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THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
APPELLEE

V.

DERRICK EDWARDS,
APPELLANT

BRIEF FOR APPELLANT

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.

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I. STATEMENT OF JURISDICTION

Jurisdiction in this matter is conferred by 42 Pa.C.S.A. § 724. Said section provides, in pertinent part, "... final orders of the Superior Court... not appealable under Section 723 (relating to appeals from Commonwealth Court) may be reviewed by the Supreme Court upon allowance of appeal by any two justices of the Supreme Court upon Petition of any party to the matter. If the Petition shall be granted, the Supreme Court shall have jurisdiction to review the Order in the manner provided by Section 5105(d)(1) (relating to scope of appeal)."

This Court granted Appellant's Petition for Allowance of Appeal on January 26, 2021.

II. ORDER IN QUESTION

This Court allowed the instant appeal from the Opinion and Judgment of the Superior Court affirming the Court of Common Pleas' denial of Appellant's Motion to Dismiss on Double Jeopardy Grounds due to the prosecutor's violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), at the first trial. The Superior Court held:

> [T]he Pennsylvania Supreme Court has not addressed the overarching holding from [*Commonwealth v.*] *Basemore*, [875 A.2d 350 (Pa. Super. 2005)], that "nowhere in the approximately twenty years of *Batson* jurisprudence has there been any suggestion that a *Batson* violation so subverts the truth seeking process as to implicate double jeopardy concerns." *Basemore*, 875 A.2d at 357. As this reasoning remains valid we are bound by it. We conclude that Edwards is not entitled to relief in this case.

Commonwealth v. Edwards, 239 A.3d 112, 2020 WL 4346744 *4 (Pa. Super. July 29, 2020) (unpublished) (hereinafter "*Edwards II*").

III. SCOPE AND STANDARD OF REVIEW

Appellant Edwards submits that a retrial is barred under the double jeopardy clauses of the United States and Pennsylvania Constitutions. An appellate court's standard of review for constitutional issues is de novo and the scope of review is plenary. *Commonwealth v. Shabezz*, 166 A.3d 278 (Pa. 2017).

IV. STATEMENT OF QUESTION INVOLVED

This Court allowed appeal on the following question:

Does the reasoning and rationale contained within this Honorable Court's recent decision (May 19, 2020) in *Commonwealth v. Johnson*, 231 A.3d 807 (Pa. 2020), apply to a *Batson* violation, thereby precluding a retrial based upon double jeopardy principles?

V. STATEMENT OF THE CASE

A. Introduction

Appellant Derrick Edwards is African-American. During *voir dire*, the prosecutor, who was Caucasian, used all eight of her peremptory strikes on racial minorities, and seven of her strikes were used on venire members who were African-American, just like Appellant Edwards. In the first appeal, the Superior Court wrote that these numbers were "startling." The Superior Court found a *Batson* violation and vacated the conviction. In this interlocutory appeal, Appellant now requests that this Court find, due to the egregious nature of the prosecutor's *Batson* violation in this case, that double jeopardy protections preclude a retrial.

This Statement of the Case is limited to the facts necessary for an understanding of the issues raised on appeal.

B. Procedural History

In 2012, Appellant Edwards was arrested and charged with a series of gunpoint robberies that occurred in September and October 2012. On October 28, 2014, jury selection began; the jury was sworn in on October 29, 2014; and, on November 4, 2014, the jury convicted Appellant of multiple counts of robbery, conspiracy to commit robbery, violations of the Uniform Firearms Act, and possessing an instrument of crime, and single counts of attempted murder,

aggravated assault, and conspiracy to commit aggravated assault. On January 9, 2015, the trial court sentenced Appellant to an aggregate term of twenty-two to forty-four years of incarceration. Appellant has been incarcerated on these charges for approximately nine years.

On direct appeal, Appellant argued that the Commonwealth used its peremptory challenges to systematically strike African-Americans from the jury, in violation of the Fourteenth Amendment to the U.S. Constitution as interpreted by *Batson v. Kentucky*, 476 U.S. 79 (1986). On January 19, 2018, the Superior Court vacated Appellant's judgment of sentence and remanded the case for a new trial, finding that "Appellant demonstrated a *Batson* violation by showing that the Commonwealth struck at least one juror with discriminatory intent." *Commonwealth v. Edwards*, 177 A.3d 963, 967 (Pa. Super. 2018) ("*Edwards I*").

On remand, Appellant filed a motion to dismiss, arguing that the double jeopardy clauses of both the United States and Pennsylvania Constitutions preclude retrial. The trial court denied the motion on September 11, 2018, making *no* finding that the motion was frivolous. *Edwards II*, 2020 WL 4346744 *2.

On September 27, 2018, Appellant filed an interlocutory appeal to the Superior Court. On July 29, 2020, the Superior Court affirmed the denial of the motion to dismiss, finding that it was bound by its prior decision in *Commonwealth*

v. Basemore, 875 A.2d 350 (Pa. Super. 2005) (hereinafter "*Basemore II*").

Edwards II, 2020 WL 4346744 *4.

Appellant filed a petition for allowance of appeal which this Court granted on January 26, 2021.

C. Factual History

Voir dire commenced on October 28, 2014. The court crier noted the race and gender of each prospective juror on the juror strike sheet provided to Appellant's trial counsel and the Commonwealth. *See* Exhibit A. The race of each prospective juror was labeled by the letters B, W, or O. Gender was labeled by the letters F or M. The Commonwealth's first strike was of Juror 25, a black female ("BF"); its second strike was of Juror 34, a black female ("BF"); its third strike was of Juror 56, a black female ("BF"); its fourth strike was of Juror 57, a black female ("BF"); its fifth strike was of prospective Juror 61, a black female ("BF"); its sixth strike was of Juror 67, a black female ("BF"); its seventh strike was of Juror 74, a non-black and non-white female ("OF"); and its alternate strike, its eighth peremptory strike, was of Juror 79, a black female ("BF").

The Commonwealth used all of its peremptory strikes on non-white females, and seven of the eight peremptory strikes were used on African-Americans jurors. Appellant's trial counsel objected to the Commonwealth's striking of four of these prospective jurors: 56, 57, 61 and 67. NT 10/28/14 at 88. The Commonwealth

represented that it struck Jurors 56 and 57 because they were speaking and joking with each other during the *voir dire* process, and it struck Juror 61 because the juror failed to identify what neighborhood she lived in on the jury questionnaire form. *Id.* at 93-94. With regards to Juror 67, the Commonwealth proffered that it struck this juror because she was "leaning back" with her "arm resting on the back" and then "she was sitting there with her arms crossed and her head kind of nodded, seemed guarded . . . as if she didn't want to be here." *Id.* at 94. The trial court concluded that the Commonwealth's reasons were race-neutral and overruled Appellant's objections. *Id.*

On direct appeal, the Superior Court concluded that the Commonwealth violated *Batson* by striking Juror 67 with discriminatory intent and that that the trial court's finding to the contrary was clearly erroneous. *Edwards I*, 177 A.3d at 978. The Court found "three factors strongly indicative" of the Commonwealth's "discriminatory intent" to strike prospective juror number 67: (1) "the identification of the race and gender of the potential jurors on the peremptory strike sheet," (2) "the probability of the Commonwealth striking such a disproportionate number of African-Americans by chance is extremely low," and (3) "the Commonwealth's race-neutral explanation for striking Juror 67 was wholly underpersuasive [sic] in that the Commonwealth relied on her supposedly

inattentive posture to conclude that she would not discharge her duties as a juror in a fair and impartial manner." *Edwards I,* 177 A.3d at 975.

In evaluating the Commonwealth's overall use of peremptory challenges, the Superior Court deemed the statistics "startling." *Edwards I,* 177 A.3d at 975. The Court noted that out of 30 potential jurors considered by the parties, 13 were African American and 14 were Caucasian. The Commonwealth struck no prospective Caucasian jurors and struck at least seven of these thirteen prospective African-American jurors from the pool of potential jurors. "It does not take a statistician to understand that the probability of striking no Caucasians and striking at least 7 of 13 African-Americans by random chance is extremely small." *Id.*

The Superior Court also found the facially race-neutral explanation offered by the Commonwealth for striking juror 67 to be "highly implausible," noting that the proffered reason that the juror seemed like she "didn't want to be here" could be used to strike almost every potential juror in every case across Pennsylvania. *Edwards I*, 177 A.3d at 976. Furthermore, the juror's relaxed posture of "leaning back," cited by the Commonwealth, was actually encouraged by the trial court who had instructed the jurors the "sit back and relax." *Id.* Accordingly, the Superior Court stated, "The persuasive value of the Commonwealth's explanation for striking Juror 67 is so low that . . . the totality of the circumstances indicates that

the Commonwealth struck Juror 67 *with discriminatory intent*." *Id.*, 177 A.3d at 978 (emphasis added).

The Superior Court concluded that the Commonwealth had violated the Equal Protection Clause of the Fourteenth Amendment as interpreted by *Batson* and vacated Appellant's conviction. *Edwards I*, 177 A.3d at 978-79.

On remand, at an evidentiary hearing on Appellant's motion to dismiss on double jeopardy grounds, the trial court permitted the Commonwealth to re-call the first trial prosecutor as a witness. The prosecutor offered the same reasons for striking Juror 67 that the Superior Court had previously found implausible and unpersuasive: "the way she was leaning back" and that "this person doesn't seem like they want to be here." NT 8/15/18 at 12. The trial court denied the motion to dismiss, finding no misconduct, in direct contravention of the Superior Court's findings that the prosecutor's facially race-neutral explanation was pretextual. Trial Court Opinion (2/1/2019) at 10.

The Superior Court, in affirming the denial of the motion, made no mention of the trial court's findings. Rather, the Superior Court concluded that it was bound by its prior holding in *Commonwealth v. Basemore*, 875 A.2d 350 (Pa. Super. 2005) ("*Basemore II*"), which held that the *Batson* violation in that matter did not *per se* constitute prosecutorial misconduct to such a degree that retrial was barred under the double jeopardy clause. Edwards II, 2020 WL 4346744 *4. The

Superior Court acknowledged that "some of the reasoning employed in *Basemore [II]* is no longer valid" in light of this Court's decision in *Commonwealth v. Johnson*. *Id.* However, because the overarching holding of *Basemore II* had not been addressed by this Court, the Superior Court concluded that they were required to apply *Basemore II* to Appellant's case and affirm the denial of his motion to dismiss. *Id.*

VI. SUMMARY OF ARGUMENT

The Pennsylvania double jeopardy clause precludes retrial when prosecutorial misconduct intentionally or recklessly deprives the defendant of a fair trial. Such behavior directly contravenes the prosecutor's duty to seek justice rather than simply win a conviction. *Batson* violations constitute serious intentional prosecutorial misconduct, and, like other forms of racially discriminatory prosecutorial misconduct, must be dealt with seriously. While all *Batson* violations impact the fundamental fairness of a trial, the *Batson* violation in Appellant's case was particularly egregious, such that it was impossible for him to receive a fair trial and any retrial must be barred under the double jeopardy clause.

VII. ARGUMENT

The Pennsylvania double jeopardy clause precludes retrial when prosecutorial misconduct intentionally or recklessly deprives the defendant of a fair trial. Such behavior directly contravenes the prosecutor's duty to seek justice rather than simply win a conviction. *Batson* violations constitute intentional prosecutorial misconduct, and, like other forms of racially discriminatory prosecutorial misconduct, must be dealt with seriously. While all *Batson* violations impact the fundamental fairness of a trial, the *Batson* violation in Appellant's case was so egregious, by any definition, that it was impossible for him to receive a fair trial and any retrial must be barred under the double jeopardy clause.

A. The Pennsylvania double jeopardy clause bars a retrial when the prosecutor engaged in serious misconduct, either intentional or reckless, with disregard of a substantial risk that the defendant would be denied a fair trial.

The federal double jeopardy clause, *see* U.S. CONST. Amend. V (stating no person shall "be subject for the same offence to be twice put in jeopardy of life or limb"), applies to the States through the Fourteenth Amendment. *See Benton v. Maryland*, 395 U.S. 784, 794 (1969). It thus represents the constitutional "floor," *Commonwealth v. Edmunds*, 586 A.2d 887, 894 (Pa. 1991), for purposes of Pennsylvania's counterpart provision, found in Article I, Section 10, of the Pennsylvania Constitution. In cases that ended in mistrial or where convictions

were overturned on appeal, the federal double jeopardy clause prohibits retrials where the prosecution's actions were intended to goad the defendant into moving for mistrial. *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982).

In 1992, this Court construed Pennsylvania's double jeopardy provision as establishing broader protections than its federal counterpart. *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992). In *Smith*, the Commonwealth committed intentional misconduct by withholding exculpatory evidence and falsely denying an agreement it had with one of the main prosecution witnesses. *Commonwealth v. Johnson*, 231 A.3d 807, 821 (Pa. 2020) (describing holding of *Smith*). The *Smith* Court found that the prosecutor's actions "violated all principles of justice and fairness embodied in the Pennsylvania Constitution's double jeopardy clause," *Smith*, 615 A.2d at 324, and held that retrial is prohibited when "the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial." *Smith*, 615 A.2d at 325.

In 1999, this Court "interpreted broadly" the holding in *Smith* to encompass "all serious prosecutorial misconduct undertaken with the purpose of denying the defendant his constitutional right to a fair trial." *Johnson*, 231 A.3d at 822 (citing *Commonwealth v. Martorano*, 741 A.2d 1221, 1223 (Pa. 1999). In *Martorano*, the prosecutor had repeatedly referenced evidence that was either inadmissible or did not exist. *Id.* The *Martorano* Court rejected the Commonwealth's argument that

Smith was limited to cases involving the withholding of exculpatory evidence, writing, "the holding of *Smith* appears to be deliberately nonspecific, allowing for any number of scenarios in which prosecutorial overreaching is designed to harass the defendant through successive prosecutions or otherwise deprive him of his constitutional rights." *Martorano*, 741 A.2d at 1223.

Just last year, this Court held that Pennsylvania's double jeopardy protection prohibited retrial not only when the prosecution engaged in *intentional* overreach, such as in *Smith* and *Martorano*, but also when the prosecution engaged in "misconduct which not only deprives the defendant of his right to a fair trial, but is undertaken recklessly, that is, with a conscious disregard for a substantial risk that such will be the result."[1] *Johnson*, 231 A.3d at 826.

