In the Supreme Court of the State of California

In re

MAURICE BOYETTE,

On Habeas Corpus

CAPITAL CASE

Case No. S092356

Direct Appeal, Case No. S032736
Alameda County Superior Court Case No. 114990B
Richard A. Haugner, Judge

EXCEPTIONS TO/REQUEST FOR ADOPTION OF REFEREE'S REPORT AND BRIEF ON THE MERITS

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INTRODUCTION

Petitioner has been provided the opportunity to prove his allegations at a reference hearing. Petitioner failed to meet his burden of proving by a preponderance of the evidence that Juror Ary (Ary) engaged in prejudicial misconduct during voir dire amounting to actual bias, or that the decision by two jurors to watch a movie recommended by Ary and other jurors during the penalty phase deliberations was prejudicial. The testimony at the reference hearing proved that Ary's responses during voir dire were made in good faith and that the movie concerned a matter of common knowledge. As a result, no federal or state presumption of prejudice is triggered. Petitioner's failure to prove bias or prejudice means he is not entitled to relief and his petition should be denied.

The only evidence in support of petitioner's allegations regarding nondisclosure on voir dire was testimony by Ary about his and his sons' criminal history. However, the referee credited Ary's testimony that his nondisclosure was not intentional and deliberate so as to indicate actual bias against petitioner. The evidence in support of petitioner's allegations regarding penalty phase deliberations was testimony by 10 former jurors at the hearing. That testimony did not establish prejudicial misconduct from two jurors watching a movie about prison gangs recommended by other jurors who had seen the movie prior to trial.

STATEMENT OF THE CASE

Petitioner, Maurice Boyette, was convicted of two counts of special circumstances murder and was sentenced to death on May 7, 1993. His conviction and sentence were affirmed on direct appeal by this Court in 2002. (*People v. Boyette* (2002) 29 Cal.4th 381.) Petitioner's application for collateral relief (habeas corpus) is before this Court. (*In re Boyette*, S092356.) The order to show cause issued in November 2006. We filed

our return in June 2007. The reference hearing at issue is related to petitioner's petition for writ of habeas corpus.

On June 10, 2009, this Court ordered an evidentiary hearing before The Honorable Jon Rolefson of the Alameda County Superior Court, appointed as special master to determine the answers to a set of factual questions related to whether or not Juror Pervies Lee Ary (Ary) was biased against petitioner. (1RHRT 1;[1] the reference questions will be discussed separately below.) Additionally, the hearing was to determine whether or not Ary intentionally and deliberately failed to disclose his prior criminal history and whether or not Ary intentionally and deliberately failed to disclose his sons' prior criminal history. Finally, the hearing was to determine whether or not, during deliberations, Ary asserted that petitioner had previously committed uncharged murders, whether or not Ary urged other jurors to watch the movie *American Me*, and whether or not any juror actually watched such movie during that time.

The hearing commenced on November 15, 2010, with certain agreements in place. (1RHRT 1.) Counsel agreed that three former jurors were unavailable and would not be testifying: (1) Marland Orgain, who is deceased; (2) Sharron Williams, who was never located; and (3) Carmen Garcia Ells O'Rourke, who was on medical bed-rest due to pregnancy. (1RHRT 7-8; 2RHRT 239.) Counsel also agreed not to call the two alternates, Ms. Travinsky and Mr. Tollman, who never took part in deliberations. (1RHRT 136.) Counsel agreed that the death verdict was returned on Thursday, March 25, 1993. (1RHRT 137.)

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[1] To avoid confusion with references to the reporter's transcript and clerk's transcript of the underlying trial, respondent refers to this reference hearing's reporter's transcript and clerk's transcript as "RHRT" and "RHCT," respectively.

The hearing lasted for three days. Testimony was taken from ten witnesses. The Referee's Report and Findings of Fact ("Findings") was filed December 1, 2010.[2] That day, the Court ordered the parties to file simultaneous exceptions to the report and briefs on the merits. Respondent does not take exception to any of the referee's findings.

ARGUMENT

I. THE REFEREE'S FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND ITS CREDIBILITY DETERMINATION SHOULD BE GIVEN GREAT WEIGHT

A. Standard for Reviewing a Referee's Report

> "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." (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) The petitioner "must prove, by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus. [Citation.]" (*In re Visciotti* (1996) 14 Cal.4th 325, 351.)

(*In re Bolden* (2009) 46 Cal.4th 216, 224; see *In re Cox* (2003) 30 Cal.4th 974, 997 ["petitioner bears the burden of establishing that the judgment under which he is restrained is invalid"]; accord *In re Andrews* (2002) 28 Cal.4th 1234, 1252-1253; *In re Gay* (1998) 19 Cal.4th 447, 461.)

When a reference hearing has been ordered, "[t]he referee's findings of fact, though not binding on the court, are given great weight when supported by substantial evidence." (*In re Cox, supra,* 30 Cal.4th at p. 998; accord *In re Johnson* (1998) 18 Cal.4th 447, 461.) The referee acts "as an impartial fact finder for this Court." (*In re Scott* (2003) 29 Cal.4th 783, 818.)

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[2] The referee's 10-page Report and Findings of Fact (Findings) is not paginated. Nonetheless, we refer to specific pages in the Findings as though it were sequentially paginated.

> Deference to the referee is particularly appropriate on issues requiring . . . assessment of witnesses' credibility, because the referee has the opportunity to observe the witnesses' demeanor and manner of testifying. [Citations.] On the other hand, any conclusions of law or resolution of mixed questions of fact and law that the referee provides are subject to [the court's] independent review. [Citation.]" [Citation.]

