IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

DAVID KEITH ROGERS,

On Habeas Corpus.

CAPITAL CASE
S084292

(Related Appeal No. S005502)
Kern County Superior Court No. 33477
The Honorable Gerald K. Davis, Judge

INFORMAL OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

On February 17, 1987, petitioner was arraigned in the West Kern Municipal Court on a complaint filed the same day charging him with the murders of an unidentified female human being on or about February 8, 1987, and Janine Benintende on or about January 1, 1986 to February 21, 1986, both with the use of a gun (Pen. Code, §§ 187, 12022.5). The complaint also charged a multiple murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)). (CTS 943-944.) The matter was continued one day for appointment of counsel. At that time, Eugene Lorenz was appointed to represent petitioner. (CTS 950.)

On April 1, 1987, petitioner was charged by information with the murders of Tracie Clark on or about February 8, 1987 (Count 1), and Janine Marie Benintende (count 2) on or about January 1, 1986 to February 21, 1986, both with the use of a gun (Pen. Code, §§ 187, 12022.5). The information also charged a multiple murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)). (CT 354-355.)

On November 16, 1987, trial commenced with the hearing of motions and jury selection. On February 17, 1988, opening statements were given and the presentation of evidence to the jury commenced. (CT 480-497.) On March

7, 1988, after the People rested their case-in-chief in the guilt phase, the court granted a defense motion for acquittal of premeditated first degree murder as to Count 2, leaving the charge as one of second degree murder. (RT 5174-5184, 5201-5203.)

On March 7, 1988, presentation of evidence in the defense case commenced. (CT 586-591.) On March 14, 1988, the People presented their case in rebuttal, counsel presented their arguments, the court instructed the jury and the jury retired to deliberate. (CT 593-594.) The jury was instructed on first degree murder by premeditation (which only applied to Count 1), second degree murder by express and implied malice and voluntary manslaughter by a sudden quarrel or heat of passion. (CT 629-648.) On March 16, 1988, the jury returned verdicts finding petitioner guilty of murder in the first degree in Count 1 and guilty of murder in the second degree in Count 2. The jury found that both murders were committed with the use of a gun and found the multiple murder special circumstance true. (CT 596.)[1/]

The penalty phase commenced on March 23, 1988, with various preliminary matters, opening statements for the People and the defense and the presentation of the People's case. (CT 681-683.) The defense case was presented on March 24, 1988. (CT 689-691.) On the next court day, March 28, 1988, the People and the defense made their arguments to the jury, the court gave the penalty phase instructions and the jury retired to deliberate. (CT 692-693.) On March 29, 1988, the jury returned a verdict of death. (CT 694-695.)[2/]

On May 2, 1988, the court heard and denied a motion for a new trial and the automatic motion to modify the penalty verdict under Penal Code section 190.4, subdivision (e). On Count 1, the court sentenced petitioner to

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1. The jury deliberated for 8 hours, 41 minutes, assuming that it took one-hour lunches (as described in RB 3, fn. 2).

2. The jury deliberated for 7 hours, 45 minutes, in the penalty phase, assuming that it took one-hour lunches (as described in RB 4, fn. 3).

death. On Count 2, it sentenced appellant to prison for 15 years to life plus two years for the gun use enhancement. (CT 729.)

The appeal of the judgment was automatic. On August 10, 1988, the Attorney General's office filed a request by respondent for correction of and addition to the record, serving petitioner's trial counsel. On January 13, 1989, current counsel was appointed to represent petitioner. On or about July 13, 1989, pursuant to extensions of time granted by the Supreme Court, appellant filed a motion which included a request for correction of and addition to the record and related motions. The Attorney General's office filed a response on behalf of respondent on July 25, 1989. The District Attorney's office filed a supplemental response on behalf of respondent on or about July 27, 1989. A hearing was held on the record on December 15, 1989. Petitioner filed a proposed settled statement on or about August 14, 1992, which was approved September 16, 1992. The record was corrected and certified complete on May 24, 1994.

Petitioner filed his opening brief on appeal on November 4, 1997. Respondent filed its brief on September 30, 1998. Petitioner filed a supplemental opening brief on November 12, 1998 and his reply brief on September 13, 1999. The instant petition was filed on December 14, 1999. The Court directed respondent to file a response on August 21, 2000.

