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SUPREME COURT
STATE OF COLORADO
Ralph L. Carr Judicial Center
2 E. 14th Ave.
Denver, CO 80203

On Certiorari to the Colorado Court of Appeals,
Case No. 19CA768
District Court, Arapahoe County, 2018CR1540
Honorable Ben L. Leutwyler, III

THE PEOPLE OF THE STATE OF COLORADO
Petitioner,

v.

RAEAJE RESSHAUD JOHNSON
Respondent.

▲COURT USE ONLY▲

Case No. 2022CA852

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ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

☑ It contains 7,554 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1 and C.A.R. 32.

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STATEMENT OF THE CASE AND FACTS

The government charged Johnson with first degree burglary, third degree assault, four counts of violation of a protection order, two counts of violation of bail bond conditions, tampering with a witness or victim, attempt to influence a public servant and second degree burglary. CF, p 153-157.

The evidence at trial included the following:

On April 23, 2018, a protection order was issued listing L.T. as the protected party and Johnson as the restrained party. TR 12/18/18, p 144:5-17. L.T. was Johnson's girlfriend. TR 12/18/18, p 143:8-12.

On May 19, 2018, L.T. was at home and feeling very ill. TR 12/18/18, p 145-146; TR 12/19/18, p 28-29. Johnson had been at L.T.'s apartment earlier in the day. TR 12/19/18, p 12:8-13. He was going to take his children to a birthday party and after the birthday party the plan was for them to come back and eat dinner with L.T. TR 12/19/18, p 12:18-21. She was expecting them for dinner by 8:30 pm. or 9:00 p.m., but Johnson did not arrived until 1:00 a.m. TR 12/18/18, p 146:11-15; TR 12/19/18, p 15:2-8. Johnson was intoxicated. TR 12/19/18, p 16:11-13.

L.T. texted Johnson several times throughout the night. TR 12/19/18, p 15-16. L.T. was enraged because Johnson was acting nonchalant about coming home

late and not being on time for dinner. TR 12/19/18, p 16:14-20. L.T. had been "mad for hours." TR 12/19/18, p 16:21-23.

L.T. let Johnson into her apartment. TR 12/18/18, p 146:16-20. L.T. had just gotten out of the shower and was wrapped in a towel. TR 12/18/18, p 146:16-20.

Johnson went into the kitchen to make himself dinner. TR 12/18/18, p 149:8-10. L.T. was upset, screaming, yelling at Johnson and accusing him of cheating. TR 12/18/18, p 149:8-13; TR 12/19/18, p 21:14-23. L.T. was getting in Johnson's face. TR 12/19/18, p 19:6-9. As L.T. was screaming, yelling and getting in his face, Johnson continued to make dinner. TR 12/19/18, p 19:10-13.

L.T. and Johnson started "tussling" in the living room. TR 12/18/18, p 149-150. The argument escalated into a physical altercation. TR 12/18/18, p 150:5-11. L.T. admitted that she became physical first. TR 12/19/18, p 21:11-13, 32:23-25. She scratched, punched and ripped out Johnson's hair. TR 12/18/18, p 150:12-15.

As L.T. shoved Johnson out of the apartment, he was trying to get away from her. TR 12/18/18, p 150-151; TR 12/19/18, p 22-23. "He was trying to get away from me and I was grabbing him." TR 12/19/18, p 23:3-5.

A shoving match started between L.T. and Johnson at the door, but she pushed him out. TR 12/19/18, p 23-24. L.T. was yelling at Johnson through the

door and he kicked the door in. TR 12/18/18, p 150-151; TR 12/19/18, p 24-25. When Johnson came back into the apartment, he was trying to detain L.T. and to try to calm her down. TR 12/19/18, p 33:1-5. L.T. scratched, punched and bit Johnson. TR 12/18/18, p 151:12-19; TR 12/19/18, p 28:3-12. "I was doing all of it. Scratching. Punching. Slapping." TR 12/19/18, p 31:17-20.

L.T. acknowledged that Johnson was reacting to her physical contact. TR 12/19/18, p 32:15-21. She did not sustain any injuries. TR 12/19/18, p 27-28.

The towel came off during the scuffle. TR 12/19/18, p 29:9-11. Johnson did not rip the towel off L.T. or kick her out of the apartment without clothes. TR 12/19/18, p 29-30. L.T. ran out the door naked. TR 12/18/18, p 151-152; TR 12/19/18, p 28-29. She was so emotional that she did not think about clothes. TR 12/19/18, p 28-29. She ran to Johnson's car where there was a person in the passenger seat and the children were sleeping in the back seat. TR 12/18/18, p 152-153. L.T. got into the car and called the police. TR 12/18/18, p 152-153. L.T. drove away and met the police at the intersection of Chambers and Evans. TR 12/18/18, p 153:7-14.

