No. S084292
(Related Appeal No. S005502)
(Kern County Superior Ct. No. 33477)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE DAVID KEITH ROGERS,

Petitioner.

On Habeas Corpus, Following A Judgment Of Death Rendered In The State Of California, Kern County (Hon. Gerald K. Davis, Judge Of The Superior Court)

PETITIONER'S REPLY TO ATTORNEY GENERAL'S INFORMAL OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

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DEATH PENALTY CASE

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INTRODUCTION

The Attorney General has already conceded that an order to show cause should issue in response to the Petition for Writ of Habeas Corpus in this case, and that an evidentiary hearing should be held. The only question now pending is how much of his case Petitioner will be permitted to prove.

The Attorney General admits that a hearing is warranted in connection with the vicious assault on Tambri Butler, evidence of which was introduced as a an aggravating factor at the penalty phase, and cited by the trial judge in upholding the imposition of the death penalty. The Attorney General acknowledges that this hearing should include: Petitioner's claims concerning newly discovered evidence and use of false evidence which show Petitioner was misidentified as Ms. Butler's attacker (Claim Three); the prosecution's failure to disclose material evidence relating to the assault (Claim Four); and trial counsel's failure to investigate the incident (Claim Five, part K). We submit that a *prima facie* case has similarly been made for relief in regard to Petitioner's claims of jury misconduct (Claim One), unlawful pre-trial shackling (Claim Two), and myriad other instances of ineffective assistance on the part of trial counsel (Claim Five).

In particular, it would be unprecedented for the Court to dismiss out of hand Petitioner's allegations (supported by competent declarations) establishing multiple instances of jury misconduct. The cases cited by the Attorney General do not support such an abbreviated and peremptory response. On the contrary, all the cases relied on by the Attorney General were decided only *after* an evidentiary hearing at which the petitioner had an opportunity to submit first-hand evidence and formal argument. Notably, the juror misconduct already shown here by declaration is far more egregious than that which was alleged in the cases cited by the Attorney General. But throughout his "informal response" the Attorney General repeatedly asserts that Petitioner needs to adduce more evidence in order to merit relief. Petitioner asks of the Court to grant him the opportunity to present that evidence.

Finally, despite the need for a show cause order as to matters the Attorney General has conceded require a hearing (and those he has not), we respectfully submit that the most prudent and economical course

would be for this Court first to consider and decide our direct appeal. Many of the claims contained in the Petition—particularly those concerning trial counsel's ineffectiveness—turn on legal issues that will not be fully resolved until the direct appeal is determined. And as serious as Petitioner's habeas corpus claims are, the Court need not reach them, because the record of the trial itself already contains substantial reversible error.

ARGUMENT

I.

JURY MISCONDUCT.

The evidence submitted in support of David Rogers' Petition for Habeas Corpus relief ("Pet.") clearly demonstrates that jury misconduct occurred in this case in several different forms, on numerous occasions, involving various jurors. The Attorney General devotes much of his response to discussing the procedure used to assess such claims, and he offers extensive quotes from this Court's cases, sometimes reiterating the same passages several times. However, the Attorney General nowhere states the primary procedural rule set forth in this Court's cases over the last century or so:

> [J]ury misconduct raises a presumption of prejudice; and unless the prosecution rebuts that presumption by proof that no prejudice actually resulted, the defendant is entitled to a new trial. (*People v. Pierce*, 24 Cal. 3d 199, 207 (1979) (citing, *inter alia*, *People v. Honeycutt*, 20 Cal. 3d 150, 156 (1977)))

See People v. Conkling, 111 Cal. 616, 628 (1896); *Remmer v. United States*, 347 U.S. 227, 229 (1954); *accord*, *e.g.*, *People v. Majors*, 18 Cal. 4th 385, 417 (1998); *People v. Nesler*, 16 Cal. 4th 561, 578 (1997); *People v. Zapien*, 4 Cal. 4th 929, 994 (1993); *People v. Marshall*, 50 Cal. 3d 907, 949 (1990) (once juror misconduct shown, the Attorney General "must then rebut the presumption or lose the verdict"). As this Court has explained:

