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THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
APPELLEE

V.

DERRICK EDWARDS,
APPELLANT

APPELLANT'S REPLY BRIEF

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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ARGUMENT

The Commonwealth concedes that in striking a prospective juror because of her race, the trial prosecutor engaged in misconduct that was intentional. Comm. Br. at 27. In other words, as stated by the Superior Court, the prosecutor struck Juror 67 with "discriminatory intent" and the race-neutral explanation offered for striking Juror 67 was "highly implausible" and pre-textual. *Commonwealth v. Edwards*, 177 A.3d 963, 976 (Pa. Super. 2016) ("*Edwards I*"). The Commonwealth seeks to evade the application of Double Jeopardy protection by arguing the prosecutor's misconduct was neither egregious nor an attack on the right to a fair trial. The question for the Court is whether the prosecutor's intentionally racially discriminatory actions warrant dismissal under Pennsylvania's Double Jeopardy clause. They do. In this Reply Brief, Appellant shows that the arguments raised by Appellee and their amici are unavailing and indeed demonstrably wrong.

I. The prosecutor's racially discriminatory behavior during voir dire was serious, egregious, and deprived the defendant of his right to a fair trial.

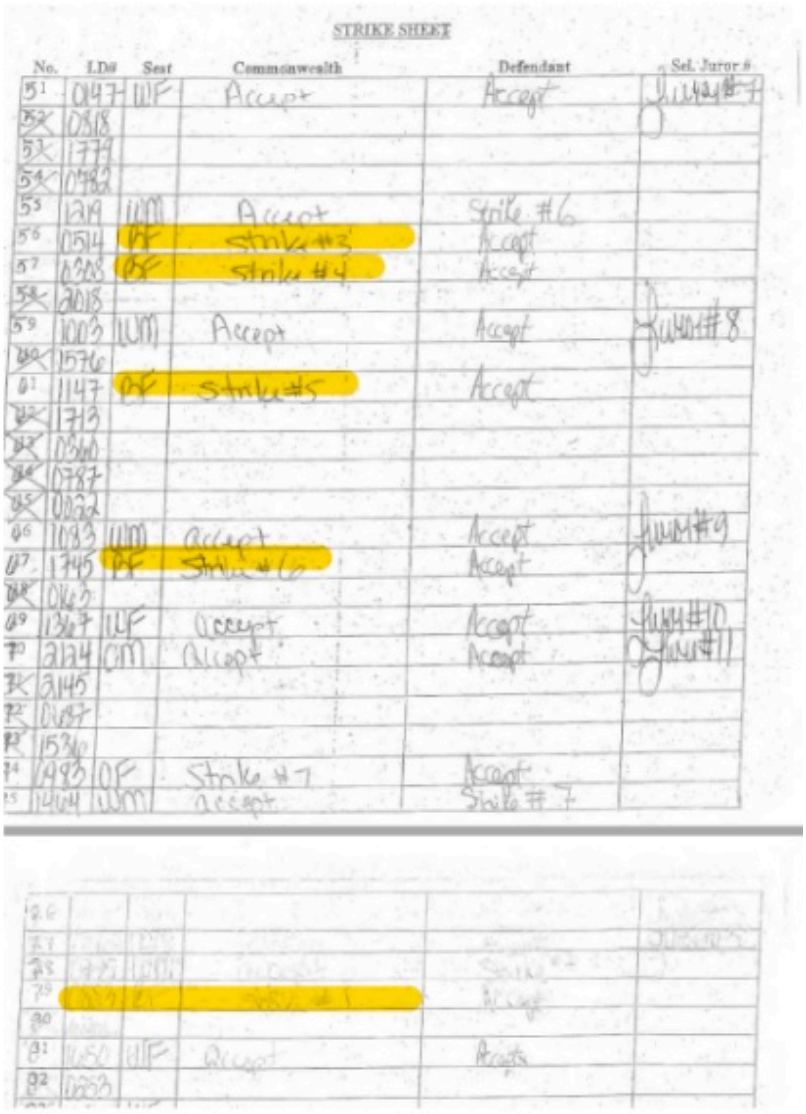
A. The prosecutor's racially discriminatory exercise of peremptory strikes was egregious.

