**IN THE SUPREME COURT OF MISSISSIPPI**

**NO. 2019-CA-00283-SCT**

***BOBBY BATISTE a/k/a BOBBY L. BATISTE a/k/a BOBBY L. BATISTE, JR. a/k/a BOBBY LIONEL BATISTE, JR. a/k/a BOBBY LIONEL BATISTE***

***v.***

***STATE OF MISSISSIPPI***

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| DATE OF JUDGMENT: | 12/18/2018 |
| TRIAL JUDGE: | HON. JAMES T. KITCHENS, JR. |
| COURT FROM WHICH APPEALED: | OKTIBBEHA COUNTY CIRCUIT COURT |
| ATTORNEYS FOR APPELLANT: | OFFICE OF CAPITAL POST-CONVICTION COUNSEL<br>BY: BENJAMIN H. McGEE, III<br>TREASURE R. TYSON<br>SCOTT A. JOHNSON |
| ATTORNEYS FOR APPELLEE: | OFFICE OF THE ATTORNEY GENERAL<br>BY: LADONNA C. HOLLAND<br>BRAD A. SMITH<br>ASHLEY L. SULSER |
| NATURE OF THE CASE: | CIVIL - DEATH PENALTY - POST CONVICTION |
| DISPOSITION: | REMANDED - 09/24/2020 |
| MOTION FOR REHEARING FILED: | |
| MANDATE ISSUED: | |

**EN BANC.**

**CHAMBERLIN, JUSTICE FOR THE COURT:**

¶1. Bobby Batiste was convicted of capital murder in Oktibbeha County and was sentenced to death. His conviction and sentence were affirmed by this Court. ***Batiste v. State***, 121 So. 3d 808 (Miss. 2013). This Court later granted him the right to file the petition for post-conviction relief (PCR), the subject of this opinion. ***Batiste v. State***, 184 So. 3d 290

(Miss. 2016).[1] This Court granted Batiste the right to file a PCR action because the Court determined that Batiste was entitled to a hearing regarding alleged communications between bailiffs and/or others and members of the jury. ***Id.***

¶2. Batiste then filed a PCR action in circuit court, and hearings were held. During the hearings, a motion was made requesting that the trial judge recuse. This motion was denied, and, ultimately, the PCR was denied. Batiste appealed both the denial of the request to recuse as well as the denial of the PCR on its merits. Because we find that evidentiary questions remain relating to the recusal issue, we do not yet address the merits of the PCR.

## FACTS AND PROCEDURAL HISTORY

¶3. Because this Court's analysis is limited to the recusal issue, a lengthy recitation of the facts underlying Batiste's conviction/sentence or this PCR action are unnecessary. A detailed outline of those facts, however, can be found in this Court's decision granting Batiste's PCR. ***Id.*** For the purposes of this opinion, the circuit court held a hearing on April 4, 2018, to determine if improper communications had occurred between bailiffs and/or other persons and the jury and, if so, what impact, if any, those communications had on Batiste's conviction and sentence.

¶4. At the hearing, the two jurors (Denise Cranford and Webster Rowan) who had

[1]Then-Associate Justice Kitchens authored the majority opinion granting Batiste leave to seek post-conviction relief, joined by former Chief Justice Waller, former Presiding Justice Dickinson, then-Associate Justice King and Justice Coleman. Former Justice Pierce dissented, joined by then-Presiding Justice Randolph and former Justice Lamar. Justice Maxwell did not participate.

presented affidavits alleging extraneous contact were called by Batiste to testify. The State called one of the trial bailiffs. After receiving testimony, the judge recessed the hearing, which he later set to reconvene on July 27, 2018. The hearing did not take place that day because Batiste had not been transported by the Mississippi Department of Corrections for unknown reasons. During a chambers conference that day, however, the trial judge expressed concern about one of the statements in Cranford's affidavit. The statement read as follows:

> During the year before my trial, my sister-in[-]law had been murdered in Tennessee by police. During the trial, Judge Kitchens told me that he knew about this situation and if there was anything he could do to help me with this situation, just let him know. I felt the judge was extremely nice to me and his attention made me feel more comfortable serving on the jury.

¶5. Batiste moved for the trial judge to recuse based on what had occurred at the conference. According to the affidavit of Batiste's counsel, the trial judge advised the attorneys that Cranford's affidavit "raised questions in his mind about the reliability of Ms. Cranford's testimony." The judge indicated that he did not recall making the statement in question to Cranford but that he had seen Cranford at a campaign-related event in 2010 and might have made such a statement to her then.

¶6. Batiste, in his motion to recuse, argued that the trial judge had become a witness in the case by relying on his personal recollection to assess Cranford's credibility. He also argued that, by sua sponte raising the issue of Cranford's credibility based on Cranford's affidavit, the trial judge had brought up a new argument that the State had never raised. The

State filed a response arguing that because the trial judge had sufficient evidence to deny the PCR without relying on his own recollection, Batiste had not overcome the presumption of the judge's impartiality.

¶7. On December 17, 2018, the trial judge denied the motion to recuse and denied the PCR on the merits. Pertinent to our analysis, the order stated, in part:

> At the July 27, 2018 discussion with the attorneys for both sides the court asked whether Ms. Cranford stated to the Office of Capital Post Conviction that this Court talked to her off the record during the pendency of this trial in October 2009. *If Ms. Cranford made such a statement, then the Court would be obliged to recuse since the Court would be a witness to rebut such statement.*

(Emphasis added.) Because "there [was] no allegation . . . that this Court conferred with Mrs. Cranford *off the record* during the pendency of this trial and before the jury reached its verdicts[,]" the trial judge denied the motion to recuse, saying, "[h]ad there been such an allegation by Mrs. Cranford, this Court would have recused itself." (Emphasis added.) The order then went on to address the merits of the PCR and found, relevant to our discussion today, that Cranford was not a credible witness in part because her testimony was contradicted by her affidavit, her testimony and the trial record.

