Received 5/24/2021 12:38:39 PM Supreme Court Eastern District

Filed 5/24/2021 12:38:00 PM Supreme Court Eastern District
6 EAP 2021

No. 6 EAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA

v.

DERRICK EDWARDS

BRIEF FOR APPELLEE

Appeal from the Superior Court's July 29, 2020 Decision, at 3429 EDA 2018, Affirming the September 11, 2018 Order of the Philadelphia Court of Common Pleas at Nos. CP-51-CR-0002611-2013, CP-51-CR-0002614-2013, CP-51-CR-0002617-2013, CP-51-CR-0002815-2013, CP-51-CR-0002820-2013, CP-51-CR-0002853-2013, CP-51-CR-0002862-2013, CP-51-CR-0002864-2013, Denying Double Jeopardy Discharge.

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COUNTER-STATEMENT OF QUESTION INVOLVED

Do the "reasoning and rationale" of *Commonwealth v. Kareem Johnson*, 231 A.3d 807 (Pa. 2020), compel double jeopardy discharge for a *Batson* violation, where the prosecutor did not commit such egregious misconduct that it constitutes overreaching; society has a strong interest in bringing the guilty to justice; and it is almost certain that defendant committed the multiple violent crimes of which the jury convicted him?

(Discharge denied below; *Johnson* had not yet been decided).

COUNTER-STATEMENT OF THE CASE

Defendant Derrick Edwards appeals the denial of his motion to preclude his retrial after he previously sought, and received, a new trial to remedy the prosecutor's *Batson* violation. He claims that the "reasoning and rationale" of this Court's decision in *Commonwealth v. Johnson*, 231 A.3d 807 (Pa. 2020), apply to a *Batson* violation, and compel a discharge on double jeopardy principles - relief that (to our knowledge) no court has ever granted for a *Batson* violation. Defendant has not satisfied *Johnson*'s standard: he has not shown that the prosecutor committed egregious prosecutorial misconduct that constitutes overreaching so significant that it outweighs society's strong interest in bringing the guilty to justice, and presents a risk of the conviction of an innocent person.

Any *Batson* violation is a serious affront to justice. The violation the Superior Court found here is not open to re-litigation: the Commonwealth of course, accepts the Superior Court's holding that the prosecutor's peremptory challenge of venireperson Patrice Johnson violated *Batson*. But the issue is now different: whether *Johnson* supports discharge. It does not. The prosecutor's *Batson* violation did not constitute overreaching. Additionally, society has a strong interest in protecting the public from defendant, a man who committed eight gunpoint robberies, and it is extremely unlikely that a retrial would result in the conviction of

an innocent person. *Johnson* might preclude retrial in some case as a consequence of a *Batson* violation, but this is not that case.

Concise Statement of Trial Evidence of Defendant's Guilt

In *Johnson* this Court declared that not all serious prosecutorial error implicates double jeopardy under the state Charter. It recognized the strong societal interest in effective law enforcement, and that the jeopardy provision is meant to protect the innocent, not primarily to penalize prosecutorial error. *Johnson*, 231 A.3d at 826. This Court's assessment of the egregiousness of the *Batson* violation here and the other interests *Johnson* identifies requires knowledge of the relevant facts and circumstances relating to the crimes and the *Batson* violation.

In September, 2012, and early October, 2012, defendant and his conspirators Hank Bayard and "Sheed" Thomas drove around Philadelphia in Thomas' mother's car and committed eight early morning gunpoint robberies. On September 18, 2012, at approximately 5:50 a.m., defendant and Thomas robbed Keith Crawford at gunpoint. Five minutes later, they approached Keith Cunningham at a bus stop, put a gun in his face, and told him, "You know what this is." Defendant pushed Cunningham to the ground and hit him twice in the head with the gun. The conspirators robbed him of his cell phone (N.T. 10/29/14, 128-138; N.T. 10/30/14, 56-78; N.T. 10/31/14, 116); *Commonwealth v. Edwards*, 177 A.3d 963, 967 (Pa. Super. 2018).

At 2:00 a.m. on October 1, 2012, two men approached Whitney Coates; one pointed a gun at her face and told her, "You know what this is." They took her cellular phone. Thirty minutes later, they attempted to rob Donald Coke. When Coke resisted, defendant shot him twice in the left arm. They fled in Bayard's mother's SUV (N.T. 10/29/14, 141-147; N.T. 10/30/14, 5-10; 57-64; N.T. 10/31/14, 141); *Edwards*, 177 A.3d at 967.

Later that morning, defendant and Bayard robbed Donald Crump at gunpoint, taking his cellphone; robbed Shanice Jones at gunpoint, taking her cellphone; robbed Hector DeJesus at gunpoint; and robbed James Floyd at gunpoint, taking his cell phone. Police caught the conspirators shortly after the last robbery and recovered property stolen from the eight victims (N.T. 10/29/14, 57-88, 109-113, 123-124, 141-147, 162-170, 198-213; N.T. 10/30/14, 5-20; 57-70; N.T. 10/31/14, 4-19, 33-54, 87, 94-104, 118-15); *Edwards*, 177 A.3d at 967.

On appeal, defendant challenged the sufficiency of evidence of only four of the eight robberies. The Superior Court found the evidence sufficient. It noted as to three of the challenged robberies that: 1) conspirator Thomas, whose confession was read to the jury, implicated defendant, and 2) as defendant conceded, the police found those victims' possessions, including their cellphones, in the getaway car moments after the last robbery. Thomas' statement also implicated defendant in the

fourth robbery, as did the fact that that robbery followed the same modus operandi as the other seven gunpoint robberies. *Edwards*, 177 A.3d at 970.

