defendant moved to vacate his murder conviction after learning that one of the jurors at trial had applied for employment with the prosecutor's office. *Phillips*, 455 U.S. at 212. The prosecutors in the case had learned of

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[5] *Remmer* made no reference to the Constitution, and some courts have concluded that it is based on this Court's supervisory power over the lower federal courts and thus does not constitute controlling authority for state courts. *Crease v. McKune*, 189 F.3d 1188, 1193 (10th Cir. 1999); *Greer v. Thompson*, 281 Ga. 419, 421 (2006); *see Early v. Packer*, 537 U.S. 3, 10 (2002) (decisions based on this Court's supervisory powers are not binding on the States).

the application during trial but did not notify the court or the defense. *Id.* at 212-213. In adjudicating the defendant's motion, the trial court held an evidentiary hearing, during which the prosecutors and the juror testified. *Id.* at 213. After the hearing, the court denied the motion. *Id.* When the case reached this Court, the defendant argued that the trial court's adjudication of the claim deprived him of due process because the trial court had considered the juror's own testimony in evaluating whether the juror was biased, instead of deeming him biased as a matter of law. *Id.* at 214-215. In rejecting that argument and upholding the conviction, this Court explained that due process principles required a jury that was capable and willing to decide the case based on the evidence before it and a trial judge who was "ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Id.* at 217. The Court observed that "[s]uch determinations *may* be properly made at a hearing" and added that "[t]his 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." *Id.* at 215, 217 (emphasis added). The Court ultimately concluded that "the prosecutors' failure to disclose [the juror's] job application, although requiring a post-trial hearing on juror bias, did not deprive respondent of the fair trial guaranteed by the Due Process Clause." *Id.* at 221.

Phillips thus recognized that a hearing was required for the allegations at issue there: that a juror had applied for employment with the prosecuting

agency and the trial prosecutors knew this but failed to inform the court or defense counsel. 455 U.S. at 221. But *Phillips* did not hold that a hearing is required in every case in which a defendant makes any kind of allegation of outside influence. *See id.*

In addition, *Remmer* and *Phillips* addressed the adjudication of juror misconduct claims before the judgments became final—*Remmer* in a new trial motion and *Phillips* in a motion to vacate the conviction. *Phillips*, 455 U.S. at 212; *Remmer*, 347 U.S. at 228. Neither case addressed the different question petitioner raises here: whether an evidentiary hearing on a juror misconduct claim is constitutionally mandated on state-court collateral review. This distinction is significant, because the constitutional protections that apply before a conviction becomes final differ from those that apply on collateral review. This Court, for example, has recognized that States "have no obligation to provide" an avenue for collateral review. *Pennsylvania v. Finley*, 481 U.S. 551, 556-557 (1987). Collateral review "is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction." *Id.* (internal citation omitted). Petitioner makes no attempt to explain how the Constitution guaranteed him a hearing on his juror misconduct claim during state postconviction collateral review. On the contrary, his insistence that the

California Supreme Court's refusal to hold an evidentiary hearing violated his Sixth Amendment right "to a fair jury trial"—in a proceeding that involves no jury—ignores this distinction. Pet. 5; *see* Pet. 3.

b. Petitioner is also incorrect when he asserts that the decision below, and California's general rule of not mandating a hearing in all cases in which allegations of juror misconduct are raised, are in conflict with decisions by the federal circuit courts and state courts. Pet. 14-16. On the contrary, there is no conflict warranting this Court's review. For example, in one case petitioner cites (Pet. 16), *Sims v. Rowland*, 414 F.3d 1148 (9th Cir. 2005), the Ninth Circuit rejected the assertion that "a hearing is required whenever evidence of juror bias is brought to light." *Id.* at 1155. Addressing *Remmer* and *Smith*, the court concluded that those cases "'do not stand for the proposition that *any time* evidence of juror bias comes to light, due process requires the trial court to question the jurors alleged to have bias.'" *Id.* (quoting *Tracey v. Palmateer*, 341 F.3d 1037, 1044 (9th Cir. 2003)). On the contrary, the Ninth Circuit explained, *Remmer* and *Smith* provide a "'flexible rule'" that requires federal courts to ""consider the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source' when determining whether a hearing is required." *Sims*, 414 F.3d at 1155 (quoting *Tracey*, 341 F.3d at 1044).

