Received 4/7/2021 1:41:51 PM Supreme Court Eastern District

Filed 4/7/2021 1:41:00 PM Supreme Court Eastern District
6 EAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

Respondent

VS. **No. 6 EAP 2021**

DERRICK EDWARDS,

Petitioner

BRIEF OF AMICUS CURIAE ATLANTIC CENTER FOR CAPITAL REPRESENTATION IN SUPPORT OF PETITIONER DERRICK EDWARDS

Appeal from the Superior Court Memorandum Decision of July 29, 2020 at 3429 EDA 2018 Affirming the Order of the Philadelphia Court of Common Pleas at CP-51-CR-2611/2614/2617/2815/2820/2853/2862/2864-2013

---

*Marc Bookman (Pa. ID No. 37320)
Executive Director
Atlantic Center for Capital Representation
1315 Walnut Street, Suite 1331
Philadelphia, PA 19107
mbookman@atlanticcenter.org

* Significant assistance with this brief provided by Aaron Siegel, law student at Yale Law School.

TABLE OF CONTENTS

PAGES

TABLE OF AUTHORITIES……………………………………………….3

INTEREST OF AMICUS CURIAE……………………………………..6

SUMMARY OF ARGUMENT…………………………………………….7

ARGUMENT……………………………………………………………9

I. Egregious *Batson* violations damage our justice system and erode trust in its integrity in the same way as violations identified in *Smith*, *Martorano* and *Johnson*………………………………………..9

A. Double jeopardy protections are critical to maintaining the legitimacy of the criminal justice system…………………………..9

B. *Johnson* affirms the underlying principle in *Martorano* and *Smith*: egregious behavior that rises to the level of prosecutorial overreaching triggers double jeopardy protection…………………9

C. This Court has stated that double jeopardy protections should have general………………………………………………………...11

D. Egregious *Batson* violations are as damaging to the criminal justice system as the forms of prosecutorial overreaching in *Smith- Martorano- Johnson*……………………………………………....12

II. A pattern of discrimination represents an egregious *Batson violation*...13

III. Philadelphia and Pennsylvania have a troubling history of discrimination in the jury selection process……………………….......17

IV. This case satisfies the criteria for prosecutorial overreaching and merits double jeopardy protection………………………………..20

CONCLUSION………………………………………………………….21

TABLE OF AUTHORITIES

CASES PAGES

Arlington Heights v. Metropolitan Housing Department Corp.
429 U.S. 252 (1977)……………………………………………15

Batson v. Kentucky
476 U.S. 79 (1986)…………………………………………….*passim*

Breed v. Jones
421 U.S. 519 (1975)……………………………………………9

Currier v. Virginia
138 S. Ct. 2144 (2018)…………………………………………..9

Flowers v. Mississippi
139 S.Ct. 2228 (2019)…………………………………………12,15,16

Green v. United States
355 U.S. 871 (1957)…………………………………………..9

Miller-El v. Dretke
545 U.S. 231 (2005)…………………………………………15,16

Oregon v. Kennedy
456 U.S. 667 (1982)…………………………………………..11

Pena-Rodriguez v. Colorado
137 S. Ct. 855 (2017)…………………………………………12,13,17,22

Powers v. Ohio
99 U.S. 400 (1991)……………………………………7, 12, 13, 14

Rose v. Mitchell
443 U.S. 545 (1979)……………………………………………7, 13

Snyder v. Louisiana
552 U.S. 472 (2008)……………………………………………14

Strauder v. West Virginia
100 U.S. 303 (1879)……………………………………………20

Swain v. Alabama
380 U.S. 202 (1965)………………………………………14,15,21

United States ex.rel. Marcus v. Hess
317 U.S. 537 (1943)……………………………………………9

Kesser v. Cambra
465 F.3d 351 (9th Cir. 2006)…………………………………14

United States v. Bishop
959 F.2d 820 (9th Cir. 1992)…………………………………14,16

Commonwealth v. Basemore
875 A.2d 350 (Pa. Super. 2005)…………………………...16,17

Commonwealth v. Daidone
684 A.2d 179 (Pa. Super. 1996)…………………………….21

Commonwealth v. Horne
635 A.2d 1033 (Pa. 1994)………………………………….16

Commonwealth v. Johnson
231 A.3d 807 (Pa. 2020)……………………………*passim*

Commonwealth v. Martorano
741 A.2d 1221 (Pa. 1999)………………………….*passim*

Commonwealth v. Rico
711 A.2d 990 (Pa. 1998)……………………………………21

Commonwealth v. Smith
615 A.2d 321 (Pa. 1992)……………………………………*passim*

Commonwealth v. Starks
416 A.2d 498 (Pa. 1980)……………………………………9,10,11,17

OTHER AUTHORITIES

A Brief History of the Criminal Jury in the United States
61 U. Chi. L. Rev. 867, 884 (1994)………………………………20