The Commonwealth urges this Court to examine the full facts and circumstances of the voir dire in arguing that the prosecutor's misconduct did not constitute overreaching. Comm. Br. at 5, 27. In doing so, the Commonwealth

argues that the prosecutor accepted African American jurors from the first venire panel and therefore her subsequent behavior cannot be egregious. Comm. Br. at 24. However, any *Batson*[1] violation – an intentional use of race, and an intentional mis-representation of why the person was dismissed – by its nature represents serious prosecutorial misconduct; and here, this serious misconduct was indeed egregious because the prosecutor's pattern of strikes shows she struck multiple prospective jurors on the basis of race. The prosecutor's use of strikes during the voir dire of the second venire panel revealed that she was determined to prevent any more African American jurors from being selected. In other words, she appeared to decide that the first venire panel had yielded enough African American jurors and that no more should be seated.

The below excerpt from the trial Strike Sheet demonstrates that the Commonwealth struck *each and every prospective African American juror* from the second panel (Jurors 51-90). Appellant's Br. Ex. A (highlights added).

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).


STRIKE SHEET

No.	I.D#	Seat	Commonwealth	Defendant	Sel. Juror #
51	0447	WF	Accept	Accept	Juror #7
52	0818				
53	1779				
54	0982				
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	0560				
64	1787				
65	0022				
66	1083	WM	Accept	Accept	Juror #9
67	1745	BF	Strike #6	Accept	
68	0463				
69	1367	WF	Accept	Accept	Juror #10
70	2174	WM	Accept	Accept	Juror #11
71	2145				
72	0187				
73	1536				
74	1493	BF	Strike #7	Accept	
75	1464	WM	accept	Strike #7	

In exercising her peremptory strikes in this manner, the prosecutor prevented the selection of any more African American jurors and thus "greatly reduced the number of African-Americans on the jury." *Edwards I*, 177 A.3d at 976.

Because the Superior Court found a *Batson* violation as to Juror 67, the Court did not reach the question of whether the prosecutor's race-neutral explanations offered for striking Jurors 56, 57, and 61 were pre-textual. However,

an examination of the voir dire record shows that the prosecutor's proffered reasons for striking these jurors were just as unpersuasive as the reason given for Juror 67, especially when one examines the jurors seated from the first panel.

During voir dire, Juror 56, Loretta Young, responded that she had previously served in on a criminal jury, she had a close family member who had been murdered, and that she could be fair and open minded. N.T. 10/28/14 at 67-68. Juror 57, Eron Palmer responded that she had finished the 12th grade and had never worked in the criminal justice system. N.T. 10/28/14 at 69. And Juror 61, Crystal McFadden had served on a prior criminal jury, had been a victim of a crime, and the father of her son was a police officer. She also stated that she lived in Southwest Philadelphia. N.T. 10/28/14 at 69-71.

The prosecutor struck these prospective African American jurors from the second panel but accepted jurors from the first panel who had relatives charged with serious crimes and seemed to be tentative in their ability to be fair and open-minded. *See* N.T. 10/28/21 at 23 (juror Tarzan), 25 (juror Holbrook), and 35-38 (juror Johnson). The difference in the prosecutor's treatment of potential jurors on the first panel versus the second panel compels the conclusion that she was determined to prevent any African American jurors from the second panel from being seated and that all of her strikes used the afternoon voir dire were racially discriminatory.

The prosecutor's justifications, never weighed by the Superior Court because of the one *Batson* finding it did make, clearly are pre-textual. The prosecutor testified that she struck Jurors 56 and 57 because they were speaking and joking with each other and she struck Juror 61 because she had not identified her residential neighborhood when she filled out the juror questionnaire. N.T. 10/28/21 at 93-94. None of these proffered reasons were related to potential bias or any inability to be fair and impartial.

The Commonwealth also argues that the lack of voir dire questioning by the lawyers deprived the prosecutor of a more complete opportunity to assess the ability of jurors to serve, such that the prosecutor was justified in relying on "visual and other non-verbal observations." Comm. Br. at 28. This argument should be rejected as the Commonwealth never appealed the Superior Court's conclusion that the prosecutor's testimony that she struck Juror 67 because of her "bearing" was implausible and pre-textual. As well, the very lack of information indicating that Jurors 56, 57, 61, and 67 were in any way biased or unfit to serve simply underlines the conclusion that the prosecutor's strikes of each of those jurors were racially discriminatory.

The prosecutor's use of peremptory strikes was deliberately calculated to prevent "too many" African American jurors from being seated. The prosecutor used every peremptory strike available to strike non-Caucasian jurors and seven

out of the eight jurors struck by the prosecution were African American women. This racial discrimination was deliberate, serious and constituted egregious prosecutorial misconduct.