In another case cited by petitioner (Pet. 14, 16), *Wisehart v. Davis*, 408 F.3d 321, 326 (7th Cir. 2005), the Seventh Circuit similarly held that the

necessity for a hearing on juror misconduct depends on the character of the allegation. The court rejected the premise that all outside communication with a juror regarding a case is presumptively prejudicial and requires a hearing. *Id.* Instead, the court explained, "the extraneous communication to the juror must be of a character that creates a reasonable suspicion that further inquiry is necessary to determine whether the defendant was deprived of his right to an impartial jury. How much inquiry is necessary (perhaps very little, or even none) depends on how likely was the extraneous communication to contaminate the jury's deliberations." *Id.*

The Fifth Circuit has likewise examined the nature of the alleged misconduct in determining whether a hearing is required. In *United States v. Sylvester*, 143 F.3d 923 (5th Cir. 1998), also cited by petitioner (Pet. 5, 16), the court addressed a claim of jury tampering that arose during trial. 143 F.3d at 931-932. The court observed that *Remmer* requires a district court, "when confronted with credible allegations of jury tampering, to notify both sides and hold a hearing with all parties participating." *Id.* at 932. The court explained that "[w]e do not mean to suggest that a district court is obligated to conduct a full-blown evidentiary hearing every time an allegation of jury tampering is raised." *Id.* at 932 n.5. Instead, "'the court must balance the probable harm resulting from the emphasis a hearing would place upon the misconduct and the disruption involved in conducting a hearing against the likely extent and gravity of the prejudice generated by the misconduct.'" *Id.* (internal brackets

omitted) (quoting *United States v. Chiantese*, 582 F.2d 974, 980 (5th Cir. 1978)).

In cases petitioner cites from the Second and Tenth Circuits, the courts also premised the necessity for a hearing on the specific character of the alleged misconduct. (*See* Pet. 5, 14, 16.) The Second Circuit explained that a district court is only required to hold a post-trial hearing if "'there is clear, strong, substantial and incontrovertible evidence, that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial of a defendant.'" *United States v. Vitale*, 459 F.3d 190, 197 (2d Cir. 2006) (quoting *United States v. Sun Myung Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983)). And the Tenth Circuit elaborated that "not every allegation of improper juror contact requires a hearing," and a hearing is only mandated when "genuine concerns" arise "that an extrinsic influence may have tainted the trial . . . ." *Stouffer v. Trammell*, 738 F.3d 1205, 1214 (10th Cir. 2013) (internal quotation marks omitted).

It is true that in another case petitioner cites (Pet. 16), *Hurst v. Joyner*, 757 F.3d 389 (4th Cir. 2014), the Fourth Circuit used language that suggests that a *Remmer* hearing is required whenever an external communication relating to the case is alleged. Specifically, the court stated that "'*Remmer* clearly established not only a presumption of prejudice, but also a defendant's entitlement to an evidentiary hearing, when the defendant presents a credible allegation of communications or contact between a third party and a juror

concerning the matter pending before the jury.'" *Id.* at 397 (quoting *Barnes v. Joyner*, 751 F.3d 229, 242 (4th Cir. 2014)). But in the case *Hurst* was quoting, *Barnes v. Joyner*, the court specified that the alleged improper communication must threaten the validity of the verdict in order to trigger the presumption of prejudice and the requirement for a hearing. The *Barnes* court explained that "to be entitled to the *Remmer* presumption and a *Remmer* hearing, a 'defendant must first establish both that an unauthorized contact was made and that it was of such a character as to reasonably draw into question the integrity of the verdict.'" *Barnes*, 751 F.3d at 244 (quoting *Stockton v. Virginia*, 852 F.2d 740, 743 (4th Cir. 1988)).

In a case petitioner cites from West Virginia (Pet. 5, 16), *State v. Jenner*, 236 W.Va. 406 (2015), the West Virginia Supreme Court made the seemingly broad statement that "'the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.'" *Id.* at 417 (quoting *Smith v. Phillips*, 455 U.S. at 215)). But in the case that the West Virginia court was quoting, *Smith v. Phillips*, this Court did not hold that a hearing is required for every claim of juror misconduct; instead, as discussed above, this Court evaluated the adequacy of a hearing that had actually been held. *Phillips*, 455 U.S. at 221. In any event, after quoting *Phillips*, the *Jenner* court explained that the necessity for a hearing depends on the character of the misconduct allegations: "The decision on whether to hear juror testimony depends on the facts and the accusations, and how well the accusations are

supported by the moving party. . . . 'The more speculative or unsubstantiated the allegation of [juror] misconduct, the less the burden to investigate. . . . The more serious the potential jury contamination, especially where alleged extrinsic influence is involved, the heavier the burden to investigate.'" *Jenner*, 236 W.Va. at 419 n.11 (quoting *United States v. Caldwell*, 776 F.2d 989, 998 (11th Cir. 1985)).