¶8. Batiste filed a motion to alter or amend the order, arguing that Cranford did not allege that the conversation had occurred on the record and that the hearing should have been reconvened to hear additional testimony on the subject. The trial court denied the motion to alter or amend. In doing so, he reiterated that the trial record spoke for itself, and he noted other issues with Cranford's credibility.

## STANDARD OF REVIEW

¶9. This Court reviews the denial of a motion to recuse for manifest abuse of discretion. ***Hathcock v. S. Farm Bureau Cas. Ins. Co.***, 912 So. 2d 844, 849 (Miss. 2005).

## DISCUSSION

¶10. The issue before the Court is covered by Canon 3 of the Mississippi Code of Judicial Conduct. Specifically implicated are Canon 3E(1)(a) and Canon 3E(1)(d)(iv), which require a judge to disqualify himself when the judge has "personal knowledge of disputed evidentiary facts concerning the proceeding" or if "to the judge's knowledge [he is] likely to be a material witness in the proceeding," respectively.

¶11. A litigant contending that a judge's failure to recuse was a manifest abuse of discretion has a heavy burden of proof. ***Payton v. State***, 897 So. 2d 921, 943 (Miss. 2003). The litigant must overcome the presumption of impartiality "that a judge, sworn to administer impartial justice, is qualified and unbiased." ***Id.*** (citing ***McBride v. Meridian Pub. Improvement Corp.***, 730 So. 2d 548, 551 (Miss. 1998)). When this Court is asked to review the denial of recusal, it "will look to the whole trial and pass upon questions on appeal in the light of the completed trial." ***Id.*** (internal quotation marks omitted) (quoting ***Brown v. State***, 829 So. 2d 93, 99 (Miss. 2002)). We will consider "[e]very act and movement had during the entire trial . . . and if we are unable to find that rulings have been prejudicial to the defendant, we will not reverse." ***Id.*** (internal quotation marks omitted) (quoting ***Brown***, 829 So. 2d at 99). But if the evidence produces a reasonable doubt about the judge's impartiality,

recusal is required. ***Hathcock***, 912 So. 2d at 849 (quoting ***Dodson v. Singing River Hosp. Sys.***, 839 So. 2d 530, 533 (Miss. 2003)).

¶12. The question in this case, at this point, is simply whether the judge was required to recuse. Although the question is simple, the answer is not. Cranford attested to a conversation with the judge during trial—a conversation the judge found did not occur. He supported that finding with a review of the record. The judge then factored this finding into his evaluation of Cranford's credibility. The trial judge recognized and emphasized that he would be "obliged to recuse" had the purported conversation occurred *off the record*. But he found the juror alleged their conversation had occurred on the record. So he understandably believed there was no impediment to his presiding over the hearing.

¶13. Cranford's affidavit, however, stated the communications happened "during trial," a statement the trial judge apparently took to mean "on the record." A review of this issue indicates that the question of whether the alleged communication was "during trial," whether it was on or off the record, was ambiguous. At this juncture, however, Batiste has not proved any "off the record" conversation between the trial judge and Cranford. Therefore, removal of the trial judge would be inappropriate.

¶14. Instead, the appropriate disposition for this case is to remand back to the trial court for the limited purpose of allowing the trial judge to hear such evidence as is necessary to allow him to clear up any ambiguity and to determine if the alleged conversation did, in fact, take place "during trial," and, if it did, whether the conversation is alleged to have occurred

on or off the record.

¶15. If the finding is that the conversation took place "on the record," recusal is unnecessary and there is no need for further action at the trial-court level. We would need only review the trial judge's findings in his denial of Batiste's PCR on the merits. But should the finding be that the alleged conversation took place "off the record" during the time that the trial was ongoing, the trial judge would be in a position to take such steps as he has previously recognized are necessary. While this matter may seem trivial to some, the trial judge himself recognized its importance and noted he would be "obliged to recuse" had the purported conversation occurred at some point off the record. I share some of the Chief Justice's concerns about stall tactics often employed by counsel in death-penalty cases, but, in this case, remand is the proper remedy. To decline to finalize the recusal issue now would only lead to additional delay.

¶16. While it appears that Batiste has wholly failed to put forth any affirmative evidence of undue influence, these PCR issues often turn on witness credibility. Credibility determinations in these matters are to be made by the trial judge, not individual members of this Court. This includes not only credibility determinations when evaluating an affirmative statement but also negative comments or denials. Batiste is entitled to have the recusal issue resolved on remand. Because these issues are not complicated or complex and because further delay would not meet the ends of justice, the hearing on this matter shall take place within sixty days of the issuance of this opinion.

¶17. Because the need for further action by this Court on the merits of the underlying PCR action will not be known until the recusal issue has been determined, there is no need for this Court to address it now.[2] Therefore, we remand this case for proceedings consistent with this opinion.

¶18. **REMANDED.**

**COLEMAN, MAXWELL, BEAM AND ISHEE, JJ., CONCUR.RANDOLPH, C.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY GRIFFIS, J.; COLEMAN, MAXWELL, BEAM, CHAMBERLIN AND ISHEE, JJ., JOIN IN PART. KITCHENS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, P.J.**

**RANDOLPH, CHIEF JUSTICE, DISSENTING:**

¶19. I agree there is error in this case; one error is that this Court repeatedly has failed to address Batiste's flagrant disregard of ***Gladney v. Clarksdale Beverage Co.***, 625 So. 2d 407 (Miss. 1993). The Court acquiesces to a plea for yet another hearing, assuring Batiste will return again, a point acknowledged by all. Once again, the Court is mute regarding Batiste's

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[2]As to Chief Justice Randolph's dissent, I share his concerns about Batiste's counsel's ex parte communications with jurors and obtaining juror affidavits outside of the procedures established in ***Gladney v. Clarksdale Beverage Co.***, 625 So. 2d 407, 418-19 (Miss. 1993). This Court has made clear that our trial courts have the "inherent power and duty to supervise [any] post-trial investigations[.]" ***Id.*** at 419. There are two prominent and very obvious reasons for this long-established judge-based supervision. First, the process "ensure[s] that jurors are protected from harassment[.]" ***Id.*** And second, it "guard[s] against inquiry" into the details of their deliberations. ***Id.*** As the Chief Justice points out, circumventing this procedure certainly cuts against these safeguards. While this matter could have been addressed before granting Batiste the right to proceed, it was not. This Court will likely have that opportunity when this case returns to our Court after the recusal issue has been determined.

transgressions and facilitates additional delay.

