

# SUPREME COURT COPY

SUPREME COURT  
FILED

DEC 01 2010

Frederick K. Ohlrich Clerk

IN THE SUPREME COURT OF CALIFORNIA

Deputy

In re MAURICE BOYETTE )

on Habeas Corpus. )

S092356 )

## REPORT AND FINDINGS OF REFEREE

By its Order dated September 9, 2009, the Supreme Court appointed me to sit as a referee in this proceeding and to take evidence and make findings of fact on certain questions regarding the case of *People v. Maurice Boyette* (Alameda County Superior Court no. 114009B).

Pursuant to said Order, a hearing was commenced on November 17, 2010. Lynn Coffin, Esq. appeared for Petitioner; Katie Kobal, Deputy District Attorney, appeared for Respondent. The hearing was conducted over a period of three days. Ten of the trial jurors testified under oath. The relevant testimony of each is summarized as follows:

### Pervies Lee Ary, Sr.

Mr. Ary is a tall, African-American man who spent 37 years working as a bus driver. In 1964 he was arrested and charged with being an "accessory" to one or more felonies. He was convicted of a felony and served six months in jail. Some time afterward, the conviction was "expunged" from his record and he entered active duty in the military. Following his discharge, he worked for 37 years as a bus driver. In 1971, he was arrested and charged with multiple counts of robbery in Los Angeles, but was subsequently exonerated and released when the real perpetrator was apprehended. In 1982, he was arrested for driving under the influence of alcohol after leaving a nightclub in Pomona, where he had consumed two beers. He was charged with a misdemeanor, pleaded guilty and received a sentence that included participation in Alcoholics Anonymous. After he fulfilled the terms of his sentence, the conviction was set aside and removed from his record, enabling him to continue working as a bus driver.

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He has two sons: Pervies Jr., born August 29, 1964; and Pervies II, born April 8, 1974. Sometime between 1982 and 1985, he learned that Pervies Jr. had been arrested on a drug charge in southern California when he received a phone call from his ex-wife asking for money to bail him out. Mr. Ary was estranged from his son at that time, and did not send any money. He didn't know the details of his son's case until years later, when he found out that the charges included drug sales and that he had been convicted of a felony and sentenced to a state institution. Pervies II also had problems with the law. Sometime before 1993, he was arrested and charged in juvenile court with joyriding. Mr. Ary attended court with him. As part of the disposition in the case, Pervies II was required to write an essay; when he failed to do so, he was rearrested and committed to Juvenile Hall. Pervies II suffered other arrests, as well, but they were some time after the Boyette trial.

Other family members with criminal records include a first cousin and a nephew serving murder sentences of life without possibility of parole. Their terms commenced over 50 years ago and about 20 years ago, respectively. He has not had direct contact with either of them. Nephews of his ex-wife have also served terms in prison.

When Mr. Ary received the jury summons, he didn't want to have to serve. He called the phone number listed on the summons and reported that he had suffered a felony conviction in approximately 1964. He was told that he was nevertheless eligible to serve, since his conviction had been "expunged." He reported as directed. Upon being assigned to the trial courtroom and learning about this case, his attitude was the same – he didn't want to serve because he didn't want to be responsible for anyone being convicted of a crime and going to prison. Nevertheless, he was willing to do his "civic duty" if called upon to do so. He didn't recognize the defendant as anyone he'd seen or heard about, and he didn't know anything about the case. He harbored no bias for or against either side.

Prospective jurors were required to complete a written questionnaire as part of the jury selection process. The questionnaire included only one question seeking information about criminal background, which read as follows:

25. HAVE YOU, A CLOSE FRIEND, OR RELATIVE EVER BEEN ACCUSED OF A CRIME, EVEN IF THE CASE DID NOT COME TO COURT?

He answered this question by circling "NO." Despite his own history and that of his sons and other relatives, he explained his reasons for this response as follows:

As for his own record, despite its use of the word "accused," he believed this question was asking about criminal **convictions**. (In fact, while testifying at the hearing, he continued to interpret the question in the same way.) Neither the 1964 felony nor the 1982 DUI -- which he didn't consider "criminal" in the first place -- qualified because both convictions had been set aside. Similarly, the 1971 robbery charges didn't result in a conviction because he was determined to be innocent and the charges were dismissed.