L.T. admitted lying to the police to get Johnson into trouble and to get him arrested. TR 12/18/18, p 157:2-12; TR 12/19/18, p 25-26, 38:11-17, 43:20-22.

During phone calls between Johnson and L.T., Johnson told her to tell the truth. TR 12/18/18, p 156:8-10; TR 12/19/18, p 40-41, 44:19-24, 45-46.

Following a jury trial, Johnson was convicted of first degree burglary, third degree assault, violation of bail bond conditions, witness tampering, and three counts of violation of protection order. CF, p 192-208. He was acquitted of attempting to influence a public official. CF, p 192-208.

On March 11, 2019, Johnson was sentenced to three-years in the DOC (plus mandatory parole) followed by a consecutive four-year probation sentence. CF, p 272-274; TR 3/11/19, p 24-27.

Johnson appealed the judgment of conviction to the court of appeals. A majority of a division of the court of appeals reversed Johnson's convictions and remanded for a new trial on the grounds that the trial court erred at the second step of the *Batson* analysis. *See People v. Johnson*, 2022 COA 118, ¶¶ 22, 27-29.

This court granted the Attorney General's petition for writ of certiorari.[1]

SUMMARY OF THE ARGUMENT

The first issue on which this court granted certiorari is "[REFRAMED] [w]hether citing a Black juror's expression of concern that police do not treat

[1] This court has also granted review in *People v. Austin*, 2023SC75, which presents issues similar to the issues here.

minority persons equally constitutes a race-neutral justification for the purposes of *Batson's* second step." Johnson was African America and Juror M. was the only African American juror on the panel when she was excused by the prosecution. The majority of the division of the court of appeals correctly analyzed step two of *Batson*. Juror M. did not express a bias against law enforcement. Her experience that police officers "act disrespectful[ly] due to certain racial identities" is inextricably linked to race and should not be accepted as a race-neutral basis for the prosecution to strike a prospective juror.

The second issue on which this court granted certiorari is "[w]hether the court of appeals erred in departing from supreme court precedent in adopting for the first time a "per se" test mandating a trial court to sustain a *Batson* objection when the challenged peremptory strike is supported by justification both race-neutral and race-based without regard to whether the strike was based on purposeful discrimination." This court should affirm the decision of the court of appeals. The per se approach to *Batson* challenges adopted by the court of appeals removes uncertainty in the application of *Batson* and provides guidance to Colorado courts in a manner consistent with *Batson*'s promise of a jury selection process free from discrimination. This court should hold that a racially

discriminatory justification for a peremptory strike violates *Batson* even if the prosecutor also provides a race neutral reason.

Finally, this court may wish to consider dismissing the Attorney General's petition for writ of certiorari as improvidently granted because the majority in *Johnson* correctly analyzed step two of *Batson* and Juror M. was not biased against law enforcement.

ARGUMENT

I. Juror M. did not express bias against law enforcement and prosecutors cannot remove non-white jurors for acknowledging their lived experience of racial injustice.

A. Standard of Review and Preservation of the Issue

Appellate courts review de novo whether the parties have met their respective burdens under steps one and two of *Batson*. *See Batson v. Kentucky*, 476 U.S. 79, 85-87 (1986); *Valdez v. People*, 966 P.2d 587, 590-91 (Colo. 1998). No deference is afforded to the lower court under de novo review. *See Close v. People*, 180 P.3d 1015, 1019 (Colo. 2008). Courts review *Batson's* step three determination of whether the prosecutor's strike was motivated by purposeful discrimination for clear error. *People v. Gabler*, 958 P.2d 505, 507 (Colo. 1997).

The Attorney General and Johnson agree that this claim was preserved by his *Batson* challenge to the prosecution's peremptory challenge to Juror M. by his

objection and arguments made in the trial court. (*See* OB, p 11.) TR 12/18/18, p 105:20-23, 107-118.

B. Additional Facts

Question 8 in the juror questionnaire asked, "Have you, a member of your family, or a close friend had a particularly good or bad experience with a police officer?" Juror M.'s answer stated, "Yes. Many cases where cops are disrespectful due to certain racial identities." Sealed, p 8. In response to question 10 of the juror questionnaire asking "Do you believe there is any reason why you cannot be a fair and impartial juror? If yes, please give your reasons[,]" Juror M. stated, "No, I would be great." Sealed, p 8.

The government excused Juror M. using its third peremptory challenge. TR 12/18/18, p 105:15-17. Defense raised a *Batson* challenge to the prosecution's excusal of Juror M. TR 12/18/18, p 105:2-23, 107-108. Defense counsel argued:

> [W]hile she does have a Hispanic-sounding last name, she is the only juror that was in the presumptive panel that looked to be of African-American in a nature and ethnically speaking. ...I am alleging a case of racial prejudice and racial basis.