The other cases that petitioner cites (Pet. 14-16) likewise do not support the proposition that the Constitution requires a hearing for every claim of juror misconduct.[6] And to the extent that any of petitioner's cited cases can be read

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[6] *See Clark v. Chappell*, 936 F.3d 944, 970-971 (9th Cir. 2019) (presumption of prejudice only applies if "the sufficiently improper contact gives rise to a 'credible risk of affecting the outcome'"); *Ewing v. Horton*, 914 F.3d 1027, 1030 (6th Cir. 2019) (trial court must inquire when "'presented with evidence that an extrinsic influence has reached the jury which has a reasonable potential for tainting that jury'"); *Godoy v. Spearman*, 861 F.3d 956, 967 (9th Cir. 2017) (to require a hearing in a motion for new trial, "[t]he defendant must present evidence of a contact sufficiently improper as to raise a credible risk of affecting the outcome of the case"); *Tarango v. McDaniel*, 837 F.3d 936, 948-950 (9th Cir. 2016) (trial court must investigate prejudice when an external contact between a government official and a juror would have a "tendency to affect" the verdict); *United States v. Bristol-Martir*, 570 F.3d 29, 42 (1st Cir. 2009) (during trial, district court must make an "adequate inquiry" when "a non-frivolous suggestion is made that a jury may be biased or tainted by some incident") (internal quotation marks omitted); *State v. Brown*, 235 Conn. 502, 531 (1995) (under state law, jury misconduct allegations in the trial court require "a preliminary inquiry," whose "form and scope may vary from a preliminary inquiry of counsel . . . to a full evidentiary hearing"); *Ramirez v. State*, 7 N.E.3d 933 (Ind. 2014) (in mistrial motion based on "suspected jury taint," presumption of prejudice applies under state law if a preponderance of the evidence demonstrates that "(1) extra-judicial contact or communications between jurors and unauthorized persons occurred, and (2) the contact or communications pertained to the matter before the jury"); *Dowdye v. Virgin*

as requiring a hearing in circumstances like those present here, this case presents no occasion to consider the question, because the California Supreme Court did not address the issue in its decision. Pet. App. C.

c. Finally, petitioner maintains that "[w]ere 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," the court would have held a hearing on his claim "and in all likelihood" granted him a new trial. Pet. 15. The constitutional right to a jury trial "guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Turner v. Louisiana*, 379 U.S. 466, 471 (1965). "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." *Id*. at 472. Here, a careful examination of the record shows that the California Supreme Court did not err in rejecting petitioner's claims on the merits without a hearing.

Juror Sauer's 1996 declaration, for example, stated that he watched television "to see if they showed me." Opp. App. A. He also stated, "I never saw the jury, but I saw David Rogers and I heard the announcer talk about the

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Islands, 55 V.I. 736, 771 (V.I. 2011) (during trial, "[w]hen a non-frivolous suggestion is made that a jury may be biased or tainted by some incident, the . . . court must undertake an adequate inquiry to determine whether the alleged incident occurred and if so, whether it was prejudicial").

case, although I don't remember what they said." *Id.* Nothing about this raised a credible risk of affecting the verdict.

Also in his 1996 declaration, Sauer stated, "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 use (the jury) being there." Opp. App. A. This statement did not support a prima facie claim for relief because it was inadmissible under California Evidence Code section 1150, which prohibits evidence concerning the mental process by which a juror reached his or her decision. *See People v. Hutchinson*, 71 Cal. 2d 342, 349 (1969).[7] Thus, Sauer's 1996 declaration, even if taken as true, could not support petitioner's claim that Sauer's actions affected the trial's outcome.