(*In re Cox, supra*, 30 Cal.4th at p. 998.) "Because the referee observes the demeanor of testifying witnesses, and thus has an advantage in assessing their credibility, this Court ordinarily gives great weight to the referee's findings on factual questions. (*In re Avena* (1996) 12 Cal.4th 694, 710.)" (*In re Bolden, supra,* 46 Cal.4th at p. 224; see *In re Hamilton* (1999) 20 Cal.4th 273, 296 [the referee observes the witnesses' manner of testifying].) Indeed, the reason the Court requires petitioners to prove their claims at an evidentiary hearing "is to obtain credibility determinations." (*In re Scott, supra*, 29 Cal.4th at p. 824)

In general, when the evidence of guilt is overwhelming, the risk that exposure to extraneous information will prejudicially influence a juror is minimized. (*In re Hamilton, supra*, 20 Cal.4th at p. 301, fn. 2.)

B. Reference Hearing

At the start of the reference hearing, the referee advised counsel of its interpretation of the Court's order:

> We start with the fact that we are conducting this hearing pursuant to an order . . . by the Supreme Court. It outlines five areas of inquiry.
>
> The first three areas of inquiry have to do with certain information that Mr. Ary did not disclose during the jury selection process. The Court wants me to determine what were his reasons for failing to disclose certain facts, were the [non]disclosures intentional and deliberate, were they indicative of juror bias, and, in fact, was he actually biased against petitioner.

> Areas [four] and [five] according to the Supreme Court order simply asks the question did Mr. Ary basically say certain things to the other jurors during deliberations. If so, at what point did this happen, and what did the other jurors do with that information if they received such information. With respect to four and five, I am not asked to make any findings whatsoever, and it makes perfect sense with respect to thought processes, bias, anything like that.
>
> What the Supreme Court wants to know is what happened during deliberations in these two specific areas. The only areas where bias comes up have to do with the jury selection process. The questions are were Mr. Ary's nondisclosures indicative of jury bias, and it's very clear to me that means at the point in time, did juror bias exist on his part to which those nondisclosures were related. In other words, did his failure to disclose those things tend to indicate that a juror bias existed at that point in time.
>
> * * *
>
> I have been given a very narrow scope of inquiry by the Supreme Court. They want me to focus on certain issues. . . . Our scope here is very limited, and I intend to keep it that way.

(1RHRT 22-23, 29.)

At the conclusion of the reference hearing, the referee admitted in evidence the final page of Ary's 1964 conviction showing that felony was expunged or dismissed under Penal Code section 1203.4 (section 1203.4).[3] (2RHRT 265.) The referee noted the dismissal "legally removes it from the record for certain purposes, but not for other purposes." (2RHRT 265.) The referee observed:

> Number one, if a person is convicted of a crime, and later a [section] 1203.4 motion is granted, to me, it doesn't change the fact that the conviction occurred. It's just that a subsequent event occurred that . . . had a significant legal affect on that

[3] None of the documents admitted at the hearing are included in the record before the Court.

> conviction. It may have changed his status for certain purposes, but it doesn't change the fact that it happened, so I start with the assumption that the conviction occurred. If something else happened that changed its legal status, it's not inconsistent with that assumption. It's just additional information.
>
> It's also relevant, because it relates directly to part of Mr. Ary's explanation for—for what he did or didn't do regardless of the manner by which he thinks he got there. And what I mean by that is, he's talked about the expungement of that 1964 conviction, but at various times he's attributed it to his entering the military on the one hand, or it actually getting dismissed at some other point in time on the other hand that seemed to open the door to him going into the military. Whatever the reason . . . it's consistent with that, and, therefore, it would seem to me to be relevant . . . to his description of what had happened. [¶] So for all those reasons, I think it's appropriate for it to come in, but I still start with the assumption that a conviction took place in about 1964.

(2RHRT 266.)

The referee also admitted in evidence a copy of Ary's juror questionnaire; his jury summons; the records of his 1964 felony conviction, including the order granting the section 1203.4 dismissal; the record of his dismissed robbery charges in 1971; and the section 1203.4 dismissal of his conviction for driving under the influence (DUI) in 1982. The referee accepted "as a given," i.e., as "true for purposes of this hearing," Ary's convictions, arrests, and other items regarding his criminal record referred to in the Supreme Court's first three questions. (2RHRT 268-273.)

The parties stipulated that Ary's oral voir dire was "pretty minimal," as the court described it, that his voir dire was transcribed on pages 1092 to 1098 of the reporter's transcript, and that "he was asked no direct questions regarding criminal record or alcohol or drug abuse in oral voir dire." (2RHRT 274.)

C. Petitioner Failed to Establish Misconduct or Bias from Ary's Failure to Disclose His and His Son's Criminal Records During Voir Dire

In keeping with the referee's analysis noted above, we address the first three inquiries in the Court's order in this section. Those inquiries concern whether juror Ary's failure to disclose his and his sons' criminal history during voir dire was intentional and deliberate so as to establish actual bias against petitioner. Based on the evidence at the reference hearing, the referee concluded that Ary's nondisclosure was neither intentional nor deliberate and that Ary was not biased against petitioner.

"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; [citations omitted].) An impartial jury is one in which no member has been improperly influenced [citations] and every member is 'capable and willing to decide the case solely on the evidence before it.' [citations]." (*In re Hamilton, supra*, 20 Cal.4th at p. 293.)

"It is well established that "a juror who conceals relevant facts or gives false answers during the voir dire examination thus undermines the jury selection process and commits misconduct." (*People v. Majors* (1998) 18 Cal.4th 385; *In re Hitchings* (1993) 6 Cal.4th 97, 111.) However, "[t]he harmless-error rules adopted by this Court . . . embody the principle that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial." (*McDonough Power Equipment, Inc. v. Greenwood* (1983) 464 U.S. 548, 553 (*McDonough*).)

