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**IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

No. 6 EAP 2021

COMMONWEALTH OF PENNSYLVANIA,

v.

DERRICK EDWARDS,
appellant

BRIEF FOR *AMICUS CURIAE,* THE OFFICE OF ATTORNEY GENERAL

Appeal by allowance from the July 29, 2020 decision of the Superior Court at 3429 EDA 2018, affirming the September 11, 2018 order of the Philadelphia County Court of Common Pleas, CP-51-CR-0002611-2013 *et seq.*, denying the defendant's motion to bar retrial for eight gunpoint robberies.

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STATEMENT OF INTEREST

The Attorney General is the chief law enforcement officer of the Commonwealth. He has jurisdiction over a variety of criminal prosecutions throughout the state, and also adopts or assists in many prosecutions within the jurisdiction of local district attorneys. The Attorney General has an overriding interest in ensuring that Pennsylvania criminal trials are conducted properly, without discrimination of any kind, so that accused persons, victims of crime, and the public at large all obtain the fair adjudication to which they are entitled.

SUMMARY OF ARGUMENT

Since its inception, the *Batson* rule has evolved and expanded into a global safeguard for the integrity of the jury system as a whole. The focus is on the equal protection rights of prospective jurors. The rule therefore applies regardless of the defendant's own race or gender, and regardless of whether he, as opposed to the juror, has suffered any discrimination. Indeed, the rule applies even *against* the defendant. Any litigant can make a *Batson* challenge – not just criminal defendants, but also prosecutors, and even civil plaintiffs and defendants – because they all are given third-party standing to raise a right that actually belongs to the juror.

Such *Batson* claims provide no clear basis for "Jay Smith" double jeopardy relief. The Court has reserved this most extreme sanction for the most blatant misconduct causing the most demonstrable prejudice to the defendant. Yet *Batson* requires no prejudice to the defendant at all. The prejudice is to the juror, and the jury process in which the juror participates. The cure for that prejudice is a new jury process, conducted in accord with constitutional norms.

This defendant seeks to prevent the cure, in this case and for other defendants. A bar to retrial would be a benefit for them. But it would diminish justice due to prospective jurors, to victims of crime, and to the public at large.

ARGUMENT

I. *Batson* is a third-party standing rule designed to remedy discrimination against jurors. Double jeopardy discharges may deliver an unwarranted windfall to criminal defendants whether or not they have themselves suffered discrimination, and regardless of their own race, gender, or conduct.

Since its landmark decision in *Commonwealth v. Jay Smith*, 615 A.2d 321 (Pa. 1992), this Court has considered a wide variety of conduct in a large number of cases to determine whether the violation of rights was so egregious that it should bar retrial on double jeopardy grounds. These cases all have one thing in common: the rights on which all these defendants sought such relief were their own. This case, in contrast, demands the ultimate sanction, and permanent immunity from prosecution, for a class of claims based often on the violation of *someone else's* rights.

The *Batson*[1] line of cases has engendered a most unusual rule in the criminal law. Although the rule is about discrimination, the criminal defendant need not be the target of the discrimination. Rather, the equal protection right belongs to the juror, and the defendant is given legal standing to assert it. The public may thus ask how, for example, the rights of blacks excluded from jury service can be vindicated by letting a white murderer go free, or the rights of venirewomen vindicated by releasing a serial rapist. That question is easily answered when the remedy for a

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

Batson violation is a new trial. The purpose of the remedy is to enhance public confidence in the fairness of the criminal justice system as a whole by nullifying the product of an improperly selected jury panel, and replacing it with a verdict reached by jurors chosen in accordance with the demands of the Equal Protection Clause.

Discharge as a remedy for *Batson* violations, however, would significantly undermine that result. The tainted verdict would no longer be replaced with an untainted one. Prospective jurors would be deprived of the chance to be chosen for a new fair trial, and the public and victims would be deprived of the fair resolution that is the central promise of the criminal justice system. Only the defendant would benefit, but in a way that may actually impair the right in question – which is the right to participate in a fair trial, not the right to no trial at all.

