

SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

MAURICE BOYETTE,

On Habeas Corpus.

CAPITAL CASE

S092356

(Former related appeal
S032736)

Alameda County Superior Court No. 114009B
The Honorable Richard Haugner, Judge

RETURN TO ORDER TO SHOW CAUSE

**SUPREME COURT
FILED**

JUN 26 2007

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DEPUTY

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DEATH PENALTY

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COMES NOW the Director of the Department of Corrections and Rehabilitation to state in return to the order to show cause issued on November 15, 2006, as follows:

I.

On May 23, 1992, petitioner, cohort Antoine Johnson, who was armed with a handgun, and three friends waited at a residence for Gary Carter and his girlfriend, Annette Devallier, to return home. As Carter entered the house, Johnson shot him four times but did not kill him. Carter ran out of the house. Petitioner took Johnson's gun, followed Carter outside, and shot him in the head, killing him. Petitioner then chased Devallier down the street, knocked her to the ground, and shot her twice in the head, killing her. Eyewitnesses identified petitioner and Johnson as the killers. (See generally *People v. Boyette* (2002) 29 Cal.4th 381, 404-407.)

II.

Petitioner was convicted of special circumstances murder, and sentenced to death in 1993. (29 Cal.4th at p. 381.)

III.

Petitioner's conviction and sentence were unanimously affirmed by this Court in 2002. (29 Cal.4th at p. 381.) Such judgment constitutes the authority and cause for petitioner's restraint in the custody of respondent at the California State Prison, San Quentin, California.

IV.

The instant petition was filed on October 19, 2000. Respondent filed an informal response to the petition on March 27, 2002, to which petitioner replied on May 3, 2002. On November 15, 2006, this Court ordered the Director of the Department of Corrections to show cause "why the relief prayed for should not be granted on the ground that: (1) Juror Pervies Ary concealed relevant facts or gave false answers during voir dire concerning his prior felony conviction and other contacts with the justice system; (2) Juror Pervies Ary concealed relevant facts or gave false answers during voir dire concerning the prior criminal records of his sons; (3) Juror Pervies Ary concealed relevant facts or gave false answers during voir dire concerning the fact that he had previously witnessed a violent crime, namely his son's assault of Beverly Miller; (4) Juror Pervies Ary concealed relevant facts or gave false answers during voir dire concerning his problem with alcohol and his son's drug addiction; (5) Juror Pervies Ary introduced information into the jury deliberations concerning an alleged prior murder committed by petitioner Maurice Boyette, although no evidence of such a crime was introduced at trial; and (6) Juror Christine Rennie and one other juror, at the urging of Juror Ary, during the pendency of the jury deliberations, rented and watched a videotape of the movie *American Me* in order to gather background information for the trial."

V.

As explained more fully herein, information secured during the course of respondent's investigation into petitioner's claims casts grave doubt on the

truth of virtually every material assertion advanced by petitioner in support of those claims.

VI.

Assuming petitioner reasserts in a forthcoming traverse each of the material allegations set forth in his petition, disputes of material fact will exist in the following regard:

(1) Petitioner has alleged that Juror Pervies Ary deliberately concealed relevant facts or gave false answers during voir dire concerning his prior felony conviction and other contacts with the justice system. (Petn. 59.) In support of this allegation, petitioner has provided copies of Ary's declaration (Exh. 53) and Ary's prior criminal history (Exhs. 239-241; see also Exh. 90). Ary's declaration relates only his 1963 conviction. (Exh. 53.)

Ary told the state's investigators that he believed his prior felony conviction had been "expunged" and removed from his record before he enlisted in the military and thus he was not required to reveal it during voir dire. He believed he did not have to reveal a prior arrest for robbery because it was dismissed with no charges filed. Likewise, he did not reveal his DUI conviction because he thought he was only required to list "major" crimes. On the basis of the foregoing, respondent denies petitioner's contrary assertions.

In dispute is whether Ary deliberately misrepresented his prior criminal history from decades ago or whether he believed that record had been expunged, was too old to count, or was otherwise not covered by the questions asked on voir dire. These issues can only be resolved by having Ary testify under oath at an evidentiary hearing about any purported bias shown by his failure to disqualify himself from jury service and his alleged concealment of his criminal record during voir dire.

(2) Petitioner has alleged that Juror Pervies Ary deliberately concealed relevant facts or gave false answers during voir dire concerning the prior

criminal records of his sons. (Petn. 59.) In support of this allegation, petitioner has provided copies of the criminal history of Ary's family members. (Exhs. 90, 243-250.) Ary's declaration relates that a cousin had been sentenced to life in prison in the 1950's for homicide. (Exh. 53.)