> [W]hether an individual verdict must be overturned for jury misconduct . . . is resolved by reference to the substantial likelihood test, an objective standard. [Citation.] Any presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including that nature of the misconduct or other event, and the surrounding

> circumstances, indicate there is no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors were actually biased against the defendant. [Citation.]

(*In re Hamilton, supra*, 20 Cal.4th at p. 296.) The high 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* (1981) 455 U.S. 209, 215; *Remmer v. United States* (1954) 347 U.S. 227, 229.)

The Court has the benefit of the referee's report and the transcript of the hearing upon which it is based. (*In re Scott, supra*, 29 Cal.4th at p. 824.) The referee's credibility determinations are properly based on the witnesses themselves and their testimony. (*Id.* at p. 822.) Those credibility findings help the Court make the legal determination whether petitioner has shown prejudice. (*Ibid.*)

1. First inquiry

With respect to the Court's first inquiry regarding Ary's reasons for failing to disclose his own criminal history on voir dire, the referee believed Ary's testimony that he failed to do so "because he was not asked about it." (Findings at 8.) The referee noted "[t]he only inquiry into this subject was a single question in the written questionnaire that asked whether he had ever been "accused" of a crime." (*Id.*) Based on Ary's testimony at the hearing, the referee concluded Ary "misunderstood that single question to be asking about convictions." (*Id.*) The referee observed the question "was not limited to convictions," but concluded that the question was never clarified by further explanation or questions on the subject. The referee found it significant that Ary "expressed the same misunderstanding of the question while testifying at the hearing." (*Id.*) The referee concluded that while Ary's interpretation of the question was unreasonable, it was not unbelievable, especially since Ary's convictions had been set aside and thus

he believed he had none to report. The referee found that the circumstances developed at the hearing established that Ary's nondisclosure was not intentional and deliberate because he believed he answered the single question accurately. The referee accepted Ary's reasons for failing to disclose these facts and concluded that Ary's nondisclosure was not indicative of juror bias and, in fact, he was not actually biased against petitioner. (*Id.*)

The referee's findings are entitled to deference, particularly on the issue of Ary's credibility. (*In re Cox, supra*, 30 Cal.4th at p. 1007.) With respect to the undisclosed prior felony conviction, Ary testified that when he received the jury summons for this case in 1993, he called the clerk and reported that he was ineligible because he had a felony conviction. (1RHRT 32, 59.) He testified that he had hoped to get out of jury service because he "didn't want to be part of convicting anyone" and "didn't want to be responsible for sending anyone to the penitentiary." (1RHRT 122, 132.) However, the court clerk informed him that he had to report for jury duty because his service in the military proved that his prior felony conviction had been expunged. (1RHRT 32-34, 104.) Based on that information, Ary believed that "after I went into the service, it cleared me." (1RHRT 105.) Ary explained that he was eligible to work as a bus driver for the City of Los Angeles only "because that felony in '64 was erased." (1RHRT 110.) Thus, he did not disclose his 1964 felony conviction because he believed it had been wiped from his record. (1RHRT 58-59, 105.) While he did not want to serve on the jury, "I did what I had to do." (1RHRT 132-133.)

Ary testified that he answered the questionnaire "the best way I could." (1RHRT 115.) He intended to be forthcoming in his answers to the questionnaire and did not intend to withhold important information. (1RHRT 115.) He said, "I did the best I could." (1RHRT 122.) He

included everything that he thought was important. (1RHRT 115.) It never occurred to him that he had left out anything from the questionnaire. (1RHRT 116.)

With respect to the failure to disclose his arrest record, Ary testified that he did not report his 1974 arrest for robbery because the charges were dropped and he was released. (1RHRT 38, 61, 108.) He did not report his subsequent DUI arrest because he believed that it had been removed from his record after he completed a DUI class. (1RHRT 60, 70, 109.) He believed the DUI had been dismissed, and thus that it was "not important" (1RHRT 126) because he was told it "would be taken off [his record] once [he] paid the fine" (1RHRT 110). Since the DUI occurred after he had consumed only two beers, he did not believe that he had a "problem with alcohol" as asked on the questionnaire. (1RHRT 40-42, 70-71, 114, 126.)

Ary also testified that he simply misread the questionnaire. (1RHRT 61-62.) He understood the question "have you, a close friend or relative ever been accused of a crime," to apply only to convictions and not merely accusations. (1RHRT 61, 130.) He believed the only time any police contact should be disclosed is when it resulted in an actual conviction. (1RHRT 131.)

Ary testified that when he entered the jury selection process, he had an open mind. (1RHRT 101.) He was not acquainted with petitioner and knew nothing about the case. (1RHRT 101, 133-134.) During the jury selection process he thought to himself: "I hope I'm not picked because this guy, his life is in our hands and what we decide is going to be a reflection on him for the rest of his life, and I really didn't want a part of that. I really didn't." (1RHRT 134.) He was not biased against petitioner before trial commenced. (1RHRT 102.) He did not omit the information about his criminal history because he was biased against petitioner. (1RHRT 116.)

The referee's findings should be given great weight because they are supported by substantial evidence produced at the reference hearing. Ary's credible testimony at the hearing established that his omissions were not intentional or deliberate and that he was not biased against petitioner, as the referee found. (*In re Bolden, supra,* 46 Cal.4th at p. 224; see *In re Hamilton, supra*, 20 Cal.4th at p. 300 ["an honest mistake on voir dire cannot disturb a judgment in the absence of proof that the juror's wrong or incomplete answer hid the juror's actual bias"]; *In re Scott, supra*, 29 Cal.4th at p. 824 ["the reason we require habeas corpus petitioners to prove their disputed allegations at an evidentiary hearing . . . is to obtain credibility determinations"].)