In so holding, this Court recognized the main objective of the double jeopardy bar is 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 (internal citations and modification omitted). However, this Court also recognized the countervailing need for effective law enforcement and noted that not all forms

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[1] As recognized by the Superior Court panel below, this Court's decision in *Johnson* invalidated the reasoning of *Basemore II*. *Edwards II*, 2020 WL 4346744 *4.

of prosecutorial misconduct would trigger double jeopardy protection and preclude a retrial. *Id.*

Rather, in striking the balance between these two potentially competing interests, the Court held that "retrial is only precluded where there is prosecutorial overreaching" since "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 at 824, 826.[2] While overreaching normally implies some sort of conscious act or omission, this Court has noted that reckless conduct subsumes conscious behavior. *Id.* at 826. The Court found that the prosecutor's errors and mistakes in *Johnson*, which included the complete mischaracterization of evidence, were so egregious that, even though unintentional, they triggered the double jeopardy bar on retrial. Thus while not all prosecutorial errors or mistakes would prevent a retrial under the double jeopardy clause, egregious prosecutorial

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[2] Cases in which this Court held the double jeopardy clause did not prohibit retrial involved situations where the Court found the errors by the prosecutor to be minor and non-intentional. For example, in *Commonwealth v. Burke*, 781 A.2d 1136, 1145-46 (Pa. 2001), the Court noted that the undisclosed evidence was cumulative in nature and involved miscommunication between the police and the prosecution rather than intentional prosecutorial misconduct. In *Commonwealth v. McElligott*, 432 A.2d 587, 589 (Pa. 1981), the lab results the prosecutor failed to disclose were not exculpatory but were merely inconclusive and there was no reason to doubt the prosecutor's assertion that he believed the information to be worthless.

misconduct – actions which by design or with reckless disregard deprive the defendant of a fair trial will trigger the application of the double jeopardy clause.

In summary, under *Smith*, *Martorano*, and *Johnson*, the Pennsylvania double jeopardy clause precludes a retrial:

- "[W]hen the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial." *Smith*, 615 A.2d at 325.
- Such triggering misconduct includes "all serious prosecutorial misconduct undertaken with the purpose of denying the defendant his constitutional right to a fair trial." *Johnson*, 231 A.3d at 822 (citing *Martorano*, 741 A.2d at 1223).
- And it includes "misconduct which not only deprives the defendant of his right to a fair trial, but is undertaken recklessly, that is, with a conscious disregard for a substantial risk that such will be the result." *Johnson*, 231 A.3d at 826.

B. *Batson* violations constitute serious prosecutorial misconduct which deprive a defendant of a fair trial.

A prosecutor's intentional discrimination during jury selection constitutes serious prosecutorial misconduct. Since shortly after the ratification of the Fourteenth Amendment to the United States Constitution, it has been the law of this land that "the State denies a black defendant equal protection of the laws when

it puts him on trial before a jury from which members of his race have been purposefully excluded." *Batson v. Kentucky*, 476 U.S. 79, 85 (citing *Strauder v. West Virginia*, 100 U.S. 303 (1880)). In *Batson*, recognizing "the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn," the Court held "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson*, 476 U.S. at 85, 89. Purposeful discrimination in jury selection "violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." *Id.* at 86. The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge. *Id.* (citing *Duncan v. Louisiana*, 391 U.S. 145, 156, (1968)). When a prosecutor intentionally discriminates on the basis of race in the exercise of peremptory challenges, the prosecutor is deliberately violating a defendant's long-standing equal protection rights and his right to a fair and impartial jury. Such intentional discrimination constitutes serious misconduct.

Not only does a prosecutor's intentional racial discrimination in jury selection constitute serious misconduct, such discrimination has an "impact upon

the fundamental fairness of a trial." *Commonwealth v. Basemore*, 744 A.2d 717, 734 (Pa. 2000) (hereinafter "*Basemore I*"). Intentional discrimination on the basis of race in jury selection constitutes structural error. *Id.* *See also Edwards I*, 177 A.3d 978-79; *Tankleff v. Senkowski*, 135 F.3d 235, 248 (2d Cir. 1998). Structural errors are "defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards," because the "entire conduct of the trial from beginning to end is . . . affected" by the error. *Id.* at 309-10; *see also Neder v. United States*, 527 U.S. 1, 8 (1999) ("Such errors infect the entire trial process and necessarily render a trial fundamentally unfair.") (internal quotation marks and citations omitted).[3]

As demonstrated by the above, when a prosecutor intentionally discriminates on the basis of race during jury selection, such misconduct is intentional, serious, and impacts the fundamental fairness of the trial.

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[3] This Court recognized in *Basemore I* that a jury selected in a racially discriminatory matter is fundamentally incapable of rendering a fair verdict as *Batson* errors infect the entire framework of the trial. 744 A.2d at 734 n.18 (characterizing the *Batson* violations as an error "resulting in a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself . . . deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair") (internal quotations and citations omitted). The Superior Court Panel in *Basemore II* failed to recognize the fundamental harm of *Batson* violations when it incorrectly concluded that a jury from which African-Americans had been deliberately excluded was still capable of "rendering a fair verdict." 875 A.2d 350, 356.

C. Prosecutorial misconduct involving racial discrimination can be particularly egregious, requiring dismissal of charges.

When a prosecutor violates the principles of equal protection during a criminal prosecution, courts have found that dismissal of the charges can be an appropriate remedy. For example, if the decision to prosecute was based on a defendant's race or religion, a court can dismiss criminal charges prior to trial because such prosecutions violate the Equal Protection clause of the constitution. *See United States v. Armstrong*, 517 U.S. 456, 463-64 (1996) (citing *Oyler v. Boles*, 368 U.S. 448, 456 (1962) (the decision whether to prosecute may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification"). When the administration of a criminal law is "directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive" that the system of prosecution amounts to "a practical denial" of equal protection of the law, the prosecution cannot stand and the charges must be dismissed. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).[4]

The Hawai'i Supreme Court has found that a single act of prosecutorial misconduct was egregious enough to bar retrial under the double jeopardy clause

[4] To warrant dismissal for selective prosecution, it must be shown that the prosecutorial action or policy "had a discriminatory effect and that it was motivated by a discriminatory purpose." *Armstrong*, 517 U.S. at 465. Applying this standard in the instant context, the Superior Court has already found that the Commonwealth exercised a peremptory strike with discriminatory intent and the effect was to jurors from the petit jury on the basis of their race.

because the misconduct violated principles of racial equality. In *State v. Rogan*, 984 P.2d 1231 (Haw. 1999), the prosecutor's closing argument attempted to appeal to the racial prejudice of the jury in a sexual assault case involved an African-American adult male defendant and an underage Caucasian girl.[5] The *Rogan* Court noted that the prosecution's duty is not merely to seek convictions, but to seek justice, to exercise the highest good faith in the interest of the public, and to avoid even the appearance of unfair advantage over the accused. 984 P.2d at 1238. Even though the prosecutor in *Rogan* made only a single improper remark, this attempt to arouse racial prejudices was "a particularly egregious form of prosecutorial misconduct." 984 P.2d at 1250. Because "racial fairness of the trial is an indispensable ingredient of due process and racial equality a hallmark of justice," 984 P.2d at 1250 (internal quotations and citations omitted), this racially discriminatory prosecutorial misconduct was egregious enough to preclude retrial under the state's double jeopardy clause.

D. The racial discrimination exercised by the prosecutor during *voir dire* was egregious enough that retrial should be precluded under the double jeopardy clause.

The *Batson* violation in this case represented egregious prosecutorial misconduct. As found by the Superior Court, the numbers were "startling."

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[5] In closing, the prosecutor stated that it was "every mother's nightmare [to find] ... some black, military guy on top of your daughter." *Rogan*, 984 P.2d at 1238.

Edwards I, 177 A.3d at 975. The prosecutor did not simply strike a few African-American jurors in a row, thus prompting a *Batson* objection. Rather, the prosecutor here exercised every single peremptory strike it had against a racial minority. Seven of the eight strikes were used against African-American women. Even though the prosecutor had 13 African Americans jurors and 14 Caucasians jurors to strike from, the prosecutor used seven strikes against African Americans and zero strikes against Caucasians. These numbers are not only startling, they are egregious. They represent intentional and systemic discrimination.

The Superior Court has already found that the prosecutor acted with discriminatory intent – that the behavior was intentional. *Edwards I*, 177 A.3d at 978. This intentional discriminatory misconduct was made more egregious by the Commonwealth's blatant attempt to cover-up the discrimination. The facially race-neutral reasons proffered by the Commonwealth for striking Juror 67 were so brazenly pretextual that on a cold record the Superior Court found them to be implausible and unpersuasive. *Id.* The Commonwealth critiqued Juror 67 for appearing as though she did not want to be there, even though this same rationale could be used to strike almost every potential juror in Pennsylvania. The Commonwealth critiqued Juror 67 for "leaning back" even though the trial court had instructed the jurors to "sit back and relax." The clearly pretextual reasons

offered by the Commonwealth in defense of its racially discriminatory strike add to the egregiousness of its misconduct.

Even if this Court finds that when the prosecutor struck Juror 67 with discriminatory intent, the prosecutor did not have the intentional purpose of denying Appellant Edwards a fair trial, certainly the prosecutor's use of every single peremptory strike on racial minorities, seven of whom were African-American, constituted a conscious disregard of the fundamental fairness of Appellant Edward's trial. Misconduct "undertaken recklessly," with a conscious disregard that the defendant would be deprived of his right to a fair trial, precludes retrial under the double jeopardy clause. *Johnson*, 231 A.3d at 826. Thus, *Johnson* recognized that even if the prosecutor does not intend for her racially discriminatory use of peremptory strikes to interfere with the defendant's fair trial or to interfere with the truth-seeking process, if prosecutor disregarded the substantial risk that such would be the result, the double jeopardy clause bars retrial.

A prosecutor must not seek a conviction at the expense of justice. When a prosecutor commits a *Batson* violation, such misconduct has infected the entire trial process "and necessarily render[s] a trial fundamentally unfair." *Neder*, 527 U.S. at 8. Here, the racially discriminatory prosecutorial misconduct of the

prosecutor was so egregious that retrial should be precluded under the Pennsylvania double jeopardy clause.

VIII. CONCLUSION

For the reasons set forth above, Appellant Edwards respectfully requests that this Court reverse the Superior Court's decision, preclude retrial in this matter, and dismiss the charges with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jason Kadish, Esquire, do hereby certify this 7th day of April 2021 that this brief was electronically filed and served upon the following party:

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APPENDIX A:
SUPERIOR COURT OPINION
(“*EDWARDS I*”) (1/2/2018)

2018 PA Super 9

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DERRICK EDWARDS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 436 EDA 2015

Appeal from the Judgment of Sentence of January 9, 2015
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): 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

BEFORE: OLSON, STABILE AND MUSMANNO, JJ.

OPINION BY OLSON, J.: **FILED JANUARY 19, 2018**

Appellant, Derrick Edwards, appeals from the judgment of sentence entered on January 9, 2015. On appeal, Appellant raises several objections, including, *inter alia*, challenges to the sufficiency of the evidence and allegations that the Commonwealth harbored racial animus in the use of its peremptory strikes. Although we hold that listing the races and genders of prospective jurors on a peremptory strike sheet, while ill-advised, does not *per se* violate the Equal Protection Clause of the Fourteenth Amendment as interpreted by ***Batson v. Kentucky***, 476 U.S. 79 (1986), we conclude that,

under the totality of circumstances, Appellant demonstrated a ***Batson*** violation by showing that the Commonwealth struck at least one juror with discriminatory intent. Accordingly, we vacate Appellant's judgment of sentence and remand for a new trial.

The factual background of this case is as follows. At approximately 5:50 a.m. on September 18, 2012, Appellant and Rasheed Thomas ("Thomas") robbed Keith Crawford ("Crawford") at gunpoint. Approximately five minutes later, Appellant and Thomas approached Kevin Cunningham ("Cunningham") as he waited at a bus stop. Appellant put a firearm in Cunningham's face and said, "You know what this is." When Cunningham did not lie down on the ground, Appellant pushed him to the ground and struck him twice in the back of the head with the firearm. Appellant and Thomas took Cunningham's cash, a set of barber clippers, a Bible, an engagement ring, and a cellular telephone.

At approximately 2:00 a.m. on October 1, 2012, two African-American males approached Whitney Coates ("Coates"). One of the males pointed a firearm at her face and said "You know what it is." Coates gave the assailants her cellular telephone. Approximately 30 minutes later, Appellant and Thomas attempted to rob Donald Coke ("Coke") at gunpoint. When Coke resisted, Appellant shot him twice in the left arm. Appellant and Thomas then fled in an SUV driven by Henry Bayard ("Bayard"). The SUV belonged to Bayard's mother.

Approximately 15 minutes later, Appellant and Bayard robbed Duquan Crump ("Crump") at gunpoint. They fled the scene with Crump's wallet, cellular telephone, and watch. Approximately 15 minutes later, Appellant and Thomas robbed Shanice Jones ("Jones") at gunpoint. They fled with Jones' wallet and cellular telephone. Approximately 15 minutes later, two African-American males approached Hector De Jesus ("De Jesus"). One of the males pointed a firearm at him and ordered him to hand over his belongings. The assailants took $150.00, an iPod touch, a wallet, and a backpack containing clothes and a taser.

Approximately 45 minutes later, an African-American male exited a vehicle and pointed a firearm at Jonas Floyd ("Floyd"). Another African-American male then exited the vehicle. The assailants took Floyd's tote bag, headphones, cellular telephone, wallet, keys, and United States currency. Shortly after this robbery, police located Appellant, Thomas, and Bayard inside the SUV that belonged to Bayard's mother. In addition to the firearms used in the robberies, police recovered a significant amount of the goods stolen from the eight victims listed above.

The relevant procedural history of this case is as follows. On November 2, 2012, the police charged Appellant *via* eight criminal complaints with various offenses relating to the robberies described above. A preliminary hearing was held on February 26, 2013. At the conclusion of that hearing, Appellant was held for court on all charges. On March 6, 2013, the

Commonwealth charged Appellant *via* eight criminal informations with essentially the same crimes as those charged in the criminal complaints.

On October 13 and 14, 2014, Appellant moved to quash the criminal informations. In those motions to quash, Appellant argued that the evidence presented at the preliminary hearing was insufficient to make out *prima facie* cases against him. On October 27, 2014, the trial court denied the motions to quash.

Jury selection began on October 28, 2014. Prior to jury selection, Appellant asked the trial court how it conducted voir dire. The trial court responded that it would ask prospective jurors questions and the attorneys would not be permitted to make inquiries. Appellant did not object to this procedure. The trial court's staff placed the race and gender of each prospective juror on the juror strike sheet prior to handing the sheet to counsel. Appellant objected to this process and the trial court overruled the objection. Once the parties exercised their respective peremptory strikes, Appellant, pursuant to ***Batson***, objected to the Commonwealth striking four prospective African-American jurors.[1] The trial court determined that the

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[1] With its eight peremptory challenges, the Commonwealth struck seven prospective African-American jurors. Appellant objected to the Commonwealth striking four of the seven prospective jurors. It is unclear why Appellant did not challenge the Commonwealth's peremptory strikes of the other three prospective African-American jurors.