Voir Dire: Method of Individual Juror Questioning

This Court can address the egregiousness of the prosecutor's misconduct only with a full understanding of the facts and circumstances of the voir dire. The trial court, the Honorable Susan I. Schulman, conducted all the group and voir dire questioning. The court asked the prospective jurors the standard disqualification questions (N.T. 10/28/14, 4-18). The court then conducted follow-up questioning of nineteen venirepeople while all were present. The court's questions appear to have been based on the prospective jurors' answers to questions on the jury questionnaire, although those questionnaires are not of record. The court did not allow counsel to question prospective jurors or to suggest follow-up questions based on the jurors' answers (N.T. 10/27/14, 18-19; N.T. 8/15/18, 7). The court met with counsel and announced on the record which jurors it was removing for cause (*Id*., 48). The court then instructed counsel to make their selections.

Selection of Jurors from First Panel

The prosecutor and defense counsel selected jurors using a "pass the pad" method. The court had removed six venirepersons for cause because they had faced criminal charges or had a close relative charged with a crime. The thirteen remaining venirepeople included eight African-Americans, four whites, and one Asian. The

parties selected six jurors from those thirteen: four African-American women, a white woman, and a white man. Defendant struck three white jurors, one African-American juror, and one "other" prospective juror (Defendant's Appendix A). The prosecutor struck two African-American prospective jurors, one who had a son arrested for robbery, and one who had a nephew charged with fraud (N.T. 10/28/14, 29-30, 39).

Questioning of Second Panel

Judge Schulman summoned an afternoon panel. The court asked the disqualifying questions (N.T. 10/28/14, 51-63). The court conducted voir dire questioning of nineteen jurors while all were present, without any input from counsel, even as to follow-up questions (N.T. 10/27/14, 18-19; N.T. 10/28/14, 63-89; N.T. 8/15/18, 7).

Selection of Jurors From Second Panel

The seventeen remaining venirepersons were five African-Americans, ten whites, one Asian, and one Latino.[1] The parties selected six jurors: two white women, three white men, and one Latino man. Defendant struck two white men; the prosecutor struck four black women, including Patrice Johnson, the strike that violated *Batson*, and one "other" woman. Each party had one challenge for alternate

[1] The parties made their selections without reaching the two remaining venirepersons: a white woman and a black man.

jurors. Defendant struck a white man. The prosecutor struck a black woman (Defendant's Appendix A). The composition of the original jury was four African-Americans, seven whites and one Latino. The next day, an African-American juror reported a work hardship, and a Hispanic man reported a new physical injury. They were replaced by the alternate jurors, a white woman and a white man (N.T. 10/29/14, 4-7; Defendant's Appendix A).

Designation of Race on the Strike Sheets

After the parties had selected jurors from the second panel, defense counsel questioned four prosecution challenges. He added that, "In my notes, I don't put down the race of any juror." The prosecutor stated that she did not either (N.T. 10/28/14, 88-89). Defense counsel then noted what had been previously unknown to the court: that the court-maintained strike sheet listed the race and gender of prospective jurors.[2] The court asked defense counsel if he had a problem with this practice. Counsel said that "it didn't seem in the morning as though this was a factor for anything because we had a bad list in the morning, some jurors were good for different reasons. When I look at their characteristics, I look to see what's gone through in their past." Asked a second time, counsel stated an objection to how the sheets were used. Counsel said that he believed that the prosecutor had seen the

[2] The prosecutor later testified she was not involved in the court's crier's decision to keep track of the race of prospective jurors (N.T. 8/15/18, 9).

notations and used them improperly. The court noted that the prosecutor would see the race and gender of jurors from their being in the courtroom, without reference to the strike sheets. Counsel claimed that many of the venirepeople were mostly located behind counsel, and asserted that the prosecutor had not turned to look at them (N.T. 10/28/14, 89-91).

The prosecutor objected to counsel's characterization of her conduct. The court interrupted and stated, "I will note that on the strike sheet the gender and race of the jurors who are questioned is noted. I do not find that notation would have any influence whatsoever on the attorney's [sic] ability to evaluate those particular jurors since they are, of course, in the room and the lawyers can, of course, look at those people and determine what their sex and race is. So I don't find that that notation would be the basis or be included in any basis for a challenge to the way the jurors are being selected" (N.T. 10/28/14, 91-92).

The Four Defense *Batson* Challenges and the Trial Court's Ruling

Defendant challenged four peremptory challenges of African-American prospective jurors: Loretta Young, Eron Palmer, Crystal McFadden, and Patrice Johnson. The court asked the prosecutor if she would like to explain the reason for removing venireperson Loretta Young. The prosecutor explained that she challenged venirepersons Loretta Young and Eron Palmer, whose removal defendant also challenged, because that the two "were talking to each other through the voir dire

and joking. It could be nothing. It seemed to me perhaps they might not be taking this process seriously" (N.T. 10/28/14, 93). The prosecutor also noted that Ms. Young had nodded when the court addressed the credibility of police officers. The court found that explanation to be race neutral (*Id*.).

The prosecutor explained that prospective juror Crystal McFadden had left the portion of the city where she lived blank on the jury questionnaire. This was a minor detail, but, nevertheless, "[t]hat's something that I do try to look at, attention to details" (N.T. 10/28/14, 94). The prosecutor also noted that Ms. McFadden's ex-partner was a police officer, and that she "kind of laughed and made a remark" (N.T. 10/28/14, 94).

Concerning the peremptory challenge of Patrice Johnson, the one the Superior Court determined to be a *Batson* violation, the prosecutor stated that, "[W]hen she was being questioned by Your Honor, she was leaning back, seemed a little cavalier, had her arm resting on the back and while we were conducting voir dire in the back, she was sitting there with her arms crossed and her head kind of nodded, seemed guarded and again as if she didn't want to be here, so I didn't think she would be a fair and competent juror" (N.T. 10/28/14, 94).

The court found the Commonwealth's reasons race neutral and stated, "*Batson* challenge is denied." Counsel did not ask the court to proceed to the final step of the *Batson* analysis: determining whether despite the provision of race neutral reasons

for the challenges, they were nevertheless racially motivated. The court did not perform that analysis sua sponte.

