No. 19-7451

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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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REPLY TO STATE'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY TO STATE'S BRIEF IN OPPOSITION

1. The State's brief in opposition never addresses – much less rebuts – the premise of the tendered petition for writ of *certiorari.* In fact, the State does not even acknowledge the question actually presented by the petition but instead responds to a quite different proposition of its own devise – one that it (unsurprisingly) finds much easier to dispatch. This familiar tactic, of fabricating a straw man and then tearing it apart, demonstrates only that the State has no appropriate answer for the question actually tendered.

It is appropriate in these circumstances to begin by reiterating the 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? (Petition at i.)

Petitioner submits that the question has already been answered, as follows: "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); citing, *Remmer v. United States*, 347 U.S. 227, 229-230 (1945). As the petition demonstrates, virtually every jurisdiction in the country has adopted that principle as a constitutional imperative whenever a court has received credible, substantial evidence of juror misconduct. (See Pet. at 6-7 & 15-16 and cases discussed therein.)

Every jurisdiction, that is, except California – the largest non-federal jurisdiction in the nation – which holds to the view that, even when (as here) a defendant has

presented substantial evidence of juror misconduct, "the defendant is *not* entitled to such a hearing as a matter of right." *People v. Hedgecock*, 51 Cal.3d 395, 415 (1990). Thus – as this case illustrates – California reserves to its courts the prerogative to refuse to hold a "*Remmer* hearing" whenever they choose, regardless of the evidence before them. Thus Petitioner's point is simple: California is disregarding the constitutional imperative recognized by this Court and as a result is repeatedly denying its citizens their rights to due process and an impartial jury.

Rather than respond to this analysis, the State has formulated a different "proposition," which it baselessly attributes to Petitioner: "the proposition that the Constitution requires a hearing for *every* claim of juror misconduct." BIO at 16 (emphasis supplied); see also, *id*. at i [rewriting the "Question Presented"]; *id.* at 11 [framing issue as whether "a hearing is required in every case in which a defendant makes any kind of allegation of outside influence"]); *id.* at 12 [disputing "the proposition that *any time* evidence of juror bias comes to light, due process requires the trial court to question the jurors" (emphasis in original)]. The State then goes about demolishing its own construct with authorities showing that *some* allegations are so insubstantial that they do not require a formal hearing, or any hearing at all. BIO at 10-11, 12-17.

But Petitioner has no quarrel with the principles set forth in the cases on which the State relies: That mere *allegations* of juror misconduct, unsupported by credible evidence, are insufficient to compel the need for a hearing, and that – when there is credible evidence of misconduct – courts have wide discretion to craft the sort of hearing that is

appropriate. See, *e.g., Smith v. Phillips*, 455 U.S. at 215-217; *Sims v. Rowland*, 414 F.3d 1148, 1155 (9th Cir. 2005). Rather, Petitioner depends on the other, more fundamental principle uniformly recognized in those cases: That the Constitution forbids courts from doing what the California Supreme Court has done in this and other cases, namely "remaining idle in the face of evidence indicating probable juror bias." (*Id.* at 1156.) It instead requires any court that has received *credible*, substantial evidence of misconduct to "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial." *Remmer*, 347 U.S. at 229-230.

2. The State asserts that there is no contradiction between this Court's precedent and the approach taken by California courts because California has embraced *Remmer*'s holding that "any unauthorized 'private communication, contact, or tampering with a juror during a trial about the matter pending before the jury' is deemed presumptively ... prejudicial."[1] BIO at 9, quoting *Remmer*, 347 U.S. at 229 (internal signals omitted), and comparing *In re Lucas*, 33 Cal.4th 682, 696 (2004).

The argument is founded on a *non sequitur*. While California has indeed adopted that part of *Remmer*'s teaching, it has rejected *Remmer*'s other holding – reiterated in *Smith v. Phillips* – that, when presented with evidence of such misconduct, the court *must*

[1]The State suggests that this rule – which its courts have accepted – is only an expression of the Court's "supervisory power over the lower federal courts and thus does not constitute controlling authority for state courts." BIO at 9, n. 5 (citations omitted). However that may be, this Court has made clear that the different rule actually at issue in this case – the requirement of a hearing to assess meaningful evidence of juror misconduct – *is* indeed constitutionally compelled. *See Smith v. Phillips*, 455 U.S. at 215-217.

hold a 'hearing' to 'determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial.'" *Remmer*, 347 U.S. at 229-230; accord, *Smith v. Phillips*, 455 U.S. at 215. It is California's faithlessness to that latter principle that gives rise to the instant petition.