Commonwealth exercised its strikes in a non-prejudicial manner and overruled Appellant's objection.

Appellant's trial commenced on October 29, 2014.[2] At trial, Thomas appeared as a witness for the prosecution but he refused to identify his co-conspirators. The Commonwealth, therefore, sought permission to read Thomas' confession into the record. Appellant objected and the trial court overruled that objection. The Commonwealth also presented an audio recording of Appellant from prison. Appellant objected to the admission of the recording and the trial court overruled that objection.

On November 4, 2014, the jury found Appellant guilty of eight counts of robbery,[3] eight counts of conspiracy to commit robbery,[4] eight counts of carrying a firearm without a license,[5] eight counts of carrying a firearm on the streets of Philadelphia,[6] eight counts of possessing an instrument of crime,[7]

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[2] On September 22, 2014, Thomas pled guilty to multiple counts each of robbery, conspiracy to commit robbery, and carrying a firearm without a license. Thus, he did not go to trial as Appellant's co-defendant.

[3] 18 Pa.C.S.A. § 3701(a)(1)(ii).

[4] 18 Pa.C.S.A. §§ 903, 3701.

[5] 18 Pa.C.S.A. § 6106(a)(1).

[6] 18 Pa.C.S.A. § 6108.

[7] 18 Pa.C.S.A. § 907(a).

attempted murder,[8] aggravated assault,[9] and conspiracy to commit aggravated assault.[10]

Over six weeks later, on December 22, 2014, Appellant moved for a mistrial. In that motion, based upon the statements of two American Sign Language interpreters present during jury deliberations, Appellant averred that jurors conducted research about the case during deliberations. The trial court denied the motion that same day. On January 9, 2015, the trial court sentenced Appellant to an aggregate term of 22 to 44 years' imprisonment. This timely appeal followed.

On April 6, 2015, the trial court ordered Appellant to file a concise statement of errors complained of on appeal ("concise statement"). ***See*** Pa.R.A.P. 1925(b). Appellant failed to file a timely concise statement and, on October 7, 2015, this Court remanded this case to the trial court to permit Appellant to file a *nunc pro tunc* concise statement. On October 28, 2015, Appellant filed his concise statement. On February 24, 2016, the trial court issued its Rule 1925(a) opinion. This case is now ripe for disposition.

Appellant raises several issues for our review, *inter alia*:[11]

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[8] 18 Pa.C.S.A. § 901, 2502.

[9] 18 Pa.C.S.A. § 2702(a)(1).

[10] 18 Pa.C.S.A. §§ 903, 2702.

[11] We address Appellant's first two issues because he would be entitled to discharge if we granted relief on those claims. We address Appellant's third

1. Did the trial court commit an error of law and/or abuse its discretion in failing to issue a judgment of acquittal[?]

2. Did the trial court commit an error of law and/or abuse its discretion in failing to quash the return of the magistrate's transcript . . . where the Commonwealth failed to present material witnesses at a preliminary hearing or supplement a devoid record prior to trial?

3. Did the trial court commit an error of law and/or abuse its discretion in denying Appellant's ***Batson*** [] motion by denoting on its jury sheet the race and gender of each potential juror and allowing the prosecution to strike jurors on the basis of race?

Appellant's Brief at 5-6 (certain capitalization omitted).[12]

In his first issue Appellant argues that the evidence presented at trial as to four of the robberies was insufficient. "The determination of whether sufficient evidence exists to support the verdict is a question of law; accordingly, our standard of review is *de novo* and our scope of review is plenary." ***Commonwealth v. Johnson***, 160 A.3d 127, 136 (Pa. 2017) (citation omitted). In assessing Appellant's sufficiency challenge, we must determine "whether viewing all the evidence admitted at trial in the light most favorable to the [Commonwealth], there is sufficient evidence to enable the

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issue because we conclude that he is entitled to relief on that claim. As we remand for a new trial, we decline to address Appellant's remaining issues which would only entitle him, at most, to a new trial. ***See Drew v. Work***, 95 A.3d 324, 338 (Pa. Super. 2014) (citation omitted).

Our dissenting colleague similarly declines to address Appellant's remaining issues because of our disposition of this appeal. Thus, he merely states that he would reach a different conclusion on Appellant's ***Batson*** claim. ***See Dissenting Opinion***, ***post*** at 1-2 n.1.

[12] We have re-numbered the issues for ease of disposition.

fact-finder to find every element of the crime beyond a reasonable doubt." ***Commonwealth v. Grays***, 167 A.3d 793, 806 (Pa. Super. 2017) (citation omitted). "[T]he facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. . . . [T]he finder of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part[,] or none of the evidence." ***Commonwealth v. Waugaman***, 167 A.3d 153, 155–156 (Pa. Super. 2017) (citation omitted).

Appellant contends that the evidence was insufficient to convict him of crimes related to the Jones, Crump, and Crawford robberies because those three victims failed to appear and did not testify at trial. Appellant concedes, however, that the property stolen from these three victims was found in the SUV occupied by Appellant, Thomas, and Bayard. ***See*** Appellant's Brief at 20. Moreover, as noted above, Thomas' confession was read to the jury at trial.[13] ***See*** N.T., 10/28/14, at 28-77. In that confession, Thomas implicated Appellant in the robberies of Jones, Crump, and Crawford. Moreover, Appellant stipulated at trial that he did not possess a valid license to carry firearms at the time the robberies occurred. N.T., 11/3/14, at 40. Combined, this stipulation, Thomas' confession, and the recovery of items taken during

[13] We explicitly decline to opine upon whether the trial court properly admitted Thomas' confession into evidence because, when considering the sufficiency of the evidence, we must consider both properly and improperly admitted evidence. ***Commonwealth v. Kane***, 10 A.3d 327, 332 (Pa. Super. 2010), *appeal denied*, 29 A.2d 796 (Pa. 2011).

the robberies from the SUV occupied by Appellant constituted sufficient evidence for the jury to conclude that Appellant committed those three robberies and offenses related to those incidents.

Appellant also argues that the evidence was insufficient to convict him of robbing Coke because Coke did not testify at trial. Once again, however, Thomas implicated Appellant in Coke's robbery. Furthermore, Coke's robbery followed the same modus operandi of the other robberies. ***See Commonwealth v. Cullen***, 489 A.2d 929, 936 (Pa. Super. 1985) (modus operandi of serial robber can be used to prove identity). Combined, the stipulation that Appellant did not possess a valid license to carry firearms, Thomas' statement, and the similarity of the robberies in this case provided sufficient evidence to convict Appellant of robbing Coke and the related offenses.

In his second issue, Appellant argues that the trial court erred in denying his motions to quash because there was insufficient evidence presented at the preliminary hearing to hold him for trial. This issue is moot. "If events occur to eliminate the claim or controversy at any stage in the process, the [issue] becomes moot." ***In re S.H.***, 71 A.3d 973, 976 (Pa. Super. 2013) (citation omitted). Our Supreme Court has held that "once a defendant has gone to trial and has been found guilty of the crime or crimes charged, any defect in the preliminary hearing is rendered immaterial." ***Commonwealth v.***

Sanchez, 82 A.3d 943, 984 (Pa. 2013) (citation omitted). Accordingly, Appellant's second issue is moot.

In his third issue, Appellant argues that the jury selection process in this case violated ***Batson***. First, he contends that the trial court violated ***Batson*** as a matter of law by listing the races and genders of potential jurors on the peremptory strike sheet.[14] Second, he argues that the Commonwealth violated ***Batson*** by striking four African-American members of the venire. "A ***Batson*** claim presents mixed questions of law and fact." ***Riley v. Taylor***, 277 F.3d 261, 277 (3d Cir. 2001) (*en banc*). Therefore, our standard of review is whether the trial court's legal conclusions are correct and whether its factual findings are clearly erroneous.

"In ***Batson***, the [Supreme Court of the United States] held that a prosecutor's challenge to potential jurors solely on the basis of race violates the Equal Protection Clause of the United States Constitution." ***Commonwealth v. Reid***, 99 A.3d 470, 484 (Pa. 2014) (citation omitted). When a defendant makes a ***Batson*** challenge during jury selection:

> First, the defendant must make a *prima facie* showing that the circumstances give rise to an inference that the prosecutor struck one or more prospective jurors on account of race; second, if the *prima facie* showing is made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the juror(s) at issue; and third, the trial court must then make the ultimate

[14] As noted above, the trial court's staff placed the races and genders of potential jurors on the strike list. The trial court was unware of its tipstaff's practice. Nonetheless, for simplicity, we refer to the trial court when discussing its tipstaff's actions.

> determination of whether the defense has carried its burden of proving purposeful discrimination.

Commonwealth v. Watkins, 108 A.3d 692, 708 (Pa. 2014) (citation omitted).

Initially, we consider whether Appellant properly preserved his ***Batson*** claim for appellate review. ***Cf.*** Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). The Commonwealth argues that Appellant "waived this claim by failing to set forth the race of: all the impaneled jurors, all of the venirepersons the Commonwealth struck, and all the venirepersons acceptable to the Commonwealth whom he struck." Commonwealth's Brief at 17-18, *citing* ***Commonwealth v. Thompson***, 106 A.3d 742, 752 (Pa. 2014); ***see Commonwealth v. Spence***, 627 A.2d 1176, 1182 (Pa. 1993).[15] The Commonwealth fails to acknowledge, however, that this information was

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[15] In ***Spence***, our Supreme Court held that the objecting party must include the following information in its objection in order to preserve a ***Batson*** claim: the race of the stricken prospective juror(s), the race of prospective juror(s) acceptable to the striking party but stricken by the objecting party, and the racial composition of the jury seated for trial. ***Spence***, 627 A.2d at 1182; ***see Thompson***, 106 A.3d at 752. The United States Court of Appeals for the Third Circuit has held that the requirements set forth in ***Spence*** are an unreasonable application of federal law. ***See Holloway v. Horn***, 355 F.3d 707, 728–729 (3d Cir. 2004). Nonetheless, our Supreme Court has refused to modify these requirements. ***See Commonwealth v. Fletcher***, 861 A.2d 898, 910 n.15 (Pa. 2004). We, of course, are "duty-bound to effectuate [our Supreme] Court's decisional law." ***Walnut St. Assocs., Inc. v. Brokerage Concepts, Inc.***, 20 A.3d 468, 480 (Pa. 2011) (citations omitted).

included on the peremptory strike sheet used by the parties. As noted above, the peremptory strike sheet included the race and gender of every prospective juror. It also included codes indicating which party (if either) objected to a juror and whether that objection was for cause or was a peremptory strike. Finally, it specifies the racial composition of the jury seated for trial. Appellant cited the peremptory strike sheet when making his ***Batson*** challenge. Therefore, Appellant's failure to repeat orally the information during his ***Batson*** challenge did not waive his ***Batson*** claim.[16]

Turning to the merits of Appellant's ***Batson*** claim, we first address his argument that listing the races and genders of prospective jurors on the peremptory strike sheet violated ***Batson*** as a matter of law. Although we find the trial court's practice both ill-advised and inappropriate, there are compelling grounds for refusing to adopt a *per se* rule that precludes this practice under ***Batson***. First, there is no precedent for such a holding. Appellant is unable to cite a single case from any jurisdiction which holds that this practice is a *per se* violation of ***Batson***.

Second, adoption of a *per se* rule runs counter to the rationale of ***Batson***, and that of several cases interpreting and applying the decision, all

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[16] Neither the Commonwealth nor our learned colleague in his dissent cite to any additional information required by ***Spence*** that the trial court would have gained if Appellant repeated orally the information contained on the strike sheet. Instead, the dissent and the Commonwealth place the form of the information over the substance. ***Cf. Commonwealth v. Farrow***, 168 A.3d 207, 219 (Pa. Super. 2017) (This Court's intent is not to "elevate form over substance.").

of which have encouraged courts to consider all relevant factors. ***Batson***, 476 U.S. at 96 ("[T]he defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."); ***see Carrillo v. Texas***, 2007 WL 2052070, *3 (Tex. App. July 19, 2007) ("[T]he ***Batson*** decision is one of fact, not of *per se* rules of law."); ***Louisiana v. Duncan***, 802 So.2d 533, 550 (La. 2001) (internal quotation marks and citation omitted) ("[A]ttempts to fashion absolute, *per se* rules are inconsistent with ***Batson*** in which the [Supreme Court of the United States] instructed trial courts to consider all relevant circumstances."); ***United States v. Grandison***, 885 F.2d 143, 147 (4th Cir. 1989), *quoting* ***United States v. Sanqineto–Miranda***, 859 F.2d 1501, 1521 (6th Cir. 1988) ("The Supreme Court's mandate in ***Batson*** to consider all the facts and circumstances means that we cannot lay down clear rules[.]"); ***see also Miller-El v. Dretke***, 545 U.S. 231, 247 n.6 (2005) ("A *per se* rule that a defendant cannot win a ***Batson*** claim unless there is an exactly identical white juror [unaffected by the challenged practice] would leave ***Batson*** inoperable; potential jurors are not products of a set of cookie cutters."). Accordingly, although we do not countenance the practice, we hold that listing the races and genders of potential jurors on the peremptory strike sheet did not violate ***Batson*** as a matter of law.

Having determined that listing the race and gender of prospective jurors does not constitute a *per se* ***Batson*** violation, we turn to a specific analysis of Appellant's ***Batson*** claim. As noted above, the first step in the ***Batson*** analysis is determining whether Appellant made "a *prima facie* showing that the circumstances give rise to an inference that the prosecutor struck one or more prospective jurors on account of race[.]" ***Watkins***, 108 A.3d at 708 (citation omitted). As our Supreme Court has explained:

> To establish a *prima facie* case of purposeful discrimination[,] the defendant must show that he is a member of a cognizable racial group, that the prosecutor exercised a peremptory challenge or challenges to remove from the venire members of the defendant's race; and that other relevant circumstances combine to raise an inference that the prosecutor removed the juror(s) for racial reasons.

Commonwealth v. Cook, 952 A.2d 594, 602 (Pa. 2008) (internal alterations, ellipsis, footnote, and citation omitted).