B. The prosecutor's racially discriminatory misconduct during voir dire denied the defendant his right to a fair trial.

The Commonwealth asserts that the trial prosecutor's racially discriminatory conduct during jury voir dire was not *intended* to deprive the defendant of his right to a fair trial. Comm. Br. at 29 (emphasis added). But this is not the relevant test. This Court's decision in *Johnson* makes clear that prosecutorial overreaching sufficient to invoke double jeopardy protections includes misconduct undertaken "with a *conscious disregard* for a substantial risk that such [depriving the defendant of his right to a fair trial] will be the result." *Commonwealth v. Johnson*, 231 A.3d 807, 826 (Pa. 2020) (emphasis added)

And *Batson* violations impact the fundamental fairness of a trial, infect "the framework within which the trial proceeds," and "deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Commonwealth v. Basemore*, 744 A.2d 717, 734 n.18 (Pa. 2000) ("*Basemore I*") (citing *Neder v. United States*, 527 U.S. 1 (1999) (internal quotations omitted)). *See also* Appellant's Br. at 17-19. Deliberately excluding African Americans from a jury on the basis of their race

deprived Mr. Edwards of a fair trial because *Batson* violations undermine verdict reliability. *See* Br. of Amicus PACDL/DAP at 10-12.

Contrary to the arguments of the Office of the Attorney General, the defendant's own individual rights are violated when the prosecutor deliberately excludes potential jurors on the basis of their race, especially when the excluded jurors are of the same race as the defendant. *Batson* followed a century-old decision recognizing that "the States 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 (1986) (citing *Strauder v. West Virginia*, 100 U.S. 303 (1880)).

While the *Batson* Court also recognized the right of the potential juror to be free from racial discrimination, the Court did not eliminate the original core understanding that an African American defendant's rights to a fair trial and equal protection are violated when the prosecutor deliberately excludes African Americans from the jury. The equal protection rights of defendants articulated in *Batson* remain a core tenet of the doctrine today. *See Eagle v. Linahan*, 279 F.3d 926, 943 (11th Cir. 2001) ("The fundamental premise of *Batson* and its progeny is that criminal defendants and excluded jurors alike are denied equal protection of the laws when the trial jury is constructed in a racially discriminatory manner"); *See also Georgia v. McCollum*, 505 U.S. 42, 58, (1992) ("We recognize, of course,

that a defendant has the right to an impartial jury that can view him without racial animus"); *Jones v. Ryan*, 987 F.2d 960, 968 (3d Cir. 1993) (reiterating 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"). Accordingly, this Court has recognized that the government denies a 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." *Basemore I*, 744 A.2d at 728.

Because the prosecutor's racially discriminatory misconduct during jury selection was both serious and deprived the defendant of his right to a fair trial, the misconduct constituted prosecutorial overreaching and Pennsylvania's Double Jeopardy clause precludes a retrial.[2]

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[2] This Court is in no way restricted by the lack of examples from other jurisdictions applying Double Jeopardy protection in the context of egregious *Batson* violations. The Commonwealth's reliance on the example of *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), Comm. Br. at 34-35, is misplaced as no party in *Flowers* raised the issue of Double Jeopardy. Furthermore, this Court has long held that the Pennsylvania Double Jeopardy clause provides more protection than the federal clause. The only other state court to have addressed this issue, the Supreme Court of Hawai'i, relied on the Superior Court decision in *Basemore II* -- a divided decision which misunderstood the nature of structural flaws, which predated this Court's decision in *Johnson*, and which predated recent recognition of the perniciousness of racial discrimination in the criminal justice system (*see* Br. of PACDL/DAP at 16-20).

II. Prosecutorial overreaching triggers the application of the Double Jeopardy clause for any defendant, not just those who are able to prove their innocence.

The Commonwealth incorrectly argues that Double Jeopardy protection applies only when prosecutorial misconduct is sufficiently egregious to be classified as overreaching *and* societal interest in effective law enforcement has been outweighed *and* retrial may result in an innocent person's conviction. Comm. Br. at 18. This is a misreading of the Court's decision in *Johnson*.

The Court's holding in *Johnson* was clearly stated:

> Therefore, we ultimately conclude as follows. Under Article I, Section 10 of the Pennsylvania Constitution, **prosecutorial overreaching sufficient to invoke double jeopardy protections 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.** This, of course, is in addition to the behavior described in *Smith*, relating to tactics specifically designed to provoke a mistrial or deny the defendant a fair trial. In reaching our present holding, we do not suggest that all situations involving serious prosecutorial error implicate double jeopardy under the state Charter. To the contrary, **we bear in mind the countervailing societal interests mentioned above regarding the need for effective law enforcement**, *see generally State v. Michael J.*, 274 Conn. 321, 875 A.2d 510, 534 (2005) (referring to the need for an "optimal balance between the defendant's double jeopardy rights and society's interest in enforcing its criminal laws"), and **highlight again that, in accordance with long-established double-jeopardy precepts, retrial is only precluded where there is prosecutorial overreaching** – which, in turn, implies some sort of conscious act or omission.