Brief for the Constitution Project as Amicus Curiae……………………..14

Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Criminal Justice System……………19

Statistical Proof Of Racial Discrimination In The Use Of Peremptory Challenges: The Impact And Promise Of The Miller-El Line Of Cases As Reflected In The Experience Of One Philadelphia Capital Case
97 Iowa L. Rev. 1425 (2012)………………………………………23

INTEREST OF THE AMICUS

The Atlantic Center for Capital Representation (ACCR) is a nonprofit organization based in Philadelphia, Pennsylvania. ACCR's mission is to serve as a clearinghouse for capital litigation and juvenile resentencing, and to provide litigation support to attorneys with clients facing capital prosecution or execution. ACCR focuses on Pennsylvania, and furthers its mission through consultation with capital defense and juvenile resentencing teams, training lawyers and mitigation specialists, and conducting trial and post-conviction litigation. ACCR has conducted eleven "Bring Your Own Case" trainings in Pennsylvania since its formation in 2010, and staff have taught regularly at bi-yearly conferences for the Pennsylvania Association of Criminal Defense Lawyers in Rule 801-approved Continuing Legal Education classes. ACCR has consulted in many capital and juvenile resentencing cases across the state, and ACCR's executive director was the lead attorney in the case of *Commonwealth v. Kareem Johnson,* named in the allocatur grant in the instant case.

SUMMARY OF ARGUMENT

This Court's decisions, from *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992) to *Commonwealth v. Martorano,* 741 A.2d 1221 (Pa. 1999) to *Commonwealth v. Johnson*, 231 A.3d 807 (Pa. 2020), have maintained a consistent theme: double jeopardy protections are necessary to rectify prosecutorial overreaching that erodes the integrity of our criminal justice system. In *Commonwealth v. Johnson*, 231 A.3d 807 (Pa. 2020), the Court defined overreaching, as distinguished from mere prosecutorial error or even intentional misconduct, as that which denies the defendant his right to a fair trial. "[O]verreaching signals that the judicial process has fundamentally broken down because it reflects that the prosecutor, as representative of an impartial sovereign, is seeking conviction at the expense of justice." 231 A.3d at 824.

In the instant case, the Court has an opportunity to bring a quintessential denial of a fair trial, an egregious *Batson*[1] violation, under the ambit of double jeopardy protections. The Court should take this opportunity to do so, as the prosecutor's clear intent to discriminate in jury selection undermines the public legitimacy and integrity of the criminal justice system. As Justice Kennedy explained in *Powers v. Ohio,* "racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' and places the fairness of a criminal proceeding in doubt." 99 U.S. 400, 411 (1991) (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)).

Racial discrimination in the criminal justice system has proved particularly pernicious, and is especially odious in the process of selecting juries, the democratic bulwark of our justice system. *Batson* violations are concrete judicial determinations of

[1] 476 U.S. 79 (1986).

intentional race discrimination in the jury selection process, and thus are examples of prosecutorial misconduct. A *Batson* violation crosses the threshold of prosecutorial overreach when undertaken with the intent to poison the jury pool by systematically eliminating a racial minority group. These violations are as damaging to the criminal justice system as the forms of prosecutorial overreaching in *Smith-Martorano-Johnson*. Furthermore, dissuading such overreach is especially important in a city and state with a particularly troubling history of racial discrimination in the jury selection process.

This case, in which the prosecutor used all eight peremptory strikes against people of color, including seven against Black people, represents just the sort of egregious prosecutorial behavior that crosses into overreaching and thus warrants double jeopardy protection. Such a decision by this Court would be consistent with its prior double jeopardy decisions and would "reinforce [this Court's] jurisprudence holding dismissal of charges is an appropriate remedy when there is deliberate and egregious overreaching by the prosecution." *Commonwealth v. Johnson*, 231 A.3d at 828 (Pa. 2020) (Dougherty, J., concurring).