2. Second inquiry

With respect to the Court's second question regarding Ary's reasons for failing to disclose his relatives' criminal histories during voir dire, the referee found Ary did not do so because he was not asked any specific question on the subject. (Findings at 8.) The referee noted that the only voir dire on this subject was the same, single question in the written questionnaire referred to in the first issue, which Ary misunderstood to be asking about criminal convictions. (*Id.* at 9.) Additionally, the referee concluded that while Ary's older son, Pervies Jr., had been convicted of a felony years earlier, their relationship was so distant that his son's crimes simply did not occur to him. Even if Ary had thought of that son, Ary was only aware at the time of trial that his son had been arrested, not that he had been convicted. With respect to Ary's younger son, Pervies II, the referee concluded that Ary did not disclose that son's juvenile joyriding case because he believed it was neither "criminal" nor a "conviction." (*Id.*) Finally, with respect to Ary's cousin and nephew who were serving life sentences for murder, the referee found that Ary had no contact with them and thus did not think about them when answering the question. For these

reasons, and also because Ary testified that he believed he had answered the questions accurately, the referee concluded that Ary's nondisclosure was neither intentional nor deliberate, was not indicative of juror bias, and he was not actually biased against petitioner. (*Id.*)

The referee's findings are entitled to deference, particularly on the issue of Ary's credibility, because they are supported by substantial evidence. (*In re Bolden, supra,* 46 Cal.4th at p. 224; *In re Cox, supra*, 30 Cal.4th at p. 1007.) With respect to his sons' criminal histories, Ary testified that he knew his older son, Pervies Jr., had been arrested two times before Ary served as a juror in this case. (1RHRT 42-44, 58, 63, 68.) However, Ary did not report those incidents on the jury questionnaire because "[i]t did not seem important at that time." (1RHRT 58.) Ary did not raise Pervies Jr. and did not think of his criminal history because they were estranged at the time. (1RHRT 62, 112.) Ary explained, "[Pervies Jr.] wasn't part of my life" (1RHRT 113), "I have had no dealing with [him] . . . until he became an older grown man" (1RHRT 128), and "I didn't have any dealing with my son until after he became an adult and then we reunited [after the trial in this case]" (1RHRT 62, 66, 69).

With respect to his younger son, Pervies II, Ary testified that he had one juvenile arrest before Ary served as a juror in this case. (1RHRT 45-46, 48, 64, 66.) Although Ary knew about that incident, he did not report it on the questionnaire because juvenile records are confidential and the case was resolved prior to adjudication. (1RHRT 66-68, 113.) He did not omit the information about either of his son's arrests because of any bias against petitioner. (1RHRT 116.)

"There is serious question whether *honest* voir dire mistakes can ever form the basis for impeachment." (*In re Hamilton, supra*, 20 Cal.4th at p. 300.) The referee found Ary's credible testimony about his honest mistakes on voir dire refuted petitioner's allegations of bias. (See *Smith v. Phillips*

(1981) 455 U.S. 209, 215 ["the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias"—imputed or implied bias is insufficient].)

3. Third inquiry

Finally, with respect to the Court's third inquiry, the referee found that Ary was not biased against petitioner when Ary failed to disclose that he had previously been convicted of DUI or that one of his sons had several prior criminal convictions for drug-related crimes. (Findings at 9.) The referee noted that Ary testified that 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 answered the question accurately. He did not consider himself to have ever been an alcoholic. He only attended AA meetings as a condition of DUI probation. He was not aware of his son's addiction to and commitment for drugs until after the end of this trial. At the time of trial, Ary only knew of his son's drug-related arrest. The nondisclosure was not intentional and deliberate, since Ary believed that he was answering the question accurately. For the same reason, it was also not indicative of juror bias or actual bias against petitioner. (*Id.* at 9-10.)

The record of the reference hearing supports the referee's findings and those findings are entitled to deference. (*In re Cox, supra*, 30 Cal.4th at p. 1007; *In re Scott, supra*, 29 Cal.4th at p. 824 ["the reason we require habeas corpus petitioners to prove their disputed allegations at an evidentiary hearing rather than merely decide the merits of the case on declarations, is to obtain credibility determinations"].) With respect to knowing that his older son, Pervies Jr., had been arrested for selling drugs, Ary did not report that Pervies Jr. had a "problem" with drugs, as the questionnaire asked,

because "[y]ou can be a drug dealer and never touch the stuff." (1RHRT 72-73.) With respect to his ex-wife's nephew and a cousin who were serving life sentences for murder, Ary testified that he had no contact with those men and thus did not mention them on the questionnaire because he "didn't think about it." (1RHRT 98.) Ary said: "I wasn't close to them as far as being around them to just . . . automatically think about them. . . . it didn't occur to me at that particular point, but now since she [petitioner's counsel] is asking me these questions, yes." (1RHRT 99.)