Superior Court Finding of *Batson* Violation

The Superior Court held that the prosecutor's peremptory challenge of Patrice Johnson violated *Batson*. The Court found three factors strongly indicative of discriminatory intent: 1) that the strike sheet the court's tipstaff prepared listed the race and gender of prospective jurors; 2) the extremely low probability of the prosecution striking such a disproportionate number (seven of thirteen) of African-Americans by chance, which it found "startling;" and 3) what the Superior Court called the prosecutor's "wholly unpersuasive" explanation for striking venireperson Patrice Johnson. *Commonwealth v. Edwards*, 177 A.3d 963, 975-978 (Pa. Super. 2018). It remanded the case for retrial. Judge Stabile dissented, taking issue with the majority's statistical analysis and its finding that prosecutor struck Ms. Johnson with racial animus.

Proceedings on Remand

On remand, defendant claimed that the prosecutor had committed such egregious misconduct that the extreme remedy of double jeopardy was warranted.[3] The prosecutor testified at the double jeopardy evidentiary hearing. She stated that

[3] Defendant did not cite this Court's opinion in *Kareem Johnson*; that case had not yet been decided.

the trial court's practice of conducting all the voir dire questioning and not allowing counsel to ask, or suggest, follow-up questions impacted her ability to assess prospective jurors' fitness to serve. The trial court's practice, the prosecutor said, "[G]oes a lot faster and sometimes there just isn't as much information to go on. So looking at how the people act and their demeanor in court is important" (N.T. 8/15/18, 6-8).

The prosecutor explained that "[s]ometimes [venire]people are more talkative when it's the attorney questioning the witness as opposed to the judge in front of other people. Also, when you are individually conducting voir dire, you kind of get a chance to interact and it's more of a discussion" (N.T. 8/15/18, 15). The prosecutor stated that prospective juror Johnson was the only juror leaning back in her chair with her arms folded and that her answers were "somewhat cavalier or flippant" (N.T. 8/15/18, 12). The prosecutor also stated that because the case involved eight robberies and would result in a comparatively long trial, the jurors' focus and attention were particularly important (*Id*., 14).

Trial Court and Superior Court Opinions

On remand, the trial court denied defendant's motion for discharge. It adopted the Superior Court's reasoning in *Commonwealth v. Basemore*, 875 A.2d 350, 356 (Pa. Super. 2005), that *Batson* violations differ from other forms of prosecutorial misconduct in ways significant to the remedy they merit:

> *Batson* violations are a peculiar type of prosecutorial misconduct… [W]e believe that there are legitimate distinctions to be made between a prosecutor's conduct in concealing exculpatory evidence or completely disrupting the trial process and a prosecutor's attempt to assemble a jury by relying on outworn and unacceptable stereotypes. In the cases cited above,[4] the prosecutor's misconduct so permeated the presentation of evidence that it was not possible for a reasonable jury to reach a fair verdict; in the instant matter, it is only if we accept the very stereotypes espoused by the prosecution that we can conclude that the first jury was incapable of returning a fair verdict. Thus, we are not persuaded by [Basemore's] argument that the prosecution's *Batson* violation necessitates the ultimate remedy of double jeopardy.

Opinion 2/1/19, 9-10, quoting *Basemore*.

The Superior Court affirmed the denial of double jeopardy relief. The Court recognized that *Johnson* permits preclusion of retrial on double jeopardy grounds when a prosecutor overreaches in reckless disregard of a defendant's constitutional rights. It declared itself bound by its *Basemore* decision, and denied relief. *Commonwealth v. Edwards*, 239 A.3d 112 (Pa. Super. 2020).

[4] The Superior Court referred here to *Smith*, *Martorano*, and cases from two other jurisdictions.

SUMMARY OF ARGUMENT

Batson violations harm more than an individual defendant; they affect the perception of fairness of the judicial system, compelling a strong remedy. However, our research has found no case, in the 35 years since *Batson*, that holds that a *Batson* violation compels discharge. Nor do defendant and his amici cite any. Although a *Batson* violation might warrant double jeopardy relief, the prosecutor's misconduct here does not.

The "reasoning and rationale" of *Commonwealth v. Johnson*, 231 A.3d 807 (Pa. 2020), show that this is not the rare case that constitutes overreaching and merits discharge. Defendant's claim compels a fact-specific inquiry into the factors this Court identified as relevant to double jeopardy: whether the prosecutor overreached at the expense of justice; society's strong interest in bringing the guilty to justice; and the economic and psychological effect of retrial on a citizen, as measured with the possibility that retrial may result in the conviction of an innocent person, and in light of the fact that jeopardy is not primarily aimed at penalizing prosecutorial error.

Application of these factors to the prosecutor's misconduct demonstrates that retrial is the proper remedy here. That the prosecutor violated *Batson* is the beginning, not the end, of a *Johnson* analysis. This Court must assess the facts and circumstances of that violation to evaluate the egregiousness of the prosecutor's misconduct. In light of the specific circumstances here, including the trial court's

constrained voir dire, in which counsel were more observers than participants, the prosecutor's misconduct is not the most blatant conduct requiring double jeopardy relief. Additionally, society's strong interest in bringing the guilty to justice favors retrial, not discharge. Compelling evidence proved defendant's guilt of eight similar early-morning gunpoint robberies and one shooting: a conspirator's confession implicating him; eyewitnesses' identifications; and the recovery of the victims' property in the getaway car. Finally, the financial and psychological costs to defendant of retrial merit lesser consideration, because there is little likelihood that retrial will result in an innocent man's conviction.