INTRODUCTION TO ARGUMENT

A petition for writ of habeas corpus must be verified by the oath or affirmation of the party making the application. (Pen. Code, § 1474, subd. 3.)

As this Court has stated:

> A habeas corpus petition must be verified, and must state a "prima facie case" for relief. That is, it must set forth specific facts which, if true, would require issuance of the writ. Any petition that does not meet these standards must be summarily denied. . . .

(*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1258.)

In *People v. Karis* (1988) 46 Cal.3d 612, 656, the Court stated:

> When a habeas corpus petition is prepared by the defendant in propria persona, we require that he "allege with particularity the facts upon which he would have a final judgment overturned." (*In re Swain* (1949) 34 Cal.2d 300, 304, 209 P.2d 793.) *This rule applies with even greater force when a petition is prepared by counsel.* Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing.
>
> . . .

(*Id.* at p. 656 [emphasis added].)

As stated in *Ex parte Walpole* (1890) 84 Cal. 584, the factual allegations must be "in such form that perjury may be assigned upon the allegations if they are false."

In *People v. McCarthy* (1986) 175 Cal.App.3d 593, 596-597 for example, the Court of Appeal found deficient a petition which was verified by the statement: "I know the contents of the petition, which contents *I believe to be true.* I declare under penalty of perjury that the foregoing is true and correct." [Italics in the original.]

Similarly, a petition based upon the trial attorney's unsworn statements and the appellate attorney's declaration containing hearsay was denied in *People v. Madaris* (1981) 122 Cal.App.3d 234, 241-242 (overruled on other grounds concerning prior convictions for impeachment in *People v. Barrick* (1982) 33 Cal.3d 115, 127.) As emphasized in *Madaris*, "Verification, under the statute, manifestly requires that all factual matters *relied upon* be stated by their declarant, whomsoever he may be, under oath." (*Id.* at p. 241.)

The reasons for the requirement of verification are readily apparent. Allegations within the petitioner's personal knowledge should be usable against him as admissions or prior inconsistent statements if he should later make contrary allegations. Requiring that petitioner personally make allegations of fact which are within his own knowledge ensures that the allegations are made in good faith (see *Star Motor Imports, Inc. v. Superior Court* (1979) 88

Cal.App.3d 201, 204), and that petitioner will not make conflicting allegations at a later point in the same proceeding or a subsequent proceeding.

In the instant proceeding, the facts stated in the petition itself are not verified by petitioner. Counsel verified the petition, not based on personal knowledge but relying, instead, on the record and on the exhibits to the petition. (See Verification, which follows Pet. 235.) The allegations which are neither proven by the record, which are sworn to under penalty of perjury or are sufficiently authenticated, nor verified are insufficient under the authorities cited above, although they may be effective to define and argue the claims.

In addition, respondent objects to hearsay within the various declarations as insufficient to constitute verified allegations (*People v. Madaris*, *supra*, 122 Cal.App.3d 234, 241-242; *Star Motor Imports, Inc. v. Superior Court*, *supra*, 88 Cal.App.3d 201, 204) or to prove the truth of the matters stated (Evid. Code, § 1200).

Respondent notes that even if the petition is later verified, it contains virtually no specific allegations of particular facts beyond those contained in the record on appeal or in the attached declarations. Instead, the petition appears to rely exclusively on the facts in the appeal record and the declarations. As this court has emphasized, the petition should "state fully and with particularity the facts on which relief is sought (*People v. Karis,* (1988) 46 Cal.3d 612, 656, 250 Cal.Rptr. 659, 758 P.2d 1189 []; *In re Swain* (1949) 34 Cal.2d 300, 304, 209 P.2d 793)." (*People v. Duvall* (1995) 9 Cal.4th 464, 474.)