3. The State also contends that the constitutional hearing requirement recognized by *Remmer*, *Smith v. Phillips,* and their progeny applies only to trial courts, and has no play in cases like this one in which evidence of juror misconduct first surfaces on state collateral review. The State reasons that because states "'have no obligation to provide' an avenue for collateral review" at all, they have no obligation to apply constitutional protections in such proceedings. BIO at 11, quoting, *Pennsylvania v. Finley,* 481 U.S. 551, 556-557 (1987). The State's reasoning fails. As this Court reiterated on the next page of the opinion on which the State relies: "'[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause.'" *Id*. at 558, quoting, *Evitts v. Lucey,* 469 U.S. 387, 401 (1985).

Thus this Court held in *Evitts* that, although the Constitution does not require states to provide the right to appeal (see *McKane v. Durston*, 153 U.S. 684, 687-688 (1894)), if the State chooses to do so, that right is subject to the Fourteenth Amendment guarantees of Equal Protection and Due Process. *Evitts*, 469 U.S. at 400-401; see also, *Griffin v. Illinois*, 351 U.S. 12 (1956). Similarly, the Constitution does not require states to provide an adversarial preliminary hearing (*Gerstein v. Pugh*, 420 U.S. 103 (1975)); but if the

State chooses to do so, that hearing is subject to the Sixth Amendment right to counsel provision. *Coleman v. Alabama*, 388 U.S. 1 (1970). Nor does the Constitution require states to make malice an element of murder (*Patterson v. New York*, 432 U.S. 197, 198 (1977)) – but if the State chooses to do so, the Fifth Amendment requires that the element be proved beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684 (1975). And, until recently, the Constitution did not compel states to provide a jury trial at the sentencing phase of a capital trial (see *Spaziano v. Florida*, 468 U.S.447 (1984), *overruled by, Hurst v. Florida*, 577 U.S. ___. 136 S.Ct. 616 (2016)), but if a State chose to do so, that jury was subject to the Sixth Amendment requirement of juror impartiality. *Morgan v. Illinois*, 504 U.S. 719, 727 (1992). Indeed, the State was bound to honor that same Sixth Amendment guarantee of impartiality – the very constitutional provision that gives rise to Petitioner's claim in the underlying case – in *every* criminal jury trial the State put on (*Irvin v. Dowd*, 366 U.S. 717), even during the years when states were not constitutionally required to provide jury trials at all. (See *Duncan v. Louisiana*, 391 U.S. 145, 154 (1968).

It is true that California was not compelled by the United States Constitution to provide a *habeas corpus* procedure in which Petitioner could raise his claims of jury misconduct. Having chosen to do so, however, California is bound to adjudicate those claims in accordance with the Constitution's Sixth Amendment and Due Process guarantees. Indeed, that is the only tenable conclusion to be drawn in a case such as this one, in which the Petitioner could not have known of the violation of his rights until after

the trial was concluded, and thus had no vehicle through which to vindicate them other than the collateral review procedure provided under California law. And, as this Court has held, when there is colorable proof of their violation, the vindication of those rights depends on a hearing at which both the extent of the violation and its prejudicial effect can be assessed, for "'[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury.'" *Smith v. Phillips*, 455 U.S. at 217, quoting, *Dennis v. United States*, 339 U.S. 162 (1950).

This in turn disposes of the State's secondary argument in this regard, namely that the Sixth Amendment's guarantee of a right to a fair jury trial has no play here because it was asserted on *habeas corpus* – "a proceeding that involves no jury." BIO at 11-12. While the right, by definition, attends jury trials, it has no meaning unless it can be vindicated whenever its violation comes to light, in whatever proceeding is available to do so – be it the trial itself, on appeal, or on *habeas corpus* or other collateral proceeding. Neither the Sixth Amendment nor fundamental principles of Due Process could tolerate any less. There is no more fundamental principle in our legal system: *Ubi jus, ibi remedium* – where there is a right there is a remedy. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); accord, *Tex & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39-40 (1916).

4. The State repeatedly implies – though it never quite says as much – that Petitioner somehow forfeited the issue he now tenders because he "did not claim that the federal Constitution compelled the California Supreme Court to order an evidentiary hearing." BIO at 2; see also, *id*. at 5. True, Petitioner did not use that precise phrase – but there

can be no mistaking the federal constitutional claim that he raised.