Defendant and the Amici Curiae focus on the prosecutor's peremptory challenges of seven African-Americans and one "other," suggesting that all of those challenges are suspect. The Pennsylvania Association of Criminal Defense Lawyers and Defender Association of Philadelphia assert that "no conduct could be more egregious than the 'eight for eight' strikes of the prosecutor…" Those arguments overstep what even defense counsel – who was present for the voir dire – claimed in the trial court. Counsel questioned only four of those eight challenges. Moreover, as to three of the four challenges, the Superior Court took no issue with the trial court's finding of race-neutral reasons; the grant of relief was only as to a single improper challenge. Not all serious misconduct merits the ultimate sanction of discharge. The prosecutor's conduct here does not.

ARGUMENT

Double Jeopardy Relief is Not Warranted.

Defendant claims that the *Batson* violation here was so egregious that it rendered it impossible for him to receive a fair trial, and bars retrial pursuant to *Johnson*'s reasoning and rationale (Defendant's Brief, 4, 13). He declares that the prosecutor's use of all eight peremptory challenges for members of racial minorities is "startling," and that those numbers represent "intentional and systemic discrimination." He also claims that the prosecutor made "a blatant attempt" to cover up discrimination by offering "blatantly pretextual" reasons for challenging Patrice Johnson, the venireperson whose strike the Superior Court found to be a *Batson* violation (Defendant's Brief, 22).

Batson violations harm not only a defendant, but prospective jurors who are deprived of a substantial opportunity to participate in the democratic process. A *Batson* violation also undermines public confidence in the fairness of the judicial system. Any *Batson* violation therefore merits censure and the grant of relief.

The Superior Court found that the prosecutor violated *Batson* by striking Ms. Johnson. The question before this Court, however, is whether the *Batson* violation precludes retrial on double jeopardy grounds. The answer to that question is "no." Defendant has not established that *Johnson*'s reasoning and rationale compel the unprecedented relief he seeks. *Johnson* precludes retrial where a prosecutor commits

egregious prosecutorial misconduct that constitutes overreaching so significant that it outweighs the strong societal interest in protecting the public from crime, and where a retrial enhances the possibility that an innocent person will be convicted.

Both *Batson* and *Johnson* compel fact-intensive inquiries. Application of the *Johnson* factors to the facts and circumstances here defeats defendant's claim. When the *Batson* violation is weighed with the strong societal interest in effective law enforcement (here, prosecuting defendant for his commission of eight gunpoint robberies and one shooting), and with the unlikelihood that a retrial will result in the conviction of an innocent person (defendant was identified by multiple eyewitnesses, a conspirator, and physical evidence), the proper remedy is a new trial. The misconduct here is not of the nature to compel an unprecedented discharge. Our research has uncovered no opinion that has discharged a defendant as the remedy for a *Batson* violation, nor do defendant and his amici cite any.

In the following argument, the Commonwealth provides the facts and circumstances surrounding the *Batson* violation, information essential to this Court's assessment of defendant's claimed right to *Johnson* relief. The Commonwealth then applies each of the three *Johnson* factors to the prosecutor's misconduct and explains why discharge is not warranted, especially where, to the Commonwealth's knowledge, such relief has never been granted for a *Batson* violation.

A. The Standards That Control This Case.

The Commonwealth here addresses both the *Batson* and *Johnson* standards. This Court's assessment of defendant's claim of entitlement to *Johnson* relief requires a consideration of both the prosecutor's misconduct and the facts and circumstances surrounding that violation.

The Batson *Standard*.

The United States Supreme Court and this Court have repeatedly emphasized that *Batson* is a fact-intensive inquiry in which an appellate court is at a considerable disadvantage compared to a trial court because it reviews a paper record. An appellate court accordingly accords great deference to a trial court's factual findings. *Flowers v. Mississippi*, 139 S.Ct. at 2246; *Snyder v. Louisiana*, 552 U.S. 472, 479 (2008); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Commonwealth v. Williams*, 980 A.2d 510, 531 (Pa. 2009). *See Commonwealth v. Roney*, 79 A.3d 595, 619 (Pa. 2013) (trial court due "great deference" because it viewed the demeanor and heard the tone of voice of the attorney exercising the challenge). *Cf. Shinal v. Toms*, 162 A.3d 429, 442 (Pa. 2017) (citation omitted) ("Hesitation, doubt, and nervousness indicating an unsettled frame of mind, with other matters, within the judge's view and hearing, but which it is impossible to place in the record, must be considered.").

A court assessing alleged discrimination in jury selection also examines the racial composition of the jury selected (here, four African-Americans, seven whites,

and one "other"); whether the prosecutor made any statements indicating a racial bias, *Commonwealth v. Williams*, 980 A.2d at 532; *Commonwealth v. Dennis*, 715 A.2d 404, 409 (Pa. 1998); and whether the case is race-sensitive. *Roney*, 79 A.3d at 623. The number of peremptory challenges of black prospective jurors a prosecutor exercises is a relevant, but not dispositive, factor. *Roney*, 79 A.3d at 622.

The Johnson *Standard*.

The *Johnson* Court identified three factors relevant to whether prosecutorial misconduct compels discharge. A court considers whether the misconduct was sufficiently egregious to be classified as overreaching. *Johnson*, 231 A.3d at 822. Next, it assesses the weight to be accorded "the strong societal interest in bringing the guilty to justice." The sanction of dismissal applies only in "the most blatant cases." *Johnson*, 231 A.3d at 822 (original sources omitted). Finally, the court assesses the protection of citizens from the "embarrassment, expense, and ordeal" of a second trial, with the possibility that retrial will result in an innocent person's conviction. *Johnson*, 231 A.3d at 826. Jeopardy prohibition is not primarily intended to penalize prosecutorial error. *Johnson*, 231 A.3d at 826.[5]

[5] Amicus Curiae Atlantic Center for Capital Representation asserts that the Court should apply the "deliberate and egregious overreaching test" of Justice Dougherty's *Johnson* concurrence (Atlantic Center Amicus at 13). Overreaching, as assessed in light of all facts and circumstances, is the proper test. However, Justice Dougherty emphasized that the standard *Johnson* articulates "continues to be a stringent one that will be satisfied in only egregious cases." *Johnson*, 231 A.3d at 828.