¶20. Furthermore, Presiding Justice Kitchens opines that the testimony answering the very question posed by this Court in ***Batiste v. State***, 184 So. 3d 290 (Miss. 2016) (***Batiste II***), is inadmissible. *See* Diss. Op. (Kitchens, P.J.) ¶¶ 61–63. And yet despite Batiste's having received dispensation, an exemption if you will, he has faltered in offering proof that his claim has merit. Batiste failed to present *any* evidence of improper influence upon any juror. Batiste did not provide the trial court or this Court with any evidence to support his claim that the jury was tainted. *See* ***Gladney***, 625 So. 2d at 414 (quoting ***Salter v. Watkins***, 513 So. 2d 569, 571 (Miss. 1987)). It is time to conclude this case in state court, permitting Batiste to avoid judgment by beginning the gamut of the federal courts while the victims and the public await a measure of justice. Both the majority and Presiding Justice Kitchens delay ultimate resolution of this case. As I am unable to persuade my colleagues to affirm the trial court's judgment on grounds other than its decision, I dissent.

**I.**

¶21. Before taking up the issue of recusal, the more consequential issue that should be addressed at present is our failure in allowing the proceeding to reach this juncture. Batiste's counsel's contravention of the law of the state of Mississippi in pursuing and conducting ex parte inquires of jurors outside of the procedures set forth by this Court should be addressed now. *See* ***Gladney***, 625 So. 2d at 418–19. In the hearing before Judge Kitchens, Batiste's counsel expressed total ignorance of ***Gladney***.

¶22. Our rules of evidence and the case law established in ***Gladney*** and its progeny exist for profound reasons: to protect the sanctity of the jury room and jurors' internal deliberations. In this country's criminal jurisprudence, justice and mercy are reposed in the members of the community. We entrust our fellow citizens with the power to deliberate and to determine whether an accused is guilty of committing a crime or innocent of the charges levied against her or him.

¶23. To protect the citizens who carry out this duty, we have structured a procedure barring ex parte inquiry and interview of jurors. This procedure permits jurors to decide without fear of ridicule or retribution by insulating the deliberative process of all jurors. ***Salter***, 513 So. 2d at 571 (citing ***United States v. Weiner***, 578 F.2d 757, 764 (9th Cir. 1978)). This prohibition operates to encourage jurors to meaningfully debate with each other and to wrestle with the difficult aspects of every case. ***Id.*** (citing ***United States v. Eagle***, 539 F.2d 1166, 1170 (8th Cir. 1976)). Protection of individual jurors is essential to our system of justice.

¶24. We have reposed in trial courts the "inherent power and duty to supervise [any] post-trial investigations to ensure that jurors are protected from harassment and to guard against inquiry into subjects" related to their deliberations. ***Gladney***, 625 So. 2d at 419. Pursuing ex parte communications and obtaining affidavits from jurors without seeking the trial court's permission and supervision flouts the rule of law. Should not this Court reject any matter gleaned from illicit communications with jurors similarly to its exclusion of evidence under

the doctrine of the fruit of the poisonous tree? *See* ***Marshall v. State***, 584 So. 2d 437, 438 (Miss. 1991) (quoting ***Murray v. United States***, 487 U.S. 533, 536, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988)); ***Utah v. Strieff***, 136 S. Ct. 2056, 2061, 195 L. Ed. 2d 400 (2016) (quoting ***Segura v. United States***, 468 U.S. 796, 804, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984)). Leave to file a petition for post conviction relief in this case was based on this attempted ill-gotten gain. The only support offered by Batiste for his post-conviction relief claim was unlawfully obtained.

**II.**

¶25. I agree with the majority that abuse of discretion is the applicable standard of review. Abuse-of-discretion review consists of analysis of factual findings from the record before us to determine if they are supported by evidence or are manifestly wrong. ***Will Realty LLC v. Isaacs***, 296 So. 3d 80, 81 (Miss. 2020) (citing ***Ashmore v. Miss. Auth. on Educ. Television***, 148 So. 3d 977, 981 (Miss. 2014)). Our precedent is quite clear that when failure to recuse is harmless error, a trial court does not abuse its discretion by denying a motion for recusal. ***Hathcock v. S. Farm Bureau Cas. Ins.***, 912 So. 2d 844, 853 (Miss. 2005).

¶26. Canon 3E(1)(a) provides in relevant part that

> (1) Judges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances . . . including but not limited to instances where:
>
> (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]

M.C.J.C., Canon 3E(1)(a). The factual issue was if Batiste offered proof that an extraneous

influence was brought *to bear* upon a juror or jurors.

¶27. A veritable claim for recusal based on this canon must establish that the judge had pertinent knowledge of an evidentiary fact in dispute. In this case, the critical query is *did improper influence taint the jury or was one of the jurors illegally influenced*. The majority imposes a self-limiting restriction on the issues raised to one issue: recusal. Presiding Justice Kitchens likewise limits his opinion to recusal. Batiste however, appealed this case on the merits as well. Examining the issues raised by the parties reveals that not one witness offered testimony that any juror was illegally influenced. Neither live testimony nor the illegally obtained affidavits presented with Batiste's petition support that a bailiff's statement influenced a juror's decision. Whether you accept Judge Kitchens's decision to exclude the jurors' testimony or whether you consider their testimony, no evidence adduced supported that a statement by a bailiff *bore* upon, *affected*, *impacted*, or *influenced* their determination.[3]

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[3] On examination, the record reveals Juror Cranford's testimony:

> [Counsel]: I know I said a few more questions about the bailiff's statement, but I do have a couple more. Is it safe to say that the statement by the bailiff did not affect – it did not impact your decision –
>
> [Cranford]: No.
>
> [Counsel]: – regarding guilty or innocence?
>
> [Cranford]: No.
>
> [Counsel]: And it did not affect or impact your decision as to what the appropriate punishment was in this case, did it?