The First Claim for Relief set forth in Petitioner's state *habeas corpus* petition was titled, in pertinent part: "The judgment rendered against Petitioner is invalid, and his consequent imprisonment and sentence of death was unlawfully obtained in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution ... in that Petitioner's trial was tainted by substantial and prejudicial juror misconduct." The *habeas corpus* petition proceeded to detail the pertinent allegations (outlined in the pending Petition for Writ of *Certiorari*, at 6-8) and federal constitutional authorities, which were supported with declarations that the State has helpfully appended to its Brief in Opposition. At the conclusion of the *habeas corpus* petition Petitioner prayed the California Supreme Court to, *inter alia*, "[o]rder an evidentiary hearing at which Petitioner will offer the proof herein stated, and further proof of, the factual allegations stated above ...." Similarly, when Petitioner later moved the California Supreme Court to expand its "order to show cause" to include the juror misconduct claims, he asserted that, "[g]iven the several blatant, admitted forms of misconduct Juror Sauer has freely (and repeatedly) acknowledged committing, it is clear that Petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution and California Constitution, article I, section 16 were violated." And by asking that the claim be included in the court's "order to show cause," Petitioner was perforce requesting under California procedure that it be the subject of an evidentiary hearing. *See* Cal. Rule of Court, rule 4.551(f).

In short, Petitioner clearly presented both aspects of his claim: that his federal constitutional rights were violated and that he was entitled to a hearing to prove as much. The State appears to fault Petitioner for not also asserting, as a separate claim, that the state court's failure to hold a hearing was itself an independent violation of the Constitution. Of course, at the time he filed his Petition, the state court had not yet committed that error. But more to the point: The State's comments are founded on a misconception about the nature of the right asserted. What *Remmer*, *Smith v. Phillips* and their progeny make clear is that a court's duty to hold a hearing, when confronted with substantial evidence of juror misconduct, is not in any sense separate from the underlying Sixth and Fourteenth Amendment rights that were violated. Rather – again – it is simply a necessary part of the vindication of those rights. That is precisely the meaning of the Court's repeated instruction that, "[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury.'" *Smith v. Phillips*, 455 U.S. at 217, quoting, *Dennis v. United States*, 339 U.S. 162 (1950).

Petitioner's invocation of his rights under the United States Constitution was clear and unmistakable. There was no forfeiture.

5. Finally, the State argues at some length that the allegations of juror misconduct set forth in the *habeas corpus* petition were somehow insufficient to warrant further proceedings, much less relief. BIO at 17-21. Notably, the State does not cite or discuss any cases – California, federal or otherwise – regarding the specific forms of juror misconduct detailed by Petitioner. In fact, the State's arguments are at odds with the

pertinent precedent of every jurisdiction that has considered such misconduct, including California.

a. We can start with Juror Edward Sauer's frank admission that he watched the news coverage of the trial proceedings on television. The State seems to contend that this was harmless because Juror Sauer said that the reason he tuned in was "to see if it showed me." BIO at 17-18, quoting Opp. App. A. But (as the State also recounts), what Juror Sauer ended up watching was not himself but rather the news announcer's commentary about the case. As pointed out in the pending petition, purposefully exposing oneself to media accounts of the case on which one is sitting is universally recognized as a classic form of misconduct. See, *e.g., United States v. Bristol-Martir*, 570 F.3d 29, 42 (1st Cir. 2009). This is no less true in California than it is anywhere else. See, *People v. Holloway*, 50 Cal.3d 1098, 1108 (1990) ["It is well settled that it is misconduct for a juror to read newspaper accounts of a case on which he is sitting, and the People so concede"];[2] accord*, In re Boyette* 56 Cal.4th 866, 892 (2013).

The State seems assume to that, because he was initially interested in just seeing himself, Juror Sauer was not exposed to any extraneous information that could have affected his deliberations. But in the absence of a timely hearing – one that now can never be held – it is impossible to know what additional "facts," true or otherwise, Juror Sauer may have learned from the news announcer and what outside opinions about the

[2]Obviously, the prohibition on reading newspapers is at least equally applicable to viewing television coverage. See *People v. Zapien*, 4 Cal.4th 929, 994 (1993).

case to which he might have been exposed. The State would have had a heavy load to carry in order to rebut the presumption of prejudice attendant to this misconduct – but that was a burden it was never required to shoulder.

b. Juror Sauer also freely admitted that he prejudged the case. In his words:

> 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. BIO, Opp. App. A.