As the Court in *Duvall* explained:

> Our state Constitution guarantees that a person improperly deprived of his or her liberty has the right to petition for a writ of habeas corpus. (Cal. Const., art. I, s 11; see *In re Clark* (1993) 5 Cal.4th 750, 764 & fn. 2, 21 Cal.Rptr.2d 509, 855 P.2d 729 (hereafter *Clark*).) Because a petition for a writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to plead sufficient grounds for relief, and then later to prove them. "For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the

> conviction and sentence; defendant thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260, 275 Cal.Rptr. 729, 800 P.2d 1159, italics in original (hereafter *Gonzalez*).)
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> . . .
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> An appellate court receiving such a petition evaluates it by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief. (*Clark, supra,* 5 Cal.4th at p. 769, fn. 9, 21 Cal.Rptr.2d 509, 855 P.2d 729; *In re Lawler* (1979) 23 Cal.3d 190, 194, 151 Cal.Rptr. 833, 588 P.2d 1257 [hereafter *Lawler*].) If no prima facie case for relief is stated, the court will summarily deny the petition. If, however, the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an OSC. (*Clark, supra,* at p. 781, fn. 16, 21 Cal.Rptr.2d 509, 855 P.2d 729; *In re Hochberg* (1970) 2 Cal.3d 870, 875, fn. 4, 87 Cal.Rptr. 681, 471 P.2d 1.)

(*People v. Duvall, supra,* 9 Cal.4th 464, 474.)

For the reasons just discussed, respondent will address the petition as if the only allegations of specific facts are the facts in the record or the declarations which are relied on in the petition.

ARGUMENT

I.

PETITIONER'S CLAIMS OF JUROR MISCONDUCT ARE INSUFFICIENT TO SHOW A PRIMA FACIE CASE FOR RELIEF

Petitioner raises a claim of juror misconduct, based principally on allegations that (A) juror Sauer watched television coverage of the trial and heard his wife comment on the case; (B) juror Tegebo heard co-workers comment on the case; (C) juror Sauer falsely stated in voir dire that he would consider a verdict of life without parole and (D) a juror, Sauer, visited a motel in the area where the victims were, or might have been, picked up by their murderer and the canal where the Tracie Clark murder occurred, and discussed the visits with another juror. (Pet. 8-25.) Respondent contends that only the allegation of watching television coverage of the case is sufficient to establish misconduct and that none of the allegations raise a substantial likelihood of prejudice.

This Court has recently summarized the rules governing claims of jury misconduct:

> An accused has a constitutional right to a trial by an impartial jury. (U.S. Const., amends. VI and XIV; Cal. Const., art. I, 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722 [81 S.Ct. 1639, 1642, 6 L.Ed.2d 751] (*Irvin*); *In re Hitchings* (1993) 6 Cal.4th 97, 110 [24 Cal.Rptr.2d 74, 860 P.2d 466] (*Hitchings*); see *Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 [95 Cal.Rptr. 516, 485 P.2d 1132] (*Weathers*).) An impartial jury is one in which no member has been improperly influenced (*People v. Nesler* (1997) 16 Cal.4th 561, 578 [66 Cal.Rptr.2d 454, 941 P.2d 87] (*Nesler*); *People v. Holloway* (1990) 50 Cal.3d 1098, 1112 [269 Cal.Rptr. 530, 790 P.2d 1327] (*Holloway*)) and every member is " 'capable and willing to decide the case solely on the evidence before it' " (*McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 554 [104 S.Ct. 845, 849, 78 L.Ed.2d 663] (*McDonough*), quoting *Smith v. Phillips* (1982) 455 U.S. 209, 217 [102 S.Ct. 940, 946, 71 L.Ed.2d 78] (*Smith*)).
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> However, with narrow exceptions, evidence that the internal

thought processes of one or more jurors were biased is not admissible to impeach a verdict. The jury's impartiality may be challenged by evidence of "*statements* made, or conduct, conditions, or *events* occurring, either within or without the jury room, of such a character as is *likely* to have influenced the verdict improperly," but "[n]o evidence is admissible to show the [*actual*] *effect* of such statement, conduct, condition, or event upon a juror . . . or concerning the *mental processes* by which [the verdict] was determined." (Evid. Code, 1150, subd. (a), italics added; see *People v. Hutchinson* (1969) 71 Cal.2d 342, 349-350 [78 Cal.Rptr. 196, 455 P.2d 132] (*Hutchinson*).) Thus, where a verdict is attacked for juror taint, the focus is on whether there is any overt event or circumstance, "open to [corroboration by] sight, hearing, and the other senses" (*Hutchinson, supra*, 71 Cal.2d at p. 350), which suggests a likelihood that one or more members of the jury were influenced by improper bias. [Fn. 17]

[Fn. 17.:] This rule "serves a number of important policy goals: It excludes unreliable proof of jurors' thought processes and thereby preserves the stability of verdicts. It deters the harassment of jurors by losing counsel eager to discover defects in the jurors' attentive and deliberative mental processes. It reduces the risk of postverdict jury tampering. Finally, it assures the privacy of jury deliberations by foreclosing intrusive inquiry into the sanctity of jurors' thought processes." (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 414 [185 Cal.Rptr. 654, 650 P.2d 1171], fn. omitted (*Hasson*).)