ARGUMENT

I. Egregious *Batson* violations damage our justice system and erode trust in its integrity in the same way as violations identified in *Smith*, *Martorano* and *Johnson*.

A. Double jeopardy protections are critical to maintaining the legitimacy of the criminal justice system.

The constitutional protection of double jeopardy, while important in the individual cases in which it applies, serves a much broader goal, namely ensuring that our criminal justice system remains legitimate in the eyes of the public. Indeed, "(t)here can be no doubt that this constitutional protection is fundamental to our system of criminal justice," *Commonwealth v. Starks*, 416 A.2d 498 (Pa. 1980). Maintaining the public legitimacy of the criminal justice system is a consistent theme in double jeopardy jurisprudence: "This guarantee [that no person may be tried more than once 'for the same offence'] recognizes the vast power of the sovereign, the ordeal of a criminal trial, and the injustice our criminal justice system would invite if prosecutors could treat trials as dress rehearsals until they secure the convictions they seek." *Currier v. Virginia*, 138 S. Ct. 2144 (2018) (citing *Green v. United States,* 355 U.S. 871 (1957)); see *Breed v. Jones,* 421 U.S. 519, 530 (1975) ("As we have observed, the risk to which the term jeopardy refers is that traditionally associated with 'actions intended to authorize criminal punishment to *vindicate public justice*.'") (quoting *United States ex.rel. Marcus v. Hess,* 317 U.S. 537, 548-549 (1943)) (emphasis added).

B. *Johnson* affirms the underlying principle in *Martorano* and *Smith*: egregious behavior that rises to the level of prosecutorial overreaching triggers double jeopardy protection.

Commonwealth v. Johnson, supra, constitutes an application of this Court's decisions in *Smith* and *Martorano,* only in a different context. While *Smith* was the first

case to clearly implicate the double jeopardy clause of the Pennsylvania Constitution instead of its federal counterpart, this Court had condemned prosecutorial overreaching years earlier. "In contrast to prosecutorial error, overreaching is not an inevitable part of the trial process and cannot be condoned. It signals the breakdown of the integrity of the judicial proceeding, and represents the type of prosecutorial tactic which the double jeopardy clause was designed to protect against." *Commonwealth v. Starks,* 416 A.2d 498, 500 (Pa. 1980). In *Smith*, the Court held that prosecutorial misconduct "intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial" triggers double jeopardy protections. 615 A.2d 321, 325 (Pa. 1992). Despite confronting a different form of prosecutorial misconduct in *Commonwealth v. Martorano*, the Court reaffirmed this core principle: "While such misconduct does not involve concealment of evidence as in *Smith,* it nonetheless evinces the prosecutor's intent to deprive [defendants] of a fair trial; to ignore the bounds of legitimate advocacy." 741 A.2d 1221, 1223 (Pa. 1999). The Court then articulated the same principle in different terms, characterizing prosecutorial overreach that triggers double jeopardy as instances in which the prosecutor seeks "to win a conviction by any means necessary." *Id.*

This Court's decision in *Commonwealth v. Johnson*, 231 A.3d 807 (Pa. 2020), applied double jeopardy protections to cases in which a prosecutor demonstrates "conscious disregard for a substantial risk that a defendant will be deprived of his right to a fair trial." The application of double jeopardy in a different context did not change this Court's previous jurisprudence. Rather, *Johnson* merely confirmed that the principles undergirding *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992) and *Commonwealth v. Martorano*, 741 A.2d 1221 (Pa. 1999) can be applied to a case in which the prosecutor's

misconduct may be unintentional but nevertheless equally egregious. *Johnson* recognized that there is no legal distinction that would justify different remedies for intentional prosecutorial misconduct versus misconduct taken with reckless disregard for the integrity of our legal system: "either way, the conduct imposes upon the defendant the very 'Hobson's choice' [i.e. no choice at all] which double jeopardy seeks to prevent." *Johnson*, 231 A.3d at 826. In this way, *Johnson* represents a renewed commitment to the steadfast principle that prosecutorial overreaching, that which "deprives the defendant of his right to a fair trial," requires more than a reprimand, a retrial, and an advisory "not to do it again." Thus, while the phrasing varies from case to case, the fundamental precept of the *Smith-Martorano-Johnson* line of cases remains consistent: double jeopardy protections are triggered when prosecutorial overreach[2] causes the fundamental breakdown of the judicial process.

