# STATE OF CONNECTICUT *v.* ANTONIO RIGUAL (SC 16026)

McDonald, C. J., and Borden, Palmer, Vertefeuille and Callahan, Js.*

Argued January 19, 2000—officially released May 8, 2001

Counsel

*G. Douglas Nash*, public defender, for the appellant (defendant).

*Frederick W. Fawcett*, supervisory assistant state's attorney, with whom, on the brief, were *Jonathan Benedict*, state's attorney, *C. Robert Satti, Jr.*, senior assistant state's attorney, and *Daniel Borowy*, student intern, for the appellee (state).

*Ronald A. Gonzalez, Karen L. Dowd* and *Kenneth J. Bartschi* filed a brief for the Connecticut Bar Association et al. as amici curiae.

*Opinion*

VERTEFEUILLE, J. The issue in this appeal is whether the state is required to offer a nondiscriminatory reason to the court for exercising a peremptory challenge when the defendant claims the challenge is based on a prospective juror's ancestry or ethnic origin.

We conclude that under *Batson* v. *Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and its progeny, a prosecutor must offer a nondiscriminatory reason for removing a venireperson when a defendant raises such a claim.

The following procedural history is necessary to an understanding of the issues before this court. After a jury trial on a three count substitute information, the jury found the defendant, Antonio Rigual, not guilty of attempted murder in violation of General Statutes §§ 53a-49 (a)[1] and 53a-54a (a).[2] The jury convicted the defendant, however, of attempted assault of a peace officer in violation of General Statutes § 53a-49 and General Statutes (Rev. to 1995) § 53a-167c (a) (1),[3] as well as commission of a class A, B or C felony with a firearm in violation of General Statutes § 53-202k.[4] The defendant appealed from the judgment of conviction to the Appellate Court, claiming that the trial court improperly had denied his motion to require the state to provide a nondiscriminatory reason for its peremptory challenge of a prospective juror. *State* v. *Rigual*, 49 Conn. App. 420, 422, 714 A.2d 707 (1998). The Appellate Court concluded that because the defendant, who is Hispanic, was not of the same racially cognizable group as the venireperson, who is Portuguese, the defendant could not raise a challenge under *Batson*. Id., 431. The Appellate Court therefore did not reach the merits of the defendant's *Batson* claim. Id.[5]

We granted the defendant's petition for certification limited to the following issue: ''Did the Appellate Court properly conclude that the trial court had not improperly denied the defendant's request to provide a race neutral explanation for [the state's] peremptory challenge of a venireperson of Portuguese descent?'' *State* v. *Rigual*, 247 Conn. 924, 719 A.2d 1171 (1998). We now must decide: (1) whether the Appellate Court properly concluded that the defendant could not raise a *Batson* claim to the state's use of a peremptory challenge regarding a venireperson of a different ethnic background from the defendant; and (2) if the Appellate Court's conclusion was not proper, whether the rule in *Batson* applies to the use of a peremptory challenge on the basis of ethnic origin or ancestry.

The following facts are relevant to these two issues. During voir dire, both the state and the defendant questioned venireperson D.B.[6] During the questioning, D.B. stated that the Bridgeport police had arrested him nine months previously for driving under the influence.[7] The court also inquired of D.B., asking him at one point, ''[a]re you Hispanic?'' D.B. replied, ''Portuguese.'' At the conclusion of the voir dire, the defendant accepted D.B. as a juror. The state, however, exercised a peremptory challenge to excuse him. The defendant then objected to the state's use of a peremptory challenge and asked the court to require the state to provide its reason for

excusing D.B. Although defense counsel did not state specifically that his objection was a *Batson* claim, our reading of the record convinces us that the objection was grounded on *Batson*. In addition, the state, in its brief and at oral argument before this court, concedes that it treated the objection as a *Batson* claim. After hearing argument from both counsel, the court stated: ''[The state has] a reason. They just haven't been required to state it. And the way we are here, I can't make them do that at this juncture.'' The defendant's objection to the peremptory challenge was overruled and the state never revealed its reason for excusing D.B.[8]

I

As a threshold matter, we must determine the applicable standard of review that governs our examination of the defendant's claims. The scope of our review depends upon the appropriate characterization of the trial court's rulings. *Morton Buildings, Inc.* v. *Bannon*, 222 Conn. 49, 53, 607 A.2d 424 (1992). In the present case, the defendant contests the correctness of the Appellate Court's legal conclusions. Our review of those conclusions is plenary. Id.