Defendant suggests that the cases which decline to grant double jeopardy relief are limited to instances of minor and non-intentional prosecutorial misconduct (Defendant' Brief at 16, n.2). That is not so. Even willful prosecutorial misconduct does not always warrant discharge. *Johnson*, 231 A.3d at 822. In *Commonwealth v. Moose*, 602 A.2d 1265 (Pa. 1992), for example, the prosecutor withheld the existence of a critical prison informant/witness until the morning of trial, despite repeated defense discovery requests. This Court found that the prosecutor had willfully violated discovery rule. It even referred the matter to the Disciplinary Board. However, it did not go farther and bar retrial.

Johnson itself is illustrative of the type of blatant misconduct that compels discharge. There, the prosecutor failed to disclose DNA evidence that undermined the foundation of his case, and falsely asserted that the DNA evidence he did present proved guilt. That conduct rendered Johnson's trial a farce. There was virtually no evidence of guilt. The prosecutor's egregious recklessness disregard of consequences compelled discharge.

The prosecutor in *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992), also overreached. The prosecutor failed to disclose a deal that his primary witness would receive favorable treatment on his own case in exchange for his testimony. The prosecutor had also withheld evidence that sand was found between the victim's toes, evidence that the crime had likely been committed on a beach in New Jersey,

rather than Pennsylvania as the prosecutor claimed. The prosecutor deliberately withheld the sand evidence until two years after trial, and accused the witness who revealed it of fabricating his testimony. That outrageous conduct established overreaching. 615 A.2d at 322-323.

Under the appropriate circumstances, a *Batson* violation might compel discharge. The *Flowers* prosecutor's deliberate, repeated *Batson* violations, and other intentional prosecutorial misconduct in at least four of Flowers' six trials suggest facts that might well merit discharge. The prosecutor's single improper strike here does not.

B. The *Batson* Violation the Superior Court Found

The Superior Court found three factors strongly indicative of a *Batson* violation: 1) the identification of the race and gender of the potential jurors on the peremptory strike sheet; 2) the "extremely low" probability of the Commonwealth striking such a disproportionate number of African-Americans by chance; and 3) the prosecutor's "wholly underpersuasive" reliance on prospective juror Patrice Johnson's inattentive posture as an indication that she would not act as a juror in a fair and impartial manner. *Commonwealth v. Edwards*, 177 A.3d at 975.

To determine whether double jeopardy precludes retrial, this Court must examine all the facts and circumstances to determine whether the prosecutor overreached and whether the overreaching is one of the most egregious of cases so

as to warrant complete discharge. It conducts this analysis in the context of society's strong interest in bringing the guilty to justice, and the protection of citizens from the ordeal of a retrial, particularly in light of the possibility that an innocent person will be convicted. Application of the *Johnson* factors to this case defeats defendant's request for an absolute discharge.

1. *The Designation of Gender and Race on the Strike Sheets*

The Superior Court found that three facts established discriminatory intent. The first was the designation of gender and race on the "strike sheets." It is undisputed, however, that the prosecutor had no role in the tipstaff's designation of race and gender on those sheets. See N.T. 10/28/14, 89 (designations were made without the trial court's knowledge); N.T. 8/15/18, 8-9 (prosecutor responds, "No, of course not," when asked if she had asked the court crier to keep track of juror's races on the strike sheet, and further states that, "[W]e in the courtroom [sic] everyone was shocked to see the clerk was keeping track of that").

In questioning the prosecutor's challenges, defense counsel stated that his notes did not indicate jurors' race.[6] Counsel asserted that the designations had affected the prosecutor's challenges. The court noted that the prosecutor could see

[6] The prosecutor gave a similar response: "[I] have to pause, too, because I don't write down the races or genders of people either…" (N.T. 10/28/14, 88-89).

the people in the courtroom. The court rejected the idea that the designation affected jury selection (N.T. 10/28/14, 89-91).

On this record, there was no egregious *prosecutorial* misconduct in the court personnel's decision to record the race and gender of jurors. The court, which was present for voir dire, perceived no connection between the designations and the exercise of strikes (N.T. 10/28/14, 91). The Superior Court stated that the listings were "part of the totality of the circumstances that we must evaluate when reviewing the trial court's *Batson* ruling." *Edwards*, 177 A.3d at 972, n.20. The prosecutor's objection to defendant's imputation to her of racial bias because of the clerk's designation on the strike sheets does not support a suggestion of egregious misconduct, nor does defendant make that argument.

2. *The Number of the Prosecutor's Peremptory Challenges of African-Americans.*

A substantial basis of the Superior Court's finding a *Batson* violation was the "extremely low" probability of striking such a disproportionate number of African-Americans by chance. *Edwards*, 177 A.3d at 975. Defendant seizes on this part of the Opinion and emphasizes the Court's repeated declaration that the prosecutor's use of seven strikes for African-American venirepersons and one for a person classified as "other" was "startling" (Defendant's Brief at 21). Several important factors show why probability is not a good index of bad intent. First, defendant did not question eight peremptory challenges. He questioned four. At the voir dire

hearing, therefore, defendant did not perceive that the prosecutor had an improper motive when exercising four of the eight challenges. That defendant did not question those challenges is a fact and circumstance relevant to assessing the egregiousness of the *Batson* violation.

Second, the Superior Court found that the Commonwealth provided race-neutral explanations for all of its challenges. Two venirepersons were talking to each other and joking throughout the voir dire process. A third did not identify where she lived on her juror questionnaire. The prosecutor called that a minor point, but relevant to the prospective juror's attention to details (N.T. 10/23/14, 93-94), an important factor in a lengthy case involving multiple sets of witnesses and eight different robberies.[7] The trial court's restrictive voir dire procedure prevented the prosecutor from assessing whether the point was truly minor. The court's absolute bar to the prosecutor's ability to investigate her perceptions must be considered when assessing egregiousness.