> "The presumption of prejudice is an evidentiary aid to those parties who are able to establish serious misconduct of a type likely to have had an effect on the verdict or which deprived the complaining party of thorough consideration of his case,

> yet who are unable to establish by a preponderance of the evidence that actual prejudice occurred." (*People v. Holloway*, 50 Cal. 3d 1098, 1109 (1990) (quoting *Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 416 (1982)))

While we believe Petitioner can demonstrate prejudice by a preponderance of the evidence, according to long-established law Petitioner has done his part by demonstrating that misconduct occurred, and it is now the Attorney General's burden to dispel the presumption of resulting prejudice.

The reason for the Attorney General's failure to acknowledge his legal obligation is patent: He cannot rebut the presumption of prejudice that flows from the misconduct in this case, and thus he must inevitably "lose the verdict." The nature of the egregious misconduct, especially when combined with the fact that it was concealed for so many years, renders it impossible for the Attorney General to prove (as he must under the law) that there is no "substantial likelihood," that the verdict was tainted by the votes of one or more of the implicated jurors. It is no longer possible to determine precisely which extra-record "facts," inflammatory pictures, emotional appeals, editorial comments and the like were seen or heard by Juror Sauer as he systematically monitored television coverage of the trial. Nor is there any reliable method to measure the avidly pro-prosecution statements Mr. Sauer heard from his wife, or the similar remarks from co-workers that pressured Juror Tegebo. We likely will never know the precise content (much less the effect) of the patently improper discussion of the case that took place between two sitting jurors, overheard by Alternate Juror Morton. Likewise, we will never know what was seen during the unlawful site visits undertaken by one of those jurors.

It is plain, however, that at least one juror prejudged the most important issue in the case and rendered a death verdict in accordance with a long-held bias that he had concealed on voir dire. We know this because he said so.

In case the Attorney General fails to persuade the Court to ignore more than a century of its own law regarding the presumption of prejudice, he has a "fallback" position. The Attorney General asserts that—except for Juror Sauer's television viewing—none of the foregoing constituted jury misconduct at all. Thus, he would have the Court believe,

the presumption of prejudice did not otherwise arise. As will be discussed presently, that argument also is contradicted by black letter law announced by this Court and the United States Supreme Court. In fact, there were at least *six* classic examples of unlawful conduct of different sorts effected by, or affecting, the jury in this case. Regardless who bears the burden at this point there is more than enough evidence to show that Petitioner was deprived of a fair trial by these many instances of misconduct.

A. Improper Receipt Of News Media Accounts.

The Attorney General concedes that Juror Sauer committed misconduct when he and his wife together systematically monitored television news coverage of the trial, but the Attorney General insists that the misconduct was by its nature so innocuous that there is not even a possibility, much less a "substantial likelihood," that Petitioner's constitutional rights were compromised as a result. We disagree.

The Attorney General fails to reckon with how egregious the misconduct was in this instance—and how the egregiousness of the misconduct spells irrebuttable prejudice. This is not a case in which a juror received news accounts or other extraneous information inadvertently (*see, e.g., People v. Nesler*, 16 Cal. 4th at 579; *People v. Lucas*, 12 Cal. 4th 415, 486-87 (1995); *People v. Zapien*, 4 Cal. 4th at 994; *People v. Cummings*, 4 Cal. 4th 1233, 1331 (1993); *People v. Holloway*, 50 Cal. 3d at 1110; *People v. Hogan*, 31 Cal. 3d 815, 844-46 (1982); *People v. Andrews*, 149 Cal. App. 3d 358, 363-65 (1983)), or could otherwise be said to be a "passive" recipient of such information (*see, e.g., In re Carpenter*, 9 Cal. 4th 634, 655-56 (1995)).[1] Nor—in contrast to all of the cited cases and virtually every similar case we have been able to find—was Juror Sauer's exposure to outside information limited to one or two occasions. Rather, defying the trial court's repeated admonitions against such conduct, Juror Sauer repeatedly sought out television news

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[1]In a different portion of his brief, the Attorney General pointedly notes that "this Court has found . . . there is a difference between active and passive receipt of extraneous information." Informal Opposition to Petition for Writ of Habeas Corpus ("IO") at 15 (citing *In re Carpenter* and *In re Hamilton*, 20 Cal. 4th 273, 305 (1999)).

reports in a manner specifically designed to ensure that he was exposed to as much of that forbidden information as possible.[2] Ex. 8 at 1:5-15 (Sauer Decl.) (emphasis added).