The first issue in this appeal is whether the Appellate Court properly concluded that the defendant, who is Hispanic, could not raise a *Batson* claim to the state's challenge of a venireperson who identified himself as being Portuguese. In *Batson* v. *Kentucky*, supra, 476 U.S. 89, the United States Supreme Court held that the use of peremptory challenges by the state to strike venirepersons solely because they are members of the defendant's race violated the equal protection clause of the federal constitution. *Batson* established a three step procedure pursuant to which the defendant in a criminal case can challenge the state's use of peremptory challenges to exclude jurors because of their race. Id., 96–98. First, the defendant must provide proof of a prima facie case of discrimination by the state. Id., 96. The state then must proffer a neutral explanation for the peremptory challenge. Id., 97. Finally, the defendant must establish purposeful discrimination by the state. Id., 98. The *Batson* court explicitly limited its ruling to the use of peremptory challenges ''to remove from the venire *members of the defendant's race*.'' (Emphasis added.) Id., 96.

Several years later, however, the Supreme Court expanded the applicability of *Batson* claims, ruling that a criminal defendant may object to race-based exclusions of jurors through peremptory challenges regardless of whether the defendant and the excluded venirepersons are of the same race. *Powers* v. *Ohio*, 499 U.S. 400, 415–16, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). The defendant in *Powers*, a Caucasian, objected to the state's use of peremptory challenges to exclude black venirepersons. Id., 403. The trial court did not

consider his objection because of the racial disparity between the defendant and the venirepersons. Id. The Supreme Court, however, concluded that the defendant had standing to raise the equal protection rights of jurors excluded from jury service. Id., 415. "We conclude that a defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race. . . . To bar [a] petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury services. In *Holland* [v. *Illinois*, 493 U.S. 474, 110 S. Ct. 803, 107 L. Ed. 2d 905 (1990)] and *Batson*, we spoke of the significant role peremptory challenges play in our trial procedures, but we noted also that the utility of the peremptory challenge system must be accommodated to the command of racial neutrality." (Citation omitted.) *Powers* v. *Ohio*, supra, 415.

In ruling that the Hispanic defendant in the present case could not make a *Batson* claim to the state's exclusion of a Portuguese venireperson, the Appellate Court relied on *Batson* and this court's application of *Batson*, with modification, in *State* v. *Holloway*, 209 Conn. 636, 553 A.2d 166, cert. denied, 490 U.S. 1071, 109 S. Ct. 2078, 104 L. Ed. 2d 643 (1989). *State* v. *Rigual*, supra, 49 Conn. App. 430–31. The Appellate Court failed to consider, however, the United States Supreme Court's ruling in *Powers* v. *Ohio*, supra, 499 U.S. 415–16, which expanded the applicability of *Batson* to cases where the defendant and the excluded venireperson are not of the same race. As a result, the Appellate Court improperly concluded that the defendant, a Hispanic, could not raise a *Batson* claim to the exclusion of the Portuguese venireperson. *State* v. *Rigual*, supra, 49 Conn. App. 431. We conclude that the defendant had standing to object to the state's use of a peremptory challenge to excuse D.B. from becoming a juror in this case.

II

We next must decide whether the rule in *Batson*, as modified by this court's decision in *State* v. *Holloway*, supra, 209 Conn. 636,[9] applies to prohibit the use of peremptory challenges on the basis of ethnic origin or ancestry. We conclude that it does.