The Superior Court accepted the prosecutor's explanations as race-neutral. *Edwards*, 177 A.3d at 973. Although the provision of race-neutral explanations is only the second step of the three-step analysis of a *Batson* challenge, it is relevant to assessing the egregiousness of the prosecutor's conduct. Significantly, neither the

[7] Additionally, that third venireperson also laughed and made a remark when she said that her "ex" was a police officer (*id*.).

Superior Court nor the trial court attributed any malign intent to those three challenges, nor did defense counsel make any contrary argument at voir dire.

Amicus Pennsylvania Association of Criminal Defense Lawyers and the Defender Association of Philadelphia (hereafter, PACDL/DAP), assert that "no conduct could be more egregious than the 'eight for eight' strikes of the prosecutor" (PACDL/DAP Brief at 7). That assertion rests on an unsupportable foundation: that all of the prosecutor's peremptory challenges were purposefully discriminatory. Even defendant does not assert that.

Third, the statistics are susceptible of different interpretations. The prosecutor **accepted** six of the first eight African-American venirepersons, without knowing the racial composition of the possible second panel. Defendant struck one of those jurors; another withdrew from the jury the next day due to a hardship (N.T. 10/29/14, 4-5). Moreover, at least some of the six African-American jurors the Commonwealth accepted did not share all the characteristics of standard "prosecution jurors." One had a cousin who had a gun charge, and said only, "I guess so, yeah," when asked if she could put that charge aside and be fair and open-minded (N.T. 10/28/14, 23, juror Tarzan); one, a social worker, had a brother whose girlfriend had accused him of rape (N.T. 10/28/14, 25, juror Holbrook); and one had a father who was charged with murder, and two nephews charged with robbery (N.T. 10/28/14, 35-38, juror Johnson).

The number of challenges the prosecutor exercised for minority venirepersons – when viewed in the context of the explanations of the challenges and the limits on voir dire – does not demonstrate egregious overreaching. There may be statistical anomalies in any small statistical sample like the one here. But the numbers themselves – four challenges defendant himself did not question, and three additional challenges for which there was a race-neutral explanation the Superior Court did not question – do not support a claim of prosecutorial overreaching requiring discharge.

3. ***The* Batson *Violation in Factual Context*.**

The Superior Court concluded that the prosecutor struck venireperson Patrice Johnson with racial animus. The Court rejected the explanation that Ms. Johnson "did not seem pleased to be called to jury duty" and that she leaned back in her chair with her arms crossed during voir dire. *Edwards*, 177 A.3d at 976. That finding is not now at issue. The facts and circumstances surrounding that challenge are, and they are relevant to assessing the egregiousness of the prosecutor's conduct.

The trial court conducted voir dire entirely on its own, without counsels' input. Counsel were not permitted to question prospective jurors, nor directly or indirectly to follow up on prospective jurors' responses to the court's questions (N.T. 10/27/14, 18-19; N.T. 8/15/18, 7). The trial court's rule constrained the prosecutor's (and defense counsel's) ability to determine both which venirepeople

might be most receptive to their case and which would be least and, hence, most advisable to remove. On remand, the prosecutor explained at the double jeopardy hearing that the trial court's jury selection method had an adverse effect on her ability to assess jurors' qualifications. As a result of the court's rapid "group voir dire" approach,[8] the prosecutor was forced to place greater emphasis on non-verbal cues:

> [Question]: So when you are conducting jury selection in a group or [sic] voir dire situation, is there anything that's maybe more important to you or that you're more focused on than you might be with individual jury selection?
>
> [Prosecutor]: Looking at the witness – or the juror's potential demeanor, how they act in the courtroom. When we do group voir dire like that, it goes a lot faster and sometimes there just isn't as much information to go on. So looking at how the people act and their demeanor in court is important.

N.T. 8/15/18, 7-8.

[8] One indication of the speed with which jury selection was conducted is that the court's individual voir dire questioning of 38 potential jurors occupies just 51 pages of the transcript (N.T. 10/28/14, 19-46, 63-87).

C. The *Johnson* Factors Do Not Support Discharge.

Application to the prosecutor's misconduct in this case of the three factors the *Johnson* Court identified shows that defendant's remedy is a new trial, rather than discharge. The prosecutor's peremptory challenge of Patrice Johnson violated *Batson* and compels a new trial. The prosecutor's conduct was intentional, as all *Batson* violations are. However, as this Court recognized in *Johnson*, not all intentional prosecutorial misconduct is sufficiently egregious as to constitute overreaching. Here, examined in context, the prosecutor did not commit egregious prosecutorial misconduct that constitutes overreaching: she did not seek conviction at the expense of justice.

1. *The First* Johnson *Factor*

The trial court greatly limited the prosecutor's ability to assess the fitness of individual jurors to serve by making counsel more observers than participants in a relatively accelerated voir dire. Counsel had less information than in a voir dire that permits counsel's questions or follow-up. In the case of venireperson Johnson, such questioning could have dissipated (or supported) the prosecutor's concern based on the way the venireperson conducted herself during voir dire. Instead, the court's method compelled the parties to use "how people act and their demeanor in court" to attempt to determine which venirepersons were best suited to serve: to rely

improperly in the case of venireperson Johnson on the visual and other non-verbal observations that produced the *Batson* violation.

Additionally, the court's conduct of "group voir dire," questioning all prospective venirepersons as a group in each other's presence, may have affected the jurors' openness, and did affect the prosecutor's ability to assess those jurors. The prosecutor believed that had the jurors been questioned individually, by counsel, they might have been more forthcoming, allowing better assessment: "Sometimes people are more talkative when it's the attorney questioning the witness as opposed to the judge in front of other people. Also, when you are individually conducting voir dire, you get a chance to interact and it's more of a discussion" (N.T. 8/15/18, 15).