[Cranford]: No.

. . . .

[Counsel]: Okay. The bailiff's statement, did it affect your – no, we did that one. You said it did not affect your decision as to guilt or innocence or as to sentencing. So, it had no impact–

[Cranford]: No impact.

[Counsel]: – on your determination? Okay. You've already said it wasn't discussed after it was initially made–ever?

[Cranford]: No. Ever.

[Counsel]: – during the course of the trial? Oh, yes. So then, your decision in this case was made based on the facts and the law as instructed by the Judge; is that correct?

[Cranford]: Correct.

The record reveals Juror Rowan's testimony:

[Counsel]: Possible. Whoever statement it was, that did not impact your decision in this case, did it?

[Rowan]: No, ma'am. Not at all.

. . . .

[Counsel]: You said it did not impact your decision in this case –

[Rowan]: No, ma'am.

[Counsel]: – as to guilt or innocence?

[Rowan]: No, ma'am.

[Counsel]: Nor as to the appropriate verdict –

No other conclusion can be drawn. If one chooses to consider the jurors' testimony, the jurors testified they convicted and sentenced Batiste based only on the law and the facts. Batiste offered no evidence to the contrary. If one chooses to exclude their testimony, Batiste offered nothing.

**III.**

¶28. The trial judge's decision to opine on the veracity of a statement unrelated to (1) guilt, (2) innocence, or (3) improper influence borne upon any juror by a witness may well be ill-advised. But it is not a valid basis for remand, recusal, or reversal. Assuming arguendo it was error, the error would be harmless.

¶29. Errors of constitutional magnitude do not necessarily mandate reversal of a trial court. *See generally* ***Davis v. Ayala***, 576 U.S. 257, 135 S. Ct. 2187, 192 L. Ed. 2d 323 (2015) (holding that constitutional error in defense counsel's absence from ex parte ***Batson***[4] hearing was harmless). Recognizing that, this Court has held that admitting testimony without the defendant's being able to cross-examine a witness can be harmless, ***Clark v. State***, 891 So. 2d 136 (Miss. 2004), that admitting statements given without ***Miranda***[5] warnings can be

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[Rowan]: No, ma'am.

[Counsel]: I meant the sentencing, excuse me?

[Rowan]: No, ma'am.

[4] *See* ***Batson v. Kentucky***, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

[5] *See* ***Miranda v. Arizona***, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

harmless, ***Walton v. State***, 998 So. 2d 971 (Miss. 2008); ***Hopkins v. State***, 799 So. 2d 874 (Miss. 2001), and that prejudicial statements made by a prosecutor during a trial can be harmless, ***Riddley v. State***, 777 So. 2d 31 (Miss. 2000). The crux of each of these cases is that despite a constitutional error, the court was confident beyond a reasonable doubt that the outcome of the proceedings would not have changed, given the overwhelming nature of the evidence. *See* ***Arizona v. Fulminante***, 499 U.S. 279, 295, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

¶30. Because Batiste failed to introduce or offer any substantive proof to the trial court in support of his petition, one might wonder whether the asserted claim was a pretext for litigious delay tactics. *See generally* ***Calderon v. Thompson***, 523 U.S. 538, 555–57, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998) (discussing the importance of finality in the proper functioning of criminal law and the strong interest of the state in finality when proof of actual innocence is fleeting); ***Sanderson v. Seaney***, 224 So. 2d 862, 864 (Miss. 1969) ("justice delayed is justice denied . . . .").

¶31. Testimony from the jurors repudiated Batiste's barren claim that members of the jury were improperly influenced by outside sources. Rejecting the jurors' live testimony as the trial court did here does not relieve Batiste of his duty to support his claim. Nothing in the record before us supports a claim of improper influence. Nothing in the record supports a claim that the jury was tainted by some external force. Not an honorable trial court in the United States would rule otherwise considering the lack of proof offered.

¶32. Moses instructed the Israelites: "do not put an innocent or honest person to death." *Exodus* 23:6. Batiste is neither. This admonition has been adopted by all of the courts in our nation. Case law abounds in both federal and state courts embracing this command. Courts must be confident beyond a reasonable doubt that the convicted and condemned are guilty. In Mississippi, we apply heightened scrutiny to all death-penalty cases to ensure the protection of the innocent and to safeguard all from the threat of unjust imprisonment and punishment. This Court can be confident beyond a reasonable doubt that Batiste is guilty because words emanating from his own mouth account for his conviction and sentence. ***Batiste v. State***, 121 So. 3d 808 (Miss. 2013) (***Batiste I***).

¶33. As such, even if Judge Kitchens abused his discretion by not recusing, such an error would be harmless. The decision of the trial court should be affirmed.

**IV.**

¶34. The trial court did err though by excluding Cranford's and Rowan's testimony, relying on Mississippi Rule of Evidence 606(b)(1). *See supra* n.1. Most respectfully, the questions posed to Cranford and Rowan were explicitly contemplated by Rule of Evidence 606(b)(2).[6] A juror may testify regarding whether "an outside influence was improperly

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[6] Rule 606(b)(2) states:

> A juror may testify about whether:
>
> **(A)** extraneous prejudicial information was improperly brought to the jury's attention; or
> **(B)** an outside influence was improperly brought to bear on any juror.

brought *to bear* on any juror." MRE 606(b)(2) (emphasis added). The word *bear* is defined as "to exert influence or force." *Bear*, Merriam-Webster's Collegiate Dictionary (11th ed. 2009). The questions posed to Cranford and Rowan at the hearing were whether any influence or force had been brought to bear (exerted) on them. They were asked if the statements made by a bailiff[7] bore on their deliberations. Each replied in the negative. Questions regarding the relevance of outside influences are permissible under the exceptions provided in Rule 606(b)(2) to allow a trial court to consider all relevant evidence to determine if an outside influence was brought to bear on jurors. The questions posed to Cranford and Rowan amounted to no more.

