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Equal Protection

EQUAL PROTECTION

N.Y CONST. art. I, § 11:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof.

U.S. CONST. amend. XIV, § 1:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

COURT OF APPEALS

People v. Hernandez[373]
(decided February 22, 1990)

The defendant, a Latino convicted of two counts of both attempted murder and criminal possession of a weapon, argued that his equal protection rights under the state[374] and federal[375] constitutions, as defined under *Batson v. Kentucky*,[376] were vio-

373. 75 N.Y.2d 350, 552 N.E.2d 621, 553 N.Y.S.2d 85, *cert denied in part*, Hernandez v. New York, 111 S. Ct. 242 (1990); *see* Comment, *Gender Based Peremptory Challenges and the New York State Constitution*, 8 TOURO L. REV. 91 (1991).

374. N.Y. CONST. art. I, § 11.

375. U.S. CONST. amend. XIV, § 1.

376. 476 U.S. 79 (1986) (prosecution's race based peremptory challenges were violative of the equal protection clause of the fourteenth amendment of the United States Constitution).

To establish a *prima facie* claim of race based discrimination under *Batson*, "the defendant first must show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." *Id.* at 96. The defendant may also rely on the fact "that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Id.* (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)). "[T]he defendant must [also] show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of

lated when the prosecution peremptorily challenged two Latino prospective jurors. Under section 270.25 of the state Criminal Procedure Law,[377] both the prosecution and defense are permitted up to twenty peremptory challenges. The prosecution asserted that the challenges were proper under *Batson* because the prospective jurors were excluded for non-racial reasons.

During the *voir dire* process, the prosecution peremptorily challenged four Latino prospective jurors. According to the prosecution, the first two challenges were exercised because each had a brother who was prosecuted by the same district attorney's office and thus might be prejudiced against the state. These challenges were not contested by the defense.[378] The remaining two challenges were contested because the defense believed that the prosecution failed to offer a race neutral explanation for excusing the Latino prospective jurors. When questioned by the trial judge for the exercise of the peremptory challenges, the prosecution stated that they were excused because he believed that the prospective jurors might have "difficulties in their accepting the official court interpreter's translation of the testimony of the Spanish-speaking witnesses."[379] The court of appeals, deciding the issue under federal law, held that the prosecution properly offered a race neutral explanation for excluding the two Latino prospective jurors and therefore did not constitute a *Batson* violation.[380] The decision was subsequently upheld by the United States Supreme Court.[381]

The court of appeals ruled that the defense properly made out a *prima facie* claim of a *Batson* violation since the only four Latino prospective jurors on the jury venire were excluded by the prosecution's peremptory challenge. According to *Batson*, once a prima facie claim of discrimination is made out, the prosecution must offer a race neutral explanation to rebut the claim. Here, the

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the venire, raises the necessary inference of purposeful discrimination." *Id.*

377. N.Y. CRIM. PROC. LAW § 270.25 (McKinney 1982).

378. *Hernandez*, 75 N.Y.2d at 354, 552 N.E.2d at 622, 553 N.Y.S.2d at 86.

379. *Id.*

380. *Id.* at 356, 552 N.E.2d at 623-24, 553 N.Y.S.2d at 87-88.

381. Hernandez v. New York, 111 S. Ct. 1859 (1991).

prosecution stated that it excluded the two prospective jurors because they hesitated when asked whether they could accept the court interpretetor's translation of the witness testimony. The court accepted this explanation as being race neutral, noting that "[h]esitancy or uncertainty about being able to decide the case on the same evidence which binds every member of a jury is a proper, neutral and nondiscriminatory basis for the prosecutorial exercise of peremptory challenges."[382]

The court felt no need to address the defendant's equal protection rights under the state constitution noting that, "analysis of the record and issues of this case on the merits would produce the same result under the Federal and State equal protection right . . . ."[383]

In a dissenting opinion, Judge Kaye disagreed with the majority view of applying only federal law, contending that this decision could have been properly settled under state constitutional law.[384] The judge believed that settling this case under state constitutional law would provide the court with the opportunity to enunciate broader protection for the criminal defendant and the unfairly excluded prospective juror than is provided under the Federal Constitution. In this instance, the judge contended that the prosecution's explanation, while race neutral on its face, was still discriminatory because it has a disparate impact upon the racial group. Because most Latinos speak only Spanish, according to the judge, they can still be subject to systematic exclusion by peremptory challenge.[385]

In a concurring opinion, Judge Titone agreed with the majority decision, but advised that the state legislature should re-examine the peremptory challenge statute given the new federal constitutional requirements announced in *Batson*. The judge recommended that the legislature should lower the amount the peremp-

382. *Hernandez*, 75 N.Y.2d at 357-58, 552 N.E.2d at 624, 553 N.Y.S.2d at 88.

383. *Id.* at 358, 552 N.E.2d at 624, 553 N.Y.S.2d at 88.

384. *Id.* at 360, 552 N.E.2d at 626, 553 N.Y.S.2d at 90 (Kaye, J., dissenting).

385. *Id.* at 356, 552 N.E.2d at 623, 553 N.Y.S.2d at 87 (Kaye, J., dissenting).

tory challenges allowed under the present statute. This change, Judge Titone concluded, would still allow the prosecution and defense to exclude suspected prospective jurors, but reduce the opportunity for systematic exclusion of certain racial groups.[386]

People v. Kern[387]
(decided March 29, 1990)

Three defendants, two convicted of manslaughter, assault and conspiracy and one convicted of manslaughter and assault, contended that neither the state nor federal constitution prohibits a criminal defendant from exercising race based peremptory challenges.[388]Peremptory challenges, provided under section 270.25 of the state's Criminal Procedure Law,[389] allow both the defense and prosecution to exclude a prospective juror without having to supply a reason.[390] The issue was whether such challenges violated the equal protection clause[391] and/or the civil rights clause[392] of the state constitution. The court held that both clauses of the New York State Constitution prohibit racially based peremptory challenges.[393]

This appeal arises from the highly publicized "Howard Beach incident" where three white youths were arrested for attacking

386. *Id.* at 359, 552 N.E.2d at 625-26, 553 N.Y.S.2d at 89-90 (Titone, J., concurring).

387. 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647, *cert denied,* Kern v. New York, 111 S. Ct. 77 (1990).

388. *Id.* at 648, 554 N.E.2d at 1239-40, 555 N.Y.S.2d at 651-52.

389. N.Y. CRIM. PROC. LAW § 270.25 (McKinney 1982).

390. *See id.*

391. *Kern,* 75 N.Y.2d at 653, 554 N.E.2d at 1243, 555 N.Y.S.2d at 655. The equal protection clause states that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof." N.Y. CONST. art. I, § 11.

392. *Kern,* 75 N.Y.2d at 650-51, 554 N.E.2d at 1241, 555 N.Y.S.2d at 653. The civil rights clause states that "[n]o person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state." N.Y. CONST. art I, § 11.

393. *Kern,* 75 N.Y.2d at 650-51, 554 N.E.2d at 1241, 555 N.Y.S.2d at 653.