TR 12/18/18, p 107-108. The government claimed to have excused Juror M. due to her answers on the juror questionnaire that she had bad experiences with law enforcement and in response to voir dire to questions related to domestic violence. TR 12/18/18, p 108:3-15, 110-111, 115-116.

During a bench conference, defense counsel argued:

[Defense counsel]: So, step one is made establishing a prima facie case of discrimination. I believe this rises to the level of discrimination due to this woman's race in the jury. There is a desperate impact on black people and African Americans, and the Prosecution must adequately exclude a juror as race neutral justification....

I have Ms. [M.], Juror No. 7's questionnaire in front of me. She says that she is a member of the Black Student's Alliance. She says that in her answer to question number eight that there are many cases where police officers are disrespectful to certain people due to their racial identities.

It's clear, based on her questionnaire, that she's experienced racism in the past. I believe she's experiencing racism as a juror by taking her off this panel for Mr. Johnson, who is an African American male.

I saw nothing she said to the District Attorney or me during our jury selection that would indicate that she would not be fair to the prosecution. It's quite the opposite. She actually mentioned things that would perhaps be prejudicial to Mr. Johnson, and that she understood why people would make things up in a domestic violence case.

She was agreeing with the woman who was sitting next to her, saying the same things, and that person just happens to be not African American, so I am alleging a case of purposeful discrimination.

Thank you.

The Court: You said that she said the same things as a juror sitting next to her?

I assume you are referring to Juror No. 5, and I don't recall at all, in terms of Ms. [M.'s] comments about wanting to know what happened in the past.

So, are there different statements that you are saying they had similar remarks regarding?

[Defense counsel]: Yes. So she was essentially saying that she was agreeing with the juror next to her ... that domestic violence cases are complicated, and that she would perhaps want to get a broader picture of what happened.

And then instead of questioning her further and perhaps trying to establish a challenge for cause ... [the prosecutor] said ... are you okay with not knowing those things, and the juror, essentially agreed with her.

Based on what everybody else said, I don't think ... this juror stands out or she was saying anything negatively about [the prosecution's] case.

TR 12/18/18, p 108-110. The court ruled:

The Court: Ms. [M.], Juror No. 7, appears to be the only African American citizen on the veneer, those people, ultimately, in seats 1 through 25, and she was excused by the prosecution.

She was the third peremptory challenge exercised by the People, and subsequently, the Defense raised the issue of a *Batson* challenge.

This is ... a three-part step. The Defendant must establish a prima facie case by showing the totality of the relevant facts gives rise to an inference of discriminatory purpose.

As a first matter, I am unable to make that finding, that the totality of the facts presented in this jury selection process gives rise to an inference of a discriminatory purpose from the Prosecution.

However, if the Court were to find that that has been established, then the burden shifts to the Prosecution to explain the racial exclusion by offering a permissible race neutral justification for the strike.

The Prosecution has already done that during our bench conference, and they point to the juror's answer on her questionnaire, specifically that she has had bad experiences with law enforcement who exercised their own racial discrimination. I don't have her questionnaire in front of me to give the exact language.

[Defense counsel]: I can read it into the record.

The Court: Go ahead.

[Defense counsel]: This is question number eight. Have you or a family member or a close friend had a particularly good or bad experience with police officers. Yes. If yes, describe. Many cases where cops are disrespectful to certain racial identity, yes.

Number 10, Do you believe that there is any reason why you cannot be a fair and impartial juror? No, I would be great. I also note she states she is a member of the Black[] Student Alliance.

The Court: Hold on.

My point is the People offered explanation is race neutral, and that she has experience with -- in her perception, that law enforcement has, themselves, discriminated against people based on their racial or ethic identity, and this case clearly involves Mr. Johnson, an African-American man and law enforcement, and the fact that credibility of witnesses is always an issue, and you have law enforcement dealing with African-American citizens, raises the question for the Prosecution of whether she can be fair.

Admittedly, her statement on the jury questionnaire later says she can be fair, but the People have offered an adequate race neutral reason for exercising that peremptory challenge.

In that case, then, the third step the Court must go to is decide whether the opponent of the strike has proved purposeful racial discrimination, and in that case, I cannot find that the Defense has met that burden.

So the Court will deny the challenge under *Batson* as to the peremptory challenge of Juror No. 7, Ms. [M.].

...