The referee's report and findings should be given great weight. It is reliable and helpful because it answers each of the Court's questions in detail, supported with relevant testimony from the reference hearing. Because the findings are reliable and helpful, the Court should adopt the referee's credibility and other factual determinations. (*In re Cox, supra*, 30 Cal.4th at p. 998.) The Court should do so here because the referee's findings are supported by substantial evidence and demonstrate that petitioner is not entitled to relief. As the high court observed in *McDonough Power Equipment, Inc.*:

> The varied responses to . . . question[s] on voir dire testify to the fact that jurors are not necessarily experts in English usage. Called as they are from all walks of life, many may be uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges. Moreover, the statutory qualifications for jurors require only a minimal competency in the English language. . . . [¶] To invalidate the result of a 3-week trial because of a juror's mistaken, though honest, response to a [voir dire] question, is to insist on something closer to perfection than our judicial system can be expected to give. A trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on voir dire examination. . . . The motives for concealing information may

> vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

(*McDonough Power Equipment, Inc. v. Greenwood, supra,* 464 U.S. at pp. 555-556 ["there are no perfect trials"].) Petitioner questioned Ary at the reference hearing and was unable to demonstrate Ary committed any misconduct or was actually biased against him during voir dire.

Finally, even if, for the sake of argument, Ary committed misconduct during voir dire, the presumption of prejudice was rebutted by other evidence elicited at the reference hearing. (*In re Hitchings, supra*, 6 Cal.4th 97, at p. 119.) Ary testified he did not know petitioner or anything about the case before jury selection, he was not biased against petitioner during jury selection, and he had actually tried to avoid being on the jury. Although petitioner was afforded a reference hearing that addressed these issues, he failed to prove actual bias from Ary's nondisclosure during voir dire.[4] Petitioner has not carried his burden of proof on the first three claims and thus is not entitled to relief. The first three claims should be dismissed.

D. Petitioner Has not Established Prejudice During Deliberations

In keeping with the referee's analysis, the Court's fourth and fifth inquiries are addressed in this section. In general, these inquiries concern: (1) whether Ary made certain statements to other jurors during

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[4] The defense questioned each juror at the reference hearing about their signed declarations that were submitted in support of the petition for writ of habeas corpus. However, none of them had written the declarations. (1RHRT 118; 2RHRT 181-182, 196.) Several jurors disputed statements attributed to them in the declarations. (1RHRT 118; 2RHRT 181.) For example, Lewis testified she was given the typed declaration and did not read it "thoroughly" before signing it. (2RHRT 183.) Ary testified that he signed but did not write the declaration prepared by the defense investigators and that some of the statements attributed to him were inaccurate. (1RHRT 77-81.)

deliberations after he became jury foreman and (2) if so, when did it happen and what did the other jurors do with that information. In other words, the first issue is whether Ary asserted during deliberations that petitioner had committed uncharged murders. The second issue is whether Ary and other members of the jury urged holdout jurors to watch the movie *American Me* during penalty phase deliberations and whether those jurors actually did so. The referee found the answer to the first inquiry is "no" and the answer to the second inquiry is "yes." (Findings at 10.) The record supports those findings and they should be accorded great weight.

"Juror misconduct, such as the receipt of information about a party or the case that was not part of the evidence received at trial, leads to a presumption that the defendant was prejudiced thereby, and may establish juror bias. [Citations.]" (*People v. Nesler* (1997) 16 Cal.4th 561, 578.) "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." (*Id.* at p. 579.)

> 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 it likely to have influenced the verdict improperly,' but 'no evidence is admissible to show that [actual] effect of such statement, conduct, condition, or event upon a juror . . . or concerning the mental processes by which [the verdict] is determined." (Evid. Code, § 1150, subd. (a)[5]

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[5] Evidence Code section 1150 provides: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have

(continued...)

> [citation]. [¶] 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, discussed the case with nonjurors, or shares improper information with other jurors, the event is called juror misconduct. [Citations.]

(*In re Hamilton, supra,* 20 Cal.4th at pp. 293-294.)

1. Fourth inquiry

The referee found that Ary did not assert during jury deliberations that petitioner had previously committed uncharged murders. (Findings at 10.) Ary testified he never did so and only one other juror, Cynthia Lewis, recalled differently. The referee observed that Lewis's recollection was that, during penalty deliberations, she was sitting next to Ary when he "nudged" her and said, "Remember that he did kill someone else." (*Id.*) The referee noted that Lewis was not certain that Ary had used the word "kill." In any event, Lewis testified that she understood that Ary was referring to an uncharged crime the jurors had heard about in open court during the guilt phase and were instructed not to consider. Lewis recalled it involved some kind of assaultive conduct. The referee noted that Lewis testified that after she reminded Ary of the court's admonition, the subject was never discussed again. (*Id.*)

The referee concluded that Lewis had confused the two subjects in her memory over time. (Findings at 10.) The referee noted that other jurors recalled mention in the courtroom of an uncharged crime and were instructed not to consider it. No juror testified that that crime was a

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(...continued)
influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him [or her] to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

homicide; several recalled it was a drug-related offense. The referee found the only discussion of other homicides occurred during penalty phase deliberations and related to whether petitioner might kill again. The referee found several jurors took part in that discussion. (*Id.*)

The record supports the referee's finding that there was no discussion of petitioner's alleged prior "murders." At the hearing, Ary denied telling one of the jurors that petitioner "had committed another murder." (1RHRT 83.) Ary recalled: "We might have discussed it." (1RHRT 117.) Ary also denied telling the defense investigators that he told other jurors that "if we find second-degree murder, when he got out in seven years he would feel like he had gotten away with the killing and would kill again." (1RHRT 83-84.) Ary testified at the hearing: "I don't know if he had committed a murder prior to this or would he kill again. I don't know nothing about that . . . ." (1RHRT 84.) Ary said he had no knowledge whether or not petitioner committed other murders. (1RHRT 121.)