Regarding the criminal records of relatives, Mr. Ary explained: In 1993, his relationship with his son, Pervies Jr., was so "distant" that "he wasn't part of my life then." As a result, Pervies Jr. didn't even enter his mind. Moreover, while he had been told of his son's drug arrest, he didn't then know the details of what had happened thereafter. As for the joyriding case of Pervies II, that was a juvenile matter and didn't qualify as either criminal or a conviction in his mind. The life sentences being served by his cousin and nephew didn't occur to him, since they were people he hadn't had contact with. The prison records of his ex-wife's nephews didn't qualify because they weren't his relatives.

The written questionnaire also included the following question:

60. HAVE YOU, A CLOSE FRIEND OR RELATIVE EVER HAD  
A **PROBLEM** INVOLVING THE USE OF DRUGS OR ALCOHOL?

In response to this question, he circled "NO." He explained that he understood this question to refer to alcoholism or drug addiction. He had never had an alcohol "problem," despite his DUI arrest and the requirement that he attend AA meetings. He pointed out that he'd only consumed two beers before that arrest. While he now knows that his son, Pervies Jr., had a drug addiction, he didn't know that at the time of this trial.

During oral voir dire, Mr. Ary was asked no questions regarding criminal background or substance abuse by himself or relatives or friends.

Following his selection as a juror, he served throughout both phases of the trial. He was not initially selected as foreperson, but replaced the original foreperson at the end of guilt phase deliberations and continued in that position through the penalty phase.

He recalled no discussion among jurors of possible uncharged murders committed by the defendant.

At one point during the penalty phase deliberations, the jury was divided 10 to 2 in favor of death. The two holdouts were young women who were having trouble appreciating what life was like in prison. Specifically, when jurors were discussing the possibility that the defendant could kill again, they couldn't comprehend how that could happen if he were in prison for the rest of his life. Mr. Ary and several other jurors recalled having previously seen the movie *American Me*, a movie about life in prison. He and the others urged the two "naïve," young women to rent the movie and watch it during a weekend break in deliberations.

### **Philip Karantzalis**

Mr. Karantzalis was a juror during the guilt phase, but was excused at the commencement of the penalty phase.

He does not recall anyone bringing up the subject of uncharged murders having been committed by the defendant. He does not recall any discussion of the movie *American Me*.

### **Cynthia Lewis**

Ms. Lewis was a registered nurse at the time, and remembers other jurors mostly by what they did for a living. She remembers a tall, black man who worked as a bus driver, but doesn't know his name.

She remembers the movie *American Me* being discussed, although she can't remember whether it was during the guilt or penalty phase. She recalls that perhaps three to five jurors were discussing it. She didn't pay much attention, since it didn't seem relevant to her. She did not watch the movie.

Sometime during deliberations in the penalty phase, the bus driver said to her, "Cynthia, remember that he did kill somebody else." She's not positive that "kill" was the word used, though that's her best memory. Whatever it was, she understood it to be a reference to something the jury had heard in open court during the guilt phase, but which they were instructed to disregard. It involved prior assaultive conduct of the defendant which did not result in a conviction, and which may or may not have been a homicide. She replied to the bus driver that they were instructed not to discuss that. There was no further mention of it.

### **Julie McLaren**

Ms. McLaren was a college student at the time of the trial, and went by the last name of Graf. She remembers a juror who was a bus driver, but can't remember his name or description.

She remembers that there was some discussion during deliberations of the possibility that the defendant would kill again if he was ever released from prison. She doesn't know who mentioned it. She doesn't believe there was discussion of the defendant having previously committed uncharged crimes.

During the penalty phase, the movie *American Me* came up. Although she can't remember who talked about it, "they" said anyone who hadn't seen the movie should watch it. She obtained the movie one night and watched it.

### **Christine Rennie**

Ms. Rennie was a homemaker at the time of the trial. She remembers a black man on the jury who worked as a bus driver and had served in the army.

While several jurors expressed concern about the possibility of the defendant killing again, she doesn't think there was any discussion about him having committed any uncharged crimes.

During penalty phase deliberations, the bus driver talked about the movie *American Me*. He said that people who hadn't seen it should do so. She watched the first half (about 45 minutes) of the movie over a weekend recess. There was no more discussion of the movie after she watched it.

### **Jim Britton**

Mr. Britton remembers that the foreperson during the penalty phase was "Pervies," who was a bus driver. Pervies "may have" said something about the defendant killing again in prison. He does not recall any evidence or discussion of prior, uncharged crimes by the defendant.