In *Batson*, the United States Supreme Court established the rule of law that the use of peremptory challenges to exclude "a cognizable racial group"; *Batson* v. *Kentucky*, supra, 476 U.S. 96; from a jury violates the equal protection clause of the United States constitution. Id., 97. In subsequent cases, the Supreme Court extended *Batson* protection to other group classifications that trigger heightened scrutiny under traditional equal protection analysis. The court concluded in *Hernandez* v. *New York*, 500 U.S. 352, 355, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991), that the use by the state of

peremptory challenges to exclude Latinos from a jury because of their ethnic origin would violate the equal protection clause. On the particular facts of that case, however, where the state's proffered reason for excusing the Latino venirepersons was that the venirepersons would have difficulty in accepting the court translator's rendition of testimony from Spanish to English because of their own knowledge of the Spanish language, the court found the state's excuse of the Latinos to be nondiscriminatory and valid. Id., 361; see also *United States* v. *Martinez-Salazar*, 528 U.S. 304, 315, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000) (peremptory challenges based on ethnicity violate equal protection clause).

In *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 143, 114 S. Ct. 1491, 128 L. Ed. 2d 89 (1994), the United States Supreme Court extended *Batson* protection to gender-based peremptory challenges and explained that peremptory challenges may not be used to excuse venirepersons on the basis of group classifications that trigger anything stricter than rational basis review under the equal protection doctrine. ''Parties may . . . exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review.'' Id. *Batson* protection, the court articulated, is reserved for venirepersons from cognizable groups that are not normally the subject of rational basis review. Id.

It has long been settled that discrimination on the basis of ancestry or national origin violates the equal protection clause of the fourteenth amendment to the United States constitution and is subject to heightened scrutiny. *Hernandez* v. *Texas*, 347 U.S. 475, 479, 74 S. Ct. 667, 98 L. Ed. 866 (1954); see *Oyama* v. *California*, 332 U.S. 633, 646, 68 S. Ct. 269, 92 L. Ed. 249 (1948) (denying persons of Japanese descent right to own land operated to discriminate on basis of their ancestry or ethnic origin); *Hirabayashi* v. *United States*, 320 U.S. 81, 100, 63 S. Ct. 1375, 87 L. Ed. 1774 (1943) (classification targeting Japanese-Americans triggered strict scrutiny). Further, the United States Supreme Court, in considering the term ''race'' as that term applied in a 42 U.S.C. § 1981 analysis, recognized that race encompassed those discriminated against based on ''their ancestry or ethnic characteristics.'' *St. Francis College* v. *Al-Khazraji*, 481 U.S. 604, 613, 107 S. Ct. 2022, 95 L. Ed. 2d 582 (1987).

Discrimination on the basis of ancestry or national origin clearly is in violation of the equal protection clause of the federal constitution. Consequently, *Batson*, which was decided on the basis of the equal protection clause, must be applied to protect venirepersons from being excused from juries because of their ancestry or national origin. We agree with the United States Supreme Court when it stated that, ''[a]ll persons, when granted the opportunity to serve on a jury, have the right

not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination.'' *J.E.B.* v. *Alabama ex rel. T.B.*, supra, 511 U.S. 142. Accordingly, we conclude that the trial court improperly failed to hold a *Batson* hearing to address the propriety of the state's exercise of a peremptory challenge to remove D.B. from the jury in this case.[10]

Purposeful discrimination in the judicial system is intolerable. More than ten years after *Holloway*, we still find that this issue is of the ''utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole.'' (Internal quotation marks omitted.) *State* v. *Holloway*, supra, 209 Conn. 645; see also *State* v. *Hodge*, 248 Conn. 207, 260–61, 726 A.2d 531, cert. denied, 528 U.S. 969, 120 S. Ct. 409, 145 L. Ed. 2d 319 (1999). Therefore, we agree with other state Supreme Courts that it is in the best interest of justice to require trial courts to conduct *Batson* hearings upon any party's request when the opposing party exercises its peremptory challenges to remove members of a particular race, gender, ancestry or national origin. See footnote 10 of this opinion.

It is suggested that our ruling today will impose an onerous burden on our trial courts with respect to the jury selection process. We disagree. When a defendant raises a *Batson* objection to the state's use of a peremptory challenge to excuse a venireperson allegedly on the basis of ancestry or national origin, the state need only present a neutral, nondiscriminatory explanation for the use of the challenge. If the court is persuaded that the state does in fact have a neutral reason for the exercise of the challenge, the court will overrule the objection and the matter will be concluded. If the court is not persuaded that the excuse of the juror is for a nondiscriminatory reason, the defendant must be given an opportunity to show purposeful discrimination by the state. The court will then rule on the objection.

