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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

v.

DERRICK EDWARDS,
Appellant.

BRIEF FOR AMICUS CURIAE PENNSYLVANIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF THE COMMONWEALTH OF PENNSYLVANIA

Appeal from the July 29, 2020 Judgment of the Superior Court, 3429 EDA 2018, affirming the order entered September 11, 2018, in the Philadelphia Court of Common Pleas, at 002611-2013, 002614-2013; 002617-2013; 002815-2013; 002820-2013; 002853-2013; 002862-2013; and 002864-2013.

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STATEMENT OF AMICUS CURIAE

The Pennsylvania District Attorneys Association is the only organization representing the interests of its member District Attorneys and their assistants in the various counties in the Commonwealth of Pennsylvania. This Court's review of whether *Johnson* should be extended to the context of a *Batson* violation is of special interest to the district attorneys throughout Pennsylvania. No other person or entity has authored any portion of the within brief, in whole or in part, nor have any funds been expended by any person or entity in the preparation and filing of this brief outside of the Association.

STATEMENT OF THE QUESTION PRESENTED

This Court's order granting permission for allowance of appeal states:

> AND NOW, this 26th day of January, 2021, the Petition for Allowance of Appeal is GRANTED. The issue, as stated by petitioner, is:
>
> (1) 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?

SUMMARY OF ARGUMENT

The Pennsylvania Constitution, as well as the Constitution of the United States, have long held that a retrial is proper remedy for a *Batson* violation. Appellant now asks this Court to expand *Johnson*, which held that a reckless disregard for the likelihood of an unfair trial qualifies as prosecutorial overreach that itself warrants discharge, to *Batson* violations.

Unlike the nearly unimaginable confluence of prosecutorial oversight and police error that occurred in *Johnson*, here the single instance where the Superior Court found that the prosecutor struck a juror with discriminatory intent does not exhibit the severely reckless disregard for a defendant's right to a fair trial that occurred in *Johnson*. Indeed, when the record of the voir dire is viewed broadly, it is evident that the *Batson* challenge was relatively weak. Such circumstances do not amount to prosecutorial overreach and should not result in the extreme remedy of barring retrial.

Double jeopardy, even as most recently interpreted by this Court in *Johnson*, was never intended to guarantee that the State will vindicate its societal interest in the enforcement of criminal laws in one proceeding. To do otherwise would frequently frustrate the purpose of our criminal statutes to protect society from those guilty of crimes by denying to the courts the

power to put a defendant to trial again. The instant *Batson* violation does not demonstrate that the prosecutor struck Juror 67 recklessly and with a "conscious disregard" for the "substantial risk" of an unfair trial.

ARGUMENT

The single *Batson* violation in the instant case does not demonstrate that the prosecutor struck a juror recklessly and with a conscious disregard for Appellant's right to a fair trial; Double Jeopardy should not apply.

Historically, the "protections afforded by the Double Jeopardy clause of the United States Constitution and the Pennsylvania Constitution are coextensive, involving the same meaning, purpose, and end." *Commonwealth v. Dasilva*, 655 A.2d 568, 571 (Pa. Super. 1995). Where the alleged misconduct involves a prosecutor, the Pennsylvania Constitution provides greater Double Jeopardy protections than the United States Constitution. *Commonwealth v. Smith*, 615 A.2d, 321, 325 (Pa. 1992). In those situations, this Court has held that relief in the form of a discharge of charges may follow only where the "prosecutorial misconduct [was] intended to provoke the defendant into moving for a mistrial" or where "the conduct of the prosecutor [was] intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial." *Id.*

Such acts are deemed "prosecutorial overreach." Prosecutorial overreach occurs where a prosecutor seeks a conviction at the expense of justice; where it occurs, double jeopardy may apply. *Commonwealth v. Johnson*, 231 A.3d 807, 824 (Pa. 2020). It is distinguishable from prosecutorial misconduct,

which includes even severe errors by a prosecutor, but for which a retrial is the appropriate remedy. Indeed, as this Court held in *Commonwealth v. Burke*, 781 A.2d 1136, 1145 (Pa. 2001), willful prosecutorial misconduct will not always warrant dismissal of the charges. *Burke* highlights that it is not the willfulness of the act (whether it be withholding of evidence of striking of jurors)[1] of the prosecutor that is critical to the determination of remedy, but rather it is the intent of the prosecutor to unduly influence the trial to the point of ensuring an unfair trial upon which the correct remedy hinges.

This Court's recent *Johnson* ruling expanded this framework slightly to include prosecutorial overreach that constitutes "reckless" behavior "undertaken to prejudice the defendant to the point of the denial of a fair

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[1] This Court has previously recognized the "legitimate distinction" between *Batson* violations and other trial-stage instances of prosecutorial misconduct:

> *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.