C. This Court has stated that double jeopardy protections should have general application.

Although this Court has not yet considered whether *Batson* violations fall within the ambit of prosecutorial misconduct that prohibits retrial, there is no reason that the Court's doctrine should be limited to fact patterns similar to *Smith, Martorano,* or *Johnson*. In fact, the Court stated in *Martorano* that "there is no doubt that the Court intended the *Smith* rule to be one of general application." 741 A.2d 1221, 1223 (Pa. 1999). The Court went on to explain that the holding in *Smith* was "deliberately nonspecific" to

---

[2] The *Johnson* opinion makes clear that the thread connecting all of the Court's double jeopardy jurisprudence is the concept of overreaching: "*Smith* itself was grounded on the distinction between mere error and overreaching, see *Smith*, 532 Pa. at 184, 615 A.2d at 324, as set forth in the pre-*Kennedy* [*Oregon v. Kennedy,* 456 U.S. 667 (1982)] case of *Starks*. *Starks* conveyed that, whereas prosecutorial errors are an 'inevitable part of the trial process,' prosecutorial overreaching is not. *Stark*s, 416 A.2d at 500. Just as important, overreaching signals that the judicial process has fundamentally broken down because it reflects that the prosecutor, as representative of an impartial sovereign, is seeking conviction at the expense of justice." 231 A.3d at 824.

cover the wide variety of prosecutorial overreaching that deprives a defendant of his constitutional rights. *Id.* An egregious *Batson* violation is a textbook example of this overreaching: an agent of an impartial sovereign infecting the jury selection process with racism to seek a conviction at the expense of a defendant's right to a fair trial and the fundamental integrity of the criminal justice system.

D. Egregious *Batson* violations are as damaging to the criminal justice system as the forms of prosecutorial overreaching in *Smith-Martorano-Johnson*.

A *Batson* violation contravenes two bedrock principles of a defendant's constitutional rights simultaneously: the right to be tried by an impartial jury, and the right to equal justice under law. In *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019), the United States Supreme Court put the intersection of these two principles succinctly: "Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process." 139 S.Ct. at 2242. In describing the jury as "a vital check against the wrongful exercise of power by the State and its prosecutors," the Supreme Court made clear that "[t]he intrusion of racial discrimination into the jury selection process damages both the fact and the perception of this guarantee." *Powers v. Ohio*, 499 U.S. 400, 411 (1991).

Indeed, addressing such racial bias "ensure[s] that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 859 (2017). Prosecutorial misconduct in jury selection has the same effect on the defendant and the criminal justice system as that in the *Smith-Martorano-Johnson* line of cases. In *Batson*, the Supreme Court described the harm of racial discrimination in the jury selection process: it "extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." 476 U.S. 79, 87 (1986). As the Supreme Court explained in

Powers v. Ohio, decided five years after *Batson*: "racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' and places the fairness of a criminal proceeding in doubt." 499 U.S. 400, 411 (1991) (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)). Indeed, racial bias is "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 859 (2017). Simply put, *Batson* violations are injurious to our system of justice; they degrade public trust in the integrity of our system in the very same way as the prosecutorial misconduct repudiated by this Court in *Smith, Martorano,* and *Johnson.*

II. A pattern of discrimination represents an egregious *Batson* violation.

In holding that a *Batson* violation can rise to the type of "deliberate and egregious" overreaching that triggers double jeopardy protections, the Court need not expand its prior double jeopardy jurisprudence any further: it must simply apply the principles it has already enunciated. This Court should apply the "deliberate and egregious overreaching" test Justice Dougherty outlined in his *Johnson* concurrence.

Batson violations, by definition, represent deliberate misconduct: the entire *Batson* framework is designed to assess intentionality. Thus, in cases where a *Batson* violation has been found, the question for double jeopardy purposes becomes one of egregiousness. In some sense, any deliberate racial discrimination is abhorrent given our country and state's history of racial discrimination, particularly in the justice system. This Court has made it clear, however, that not all prosecutorial error merits double jeopardy protections. See *Johnson,* 321 A.3d at 822 ("In spite of the broader protections reflected in *Smith* and *Martorano*, later case law clarified that not all intentional misconduct is sufficiently

egregious to be classified as overreaching and, as such, to invoke the jeopardy bar.”). Nonetheless, it is possible for judges to distinguish particularly egregious instances of racial discrimination in the jury selection process, much as they distinguish particularly egregious prosecutorial misconduct in other double jeopardy contexts. We propose a framework in which a *Batson* violation becomes egregious when undertaken as part of a broader pattern of systematic discrimination.[3]

Batson must be understood in its historical context. Its predecessor, *Swain v. Alabama,* 380 U.S. 202 (1965), held that:

> [T]he presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes.