Ary told the state's investigators that he was not aware of his older son's prior convictions because he did not live with or help raise that son. His son never discussed the nature of his convictions with Ary but did discuss experiences he had in prison. Ary also did not recall that his youngest son had been arrested just before Boyette's trial; Ary recalled that the arrest occurred afterwards. He knew that a cousin had been sentenced to death for murder, but did not reveal it because they had never met and he did not consider the cousin to be part of his family. On the basis of the foregoing, respondent denies petitioner's contrary assertions.

In dispute is whether Ary deliberately misrepresented his family's prior criminal records. These issues can only be resolved by having Ary testify under oath at an evidentiary hearing.

(3) Petitioner has alleged that Juror Pervies Ary deliberately concealed relevant facts or gave false answers during voir dire concerning the fact that he had previously witnessed a violent crime, namely his son's assault of Beverly Miller, his son's former girlfriend. In support of this allegation, petitioner has provided copies of the criminal history of Ary's son and a declaration from Miller. (Exhs. 90, 243-250.)

Ary told the state's investigators that it was untrue that Miller had once lived with him. He never witnessed his son commit domestic violence upon Miller, but did hear some "contact noise" from their bedroom while visiting at their residence. He was never a guardian of Miller or her children. On the basis of the foregoing, respondent denies petitioner's contrary assertions.

In dispute is whether Ary deliberately misrepresented his son's domestic dispute record. These issues can only be resolved by having Ary testify under oath at an evidentiary hearing.

(4) Petitioner has alleged that Juror Pervies Ary concealed relevant facts or gave false answers during voir dire concerning his problem with alcohol and his son's drug addiction. (Petn. 59.) In support of these allegations, petitioner has provided copies of Ary's prior criminal history (Exhs. 239-241), and the criminal history of Ary's sons (Exhs. 243-250). (See also Exhs. 90, 238.) Ary's declaration does not mention these issues. (Exh. 53.)

Ary told the state's investigators that he was not an alcoholic but acknowledged that after his DUI conviction he had to attend AA meetings. Ary said that, although aware of his son's arrest for possession and sales of drugs, he did not reveal that information during voir dire because he did not believe it applied to the question regarding "the use" of drugs. On the basis of the foregoing, respondent denies petitioner's contrary assertions.

In dispute is whether Ary deliberately misrepresented his use of alcohol or his son's use of illegal drugs. These issues can only be resolved by having Ary testify under oath at an evidentiary hearing.

(5) Petitioner has alleged that Juror Pervies Ary introduced information into the jury deliberations concerning an alleged prior murder committed by petitioner Maurice Boyette, although no evidence of such a crime was introduced at trial. (Petn. 79.) In support of this allegation, petitioner has provided declarations from Ary and juror Cynthia Lewis stating that Ary told the jury that Boyette may have committed previous murders. (Petn. 79; Exh. 53.)

Petitioner's documents are in conflict regarding the timing of the discussion of the purported "previous murder." The petition and Ary's declaration contend that discussion occurred in "guilt phase deliberations."

(Petrn. 79-80; Exh. 53 [Ary declaration].) By contrast, Lewis's declaration places that discussion in the penalty phase deliberations. (Exh. 86.) Lewis states: "At one point [during penalty deliberations] when it was becoming quite clear [to the other jurors] that I [Lewis] did not want to vote for death, [Ary] said, 'But remember the other murder.'" (Exh. 86.) There is thus a conflict whether the discussion of Boyette's purported "previous murder" occurred during the guilt or penalty phase deliberations, or during both. Ary told the state's investigators that he did not recall telling any jurors that Boyette had been suspected of committing additional murders. He did not recall anything about that issue. By contrast, Lewis told the investigators that she changed her vote to death after Ary told her about Boyette's purported prior murder conviction. On the basis of the foregoing, respondent denies petitioner's contrary assertions.

In dispute is whether Ary, Lewis, or some other juror discussed Boyette's purported prior murders, and whether any of the jurors relied on that information. These issues can only be resolved by having all of the jurors testify under oath at an evidentiary hearing.

(6) Petitioner has alleged that juror Christine Rennie and one other "hold-out" juror, at the urging of Ary, "during the pendency of the jury deliberations, rented and watched a videotape of the movie *American Me* over the weekend in order to gather background information for the trial." (Petrn. 92-93; Exh. 53.) The petition claims the two jurors rented and watched the movie during penalty phase deliberations. (Petrn. 92-93.) However, the petition only identifies Rennie and not the other juror who purportedly watched the movie during deliberations. (Petrn. 92-93.)