Commonwealth v. Basemore, 875 A.2d 350, 356 (Pa. 2005)

trial." *Johnson*, 231 A.3d at 828; *Smith*, 615 A.2d at 325. As the *Johnson* Court recognized, "the jeopardy prohibition is not primarily intended to penalize prosecutorial error," but to protect citizens from the ordeal of a second trial. *Johnson*, 231 A.3d at 826. This limitation recognizes that "dismissal of criminal charges punishes not only the prosecutor … but also the public at large, since the public has a reasonable expectation" that those who have been charged with crimes will be prosecuted "to the full extent of the law. Thus, the sanction of dismissal of criminal charges should be utilized in only the most blatant cases." *Burke*, 781 A.2d at 1144 (internal citation omitted).

It is within this framework that the appellant argues that the instant *Batson* violation was prosecutorial overreach requiring discharge. Yet, appellant's argument ignores that this was a relatively weak *Batson* violation that did not demonstrate that the prosecutor intended to prejudice appellant to the point that he was denied a fair trial.

In the prior appeal in this matter, the Pennsylvania Superior Court majority concluded that appellant's claim as to a single *Batson* violation (out of the 4 he raised) was meritorious. The Superior Court found discriminatory intent in the Commonwealth's strike of Juror 67 based on: (1) the racial and gender designations on the strike sheet, (2) statistics that supposedly

demonstrated that the Commonwealth struck a disproportionate number of African Americans, and (3) its finding that the Commonwealth's race neutral explanation for striking Juror 67 was unpersuasive. As Judge Stabile lamented in his robust dissent, the panel gave undue weight to the fact sheet, took a narrow view of the statistics, and substituted its credibility judgments for that of the trial court. This feeble finding of a *Batson* violation both does not rise to the level of prosecutorial overreach and presents a poor vehicle for this Court to determine whether *Johnson* should be expanded.

First, Judge Stabile highlighted that the panel erroneously ignored the trial court's conclusion that all four of the challenged strikes were race neutral. *See* Trial Court Op., 2/24/16 at 18-19. Not only did the majority ignore this factual finding by the lower court, it found discriminatory intent in the strike of Juror 67 by way of the strike sheet designations delineating the race and gender of the jurors. But, as even the panel admitted, the court staff – not the Commonwealth – created the strike sheet and made the designating marks on the sheet. As Judge Stabile noted: "I do not understand how the Majority can impute discriminatory intent to the Commonwealth from the content of this document when the Commonwealth had no say or

involvement in its drafting." *Commonwealth v. Edwards*, 177 A.3d 963, 983 (Pa. Super. 2018) (Stabile, dissenting). He continued:

> the Majority fails to explain how—or even if—the Commonwealth misused the information. I too fail to see how this information was misused, or for that matter ill-advised, especially when Appellant was required to include this information in the record as a part of his prima facia showing, and this information discloses no more than what plainly can be observed of the venire panel during jury selection. As previously stated, had it not been for the trial court staff's notations on the Strike Sheet, the prima facia information required under *Hill* would be completely absent from the record in this case. Respectfully, I find the Majority's designation of the Strike Sheet as indicative of discriminatory intent as unfounded.

Id.

Second, the "startling" statistics referenced by the panel lose force when viewed less myopically. Indeed, the panel acknowledged that statistics alone cannot establish discriminatory intent. *Id.*, at 975. Here, the trial court ran voir dire. It divided the potential jurors into two groups – the first containing 50 people, the second 30. On its own accord, the trial court reduced the first group of 50 to 19 people. N.T. 10/28/14 at 10-18. It was these 19 people whose race was recorded by the court on the strike sheet. The trial court then struck 4 Caucasians, 1 African American, and 1 Other, leaving 13 potential jurors.

Four of the 13 were Caucasian, 8 were African American, and 1 was Other. Appellant struck 3 Caucasians, 1 African American, and 1 Other while the Commonwealth struck 2 African Americans. *See* Strike List, 10/28/14, at 1–2. The remaining 6 from the first group who were ultimately seated on the jury included 5 African Americans and 1 Caucasian. Id. Importantly, as Judge Stabile noted, "a review of the Strike List reveals that the Commonwealth accepted six of the first eight African Americans on the panel. This is particularly telling and compelling in light of the fact the venirepersons were brought into the courtroom for voir dire in two groups" *Edwards*, 177 A.3d at 984-85.

At the end of voir dire (after both groups had been questioned) the Commonwealth had struck 7 African Americans and Appellant did not assert *Batson* challenges to 3 of them or to the Other venireperson. Appellant used his peremptory strikes on 1 African American, 6 Caucasians, and 1 Other. As a result, the jury ultimately empaneled included 5 African Americans, 7 Caucasians, and 1 Other. *See* Strike List 10/28/14. This more comprehensive review of the data available belies the panel's suggestion that the Commonwealth was attempting to "purge the jury" of African Americans. *Edwards*, 177 A.3d at 976.