This case also differs from those discussed by the Attorney General—and virtually all of the pertinent precedent—in another important respect. In the vast majority of cases, the misconduct is revealed (often by the malfeasant juror himself or herself) during the trial, or shortly afterwards. *See, e.g., People v. Nesler*, 16 Cal. 4th at 570 (issue raised on motion for new trial); *People v. Zapien*, 4 Cal. 4th at 994 (issue arose during trial); *People v. Cummings*, 4 Cal. 4th at 1331 (issue arose between guilt and penalty phase). In this case, Juror Sauer concealed his misconduct for more than eight years after the trial ended.

Those facts not only make the misconduct in this case worse than in prior, similar cases, but also make it impossible to dismiss that misconduct as somehow non-prejudicial. If the "rebuttable presumption of prejudice" has any meaning whatsoever, it means that the Attorney General bears the burden of showing both (1) that none of the material viewed by Juror Sauer during his bouts of channel surfing was "so prejudicial in and of itself that it [was] inherently and substantially likely to have influenced [the] juror," and (2) "even if the information is not 'inherently' prejudicial," the nature of the misconduct and surrounding circumstances do not demonstrate substantial likelihood that the "juror was 'actually biased' against the defendant." *People v. Nesler*, 16 Cal. 4th at 578-79. He can show neither, for the extent of the misconduct and the length of time during which it was concealed render his task impossible.

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[2]Remarkably, the Attorney General attempts to dispute this assertion, *contending* that Juror Sauer's declaration does not contain any such damning admission. IO at 11 n.4. In response we quote the pertinent part of the declaration:

> 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. (Ex. 8 at 1:7-13 (Sauer Decl.))

As the Petition and supporting declarations demonstrate, it is now too late to identify with any confidence *which* news reports Juror Sauer watched—let alone to reconstruct the content of all of the stories he was likely to have seen. Of the three local television channels that Juror Sauer regularly "surfed," one has long since destroyed all of its on-air coverage of Petitioner's trial; the other two were able to recover only a fraction of the videotapes shown on the air, and most of those are without the "sound-over" narration and commentary that accompanied them. *See* Pet. at 16 n.10 (and declarations discussed therein). Since it is not possible to identify, even approximately, the illicit images, words, and "facts" absorbed by the errant Juror, the Attorney General also cannot possibly upset the presumption that they were "inherently prejudicial"—much less can he demonstrate that they were wholly unlikely to have created bias.

There is another respect in which the passage of time resulting from the juror's concealment makes the Attorney General's task futile. At this late date, the memories of Juror Sauer and the other members of his family cannot be taken as reliable sources either for determining the specific content of the material that he viewed during those evenings in 1988, or for assessing the influence that material had upon him.[3] *See United States v. Resko*, 3 F.3d 684, 695 (3d Cir. 1993) (holding that passage of one year made it impossible to assess effect of misconduct; presumption of prejudice required reversal). There is, in short, no way for the Attorney General to rebut the presumption of prejudice flowing from Juror Sauer's flagrant misconduct.

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[3]The Attorney General takes Juror Sauer's admitted lack of specific memory of the newscasts to mean that nothing of substance was presented, and that (in any event) the coverage made little impression on him. IO at 10. Such speculation is contrary to common experience: clearly everyone has seen or read things in the popular media that influenced their opinion on a given subject—but how many of those specific statements and images do we specifically recall eight years later? A simpler and more sensible inference to be drawn from Juror Sauer's lack of specific recollection is that he was unable, eight years after the fact, to recall whether and to what extent the various things that shaped his view of the case were conveyed to him properly in court, as opposed to improperly, through watching television.