> [Defense counsel]: ... Ms. [M.] says that she is a member of the Black Student Alliance. She identifies as black, obviously. She looks black to me. I spoke with my co-counsel, and he agreed with me.
>
> For all intents and purposes, she appears to be African-American, and she also identifies that way, and so I object to any characterization that ... she could be of mixed race, and that is fair, but she clearly identifies as black.
>
> Secondly, it is not a race neutral reason to cite racial discrimination and the fact that she has experienced it in the past as a reason to remove her from this panel.
>
> She has a right to serve as a juror.
>
> Mr. Johnson has a right to have people of like ethnicities on his own jury. This is not a jury of his peers. I object to the Court denying my motion.
>
> I think this, in fact, racial discrimination. I would also like to supplement the record by saying we had a trial in Division 401, just last week. The exact same thing happened to Mr. Johnson last week in Division 401 with the one black juror that was removed from the panel, citing some race neutral reason that is a pretext.
>
> There is a pretext that is happening here, and it's not relevant to ... the Prosecution's decision ... what color skin Ms. [T.] has. It's about Mr. Johnson and about this individual juror.
>
> There is purposeful discrimination happening here, and clearly, I think it happens in numerous cases and now it's happened to Mr. Johnson, so I object.

TR 12/18/18, p 113-117.

C. Law and Analysis

The United States and Colorado Constitutions both prohibit peremptory strikes to dismiss prospective jurors on the basis of race, gender, or ethnicity. U.S.

Const. Amend. XIV; Colo. Const. art. II, §§16, 25; *Foster v. Chatman*, 136 S.Ct. 1737, 1747 (2016); *People v. Beauvais*, 2017 CO 34, ¶ 34. The exercise of a single peremptory challenge on the basis of race violates the Fourteenth Amendment. *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008). Additionally, discriminatory peremptory challenges violate a defendant's right to an impartial jury under the Colorado Constitution. *See* Colo. Const. art. II, §16; *Fields v. People*, 732 P.2d 1145 (Colo. 1987).

The United States Supreme Court prescribed a three-step process to evaluate claims of purposeful discrimination in jury selection. *Batson*, 476 U.S. at 96-98; *People v. Rodriguez*, 351 P.3d 423, 429 (Colo. 2015). First, the defendant must make a prima facie showing that the prosecution used a peremptory challenge to exclude the prospective juror because of race. *Id.*; *People v. Phillips*, 315 P.3d 136, 169 (Colo.App. 2012). The prima facie standard is not a high one, only requiring the defendant to present evidence sufficient to raise an inference that discrimination occurred. *Valdez,* 966 P.2d at 590. "The facts and circumstances surrounding the use of peremptory challenges can raise the inference that the challenges were used to exclude potential jurors because of their race." *Gabler,* 958 P.2d at 507. Second, if the defendant makes such a prima facie showing, the burden then shifts to the prosecution to state a race-neutral explanation for the

challenge. *Batson,* 476 U.S. at 96-98. Third, the trial court must determine whether the defendant has proved purposeful racial discrimination. *Id.*; *People v. Wilson*, 351 P.3d 1126, 1131-32 (Colo. 2015). "At this point the plausibility of the prosecutor's race-neutral explanation becomes relevant, such that incredible explanations may (and probably will) be found to be pretexts for purposeful discrimination." *Gabler,* 958 P.2d at 507.

The majority in *Johnson* correctly analyzed step two of *Batson*.

Under *People v. Ojeda*, 2022 CO 7, a prosecutor's race-based justification can end the *Batson* inquiry at step two, even if other justifications are offered. *Ojeda*, ¶ 1 ("We hold that because the prosecution offered an explicitly race-based reason for striking [the juror], it did not meet its burden of providing a race- neutral explanation for the strike, as required under step two of the *Batson* test."); ¶ 31 ("Because we conclude that one of the prosecution's reasons for striking [the juror] was not race-neutral, we hold the trial court erred in overruling [the] Batson challenge . . . .").

The majority of the court of appeals division's decision in *Johnson* is consistent with this court's decision in *Ojeda*. This case is a paradigmatic example of a race-based justification for a peremptory strike -- excusing an African American juror based on her lived experience with and perception of law

enforcement. In *Ojeda*, this court held that if the prosecution offers an explicitly race-based reason for striking a prospective juror, it does not meet its burden under *Batson* step two and results in an automatic reversal. *Ojeda*, ¶¶ 1, 25, 31, 46-47, 52. "Step two of *Batson* analysis turns on the facial validity of the proponent's explanation. A race neutral explanation is an explanation based on something other that the race of the juror." *Ojeda*, ¶ 24 (citations and quotations omitted). "In evaluating the race neutrality of the proponent's explanation, a court must determine whether, assuming the proffered reason for the peremptory challenge is true, the challenge is based on something other than race, or whether it is race-based and, therefore, violates the Equal Protection Clause as a matter of law." *Ojeda*, ¶ 26 (citation omitted).

The Attorney General's contention that the burden at *Batson's* second step is "not high[,]" ignores the reality that de novo review applies at step two. (*See* OB, p 15-16.) *See People v. Wilson*, 351 P.3d at 1131. De novo means "anew, afresh; a second time." *Valdez v. People*, 966 P.2d at 598 (Kourlis, J., dissenting) (quoting *Black's Law Dictionary*, 392 (5th ed. 1979)). When an appellate court undertakes de novo review, it accords no deference to the lower court. *See Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005).