Indeed, every other juror who testified at the reference hearing recalled that the only information on this issue concerned evidence produced or discussed by the parties in open court during the trial. The other jurors who recalled a reference to prior crimes, whether drugs or assaults, testified that it concerned information produced at trial that they were then instructed not to consider. (2RT 172, 246, 253-254, 260.) Every juror testified that he or she abided by the court's instructions to consider only the evidence received at trial. (2RHRT 156, 247, 254-255, 260.) Except for Cynthia Lewis, no juror who testified at the hearing recalled any discussion about petitioner committing a murder other than the two murders charged at trial. (2RHRT 151, 155, 245.)

Lewis, a registered nurse at the time, was the only juror at the reference hearing who recalled such a discussion. Lewis testified that during guilt phase deliberations, she was sitting next to Ary when he

nudged her and stated, "Now, Cynthia, you remember that he did kill someone else." (2RHRT 166-167, 171-172.) Lewis testified that she "vaguely" recalled hearing about "something of that nature" during the trial. (2RHRT 166, 172,174.) Lewis testified that while the jury was in the courtroom, she heard some reference to a prior incident: "It might have been one of the attorneys. It might have been—someone mentioned something about him possibly shooting, but he got off or something. Something was said about a prior." (2RHRT 173, 175.) Lewis said, "It had to do with someone being injured by the individual that was on trial." (2RHRT 174.) She said the reference was not necessarily a comment about a homicide. (2RHRT 174.) Lewis testified, "I do recall the judge saying . . . strike it" (2RHRT 173-175), or that they should discount it (2RHRT 166). Lewis testified that when Ary made the comment regarding the prior, she promptly advised him, "But we're not supposed to talk about that." (2RHRT 183.) She said it was never mentioned again. (2RHRT 184.) Although Lewis testified that she heard the comment during guilt phase, she also testified that after she heard that comment she changed her vote to death. (2RHRT 171.)

The record supports the referee's finding that there was no credible evidence to support the allegation that Ary had discussed petitioner's purported prior murders and that Lewis had confused the two subjects—purported priors with the in court discussion of a prior assault—in her memory. In any event, every juror who recalled the discussion also testified they abided by the instruction not to consider that information during deliberations. (2RHRT 157, 175, 177, 179, 183-184; 191, 246-247, 253.) (See *People v. Majors* (1998) 18 Cal.4th 385, 428, 430 [evidence that during deliberations one juror revealed information about defendant's accomplice was not prejudicial where other jurors reiterated the judge's

instruction not to consider that issue and the entire discussion lasted mere seconds].)

> Moreover, the referee is entitled to discredit portions of a witness's testimony while finding the witness credible in other particulars. [Citation.] Thus, the fact that the referee expressly or impliedly disbelieved a witness in some respects, or that portions of a witness's testimony seem unlikely on their face, does not mean that any finding based solely or primarily on the same witness's testimony on other matters is without substantial support.

(*In re Hamilton, supra*, 20 Cal.4th at p. 297, fn. 18.) This is clearly how the referee approached Lewis's testimony.

In sum, the evidence at the reference hearing supports the referee's finding that Ary was not biased against petitioner during penalty phase deliberations. In addition to the evidence already noted, Britten testified that Ary did not volunteer to be jury foreman after the first foreman left, but was chosen by the other jurors. (2RHRT 220-221.) Salcedo/Rose testified that Ary was a natural "leader" and "wonderful" person. (2RHRT 259.) In fact, Rennie testified that the penalty phase foreman (i.e., Ary) was "very quiet for the foreman" and "[m]any other voices were prominent, more prominent than his." (2RHRT 205.) None of those attributes indicate that Ary was biased against petitioner.

2. Fifth inquiry

With respect to the Court's fifth and final inquiry regarding the movie *American Me*, the referee found that, during penalty phase deliberations, Ary and several other jurors urged holdout jurors to watch the movie *American Me* in order for those two jurors to learn about the nature of life in prison. (Findings at 10.) The referee also found that two jurors—Julie McClaren and Christine Rennie—watched the movie *American Me* during the penalty phase deliberations. (*Id.*) We do not dispute that finding

because McClaren and Rennie testified that they watched the movie *American Me* during deliberations.

The Court did not order the referee to find whether watching the movie amounted to misconduct or bias. As the referee noted, it is not permitted to delve into the jurors' thought processes. (Evid. Code, § 1150.) Thus, it remains for this Court to determine whether watching the movie was misconduct and proved actual bias. (See *People v. Collins* (2010) 49 Cal.4th 175, 242 ["We first determine whether there was any juror misconduct. Only if we answer that question affirmatively do we consider whether the conduct was prejudicial"].) While we acknowledge misconduct occurred, we contend that prejudice is not shown.

With respect to the issue of misconduct, the testimony at the hearing indicated misconduct occurred in this case because two jurors rented a movie during penalty phase deliberations in order to learn about what petitioner's life in prison would be like. "In the [past] century . . . numerous cases have reiterated the distinction between an experiment that results in the acquisition of new evidence, and conduct that is simply a 'more critical examination' of the evidence admitted. The former is misconduct; the latter is not." (*People v. Collins, supra,* 49 Cal.4th at p. 242, and p. 249 ["What the jury cannot do is conduct a new investigation going beyond the evidence admitted"].)

The three jurors who initially voted against the death penalty were Cynthia Lewis, Julie Graff McClaren, and Christine Rennie. (2RHRT 162-163, 168-169, 187.) At the reference hearing, Lewis testified that she recalled the movie *American Me* being discussed during deliberations, but she did not recall if the discussion was during guilt or penalty phase deliberations. (2RHRT 164, 171.) Lewis recalled about "three to five [jurors] discussing it [the movie]." (2RTRH 165.) Lewis testified that she did not pay much attention to the discussion about the movie because she

"didn't feel it was relevant." (2RHRT 165.) Lewis did not watch the movie at any time during deliberations. (2RHRT 165, 171.) Lewis said that the two other women who were also against the death penalty were a Hispanic teacher and a white "CPA," or accountant. (2RHRT 168, 170.) Lewis testified that she and the two other holdout jurors changed their minds "one-by-one," as opposed to all together. (2RHRT 170.)

