Serial: **252377**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2023-DR-00895-SCT

STEPHEN ELLIOT POWERS ***Petitioner***

v.

STATE OF MISSISSIPPI ***Respondent***

EN BANC ORDER

Before the en banc Court are Stephen Elliot Powers's Motion for Access to Jurors and Disclosure of Documents, the State of Mississippi's response, and Powers's reply. Also before us are Powers's First Supplement to Successor Petition for Post-Conviction Relief, the State's response, and Powers's reply. In both the motion and petition, Powers requests oral argument.

We find that Powers's requests for juror access and disclosure of documents, as well his request that those issues be remanded to the circuit court, should be denied.

Powers claims that newly discovered evidence shows the State offended his due-process rights by violating ***Brady v. Maryland***, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and engaging in prosecutorial misconduct. We find that the ***Brady*** and ***Brady***-related prosecutorial-misconduct claims are time and successive-writ barred. *See* En Banc Order, ***Underwood v. State***, No. 2015-DR-01378-SCT, at **6–7 (Miss. Dec. 16, 2021). And we find that the newly-discovered-evidence exception is unmet. *See* Miss. Code Ann. § 99-39-5(2)(a)(i), -27(9) (Rev. 2020).

Exhibit A

IT IS, THEREFORE, ORDERED that the Motion for Access to Jurors and Disclosure of Documents, First Supplement to Successor Petition for Post-Conviction Relief, and oral-argument requests are denied.

SO ORDERED, this the 11 day of September, 2024.

JOSIAH DENNIS COLEMAN, JUSTICE
FOR THE COURT

AGREE: RANDOLPH, C.J., COLEMAN, MAXWELL, BEAM, CHAMBERLIN, ISHEE AND GRIFFIS, JJ.

DISAGREE: KITCHENS AND KING, P.JJ.

KITCHENS, P.J., OBJECTS TO THE ORDER WITH SEPARATE WRITTEN STATEMENT JOINED BY KING, P.J.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2023-DR-00895-SCT

Stephen Elliot Powers

v.

State of Mississippi

KITCHENS, PRESIDING JUSTICE, OBJECTING TO THE ORDER WITH SEPARATE WRITTEN STATEMENT:

¶1. I would grant Powers's request to access jurors as part of his post-conviction investigation into juror bias and ***Batson***[1] violations. In ***Gladney v. Clarksdale Beverage Co., Inc.***, 625 So. 2d 407, 418 (Miss. 1993), this Court "adopt[ed] our own prophylactic method to uniformly execute juror inquiry, under M.R.E. 606(b)[.]" In establishing the "procedure for trial judges to employ in alleged juror misconduct cases[,]" we held that for an allegation of juror misconduct to trigger a duty to investigate, at "minimum, it must be shown that there is sufficient evidence to conclude that good cause exists to believe that there was in fact an improper outside influence or extraneous prejudicial information." ***Id.*** at 419. "The trial court has the inherent power and duty to supervise these post-trial investigations to ensure that jurors are protected from harassment and to guard against inquiry into subjects beyond which a juror is competent to testify under M.R.E. 606(b)." ***Id.*** However, "[i]nquiry is allowable outside the presence of the trial court, upon written request and trial court permission[.]" ***Id.***

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

¶2. Powers raises legitimate questions related to whether the ***Gladney*** protocols and restrictions on juror access are appropriately fitted to the post-conviction context. He points out that the ***Gladney*** standard was crafted to operate when evidence of juror impropriety emerges during or right after trial—a stage in which the trial court still has jurisdiction and the original attorneys are pursuing post-trial motions. For example, in ***Gladney***, a concerned juror approached an attorney immediately following the jury verdict. ***Id.*** at 410. In ***Lattimore v. State***, 958 So. 2d 192, 203 (Miss. 2007), court personnel came forward with information of possible juror misconduct immediately after the sentencing trial.