The *Johnson* majority accepted the prosecutor's explanation for striking Juror M. as true. *See People v. Madrid*, 2021 COA 70, ¶¶ 22-34 (*cert. granted*, case no. 21SC505(Colo. Mar. 28, 2022)) (citations omitted). The prosecution's reasons for striking Juror M. were her answers on the juror questionnaire that police officers "act disrespectful[ly] due to certain racial identities" and her response to voir dire to questions related to domestic violence. *Johnson*, ¶¶ 17, 27-28. Johnson was African America and Juror M. was the only African American juror on the panel when she was excused by the prosecution. The prosecutor's initial reaction to the *Batson* challenge was that "this is tantamount to an accusation of picking jurors based on race." TR 12/18/18, p 108:3-5. The majority acknowledged that the domestic violence reason offered by the prosecution was a race neutral reason. *Johnson*, ¶ 28.

The trial court observed that Juror M.'s response on the questionnaire evidenced she, a family member or close friend had been disrespected by the police "due to certain racial identities" but concluded that the prosecution proffered "an adequate race neutral reason" for the peremptory challenge. TR 12/18/18, p 111-118. The division determined the trial court's conclusion at step two was in error. *Johnson*, ¶ 27. The *Johnson* division determined the trial court erred because "a Black juror's personal experience with law enforcement that is race

based is not, on its face, a race-neutral explanation and, instead, constitutes a race-based explanation." The division concluded that "a Black juror's personal experience with law enforcement that is race based is not, on its face, a race-neutral explanation and, instead, constitutes a race-based explanation." *Id.* The majority reasoned the prosecution did not: (1) ask Juror M. any questions regarding her questionnaire response during voir dire; (2) establish that Juror M. had a general bias against law enforcement generally and/or; (3) establish that Juror M. would evaluate a law enforcement officer's credibility differently that a non-law enforcement witness. *Id.*

Juror M.'s experience that police officers "act disrespectful[ly] due to certain racial identities" is inextricably linked to race because her statement is based on her lived experience as an African American woman. As explained by Justice Marshall, *Batson* requires a race-neutral reason for striking a juror and "[t]o be 'neutral,' the explanation must be based *wholly* on nonracial criteria." *Wilkerson v. Texas*, 493 U.S. 924, 926 (1989) (Marshall, J. dissenting from denial of certiorari); *see also Ojeda*, ¶ 24.

As in *Ojeda*, this is a case in which the prosecution explicitly relied on race-based considerations and the lived experience of racial minorities to justify a peremptory strike of a prospective African-American juror. The prosecution

offered two reasons for striking Juror M., but the predominate reason was her statement on the juror questionnaire about how law enforcement was disrespectful. *See Ojeda*, ¶ 47 (citing *Batson*, 476 U.S. at 104 (1986) (Marshall, J., concurring) (the exclusion of black jurors cannot "be justified by a belief that blacks are less likely than whites to consider fairly or sympathetically the State's case against a black defendant"); *see also Beauvais*, n.12 ("a strike demonstrates purposeful discrimination where it is based on the juror's gender or race as a proxy for the juror's assumed bias").

The Attorney General relies on a number of federal and out-of-state cases to support its position that a prospective juror's bias against, or hostility towards, law enforcement is a valid, race-neutral justification for exercising a peremptory strike. (*See* OB, p 16-19.) These cases have no precedential or persuasive value. The Attorney General portrays Juror M. as having a bias against the police. This contention is irreconcilable with the record. Juror M. stated, "Yes. Many cases where cops are disrespectful due to certain racial identities" in response to a juror questionnaire given to all prospective jurors. Sealed, p 2-86 (Juror M's questionnaire is found on p 8). The prosecution did not question Juror M. about this statement during vior dire. TR 2/18/18, p 34-107. The trial court observed that the nature of Juror M.'s response suggested those were negative experiences,

and the prosecution was "inferring from that that she would have her own bias against law enforcement, based on her experiences. She did not come out and say that." TR 1/28/18, p 111-112. Juror M.'s experience that police officers "act disrespectful[ly] due to certain racial identities" does not equate to bias against law enforcement. There is no evidence in the record that would suggest Juror M. exhibited bias against law enforcement. Indeed, Juror M. stated that she would be a "great" juror in response to question 10 on the juror questionnaire "Do you believe there is any reason why you cannot be a fair and impartial juror? If yes, please give your reasons." Sealed, p 8; *Johnson*, ¶27.