McClaren testified that one of the jurors, she does not recall who, recommended that "anybody who had not seen it [*American Me*] should see it," especially "the three or four jurors" like her, who had not yet made a decision. (2RHRT 192-194.) McClaren denied that she opposed the group, or "camp," voting for the death penalty. (2RHRT 200.) She testified, "I needed more time to make a decision. It's not that I wasn't in that camp . . . ." (2RHRT 200.) McClaren testified that she watched the movie during deliberations. (2RHRT 194, 198-199.) She described *American Me* as "a prison movie, and it talked about how they contact the people on the outside . . . ." (2RHRT 202.) McClaren testified that when deliberations resumed, she voted for death. (2RHRT 194.) She recalled they discussed gangs during deliberations. (2RHRT 200.)

Rennie testified that several jurors, including Ary, recommended that she and the other jurors having a hard time "com[ing] to a conclusion about the sentence" should watch the movie *American Me*. (2RHRT 211.) Rennie testified:

> I remember at one phase, that three or four people, including myself, saying, you know, maybe it's harder for me, me and these couple of other people, to come to a conclusion about a sentence, because we don't have the life experience, that includes anyone in our families being in jail, or, you know, one we knew. That's why somebody said maybe you should look at this movie.

(2RHRT 211.)

Rennie testified that she thought Ary was the person who recommended seeing the movie. (2RHRT 211.) Rennie said, "I watched part of it." (2RHRT 213.) Rennie testified that she watched "[m]aybe 45 minutes. Maybe it would have been half . . . It was rather repetitious. I kind of just wanted to get an idea on what people had been talking about . . . about being in prison" (2RHRT 215). Rennie recalled watching the movie "on the weekend" during penalty phase deliberations. (2RHRT 213, 215.) When deliberations resumed, there was no further discussion of the movie. (2RHRT 216-217.) She "eventually" voted for the death penalty, but not immediately after watching the movie. (2RHRT 213-214.)

Ary testified that he first saw the movie *American Me* several years before the instant trial. (1RHRT 119.) He recalled it concerned the rise of the Mexican Mafia prison gang in the 1960s and 1970s, although it referred to other gangs, like the Black Guerilla Family (BGF). (1RHRT 119-120.) Ary testified that he and several other jurors suggested that during the weekend break, the two young women jurors should "go home and rent it from Blockbuster." (1RHRT 120, 123.) Ary said, "Being the jury foreman, I said you should go see this. You should go get it and look at it for yourself and see what life in prison is all about." (1RHRT 125.) When deliberations resumed, the jurors did not discuss the movie. (1RHRT 120.) Ary testified:

> The two jurors, which was the two young ladies, they were so naive about street life until they were so determined that he couldn't harm no one while he was in prison for the rest of his life, and we discussed this, we deliberated and discussed it, and that Friday, the judge said, well, we got to come to a conclusion. We have to do something about this because it's been deliberated too long, so I asked these two young ladies, because the rest of us had already found him guilty with special circumstances, the death penalty, but these two said he will never hurt anyone as long as he is in the penitentiary for life.

> I said you just don't know anything about prison life. I said you two go to Blockbuster and get the movie "American Me." Sit down and look at it. It will explain penitentiary life to you, and you will see what a person can do while he is in the penitentiary.

(1RHRT 86.)

Ary testified that he urged the two young women jurors to go home and watch the movie "to get knowledge of prison life." (1RHRT 86, 99.) Ary testified, "Me and a few other jurors, when I said that you need to know what prison life is about, what they can and what they can't do while they are in prison, and this is based on a new story, and a couple of the jurors said I saw that, yes, and this will let you know what prison life is about . . . ." (1RHRT 99-100.) Ary testified that whereas on Friday, the vote was 10 to 2, when the two women returned to deliberations on the following Monday, the vote for death was unanimous. (1RHRT 88, 101.)

Other jurors recalled Ary suggesting that the two female "holdout" jurors should watch the movie *American Me* "to give them an idea of what prison life would be like . . . ." (2RHRT 222-223, 248.) The jurors recalled that after Ary recommended the movie, the vote for death became unanimous. (2RHRT 223.) Moreover, several jurors who had previously seen the movie *American Me,* including Perez, also recommended the holdout jurors watch it in order to see "what life would be like in prison." (2RHRT 193, 222-223, 230, 232-237, 243-244, 248.) Perez testified that "we all agreed with him [Ary]" that the two holdout jurors should watch the movie "[b]ecause they lived in the suburbs, and they didn't really know how life on the street really went, and so it was a good movie for them to get an idea of what would happen in prison." (2RHRT 234.) After that discussion, the vote for death went from "10-2 . . . to 12" for death. (2RHRT 223.)

Although that record at the reference hearing established that two jurors watched a movie about prison gangs and prison life during

deliberations, the misconduct does not rise to the level of actual prejudice to require reversal of the death verdict. Initially, since the evidence of petitioner's guilt was overwhelming, the risk that exposure to the extraneous information in the movie prejudicially influenced a juror was minimized. (*In re Hamilton, supra*, 20 Cal.4th at p. 301, fn. 21.) As one of the jurors testified, "it took deliberations to come up with 12 of us all agreeing" to the death penalty. (2RHRT 221-222.) In other words, the jury properly deliberated before voting for death. Moreover, the court's admonition to decide the case on the evidence also dispels the presumption of prejudice arising from any misconduct. (*People v. Zapien* (1993) 4 Cal.4th 929, 996.)