In support of this allegation, petitioner has provided declarations from seven jurors. There are inconsistencies between the petition and petitioner's declarations. While the petition claims there were two purported "hold-out"

jurors, the declarations indicate that there were three purported “hold out” jurors: Rennie, Cynthis Lewis, and Julie Graff-McLaren. (See Exh. 102 [Rennie decl.]: “I was not initially in favor of voting for the death penalty”; Exh. 86 [Lewis decl.]: “There were three of us who favored . . . prison instead of death.”; Exh. 70 [Graff-McLaren decl.]: “During penalty phase deliberations, . . . I and a few other jurors (no more than three) needed more time coming to a decision.”; Exh. 53 [Ary decl.] “[A]t least three jurors were ‘holding out’ for a life without possibility of parole sentence.”) These declarations suggest, but do not clearly establish, that the three “hold out” jurors were Graff-McLaren, Lewis, and Rennie. On the basis of the foregoing, respondent denies petitioner’s contrary assertions.

In dispute is the identity of the purported “hold out” jurors and precisely who on the jury watched or discussed the movie during deliberations. The declarations are contradictory in this regard.

Moreover, the petition claims that two jurors “rented the movie [*American Me*] and watched it over the weekend.” (Petn. 92-93; see, also, Exh. 53 [Ary decl.]) The petition identifies Rennie as one of the two jurors who rented and watched the movie during deliberations. (Petn. 92-93.) This part of the petition is apparently confirmed by Rennie’s declaration, wherein she states: “I rented [the] movie one night during deliberations.” (Exh. 102.)

However, neither the petition nor declarations identify the other juror who purportedly watched the movie. Graff-McLaren states: “The movie *American Me* was also mentioned during penalty deliberations.” (Exh. 70.) Lewis states: “I remember there being some discussion among some of the jurors about the movie *American Me*, although I am not sure whether anyone ultimately watched it.” (Exh. 86.) Assuming, for the sake of argument, that Rennie, Graff-McLaren, and Lewis were the three “hold out” jurors, as the petition asserts (Petn. 92-93), then either the petition is mistaken or one of the

jurors was not truthful in her declaration regarding the movie. On the basis of the foregoing, respondent denies petitioner's contrary assertions.

Ary told the state's investigators that he did discuss the movie *American Me* during deliberations so that other jurors would learn what life was like in prison. He recommended that several "naive" jurors watch the movie. He did not know if any jurors actually watched the movie during deliberations or which jurors had previously seen the movie. He recalled one juror thanking him for recommending the movie. On the basis of the foregoing, respondent denies petitioner's contrary assertions.

Most of the other jurors who spoke with the state's investigators recalled a discussion about a movie during deliberations. Four jurors, Britton, Rennie, Salcido-Rose, and Mann-Grooms, recalled that Ary recommended that several jurors watch the movie *American Me* during deliberations. However, Perez claimed that she was the person who suggested that two jurors should watch the movie. Perez also said that over a third of the jury had already seen the movie before trial commenced. On the basis of the foregoing, respondent denies petitioner's contrary assertions.

In dispute is which jurors actually watched the movie during deliberations, which jurors had already seen the movie before the trial commenced, and whether any of them changed their decision as a result. Only when all of the jurors are questioned under oath at a hearing can this issue be fully explored.

VII.

Except as otherwise indicated, respondent denies each and every material allegation of the petition, denies that petitioner's confinement is in any way illegal, and denies that petitioner's rights have been violated in any respect.

VIII.

If petitioner disputes the material facts asserted in this return, a referee should be appointed and an evidentiary hearing held to resolve any conflict thus created.

WHEREFORE, it is respectfully submitted that the petition for writ of habeas corpus should be denied and the order to show cause discharged, unless petitioner disputes any material assertion contained herein. If petitioner does deny any material fact asserted herein, a referee should be appointed and an evidentiary hearing should be convened to resolve such disputed fact or facts, after which the petition for writ of habeas corpus should be denied and the order to show cause discharged.

Dated: June 26, 2007

Respectfully submitted,

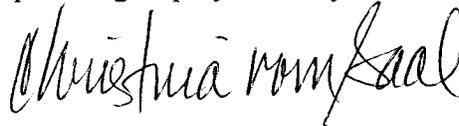
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CVS/cvs/lls
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CERTIFICATE OF COMPLIANCE

I certify that the attached RETURN TO ORDER TO SHOW CAUSE
uses a 13 point Times New Roman font and contains 2361 words.

Dated: June 26, 2007

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of
California

A handwritten signature in cursive script that reads "Christina Vom Saal". The signature is written in black ink and is positioned above the printed name of the signatory.

CHRISTINA VOM SAAL
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Maurice Boyette**

No.: **S092356**

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. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On June 26, 2007, I served the attached **RETURN TO ORDER TO SHOW CAUSE** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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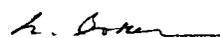
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 26, 2007, at San Francisco, California.

L. SORENSEN

Declarant



Signature