The Attorney General's next assertion that the court of appeals blurred steps two and three of the *Batson* analysis and improperly shifted the burden of proof is not persuasive. (*See* OB, p 20-27.) The Attorney General concedes, "the prosecutor's foremost concern was that Juror M. "talked about how law enforcement was disrespectful."" (*See* OB, p 24-25.) (citing TR 12/18/18, p 108:6-8). The prosecutor later stated that Juror M.'s responses to questions about domestic violence was also a reason for her excusal. TR 12/18/18, p 110-111. The division acknowledged the burdens of proof at the different steps of *Batson* and that the ultimate burden of persuasion rests with the opponent of the strike. *Johnson*, ¶¶ 14-16. The majority of the division of the court of appeals did not

make any credibility determination, but rather accepted the prosecution's proffered reasons as true. The majority then analyzed the grounds for the peremptory strike to ascertain whether it was race-based. *Johnson*, ¶¶ 27-30. The *Johnson* division owed no deference to the trial court's ruling on step two since this step is reviewed de novo. *See Valdez v. People*, *supra*. Finally, the division specifically declined to reach step three of *Batson*. *Johnson*, ¶ 27.

This court should reject the Attorney General's argument that because jurors of all races and ethnicities can hold the belief that the police do not treat minorities equally, it is a race-neutral justification. Specifically, the Attorney General is asking this court to hold that bias against law enforcement, even if shaped by the belief that law enforcement do not treat minority persons equally, is facially race-neutral basis for his or her excusal. (*See* OB, p 27-33.) It is important to reiterate that Juror M. was not biased against law enforcement. In *Ojeda*, a prosecutor stated a juror had an anti-law enforcement bent because he'd experienced racial profiling and expressed reservations about the criminal justice system's ability to be fair to people of color. This court determined that striking minority jurors on grounds they've had prior negative experiences with police because of their race is *decidedly not a race-neutral justification*. *Ojeda*, ¶ 46 (emphasis added). Ultimately, this court affirmed, concluding that a prosecutor's explanation for the

strike was overtly race-based. *Ojeda*, ¶¶ 8-14, 32-38, 46-49. This court warned lower courts against "improperly ignor[ing] less blatant race-based strikes," which "raises the burden for the objecting party." *Ojeda*, ¶ 50.

If the jury selection system allows prosecutors to strike ethnic or racial minorities or other persons of a protected class who are concerned about discrimination because of their experiences, then juries will never be made up of a fair cross-section of our communities. It would violate the guarantee of equal protection, which "ensures litigants' and potential jurors' rights to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." *Ojeda*, ¶ 19; *see also People v. Newman*, 2020 COA 108, ¶ 1 ("Jurors are generally permitted, even expected, to lean on their own experience and background . . . during deliberations."); *People v. Holt*, 266 P.3d 442, 445 (Colo. App. 2011) (jurors' personal experience with criminal system cannot be offered to impeach a verdict).

In addition, the prosecution has a remedy if it believes that a prospective juror has opinions or biases that prevent him or her from being impartial or to follow the law as instructed -- a challenge for cause. *See generally, People v. Samson*, 2012 COA 167, ¶¶ 12-14.

The Attorney General's contention that any concerns about *Batson*'s "alleged shortcomings" are best answered by the legislature or through other judicial avenues is not convincing. (*See* OB, p 33-37.)

On March 10, 2022, the General Assembly's Judiciary Committee indefinitely postponed consideration of SB 22-128 (a bill enumerating invalid reasons for peremptory challenges) stating it would ask this Court's Rules Committee to make recommendations. *See* Colo. Senate Committee on Judiciary, Bill Summary for SB22-128 (March 10, 2022). Available at https://leg.colorado.gov/content/43472aff03e9a03d8725880100726e71- hearing-summary. This court has stated publicly that it plans to rule on several cases, including Johnson's, before ruling on the proposed changes to Crim. P. 24. *See* Michael Karlik, Colorado Supreme Court to Decide Fate of Racial Bias Rule After Hearing Cases, Colorado Politics, updated Sept. 8, 2023. Available at: https://www.coloradopolitics.com/courts/colorado-supreme- court-to-decide-fate-of-racial-bias-rule-after-hearing- cases/article_8d64fa56-48f2-11ee-bf0c-1fd7ef5fdc16.html.

It is well-established that this court can interpret constitutional law and craft appropriate remedies, even where Colorado's constitutional protections are more protective than the federal constitution. *See, e.g., Rocky Mountain Gun Owners v.*

Polis, 2020 CO 66, ¶ 37; *People v. Young*, 814 P.2d 834, 842 (Colo. 1991). The U.S. Supreme Court acknowledged that states have flexibility in formulating appropriate procedures to comply with *Batson*. *See Johnson v. California*, 545 U.S. 162, 168 (2005); *Powers v. Ohio*, 499 U.S. 400, 416 (1991). This case is a good vehicle for this court to clarify the scope of analysis at step two of *Batson* and provide guidance to Colorado courts. *See Batson*, 476 U.S. at 100 (requiring reversal); *Ojeda*, ¶¶49, 52 (reversing, at step 2, for race-based strike).