¶35. Our decision in ***Gladney***, a juror misconduct case, recognized that questions such as these are proper. ***Gladney*** prohibits testimony regarding subjective impressions but provides for juror testimony related to "facts bearing on extraneous influences on the deliberation process." ***Gladney***, 625 So. 2d at 419. The questions and answers are admissible under both our rules of evidence and our case law. It remains for a court to determine whether to accept or reject testimony related to influence borne upon a juror. ***Id.***

¶36. Assuming the opposite, arguendo, the result does not change. If the testimony is excluded, the record remains devoid of testimony to support Batiste's claim. This is a veritable truth whether or not Cranford's and Rowan's testimony is included or excluded.

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MRE 606(b)(2).

[7] The alleged statements concerned neither the facts of the crime at issue nor did they suggest guilt or innocence.

## V.

¶37. Is this appeal yet another tactical delay to avoid the sentence rendered by a jury? The late Justice Scalia noted that post-conviction challenges to death-penalty cases have developed to the point of absurdity, comparing one course of arguments to a "man sentenced to death for killing his parents, who pleads for mercy on the ground that he is an orphan." ***Glossip v. Gross***, 576 U.S. 863, 898, 135 S. Ct. 2726, 192 L. Ed. 2d 761 (2015) (Scalia, J., concurring). He noted that for more than a century and a half, death sentences were carried out relatively quickly but that, today, it takes almost eighteen years for a case to conclude on average. ***Id.*** (citing ***Trop v. Dulles***, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958) (plurality opinion)). This phenomenon was observed much earlier in this state by Justice Griffith, who saw

> a course of practice in cases of death sentences which, under the experiences of the last few years, has become intolerable, and has produced such mischief as to bring the courts and the law into a measure of disrespect, in the hearing of numerous applications for the stay of executions and in the too frequent granting thereof. . . . We have reached the point where it becomes the solemn obligation of this court to close some of the doors to the field by which judgments of conviction with death sentences may be made footballs, to be tossed from court to court, and from one delay to another.

***McGee v. State***, 50 So. 2d 383, 385 (Miss. 1951) (Hall, J., specially concurring) (internal quotation mark omitted) (quoting ***Mitchell v. State***, 179 Miss. 814, 176 So. 743, 744–45 (1937)). Justice Gorsuch recently wrote, "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence." ***Bucklew v. Precythe***, 139 S. Ct. 1112, 1133, 203 L. Ed. 2d 521 (2019) (internal quotation marks omitted) (quoting ***Hill v.***

***McDonough***, 547 U.S. 573, 584, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2006)). Just as in ***Bucklew***, these interests have been frustrated. Just as in ***Bucklew***, Batiste committed these crimes years ago. Just as in ***Bucklew***, the defendant has secured interminable delays.

¶38. The posttrial proceedings confirm former Justice Pierce's prescient words in the ***Batiste II*** dissent: "Batiste has failed to make a showing that the bailiff's comments did, or may have, tainted the jury in any way. And Batiste has not made a prima facie showing that he can overcome the presumption of jury impartiality in this instance." 184 So. 3d at 295 (Pierce, J., dissenting).

## CONCLUSION

¶39. Four years after Justice Pierce's dissent, seven years after this Court affirmed Batiste's conviction and sentence of death, and twelve years after Batiste bludgeoned his roommate to death, the citizens of this state and the victims of his crime have no closure. Respectfully, I dissent.

**GRIFFIS, J., JOINS THIS OPINION. COLEMAN, MAXWELL, BEAM, CHAMBERLIN AND ISHEE, JJ., JOIN THIS OPINION IN PART.**

**KITCHENS, PRESIDING JUSTICE, DISSENTING:**

¶40. I respectfully dissent. The proper disposition of this case is to reverse and remand for a new hearing before a different judge. Because Judge Kitchens had personal knowledge that he deemed relevant to a material witness's credibility, he had "personal knowledge of disputed evidentiary facts concerning the proceeding," and Canon 3E(1)(a) of the Mississippi Code of Judicial Conduct required his recusal. Miss. Code of Jud. Conduct, Canon 3E(1)(a).

¶41. A detailed rendition of the facts sheds light on what occurred in this case. After this Court affirmed his conviction of capital murder and sentence of death, Batiste filed a motion for leave to proceed with a petition for post-conviction relief (PCR) in the trial court. ***Batiste v. State***, 184 So. 3d 290, 291 (Miss. 2016). We granted relief and held that, because Batiste had made a sufficient showing through juror affidavits that a bailiff had made prejudicial comments to the jury, Batiste was entitled to file a PCR petition in the trial court on that issue. ***Id.*** at 294. We held that Batiste was entitled to a hearing "to enable the circuit court to ascertain what communications were had between bailiffs and/or other persons and the jury and to determine, insofar as is possible, what impact, if any, those communications had on Batiste's conviction and sentence." ***Id.***

¶42. Accordingly, Batiste filed a PCR petition in the trial court, and a hearing occurred before the judge who had presided over the trial, Circuit Judge James T. Kitchens, Jr.[8] Judge Kitchens heard testimony from the two jurors who had submitted affidavits indicating that they had received extraneous information from a bailiff during the trial. Juror Cranford testified that, after she had expressed concern that all the jurors were white, a black male bailiff had responded that "[b]lacks do not believe in capital murder." Juror Rowan testified that someone had said that black people are uncomfortable with the death penalty. One of the trial's two black male bailiffs testified for the State that he did not recall any such statements'

[8] Circuit Judge James T. Kitchens, Jr., and Presiding Justice James W. Kitchens of this Court are not related.

having been made; the other had died. The judge recessed the hearing in anticipation of receiving further witness testimony at another time. Later, Batiste notified the judge and the State that no further testimony would be forthcoming and requested a post-hearing briefing schedule. On May 2, 2018, Judge Kitchens entered an order stating that, because "there are questions that remain unanswered before the Court," a hearing was "necessary . . . to satisfy the Court's inquiries." An agreed order set that matter for hearing on July 27, 2018. Neither party was aware of why the trial court had called the hearing.