Moreover, even without a presumption of prejudice, Petitioner would be entitled to relief on this claim, because the available evidence demonstrates far more than a substantial likelihood that prejudice resulted from the acknowledged misconduct. While it is impossible to reconstruct just how much of the television coverage Juror Sauer saw, it is clear from his declaration that he (and his family) watched repeatedly, and when they did watch they did so methodically, "flipp[ing] back and forth" among the three local channels to catch all of the available reports. Ex. 8 at 1:11-13 (Sauer Decl.).

As set out in the Petition, among the contemporary "news" accounts that have been recovered was a televised interview with the sobbing mother of victim Janine Benintende, in which she appeals for Petitioner to be put to death. Accompanied as it was by compelling pictures of the attractive young Ms. Benintende alive—and gruesome footage of her bloated corpse—the coverage constituted nothing less than an "infomercial" for the imposition of the death penalty.[4]

No part of this "victim impact" material lawfully could have been presented to Juror Sauer or any of the other jurors under the provisions of the Constitution as it was interpreted by the United States Supreme Court at the time of Petitioner's trial. *See Booth v. Maryland*, 482 U.S. 496, 509 (1987). Indeed, even though *Booth*'s absolute prohibition on victim impact information was later overruled in *Payne v. Tennessee*, 501 U.S. 808, 828-30 (1991), the televised reportage of Rose Benintende, if offered in evidence, would still be barred as violative of the Eighth Amendment, both because of its direct appeal for imposition of a death sentence and because of its gratuitously sensational and inflammatory nature. *Id.* at 830 n.2 (noting that the portions of *Booth* prohibiting "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate

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[4]The report is before the Court as part of Exhibit 49 to the Petition (KERO tape, No. 3 (2/23/88)), and is described in more detail in the Petition at pages 16-17. The Attorney General attempts to shrug off this material as "merely show[ing] that [Ms. Benintende's] mother was upset about her daughter's murder, together with facts which were proved by the evidence." IO at 12 n.5. We invite the Court to view the material and make its own assessment.

sentence" were not challenged and remain law); *see also id.* at 831-32 (O'Connor, J., concurring); *People v. Edwards*, 54 Cal. 3d 787, 836 (1991) (holding that, even after *Payne*, the Constitution requires that "inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed").

If the category of "inherently prejudicial" information set forth in the test for prejudicial misconduct contains anything, it must perforce include professionally packaged, demonstrably inflammatory material of a sort that has been condemned by the United States Supreme Court as offensive to the Eighth Amendment when shown to jurors in a capital case.[5]

Similarly, it would have been difficult for anyone watching the news to miss the widely-reported remarks of Petitioner's employer—the Kern County Sheriff—to the effect that he did not care if Petitioner was executed. The Sheriff's remarks were particularly damaging when viewed against the background of the other contemporary new accounts, which contained a wealth of false and damaging statements regarding Petitioner's conduct as a deputy sheriff, and which wrongly portrayed him as engaging in a pattern of abusive, sadistic, illegal and generally

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[5]The Attorney General asserts that the televised appeal for a death sentence was insignificant, and, in support, quotes a phrase from one of this Court's cases to the effect that there is nothing unusual about a victim's friends wanting the murderer to receive the death penalty. IO at 12 n.5 (quoting *People v. Breaux*, 1 Cal. 4th 281, 295 (1991)). The assertion is without legal or factual support. The *Breaux* case concerned something quite different (as the Attorney General obliquely concedes): The issue there was whether a prosecutor should have been recused from a death case because he had social contact with a friend of the victim, who had opined that the defendant should be executed. There is a world of difference between what a prosecutor knows and what the Constitution permits a capital juror to hear. Specifically, many a prosecutor knows whether the victim's family supports a death sentence, but the Constitution forbids the prosecutor from bringing the family into court to plead for the defendant's execution. Nor is the Attorney General's implied factual premise—that the victim's parents would obviously support death—an accurate one. In this very case, Janine Benintende's other parent (her father) appealed to the Judge in open court for the imposition of a life sentence. RT 5991.

inappropriate behavior both on the job and in his personal life.[6] Pet. at 18; CT 532-61. Individually and together, these things would have completely undermined the effect of the mitigating evidence put on by defense counsel in the penalty phase, almost all of which was designed to portray Petitioner as someone who had contributed to society as a good and effective law enforcement officer, and a loyal and conscientious family man.