The trial court's jury selection rules deprived the prosecutor of a more complete opportunity to assess the ability of jurors to serve. It was under these circumstances that the prosecutor violated *Batson* by exercising a peremptory challenge for Patrice Johnson, whose bearing suggested that she would not be a good juror for a multi-day trial involving eight different armed robberies. This fact makes the prosecutor's *Batson* violation less, not more, egregious.

Additionally, defendant does not assert the presence here of any of the factors that so convinced the Supreme Court in *Flowers* of the existence of racial animus. He does not claim that there were racial issues in the case, or that the prosecutor

failed to strike a white juror with characteristics similar to the improperly stricken black juror. The *Flowers* Court was troubled by the facts that the prosecutor had asked a grossly disparate number of questions of black and white jurors, and struck a black juror with characteristics similar to that of a white juror the prosecutor did not strike. Here, the prosecutor was not permitted to ask any questions. Defendant does not contend that the prosecutor accepted white jurors with the same characteristics as black jurors whom she peremptorily challenged. Further, unlike in *Flowers* where only one black juror was selected, the parties selected a jury of four African-Americans, a Hispanic, and seven whites.

Further, the prosecutor's removal of Ms. Johnson from the venire, though improper, does not suggest that the prosecutor acted with the intent to deprive defendant of a fair trial. Ms. Johnson told the court, in the less than two pages of questioning the court conducted, that her neighbor was a police officer; that she had a close friend who was a Philadelphia detective; and that her closest friend's son was a police officer (N.T. 10/28/14, 71-73). Employing "outworn and unacceptable stereotypes" to which *Basemore* referred, Ms. Johnson would appear to be a Commonwealth-favorable juror. That the prosecutor was wrong to remove her does not suggest that she acted with the avowed intent to deprive defendant of a fair trial.

Defendant argues that the prosecutor's egregious conduct is heightened by her "blatant attempt to cover up the discrimination. The facially race-neutral reasons

reason proffered by the Commonwealth for striking Juror 67 [Ms. Johnson] were so brazenly pretextual that on a cold record the Superior Court found them to be implausible and unpersuasive." (Defendant's Brief at 22, citing *Edwards*, 177 A.3d at 978). Defendant essentially argues that every *Batson* violation should bar retrial. In every case in which a *Batson* violation is alleged, a court has necessarily rejected the prosecutor's race-neutral explanation. We have found no appellate decision that has barred retrial on that basis.

The Second and Third *Johnson* Factors.

Johnson review requires this Court's consideration of two other factors. The first of those is society's strong interest in bringing the guilty to justice, which discharge frustrates. Absolute discharge is accordingly reserved for the worst cases of prosecutorial misconduct:

> 'Dismissal of criminal charges punishes not only the prosecutor… but also the public at large, since the public has a reasonable expectation that those who have been charged with crimes will be fairly prosecuted…. Thus, **the sanction of dismissal of criminal charges should be utilized in only the most blatant cases given the public policy goal of protecting the public from criminal conduct**.'

Johnson, 231 A.3d at 822, quoting *Burke*, 781 A.2d 1136, 1144 (Pa. 2001), quoting *Commonwealth v. Shaffer*, 712 A.2d 749, 752 (Pa. 1998) (emphasis added), and also citing *Commonwealth v. Potter*, 386 A.2d 918, 925 (Pa. 1978) (absent extreme circumstances, a new trial resulting from prosecutorial misconduct "adequately vindicates both the defendant's interest in a fair trial and society's interest in

bringing criminals to justice."). The *Johnson* Court found that constraint weighty; it repeated it. *See Johnson*, 231 A.3d at 826 (the Court "do[es] not suggest that all situations involving serious prosecutorial misconduct implicate double jeopardy under the state Charter. To the contrary, we bear in mind the countervailing societal interests… regarding the need for effective law enforcement….").

Johnson highlighted the distinction between prosecutorial error and prosecutorial overreaching: "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." *Johnson*, 231 A.3d at 824.

Johnson identified a third interest, one not focused primarily on penalizing prosecutorial error, but on protecting citizens from the anxiety and ordeal of a second trial and the risk of conviction of an innocent person:

> It is established that the jeopardy prohibition is not primarily intended to penalize prosecutorial error, but to protect citizens from the "embarrassment, expense and ordeal" of a second trial for the same offense and from "compelling [them] to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent [they] may be found guilty."

Johnson, 231 A.3d at 826, quoting *Commonwealth v. Ball*, 146 A.3d 755, 763 (Pa. 2016), quoting *Green v. U.S.*, 355 U.S. 187 (1957). Notably, both *Green* and *Ball* address attempts to subject a defendant to a second trial following an acquittal. The second trial here follows conviction on all charges.

Society's strong interest in bringing the guilty to justice weighs against defendant's discharge. Defendant was almost certainly guilty of the eight robberies and the attempted murder and aggravated assault for which the jury convicted him. Shortly after the last robbery, defendant and his conspirators were caught in their getaway car with the guns used in the robberies. The car contained cellphones that belonged to two other people they had robbed that night, and a man they had robbed two weeks before (N.T. 10/31/14, 33-44, 145). Further, one of defendant's conspirators, Rasheed Thomas, gave a statement admitted as substantive evidence at defendant's trial, that defendant, he, and another conspirator had committed the gunpoint robberies that ended with their arrest. Thomas's account matched the victims' accounts of the robberies and the items defendant took from that at gunpoint (N.T. 10/30/14, 60, 65, 66; N.T. 10/31/14, 118-139).

Protecting citizens from all the economic and psychological costs of retrial, as well as the possibility that an innocent person will be convicted, the third *Johnson* interest, also supports retrial, not absolute discharge. As noted, this interest is not primarily focused on penalizing prosecutorial error but on vindicating the rights of citizens and their protection against unjust conviction.