In overruling *Swain*, the *Batson* Court made clear that demonstrating a history of racial discrimination is not necessary for a successful claim. See *Batson v. Kentucky,* 476 U.S.

---

[3] Such a framework is far from exhaustive, of course. Other sorts of claims, such as explicitly exploiting racial stereotypes or tensions, may also render a *Batson* violation particularly egregious. Peremptory strike justifications that fail the second *Batson* step, those that are racially discriminatory on their face, represent such violations. As the Supreme Court explained, “[a]ctive discrimination by a prosecutor during this process condones violations of the United States Constitution within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury's neutrality and its obligation to adhere to the law. The cynicism may be aggravated if race is implicated in the trial.” *Powers v. Ohio*, 499 U.S. 400, 412 (1991). In *Kesser v. Cambra,* the Ninth Circuit noted that “(t)he racial animus behind the prosecutor's strikes is clear…When he was asked to explain why he used a peremptory challenge to eliminate Rindels, he answered using blatant racial and cultural stereotypes. He identified Rindels as a ‘darker skinned,’ ‘[N]ative American female’ and worried that Native Americans who worked for the tribe, like Rindels, were ‘a little more prone to associate themselves with the culture and beliefs of the tribe than they are with the mainstream system.’” 465 F.3d 351, 357 (9th Cir. 2006). Of course, racial tropes are rarely as explicit as those in *Kesser,* but are nonetheless identifiable. In *United States v. Bishop,* 959 F.2d 820 (9th Cir. 1992), the prosecutor emphasized “that he did not challenge Ms. Burr because she was black, but (at least in part) because she lived in Compton, a poor and violent community whose residents are likely to be ‘anesthetized to such violence’ and ‘more likely to think that the police probably used excessive force.’” 959 F.2d 820, 825. Actively exploiting racial tensions of the case after a *Batson* violation also indicates egregiousness. For instance, in *Snyder v. Louisiana*, 552 U.S. 472 (2008), the prosecutor made explicit references to the O.J. Simpson case during the trial in an effort to inflame racial tensions, thereby undermining the very foundation of a system that purports to treat every person equally. Brief for the Constitution Project as Amicus Curiae, p. 22, *Snyder v. Louisiana*, 552 U.S. 472 (2008).

79, 95 (1986) (quoting *Arlington Heights v. Metropolitan Housing Department Corp.*, 429 U.S., at 266, n. 14 (1977) ("'a consistent pattern of official racial discrimination' is not 'a necessary predicate to a violation of the Equal Protection Clause.'"). The *Batson* Court also noted that a defendant need not show multiple racially motivated strikes. The Supreme Court later clarified that "one racially discriminatory peremptory strike is one too many." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2241 (2019). *Flowers* applied concepts present in *Batson* and *Swain,* again recognizing that a single discriminatory strike is sufficient but nevertheless considering a prosecutor's history of minority juror strikes: "Stretching across Flowers' first four trials, the State employed its peremptory strikes to remove as many black prospective jurors as possible. The State appeared to proceed as if *Batson* had never been decided." 139 S. Ct. at 2246.

Flowers was not the first time the Supreme Court had encouraged the use of "historical evidence" in assessing a possible *Batson* violation. In *Miller-El v. Dretke,* 545 U.S. 231 (2005), the Court noted that if any more evidence was needed to confirm a racially discriminatory pattern of jury selection, "history supplies it:"

> (T)he defense presented evidence that the District Attorney's Office had adopted a formal policy to exclude minorities from jury service.... A manual entitled 'Jury Selection in a Criminal Case' [sometimes known as the Sparling Manual] was distributed to prosecutors. It contained an article authored by a former prosecutor (and later a judge) under the direction of his superiors in the District Attorney's Office, outlining the reasoning for excluding minorities from jury service.

