MCDONALD, C. J., dissenting. Under our supervisory authority, the majority eliminates the need to establish a prima facie case of purposeful juror discrimination before requiring a race neutral explanation of a peremptory challenge. See footnote 10 of the majority opinion.

By requiring a party to give an explanation for a peremptory challenge whenever requested by another party, the majority eliminates peremptory challenges, which are provided for in Connecticut's statutes and guaranteed by the Connecticut constitution,[1] and, ultimately, undermines the guarantee of an impartial jury under the federal constitution. See *Holland* v. *Illinois*, 493 U.S. 474, 110 S. Ct. 803, 107 L. Ed. 2d 905 (1990). Moreover, it does so under our supervisory authority, which we have held ''is not a form of free-floating justice, untethered to legal principle. . . . Thus, [e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions. . . . *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1988).'' (Citation omitted; internal quotation marks omitted.) *State* v. *Pouncey*, 241 Conn. 802, 813, 699 A.2d 901 (1997).

In *State* v. *Holloway*, 209 Conn. 636, 645–46, 553 A.2d 166, cert. denied, 490 U.S. 1071, 109 S. Ct. 2078, 104 L. Ed. 2d 643 (1989), this court exercised its supervisory powers to require an explanation if the state strikes venirepersons who are members of the defendant's cognizable racial group and the defendant requests a hearing under *Batson* v. *Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).[2] *Holloway* was decided before the United States Supreme Court made clear in *Powers* v. *Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991), that a party need not be of the same race as the excused juror to have standing to raise a *Batson* claim. After *Holloway*, the United States Supreme Court also extended *Batson* to peremptory challenges based on the gender and ethnic origin of the venireperson. See *United States* v. *Martinez-Salazar*, 528 U.S. 304, 315, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000), citing *Hernandez* v. *New York*, 500 U.S. 352, 362–63, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991). In light of these later cases, the majority now extends the *Holloway* rule to cases where the defendant and the stricken venireperson are not claimed to have a common ethnic origin or ancestry. I submit that, in doing so, the majority misapplies the rule for standing to invoke *Batson* to the *Batson* requirement of a prima facie case of discrimination. Those aspects of *Batson* are, however, distinct. I would restrict the *Holloway* supervisory rule to cases where a party and the challenged juror are members of the same cognizable racial or ethnic group. I would require a prima facie showing of juror discrimination in all other circumstances. The difference between *Batson* standing and a *Batson* prima facie case was explained by Justice Kennedy in his concurrence in *Holland* v. *Illinois*, 493 U.S. 474, 488–90, 110 S. Ct. 803, 107 L. Ed. 2d 905 (1990). There he saw ''no obvious reason to conclude that a defendant's race should deprive him of standing''; id., 489 (Kennedy, J., concurring); to raise a *Batson* claim, and explained, ''*Batson* did contain language indicating that the peremptory challenge of jurors of the same race as the defendant presents a different situation from the peremptory challenge of jurors of another race, but I consider the significance of the discussion to be procedural. An explicit part of the evidentiary scheme adopted in *Batson* was the defendant's showing that he was a member of a 'cognizable racial group,' and that the excluded juror was a member of the same group. See [*Batson* v. *Kentucky*, supra, 96–98]. The structure of this scheme rests upon grounds for suspicion where the prosecutor uses his strikes to exclude jurors whose only connection with the defendant is the irrelevant factor of race. It is reasonable in this context to suspect the presence of an illicit motivation, the 'belief that blacks could not fairly try a black defendant.' Id. . . . 101 (White, J., concurring). Where this obvious ground for suspicion is absent, different methods of

proof may be appropriate.'' *Holland* v. *Illinois*, supra, 489–90 (Kennedy, J., concurring).

Batson required a prima facie case before a defendant could call for an explanation of a peremptory challenge. The Supreme Court held that ''[t]he standards for assessing a prima facie case in the context of discriminatory selection of the venire have been fully articulated since *Swain* [v. *Alabama*, 380 U.S. 202, 223–24, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965)]. . . . These principles support our conclusion that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, 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. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' *Avery* v. *Georgia*, 345 U.S. [559, 562, 73 S. Ct. 891, 97 L. Ed. 1244 (1953)]. Finally, the defendant must 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 the venire, raises the necessary inference of purposeful discrimination.