¶43. For unexplained reasons, the Mississippi Department of Corrections did not transport Batiste to court on the day of the hearing. So instead of holding a hearing, Judge Kitchens directed counsel for both parties to appear in chambers for a conference without a court reporter present. After the off-the-record conference, Batiste moved for Judge Kitchens to recuse based on what had occurred at the conference. Batiste's counsel filed an affidavit outlining the events of the conference. The State has not questioned the accuracy of Batiste's counsel's account. According to the affidavit, Judge Kitchens explained that he had called the hearing to address his concern about one of the statements in Cranford's affidavit, appearing in paragraph 8, which read as follows:

> During the year before the trial, my sister-in[-]law had been murdered in Tennessee by police. During the trial, Judge Kitchens told me that he knew about this situation and if there is anything he could do to help me with this situation, just let him know. I felt the judge was extremely nice to me and his attention made me feel comfortable serving on the jury.

Judge Kitchens advised the attorneys that paragraph 8 of Cranford's affidavit "raised

questions in his mind about the reliability of Ms. Cranford's testimony." Judge Kitchens said that he did not recall having told Cranford during the trial to let him know if she needed help with the situation in Tennessee. But he said he had seen Cranford at a campaign-related event in 2010 and might have made that statement to her then.

¶44. Batiste objected, arguing that Judge Kitchens's reliance on his own memory of facts not appearing in the trial record would place him in the role of a witness. At that point, Judge Kitchens, in counsel's presence, reviewed the trial transcript, which did not contain the exact statements from Judge Kitchens described by Cranford. Batiste objected again, and Judge Kitchens instructed him to "file a motion." Judge Kitchens did not allow Batiste to place his objections on the record at that time, but he said that the hearing would be reconvened, permitting Batiste to make his objections on the record. Judge Kitchens said he planned to reconvene the hearing to take Cranford's testimony about her statements in paragraph 8.

¶45. In the motion to recuse, Batiste argued that Judge Kitchens had become a witness in the case by relying on his own recollection to assess Cranford's credibility. He contended that, if a hearing occurred to address Cranford's recollections about the alleged conversations, Judge Kitchens would be a material witness. He argued also that, by *sua sponte* raising the issue of Cranford's credibility based on paragraph 8, Judge Kitchens had assisted the State by bringing up a new argument that the State never had raised. No further hearings occurred. Instead, on December 17, 2018, Judge Kitchens entered an order denying the motion to recuse and denying the PCR on the merits.

¶46. In denying the motion to recuse, Judge Kitchens interpreted Cranford's affidavit as having alleged that his comment about her sister-in-law's murder had been *on the record*. The order stated:

> At the July 27, 2018 discussion with the attorneys for both sides the court asked whether Ms. Cranford stated to the Office of Capital Post Conviction that this Court talked to her off the record during the pendency of this trial in October 2009. If Ms. Cranford made such a statement, then the Court would be obliged to recuse since the Court would be a witness to rebut such a statement.

Because "there [was] no allegation . . . that this Court conferred with Mrs. Cranford *off the record* during the pendency of this trial and before the jury reached its verdicts[,]" Judge Kitchens denied the motion to recuse, saying, "[h]ad there been such an allegation by Mrs. Cranford, this Court would have recused itself." (Emphasis added.) Judge Kitchens reasoned that, because the trial record did not show such a conversation, the record *itself* demonstrated that Cranford was not credible, obviating the need for him to rely on his own recollection of whether the conversation had occurred. In denying the PCR, Judge Kitchens found that Cranford was not a credible witness.

¶47. Batiste filed a motion to alter or amend the order, arguing that Cranford's affidavit had not averred that her conversation with Judge Kitchens had been on the record. He complained that Judge Kitchens should have reconvened the hearing to allow examination of Cranford about her interactions with him instead of injecting his own personal recollection into the case, effectively becoming a witness.

¶48. In denying the motion to alter or amend, Judge Kitchens reviewed the trial record of

his interaction with Cranford. The trial record shows that, during *voir dire*, Cranford had reported that her sister-in-law had been killed. During individual *voir dire*, she described the situation surrounding her sister-in-law's alleged killing by police at her home in Tennessee. Cranford averred that she could try Batiste's case fairly. After Cranford was excused, Judge Kitchens said:

> Just as an aside, what a small world it is, I was in Sevierville this July. Mr. Allgood [the district attorney] knows that's—my mother is from Knoxville, so I was up there, and we were up in Sevierville, and I saw the house that she's talking about. It's kind of a big story up there.
>
> My uncle and aunt were showing me the place, so I know—it's kind of a big deal up there in Sevierville. That's by Pigeon Forge and up in there.

¶49. In his order, Judge Kitchens said he had reviewed the trial transcript with the attorneys at the July 27, 2018 conference. He said that he had told the attorneys that he had met Cranford at an October 2010 judicial candidate forum in Starkville but that he recalled no specific conversation with her at the forum. Judge Kitchens cited other issues that had affected Cranford's credibility in his view, including the length of time since the trial and conflicts between her affidavit and trial testimony. Judge Kitchens found that no further testimony from Cranford had been required after the July 27, 2018 conference because the parties had rested and the court had all the evidence and law it needed to decide the case.