545 U.S. at 264. The parallel to the "McMahon tape," *infra,* is inescapable. Historical evidence, of course, is often unavailable or nonexistent, and should hardly be considered a requirement to prosecutorial overreaching. While the *Flowers* case exhibited a lengthy

history of discrimination in jury selection, the state also struck five of the six eligible Black jurors in the defendant's last trial.[4]

Prosecutors in Pennsylvania engage in similarly egregious patterns of discrimination. For instance, in *Commonwealth v. Basemore*, 875 A.2d 350 (Pa. Super. 2005), the prosecutor used all 19 peremptory strikes on Black people. The appellate court opinion endorsed the findings of the PCRA court, which noted a pattern to systemically discriminate: "this Court is convinced that the trial prosecutor in this case engaged in a pattern of discrimination during voir dire. The record indicates a conscious strategy to exclude African-American jurors." 875 A.2d at 852. That same Court noted that the prosecutor had endorsed discriminatory behavior in a training tape for the Philadelphia District Attorney's Office (the "McMahon Tape," *infra*). In *Commonwealth v. Horne*, 635 A.2d 1033 (Pa. 1994), the prosecutor used three peremptory strikes to eliminate all Black people from the jury panel, using the juror's place of residence as a reason for one of the strikes, which the Court recognized as racially discriminatory.[5]

While not necessary for a successful *Batson* claim, either or both of these circumstances - a high number or proportion of minority jurors struck or a history of racial discrimination - indicate egregiousness. Both represent a systematic and concerted attempt

---

[4] The *Flowers* Court noted that leaving a single Black juror on a jury was likely a tactic, and would not insulate the state against a *Batson* claim: "The State's use of peremptory strikes in Flowers' sixth trial followed the same pattern as the first four trials, with one modest exception: It is true that the State accepted one black juror for Flowers' sixth trial. But especially given the history of the case, that fact alone cannot insulate the State from a *Batson* challenge. In *Miller-El II*, this Court skeptically viewed the State's decision to accept one black juror, explaining that a prosecutor might do so in an attempt "to obscure the otherwise consistent pattern of opposition to" seating black jurors. 545 U.S. at 250, 125 S.Ct. 2317. The overall record of this case suggests that the same tactic may have been employed here. In light of all of the circumstances here, the State's decision to strike five of the six black prospective jurors is further evidence suggesting that the State was motivated in substantial part by discriminatory intent." 139 S.Ct. 2228 at 2246.

[5] See *United States v. Bishop,* 959 F.2d 820 (9th Cir. 1992), and *supra* at fn.2.

to exclude jurors on account of their race, and both strike at the integrity of the judicial process. As the *Batson* Court explained, "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." 476 U.S. at 87. The repeated use of these procedures, over the course of a given voir dire, or stretched over many years by the same prosecuting authority, severely degrades public confidence in our justice system.[6] The invocation of double jeopardy protection can mitigate this degradation of confidence; indeed, such protection is designed to safeguard the integrity of the judicial process. See *Commonwealth v. Starks,* 416 A.2d 498, 500 (Pa. 1980).

III. Philadelphia and Pennsylvania have a troubling history of discrimination in the jury selection process.

In bringing egregious *Batson* violations within the ambit of double jeopardy protections, this Court would be answering the United States Supreme Court's clarion call to root out racial discrimination in the jury selection process:

> The Nation must continue to make strides to overcome race-based discrimination... [B]latant racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases like this one ...It is the mark of a maturing legal system that it seeks to understand and to implement the lessons of history.

Pena-Rodriguez v. Colorado 137 S. Ct. at 871. The history of jury exclusion on the basis of race in Pennsylvania is particularly stark. Thirty-five years ago, a prominent prosecutor in Philadelphia, Jack McMahon, instructed a new class of assistant district attorneys: "[B]lacks from low income areas….you don't want those people on your jury." *Commonwealth v. Basemore*, 744 A.2d 717, 730 (Pa. 2000). Exclusion on the basis of race

