IN THE SUPREME COURT OF MISSISSIPPI

NO. 2013-DR-01624-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

DATE OF JUDGMENT:	05/16/2013
TRIAL JUDGE:	HON. JAMES T. KITCHENS, JR.
COURT FROM WHICH APPEALED:	OKTIBBEHA COUNTY CIRCUIT COURT
ATTORNEYS FOR PETITIONER:	OFFICE OF CAPITAL POST-CONVICTION COUNSEL BY: DELLWYN K. SMITH LOUWLYNN VANZETTA WILLIAMS SCOTT A. JOHNSON
ATTORNEYS FOR RESPONDENT:	OFFICE OF THE ATTORNEY GENERAL BY: JASON L. DAVIS CAMERON L. BENTON BRAD A. SMITH
NATURE OF THE CASE:	CIVIL - DEATH PENALTY - POST CONVICTION
DISPOSITION:	LEAVE TO SEEK POST-CONVICTION RELIEF GRANTED - 01/21/2016
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

KITCHENS, JUSTICE, FOR THE COURT:

¶1. Bobby Batiste was convicted of capital murder with the underlying felony of robbery and was sentenced to death in the Circuit Court of Oktibbeha County. ***Batiste v. State***, 121

So. 3d 808, 823 (Miss. 2013).[1] This Court affirmed Batiste's conviction and sentence on May 16, 2013. ***Id.*** Batiste now seeks, *inter alia*, leave to file a Petition for Post-Conviction Relief in the Circuit Court of Oktibbeha County. His proposed petition raises sixteen separate issues, one of which we address: whether certain statements, alleged to have been made by bailiffs to jurors, violated Batiste's constitutional right to an impartial jury.

¶2. Attached to Batiste's proposed petition are two affidavits from persons who served on the jury. The first, from juror Denise Cranford, says that "[t]he bailiffs were always very friendly and helpful to us. When we had questions, the bailiffs explained the law to us." She continued:

> At the start of the trial, I and some of the other jurors were concerned that the jury was all white but one of the bailiffs explained to us that blacks and whites are different in their opinion about the death penalty. The bailiff said that black people will not consider the death penalty. After that explanation I was no longer concerned.

Another juror, Webster Rowan, related, by affidavit, a similar experience: "[the jury] did not include any blacks, which at first bothered me. Someone, though I can't remember who exactly, explained that you have to be comfortable with the death penalty, and blacks don't feel as comfortable with it." He went on to say that, "[d]uring the penalty phase deliberations, we were initially split" and that "[a]fter much discussion and prayer over the course of most of that Saturday, we were able to arrive at our decision."

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[1]This Court thoroughly detailed the facts of Batiste's case on direct appeal and they will not be repeated here.

ANALYSIS

¶3. Batiste claims that his Sixth Amendment right to a fair trial by an impartial jury was violated by the conduct of the bailiffs at his trial: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI; *see also* Miss. Const. art. 3, § 26. We have held that "[t]he right to a fair trial by an impartial jury is fundamental and essential to our form of government. It is a right guaranteed by both the federal and the state constitutions." ***Johnson v. State***, 476 So. 2d 1195, 1209 (Miss. 1985) (citing ***Adams v. State***, 220 Miss. 812, 72 So. 2d 211 (1954)).

¶4. The State responds that Batiste's claim is procedurally barred because it was "capable of determination at trial and/or direct appeal" under Mississippi Code Section 99-39-21(1) (Rev. 2015). But Batiste's claim was not ascertainable at trial or on direct appeal, because Batiste's trial and appellate attorneys had no reason to know that the jury had been influenced unduly by the bailiffs. Affidavits of individual jurors revealed to Batiste's PCR counsel problems with the conduct of the bailiffs. It is precisely this sort of "evidence of material facts, not previously presented and heard," which is contemplated by the Mississippi Uniform Post-Conviction Collateral Relief Act, Mississippi Code Section 99-39-5(1)(e) (Rev. 2015).