''In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.'' (Citations omitted.) *Batson* v. *Kentucky*, supra, 476 U.S. 96–97. *Batson* also recognized that prosecutors may tend to act on the discriminatory assumption that a juror will be biased in favor of members of the juror's own race. In *Batson*, the Supreme Court held that the equal protection clause ''forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black.'' Id., 97. When the defendant and the venireman are of the same cognizable race, therefore, the striking of a single venireman itself may be evidence that the prosecutor is making such an impermissible assumption. The *Holloway* rule

recognizes that fact, and relieves the defendant in those circumstances of the burden of further establishing a prima facie case. When the defendant and the stricken venireman are of different races, gender or national origin, however, the ''obvious ground for suspicion is absent''; *Holland* v. *Illinois*, supra, 493 U.S. 490 (Kennedy, J., concurring); where there is a single peremptory challenge. Then there is no prima facie case as required by *Batson*, and ''different methods of proof [are] . . . appropriate.'' Id.

The United States Court of Appeals for the Second Circuit confronted circumstances much like the ones in this case in *United States* v. *Stavroulakis*, 952 F.2d 686 (2d Cir. 1992). The trial court in that case, relying upon *Batson*, pre-*Powers*, had denied the defendant's *Batson* claim because the defendant was not of the same racial group as the excused juror. Id., 696–97. Recognizing that *Powers* conferred standing upon the defendant, the Second Circuit nevertheless upheld the trial court's ruling. Id., 697.[3] The Second Circuit concluded that a prima facie case had not been made out so as to require the prosecutor to come forward with a race-neutral justification under *Batson*. Id. The court held that mere reference to the race of one excluded venireperson, without more, was insufficient to raise an inference of discrimination. Id., 696. The court remarked that ''[a] member of any race can be the subject of a proper peremptory challenge.'' Id.

The majority argues that *Stavroulakis* is not persuasive because the Second Circuit has not adopted the rule that this court adopted in *State* v. *Holloway*, supra, 209 Conn. 636. I agree that the Second Circuit has not adopted the *Holloway* rule, or the rule we adopt today.

The courts of Alabama and South Carolina may differ in their holdings from the holding of the Second Circuit Court of Appeals, the federal circuit in which this court is located, when applying *Batson*'s interpretation of the federal constitution. I, however, would find the Second Circuit's decision ''particularly persuasive'' and ''entitled to great weight.'' (Internal quotation marks omitted.) *Turner* v. *Frowein*, 253 Conn. 312, 341, 752 A.2d 955 (2000); *Schnabel* v. *Tyler*, 230 Conn. 735, 743 and n.4, 646 A.2d 152 (1994); *Red Maple Properties* v. *Zoning Commission*, 222 Conn. 730, 739 n.7, 610 A.2d 1238 (1992). Ironically, the federal courts in Connecticut, bound by the Second Circuit ruling, will require a prima facia case before finding that an acceptable explanation of a peremptory challenge is necessary, while our state courts, despite the Connecticut constitution's guarantee of peremptory challenges, will not require one.

Today's ruling requires an explanation for every peremptory challenge of every prospective juror. All persons have, of course, a gender and some kind of ethnic origin or ancestry. The majority's ruling will transform the peremptory challenge into a challenge

based upon some acceptable ground, perhaps less than those grounds needed for a challenge for cause. Because an explanation must be given and accepted by the court, such a challenge no longer will be a peremptory challenge.