Additionally, the testimony indicated that watching the movie did not influence the verdict. First, the movie was not mentioned when deliberations resumed after two jurors watched it over the weekend. (1RHRT 120.) Second, the holdouts did not change their minds as a unit, but voted for death "one-by-one" (2RHRT 170, 213). In other words, it was the deliberations and not the movie that convinced them to change their votes. Finally, the two jurors who watched the movie during deliberations did not describe it in terms relevant to the contested issue whether petitioner would kill again in prison. To the contrary, McClaren testified the movie "talked about how they [prisoners] contact the people on the outside" (2RHRT 202), which was not an issue in petitioner's case. Rennie testified that she only watched the first part of the movie and she simply recalled that it was "about being in prison" (2RHRT 215), not that it showed prison violence. In other words, what the two jurors gleaned from the movie did not relate to the penalty phase issue whether petitioner would kill again in prison. Thus, there was no substantial likelihood of prejudice by the misconduct in this case.

Finally, the issue of prison gangs that was the focus of *American Me* was a matter of common knowledge. Prejudice is thus not shown because the testimony at the reference hearing revealed that the movie was already part of the common knowledge, since nearly half of the jurors had already seen it prior to trial. (1RHRT 119; 2RHRT 165, 193, 248.) "The jury system is an institution that is legally fundamental but also fundamentally human. Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system." (*People v. Mendoza* (2000) 24 Cal.4th 130, 195.)

The jurors who had already seen the movie recommended it to the other jurors in order to dispel the preconceived and incorrect notion that prisoners cannot commit crimes inside prison. Just as prosecutors and defense attorneys "may freely comment on matters of common knowledge in illustrating and supporting his argument for conviction, such as the serious and increasing menace of criminal conduct" (5 Witkin & Epstein, Cal. Criminal Law (2nd ed. 1989) Trial, § 2901, pp. 3556, 3579; see *People v. Jones* (1997) 15 Cal.4th 119, 180 [prosecutor's references to notorious murderers in summation did not constitute misconduct]; *People v. Farmer* (1989) 47 Cal.3d 888, 922 ["it is improper to state facts that are not in evidence during summation, with certain narrow exceptions such as commonly known matters"]; *People v. Love* (1961) 56 Cal.2d 720, 730 [counsel's summation may refer to matters of common knowledge or illustrations drawn from experience, history, or literature]; *People v. Woodson* (1964) 231 Cal.App.2d 10, 16 [error to prevent defense counsel from reading newspaper article about a similar crime]), so, too, may the deliberating jury discuss matters of common knowledge such as a movie about the rise of prison gangs that many jurors had seen before trial (see *Gorman v. Leftwich* (1990) 218 Cal.App.3d 141, 147 [allegation that two

jurors discussed watching TV show about medical malpractice during deliberations on medical malpractice action did not establish misconduct absent showing the program influenced the verdict]). Any presumption of prejudice is rebutted because no juror testified that the movie "influenced the jury's ultimate decision." (*Ibid.*)

Finally, *American Me* is a movie made for dramatic effect. It would thus be obvious to a reasonable juror that any conclusions or deductions derived from it would be unreliable and potentially erroneous. Judged objectively, any potential information in the movie was not inherently and substantially likely to have influenced the jury. Therefore, it is not substantially likely that those jurors who watched the movie during deliberations were actually prejudiced as a result of that information. (*In re Nesler, supra*, 16 Cal.4th at p. 579.) The overwhelming evidence of petitioner's guilt minimized the risk that exposure to the movie prejudicially influenced any juror. (*In re Hamilton, supra*, 20 Cal.4th at p. 301, fn. 21.)

The record at the reference hearing established that no juror was biased against petitioner. Accordingly, petitioner has failed to meet his burden of proving actual bias for reversal. He is not entitled to relief.

CONCLUSION

Accordingly, respondent respectfully submits that the order to show cause should be discharged and the petition for writ of habeas corpus should be denied.

Dated: April 4, 2011

Respectfully submitted,

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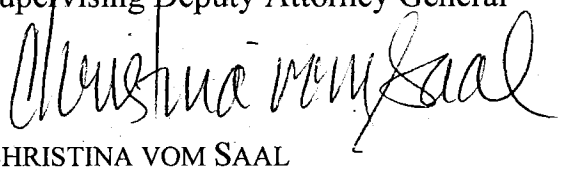

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CERTIFICATE OF COMPLIANCE

I certify that the attached EXCEPTIONS TO/REQUEST FOR ADOPTION OF REFEREE'S REPORT AND BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 8,459 words.

Dated: April 4, 2011

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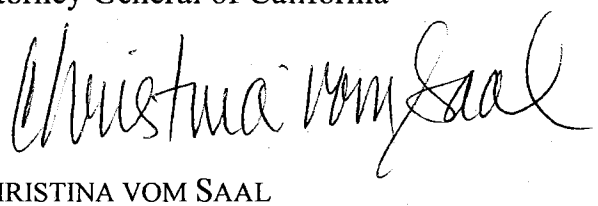

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DECLARATION OF SERVICE BY U.S. MAIL

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 April 4, 2011, I served the attached **EXCEPTIONS TO/REQUEST FOR ADOPTION OF REFEREE'S REPORT AND BRIEF ON THE MERITS** 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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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 April 4, 2011, at San Francisco, California.

L. Sorensen
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Signature

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