We agree with the trial court's conclusion that Appellant established a *prima facie* case of purposeful discrimination.[17] Appellant is African-American

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[17] Our learned colleague disagrees with our characterization of the trial court's conclusion that the first prong of the ***Batson*** test was met. According to our dissenting colleague, the trial court never found that Appellant established a *prima facie* case of purposeful discrimination. Although the trial court did not use the magic words "*prima facie* case of purposeful discrimination," it is evident by the trial court's words and actions that it made this finding. The trial court considered whether the second step of the ***Batson*** test was met which it would not have done had it found that Appellant failed to establish the first step. Moreover, as our dissenting colleague notes, even if the trial court failed to make this finding, "we may turn directly to the question of whether the appellant had carried his burden of proving that the prosecution had struck the juror based on race." ***Dissenting Opinion***, ***post*** at 6 (internal

and the Commonwealth struck seven African-American prospective jurors. Furthermore, although listing the races and gender of prospective jurors on the peremptory strike sheet did not qualify as a *per se* ***Batson*** violation, it is a relevant circumstance that raised an inference that the prosecutor struck the jurors based on their race. Therefore, we agree with the trial court that Appellant established a *prima facie* case of purposeful discrimination.

The second step in the ***Batson*** analysis is the determination of whether the Commonwealth provided race-neutral explanations for striking the prospective jurors. ***Watkins***, 108 A.3d at 708 (citation omitted). As our Supreme Court explained:

> The second prong of the ***Batson*** test, involving the prosecution's obligation to come forward with a race-neutral explanation of the challenges once a *prima facie* case is proven, does not demand an explanation that is persuasive, or even plausible. Rather, the issue at that stage is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.

Commonwealth v. Harris, 817 A.2d 1033, 1043 (Pa. 2002) (internal quotation marks and citations omitted).

Here again, we agree with the trial court's conclusion that the Commonwealth proffered race-neutral explanations for striking the four African-American jurors in question. The Commonwealth stated that it struck Jurors 56 and 57 because they were talking to each other and joking

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quotation marks omitted), *quoting* ***Commonwealth v. Sanchez***, 36 A.3d 24, 45 (Pa. 2011).

throughout the voir dire process. N.T., 10/28/14, at 93. The Commonwealth also stated that Juror 56 was nodding and making faces while the trial court discussed the credibility of police officers. ***Id.*** The Commonwealth stated that it struck Juror 61 because she didn't identify the neighborhood in which she lived on the juror questionnaire and her ex-husband was a police officer. ***Id.*** Finally, the Commonwealth stated that it struck Juror 67 because:

> when she was being questioned by [the trial court] 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.

Id. at 94. All of these reasons are facially acceptable. Accordingly, we agree with the trial court that the Commonwealth offered race-neutral reasons for striking the four African-Americans in question.

The third step in a ***Batson*** analysis involves determining if the defense carried its burden of proving purposeful discrimination. ***Watkins***, 108 A.3d at 708 (citation omitted). "It is at this stage that the persuasiveness of the facially-neutral explanation proffered by the Commonwealth is relevant." ***Commonwealth v. Towles***, 106 A.3d 591, 601 (Pa. 2014) (citation omitted).[18]

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[18] The Commonwealth cites ***Cook*** and ***Commonwealth v. Washington***, 927 A.2d 586 (Pa. 2007), for the proposition that a ***Batson*** claim fails whenever the prosecution states race-neutral reasons for disputed peremptory challenges, even if the proffered explanation lacks persuasive force or plausibility. ***See*** Commonwealth's Brief at 18. In essence, the

In this case, the trial court did not make an explicit determination during voir dire that Appellant failed to prove purposeful discrimination. ***See*** N.T., 10/28/14, at 94. The trial court's denial of Appellant's ***Batson*** challenge, along with the reasoning in its Rule 1925(a) opinion, ***see*** Trial Court Opinion, 2/24/16, at 19, indicates that the trial court implicitly found that Appellant failed to prove purposeful discrimination. As our Supreme Court explained, a

> trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal and will not be overturned unless clearly erroneous. Such great deference is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations. Moreover, there will seldom be much evidence on the decisive question of whether the race-neutral explanation for a peremptory challenge should be believed; the best evidence often will be the demeanor of the prosecutor who exercises the challenge.

Commonwealth v. Williams, 980 A.2d 510, 531 (Pa. 2009) (internal quotation marks and citation omitted).

Commonwealth argues that the defense cannot prevail where the Commonwealth satisfies the second step of the ***Batson*** inquiry. This argument is inconsistent with prevailing jurisprudence. Every case from the Supreme Court of the United States and our Supreme Court interpreting ***Batson*** requires the trial court to proceed to the third step of the ***Batson*** inquiry if the defendant demonstrates a *prima facie* case of discrimination and the prosecutor provides a race-neutral explanation. ***E.g.***, ***Miller-El***, 545 U.S. at 239-240; ***Purkett v. Elem***, 514 U.S. 765, 769 (1995) (*per curiam*) ("The prosecutor's proffered explanation . . . is race neutral and satisfies the prosecution's step two burden of articulating a nondiscriminatory reason for the strike. . . . Thus, the inquiry properly proceeded to step three, where the state court found that the prosecutor was not motivated by discriminatory intent."); ***Commonwealth v. Roney***, 79 A.3d 595, 619 (Pa. 2013) (citation omitted) ("If a race-neutral explanation is tendered, the trial court must then proceed to the third prong of the test[.]"); ***Cook***, 952 A.2d at 611.

Although we must exercise great deference in reviewing the trial court's factual finding with respect to discriminatory intent, we do not function as a rubber stamp. ***Cf. Foster v. Chatman***, 136 S.Ct. 1737, 1747-1755 (2016) (even under Antiterrorism and Effective Death Penalty Act of 1996's ("AEDPA's") double deferential standard of review, the trial court's factual finding with respect to discriminatory intent was clearly erroneous); ***Commonwealth v. Monahan***, 860 A.2d 180, 185 (Pa. Super. 2004), *appeal denied*, 878 A.2d 863 (Pa. 2005) (In the context of a discretionary aspects of sentencing claim, in which we employ a highly deferential standard of review, we do not act as a rubber stamp.). In this case, the evidence establishes that the Commonwealth struck Juror 67 with discriminatory intent; therefore, we conclude that the trial court's factual finding was clearly erroneous.[19]

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[19] In this case, Appellant did not attempt to rebut the Commonwealth's race-neutral explanations. He also did not withdraw his ***Batson*** challenge. Instead, Appellant believed that the reasons offered by the Commonwealth were so unpersuasive that he did not need to offer argument as to why the race-neutral explanations were pretextual. As the Supreme Court of Mississippi explained, a defendant

> is not procedurally barred from contesting the [prosecutor's] strikes of [] jurors for whom he did not provide rebuttal during the ***Batson*** hearing. Although the defendant **may** provide rebuttal, ***Batson*** does not **require** the opponent of a peremptory strike to rebut the [other party's] proffered race-neutral basis. Under ***Batson***'s three-step procedure, once the [prosecutor] has presented race-neutral reasons to rebut the defendant's *prima facie* case, the trial court should determine whether the defendant has established purposeful discrimination.

We find three factors strongly indicative of discriminatory intent in this case; first, as noted above, the identification of the race and gender of the potential jurors on the peremptory strike sheet.[20] Although this was not a *per se* ***Batson*** violation, when combined with the other factors listed below it supports an inference of racial discrimination. Second, the probability of the Commonwealth striking such a disproportionate number of African-Americans by chance is extremely low. Finally, the Commonwealth's race-neutral explanation for striking Juror 67 was wholly underpersuasive in that the Commonwealth relied on her supposedly inattentive posture to conclude that she would not discharge her duties as a juror in a fair and impartial manner.

During the peremptory strike process, 30 potential jurors were considered by the parties. Of those 30, 13 were African-American. The Commonwealth used seven of its eight peremptory strikes on African-

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Corrothers v. Mississippi, 148 So.3d 278, 345–346 (Miss. 2014) (emphasis in original), *citing* ***Batson***, 476 U.S. at 97-98; ***see Colorado v. O'Shaughnessy***, 275 P.3d 687, 694 (Colo. App. 2010), *aff'd*, 269 P.3d 1233 (Colo. 2012) (citations omitted). Moreover, the Commonwealth does not cite, nor are we aware of, any decisions from our Supreme Court or this Court requiring such rebuttal. ***Cf. Missouri v. Jones***, 471 S.W.3d 331, 334 (Mo. App. 2015) (Missouri requires such rebuttal in order to make a ***Batson*** challenge). We decline to adopt such a requirement in this case.

[20] The dissent asserts that the Commonwealth is not responsible for the trial court's actions in placing the race and gender of each prospective juror on the preemptory strike sheet. Although this is accurate, we note that when Appellant objected to having this information noted on the strike sheet, the Commonwealth objected to Appellant's objection. ***See*** N.T., 10/28/14, at 91. Moreover, the trial court's listing of the potential jurors' races and genders on the strike sheet is a part of the totality of the circumstances that we must evaluate when reviewing the trial court's ***Batson*** ruling.

Americans. An additional 14 potential jurors were Caucasian. The Commonwealth did not strike any of the Caucasian potential jurors. Finally, three of the potential jurors were neither Caucasian nor African-American. The Commonwealth exercised its last peremptory strike on one of those three individuals.

It does not take a statistician to understand that the probability of striking no Caucasians and striking at least 7 of 13 African-Americans by random chance is extremely small. Statistics alone are insufficient to prove discriminatory intent. ***Commonwealth v. Johnson***, 139 A.3d 1257, 1282–1283 (Pa. 2016) (citations omitted). Statistics can be used, however, when considering the totality of the circumstances to determine if the Commonwealth exercised its peremptory strikes in a discriminatory manner. ***See Commonwealth v. Ligons***, 971 A.2d 1125, 1144 (Pa. 2009).

The statistics in this case are startling. Unlike many cases addressed by our Supreme Court, in this case the Commonwealth exercised all eight of its peremptory strikes on racial minorities and seven of those eight on African-Americans. ***See*** Pa.R.Crim.P. 633, 634 (setting forth the number of peremptory strikes that the Commonwealth may exercise); ***cf. Johnson***, 139 A.3d at 1281-1283 (Commonwealth struck seven African-Americans and seven non-African-Americans and did not exercise all of its peremptory challenges); ***Commonwealth v. Roney***, 79 A.3d 595, 620-621 (Pa. 2013) (Commonwealth struck four Caucasians); ***Commonwealth v. Hutchinson***,

25 A.3d 277, 287 (Pa. 2011) (Commonwealth struck eight Caucasians); ***Ligons***, 971 A.2d at 1143-1144 (Commonwealth struck two Caucasians and did not exercise eight or nine of its peremptory strikes[21]). Although the Commonwealth could not completely purge the jury in this case of African-Americans because of the number of African-American members of the venire, the Commonwealth greatly reduced the number of African-Americans on the jury in this case by exercising all of its peremptory strikes and using seven of those eight strikes on African-Americans. These probabilities, combined with the identification of the potential jurors' races and genders on the peremptory strike sheet and the proffered, but highly implausible, race-neutral explanation for striking Juror 67, cause us to conclude that Appellant met his burden in demonstrating that the Commonwealth struck Juror 67 with discriminatory intent.

Finally, the most important factor when considering the totality of the circumstances is the race explanation offered by the Commonwealth. We focus on the Commonwealth's race-neutral explanation for striking Juror 67, which is reproduced in full ***supra***. Essentially, the Commonwealth stated that it struck Juror 67 because she did not seem pleased to be called to jury duty. Although, as noted above, this was a facially race-neutral explanation, this same rationale could be used to strike almost every potential juror in almost

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[21] At one point, our Supreme Court referenced the Commonwealth not using eight of its preemptory strikes while at another point our Supreme Court referenced the Commonwealth not using nine of its preemptory strikes.

every case tried throughout Pennsylvania. Few (if any) citizens are thrilled when they receive a jury summons in the mail. Instead, they begrudgingly arrive at the courthouse to fulfill their civic duty (or avoid being arrested). The trial court acknowledged this reality twice during the jury selection process in this case. N.T., 10/28/14, at 5, 52.

The Commonwealth also stated that Juror 67 was leaning back in her chair with her arms crossed during the voir dire process. This, however, was encouraged by the trial court at the beginning of jury selection. ***Id.*** at 4 ("So sit back and relax"). There is no assertion that she was disruptive, that she ignored the trial court's instructions, or that she exhibited outward or palpable disinclination to discharge her duties as an impartial factfinder.

We find instructive the Supreme Court of the United States' decision in ***Snyder v. Louisiana***, 552 U.S. 472 (2008). In ***Snyder***, the prosecutor struck a prospective African-American juror because he appeared nervous and because of concerns regarding his student teaching position. The trial court contacted his college dean and alleviated any concerns regarding his student teaching duties. Nonetheless, the trial court overruled the defendant's ***Batson*** challenge and the state appellate courts affirmed. Justice Alito, writing for a seven-member majority, concluded that the trial court's factual finding on discriminatory intent was clearly erroneous. ***Id.*** at 484-485. Instead, considering the totality of the circumstances, the majority found the prosecution's explanation for striking the prospective juror highly implausible

and, therefore, pretextual. ***See id.***; ***see also Miller–El***, 537 U.S. at 339, *quoting* ***Purkett v. Elem***, 514 U.S. 765, 768 (1995) (*per curiam*) (At the third "stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination."); ***Commonwealth v. Garrett***, 689 A.2d 912, 917 (Pa. Super. 1997), *appeal denied*, 701 A.2d 575 (Pa. 1997) (citation omitted) ("An explanation which at first blush appears to be clear, specific and legitimate may be exposed as a pretext for racial discrimination when considered in the light of the entire voir dire proceeding."); ***Commonwealth v. Jackson***, 562 A.2d 338, 350 (Pa. Super. 1989) (*en banc*) (Beck, J. opinion announcing the judgment of the court), *appeal denied*, 578 A.2d 926 (Pa. 1990) (citation omitted) (same).[22]

In both ***Snyder*** and the case at bar the trial court did not make an explicit factual finding that it witnessed the alleged demeanor relied upon by

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[22] Judges Del Sole and Montemuro joined Judge Beck's opinion. Judge Popovich joined the relevant portions discussed in this decision (and that of our dissenting colleague). President Judge Cirillo filed a concurring opinion in which Judge Brosky joined. That concurring opinion stated that, "I therefore concur only in the conclusion that appellant has failed to show an equal protection violation and in the affirmance of the judgment of sentence." ***Jackson***, 562 A.2d at 358 (Cirillo, J. concurring). Judge Tamilia filed a concurring opinion in which he stated that, "I concur in the result[.]" ***Id.*** at 358 (Tamilia, J. concurring). Judge McEwen filed a dissenting opinion which Judge Johnson joined. Thus, only four of the nine members of the *en banc* panel in ***Jackson*** joined the relevant portions of Judge Beck's opinion. Hence, it is only an opinion announcing the judgment of the court. Such an opinion is not binding upon this panel. ***See Commonwealth v. Gorbea-Lespier***, 66 A.3d 382, 387 n.5 (Pa. Super. 2013), *appeal denied*, 77 A.3d 1259 (Pa. 2013) (citations omitted).

the prosecutor to strike the juror. ***See Snyder***, 552 U.S. at 477 ("[T]he trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor.");[23] ***see also*** N.T., 10/28/14, at 94; Trial Court Opinion, 2/24/16, at 19. Moreover, in both ***Snyder*** and the case at bar the race-neutral

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[23] Our dissenting colleague argues that the Supreme Court of the United States rejected our reading of ***Snyder*** in ***Thaler v. Haynes***, 559 U.S. 43 (2010) (*per curiam*). ***See Dissenting Opinion***, ***post*** at 22-25. Our reading of ***Snyder***, however, is consistent with ***Thaler***. In ***Thaler***, the Court explained that the failure of the ***Snyder*** trial court to note any personal recollection of the prospective juror's demeanor was only one factor it considered when determining that the trial court's factual finding was unsupported by the record. ***See Thaler***, 559 U.S. at 48-49. Unlike ***Snyder***, which was on direct review, ***Thaler*** was a *habeas corpus* proceeding. Hence, the Supreme Court of the United States rejected the United States Court of Appeals for the Fifth Circuit's interpretation of ***Snyder*** as a *per se* rule requiring such recollection in order for a federal court to apply AEDPA deference to a state court decision. ***See id.*** at 49; ***see also Colorado v. Beauvais***, 393 P.3d 509, 518 (Colo. 2017) (explaining that ***Thaler*** rejected the Fifth Circuit's "broad characterization of ***Snyder*** as creating an express credibility finding requirement" while noting that "express credibility findings significantly aid effective appellate review"); ***cf. Michigan v. Tennille***, 888 N.W.2d 278, 289-291 (Mich. App. 2016) (holding that under ***Snyder*** and ***Thaler*** an appellate court must examine the totality of the circumstances when determining if a trial court's factual finding is supported by the record in absence of an explicit finding regarding a demeanor-based explanation from the prosecution).