II. This court should affirm the per se test adopted by the court of appeals and hold that a racially discriminatory justification for a peremptory strike violates *Batson* even if the prosecutor also provides a race neutral reason without regard to whether the strike was based on purposeful discrimination.

A. Standard of Review

Questions of law are subject to de novo review. *See e.g., People v. Allison*, 86 P.3d 421, 426 (Colo. 2004).

B. Preservation

The *Johnson* division determined, "striking a juror on the basis of race independently violates the due process clause of the Colorado Constitution." *Johnson*, ¶ 23, (citation omitted).

The Attorney General's contention that Johnson did not preserve a due process claim under the Colorado Constitution is unconvincing. (*See* OB, p 52-54.) The Attorney General does not dispute that Johnson's *Batson* challenge was

preserved. (*See* OB, p 11.) TR 12/18/18, p 105:20-23, 107-118. Step two of the *Batson* analysis is reviewed de novo. This court has rejected a narrow and formalistic approach to issue preservation. A party is "not require[d] . . . [to] use 'talismanic language' to preserve particular arguments for appeal." *People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004) (quotation omitted). Rather, an issue is preserved so long as the trial court had an "adequate opportunity to make findings of fact and conclusions of law on any issue" later raised on appeal. *Id.* Moreover, issues raised at the trial level are preserved even if a party did not "formally ask . . . for a particular ruling" or did not "fully argue" a legal question, so long as the existing record permits "meaningful appellate review" of the issue. *See People v. Syrie*, 101 P.3d 219, 223 n. 7 (Colo. 2004) (citation omitted). In Colorado, a criminal defendant's equal protection challenge under *Batson* includes a due process claim tethered to Article II, § 25 of the Colorado Constitution. "Although the Colorado Constitution contains no equal protection clause, we have construed the due process clause of the Colorado Constitution to imply a similar guarantee." *Dean v. People*, 2016 CO 14, ¶ 11. This court should have no hesitation in reaching the merits.

C. Legal Analysis

Justice Byron White, in his concurrence in *Batson,* acknowledged that "[m]uch litigation will be required to spell out the contours of the Court's equal protection holding today." *Batson*, 476 U.S. at 102 (White, J. concurring).

The *Johnson* majority of the court of appeals is part of the evolution of the contours of Step two of *Batson.* Johnson respectfully submits this court should affirm the division's adoption of the per se rule. When a prosecutor offers both a race-based and race neutral explanation in response to a *Batson* objection, the trial court should apply the per se approach and sustain the objection because once a discriminatory reason has been provided, this reason taints the entire jury selection process. The per se or tainted approach reasons that the discriminatory explanation undermines the legitimacy of the entire jury selection process, such that the existence of an accompanying non-discriminatory explanation cannot "save the strike." *Johnson*, ¶¶ 19-24. Despite partially dissenting, Judge Berger explicitly joined in the majority's adoption of the per se approach. *Johnson*, ¶ 76 n.5.

The Attorney General's claim that the per se approach overlooks *Batson's* purpose and encourages dangerous results is unpersuasive. (*See* OB, p 46-51.) The U.S. Supreme Court, by its own description, began "vigorously enforc[ing] and reinforc[ing] [Batson], and guard[ing] against any backsliding." *Flowers v.*

Mississippi, 139 S. Ct. 2228, 2243 (2019) (citing cases). Under *Flowers*, reviewing courts are obligated to scrutinize the trial court's step-three findings "in light of all the evidence" appearing in the record. *Ojeda*, ¶ 28; *Flowers*, 139 S.Ct. at 2243-45. "As we see it, the overall context here requires skepticism of the State's strike . . . . We cannot just look away." *Flowers*, 139 S.Ct. at 2250-51 (citations omitted). In the dissent in *Beauvais*, Justice Marquez observed that the majority's deferential approach abdicated an appellate courts' responsibility to strictly enforce *Batson's* protections. *Beauvais*, ¶ 66 (Marquez, J., dissent). Justice Marquez envisioned a more active role for appellate courts in evaluating *Batson* challenges, including a willingness "to examine the record with a skeptical eye and reverse when necessary, so that members of the public are not excluded from jury service in violation of the Constitution." *Id.*, ¶ 103.