"The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry, and without being subject to the court's control." *Swain* v. *Alabama*, supra, 380 U.S. 220. From the time of Blackstone, the peremptory challenge, then venerable, has been defined as "an arbitrary and capricious species" of challenge. 2 W. Blackstone, Commentaries on the Laws of England (G. Sharswood ed. 1875) p. 353. Historically, the challenge was grounded on two reasons: (1) a defendant may conceive "unaccountable prejudices" from the "bare looks and gestures" of the juror during voir dire, and the defendant should not "be tried by any one man against whom he has a conceived a prejudice, even without being able to assign a reason for such his dislike"; id.; and (2) during voir dire to establish a challenge for cause, the questioning of a juror "may sometimes provoke a resentment" in the juror, which can be removed only by the use of a peremptory challenge. Id. These reasons are equally valid today. All fifty states and the federal system thus provide for peremptory challenges. See *Holland* v. *Illinois*, supra, 493 U.S. 482; *Swain* v. *Alabama*, supra, 380 U.S. 217. In *Batson*, the United States Supreme Court rejected "eliminating peremptory challenges entirely" as urged by Justice Marshall. *Batson* v. *Kentucky*, supra, 476 U.S. 99 n.22; id., 103 (Marshall, J., dissenting). The court, while stating that it did not share Justice Marshall's views, assumed trial judges could be alert to identify "a prima facie case of purposeful discrimination. Nor do we think that this historic trial practice, which long has served the selection of an impartial jury, should be abolished . . . ." Id., 99.

This court repeatedly has recognized that " 'the right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused . . . .' " *DeCarlo* v. *Frame*, 134 Conn. 530, 533, 58 A.2d 846 (1948), quoting *Pointer* v. *United States*, 151 U.S. 396, 408, 14 S. Ct. 410, 38 L. Ed. 208 (1894); *State* v. *McDougal*, 241 Conn. 502, 519, 699 A.2d 872 (1997). The United States Supreme Court also has recognized that the peremptory challenge is " 'a necessary part of trial by jury' " and is required for the selection of an impartial jury. *Holland* v. *Illinois*, supra, 493 U.S. 484. "[T]he assurance of impartiality [is a legitimate state interest] that the system of peremptory challenges has traditionally provided." Id., 483. "The ideal that the peremptory serves is that the jury not only should be fair and impartial, but should seem to be so to those whose fortunes are at issue." B. Babcock, "Voir Dire: Preserving 'Its Wonderful Power,' " 27 Stan. L. Rev. 545, 552 (1975). "The symbolic-educative, impartiality-

promoting role of the peremptory challenge makes it central to the jury trial right.'' Id., 555. Now we no longer have this ancient safeguard of that central right.

Moreover, the record in the present case plainly reflects a nondiscriminatory reason for the state's attorney's peremptory challenge. The challenged juror recently had been arrested by officers of the same police department responsible for the defendant's arrest. A detective from that department, the victim of the charge of assault of a peace officer, had been involved in a gun battle with the defendant and was the principal witness for the state. The trial court stated that the state had a reason to strike the juror. Where the nondiscriminatory reason for the peremptory challenge is obvious, I see no reason to return this case so that the state's attorney may state his reason to that judge.

As to the sufficiency of the explanation, there may be grounds in this case for a challenge for cause. We previously have recognized that the trial court should grant a challenge for cause as to prospective jurors who counsel reasonably believes, on the basis of questioning on voir dire, may be predisposed to decide a case on legally irrelevant grounds. See *State* v. *Griffin*, 251 Conn. 671, 699, 741 A.2d 913 (1999).[4] By way of example, the United States Supreme Court noted in *Hernandez* v. *New York*, supra, 500 U.S. 355, that Hernandez did not press his *Batson* claim with respect to two prospective jurors who, although also Hispanic, had brothers who were convicted of crimes, and one of whom was being prosecuted by the same district attorney's office prosecuting Hernandez.

Accordingly, I respectfully dissent.

[1] Peremptory challenges are not only provided for in our statutes; see General Statutes §§ 51-241 and 54-82g; they are also guaranteed in our constitution.

General Statutes § 51-241 provides: ''On the trial of any civil action to a jury, each party may challenge peremptorily three jurors. Where the court determines a unity of interest exists, several plaintiffs or several defendants may be considered as a single party for the purpose of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly. For the purposes of this section, a 'unity of interest' means that the interests of the several plaintiffs or of the several defendants are substantially similar.''