---

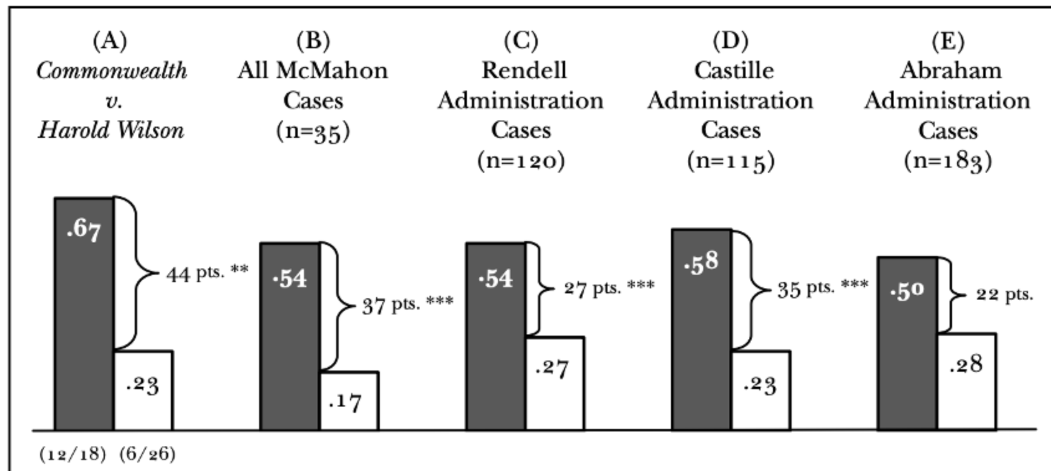
[6] According to a Gallup poll conducted last year, less than a quarter of Americans are confident in our criminal justice system. For Black Americans, that number falls to a mere eleven percent. https://news.gallup.com/poll/317114/black-white-adults-confidence-diverges-police.aspx

did not start or end with McMahon, but his rhetoric is indicative of a deep and abiding practice that continues to undermine the integrity of our criminal justice system. McMahon, steeped in the culture and practice of the office, trained new assistant district attorneys to systematically exclude Black Americans, specifically poor Black Americans, from serving on juries. Sure enough, across the Rendell and Castille District Attorneys' administrations, peremptory strike rates for Black jurors remained significantly higher than their white counterparts. During the Rendell administration (1978-1986), the strike rate for Black prospective jurors was fifty-four percent compared to twenty-seven percent for white prospective jurors. The disparity only widened with the Castille administration (1986-1991), during which fifty-eight percent of Black prospective jurors were struck compared to just twenty-three percent of white prospective jurors. The strike rate remained twenty-two percentage points higher through the Abraham administration, which ended in 2010. The below chart, which details racial disparities in the prosecution's use of peremptory challenges over decades, documents a stark and compelling case of

discrimination:

FIGURE 1

UNADJUSTED RACE DISPARITIES IN THE PROSECUTORIAL USE OF PEREMPTORY STRIKES
(The bars represent prosecutorial strike rates against black and non-black venire members.)



** Denotes a statistically significant disparity at the .01 level.
*** Denotes a statistically significant disparity at the .001 level.

Baldus, *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges: The Impact and Promise of the Miller-El Line of Cases As Reflected in the Experience of One Philadelphia Capital Case*, 97 Iowa L. Rev. 1425, 1456 (2012).

This chart illustrates that the disproportionate exclusion of Black jurors using peremptory strikes is a pernicious problem not limited to a particular time period or administration. Nor is the practice limited to a small subset of cases: it pervades the jury selection process across Pennsylvania criminal cases. The *Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Criminal Justice System,*[7] released in 2001, noted:

> In at least one large county in Pennsylvania [Allegheny County], people in predominantly African American and Latino neighborhoods receive fewer

[7] On October 15, 1999, the Supreme Court of Pennsylvania appointed the Committee on Racial and Gender Bias in the Justice System, "to undertake a study of the state court system to determine whether racial or gender bias plays a role in the justice system."

> summonses for jury duty, and the number of potential jurors consequently declines because of difficulties with transportation, childcare, and work rules that discourage jury participation by hourly employees. *When potential minority jurors do appear at the courthouse, in many jurisdictions they are more likely than white jurors to be dismissed through the exercise of peremptory challenges* by prosecutors and/or defense attorneys tacitly exhibiting their belief that a juror's race may predispose him or her toward conviction or acquittal of a defendant.[8]

However, it must not be forgotten that the above chart and report are not ancient history, given the facts of the instant case. In other words, the issue of racial discrimination in jury selection extends well beyond one prosecutor in Philadelphia thirty-five years ago: it remains a widespread problem across the Commonwealth, up to and including today.