Defendant may experience "embarrassment, expense and ordeal" from being retried, as well as "anxiety and insecurity." *Johnson*, 236 A.3d at 826. However, those real tolls on defendant do not support the grant of discharge. The primary

focus of this interest is not in penalizing the prosecutor, as discharge would do. Defendant is not an innocent citizen caught in the nightmare scenario of being repeatedly tried for crimes he did not commit. Defendant almost certainly committed the crimes for which the jury convicted him. Compelling testimony, including victim identifications; the confession of one of his conspirators; his arrest in flight from the final robbery; and the recovery of the proceeds from multiple robberies in the getaway car all identify defendant as the man who committed the eight early morning gunpoint robberies and the shooting of which he was convicted.

The anxiety a guilty person experiences when facing retrial after his convictions are vacated for reasons unrelated to the evidence of his guilt is a less compelling interest than if he were likely innocent. The evidence of defendant's guilt is very strong. The evidence of *Johnson*'s guilt by contrast, was circumstantial and very weak. This is not a case in which the prosecution seeks a do-over having failed in its first attempt to convict a defendant of a crime he may not have committed.

Viewed in context, the prosecutor's conduct does not constitute egregious misconduct that establishes overreaching. Retrial, not discharge, is the remedy for the misconduct here.

D. To Our Knowledge, No Court has Ever Granted Discharge as a Remedy for a *Batson* Violation.

The absence of precedent is not dispositive; this Court may grant defendant the complete discharge he seeks. However, it is notable that our research has not found – nor has defendant or his amici cited – a single case in which retrial was precluded as the remedy for a *Batson* violation.

Even in cases of egregious, persistent discrimination, the United States Supreme Court has not of its own accord expanded *Batson* relief to bar retrial. In *Flowers v. Mississippi*, 139 S.Ct. 2228 (U.S. 2019), the Court determined that a *Batson* violation compelled relief following the accused's **sixth** trial - two of which retrials had been occasioned by the same prosecutor's repeated *Batson* violations; and two others by other instances the same prosecutor's misconduct.[9] Reversal of Flowers' sixth conviction was compelled, among other facts, by the prosecutor's dramatically disparate questioning of black and white prospective jurors (as a means to find a non-racial pretext for a strike); and the prosecutor's strike of at least one black prospective juror similarly situated to white prospective jurors he did not challenge.

Despite the prosecutor's egregious and ignoble course of conduct, the Supreme Court did not of its own accord determine that the egregious facts of the

[9] The other two trials ended in hung juries.

case warranted a remedy beyond that sought. It remanded the case to the Mississippi Supreme Court. *Id*. at 2235, 2251. And that Court subsequently ordered a new (seventh) trial. *Flowers v. State,* 287 So.3d 905 (Miss. 2019).

In its Amicus brief, the Atlantic Center for Capital Representation quotes from *Flowers* for the uncontroversial principle that *Batson* violations damage the judicial system in multiple ways. But it is worth noting that the *Flowers* Court, faced with conduct much more egregious than that here, did not even consider discharge as a remedy.

Commonwealth v. Basemore, 875 A.2d 350 (Pa. Super. 2005), is the only Pennsylvania appellate decision to address the issue. In *Basemore,* the Superior Court contrasted the concealment of evidence or complete disruption of the trial process that makes it impossible for a jury to render a fair verdict, with a prosecutor's reliance on outworn and unacceptable stereotypes to select a jury. The Court believed that it was an unreasonable logical leap to conclude that the jury so selected was incapable of returning a fair verdict. It therefore declined to grant "the ultimate remedy" of a double jeopardy discharge. *Basemore*, 875 A.2d at 356.[10]

[10] Notably, *Basemore* involved the allegation that Jack McMahon, the trial prosecutor and the creator of the "McMahon tape" (which this Court stated supports "an inference of invidious discrimination on the part of any proponent"), struck **19** African-American venirepersons. *Commonwealth v. Basemore*, 744 A.2d 717, 729, 732 (Pa. 2000).

Like Pennsylvania, five other States have expanded double jeopardy principles to compel discharge in circumstances broader than those recognized in *Oregon v. Kennedy*, 456 U.S. 667 (1982).[11] However, none of those States has declared that a *Batson* violation bars retrial on double jeopardy grounds. Only Hawai'i has even addressed the argument, and its Supreme Court rejected it. *Commonwealth v. Daniels*, 122 P.3d 796, 802 (Haw. 2005) (citing *Basemore*).[12]

Neither the facts of this case, nor any precedent of which the Commonwealth is aware, supports the grant of discharge. Though indisputably wrong, the prosecutor's conduct was not egregious and did not constitute overreaching at the expense of justice. Nor, given the compelling evidence of defendant's guilt, do the other *Johnson* factors supported the grant of the unprecedent relief defendant seeks. Defendant's proper relief is the retrial he was granted.

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[11] *State v. Kennedy*, 666 P.2d 1316 (Or. 1983); *Pool v. Superior Court*, 677 P.2d 261 (Ariz. 1984); *People v. Dawson*, 397 N.W.2d 277 (Mich. Ct. App. 1986); *State v. Breit*, 930 P.2d 792 **(**N.M. 1996); *State v. Rogan*, 984 P.2d 1231 (Haw. 1999).

[12] Defendant's brief notes that Hawai'i, like Pennsylvania, affords enhanced double jeopardy protections in cases of egregious prosecutorial misconduct (Defendant's Brief, 21). He does not acknowledge that, in *Daniels*, Hawai'i's Supreme Court rejected the *Batson* claim he now advances.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully request that this Court affirm the decision of the Superior Court and remand this case for retrial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 2135

This brief complies with the word-count limitation of Pa.R.A.P. 2135 because it contains 8,582 words, including footnotes, table of contents, the table of cases and authorities, and this certificate.

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Dated: May 24, 2021