Although our decision today is based on the equal protection clause of our federal constitution, it is important to recognize, that unlike the federal constitution, the equal protection provision of our state constitution *explicitly* prohibits discrimination on the basis of ancestry or national origin. Article first, § 20, of the constitution of Connecticut, as amended by articles five and twenty-one of the amendments, provides: ''No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his civil or political rights because of religion, race, color, *ancestry, national origin*, sex or physical or mental disability.'' (Emphasis added.) This express prohibition against discrimination based on ancestry or national origin was adopted as part of our 1965 constitution. Our decision today therefore is in accord with the clear public policy of our state as

reflected in the equal protection provision of our state constitution.[11]

Having concluded, first, that the defendant had standing to challenge the exclusion of D.B. by the state, and, second, that *Batson* and *Holloway* apply to the use of a peremptory challenge on the basis of national origin or ancestry, we now must decide the proper remedy to be applied. When the trial court improperly fails to hold a *Batson* hearing, there are two remedial alternatives. *State* v. *Robinson*, 237 Conn. 238, 253, 676 A.2d 384 (1996). ''We could direct a limited remand, ordering the trial court to conduct a hearing now to determine whether the state's peremptory challenge was racially motivated. . . . This is the remedy usually invoked . . . . Alternatively, we could reverse the judgment of the Appellate Court and direct it to remand the case to the trial court with direction to set aside the judgment against the defendant and to conduct a new trial on the charges against him.'' (Citations omitted.) Id., 253–54.

In *Robinson*, this court, after concluding that the trial court improperly failed to hold a *Batson* hearing, ordered a new trial because there was ''no reasonable possibility that the circumstances surrounding [the voir dire could] be reconstructed fairly . . . .'' (Internal quotation marks omitted.) Id., 254. In ordering a new trial, we relied on the fact that five years had passed between the trial and the appeal to this court and that there was no record regarding what nondiscriminatory reason the state could offer for excluding the juror. Id.

In the present case, however, the state was prepared at the time of the voir dire to state its reason for excusing D.B. The state remains prepared to do so and, in fact, has set forth its reason in its brief filed in this court. It appears, therefore, that the circumstances surrounding the voir dire can be reconstructed and a limited remand is therefore appropriate.

Accordingly, we reverse in part the judgment of the Appellate Court and remand the case to that court with direction to remand the case to the trial court with direction to require the state to proffer a nondiscriminatory reason for excusing D.B. from the jury panel. If the state is unable to do so, or if the trial court finds that too much time has passed so that there is ''no reasonable possibility that the circumstances surrounding [the voir dire] can be reconstructed fairly''; (internal quotation marks omitted) id.; the trial court is directed to set aside the judgment against the defendant and to conduct a new trial.

The judgment of the Appellate Court is reversed in part and the case is remanded to that court with direction to remand the case to the trial court for further proceedings consistent with the preceding paragraph.

In this opinion BORDEN, PALMER and CALLAHAN, Js., concurred.

* The listing of justices reflects their seniority status on this court as of the date of argument.

Although Chief Justice McDonald and Justice Callahan reached the mandatory age of retirement before the date that this opinion officially was released, their continued participation on this panel is authorized by General Statutes § 51-198 (c).

[1] General Statutes § 53a-49 (a) provides: ''A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he: (1) Intentionally engages in conduct which would constitute the crime if attendant circumstances were as he believes them to be; or (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.''

[2] General Statutes § 53a-54a provides in relevant part: ''(a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person . . . .''

[3] General Statutes (Rev. to 1995) § 53a-167c (a) provides in relevant part: ''A person is guilty of assault of a peace officer . . . when, with intent to prevent a reasonably identifiable peace officer . . . from performing his duty, and while such peace officer . . . is acting in the performance of his duties, (1) he causes physical injury to such peace officer . . . .''

[4] General Statutes § 53-202k provides in relevant part: ''Any person who commits any class A, B or C felony and in the commission of such felony uses, or is armed with and threatens the use of, or displays, or represents by his words or conduct that he possesses any firearm . . . shall be imprisoned for a term of five years, which shall not be suspended or reduced and shall be in addition and consecutive to any term of imprisonment imposed for conviction of such felony.''