The defendant here does not acknowledge that the extreme expansion of law he seeks is founded on rights often raised only by proxy. This Court, however, has long recognized that *Batson* has become a third-party standing rule. *Commonwealth v. Carson*, 741 A.2d 686, 694-95 (Pa. 1999). And, as the *Carson* Court noted, the implications are both "novel" and "compelling." Because the right is the juror's, even white defendants can secure relief based on discrimination against blacks, and males on the basis of discrimination against females. *Powers v. Ohio*, 499 U.S. 400

(1991); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).[2] Because the right is the juror's, even criminal defendants cannot exercise strikes based on race, and prosecutors have standing to stop them. *Georgia v. McCollum*, 505 U.S. 42 (1992).[3] Because the right is the juror's, even civil litigants can raise *Batson* challenges, although money and not liberty is at stake. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).[4]

And, because the right is the juror's, *Batson* violations constitute structural error, requiring no showing of prejudice. *Commonwealth v. Basemore*, 744 A.2d 717, 734 (Pa. 2000).[5] That is, the defendant need not demonstrate that excluded jurors would have been more favorable to him. More importantly, the defendant *can*not show such prejudice, because any such claim would contradict the entire premise of the *Batson* rule. The Court has explicitly repudiated the notion that race

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[2] "We conclude that a defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race…. [R]ace is irrelevant to a defendant's standing to object to the discriminatory use of peremptory challenges." *Powers*, 499 U.S. at 415-16.

[3] "[P]ublic confidence [is] undermined where a defendant, assisted by racially discriminatory peremptory strikes, obtains an acquittal…. As the representative of all its citizens, the State is the logical and proper party to assert the invasion of the constitutional rights of the excluded jurors in a criminal trial." *Id.* at 50, 56.

[4] "[D]iscrimination on the basis of race in selecting a jury in a civil proceeding harms the excluded juror no less than discrimination in a criminal trial." *Edmonson*, 500 U.S. at 619.

[5] "[W]e note that *Batson* violations fall within a limited and unique category of claims which, by the nature of their impact upon the fundamental fairness of a trial, are not subject to conventional harmless error or prejudice analysis." *Id.*

is a valid predictor of juror bias; this is "the very stereotype the law condemns." *Powers*, 499 U.S. at 410. Thus, litigants may no longer strike jurors on the assumption "that they would be partial to the defendant because of their shared race." *Batson*, 476 U.S. at 97. "This Court firmly has rejected the view that assumptions of partiality based on race provide a legitimate basis for disqualifying a person as an impartial juror." *McCollum*, 505 U.S. at 59.[6]

This case well illustrates the contrast between structural error and actual prejudice. The defendant was tried for a two-week rampage of gunpoint robberies in minority neighborhoods throughout North Philadelphia. One of the victims was shot. Most if not all were black. No suggestion appears of any issues of racial animus, nor has the defendant claimed any. Five blacks served on the jury, plus one member described as "other," all of whom had been accepted by the Commonwealth. Only one purportedly improper peremptory challenge was identified by the Superior Court panel – in a 2-1 split decision rejecting the findings of the trial judge, and over a lengthy and comprehensive dissent – and on that basis the jury's unanimous verdict was overturned.

[6] By the same token, the Court has consistently rejected the view of Justice Thomas and others that, "because racial biases, sympathies, and prejudices still exist," litigants should be permitted to use peremptory challenges based on race. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2274 (2019) (Thomas, J., dissenting).

And so the defendant has received a new trial for his voluminous and violent crimes – not because one strike was likely to change the outcome, but because the error was structural. The harm was to the juror, and to the public perception that justice will be done. It is necessary and proper that this remedy be imposed. But there is no rational basis for now barring the retrial and denying the public the justice a new proceeding was intended to provide. Those segments of society most likely to suffer discrimination – the poor and people of color – are exactly those who are most often victimized by crime, and who are most in need of effective enforcement of the law.

Criminal defendants can become *Batson*'s beneficiaries by serving as surrogates for the equal protection rights of others. They need not show they have themselves suffered any discrimination; they need not even share the race or gender of the jurors who are the actual victims of discrimination. When standing in for jurors, therefore, they deserve just the relief required to remedy the violation of the jurors' rights: a new jury, with lawfully selected members.

CONCLUSION

For these reasons, the judgment below should be affirmed, and the case remanded for fair trial before a fair jury on the numerous criminal charges currently pending against the defendant.

Respectfully submitted,

/s/ *Ronald Eisenberg*

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CERTIFICATE OF COMPLIANCE
WITH RULE 2135

This brief complies with Pa. R. App. P. 2135(d) (certificate of compliance), as it contains fewer than 7,000 words.

CERTIFICATE OF COMPLIANCE
WITH RULE 127

This brief complies with Pa. R. App. P. 127(a) and the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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