Sauer's subsequent declaration from 2014 also failed to support a prima facie claim for relief. Eighteen years after Sauer's original declaration, his new declaration offered novel allegations that were without explanation absent from his 1996 declaration. The new allegations included a claim that Sauer had visited "the scene in East Bakersfield with the other jurors during the trial." Opp. App. E. As to this claimed excursion, Sauer elaborated that "[t]he Prosecutor told us that Rogers had dumped her body in the canal there. I

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[7] Federal law similarly prohibits a juror from testifying about "any juror's mental process concerning the verdict or indictment." Fed. R. Evid. 606(b); *accord Rushen v. Spain*, 464 U.S. 114, 122 n.5 (1983) ("a juror general cannot testify about the mental process by which the verdict was arrived").

remember being disturbed when I saw the scene." *Id*. Under California law, a jury can only visit a crime scene if the court orders it. Cal. Penal Code § 1119. And such an order would necessarily appear in the trial record. Cal. Penal Code § 190.7(a); Cal. R. Ct. 33(a)(1) (Deering Supp. 1993 & Drafter's Notes) (current version at Cal. R. Ct. 8.320(a)); Cal. R. Ct. 39.5(c) (Deering Supp. 1993) (current version at Cal. R. Ct. 8.610(a)). The record from petitioner's trial, however, contains no indication that the jury visited the crime scene or that the court ordered such a visit. *See In re Hochberg*, 2 Cal. 3d 870, 873 n.2 (1970) (habeas court considers "'any matter of record pertaining to the case'" in determining whether petitioner has made a prima facie showing).

The California Supreme Court likewise did not err in rejecting petitioner's claim of misconduct based on the statement in Sauer's 2014 declaration that he knew one of the witnesses but failed to disclose that fact to the judge or the attorneys. Sauer believed the witness's name was "Johnny Ward," whom he described as his father's best friend. Opp. App. E. But no one named Johnny Ward testified at petitioner's trial.

Lastly, Sauer stated in his 2014 declaration that he "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." Opp. App. E. This location appears to be the place where Tambri Butler, a penalty-phase witness, said that petitioner had picked her up in 1986. 22 Reporter's Tr. 5781. Butler, however, did not testify at the guilt phase, so any purported misconduct related

to her testimony is irrelevant to petitioner's present challenge to his convictions.

The court below also did not err in declining to grant relief based on Juror Morton's 1999 declaration. Morton's declaration is short on details and is based exclusively on inadmissible hearsay, according to which she claimed to believe that a juror had said "he had driven out to the Arvin-Edison canal to 'see where [petitioner] dumped the body at.'" Opp. App. B. She also stated that this juror claimed to have visited the El Don Motel, which was near the location where petitioner had picked up victim Clark before driving her to an isolated location and murdering her. *Id.*; *People v. Rogers*, 39 Cal. 4th at 838. Morton came to this conclusion about the unidentified juror by piecing together several words that she recalled the juror uttering. Opp. App. B.

Petitioner assumes Morton is referring to Sauer (Pet. 7), but Sauer never claimed in either of his declarations that he had visited the Arvin-Edison Canal or the El Don Motel. Opp. App. A; Opp. App. E. In any event, the El Don Motel was 11 miles from the murder scene and was irrelevant to any disputed issue. *See People v. Rogers*, 39 Cal. 4th at 838-840 & n.4. Moreover, Morton's vague description of the juror as "blue collar" and "thickly built, with dark hair" (Opp. App. B) does little to connect her claims to Sauer. Thus, besides being based on hearsay, her declaration was too vague and speculative to warrant an evidentiary hearing.

The final two declarations, which petitioner briefly mentions, do not support relief from his convictions, because they principally concerned the penalty phase, and the California Supreme Court has already vacated that judgment. Pet. 7-8. Jurors Debra Tegebo and Darryl Johnson both asserted that coworkers "repeatedly" attempted to discuss the case with them, but both jurors honored their oaths to avoid extraneous information as much as possible. Opp. App. C at 1; Opp. App. D at 1. Neither juror stated that outside influences had affected their guilt verdict. Opp. App. C; Opp. App. D. Tegebo recalled that "community opinion" made it "much easier for [her] to vote for death" (Opp. App. C at 1-2), but this assertion related solely to petitioner's sentence, not his guilt. In any event, it was inadmissible because it concerned Tegebo's thought process. Cal. Evid. Code § 1150; *see* Pet. 7-8.