Finally, Judge Stabile found the majority's reweighing of the trial court's credibility determination regarding the Commonwealth's reason for striking Juror 67 inappropriate:

> As the record reflects, once the Commonwealth disclosed its reasons for striking Juror 67, the trial court did not hesitate to grant the strike. Appellant's counsel did not object and the trial court seemingly did not find it necessary to add its own explanation on the record for granting the strike. It would appear, therefore, the trial court agreed with the Commonwealth's description of Juror 67's attitude, body language, and demeanor. It is not for this Court to speculate otherwise

Id., at 985.

A comprehensive review of the record available makes plain that the prosecutor's act of striking Juror 67 was neither designed, nor was it "undertaken recklessly," to deprive appellant of a fair trial. The *Batson* violation here therefore did not amount to prosecutorial overreaching permitting the application of double jeopardy.

Conversely, *Johnson* involved a series of nearly unfathomable oversights and mistakes made by the prosecutor and police during the investigation and trial. This Court stated that the court below:

> saliently found that the experienced prosecuting attorney made "almost unimaginable" mistakes, which "dovetailed" with other serious errors by law-enforcement officers and other police

personnel …. In terms of the errors made by the attorney himself, first, there was a notable discrepancy between the property receipt numbers for the two caps. The prosecutor was aware this meant that the associated results reflecting the presence of the victim's blood and Appellant's DNA might have related to different pieces of physical evidence. Yet, in the face of this information, he never sought to verify his working hypothesis that the receipt numbers pertained the same baseball cap. He did not even notice this error at the preliminary hearing when he had in his possession property receipt number 2425291, which clearly stated that it was associated with a black baseball cap. Second, in preparation for a capital case, the prosecutor did not obtain a criminalistics report which would have summarized the evidence connected with the matter and revealed that there were two different caps involved.

* * *

As to the court's suggestion that these items "dovetailed" with the errors of other law enforcement personnel who held lead roles in the investigation and prosecution, there are two particularly noteworthy examples. First, on the night of the shooting, the assigned detective interviewed the victim's companion, Ms. Williams, who personally handed him a black baseball cap with a bullet hole in it, and explained that it was the hat the victim was wearing when he was shot. This crucial piece of information was apparently forgotten as the investigation ensued. Second, the lead crime scene investigator testified that, when he went to the location of the murder, he saw fresh drops of blood under the brim of the red cap, when that would have been impossible – as persuasively explained by the common pleas court. … We, like the common pleas court, cannot escape the conclusion that the officer testified to something that he did not actually observe, especially in light of his subsequent explanation that the testimony was wrong and was based on a mere assumption.

Johnson, 231 A.3d 826-27.

Although this Court concluded that these acts and omissions were not made intentionally or with a specific purpose to deprive Johnson of a fair trial, this Court ultimately ruled that they constituted a "reckless disregard for consequences and for the very real possibility of harm stemming from the lack of thoroughness in preparing for a first-degree murder trial." Id., at 827-28. Thus, because of prosecutor's reckless disregard for the "almost unimaginable" errors that combined to deprive Johnson of a fair trial, double jeopardy applied and barred his retrial.

The single *Batson* error here – where the Superior Court panel considered the strike sheet as evidence of the Commonwealth's intent to discriminate even where the Commonwealth played no role in the creating or logging of the information on the strike sheet, where a complete view of the voir dire process showed that the Commonwealth accepted the first 6 of 8 African American venirepersons to come before the Court, and where the panel reweighed the credibility determinations of the trial court – is easily distinguishable from the facts of *Johnson*. Here, the Commonwealth did not consciously disregard a substantial risk to appellant's right to a fair trial. Rather, the Commonwealth struck jurors it deemed ill-suited for service

while still ensuring a fair trial where the final jury was split evenly with 6 Caucasians and 7 non-Caucasians. This *Batson* violation does not meet *Johnson*'s "stringent" standard that requires discharge only in "egregious cases." *Johnson*, 231 A.3d at 828 (Dougherty, concurring).

To pretend that the instant facts rise to the level prosecutorial overreach present in *Johnson* is folly. The Superior Court ruling below ordering Appellant's retrial should be affirmed.

CONCLUSION

WHEREFORE, the Pennsylvania District Attorneys Association, amicus curiae, respectfully requests that the Superior Court's order be affirmed.

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CERTIFICATIONS

I hereby certify pursuant to Pa.R.A.P. 531 (b)(3) that this amicus brief does not exceed the 7,000-word count limit.

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Catherine B. Kiefer
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Date: May 24, 2021

PROOF OF SERVICE

I, Catherine B. Kiefer, hereby certify that on May 24, 2021, I filed the foregoing amicus brief through this Court's PACFILE electronic filing system and thereby served the following parties:

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