General Statutes § 54-82g provides: ''The accused may challenge peremptorily, in any criminal trial before the Superior Court for any offense punishable by death, twenty-five jurors; for any offense punishable by imprisonment for life, fifteen jurors; for any offense the punishment for which may be imprisonment for more than one year and for less than life, six jurors; and for any other offense, three jurors. In any criminal trial in which the accused is charged with more than one count on the information or where there is more than one information, the number of challenges is determined by the count carrying the highest maximum punishment. The state, on the trial of any criminal prosecution, may challenge peremptorily the same number of jurors as the accused.''

The constitution of Connecticut, article first, § 19, as amended by article four of the amendments, provides: ''The right of trial by jury shall remain inviolate, the number of such jurors, which shall not be less than six, to be established by law; but no person shall, for a capital offense, be tried by a jury of less than twelve jurors without his consent. In all civil and criminal actions tried by a jury, the parties shall have the right to challenge jurors peremptorily, the number of such challenges to be established by law. The

right to question each juror individually by counsel shall be inviolate.''

[2] The rule enunciated in *State* v. *Jones*, 293 S.C. 54, 57–58, 358 S.E.2d 701 (1987), which this court adopted in *State* v. *Holloway*, supra, 209 Conn. 636, stated that ''the better course to follow would be to hold a *Batson* hearing on the defendant's request whenever the defendant is a member of a cognizable racial group and the prosecutor exercises peremptory challenges to remove members of the defendant's race from the venire.'' Id., 646 n.4.

[3] The Second Circuit stated, ''[i]n *Batson*, the Supreme Court stated that a prima facie case of discrimination in jury selection requires a showing that the defendant '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.' *Batson* [v. *Kentucky*, supra, 476 U.S. 96] . . . . The Supreme Court has recently clarified this statement—after the district court ruled on the *Batson* question in this case—and it now holds that the defendant does not have to be of the same race as the excused juror to raise the Equal Protection argument. *Powers* v. *Ohio*, [supra, 499 U.S. 400]. Although Judge Griesa can hardly be faulted for following the letter of *Batson*, and it would seem that we are obliged to apply *Powers* to this case, see *Griffith* v. *Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 716, 93 L. Ed. 2d 649 (1987) (*Batson* rule applicable to cases pending on direct appeal), we do not find the error to be reversible. It is clear that the district court independently determined that there was no inference of discrimination to support defendant's prima facie case, regardless of defendant's race. And, granting the requisite deference to this finding by the district court, we are unable to say that the court erred in finding no inference of discrimination.'' *United States* v. *Stavroulakis*, supra, 952 F.2d 696–97.

[4] ''[A] challenge [for cause] to an individual juror for bias or prejudice can be either a principal challenge or a challenge to the favor. *McCarten* v. *Connecticut Co.*, [103 Conn. 537, 542, 131 A. 505 (1925)]. A principal challenge may arise when the connection between the prospective juror and either party is of so close a nature that, when the facts concerning the relationship or interest are proven or when the prospective juror has formed or expressed an opinion on the question at issue, the disqualification is conclusively presumed. Id.; see, e.g., *State* v. *Kokoszka*, 123 Conn. 161, 164, 193 A. 210 (1937). A challenge to the favor, on the other hand, is one where the connection, being more remote, tends to show bias but does not create a conclusive presumption of bias. *McCarten* v. *Connecticut Co.*, supra, 542–43. *Johnson* v. *New Britain General Hospital*, [203 Conn. 570, 581–82, 525 A.2d 1319 (1987)].

''Examples of a principal challenge include relationship to either party to the suit . . . an interest in the outcome of the suit, either personal or as a member of a corporation, or the relation of master or servant . . . to either party . . . . *McCarten* v. *Connecticut Co.*, supra, [103 Conn.] 542. These relationships are held to import absolute bias or favor and require the disqualification of the juror as a matter of law. *State* v. *Kokoszka*, supra, [123 Conn.] 164. A challenge to the favor, however, is based on facts and circumstances . . . such as would tend to show bias but not such as to create a conclusive presumption of disqualification. Id., 164–65.'' (Internal quotation marks omitted.) *Morgan* v. *St. Francis Hospital & Medical Center*, 216 Conn. 621, 624, 583 A.2d 630 (1990).