¶50. Batiste has appealed the denial of the motion to recuse. This Court will reverse a judge's denial of a motion to recuse for manifest abuse of discretion. ***Hathcock v. S. Farm Bureau Cas. Ins. Co.***, 912 So. 2d 844, 849 (Miss. 2005). Canon 3E(1)(a) of the Mississippi

Code of Judicial Conduct provides that

> (1) Judges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law, including but not limited to instances where:
>
> (a) the judge has a personal bias or prejudice concerning a party, *or personal knowledge of disputed evidentiary facts concerning the proceeding*;

Miss. Code of Jud. Conduct, Canon 3E(1)(a) (emphasis added). Under Canon 3E(d)(iv), a judge must recuse if "to the judge's knowledge [he is] likely to be a material witness in the proceeding." Miss. Code of Jud. Conduct, Canon 3E(d)(iv).

¶51. In ***Collins v. Dixie Transport, Inc.***, 543 So. 2d 160, 167 (Miss. 1989), this Court found that a trial judge had been required to recuse based on his having had personal knowledge of facts in dispute. The credibility of the plaintiff and of other witnesses was at issue concerning the events of a settlement conference. ***Id.*** at 161. The plaintiff and his son testified that the trial judge had been present at the settlement conference and had encouraged the plaintiff to accept the defendant's settlement offer. ***Id.*** at 162-64. On the record, the trial judge said that, according to his recollection, he had not been present at the settlement conference and had not been involved in settlement negotiations. ***Id.*** at 165-66. This Court reversed and remanded for a new trial before a different judge. We said that

> [n]o man may serve as judge of his own cause. . . .The principle's power extends beyond the case of the judge-litigant to that of the judge-witness, to the case where the judge judges his own credibility as a player in the events whose truth is sought.
>
> Elementary notions of due process afford a corollary principle: that a

> judge who is otherwise qualified to preside at trial or other proceeding must be sufficiently neutral and free of disposition to be able to render a fair decision. No person should be required to stand trial before a judge with a "bent of mind."
>
> These principles have been reinforced by our Code of Judicial Conduct.

***Id.*** at 166 (citations omitted).

¶52. This Court recognized that the standard from Canon 3 is "enforce[d] . . . rigorously, even when a litigant has not made specific demand for its enforcement. ***Id.*** at 166. Further, the standard is an objective one, requiring recusal if the judge's "impartiality might reasonably be questioned." ***Id.*** (internal quotation mark omitted) (quoting 28 U.S.C. § 455 (1976)). If a reasonable person with knowledge of "all circumstances would harbor doubts about his impartiality[,]" the judge must recuse. ***Id.*** (internal quotation mark omitted) (quoting ***Hall v. Small Bus. Admin.***, 695 F.2d 175, 179 (5th Cir. 1983)).

¶53. Significantly for the present case, "[p]urity of heart is not enough." ***Id.*** (quoting ***Hall***, 695 F.2d at 176). A judge must recuse if the above standard is met even if the judge harbors a subjective belief in his own impartiality. And that is because "even the appearance of impropriety [must] be avoided." ***Id.*** at 166-67 (quoting ***Haralson v. Haralson***, 483 So. 2d 378 (Miss. 1986)).

¶54. In ***Collins***, we held that the credibility of the plaintiff and his son had been crucial to the central issue in that case: whether an enforceable settlement agreement existed. ***Id.*** at 167. But regarding those witnesses' credibility, the judge had acted as "both a witness to and an adjudicator of fact issues with respect to which he was obliged to have played but one role."

***Id.*** Distinguishing that situation from a trial judge's permissible examination of witnesses, "[o]ur focus is upon the fact that the trial judge possessed knowledge of the (non)occurrence of events critical to the credibility of Collins' witnesses and ultimately to divining the truth of those events." ***Id.*** at 167 n.1.

¶55. I would hold that Canon 3E(1)(a) required Judge Kitchens to recuse because he had personal knowledge bearing on the credibility of a witness. Witness credibility was crucial to a central issue in the case: whether a bailiff had made the comments that Jurors Cranford and Rowan had alleged in their affidavits. Whether Cranford had the conversation with Judge Kitchens she had alleged in her affidavit was not a disputed issue until Judge Kitchens raised it *sua sponte*. The alleged conversation had no obvious bearing on the issue, which was whether a bailiff had improper contact with jurors at Batiste's trial. This Court did not mention the alleged conversation in our opinion, nor did the parties raise it. Only when Judge Kitchens called a hearing for the sole purpose of *sua sponte* raising and investigating the possibility that the conversation had not occurred as alleged by Cranford did the occurrence or nonoccurrence of the conversation become materially relevant to her credibility as a witness. Accordingly, in deciding that Cranford was not credible, Judge Kitchens relied on his comparison of Cranford's affidavit, which he found alleged that the conversation had occurred on the record, with the trial transcript, which had recorded no such conversation. For that reason, the issue of whether the conversation between Judge Kitchens and Cranford had, in fact, occurred was an undeniable component of Judge Kitchens's assessment of

Cranford's credibility.

¶56. Judge Kitchens recognized that, had Cranford alleged in her affidavit that he had spoken with her *off the record*, he would become a witness and would be required to recuse. Judge Kitchens found that, because Cranford averred the conversation was *on the record*, recusal was not required. But Cranford's affidavit does not support Judge Kitchens's finding that she alleged the conversation took place *on the record*. Instead, Cranford's affidavit says only that the conversation occurred "[d]uring the trial":

> During the year before the trial, my sister-in-law had been murdered in Tennessee by police. *During the trial*, Judge Kitchens told me that he knew about this situation and if there was anything he could do to help me with the situation, just let him know. I felt the judge was extremely nice to me and his attention made me feel comfortable serving on the jury.

(Emphasis added.) Nothing in the affidavit suggests that the alleged conversation took place on the record. Instead, Cranford's affidavit alleges the conversation occurred "[d]uring the trial." There can be no doubt that "during the trial" does not equate to "on the record." We have recognized that a trial includes both on-the-record and off-the-record proceedings. ***Carr v. State***, 655 So. 2d 824 (Miss. 1995) (the court noted that off-the-record bench conferences had occurred "during the trial").