We have likewise explicitly rejected *per se* rules in the ***Batson*** context. ***See supra*** at 12-13. As we have emphasized throughout this Opinion, it is not one factor that leads us to the conclusion that the trial court's factual finding is unsupported by the record. Instead, it is the totality of the circumstances, including the trial court's failure to note Juror 67's demeanor on the record, which leads us to this conclusion. ***See Thaler***, 559 U.S. at 49. Therefore, our decision to vacate Appellant's judgment of sentence is consistent with ***Thaler***.

explanation offered by the prosecutor was highly implausible when considered in light of the totality of the circumstances surrounding the voir dire process.

It is for this reason that our dissenting colleague's argument that we are "substituting [our] judgment for that of the trial court," ***Dissenting Opinion***, ***post*** at 17, is flawed. Our dissenting colleague cites nothing in the record to indicate that the trial court observed Juror 67 and found that Juror 67's demeanor credibly exhibited the basis for the strike attributed to her by the Commonwealth.

Instead of relying on ***Snyder***, which is binding precedent, our learned colleague relies on ***Jackson***, which is not binding precedent for the reasons set forth above. Moreover, ***Jackson*** differs from the factual scenario in the case *sub judice*.

The extensive portion of Judge Beck's opinion quoted by our dissenting colleague did not address the third step of ***Batson***. ***See Dissenting Opinion***, ***post*** at 18-19, *quoting* ***Jackson***, 562 A.2d at 351 (Beck, J., opinion announcing the judgment of the court). Instead, this language came from Judge Beck's discussion of the second ***Batson*** step. ***See Jackson***, 562 A.2d at 351 (Beck, J., opinion announcing the judgment of the court).[24] Judge Beck only reached the third ***Batson*** step with respect to jurors who were challenged because of their alleged familiarity with the location of the crime. ***See id.*** at

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[24] The defendant in ***Jackson*** only argued step two of ***Batson*** with respect to this prospective juror. He argued step three for other prospective jurors.

352-354. As noted above, we agree with the trial court, the Commonwealth, and our dissenting colleague that the Commonwealth's proffered rationale for striking Juror 67 satisfied the second step of ***Batson***. Our disagreement is with the trial court's finding that Appellant failed to prove purposeful discrimination at step three of the ***Batson*** analysis.

Although Judge Beck did not reach the third ***Batson*** step in the portion of the opinion relied on by our dissenting colleague, she did reference it in her analysis of the second ***Batson*** step. Specifically, she stated that, "A trial judge should not uncritically accept [body language] or any other proffered explanation for a peremptory challenge. Instead, the judge should assess each proffered explanation in light of [his or] her independent recollection of the demeanor and responses of the venire panel members." ***Id.*** at 351. As noted above, in the case at bar the trial court failed to assess the Commonwealth's proffered explanation for striking Juror 67 in light of its independent recollection of Juror 67's demeanor and responses. Thus, this case is more akin to ***Snyder*** than to ***Jackson*** – in which the plurality failed to reach step three of the ***Batson*** test.

The persuasive value of the Commonwealth's explanation for striking Juror 67 is so low that, when combined with the other factors listed above, the totality of the circumstances indicates that the Commonwealth struck Juror 67 with discriminatory intent. The trial court's finding to the contrary was clearly erroneous. As such, we conclude that the Commonwealth violated

the Equal Protection Clause of the Fourteenth Amendment as interpreted by ***Batson***. As a ***Batson*** violation can never be harmless error, ***Commonwealth v. Basemore***, 744 A.2d 717, 734 (Pa. 2000), we vacate Appellant's judgment of sentence and remand for a new trial.

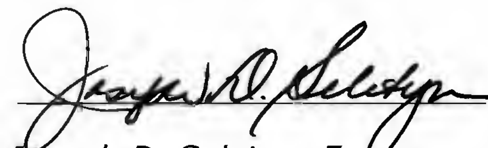
In sum, we conclude that there was sufficient evidence to convict Appellant at trial and Appellant's challenge to the denial of his motions to quash is moot. We conclude, however, that the Commonwealth's peremptory strike of Juror 67 was racially motivated and violated ***Batson***. Accordingly, we vacate Appellant's judgment of sentence and remand for a new trial. As explained in note 11 ***supra***, because we remand for a new trial we decline to address Appellant's remaining issues which would only entitle him to a new trial.

Judgment of sentence vacated. Case remanded. Jurisdiction relinquished.

Judge Musmanno joins this Opinion.

Judge Stabile files a Dissenting Opinion.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/19/2018

APPENDIX B:
TRIAL COURT OPINION
(1/1/2019)

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OFFICE OF JUDICIAL RECORDS
CRIMINAL DIVISION
FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	CP-51-CR-0002611-2013
	:	CP-51-CR-0002614-2013
	:	CP-51-CR-0002617-2013
	:	CP-51-CR-0002815-2013
v.	:	CP-51-CR-0002820-2013
	:	CP-51-CR-0002853-2013
	:	CP-51-CR-0002862-2013
	:	CP-51-CR-0002864-2013
	:	
DERRICK EDWARDS	:	3429 EDA 2018

CP-51-CR-0002611-2013 Comm. v Edwards, Derrick U E.
Opinion

OPINION

Derrick Edwards ("Appellant") appeals this Court's order denying his motion to dismiss on grounds of double jeopardy. This Court submits the following opinion pursuant to Pa. R.A.P. 1925(b) and recommends that Appellant's appeal be denied.

PROCEDURAL BACKGROUND

On November 4, 2014, a jury convicted Appellant of eight (8) counts of robbery, eight (8) counts of conspiracy to commit robbery, eight (8) counts of firearms not to be carried without a license, eight (8) counts of carrying firearms on the public streets of Philadelphia, eight (8) counts of possessing an instrument of a crime, one (1) count of attempted murder, one (1) count of aggravated assault, and one (1) count of conspiracy to commit aggravated assault. On January 9, 2015, this Court sentenced Appellant to an aggregate term of twenty-two (22) to forty-four (44) years' incarceration.

On direct appeal, Appellant argued that the Commonwealth used its peremptory challenges to systematically strike African-Americans from the jury, in violation of the Fourteenth Amendment to the Constitution as interpreted by Batson v. Kentucky, 476 U.S. 79 (1986). On January 19, 2018, the Superior Court vacated Appellant's judgment of sentence and

remanded the case for a new trial, finding that "Appellant demonstrated a *Batson* violation by showing that the Commonwealth struck at least one juror with discriminatory intent." Commonwealth v. Edwards, 2018 Pa. Super 9, 177 A.3d 963, 967 (Pa. Super. 2018).

On remand, Appellant filed a "motion to dismiss" his case "with prejudice," arguing that the double jeopardy clauses of both the United States and Pennsylvania Constitutions preclude retrial. The Commonwealth filed a letter brief in opposition to Appellant's motion, and on August 15, 2018, this Court conducted a hearing on the matter. On September 12, 2018, this Court entered an order denying Appellant's motion.

On September 27, 2018, Appellant filed an interlocutory appeal to the Superior Court. On January 14, 2019, Appellant filed a Statement of Matters Complained of on Appeal pursuant to Pa. R.A.P. 1925(b).

FACTUAL BACKGROUND

The facts of this case were detailed in this Court's Rule 1925(a) opinion filed on February 24, 2016, and were summarized as follows by the Superior Court:

> ... At approximately 5:50 a.m. on September 18, 2012, Appellant and Rasheed Thomas ('Thomas') robbed Keith Crawford ('Crawford') at gunpoint. Approximately five minutes later, Appellant and Thomas approached Kevin Cunningham ('Cunningham') as he waited at a bus stop. Appellant put a firearm in Cunningham's face and said, 'You know what this is.' When Cunningham did not lie down on the ground, Appellant pushed him to the ground and struck him twice in the back of the head with the firearm. Appellant and Thomas took Cunningham's cash, a set of barber clippers, a Bible, an engagement ring, and a cellular telephone.
>
> At approximately 2:00 a.m. on October 1, 2012, two African-American males approached Whitney Coates ('Coates'). One of the males pointed a firearm at her face and said "You know what it is." Coates gave the assailants her cellular phone. Approximately 30 minutes later, Appellant and Thomas attempted to rob Donald Coke ('Coke') at gunpoint. When Coke resisted, Appellant shot him twice in the left arm. Appellant and Thomas then fled in an SUV driven by Henry Bayard ('Bayard'). The SUV belonged to Bayard's mother.

> Approximately 15 minutes later, Appellant and Bayard robbed Duquan Crump ('Crump') at gunpoint. They fled the scene with Crump's wallet, cellular telephone, and watch. Approximately 15 minutes later, Appellant and Thomas robbed Shanice Jones ('Jones') at gunpoint. They fled with Jones' wallet and cellular phone. Approximately 15 minutes later, two African-American males approached Hector De Jesus ('De Jesus'). One of the males pointed a firearm at him and ordered him to hand over his belongings. The assailants took $150.00, an iPod touch, a wallet, and a backpack containing clothes and a taser.
>
> Approximately 45 minutes later, an African-American male exited a vehicle and pointed a firearm at Jonas Floyd ('Floyd'). Another African-American male then exited the vehicle. The assailants took Floyd's tote bag, headphones, cellular telephone, wallet, keys, and United States currency. Shortly after this robbery, police located Appellant, Thomas, and Bayard inside the SUV that belonged to Bayard's mother. In addition to the firearms used in the robberies, police recovered a significant amount of the goods stolen from the eight victims listed above.

Edwards, 177 A.3d 963, 967.

Before trial, this Court conducted a jury voir dire. Unbeknown to this Court, the court crier noted the race and gender of each prospective juror on the juror strike sheet provided to defense counsel and the Commonwealth. Defense counsel objected to the notations and this Court overruled the objection. The parties then utilized their eight (8) respective peremptory strikes, whereby the Commonwealth struck seven (7) prospective African-American jurors. Appellant objected to the Commonwealth's striking of four of these prospective jurors, but this Court, after inquiring into the Commonwealth's reasons for striking these specific venirepersons, concluded that the Commonwealth's reasons were race-neutral and overruled Appellant's objections.

On appeal, the Superior Court rejected Appellant's argument that this Court "violated *Batson* as a matter of law by listing the races and genders of potential jurors on the peremptory strike sheet." While finding that "listing the races and genders of prospective jurors on the peremptory strike sheet" was "ill-advised and inappropriate," the Court held that the court crier's notations "did not violate *Batson* as a matter of law." Edwards, 177 A.3d 963, 970-972. The

Court next addressed Appellant's specific claims that "the Commonwealth violated *Batson* by striking four African-American members of the venire," and ruled that the Commonwealth had impermissibly struck one of these venirepersons on the basis of race. Id. The Court noted that there is a three-prong test for a *Batson* challenge:

> First, the defendant must make a *prima facie* showing that the circumstances give rise to an inference that the prosecutor struck one or more prospective jurors on account of race; second, if the *prima facie* showing is made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the juror(s) at issue; and third, the trial court must then make the ultimate determination of whether the defense has carried its burden of proving purposeful discrimination.

Id. at 971 (citing Commonwealth v. Watkins, 630 Pa. 652, 108 A.3d 692, 708 (2014)).

Regarding the first prong, the Court held that Appellant "established a *prima facie* case of purposeful discrimination" on the part of the prosecutor for the combined reasons that (a) "Appellant is African-American and the Commonwealth struck seven African-American prospective jurors," and (b) the court crier listed "the races and genders of prospective jurors on the peremptory strike sheet." Id. at 972-973. Regarding the second prong, the Court found that the Commonwealth "proffered race-neutral explanations for striking the four African-American jurors in question." Id. at 973.

Regarding the third prong, however, the Court held that "the defense carried its burden of proving purposeful discrimination" with respect to the Commonwealth's striking of one of the four jurors at issue. The Court found "three factors strongly indicative" of the Commonwealth's "discriminatory intent" to strike Juror 67: (1) "the identification of the race and gender of the potential jurors on the peremptory strike sheet;" (2) "the probability of the Commonwealth striking such a disproportionate number of African-Americans by chance is extremely low;" and (3) "the Commonwealth's race-neutral explanation for striking Juror 67 was wholly underpersuasive[sic] in that the Commonwealth relied on her supposedly inattentive posture to

conclude that she would not discharge her duties as a juror in a fair and impartial manner." Id. at 975. Because a *Batson* violation "can never be harmless error," the Court vacated Appellant's judgment of sentence and remanded for a new trial. Id. at 978-979.

DISCUSSION

On remand, Appellant argues that a retrial is barred on double jeopardy grounds because the Commonwealth's *Batson* violation "served no purpose but to deprive [Appellant] of a fair trial and subvert the truth determining process." Appellant is mistaken.