¶5. Even if the State is correct that Batiste's claim is procedurally barred, "[e]rrors affecting fundamental constitutional rights are excepted from the procedural bars of the [Uniform Post Conviction Collateral Relief Act]." ***Rowland v. State***, 42 So. 3d 503, 508 (Miss. 2010). Furthermore, "death is different." ***Pruett v. State***, 574 So. 2d 1342, 1345 (Miss. 1990) (quoting ***Jackson v. State***, 337 So. 2d 1242, 1252 (Miss. 1976)). As such, "procedural

niceties give way to the search for substantial justice." ***Hansen v. State***, 592 So. 2d 114, 142 (Miss. 1991). According to the heightened standard of review this Court employs in death penalty cases, "*all doubts* are to be resolved in favor of the accused." ***Chamberlin v. State***, 989 So. 2d 320, 330 (Miss. 2008) (citing ***Lynch v. State***, 951 So. 2d 549, 555 (Miss. 2007)) (emphasis added). In light of the foregoing, we find that Batiste's claim is not procedurally barred and we proceed to address the merits.

¶6. In support of his claim that his right to an impartial jury was violated by the bailiffs' alleged misconduct, Batiste cites ***Parker v. Gladden***, 385 U.S. 363, 87 S. Ct. 468, 17 L. Ed. 2d 420 (1966). In that case, the petitioner had been convicted of second-degree murder. ***Id.*** at 363. At an evidentiary hearing on his petition for post-conviction relief, the Oregon trial court had found that "a court bailiff assigned to shepherd the sequestered jury, which sat for eight days, stated to one of the jurors in the presence of others, while the jury was out walking on a public sidewalk: 'Oh that wicked fellow (petitioner), he is guilty.'" ***Id.*** The same bailiff, "on another occasion said to another juror under similar circumstances, 'If there is anything wrong (in finding petitioner guilty), the Supreme Court will correct it.'" ***Id.*** at 364.

¶7. The Oregon trial court determined that the petitioner's rights had been violated, but the Supreme Court of Oregon reversed. ***Id.*** The United States Supreme Court reversed, *per curiam*, the judgment of the Supreme Court of Oregon. ***Id.*** The Court held that "we believe that the unauthorized conduct of the bailiff 'involves such a probability that prejudice will result that it is deemed inherently lacking in due process.'" ***Id.*** at 365 (quoting ***Estes v.***

Texas, 381 U.S. 532, 542-43, 85 S. Ct. 1628, 1633, 14 L. Ed. 2d 543 (1965)). The Court continued: "Here there is dispute neither as to what the bailiff, an officer of the State, said nor that when he said it he was not subjected to confrontation, cross-examination or other safeguards guaranteed to the petitioner." ***Parker***, 385 U.S. at 364

¶8. This Court, too, has considered whether the rights of the defendant are violated by improper bailiff commentary. In ***Brown v. State***, 69 Miss. 398, 10 So. 579, 579-80 (1892), this Court held that:

> We are not prepared to affirm that no injury resulted to the appellant from the suggestion of the bailiff to the jury that his personal desire was that they should not longer delay their decision, as he wished to be relieved of further waiting, and his officious intermeddling by pointing out an instruction (by which the jury were told that it was within their power to find the defendant guilty of murder, and award the punishment of imprisonment for life instead of capital punishment) upon which, in the opinion of the prosecuting attorney, they would agree upon a verdict.

This Court reversed, holding that "one on trial for his life has rights which even a bailiff must respect." ***Id.***

¶9. In ***Wilkerson v. State***, 78 Miss. 356, 29 So. 170 (1901), this Court reversed and remanded a judgment by which the defendant had been tried and convicted of burglary and petit larceny:

> [A]bout an hour and a half after the case had been submitted to the jury one of the jury opened the door and asked Bailiff Bond the difference between burglary and larceny and burglary and petit larceny, and Bond replied that the first would send the prisoner to the penitentiary and the other would send him to the county farm.