Juror Sauer later amplified those remarks, as follows: "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." BIO, Opp. App. E at 2.

As *Smith v. Phillips* indicates, it is improper for a juror to prematurely decide the outcome of the trial. 445 U.S. at 221-222. California law is abundantly clear on this point: "Prejudgment 'constitutes serious misconduct,' raising a presumption of prejudice." *People v. Weatherton*, 59 Cal.4th 589, 598 (2014), quoting, *People v. Brown*, 61 Cal.App.3d 476, 480 (1976). In *Weatherton,* as in this case, one of the jurors decided, before the guilt phase evidence was complete, "that defendant was guilty [and] that he deserved the death penalty. ..." *Id.* at 600. In part on that basis, the state Supreme Court found that the presumption of prejudice arising from the juror's misconduct mandated a reversal of the judgment. *Ibid*. No reason appears why the same result would not have obtained in the instant case – had the state court ordered a *Remmer* hearing.

The State argues that Juror Sauer's statement "did not support a prima facie case 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." BIO at 18. The State is wrong. As the California Court of Appeal explained in a case on point, a juror's statement that "'I made up my mind during trial' was a 'statement of bias'– actually, it showed that she had prejudged the case. ... California courts ... treat statements of bias differently from other statements about a juror's mental processes. ... Indeed, we are aware of no jurisdiction that does not distinguish statements of bias from other statements about a juror's mental processes. The right to an impartial jury could not be protected without a recognition of this distinction." *Grobeson v. City of Los Angeles* 190 Cal.App.4th 778, 790–791 (2010). The state court accordingly rejected exactly the same argument on which the State now relies, and reversed the judgment. Again, the State tenders no tenable reason why that would not have occurred in this case, had the constitutional mandate been honored.

While the State shrugs off some of the acts of misconduct as merely affecting the penalty verdict – which was vacated on other grounds – it is critical to note that Juror Sauer's prejudgment of the case corrupted the guilt phase as well.[3] After Petitioner admitted that he killed one of the two victims, Juror Sauer formed a firm resolve to find

[3]The State points out, accurately, that Petitioner is not under a judgment of death at this moment. BIO at i, n. 1. However, given that the State is still maintaining its prerogative to subject him to another death penalty trial, and that he remains housed on Death Row, Petitioner continues to view this as a "death penalty case."

for the death penalty. In doing so, the juror leapt over the most crucial guilt phase issues he had sworn to consider: whether the killing was first degree murder or (as Petitioner maintained) a lesser form of homicide, and whether Petitioner was responsible for the death of the other victim (which Petitioner denied). In short, had the state court followed *Remmer* and *Smith v. Phillips* it would have had to acknowledge that there was indeed misconduct and it presumptively invalidated the entire judgment.

c. More serious yet was the fact – acknowledged by both Juror Sauer and his wife – that they freely discussed the case as it was being tried. Here we need look no further than *Remmer* itself for the principle that "any private communication ... with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." 347 U.S. at 229. Not only have the federal courts specifically found potentially prejudicial misconduct in communications between a juror and spouse (*see, Stouffer v. Trammell*, 738 F.3d 1205, 1213–1214 (10th Cir. 2013), but the California Supreme Court has specifically held that, for a juror to discuss the pending case with his wife is "an act that constitutes deliberate misconduct." *People v. Ledesma*, 39 Cal.4th 641, 743 (2006).

It would be far-fetched to assume that the Sauers' conversations were benign. They admittedly watched the television coverage together and Mrs. Sauer was sufficiently invested in the case that she attended the trial. BIO, Opp. Apps. A & F. And Mrs. Sauer explicitly advised her husband of her view of the appropriate outcome of the proceedings, agreeing that, in essence, the entire case was over when Petitioner admitted to homicide.

d. There is also a quantity of evidence that Juror Sauer repeatedly violated the trial court's admonitions and visited various locations pertinent to the case, including the scene of the killing. This too constituted misconduct, and a violation of Petitioner's Sixth Amendment rights, both under federal precedent (*e.g.*, *Pyles v. Johnson*, 136 F.3d 986, 992 (5th Cir. 1998) and California law. See, *People v. Sutter,* 134 Cal.App.3d 806, 819 (1982), and cases cited therein.