The Pennsylvania Constitution provides double jeopardy protection that is at least as broad, and possibly "broader," than the protection afforded under the federal Constitution. Commonwealth v. Hockenbury, 549 Pa. 527, 536-537 (1997) (citing Commonwealth v. Smith, 532 Pa. 177 (1992)). "[T]he double jeopardy clause of the Pennsylvania Constitution [Article 1, § 10] prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial." Smith, 532 Pa. 177, 186. "[I]n order for double jeopardy to bar retrial in cases of prosecutorial misconduct, there must be a showing that the Commonwealth either (1) goaded the defendant into moving for a mistrial, or (2) specifically undertook to prejudice the defendant to the point of denying him a fair trial." Commonwealth v. Moose, 623 A.2d 831, 836 (Pa. Super. 1993).

Appellant has cited no case in which a *Batson* violation barred retrial on grounds of double jeopardy, and this Court's research has unearthed none. Appellant relies on Smith supra and Commonwealth v. Simone, 712 A.2d 770 (Pa. Super. 1998) in support of his double jeopardy argument. In Smith, the appellant was convicted of conspiracy to commit murder. The Pennsylvania Supreme Court found that the evidence sufficed to sustain the appellant's

conviction but remanded the matter for a new trial due to the erroneous admission of hearsay testimony. Before retrial commenced, the appellant learned that the Commonwealth knowingly withheld exculpatory physical evidence for nearly four years. When a prosecution witness exposed the existence of the exculpatory evidence, the prosecutor "excoriated" his own witness and falsely accused him of having fabricated and planted the evidence. The Commonwealth also concealed an agreement with its "chief witness," whereby the witness would testify against the appellant in exchange for a more lenient sentence recommendation in an unrelated case. Smith, 532 Pa. 177, 180-184.

Addressing the appellant's motion to dismiss on grounds of double jeopardy, the Supreme Court noted that the prosecution's "bad faith" was "beyond any possibility of doubt," and that it "would be hard to imagine more egregious prosecutorial tactics." Id. at 182. The prosecution's "[d]eliberate failure to disclose material exculpatory physical evidence during a capital trial, intentional suppression of the evidence while arguing in favor of the death sentence on direct appeal, and the investigation of [its witness's] role in the production of the evidence rather than its own role in the suppression of evidence constitute[d] prosecutorial misconduct such as violate[d] all principles of justice and fairness embodied in the Pennsylvania Constitution's double jeopardy clause." Id. at 183. The Court therefore held that "[b]ecause the prosecutor's conduct ... was intended to prejudice the [appellant] and thereby deny him a fair trial, appellant must be discharged on the grounds that his double jeopardy rights, as guaranteed by the Pennsylvania Constitution, would be violated by conducting a second trial." Id. at 186.

In Simone, the appellant was granted a mistrial after the prosecutor elicited "improper testimony concerning appellant's unrelated criminal conduct." Simone, 712 A.2d 770. The appellant subsequently filed a motion to bar his retrial, but the trial court denied the motion. On

appeal, the Superior Court rejected the appellant's double jeopardy argument, explaining that *Smith* did not create a *per se* bar to retrial in all cases of intentional prosecutorial misconduct. Id. at 774-775 (citations omitted here). Rather, "the *Smith* court primarily was concerned with prosecution tactics, which actually were designed to demean or subvert the truth seeking process." Id. (citation omitted here). Accordingly, the Court held that even if the prosecutor's "questioning demonstrated intentional misconduct, this fact would not bar retrial of appellant" because the misconduct "did not undermine the truth seeking process." Id. at 775.

Neither the Supreme Court in Smith, nor the Superior Court in Simone, addressed whether a *Batson* violation barred retrial under double jeopardy principles. The Superior Court in Commonwealth v. Basemore, 875 A.2d 350 (Pa. Super. 2005), in contrast, squarely addressed the issue and held that a *Batson* violation, "without more," does not so "subvert[] the truth seeking process as to implicate double jeopardy concerns." Id. at 357.

The appellant in Basemore, who was convicted of murder and robbery, filed a Post-Conviction Relief Act ("PCRA") petition alleging a *Batson* violation in the jury selection process. The PCRA court granted the appellant's petition and ordered a retrial, finding that the trial prosecutor "engaged in a pattern of discrimination during voir dire" with "a conscious strategy to exclude African-American jurors." Id. at 352. The appellant thereafter filed a motion to dismiss the charges, which the PCRA court denied. Retrial ensued and the appellant was again convicted of murder and related charges. Id. On appeal, the appellant argued that the "prosecutor's *Batson* violation during the first trial manifested a conscious pattern of discrimination and denied [the appellant] equal protection of the law, thereby fatally prejudicing the proceedings." Id. The appellant argued that "a *Batson* violation constitutes a deliberate

attempt to deprive a criminal defendant of a fair trial thus implicating double jeopardy concerns under" Pennsylvania case law, including Smith and cases following Smith. Id. at 353.

Rejecting the appellant's argument, the Superior Court explained that "[s]ince the *Batson* decision, hundreds of state and federal courts have applied *Batson*, and, when *Batson* violations have occurred after jeopardy attached, those courts have remanded cases for further evidentiary proceedings, reversed convictions, and remanded for new trials." Id. at 353. However, "[n]o state or federal court in any published or unpublished decision has ever held that a prosecutor's *Batson* violation, no matter the circumstances, constitutes prosecutorial misconduct of such a degree as to implicate double jeopardy principles." Id.

The Court held that while it "is well-settled that a *Batson* violation constitutes intentional misconduct by a prosecutor and a violation of the defendant's constitutional rights[,]" the violation, "without more," does not "constitute[] the type of prosecutorial misconduct" that bars retrial on double jeopardy grounds. Id. at 355. In cases where prosecutorial misconduct barred retrial on double jeopardy grounds, the courts "were concerned with misrepresenting and/or withholding of evidence by the prosecution so as to obtain an unfair verdict." Id. "These cases discussed actions taken by the prosecutor which hampered the ability of the defendant to present a defense and mocked the integrity of the trial court, tactics that were designed to demean or subvert the truth seeking process." Id. (citations omitted here). "[A]ll of these cases concerned a course of conduct by the prosecution, such as in *Smith*, where the prosecutor's concealment of evidence lasted throughout the trial and well into the appellate process," or had "affected every stage of the trial process, beginning in *voir dire* and continuing into the appellate proceedings." Id. "Further, in all of these cases, the prosecutor's misconduct was compounded because of the relatively weak cases against the defendants." Id.

Distinguishing the effects of *Batson* violations from the harms flowing from other forms of prosecutorial misconduct, the Court explained:

> *Batson* violations are a peculiar type of prosecutorial misconduct. While we in no way wish to minimize the importance of the constitutional principles underlying the *Batson* decision or to disregard the severity of the prosecutor's misconduct in this matter, we believe that there are legitimate distinctions to be made between a prosecutor's misconduct 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, 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 rendering a fair verdict. Thus, we are not persuaded by Appellant's argument that the prosecution's *Batson* violation necessitates the ultimate remedy of double jeopardy.

Basemore, 875 A.2d 350, 356. After exhaustively reviewing the relevant case law, the Court concluded that "nowhere in the approximately twenty years of *Batson* jurisprudence has there been any suggestion that a *Batson* violation so subverts the truth seeking process as to implicate double jeopardy concerns." Id. at 357.

Here, in accord with Basemore, the Commonwealth's *Batson* violation should not bar Appellant's retrial. The prosecutor's misconduct did not involve "concealing exculpatory evidence or completely disrupting the trial process." Quoting Basemore, supra. Nor did the prosecutor's "misconduct so permeate[] the presentation of evidence that it was not possible for a reasonable jury to reach a fair verdict[.]"

In the case at bar, the Superior Court found that Appellant had "demonstrated a *Batson* violation by showing the Commonwealth struck at least one juror (juror #61) with discriminatory intent" (Id at 177 A.3rd 963, 967). At the evidentiary hearing held pursuant to Appellant's Motion to Dismiss, the prosecutor discussed her reasons for striking this juror. She testified that along with listening to the jurors answer questions, "we look at body language a lot". About juror #61, she observed that "she was sitting back....kind of with her arm against [the gallery] as if she

seemed if she didn't care to be there" ... "she wasn't really engaged in Her Honor's questioning"... "she caught my attention because [she] was different than everyone else"..."her body language to me felt guarded, and I remember her being somewhat cavalier or flippant with her answers, just in the attitude, the way she delivered them. And I thought this person doesn't seem like they want to be here; that they wouldn't be an attentive juror, someone who was going to listen." (N.T. 8/15/18 pgs. 10-12).

There is no evidence of misconduct, and certainly nothing to support intentional misconduct in the prosecutor's decision to strike a juror because of a belief that the juror had a bad attitude, whether that belief is based upon a juror's answers, tone of voice, or body language.

Furthermore, is no evidence that the selected jurors were animated by any bias in rendering their original verdict, or that their truth-seeking process was undermined by the Commonwealth's *Batson* violation. Id. ("[I]t is only if we accept the very stereotypes espoused by the prosecution that we can conclude that the first jury was incapable of rendering a fair verdict."). Indeed, as the Superior Court held, the evidence was sufficient to sustain all of the jury's verdicts which Appellant challenged on his direct appeal. Edwards, 177 A.3d 963, 970.

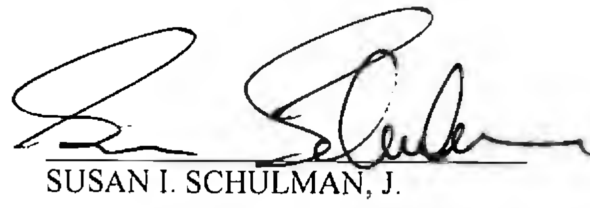
Because Appellant identifies no reason to depart from the Superior Court's holding in Basemore that a *Batson* violation does not *per se* bar retrial on grounds of double jeopardy, this Court properly denied Appellant's motion to dismiss.

CONCLUSION

For the reasons set forth in the foregoing Opinion, this Court's Order denying Appellant's motion to dismiss on double jeopardy grounds should be affirmed.

BY THE COURT:

DATE: 1/31/19



SUSAN I. SCHULMAN, J.

PROOF OF SERVICE

I, Darece Williford, secretary to Honorable Susan I. Schulman, hereby certify that I served, on February 1, 2019 by First-Class and Inter-Office mail, a true and correct copy of the foregoing Opinion on the following

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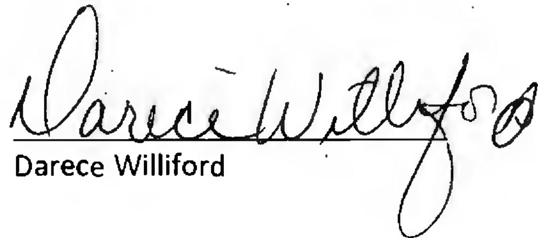
Philadelphia, PA 19107
(Inter-office mail)



Darece Williford

APPENDIX C:
SUPERIOR COURT OPINION
(“*EDWARDS II*”*)* (7/29/2020)

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA v. DERRICK EDWARDS Appellant	: : : : : : : : :	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3429 EDA 2018

Appeal from the Order Entered September 11, 2018
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): 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

BEFORE: PANELLA, P.J., OLSON, J., and NICHOLS, J.

MEMORANDUM BY PANELLA, P.J.: **FILED JULY 29, 2020**

Derrick Edwards appeals from the order entered in the Philadelphia County Court of Common Pleas denying his motion to dismiss based on double jeopardy grounds. After careful review, we affirm.

In 2012, Edwards, along with two co-conspirators, drove around Philadelphia robbing victims at gunpoint. During one of the robberies, Edwards shot the victim twice. Edwards was charged with various crimes related to these events at eight separate docket numbers. The eight cases proceeded to a consolidated trial.

After a jury trial, Edwards was convicted of eight counts each of robbery, conspiracy to commit robbery, carrying firearms without a license, carrying

firearms on the public streets of Philadelphia, and possessing an instrument of crime, and one count each of attempted murder, aggravated assault, and conspiracy to commit aggravated assault. Edwards was sentenced to an aggregate term of twenty-two to forty-four years' incarceration.

In Edwards' direct appeal, involving all eight lower-court docket numbers, he raised a challenge pursuant to ***Batson v. Kentucky***, 476 U.S. 79 (1986), based on the Commonwealth's use of its peremptory challenges to strike African-Americans from the jury. This Court concluded that Edwards demonstrated a ***Batson*** violation by showing the Commonwealth struck at least one juror with discriminatory intent. ***See Commonwealth v. Edwards***, 177 A.3d 963 (Pa. Super. 2018). We therefore vacated Edwards' judgment of sentence and remanded the case for a new trial. ***See id.*** at 979.

Edwards filed a motion to dismiss arguing retrial was barred on double jeopardy grounds. The trial court entered a single order denying the motion as to all eight docket numbers. On September 27, 2018, Edwards filed an interlocutory appeal by filing eight notices of appeal at each docket number, each with a different time stamp, and each listing all eight trial court docket numbers.

In ***Commonwealth v. Walker,*** 185 A.3d 969 (Pa. 2018), our Supreme Court held that "where a single order resolves issues arising on more than one docket, separate notices of appeal must be filed for each case." ***Id***. at 971.

"The failure to do so requires the appellate court to quash the appeal." ***Id***. at 976-977; ***see also*** Pa.R.A.P. 341, Official Note.

A divided three-judge panel of this Court then filed a published opinion in ***Commonwealth v. Creese***, 216 A.3d 1142 (Pa. Super. 2019), construing ***Walker*** to mean that "we may not accept a notice of appeal listing multiple docket numbers, even if those notices are included in the records of each case." ***Creese***, 216 A.3d at 1144. Instead, the panel concluded "a notice of appeal may contain ***only one*** docket number." ***Id.*** (emphasis added). The panel quashed the appeal. Neither party filed a petition for allowance of appeal with the Supreme Court, rendering ***Creese*** a final disposition and setting precedent in this Court.

Our Court recently granted *en banc* review to decide whether ***Walker*** and Rule 341 dictate that only one number may appear on a notice of appeal. In an opinion filed in July 2020, this Court expressly overruled ***Creese***'s determination that "a notice of appeal may contain only one docket number." ***Commonwealth v. Johnson***, ___ A.3d.___ (Pa. Super. 2020) at *___. As a result, the fact that Edwards' notice of appeal contained more than one number is of no consequence.

We observed that Rule 341 and ***Walker*** make no mention of case numbers on a notice of appeal. ***See id***. To be sure, the error in ***Walker*** was the filing of a ***single*** notice of appeal affecting multiple cases and several defendants. The bright-line rule set forth in ***Walker*** only required an appellant

to file a ***"separate"*** notice of appeal for each lower court docket the appellant was challenging.