Id. This aided the jury to consensus, for "immediately they made up their verdict." ***Id.*** The Court held that "the record sustains the presumption that the statement made to the jury by

the bailiff may have had a decided effect upon the verdict." ***Id.*** The Court continued: "Such communication, in our judgment, affects the purity of the verdict, and it cannot be permitted to stand." ***Id.*** In ***Shaw v. State***, 79 Miss. 577, 31 So. 209 (1902), this Court reversed a judgment in a case in which the jury had been told by the bailiff "'that the judge would leave for home in a few minutes, and, unless they would return a verdict at once, they would be held until the following Monday.'" Not surprisingly, "the result was a verdict in five minutes." ***Id.***

¶10. In ***Horn v. State***, 216 Miss. 439, 62 So. 2d 560 (Miss. 1953), Horn, having been convicted of manslaughter, appealed to this Court. ***Id.*** at 441. The bailiff was asked by the jury about the penalty for the crime of manslaughter, whereupon he responded that the penalty was service of between one year to ten years in the state penitentiary. ***Id.*** "In about thirty minutes," the jury returned the verdict: "'We, the Jury, find the defendant guilty as charged, and ask that he be given the mercy of the court.'" ***Id.*** The Court reversed the judgment and remanded the case, because "the jurors understood from the bailiff the punishment for manslaughter was from one to ten years in the penitentiary. That was not correct. In the case of punishment by being sent to the penitentiary the penalty is not less than two years nor more than twenty years." ***Id.*** at 443."Conceivably, had the jurors not thought defendant could be sent to the penitentiary for as short a period as one year, they would not have convicted him—at least, it is impossible to say they were not influenced in their action by the information they had received from the bailiff." ***Id.***

¶11. In the present case, affidavits from jurors who convicted Batiste and sentenced him to death support Batiste's claim that bailiffs made improper comments which affected his right to a fair trial. The affidavits substantiate that the bailiffs "explained the law" when the jurors had questions about it. Furthermore, according to one juror, the bailiff explained that the reason no African Americans were serving on the jury was because "blacks and whites are different in their opinion about the death penalty" and "black people will not consider the death penalty." Another juror agreed that "someone" had "explained that you have to be comfortable with the death penalty, and blacks don't feel as comfortable with it." While such an explanation may have alleviated the concerns of jurors regarding the absence of African Americans on Batiste's jury, we cannot say that such remarks to jurors, if made, did not impact Batiste's fundamental constitutional right to a fair trial by an impartial jury. This case seems especially egregious in light of the heightened standard which we are bound to apply in cases which involve the death penalty. As in ***Wilkerson***, "the record sustains the presumption that the statement made to the jury by the bailiff may have had a decided effect upon the verdict." ***Wilkerson***, 29 So. at 170. As in ***Parker***, "we believe that the unauthorized conduct of the bailiff 'involves such a probability that prejudice will result that it is deemed inherently lacking in due process.'" ***Parker***, 385 U.S. at 365. One of the jurors' affidavits indicated that, "[d]uring the penalty phase deliberations, we were initially split," so it cannot be said with certainty whether the split was resolved by the comments of the bailiffs. Based on the record before us, we find that the bailiff's conduct, if accurately reported, was presumptively prejudicial.

¶12. We have held that "a petitioner is entitled to an in-court opportunity to prove his claims if the claims are 'procedurally alive "substantiall[y] showing denial of a state or federal right."'" ***Washington v. State***, 620 So. 2d 966, 968 (Miss. 1993) (quoting ***Horton v. State***, 584 So. 2d 764, 767 (Miss. 1991) (quoting ***Neal v. State***, 525 So. 2d 1279, 1281 (Miss. 1987))). We find that Batiste has made a substantial showing of a denial of a state or federal right sufficient to entitle him 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. We therefore grant Batiste's motion for leave to file his petition for post-conviction relief in the Circuit Court of Oktibbeha County.