¶3. But in the post-conviction context, distanced from the immediacy of original trial proceedings, new attorneys have a professional responsibility to investigate and collect evidence to support the claims recognized by the Mississippi Uniform Post-Conviction Collateral Relief Act (UPCCRA). Miss. Code Ann. § 99-39-5(1)(e) (Rev. 2020); *see also* ***Batiste v. State***, 184 So. 3d 290, 291 (Miss. 2016) (acknowledging that juror affidavits are "precisely" the "sort of 'evidence of material facts, not previously presented and heard'" that is contemplated by the UPCCRA) (quoting Miss. Code Ann. § 99-39-5(1)(e) (Rev. 2015)). Post-conviction counsels' professional responsibility timely to discover and pursue legitimate claims for relief is in tension with ***Gladney***'s barriers to access intended to project jurors in the immediate aftermath of rendering the verdict. Constitutional due process concerns are clearly implicated when post-conviction death-penalty defendants do not have the necessary access to develop legitimate challenges to their convictions and sentences.

¶4. Applying ***Gladney***, however, Powers has met his burden to show good cause especially when analyzed under the heightened scrutiny applicable to death penalty cases. In ***Gladney***, we reiterated that "a minimal standard of a good cause showing of specific instances of misconduct is acceptable," and we explicitly rejected as "too stringent" a standard that would require "clear, strong, substantial, and incontrovertible evidence . . . that a specific, non-speculative impropriety has occurred." 625 So. 2d at 419 (alteration in original) (internal quotation marks omitted). "The Court applies heightened scrutiny when reviewing capital murder convictions where the death penalty has been imposed." ***Dickerson v. State***, 175 So. 3d 8, 15 (Miss. 2015). "Under this method of review, all genuine doubts are to be resolved in favor of the accused because 'what may be harmless error in a case with less at stake becomes reversible error when the penalty is death.'" ***Wilson v. State***, 21 So. 3d 572, 576 (Miss. 2009) (internal quotation marks omitted) (quoting ***Walker v. State***, 913 So. 2d 198, 216 (Miss. 2005)). Powers has presented an affidavit from Juror Duckworth detailing that extra-record evidence about the victim was presented to the jury during deliberations, justifying further investigation into juror bias claims against Jurors Cuevas, Bickford, Eppling, Russell, and Bond. This satisfies ***Gladney***'s minimum good cause standard especially when considered in light of the heightened standard that applies in death penalty cases.

¶5. ***Gladney*** does not apply to jurors who were not seated at trial; therefore, Powers does not need this Court's permission to access them. I would find merit to Powers's argument that he needs access to seated jurors as part of his investigation into previous counsel's

failure to assert a ***Batson*** challenge. *See* ***Batson***, 476 U.S. 79. Concerns with jury selection in this death penalty case were evident at trial, as shown by the trial court's comment during post-trial motions proceedings that "I was shocked and appalled that ***Batson*** was not raised, but as I understand and appreciate the law . . . a trial judge does not have the authority to invoke [***Batson***] on his own initiative." ***Powers v. State (Powers III)***, 371 So. 3d 629, 722 (Miss. 2023) (Kitchens, P.J., dissenting) (alterations in original) (internal quotation marks omitted). Powers's trial attorney "acknowledged in an evidentiary hearing that he was not experienced with ***Batson*** and was not 'fully prepared to raise it' at trial. ***Id.***

¶6. As I discussed in my dissent in ***Powers III***, the circumstances support that "there is more than a reasonable probability that a ***Batson*** objection would have been successful." ***Id.*** These circumstances include but are not limited to the disparate questioning of Black prospective jurors during voir dire, the absence of a trial strategy that would warrant choosing not to raise a ***Batson*** challenge, and the prosecution's use of peremptory strikes to eliminate Black jurors. ***Id.*** Our system of justice should operate to facilitate Powers's investigation into the ineffectiveness of his trial and post-conviction counsel. *See* ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***Ronk v. State***, No. 2021-DR-00269-SCT, 2024 WL 131639 (Miss. January 11, 2024) (Kitchens, P.J., dissenting).

¶7. Finally, I would grant fully Powers's request for disclosure of documents. Previously this Court granted Powers's request for certain documents pursuant to Mississippi Code Section 99-49-1(3)(e) (Rev. 2020). *See* En Banc Order, ***Powers v. State***, No.

2017-DR-00696-SCT (Miss. June 1, 2023) (Kitchens, P.J. objecting in part to the order with separate statement). I would go further and grant Powers's more expansive request for documents pursuant to Mississippi Rule of Appellate Procedure 22(c)(4)(ii) to facilitate Powers's investigation into alleged ***Brady*** violations. *See* ***Brady v. Maryland***, 373 U.S. 83, 83 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

KING, P.J., JOINS THIS SEPARATE WRITTEN STATEMENT.