Here, it appears Edwards filed a separate notice of appeal for each of the eight dockets below, because all eight notices have different time stamps. The fact that the notices contained all eight lower court numbers is of no consequence. Indeed, the Rules of Appellate Procedure are to be liberally construed to effectuate justice. Pa.R.A.P. 105(a); ***see also*** 1 Pa.C.S.A. § 1928(c). We should not invalidate an otherwise timely appeal based on the inclusion of multiple docket numbers, a practice that the Rules themselves do not expressly forbid. Therefore, we decline to quash this appeal and will review the merits of Edwards' claim.

Before we may address the merits, we must determine whether we have jurisdiction over this appeal. Instantly, Edwards claims jurisdiction properly lies in this Court pursuant to Pa.R.A.P. 311, relating to interlocutory appeals as of right. The only section of Rule 311 that may be relevant here provides in pertinent part:

> **(a) General rule.** An appeal may be taken as of right and without reference to Pa.R.A.P. 341(c) from:
>
> ....
>
> (6) *New trials.* An order in a civil action or proceeding awarding a new trial, or an order in a criminal proceeding awarding a new trial where the defendant claims that the proper disposition of the matter would be an absolute discharge or where the Commonwealth claims that the lower court committed an error of law.

Pa.R.A.P. 311(a)(6). However, Edwards does not appeal the order granting a new trial, but rather an order denying his pretrial motion to dismiss a new trial on double jeopardy grounds. As no other section applies to the instant situation, Rule 311 is inapplicable here, and as a result, we cannot exercise jurisdiction on that basis.

Nevertheless, we may be able to exercise jurisdiction over this appeal to the extent the order denying Edward's pretrial motion to dismiss qualifies as a collateral order under Pa.R.A.P. 313, which provides in part:

> A collateral order is an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

Pa.R.A.P. 313(b).

Our Supreme Court has specifically held that orders denying a defendant's motion to dismiss on double jeopardy grounds are appealable as collateral orders, *so long as the motion is not found to be frivolous*. ***See Commonwealth v. Orie***, 22 A.3d 1021, 1024 (Pa. 2011); ***see also Commonwealth v. Brady,*** 508 A.2d 286, 291 (Pa. 1986); ***see also*** Rule 313, Comment (specifically citing an order denying a pretrial motion to dismiss on double jeopardy grounds as an example of a collateral order).

Further, in a recently filed *en banc* opinion, this Court reaffirmed the proposition that an order denying a double jeopardy motion, which makes no finding that the motion is frivolous, is a collateral order under Rule 313 and

immediately appealable. ***See Commonwealth v. Gross***, ___ A.3d.___, 375 EDA 2016 (Pa. Super. 2020) at *9. Thus, this appeal is properly before us for review.[1]

On appeal, Edwards contends a new trial is barred on double jeopardy grounds.

> An appeal grounded in double jeopardy raises a question of constitutional law. This court's scope of review in making a determination on a question of law is, as always, plenary. As with all questions of law, the appellate standard of review is de novo[.] To the extent that the factual findings of the trial court impact its double jeopardy ruling, we apply a more deferential standard of review to those findings:
>
> Where issues of credibility and weight of the evidence are concerned, it is not the function of the appellate court to substitute its judgment based on a cold record for that of the trial court. The

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[1] After the decision in ***Orie***, Pa.R.Crim.P. 587 was amended, effective July 4, 2013, to govern the procedure for addressing a double jeopardy motion to dismiss. It is clear from a review of the record that the trial court failed to comply with the terms of Rule 587 in denying Edwards' motion to dismiss on the basis of double jeopardy. The trial court erred in failing to enter a statement of findings of fact and conclusions of law on the record, in failing to enter a specific finding on the record as to frivolousness and in failing to advise Edwards of his appellate rights. ***See*** Pa.R.Crim.P. 587(B)(3)-(6). However, this Court has recently concluded that Rule 587 only governs the trial court's procedure, and does not govern or control appellate jurisdiction. ***See Gross***, at *32, n.1.

Accordingly, Edwards could have appealed on the basis that the trial court failed to follow the dictates of Rule 587. However, Edwards did not raise this issue on appeal and this procedural rule violation is not an issue which we may raise *sua sponte*. ***See Commonwealth v. Colavita***, 993 A.2d 874, 891 (Pa. 2010) (holding that, generally, "[w]here the parties fail to preserve an issue for appeal, the Superior Court may not address that issue *sua sponte*") (quotations and citations omitted); ***see also In re Estate of Tscherneff***, 203 A.3d 1020, 1027 (Pa. Super. 2019) (noting that there are only "a few discrete, limited non-jurisdictional issues that courts may raise *sua sponte*").

> weight to be accorded conflicting evidence is exclusively for the fact finder, whose findings will not be disturbed on appeal if they are supported by the record.

Commonwealth v. Graham, 109 A.3d 733, 736 (Pa. Super. 2015) (citation omitted).

The Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and Article 1, § 10 of the Pennsylvania Constitution prohibit retrial where prosecutorial misconduct during trial provokes a criminal defendant into moving for a mistrial. ***See Oregon v. Kennedy***, 456 U.S. 667, 679 (1982); ***see also Commonwealth v. Simons***, 522 A.2d 537, 540 (Pa. 1987). However, Article 1, § 10 of the Pennsylvania Constitution offers broader protection than its federal counterpart in that

> the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial.

Commonwealth v. Smith, 615 A.2d 321, 325 (Pa. 1992). Our Supreme Court has recently held that in addition to the behavior described in ***Smith***, prosecutorial overreaching[2] sufficient to invoke double jeopardy protections

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[2] Prior to ***Kennedy***, the limiting principle was expressed in terms of prosecutorial overreaching – that is, misconduct intended to provoke a defense motion for a mistrial or actions otherwise taken in bad faith to harass or unfairly prejudice the defendant. ***See Lee v. United States***, 432 U.S. 23, 34 (1977); ***see also Commonwealth v. Starks***, 416 A.2d 498, 500 (Pa. 1980).

under Article 1, § 10 of the Pennsylvania Constitution includes reckless misconduct which deprives the defendant of a fair trial. ***See Commonwealth v. Johnson***, ___ A.3d.___, 40 EAP 2018 (Pa., filed May 19, 2020) ("***Johnson (Pa.)***"). Therefore, the type of misconduct which qualifies as overreaching under our state constitution encompasses governmental errors that occur absent a specific intent to deny a defendant his constitutional rights. ***See id***.

Edwards argues a retrial is barred on double jeopardy grounds because the Commonwealth's ***Batson*** violation served no other purpose than to

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In ***Kennedy***, the United States Supreme Court disapproved further use of the "overreaching" test, and instead held the Fifth Amendment immunizes the defendant from retrial only where the government's actions were "intended to 'goad' the defendant into moving for a mistrial." ***Id***. at 675-676. In ***Simons***, the Pennsylvania Supreme Court adopted the ***Kennedy*** rule, and found double jeopardy only attached to those mistrials which had been *intentionally* caused by prosecutorial misconduct. ***Simons***, 522 A.2d at 540.

Subsequently, in ***Smith***, our Supreme Court construed Pennsylvania's double-jeopardy provision as supplying broader protections than its federal counterpart, and returned to the pre-***Kennedy*** "overreaching" test. ***Smith*** was grounded on the distinction between mere error and overreaching, as set forth in ***Starks***. ***See Smith***, 615 A.2d at 324. ***Starks*** conveyed that, whereas prosecutorial errors are an "inevitable part of the trial process," prosecutorial overreaching is not. ***Starks***, 416 A.2d at 500.

Our Supreme Court has concluded that although it departed from the Fifth Amendment in the wake of the ***Kennedy*** decision, it never disavowed the "overreaching" prerequisite, which is firmly entrenched in case precedent both pre- and post-***Kennedy***. ***See Commonwealth v. Johnson***, ___ A.3d ___, 40 EAP 2018, (Pa., filed May 19, 2020).

deprive him of a fair trial and subvert the truth determining process. ***See*** Appellant's Brief, at 7. Edwards acknowledges that we are bound by our precedent in ***Commonwealth v. Basemore***, 875 A.2d 350 (Pa. Super. 2005), in which we held that a ***Batson*** violation does not *per se* bar retrial on double jeopardy grounds, but requests that we revisit the dissent in ***Basemore*** in order to reconsider our previous holding.

We note that the Supreme Court of Pennsylvania has held that a prosecutor's reckless disregard of the constitutional rights of the defendant can raise double jeopardy concerns under the Pennsylvania Constitution. ***See Johnson (Pa.)***. Therefore, at least some of the reasoning employed in ***Basemore*** is no longer valid. ***See Basemore***, 875 A.2d at 356.

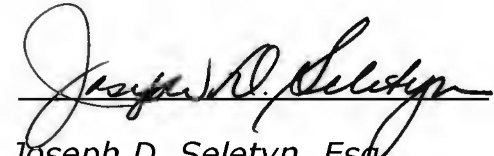
However, the Pennsylvania Supreme Court has not addressed the overarching holding from ***Basemore***, that "nowhere in the approximately twenty years of ***Batson*** jurisprudence has there been any suggestion that a ***Batson*** violation so subverts the truth seeking process as to implicate double jeopardy concerns." ***Basemore***, 875 A.2d at 357. As this reasoning remains valid we are bound by it. We conclude that Edwards is not entitled to relief in this case.

Order affirmed. Jurisdiction relinquished.

Judge Olson joins the memorandum.

Judge Nichols concurs in the result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/29/2020

EXHIBIT A:
STRIKE SHEET & JUDGE’S LIST

DATE: [illegible]

DEF: [illegible] CR# [illegible]

DA: [illegible]

ATTY: [illegible]

STRIKE SHEET

No.	I.D#	Seat	Commonwealth	Defendant	Sel. Juror #
1	0044	WF			
2	1878				
3	0152				
4	0593				
5	0448				
6	0454				
7	0605				
8	1553				
9	0112	BF	accept	Accept	Juror #1
10	1162				
11	1109				
12	1451				
13	1208	BF	Accept	Accept	Juror #2
14	0608	BF	Accept	Accept	Juror #3
15	1595				
16	0700	OF	~~Strike #1~~ accept	~~Accept~~ Strike #1	
17	0068				
18	1440				
19	1173	WF	accept	Strike # [illegible]	
20	1472				
21	0842				
22	0415				
23	1284	WF			
24	1060				
25	1164	BF	~~Accept~~ Strike #1	Accept	

26					
27					
28					
29	2041	WF			
30	1786				
31	0714				
32	1339	BM			
33	0950	BM	Accept	Accept	Juror #4
34	0525	BF	strike #2	Accept	
35	0791	WF	Accept	Strike #3	
36	0099				
37	1071				
38	0251	WM	Accept	Strike #4	
39	0064				
40	2044				
41	0607				
42	0072	WM	Accept	Accept	Juror #5
43	1054				
44	0990				
45	0184	BF	Accept	Accept	Juror #6
46	0513	OM			
47	0067				
48	0154	BF	Accept	Strike #5	
49	1775				
50	0219				
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59					

DATE: [illegible]

DEF. [illegible] CR# [illegible]

DA: [illegible]

ATTY: [illegible]

STRIKE SHEET

No.	I.D#	Seat	Commonwealth	Defendant	Sel. Juror #
51	0147	WF	Accept	Accept	Juror #7
52	0818				
53	1779				
54	0782				
55	1219	WM	Accept	Strike #6	
56	0514	BF	Strike #3	Accept	
57	0308	BF	Strike #4	Accept	
58	2018				
59	1003	WM	Accept	Accept	Juror #8
60	1576				
61	1147	BF	Strike #5	Accept	
62	1713				
63	0360				
64	0787				
65	0022				
66	1083	WM	Accept	Accept	Juror #9
67	1745	BF	Strike #6	Accept	
68	0163				
69	1367	WF	Accept	Accept	Juror #10
70	2124	OM	Accept	Accept	Juror #11
71	2145				
72	0087				
73	1536				
74	0983	OF	Strike #7	Accept	
75	1404	WM	Accept	Strike #7	

26					
27		[illegible]		[illegible]	[illegible]
28	[illegible]	[illegible]	Accept	Strike	
29	[illegible]	BF	[illegible] # 1	Accept	
30	[illegible]				
31	1650	WF	Accept	Accept	
32	0253				
33	1086	WF			
34	1738				
35	0538				
36	0756	WF			
37	0892	BF			
38	0298	BM			
39	Avail				
40	0162				
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Judge's List

Judge: SCHULMAN
Event: SCHU 10/28/14

Room: CJC901
Trial Type: CRIMINAL - PETIT

Date: 10/28/14
Time: 9:44 AM

	Random No.	Part No.	Pool Seq.	Name		Code (see legend)
A *	1	100522328	17- 0046	ANNA MC MICHEN PHILADELPHIA	WF	BC
B *	2	101664267	03- 1878	JAMES WP KORHAN SR PHILADELPHIA	WM	NU
A *	3	100478953	17- 0152	MICHELE RENEE MACK PHILADELPHIA	BF	NU
B *	4	101870223	17- 0593	THOMAS MCDANIEL PHILADELPHIA	WM	NU
B *	5	100230725	17- 0448	LINDA J DUNSTON PHILADELPHIA	BF	NU
A *	6	100444861	17- 0454	DONNA LANE PHILADELPHIA	meds	NU
B *	7	100116840	17- 0205	FRANK CASSELLO PHILADELPHIA	WM	NU
B *	8	100413640	17- 1553	VANESSA JULYE PHILADELPHIA	BF	NU
A *	9	100783492	17- 0112	CLAIRESSE D TARZAN PHILADELPHIA	BF	J#1
B *	10	100643165	17- 1162	STEPHEN M PYNE PHILADELPHIA	WM	NU
B *	11	100310095	03- 1109	KIA C GORDINE PHILADELPHIA	BF	NU
B *	12	100498810	17- 1451	ALLEN MARTIN PHILADELPHIA	BM	NU
A	13	100489090	17- 1208	TOMEKA S MAGEE PHILADELPHIA	BF	J#2 - Excused For Hard Ship 10/29
A	14	100354631	17- 0608	DENEE A HOLBROOK PHILADELPHIA	BF	J#3
B	15	100428306	17- 1595	KEVIN K KINSEY PHILADELPHIA	BM	NU
A	16	100933190	17- 0700	SUNI SUNIL CHACKO PHILADELPHIA	AF	AS1
B	17	101134140	17- 0028	TAMARA T TEAFORD PHILADELPHIA	WF	NU
A	18	100210436	17- 1440	MARTIN F DUFFY PHILADELPHIA	WM	NU
A	19	101868959	17- 1173	TESSA MARTIN PHILADELPHIA	WF	AS2

Legend: J=Jury A=Alternate NU=Not Used BC=By Court
PP=Peremptory Challenge Prosecutor/Plaintiff PD=Peremptory Challenge Defense
CP=Challenge ... llenge For Cause Defense
JO=Joint Pere ... NS=Not Sent to Court

Note: Return to Jury ... el.