CONCLUSION

¶13. For the foregoing reasons, we grant Batiste leave to file his petition for post-conviction relief in the Circuit Court of Oktibbeha County within sixty days of the issuance of this Court's mandate.

¶14. **LEAVE TO SEEK POST-CONVICTION RELIEF GRANTED.**

WALLER, C.J., DICKINSON, P.J., KING AND COLEMAN, JJ., CONCUR. PIERCE, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY RANDOLPH, P.J., AND LAMAR, J. MAXWELL, J., NOT PARTICIPATING.

PIERCE, JUSTICE, DISSENTING:

¶15. "In any trial there is initially a presumption of jury impartiality." ***Carr v. State***, 873 So. 2d 991, 1005 (Miss. 2004) (quoting ***United States v. O'Keefe***, 722 F. 2d 1175, 1179 (5th Cir. 1983)). Here, to prevail on his claim that the bailiff's comments improperly influenced the jury, Batiste must overcome this presumption. ***Roach v. State***, 116 So. 3d 126, 133

(Miss. 2013) (quoting ***Gladney v. State***, 625 So. 2d 407, 418 (Miss. 1993)). Because he has failed to do so, I dissent.

¶16. In the cases relied on by the majority, the bailiffs directly commented on a desired outcome or improperly explained applicable law. For example, in ***Brown v. State***, 69 Miss. 398, 10 So. 59, 579-80 (1892), the bailiff expressed his "personal desire" that the jury no longer delay in reaching a verdict and pointed out an instruction which informed the jury that they could find the defendant guilty and sentence him to life instead of death. In ***Wilkerson v. State***, 78 Miss. 356, 29 So. 170, 170 (1901), the bailiff incorrectly informed the jury that the defendant would be incarcerated in the penitentiary if found guilty of burglary and sent "to the county farm" if found guilty of larceny. After hearing this erroneous statement, the jury immediately returned a verdict. ***Id.*** Like ***Wilkerson***, in ***Horn v. State***, 62 So. 2d 560, 216 Miss. 439, 561 (1953), the bailiff incorrectly informed the jury that the possible sentence for the defendant's manslaughter charge ranged from one to ten years. At that time, the minimum punishment for manslaughter was not less than two years incarceration. ***Id.*** Upon reaching a verdict, the jury informed the trial court that they intended for the defendant to be sentenced to one year. ***Id.*** at 560.

¶17. Here, jurors raised concerns to a bailiff about the absence of African Americans on the jury. According to two jurors' affidavits, the bailiff responded that African Americans do not "feel as comfortable with" the death penalty, or that African Americans "will not consider the death penalty." There is no indication that the bailiff expressed personal beliefs relating to Batiste's conviction or sentence, or that the comments influenced the jury's decision-making process. Finally, the trial court instructed the jurors to weigh aggravating

and mitigating circumstances and that "each of you must decide for yourself whether death or life without parole is the appropriate punishment for Mr. Batiste." *See* ***Keller v. State***, 138 So. 3d 817, 845 (Miss. 2014)) ("It is presumed that jurors follow the instructions of the court."). The claimed facts presented in today's case are not comparable to the egregious nature of the cases discussed above.

¶18. In ***Russell v. State***, 849 So. 2d 95, 111 (Miss. 2003), the bailiffs asked the jurors their thoughts on the case and "which way [they] were leaning." A bailiff also identified to the jury the victim's family members who were present in the courthouse. ***Id.*** at 112. This Court found that these statements and actions did not taint the jury. ***Id.*** Like ***Russell***, 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. *See* ***Carr***, 873 So. 2d at 1005. For this reason, I would deny Batiste's motion for leave to file or petition for post-conviction relief in the trial court.

RANDOLPH, P.J., AND LAMAR, J., JOIN THIS OPINION.