There was discussion about a movie that portrayed life in prison. Pervies suggested to two, young women who were holdouts for a life sentence that they should watch the movie to get an idea of what prison life was like.

**Darlene Perez**

Ms. Perez does not recall hearing any evidence of uncharged crimes, or any discussions of that subject by jurors.

During deliberations, the movie *American Me* was discussed. A number of jurors, including her, had seen it. Two holdout jurors were encouraged to watch it in order to learn what life was like in prison. She may have been one of the persons urging them to watch it

**Becky R. Grooms**

Ms. Grooms, who went by the name Mann at the time of the trial, recalls that the foreperson was a black man who worked as a bus driver.

At some point during the trial, the jury heard something in the courtroom about the defendant having committed uncharged crimes, although she can't remember the details. The jurors were instructed not to discuss them, and they didn't. She remembers no other mention of other crimes.

The movie *American Me* was discussed by jurors during the penalty phase, although she's not sure about the title. The bus driver brought it up, and someone on the jury recommended that it be seen. She did not watch it.

**Maryanne Hickman**

Ms. Hickman was an alternate juror who was substituted in as a juror at the beginning of the penalty phase.

She thinks there was mention during the trial of the defendant's prior drug conviction. It wasn't discussed in the jury room.

She doesn't recall anything about the movie *American Me* coming up.

**Karen Rose**

Ms. Rose went by the name Salcedo at the time of the trial.

She vaguely recalls hearing about an uncharged crime during the trial, but being instructed not to discuss it. She doesn't recall there being any discussion of it in the jury room.

A movie was mentioned that had something to do with gangs. She didn't watch it.

**ADDITIONAL EVIDENCE PRESENTED:**

In addition to the testimony of witnesses, the following documents were received into evidence at the hearing:

Petitioner's Exhibits:

1. Copy of the jury summons received by Mr. Ary
2. Copy of the juror questionnaire completed by Mr. Ary.
3. 7-page reporter's transcript of oral voir dire of Mr. Ary, which reflects that he was asked no questions about criminal background of or substance abuse by himself or anyone else.

Respondent's Exhibits:

- A. Certified copy of records of Contra Costa County Superior Court case no. 8809, relating to Mr. Ary's 1964 felony grand theft conviction (11 pages). These records reflect that, on March 29, 1967, the conviction was set aside and the charge was dismissed pursuant to Penal Code section 1203.4.
- B. Copy of records of Los Angeles County Superior Court case no. A280433, relating to Mr. Ary's 1971 robbery prosecution that resulted in dismissal on motion of the People for insufficient evidence. (28 pages).
- C. Copy of records of Pomona Municipal Court case no. 107477, relating to Mr. Ary's 1982 misdemeanor DUI conviction. (5 pages) These records reflect that on July 17, 1984, probation was terminated, the conviction was set aside, and the charge was dismissed pursuant to Penal Code section 1203.4.

## **FINDINGS:**

The evidence having been presented and the matter submitted, I make the following findings of fact relative to the questions posed by the Court in its Order:

***(1) What were Juror Pervies Lee Ary's reasons for failing to disclose his own history of arrests and prosecutions either on his juror questionnaire or during voir dire?***

Mister Ary did not disclose his own criminal history on voir dire because he was not asked about it. The only inquiry into this subject was a single question in the written questionnaire that asked whether he had ever been "accused" of a crime. He misunderstood that single question to be asking about convictions. Clearly, the question was not limited to convictions, since it not only used the word "accused," but also added the phrase, "even if the case did not come to court." On the other hand, there was no further explanation provided, no additional questions on the subject, and no inquiry during voir dire that might have provided clarification. Moreover, Mr. Ary expressed the same misunderstanding of the question while testifying at the hearing. Thus, while his interpretation of the question was certainly unreasonable, it is not unbelievable under the circumstances. Since his only convictions had been set aside, he believed he had none to report.

***Was the nondisclosure intentional and deliberate?***

Mr. Ary believed that he was answering the single question accurately. Therefore, his nondisclosure was not intentional and deliberate.

***Was his nondisclosure indicative of juror bias?***

Since Mr. Ary believed that he was answering the single question accurately, his nondisclosure was not indicative of juror bias.

***Was he actually biased against Petitioner?***

Mr. Ary was not biased against Petitioner.