When the overt event is a direct violation of the oaths, duties, and admonitions imposed on actual or prospective jurors, such as when a juror conceals bias on voir dire, consciously receives outside information, discusses the case with nonjurors, or shares improper information with other jurors, the event is called juror misconduct. (See, e.g., *Nesler, supra*, 16 Cal.4th 561, 578-579; *In re Carpenter* (1995) 9 Cal.4th 634, 647 [38 Cal.Rptr.2d 665, 889 P.2d 985] (*Carpenter*); *Hitchings, supra*, 6 Cal. 4th 97, 118.) A sitting juror's involuntary exposure to events outside the trial evidence, even if not "misconduct" in the pejorative sense, may require similar examination for probable prejudice. Such situations may include attempts by nonjurors to tamper with the jury, as by bribery or intimidation. (See, e.g., *Remmer v. United States* (1954) 347 U.S. 227, 229 [74 S.Ct. 450, 451, 98 L.Ed. 654]; *People v. Cobb* (1955) 45 Cal.2d 158, 161 [287 P.2d 752] (Cobb); *People v. Federico* (1981) 127 Cal.App.3d 20, 38-39 [179 Cal.Rptr. 315] (*Federico).*)

(*In re Hamilton* (1999) 20 Cal.4th 273, 293-295.)[3/]

A. Juror Sauer's Exposure To News Media Accounts And His Wife's Comments

Petitioner argues that Juror Sauer committed misconduct in permitting himself to be exposed to news accounts of the trial and in discussing the case with his wife. (Pet. 15-20; see Pet. 9-10 [allegations], 11-12 [discussion of declaration].)

The governing standard was described in *People v. Nesler* (1997) 16 Cal.4th 561, 578-579:

> We assess the effect of out-of-court information upon the jury in the following manner. When juror misconduct involves the receipt of information about a party or the case from extraneous sources, the verdict will be set aside only if there appears a substantial likelihood of juror bias. (*In re Carpenter* (1995) 9 Cal.4th 634, 653.) Such bias may appear in either of two ways: (1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not "inherently" prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was "actually biased" against the defendant. If we find a substantial likelihood that a juror was actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict, because a biased adjudicator is one of the few structural trial defects that compel reversal without application of a harmless error standard.

(*Id.* at pp. 653-654 [lead opinion].)

In *In re Carpenter* (1995) 9 Cal.4th 634, 653, 654, the Court stated:

> In an extraneous-information case, the "entire record" logically bearing on a circumstantial finding of likely bias includes the nature of the juror's conduct, the circumstances under which the information

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3. Petitioner relies heavily on *Hamilton* (Pet. 9-10), but fails to mention its holdings, which are uniformly adverse to his arguments, as respondent will explain below.

> was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant. For example, the stronger the evidence, the less likely it is that the extraneous information itself influenced the verdict

Petitioner relies on juror Sauer's declaration, dated September 23, 1996, which states:

> 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 home 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 got 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.

(Exh. 8.)

It appears to respondent that, if the statements in the declaration are true, the conduct described would constitute misconduct by the active receipt of extraneous information. (*In re Carpenter, supra,* 9 Cal.4th at p. 647; see *id.* at p. 642.) In addition, the conduct would constitute a violation of the court's admonition not to watch television news accounts of the case. (RT 809-810; see RT 4522-4523 [to jury: "remember what I told you about watching television broadcasts about this case"].) However the declaration fails to show a substantial likelihood of prejudice.