CP-51-CR-0002611-2013 Comm. v. Edwards, Derrick U E
Jury Selection

7216546181

Judge's List

Judge: SCHULMAN
Event: SCHU 10/28/14

Room: CJC901
Trial Type: CRIMINAL - PETIT

Date: 10/28/14
Time: 9:44 AM

	Random No.	Part No.	Pool Seq.	Name		Code (see legend)
B	20	100144226	17- 1772	ANTHONY S CIACCIO JR PHILADELPHIA	WM	NU
A	21	100075850	17- 0842	MARK BOWSER SR PHILADELPHIA	BM	NU
B	22	100150052	17- 0415	YVONNE A COCHRAN PHILADELPHIA	BF	NU
A	23	101830352	17- 1284	POLINA CALABRO PHILADELPHIA	meds WF	BC
B	24	101811902	17- 1060	MATTHEW CARROLL ZIMMER PHILADELPHIA		NU
A	25	101761221	17- 1164	LISA M NELSON HILL CHESTER	BF	CS1
B	26	100036754	03- 0198	ANITA L BELL PHILADELPHIA		NU
A	27	100100376	17- 0636	SANDRA BRYDGES PHILADELPHIA	WF	BC
B	28	100424639	17- 1803	LISA ANNE KENNY PHILADELPHIA	WF	NU
A	29	100817292	17- 0041	RANDI E ULITSKY PHILADELPHIA	WF	BC
B	30	100713503	17- 1786	KATHLEEN M SCHIMANECK PHILADELPHIA	WF	NU
B	31	100629182	17- 0714	KETTLIE PIERRE PHILADELPHIA		NU
A	32	100404019	17- 1339	ERNEST L JONES JR PHILADELPHIA	BM	BC
A	33	100396416	17- 0950	ILLYA NIMOY JOHNSON PHILADELPHIA	BM	J#4
A	34	101052307	17- 0525	SHIRLEY MORRISON PHILADELPHIA	BF	AS2
A	35	101809331	17- 0791	ARIELLE JULIA WOLFE PHILADELPHIA		AS3
B	36	101144065	17- 0099	DENNIS JAMES WARD PHILADELPHIA	WM	NU
B	37	100639592	17- 1071	VICTORIA H QUAINTANCE PHILADELPHIA	WF	NU
A	38	101487362	17- 0251	RICHARD JASON DOMINUS PHILADELPHIA	WM	AS4

Legend: J=Jury A=Alternate NU=Not Used BC=By Court
PP=Peremptory Challenge Prosecutor/Plaintiff PD=Peremptory Challenge Defense
CP=Challenge For Cause Prosecutor/Plaintiff CD=Challenge For Cause Defense
JO=Joint Peremptory Challenge H=By Court - Hardship NS=Not Sent to Court

Note: Return to Jury Assembly Room each evening during Panel.

Judge's List

Judge: SCHULMAN
Event: SCHU 10/28/14

Room: CJC901
Trial Type: CRIMINAL - PETIT

Date: 10/28/14
Time: 9:44 AM

	Random No.	Part No.	Pool Seq.	Name		Code (see legend)
B	39	100738703	17- 0064	ALPHONSO SMITH PHILADELPHIA		NU
A	40	100325133	03- 2044	MIKAL CHANTEL HARDEN PHILADELPHIA	WM	NU
B	41	100399696	17- 0607	VIVENNE M JOHNSON PHILADELPHIA		NU
A	42	100700318	17- 0072	ANTONIO P SALVADO PHILADELPHIA	WM	J#5 - Excused For HardShip 10/29
B	43	100515368	17- 1054	JASON S MC KENNA PHILADELPHIA		NU
B	44	101080307	17- 0990	ABRAHAM M POOVANNUMMOOTTIL PHILADELPHIA		NU
A	45	100835240	17- 0684	RACHELLE H WATSON PHILADELPHIA	BF	J#6
A	46	101774371	17- 0513	JOSEPH REGUEIRA PHILADELPHIA	WM	BC
B	47	101839644	17- 0067	LOUIS DITRI PHILADELPHIA	WM	NU
A	48	100865955	17- 0154	SHEMEKA L WILLIAMS PHILADELPHIA	BF	JS5
B	49	100588140	17- 1775	CARLOS M NUNEZ PHILADELPHIA		NU
B	50	101768140	17- 0219	ALEX DEBARGE PEELE PHILADELPHIA		NU

Legend: J=Jury A=Alternate NU=Not Used BC=By Court
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Note: Return to Jury Assembly Room each evening during Panel.

Judge: SCHULMAN
Event: SCHU 10/28/14

Room: CJC901
Trial Type: CRIMINAL - PETIT

Date: 10/28/14
Time: 11:57 AM

	Random No.	Part No.	Pool Seq.	Name		Code (see legend)
A	51	100203133	17- 0147	DOROTHY A DONOHUE PHILADELPHIA	WF	J #7
B	52	100412324	17- 0818	RICHARD B KALSON PHILADELPHIA	WM	NU
B	53	100115544	17- 1779	CAROL A CALDWELL PHILADELPHIA	WF	NU
B	54	101876140	17- 0782	ARIELLE NEWCOMBE PHILADELPHIA	WF	NU
A	55	100263479	17- 1219	MICHAEL R FROEHLICH PHILADELPHIA	WM	AS6
A	56	101158170	17- 0514	LORETTA YOUNG PHILADELPHIA	BF	C53
A	57	100605103	17- 0308	ERON J PALMER PHILADELPHIA	BF	C54

Legend: J=Jury A=Alternate NU=Not Used BC=By Court
PP=Peremptory Challenge Prosecutor/Plaintiff PD=Peremptory Challenge Defense
CP=Challenge For Cause Prosecutor/Plaintiff CD=Challenge For Cause Defense
JO=Joint Peremptory Challenge H=By Court - Hardship NS=Not Sent to Court

Note: Return to Jury Assembly Room each evening during Panel.

Judge's List

Judge: SCHULMAN
Event: SCHU 10/28/14

Room: CJC901
Trial Type: CRIMINAL - PETIT

Date: 10/28/14
Time: 1:04 PM

	Random No.	Part No.	Pool Seq.	Name		Code (see legend)
B	58	100580369	03- 2018	BATYR NIKOLAJEW PHILADELPHIA	BM	NU
A	59	101839711	17- 1003	LARRY DODGE JR PHILADELPHIA	WM	J#8
B	60	101206277	17- 1576	ROBERT L CLARK JR PHILADELPHIA	BM	NU
A	61	100512686	17- 1147	CRYSTAL L MC FADDEN PHILADELPHIA	BF	CS5
B	62	100536496	17- 1713	DARLYN MARY MERILAN PHILADELPHIA	BM	NU
A	63	101693762	17- 0360	KUSHANAVA CHOUDHURY PHILADELPHIA	AF	NU
A	64	100513982	17- 0787	KENDRA I MC CRAE PHILADELPHIA		NU
B	65	100160893	17- 0022	TRACY J CROZIER PHILADELPHIA		NU
A	66	101516406	17- 1083	MICHAEL F MORRISON JR PHILADELPHIA	WM	J#9
A	67	100399985	17- 1745	PATRICE L JOHNSON PHILADELPHIA		CS6
B	68	100031945	17- 0163	NICHOLAS E AVERSA PHILADELPHIA		NU
A	69	100537427	17- 1367	MARSHA MICELI PHILADELPHIA	WF	J#10
A	70	101665342	03- 2124	ISRAEL ORTIZ JR PHILADELPHIA	HM	J#11
B	71	100002762	03- 2145	ESAM A ADAM PHILADELPHIA		NU
B	72	100187430	17- 0687	EAPEN DAVID PHILADELPHIA		NU
B	73	101580178	17- 1536	ERIN PATRICIA FOLEY PHILADELPHIA		NU
A	74	100624483	17- 0983	SREY L PHA PHILADELPHIA		CS7
A	75	100153598	17- 1464	ARTHUR COLLI JR PHILADELPHIA		DS 7
A	76	101871376	17- 1795	NICHOLAS B MEEKER PHILADELPHIA	WM	J#12

Legend: J=Jury A=Alternate NU=Not Used BC=By Court
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CP=Challenge For Cause Prosecutor/Plaintiff CD=Challenge For Cause Defense
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Note: Return to Jury Assembly Room each evening during Panel.

Judge: SCHULMAN
Event: SCHU 10/28/14

Room: CJC901
Trial Type: CRIMINAL - PETIT

Date: 10/28/14
Time: 1:04 PM

	Random No.	Part No.	Pool Seq.	Name		Code (see legend)
A	77	100094590	17- 0860	ANTHONY M BUSCH PHILADELPHIA		J#13
A	78	101824634	17- 0725	PATRICK BECKER PHILADELPHIA		
A	79	100507194	17- 0883	LYNETTE J MC CLAIN PHILADELPHIA		
	80	100764861	17- 1222	JEROME R STATON PHILADELPHIA	awol	NU
A	81	100218452	17- 1650	ROBIN L EATON PHILADELPHIA	WF	J#14
B	82	101753369	17- 0253	AUBREY H MC KINNEY II PHILADELPHIA		NU
A	83	100432508	17- 1086	BARBARA A KLENK PHILADELPHIA	meds	NU
B	84	100497794	17- 1738	ELLA D MARTIN PHILADELPHIA		NU
B	85	100551412	17- 0538	JACQUELINE T MOORE PHILADELPHIA		NU
A	86	100149524	17- 0756	ALISON MARGARET COHEN PHILADELPHIA		NU
A	87	101124043	17- 0892	GWEN A TAYLOR PHILADELPHIA		NU
A	88	101601011	17- 0298	VERNON JONES PHILADELPHIA		NU
	89	100295789	17- 1797	RENEL C GIBBS PHILADELPHIA	awol	NU
B	90	100543741	17- 0162	JACOLE KATRIN MINTZ PHILADELPHIA		NU

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Judge's List

Judge: SCHULMAN
Event: SCHU 10/29/14-1

Room: CJC901
Trial Type: CRIMINAL - PETIT

Date: 10/29/14
Time: 9:56 AM

	Random No.	Part No.	Pool Seq.	Name	Code (see legend)
B *	1	100081354	18- 1238	NATASHA N BROWN PHILADELPHIA	NU
B *	2	100478446	18- 0216	MAIRA MACHADO PHILADELPHIA	NU
A *	3	100739637	18- 1307	DENISE A SMITH PHILADELPHIA	NU
A *	4	100377002	18- 0492	BARTRAM T JACKSON III PHILADELPHIA	BC
A *	5	100362932	18- 0278	ELAINE HOWELL PHILADELPHIA	J#13
A *	6	101683266	18- 0105	MARIA L BOBE PHILADELPHIA	J#14
A *	7	101689478	18- 1016	HERBERT JEFFREY CAMPBELL III PHILADELPHIA	NU
A *	8	100634725	18- 0533	LIZZETTE PONE PHILADELPHIA	NU
B *	9	101876582	18- 1028	MICHAEL NGUYEN PHILADELPHIA	NU
A *	10	100110708	18- 0227	JOANNA CARPENTER PHILADELPHIA	NU

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Commonwealth of Pennsylvania
Court of Common Pleas
County of Philadelphia
1st Judicial District

Letter of Appointment

Commonwealth of Pennsylvania
v.
Derrick U. Edwards

Jason Christopher Kadish
2 Penn Ctr 1500 Jfk Blvd Ste 1723
Philadelphia, PA 19102

Appointment Date: 02/02/2018
Invoice Number: 51-2018-I000001566
State ID: 201708
Case Role: Lead Attorney

Docket No: CP-51-CR-0002815-2013
PID: 1006617
RE: Derrick U Edwards - Defendant
131 E Coulter ST
Philadelphia, PA 19144

ORDER

Pursuant to Pa.R.Crim.P. No. 122 Judge Unassigned has appointed you in the above captioned case.

This appointment is not transferable.

Your entry of appearance is being automatically entered pursuant to Pa.R.Crim.P. No. 120 (A)(2), and your appointment is effective from the time of appointment through final judgment and any proceedings upon direct appeal including new trials, if any, unless you are permitted to withdraw as provided in Pa.R.Crim.P. No. 120 (B).

Acceptance of this appointment constitutes certification that you maintain a principal office in Philadelphia County as required by Administrative Governing Board Directive Number 2 of 1997.

This Order authorizes the defendant to proceed in forma pauperis in the First Judicial District, and defendant may proceed in forma pauperis on appeal as provided in Pa.R.A.P. 551 et seq. As defendant's court appointed counsel, you are entitled to receive notes of testimony, in an electronic format only (via email), at no cost to you or to the defendant provided that you email a Transcript Order form (available at http://www.courts.phila.gov/forms) to Court Reporter Administration at the following email address: transcripts@courts.phila.gov. **To ensure timely transcription of required notes of testimony, hand-delivered and mailed requests will NOT be accepted**.

In the event you are replaced by another court appointed attorney, you must provide new counsel a copy of your entire case file, including all pleadings, documents and other materials, including notes of testimony, you received during your representation of the defendant in connection with this case.

Compensation for service as court-appointed counsel, expert witnesses, and investigators shall be allowed as provided by local rules applicable to the appointment's specific Case Type. Upon filing the Counsel Fee Petitions and Payment Vouchers with the Office of Judicial Records, they will be forwarded to the Counsel Fee Unit for review and processing.

Counsel understands and agrees that pursuant to Administrative Order No. 02-2012 issued on April 3, 2012 by Administrative Governing Board of the First Judicial District, effective July 1, 2012, upon judicial approval of the amount of the counsel fee and costs to be paid, payment of the approved fee is the obligation of the City of Philadelphia and payment shall thus be issued by the City of Philadelphia directly to the court-appointed counsel.

Additional information concerning compensation and payment processing will be available on the website of the First Judicial District at: http://www.courts.phila.gov/departments/financial.services.asp and from the City of Philadelphia at (215) 686-5639.

Event Date	Location	Type	Judge
02/02/2018 - 9:00 am	901	Status	Judge Susan I. Schulman
08/06/2018 - 9:00 am	901	Trial	Judge Susan I. Schulman

Comments regarding Counsel Appointments

ASSOCIATED CASES: CP-51-CR-0002820-2013, CP-51-CR-0002853-2013, CP-51-CR-0002862-2013, 0002864-2013,0002614-2013 AND CP-51-CR-0002617-2013
APPOINTED BY JUDGE SCHULMAN