***(2) What were Mr. Ary's reasons for failing to disclose that his two sons had criminal records and that two relatives had been convicted of murder?***

Mr. Ary did not disclose the criminal records of his relatives on voir dire because he was not asked any questions on the subject. The only inquiry into this subject was the same, single question in the written questionnaire referred to above, which he misunderstood to be asking about criminal convictions. While his older son, Pervies Jr., had been convicted of a felony years before, their relationship was so distant that he didn't even occur to him. Even if he had,



Mr. Ary was only aware at that time of his son's arrest, but not the conviction. He didn't disclose the juvenile joyriding case of his younger son, Pervies II, because he didn't think he had to, since it was neither "criminal" nor a "conviction." As for the cousin and nephew who were serving life sentences for murder, he didn't think of them, either, since they were not people with whom he'd had contact.

***Was the nondisclosure of this information intentional and deliberate?***

Since Mr. Ary's nondisclosure of the criminal history of family members was due in part to his belief that he was answering the question accurately and in part to his failure of recollection, it was not intentional and deliberate.

***Was his nondisclosure indicative of juror bias?***

Since Mr. Ary's nondisclosure of the criminal history of family members was due in part to his belief that he was answering the question accurately and in part to his failure of recollection, it was not indicative of juror bias.

***Was he actually biased against Petitioner?***

Mr. Ary was not biased against Petitioner.

***(3) What were Mr. Ary's reasons for failing to disclose his prior conviction for driving under the influence and attendance at Alcoholics Anonymous, as well as his son's record of convictions and incarceration and treatment for drug-related crimes?***

He did not disclose this information on voir dire because he was not asked about alcohol or substance abuse. The only inquiry into this subject was a single question in the written questionnaire asking about a "problem" with alcohol or drugs, which he understood to mean alcoholism or drug addiction. As far as he knew, he was answering the question accurately. He did not consider himself to have ever been an alcoholic. While he did attend AA meetings, he was required to do so as a condition of DUI probation. As for his son's addiction to and commitment for drugs, he wasn't aware of that until some time after this trial. At the time of this trial, he only knew of a drug-related arrest.

***Was the nondisclosure intentional and deliberate?***

Since Mr. Ary believed that he was answering the question accurately, the nondisclosure was not intentional and deliberate.

***Was the nondisclosure indicative of juror bias?***

Since Mr. Ary believed that he was answering the question accurately, the nondisclosure was not indicative of juror bias.

***Was he biased against Petitioner?***

Mr. Ary was not biased against Petitioner.

***(4) Did Mr. Ary assert during jury deliberations that Petitioner had previously committed uncharged murders?***

Mr. Ary did not assert that Petitioner had previously committed uncharged murders.

No juror other than Cynthia Lewis recalled ever hearing Mr. Ary or anyone else make such a statement. Ms. Lewis' recollection was that, during penalty deliberations, Mr. Ary said to her, "Remember that he did kill someone else." She was not certain, however, that "kill" was the word used. Whatever it was, she understood that he was referring to an uncharged crime they'd heard about in open court during the guilt phase and were instructed not to consider. She thought it involved some kind of assaultive conduct. She reminded him of the admonition, and the subject wasn't discussed again. Other jurors also remembered that they heard mention in the courtroom of an uncharged crime and were instructed not to consider it. It wasn't a homicide, though. Some thought it was a drug-related offense. The only discussion of other homicides that Mr. Ary and other jurors remember related to whether the defendant might kill again. I find that Ms. Lewis has confused the two subjects in her memory over time.

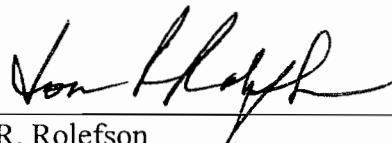
***(5) Did Mr. Ary urge other jurors, during jury deliberations, to watch the movie American Me in order to learn more about the nature of a prisoner's life in prison?***

Mr. Ary, along with one or more other jurors, did urge two holdout jurors to watch the movie *American Me* in order to learn more about the nature of a prisoner's life in prison.

***Did any juror actually watch the movie?***

Two jurors – Julie McLaren and Christine Rennie – did watch the movie during the penalty phase deliberations.

Dated: November 29, 2010



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Jon R. Rolefson  
Judge of the Superior Court

In Re Maurice Boyette

**CLERK'S CERTIFICATE OF MAILING**

I certify that the following is true and correct: I am the clerk of the above-named court and not a party to this cause. I served **Report and Findings of Referee, No. S092356** by placing copies in envelopes addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

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Dated: November 29, 2010

By   
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