Sauer's declaration states that he "saw some of" the television coverage of the trial at home and that "[s]ometimes" he turned it on to see if they showed him and flipped from channel to channel. He said, "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." Thus, the only reason stated in Juror Sauer's declaration that *he* watched television coverage of the trial was *to see himself.* The declaration does not mention anything of substance in the news

stories, except that Sauer saw petitioner. Instead, the news coverage made so little impression on Sauer that he remembered nothing of what the announcers said[4/]

Contrary to petitioner's premise (Pet. 15-18), nothing in Sauer's declaration shows that he saw any particular news stories. The substance of the statements are that Sauer and his wife "would watch the television coverage together," at unstated times and on an unstated number of occasions, and that he sometimes "flipped back and forth to see the trial coverage" in order to see himself. (Exh. 8.) Petitioner presents no valid allegations which might tend to

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4. The declaration does not state, as petitioner argues, that Sauer "spent his evenings actively seeking out all of the televised reports that he could find, changing channels . . . to make sure that he heard it all." (Pet. 15.)

As respondent has noted, petitioner bears the burden of setting forth "specific facts which, if true, would require issuance of the writ." (*People v. Gonzalez, supra,* 51 Cal.3d 1179, 1258.) As noted above, the petition itself contains no verified allegations, although the attached declarations do.

A report of the Sheriff's comment after the guilt verdict and before the penalty phase that he would have "no problems at all if he goes to the electric chair. It's been tough on everyone" (RT 5734; Exh. A on motion) could not have affected the guilt phase. It would also have no persuasive force as to the penalty verdict because the jury was told to weigh the factors for itself to determine the appropriate penalty. Moreover, since the Sheriff had a duty to uphold the law, it would be expected that he would personally hold other peace officers to a higher standard. As in *In re Carpenter, supra,* 9 Cal.4th at p. 650 and *Romano v. Oklahoma* (1994) 512 U.S. 1, 13-14, it is impossible to predict the effect of the extraneous information, at least without inadmissible declarations about the effect of the information on deliberations. Moreover, petitioner has waived any claim of prejudice by declining the court's offer to question the jurors regarding whether they were exposed to the Sheriff's comment. (RT 5745, 5747.)

Other news stories discussed by petitioner preceded the trial and, under Sauer's declaration, were not seen by Sauer. (Pet. 18; see Pet. 18, fn. 11 [admitting that Sauer was not exposed to any pre-trial media accounts of the case].)

show that Sauer saw any particular news stories.[5/] Since no extraneous material can be identified, petitioner fails to show that the extraneous material was inherently prejudicial. Petitioner also fails to show actual bias due to exposure to the extraneous material.

In *In re Carpenter, supra,* 9 Cal.4th 634, during the guilt phase of trial, a juror had obtained information, "from newspaper accounts, either directly or through her husband" that the defendant had already been convicted of other murders and sentenced to death in another county. The husband had told the juror that the trial was a waste of time and money. In addition, the juror and her husband had been "experiencing drinking problems and marital troubles" and had made false statements regarding their newspaper subscription in their declarations during habeas corpus proceedings. (*Id.* at pp. 642-643, 647.) However, this Court disagreed with the finding of the superior court that the misconduct was prejudicial. (*Id.* at p. 647.) Specifically, the Court disagreed with the superior court's finding that the extraneous was "inherently prejudicial." (*Id.* at p. 655.) The Court found the evidence of guilt

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5. Due to this failing, petitioner's reliance on videotaped television news stories in Exhibits 49 and 50 is misplaced. (See Pet. 16-17.) Even if the television news stories in Exhibits 49 and 50 are considered, they fail to show a reasonable probability of prejudice. The story with Janine Benintende's mother (see Pet. 16-17) merely shows that her mother was upset about her daughter's murder, together with facts which were proven by the evidence. As this Court held in a different context in *People v. Breaux* (1991) 1 Cal.4th 281, 295, "the fact that the victim had friends, some of whom felt that her murderer should receive the death penalty, does not make this case different from most murder cases . . . ." Other news stories mentioned by petitioner (Pet. 17) also show nothing more than facts which were proven by the evidence. A news reporter's implication that the prosecution had "demolished" a defense witness on cross-examination and had argued effectively (Pet. 17-18) are wholly innocuous because the jury heard the cross-examination and argument itself. It is not the law that jurors are presumed to be swayed by a television news personality's opinions which have an uncertain basis and are subject to a well-known motive to sensationalize a story to gain viewers.