Based on the allegations presented to the California Supreme Court, petitioner fell well short of making a prima facie showing of juror misconduct at the guilt phase; thus, the California Supreme Court did not err when it denied relief on those claims without an evidentiary hearing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

XAVIER BECERRA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
LANCE E. WINTERS
Chief Assistant Attorney General
AIMEE FEINBERG
Deputy Solicitor General

/s/ ***Kenneth N. Sokoler***
KENNETH N. SOKOLER
Supervising Deputy Attorney General
HENRY J. VALLE
Deputy Attorney General

Dated: May 1, 2020

Opposition Appendix A

DECLARATION OF EDWARD ROBERT SAUER

I, Edward Sauer, declare as follows:

I served as a juror in the trial of David Rogers for the crime of murder in 1988. 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. Also, my wife knew the lawyers and sometimes came to watch the trial during her breaks (she worked next door to the courthouse). We would watch the television coverage 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, although I don't remember what they said.

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.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 23 day of September, 1996, at Bakersfield, California.

Edward R. Sauer
Edward Robert Sauer

Opposition Appendix B

DECLARATION OF DEBORAH JANE MORTON

1. I, Deborah Jane Morton, declare: I served as a alternate juror during the Kern County trial of David Keith Rogers in which he was sentenced to the death penalty. Though I did not join in the deliberations, I attended the entire trial. Until deliberations, the alternates remained with the rest of the jurors during court recesses and lunch breaks.

2. 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 one one man tell the other that he had gone to the scene of the crime. I heard him say he had 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." I recall he said the words, "El Don" and "Arvin-Edison canal" and "where he dumped the body at."

3. I just kept on walking without looking at the two men or talking to them. I knew none of the jurors were supposed to go inspect the scene of the crime, but I didn't want to confront them or cause trouble.

4. The man who said he had driven to the scene was not very tall. He was under six feet, thickly built, with dark hair. I cannot recall his name. He might have been a "blue-collar" worker of some sort, such as construction.

I declare under penalty of perjury under the laws of the State of California that the above statement is true and correct.

Dated: Oct 5, 1999.

Deborah Jane Morton

DEBORAH JANE MORTON

Opposition Appendix C

DECLARATION OF DEBRA TEGEBO

I, Debra Tegebo, declare as follows:

I served as a juror in the trial of David Rogers for the crime of murder in 1988. Before I was chosen as a juror at trial, I saw some of the news coverage of the case in the newspapers and on television. It was a popular subject, and it would have been hard for someone who lived in this area not to see it on television.

On at least one occasion, I saw David Rogers himself on television, being led into court for some pre-trial court appearance. He was in a jumpsuit (orange, I think) and his hands were bound together, maybe in handcuffs (I do not recall if they were in front of him or behind him). He looked strange -- deranged, almost. It left the impression that he probably committed the crimes; he looked like he could be guilty.

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.

Every Friday during the trial I would go to back to my place of work, and I also went to 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

Debra Tegebo

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.

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 finally voted for the death penalty because I believed that the sentence would easily be set aside, either by the judge or on appeal, because it was obvious that the defense Gene Lorenz provided for David Rogers had been so poor. I told the other jurors this. Several other jurors were also reluctant to vote for death at first, but I said to them that we were not the final deciders -- because the defense was so badly presented I was certain the sentence would be overturned. On the other hand, 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.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: 4/4/98

Debra J. Tegebo

Opposition Appendix D

DECLARATION OF DARRYL K. JOHNSON

I, Darryl K. Johnson, declare as follows:

1. I was a juror in the trial of David Rogers in Kern County in 1988.

2. I saw David Rogers on television when he was first arrested. I recall his being dressed in jail clothes and appearing unshaven, almost like a homeless person. He looked really bad, totally depressed. D.D.

3. Before I was called for jury duty I also read something about the case in the newspaper. I remember I thought at the time that there was so much publicity about the case that it would almost certainly not be tried in Bakersfield. It was in every newspaper and it was the lead story on television for days. It was the talk of the town that a D.D. deputy sheriff had been arrested for killing prostitutes. Before I called for jury duty My co-workers and other people I knew talked to me about it.

4. Although I think I was as fair to David Rogers as I could be, I think he would have had a more impartial jury if his case had been tried in a place where there was not so much community attention about the case. In Bakersfield, there was a tremendous amount of outcry because he was a deputy on our local force.