[5] The defendant also claimed that the trial court had improperly instructed the jury on self-defense, and incorrectly sentenced the defendant on § 53-202k as a separate offense. *State* v. *Rigual*, supra, 49 Conn. App. 422. The Appellate Court vacated the defendant's conviction under § 53-202k and remanded the case for resentencing. Id., 432. The Appellate Court, however, found no impropriety with the trial court's self-defense instructions; id., 429; and did not address the merits of issue in the present appeal, having determined that the defendant had not met the threshold set out in *Batson*. Id., 431.

[6] We refer to the venireperson by his initials to protect his privacy. See *State* v. *Hodge*, 248 Conn. 207, 229 n.25, 726 A.2d 531, cert. denied, 528 U.S. 969, 120 S. Ct. 409, 145 L. Ed. 2d 319 (1999).

[7] Bridgeport police also had arrested the defendant on the charges at issue in this case and a Bridgeport police officer was the victim of the defendant's assault on a peace officer charge in this case.

[8] The state did appear ready, however, to present its reason for excusing venireperson D.B., if the court so required, as evidenced by the following exchange:

''The Court: You have no response, is that it?

''[Senior Assistant State's Attorney]: If you want me to give a response. At this point, I don't believe he has reached the threshold to have me give a response.''

[9] In *Holloway*, this court modified the three step *Batson* procedural framework as it is used in Connecticut by relieving a defendant of the need to make an initial prima facie showing of discrimination. *State* v. *Holloway*, supra, 209 Conn. 645–46. A defendant in this state need only make a *Batson* objection in order to trigger the requirement that the state respond with a nondiscriminatory reason for excusing the proposed juror. Id.

[10] We emphatically disagree with the dissent's conclusion that today's opinion ''[b]y requiring a party to give an explanation for a peremptory challenge whenever requested by another party . . . eliminates peremptory challenges . . . and, ultimately, undermines the guarantee of an impartial jury under the federal constitution.'' Such a conclusion ignores our decision in *State* v. *Holloway*, supra, 209 Conn. 646, which requires a party to give an explanation for a peremptory challenge whenever another party asserts a *Batson* claim.

We perceive no reasoned basis for the dissent's call to apply *Holloway* only where a party and the challenged juror are of the same cognizable racial or ethnic group and to require a prima facie showing of juror discrimination in those instances where the party does *not* share the same race or ethnic origin as the prospective juror. The dissent relies on *United States*

v. *Stavroulakis*, 952 F.2d 686 (2d Cir. 1992), to further articulate its claim that a prima facie case of discrimination was required in the current case. *Stavroulakis*, however, is from a jurisdiction that has not adopted the South Carolina rule that this court adopted in *Holloway*. See *State* v. *Holloway*, supra, 209 Conn. 646 n.4; *State* v. *Jones*, 293 S.C. 54, 58, 358 S.E.2d 701 (1987). Therefore, in light of *Holloway*, this case is not applicable.

We conclude that in light of *Powers*, *Holloway* must now be construed to require that trial courts hold a *Batson* hearing when one is requested by any person, regardless of the race, gender, ethnicity or national origin of that person. We join two other state Supreme Courts that follow the South Carolina rule that have concluded the same. See *Ex parte Bird*, 594 So. 2d 676, 687 (Ala. 1991) (trial judges must hold *Batson* hearing upon any party's request whenever other party exercises peremptory challenges to remove members of cognizable racial group from venire); *State* v. *Adams*, 322 S.C. 114, 124, 470 S.E.2d 366 (1996) (trial judge must hold *Batson* hearing when members of cognizable racial group or gender are struck and opposing party requests hearing, even where defendant is of different cognizable racial group or gender than stricken venireperson).

[11] Nothing in our ruling today alters the cognizable group analysis we previously have applied when peremptory challenges are allegedly utilized to excuse members of groups that do not enjoy heightened scrutiny for equal protection purposes. See *State* v. *McDougal*, 241 Conn. 502, 514–20, 699 A.2d 872 (1997).