By affirming the per se approach, this court would join most courts which have held that a party violates *Batson* when it provides even one basis to strike a juror grounded in impermissible discrimination. *See United States v. Greene*, 36 M.J. 274, 282 (C.M.A. 1993); *McCray v. State*, 738 So.2 911, 914 (Ala.Crim.App. 1998); *State v. Lucas*, 18 P.3d 160, 163 (Ariz.Ct.App. 2001); *People v. Douglas*, 232 Cal. Rptr.3d 305, 315 (Ct.App. 2018); *Robinson v. U.S.*, 878 A.2d 1273, 1284 (D.C. 2005); *Rector v. State*, 444 S.E.2d 862, 865 (Ga.Ct.App. 1994); *McCormick*

v. State, 803 N.E.2d 1108, 1113 (Ind. 2004); *Ray-Simmons v. State*, 132 A.3d 275, 285 (Md. 2016); *State v. McFadden*, 191 S.W.3d 648, 657 (Mo. 2006); *Payton v. Kearse*, 495 S.E.2d 205, 210 (S.C. 1998); *Powers v. Palacios*, 813 S.W.2d 489, 491 (Tex. 1991); *State v. Jensen*, 76 P.3d 188, 193-94 (UtahCt.App. 2003); *State v. King*, 572 N.W.2d 530, 535 (Wis.Ct.App. 1997).

Johnson reasoned the "most faithful to the principles outlined in Batson" is the per se approach. *Johnson*, ¶ 23. The per se approach is also more straightforward for courts to consistently apply and removes uncertainty in the application of *Batson*. *Johnson*, ¶ 24. Trial courts are "ill-equipped to second-guess" counsel's assertion about his or her own motivations so that determinations under the mixed motive and substantial motivation standard will tend to be unreliable and inconsistent. *Id.*

The Attorney General's allegation that there is no basis for adopting the per se test even if this court concludes that precedent does not preclude it is not persuasive. (*See* OB, p 51-55.) "[T]he central concern of the . . . Fourteenth Amendment was to put an end to governmental discrimination on account of race." *Batson*, 476 U.S. at 85. *Batson* and other landmark anti-discrimination cases are fueled by the "duty to confront racial animus in the justice system." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017). "Racial discrimination in

selection of jurors . . . undermines public confidence in the fairness of our system of justice. And it shamefully belittles minority jurors who report to serve their civic duty only to be turned away on account of their race." *Madrid*, ¶ 6 (citations omitted).

The *Johnson* division citied Justice Liu of the California Supreme Court in People v. Triplett, 267 Cal. Rptr. 3d 675 (Ct.App.2020)(review denied), as criticizing the practice of excusing minorities from juries "based on ostensibly race-neutral justifications that mirror the racial faultlines in society. This approach is not dictated by high court precedent, and it is untenable if our justice system is to garner the trust of all groups in our communities and to provide equal justice under law." *Id.* at 692. "Exercising a peremptory strike to remove a Black juror because of her personal experience that police officers act "disrespectful[ly] due to certain racial identities" improperly mirrors a racial faultline." *Johnson*, ¶ 31. The division's majority correctly held that the Equal Protection Clause of the U.S. Constitution and the due process clause of the Colorado Constitution are violated when a prosecutor strikes an African American juror solely because they or someone close to them have had a negative experience with law enforcement because of his or her race. *Johnson*, ¶ 32.

III. Given that the majority in *Johnson* correctly analyzed step two of *Batson* and Juror M. was not biased against law enforcement, this court may wish to dismiss the Attorney General's petition as improvidently granted.

This court may wish to consider dismissing the Attorney General's petition for writ of certiorari as improvidently granted. The first question on which certiorari was granted concerns the narrow question "[w]hether citing a Black juror's expression of concern that police do not treat minority persons equally constitutes a race-neutral justification for the purposes of Batson's second step."

As detailed *supra*, the court of appeals correctly analyzed step two of *Batson* and its decision is consistent with this court's decision in *Ojeda*. Here, the Attorney General asks this court to hold that bias against law enforcement, even if shaped by the belief that law enforcement do not treat minority persons equally, is facially race neutral as a matter of law. The question is beyond the scope of the issue on which the court did grant certiorari. This court reframed the issue on review such that the issue of general bias against law enforcement being a facially neutral ground for striking a prospective juror is not properly before this court. The facts of this case do not raise this issue: Juror M. did not express a general bias against law enforcement. The trial court observed that the prosecution inferred that Juror M. had such a bias. TR 1/28/18, p 111-112.

Accordingly, this court may have improvidently granted certiorari in this case. *See* C.A.R. 49.

CONCLUSION

Based on the foregoing reasons and authorities, Raeaje R. Johnson respectfully requests that this court either dismiss the Attorney General's petition for writ of certiorari as improvidently granted or affirm the court of appeals.

Dated this 6th day of November, 2023.

Respectfully submitted,

/s/ *Tanja Heggins*

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CERTIFICATE OF SERVICE

I certify that on November 6, 2023, a true and correct copy of the foregoing **ANSWER BRIEF** was filed and served by the Colorado Courts E-Filing System to all counsel of record.

/s/ *Tanja Heggins*
Tanja Heggins