Nor was the likely prejudice limited to the penalty phase. Inaccurate and improper interpretations of the trial by newscasters—such as the repeated misstatement that "in order to avoid the death penalty the defense must prove there was no evidence of premeditation in the [Clark] murder" (*see* Pet. at 18 (quoting Ex. 50 (KBAK videotape)))—could well have confused the juror (who was obviously not listening to the court's legal instructions)[7] as to who bore the burden of proof on the most important issue in the case. There is, in short, ample evidence to demonstrate a substantial likelihood that Juror Sauer's conceded misconduct prejudiced Petitioner in regard to all phases of the case. *See People v. Martinez*, 82 Cal. App. 3d 1, 22 (1978) (holding that whether a defendant has been injured by jury misconduct depends, *inter alia*, on "whether the prosecution's burden of proof has been lightened . . .").

In opposition, the Attorney General relies principally on this Court's opinion in *In re Carpenter*, 9 Cal. 4th 634 (1995). IO at 9-14. That case is inapposite.[8] To begin with, *Carpenter* was decided after a

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[6]The Attorney General dismisses out of hand the printed news accounts contained in the trial court's record on the basis that those accounts were published pre-trial, and thus were not themselves viewed by the juror, who swore that he did not see any pre-trial accounts. IO at 11 n.4. The Attorney General misses the point: The documentation of false and misleading pre-trial news accounts supports the inference that similar misinformation was also broadcast shortly afterwards—during the trial itself—and was viewed by the errant Juror at that time.

[7]It should also be recalled that the trial court's instructions—particularly in regard to the *mens rea* elements of the various offenses—were unusually muddled and confusing, as outlined in Petitioner's briefs on direct appeal.

[8]The present discussion is limited to the juror's misconduct in viewing news accounts pertinent to the trial. His factually related (but analytically distinct) misconduct in discussing the case with his wife and family, and (continued . . .)

full evidentiary hearing regarding juror misconduct and prejudice, held pursuant to an order to show cause. 9 Cal. 4th at 642-43. Such a hearing is precisely what the Attorney General's "Informal Opposition" seeks to forestall in the instant case. In *Carpenter*, after all of the evidence was adduced, it appeared that the only potentially prejudicial information received from the media by the errant juror was the fact that the defendant had already been convicted and sentenced to death for other crimes in a separate trial, held in a different county. *Id.* at 643-44. Although the trial court found such information to be inherently prejudicial (*id.* at 644), the United States Supreme Court subsequently held that such information does not compromise the constitutional rights of a defendant when published to the jury in a capital case. *Romano v. Oklahoma*, 512 U.S. 1, 9-10 (1994). This Court accordingly held that *Romano* disposed of the question of whether the information improperly obtained in *Carpenter* was "inherently" prejudicial. *Carpenter*, 9 Cal. 4th at 655. The alternative prejudice inquiry—*i.e.*, whether there was "a substantial likelihood" that Carpenter was nonetheless prejudiced (*id.* at 654)—was essentially answered by the trial court's finding "beyond a reasonable doubt[,] any jury would have sentenced the defendant to the death penalty based upon the evidence presented," for that evidence was "overwhelming." *Id.* at 645; *see also id.* at 658-59. Even so, this Court only denied the claim provisionally, holding that it could not rule out all possibility of prejudice until it had thoroughly reviewed the entire appellate record. *Id.* at 659.

In a real sense, the Attorney General is asking this Court to do the opposite of what the Court indicated in *Carpenter* was required to evaluate a claim of the kind presented here. Not only has there been no review of the entire appellate record (the absence of which precluded any final disposition in *Carpenter*), there has not even been a full development of all the facts pertinent to the claim. Indeed, the Attorney General's entire effort is to convince the Court not to take even the initial step that was the predicate for decision in *Carpenter* and every related precedent: He insists that the Court should not so much as issue

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(. . . continued)
the significance of *Carpenter* in that regard, is discussed in Section I(B)(2), *infra*.