¶57. Because Cranford's affidavit alleges that she had the above conversation with Judge Kitchens during the trial and because a trial includes both on-the-record and off-the-record proceedings, Cranford's affidavit is to the effect that the conversation could have occurred *off the record*. Judge Kitchens found that, if Cranford were to have alleged that the

conversation had occurred *off the record*, he would have been placed in the role of a witness to whether that conversation had occurred, requiring recusal. Because Cranford's affidavit did not exclude off-the-record contact, Judge Kitchens should have granted Batiste's motion to recuse.

¶58. The majority orders further inquiry into the alleged conversation. It remands for a hearing "for the limited purpose of allowing the trial judge to hear such evidence as is necessary to allow him to clear up any ambiguity and to determine if the alleged conversation did, in fact, take place 'during trial,' and, if it did, whether the conversation is alleged to have occurred on or off the record." Maj. Op. ¶ 14. The majority holds that, if Judge Kitchens finds the conversation was on the record, then recusal was not required and this Court can proceed to review the denial of post-conviction relief. Maj. Op. ¶ 15. If Judge Kitchens finds the conversation with Cranford occurred off the record, then he must recuse. Maj. Op. ¶ 15.

¶59. Judge Kitchens now has been tasked with deciding whether the alleged conversation took place during the trial. But the persons who reasonably could be expected to have the most insight into whether the alleged conversation took place during the trial are Cranford and Judge Kitchens. Therefore, it is likely that, as Batiste averred in his motion to recuse, Judge Kitchens will be a material witness at the hearing, necessitating his recusal under Canon 3E(1)(d). The majority directs Judge Kitchens, if he finds that the conversation occurred during the trial, to proceed to determine whether it is alleged to have occurred on the record or off the record. Because it was Cranford who made the allegation, I presume

that endeavor will involve testimony from Cranford about whether she thinks the conversation was on the record or off the record. With respect, it is unrealistic for this Court to expect Cranford, a layperson, to know or to be able to opine with any accuracy whatsoever whether a court reporter had entered a particular matter into the trial record. Moreover, it is unfair to expect Judge Kitchens, who took issue with Cranford's recollection of a conversation with him during the trial, to put his own recollection that no such conversation occurred, or that it might have occurred instead at a judicial candidate's forum, out of his mind in making those determinations. Judge Kitchens has precisely the sort of "personal knowledge of disputed evidentiary facts" that should trigger recusal under Canon 3E(1)(a).

¶60. The majority says also that "it appears that Batiste has wholly failed to put forth any affirmative evidence of undue influence . . . ." Maj. Op. ¶ 16. This statement is definitively advisory. "As a matter of judicial policy, this Court does not issue advisory opinions." ***Hughes v. Hosemann***, 68 So. 3d 1260, 1263 (Miss. 2011). This Court errs by opining on the merits of Batiste's PCR when the issue before us is whether to order recusal of the trial judge because a hearing on the merits before another judge may yet occur. The majority's extension of a powerful hint to a potential new judge on how this Court views the evidence is advisory and invades the fact-finding role of the trial court.

¶61. Nor is the issue about the competency of juror affidavits before us. As illustrated by the argument in the parties' briefs, the application of ***Gladney v. Clarksdale Beverage Co.***, 625 So. 2d 407, 418-19 (Miss. 1993), in post-conviction proceedings should merit thoughtful

consideration. The issue should not be addressed by this Court in a manner both cursory and advisory. We should withhold analysis of this issue until it squarely is before the Court.

¶62. At this juncture, the sole issue is recusal. With respect, I reject Chief Justice Randolph's suggestion that the failure to recuse was harmless error. Diss. Op. (Randolph, C.J.) ¶ 33. "[W]hat may be harmless error in a case with less at stake becomes reversible error when the penalty is death." ***Ronk v. State***, 267 So. 3d 1239, 1247 (Miss. 2019) (quoting ***Crawford v. State***, 218 So. 3d 1142, 1150 (Miss. 2016)). I note that Chief Justice Randolph's analysis relies on Cranford and Rowan's testimony that their deliberations were unaffected by extraneous information. Mississippi Rule of Evidence 606(b)(1) provides that "a juror may not testify about . . . the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict . . . ." MRE 606(b)(1). Rule 606(b)(2) provides exceptions permitting a juror's testimony on whether "extraneous prejudicial information was improperly brought to the jury's attention" or whether "an outside influence was improperly brought to bear on any juror." MRE 606(b). In ***Gladney***, this Court "adopt[ed] the view held by the Ninth Circuit . . . that inquiry is subject to the following limitation; the 'Federal Rules of Evidence 606(b) prohibits juror testimony about the deliberative process or subjective effects of the extraneous information.'" ***Gladney***, 625 So. 2d at 419. "[I]n the course of post-trial hearings, juror testimony is only admissible as to objective facts bearing on extraneous influences on the deliberation process." ***Id.***

¶63. In his ruling on the merits, Judge Kitchens recognized that Rule 606(b) allows a juror

to testify about extraneous information or outside influence improperly brought to the jury's attention but that it prohibits a juror from testifying about how that extraneous information or outside influence subjectively affected the juror's verdict. *See* ***Gladney***, 625 So. 2d at 419. He ruled that he had erred by admitting juror testimony about how the alleged extraneous information had affected the deliberations. Therefore, much of Chief Justice Randolph's analysis is based on testimony that Judge Kitchens correctly recognized was inadmissible under our rules of evidence and case law and on which he did not rely in making his decision on the merits.

¶64. I would hold that Judge Kitchens's personal knowledge of the occurrence or nonoccurrence of a conversation between him and Juror Cranford during the trial, a fact which he deemed material to his assessment of her credibility as a witness, would cause a reasonable person to harbor doubts about his impartiality. Judge Kitchens pitted himself and his credibility against Cranford and her credibility. Denial of the motion to recuse was a manifest abuse of discretion that denied Batiste due process of law. This Court's heightened standard of review in death penalty cases compels reversal. Therefore, I would reverse and remand this case for a new evidentiary hearing before another judge.

**KING, P.J., JOINS THIS OPINION.**