Johnson, 231 A.3d at 826. In restricting application of the Double Jeopardy clause only to instances of "prosecutorial overreaching," rather than all "serious prosecutorial error," the Court has already taken into consideration the countervailing interests for effective law enforcement. Prosecutorial overreaching is restricted to instances of serious misconduct, not mere error or mistake, which deliberately or recklessly deprives the defendant of a fair trial; and there is no indication that prosecutorial misconduct can only constitute overreaching if it is committed against the clearly innocent

The Court does not hold that a defendant must show that they are innocent in order to be protected under the Double Jeopardy clause. To require such a showing from a defendant who has not yet had a fair trial eviscerates the presumption of innocence and flips the burden of proof onto the defendant. One of the main objectives underlying the double jeopardy bar is "that a defendant should not have to choose between (a) having his fate decided by his first jury notwithstanding that the proceedings are infected by serious errors, or (b) enduring a new proceeding from the beginning with the expense, anxiety, and disruption it entails, and with the government in a better position to marshal evidence and anticipate the defense strategy." *Johnson*, 231 A.3d at 825. Double jeopardy's fundamental policy objective is that "defendants not be put to multiple trials for the same offense – particularly in view of the government's power and resources

which would otherwise enable it to subject defendants to serial proceedings." *Id.* This protection applies to all *defendants*, not just those who have already been acquitted or who have affirmative proof of their innocence.

Under *Johnson*, the strength of the prosecution's case is not relevant to the question of whether there was prosecutorial overreaching that deprived the defendant of a fair trial. However, it deserves note that there was a significant defense in this matter – in closing, counsel argued that there were only two culprits and not three, and that the defendant was not one of the two individuals who robbed the complainants. N.T. at 11/3/14 at 73-77. The trial evidence supported such a defense: the complainants testified to two perpetrators only, not three; two other individuals had already been convicted of these offenses; only a single complainant out of eight identified the defendant as a perpetrator in a photo array and that single complainant did not identify the defendant when he saw him in person at the preliminary hearing or at trial; the defendant's fingerprints were found only on the outside of the car with the stolen property and not on any of the stolen property itself; no stolen property was recovered from the defendant's home; and the co-defendant who allegedly implicated defendant in his confession testified under oath that his confession was false.[3] The jury must have struggled with this

[3] N.T. 10/29/14 at 129 (K. Cunningham testified that two men robbed him), 138 (K. Cunningham did not identify defendant at the preliminary hearing), 147 (W. Coates testified that two men, not three, robbed her and that she was unable to

evidence because it deliberated for two days, and asked multiple questions. N.T. 11/3/14 at 138-141 (jury started deliberations on 11/3/14 and asked two questions on that day); N.T. 11/4/14 at 3. And there is at least some evidence that the jury was only able to reach its guilty verdict after improperly consulting outside information through use of a cell phone during jury deliberations. N.T. 12/22/14 at 22. This was not the error-free, overwhelming case described by the prosecution.

CONCLUSION

In *Johnson*, this Court made clear that prosecutorial misconduct constitutes overreaching when it is serious, egregious, and deprives a defendant of a fair trial. We are now 35 years after *Batson* was decided. After all this time, little can be more serious or egregious than intentionally striking prospective jurors based on their race. 35 years of such misconduct is enough.

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identify them), & 158-60 (H. DeJesus testified that two men, not three, robbed him and that he was unable to identify them); N.T. 10/30/14 at 23-24 (J. Floyd verified that two men, not three, robbed him and that he did not make any identifications), 41, 54 (R. Thomas denied making the statements in his out-of-court "confession"); N.T. 10/31/14 at 66 (no fingerprints from inside of the car were submitted for comparison), 116-17 (only one complainant identified defendant in a photo array), 156-57 (the complainants who testified at trial reported two perpetrators only), 163 (stolen property found in the home of R. Thomas but not the defendant), 176 (no fingerprints recovered from the stolen items), 179 (no fingerprints recovered from the guns).

Wherefore, Appellant Edwards respectfully requests that this Court reverse the Superior Court's decision denying his motion to dismiss, 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 June 2021 that this brief was electronically filed and served upon the following party:

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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

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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
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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