Without really denying that Juror Sauer's extra-judicial trips were misconduct, the State asserts that they could not have been prejudicial. Although the juror admitted going to the scene of the killing, he claimed that he did so with the rest of the jury. BIO, Opp. App. E. As the State correctly observes, however, the jury in this case never went on an authorized trip to the crime scene (or anywhere else). From this the State deduces that Juror Sauer in fact never went to the scene.

There are several problems with the State's deduction, and good reasons to conclude that the juror in fact made an unauthorized trip to the scene of the killing. First of all, another juror (Deborah Morton) declared that one of the male jurors, whose description matched that of Edward Sauer, *said* that he had driven out to the scene by himself. BIO, Opp. App. B. Second, the State does not dispute Juror Sauer's admissions about other improper visits to locales involved in the case, which tend to bolster the conclusion that he made a similar visit to where the killing took place. Lastly: if, as seems clear, the juror's memory was faulty the question remains: in what way did he misremember? It is far more likely that he forgot the circumstances surrounding his trip

to the crime scene – including who he was with – than that he was wrong about having gone at all, given that (by his account) he found the visit disturbing. BIO, Opp. App. E.

The State dismisses Ms. Morton's statements in this regard as "based exclusively on inadmissible hearsay." BIO at 20. The State is again wrong about the California law of evidence. Absent a sworn admission by Juror Sauer himself that he had made an illegal visit to the crime scene, Ms. Morton's account of his statements in that regard would certainly have been allowed into evidence. Had Juror Sauer denied it, Ms. Morton's testimony would have come in as an account of prior inconsistent statements under California Evidence Code, section 1235, and had he not been available to testify at all, his statements, as reported by Ms. Morton, would have constituted admissions against his social and penal interests pursuant to California Evidence Code section 1230.[4] The State also contends that Ms. Morton's declaration is too "vague" and "speculative" regarding the description to establish that it was indeed Juror Sauer she heard. BIO at 20. Of course, those details could have been fleshed out – and, if necessary, an identification made – at an actual *Remmer* hearing if one had been held. As it stands, however, Petitioner has alleged in his *habeas corpus* petition that the description matched Juror Sauer and, under California procedure, those allegations must be credited. *People v. Duvall*, 9 Cal.4th 464, 474-475 (2009).

Had the required *Remmer* hearing been held, the State may have been able to prove

[4]Juror Sauer's violation of the trial court's admonitions constituted a contempt of court under California Code of Civil Procedure, section 1209 (a), and as such were punishable by a fine or imprisonment or both, pursuant to section 1218 of that Code.

otherwise, or to rebut the presumption that Juror Sauer's unlawful excursions were prejudicial. But we will never know, for the state court chose not to accord with the mandated procedure.

e. While the scope, severity and variety of forms of misconduct in which Juror Sauer engaged is impressive, his were not the only acts that violated Petitioner's Sixth Amendment rights. As set forth in the declarations attached to the Brief in Opposition, other jurors were subjected to pressure from co-workers and other community members, who urged them to convict and exact the harshest punishment on Petitioner. BIO, Opp. Apps C & D. While these jurors themselves can hardly be blamed, this interference with their function also falls in the category of "misconduct." As this Court instructed in *Remmer*: "In a criminal case, *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 prejudicial ...." 347 U.S. at 229. The fact on which the State rests – that both jurors "honored their oaths" and did their best to avoid discussing the case with others – does not respond to the reality that those others tried hard to influence the jurors' verdicts. Without a hearing, it cannot be said that the resulting presumption of prejudice was rebutted.

Conclusion

As Petitioner has demonstrated – and the State has failed to rebut – California has chosen to disregard the Sixth and Fourteenth Amendment principles and practices announced by this Court in *Remmer* and *Smith v. Phillips* and followed by virtually other court in the country. As a result, the largest non-federal jurisdiction in the nation continues to deprive its citizens of their federal constitutional rights, and Petitioner remains vulnerable to being put to death without ever having had a hearing on the unrebutted evidence of prejudicial juror misconduct that infected his capital trial.

Dated: May 21, 2020

Respectfully submitted,

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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 May 22, 2020, I served the enclosed Reply to State's Brief in Opposition to Petition for Writ of *Certiorari* 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 May 22, 2020, at Berkeley, California.

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