IV. This case satisfies the criteria for prosecutorial overreach and merits double jeopardy protection.

The particular facts of the instant case demonstrate the egregious nature of this violation, and why such violations are so damaging to the legitimacy of our justice system. Here the Commonwealth used all but one peremptory strike against Black prospective jurors, using the last strike against another person of color. This sort of systematic exclusion of Black potential jurors has a long and troubling history, echoing back at least as far as *Strauder v. West Virginia,* 100 U.S. 303 (1879), a Supreme Court decision that prohibited states from excluding Black Americans from jury pools. Indeed, a Black person did not sit on a jury in this country until 1860.[9] Had the Commonwealth sought to deny an entire race's participation in the jury selection process, the prosecutor's actions would be indistinguishable from the peremptory strikes exercised in this case: she struck as many Black people and other people of color as she possibly could. Such a systematic denial not

---

[8] Report, *Id.* at page 54 (emphasis added).
[9] Baldus, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 884 (1994).

only infects that particular trial, it "undermine[s] public confidence in the fairness of our system of justice." *Batson,* 476 U.S. at 87.

This case is not a standard *Batson* violation. It is a particularly egregious one that should bar retrial under the double jeopardy clause. The misconduct was sufficiently blatant that the Superior Court overturned the trial court's finding of no discrimination, despite the great deference generally accorded trial courts on *Batson* rulings. *Commonwealth v. Rico,* 711 A.2d 990, 993 (Pa. 1998) ("The findings of the trial court are to be given great deference on appeal and will not be disturbed absent a determination that the trial court's ruling was clearly erroneous."). The fact that the prosecution exclusively struck prospective jurors of color suggests racial discrimination played a role in multiple strikes: as the Superior Court opinion noted, "[i]t does not take a statistician to understand that the possibility of striking no Caucasians and striking at least 7 of 13 African Americans by random chance is extremely small." The Superior Court characterized these numbers as "startling." Such egregious overreaching is sufficient to trigger double jeopardy protections. As the Superior Court explained in *Commonwealth v. Daidone,* 684 A.2d 179 (Pa. Super. 1996): "where th[e] constitutional mandate [of a fair trial] is ignored and subverted by the Commonwealth, we cannot simply turn a blind eye and give the Commonwealth another opportunity." 684 A.2d 179, 184.

CONCLUSION

Justice White, who authored *Swain* in 1965, concurred in its overruling by *Batson* twenty-one years later:

> I do so because *Swain* itself indicated that the presumption of legitimacy with respect to the striking of black venire persons could be overcome by evidence that over a period of time the prosecution had consistently excluded blacks from petit juries. This should have warned prosecutors that using peremptories to exclude

> blacks on the assumption that no black juror could fairly judge a black defendant would violate the Equal Protection Clause. It appears, however, that the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread, so much so that I agree that an opportunity to inquire should be afforded when this occurs.

Batson, 476 U.S. 79 at 101 (1986) (White, J., concurring). This Court has come to a similar crossroads. Thirty-five years after *Batson,* its central promise remains unfulfilled. The problem of racial discrimination in jury selection continues unabated, as evidenced by the egregious violation in this case. This Court has the opportunity to make clear that prosecutorial overreaching of this sort will no longer be tolerated, and "ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017). It should take it.

Dated: April 7, 2021

Respectfully Submitted:

s/Marc Bookman
Marc Bookman, Esquire
Pa. Bar No. 37320
Executive Director
Atlantic Center for Capital Representation

CERTIFICATE OF COMPLIANCE

Counsel for amicus curiae hereby certifies that this brief complies with the word limit of Pa. R. P. A. 531 based on the word count (4974) according to the word processing system used to prepare it.

s/Marc Bookman
Marc Bookman, Esquire
Pa. Bar No. 37320

CERTIFICATE OF SERVICE

This 7th day of April, 2021, I, Marc Bookman, Esquire, hereby certify that a true and correct copy of the foregoing document was served upon the persons and in the manner indicated below, in compliance with Pa. R.A.P. 121:

BY FIRST CLASS MAIL, POSTAGE PRE-PAID &ELECTRONIC SERVICE:

Lawrence Krasner, Esquire
District Attorney's Office
Three South Penn Square
Philadelphia, PA 19107
(215) 686-5073

Jason Kadish, Esquire
1500 John F. Kennedy Blvd., #1723b
Philadelphia, PA 19102
215-231-9844