5. The Rogers trial was not in session on Fridays, so I went to work each Friday during the trial. My co-workers knew I was a juror on the Rogers case. Although I told them not to do so, my co-workers repeatedly tried to discuss the case with me.

6. On 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.

7. After the jury reached our death penalty verdict, there were so many media people that Ms Ryals and Judge Davis came to the jury room and arranged for us to leave through the Judge's exit.

8. Tam Hodgeson, the District Attorney's investigator gave all of us jurors his business card and told us to call him if anyone harassed us. He implied that someone in the Sheriff's Department might harass us.

9. Mr. Hodgeson also told the jury, after the penalty phase verdict, that he believed there was some kind of coverup in the sheriff's Department and that there could have been other prostitutes murdered or other crimes involving David Rogers that deputies may have known of, even earlier than the crimes David Rogers was accused and convicted of.

10. Since the trial, whenever I mention the Rogers case and that I served on that jury, anyone who is from around here remembers the case and remarks on it.

I declare under penalty of perjury and the laws of the State of California that the foregoing is true and correct.

Dated: 4-16-98.

Darryl K. Johnson

Opposition Appendix E

DECLARATION OF EDWARD ROBERT SAUER

I, Edward Sauer, declare as follows:

I served as a juror in the trial of David Rogers for the crime of murder in 1988. The trial was televised, with cameras in the court room. I saw some of the daily news broadcast coverage on my television set at home throughout the months of the trial. My wife and children were interested in the trial because I was on the jury. Also, my wife knew the lawyers and sometimes came to watch the trial during her breaks, since she worked for the County Assessors Office in the same building. We would watch the television coverage together. Sometimes I turned it on to see if they showed me. We got three local channels and I flipped back and forth to see the trial coverage. I never saw the jury on TV, but I saw David Rogers and I heard the announcers discussing the case, although I don't remember what they said.

The trial was a big event in Bakersfield at the time. People everywhere I went were talking about the case. Citizens were expressing their embarrassment in David Rogers as a public employee.

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. 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.

During the trial my father's best friend took the stand as a witness in the case. I believe his name was Johnny Ward. 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

E. R. Sauer

do so. Johnny Ward's testimony did not influence me, nor did the site visit because my guilty verdict was determined solely by Rogers' confession.

I believe in the death penalty, and that if you kill someone, you should die. Once Rogers took the stand and confessed, I stopped paying attention to the trial because I felt I already had enough information to convict him. I would have listened to the whole trial and kept an open mind had Rogers not confessed. As my wife put it, if was a waste of the taxpayer's money.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, Executed this 5th day of October, 2014 at Bakersfield, CA.

Edward R. Sauer 10-5-14

Edward Robert Sauer

Opposition Appendix F

DECLARATION OF SHIRLEY SAUER

I, Shirley Sauer, declare as follows:

My husband, Edward Sauer served as a juror in the trial of David Rogers for the crime of murder in 1988. The trial, which was a big story at that time, was televised, with cameras in the court room, and we saw some of the coverage on our television set at home. At that time my teenage children, who were not normally interested in the news, watched with us to see if they could get a glimpse of their father. Since I worked in the same building at the time, for the County Assessors Office, I would go and watch the trial during my breaks.

I was familiar with the defense counsel, Gene Lorenz through his ex-wife, and knew that he had a reputation as someone who represented guilty clients.

I recall my husband telling me that he felt bad for the older female jurors for what they had to listen to during the course of the trial. Specifically, he told me that some graphic sexual street language was used during trial. The vulgarity about gave an older female juror a heart attack and he did not feel it was right for the juror to be exposed to it.

When I heard that Rogers had confessed, I felt that the whole trial was a waste of taxpayer's money.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, Executed this 5th day of October, 2014 at Bakersfield, CA.

Shirley Sauer 10-5-14

Shirley Sauer

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Rogers v. The State of California***

No.: **19-7451**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On May 1, 2020, I served the attached **Opposition of Certiorari** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, California, addressed as follows:

Mr. Scott S. Harris
Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Aj Kutchins
Nerissa Huertas
Law Office of Aj Kutchins
284 The Uplands
Berkeley, California 94705

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 1, 2020, at Sacramento, California.

M. Sanchez
Declarant

/s/ ***M. Sanchez***
Signature

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