No. _____

IN THE SUPREME COURT OF THE UNITED STATES

---

ANDREW CEBALLOS, Petitioner,

v.

THE STATE OF CALIFORNIA, Respondent.

---

On Petition For Writ Of Certiorari To The
Court of Appeal of the State of California,
First Appellate District, Division Two

---

# PETITION FOR WRIT OF CERTIORARI

---

LAURA S. KELLY
*Counsel of Record*
4521 Campus Drive No. 175
Irvine, CA 92612
lkelly@lkellylaw.net
(949) 737-2042

Counsel for Petitioner

## Question presented

Courts often reject *Batson*[1] claims where the prospective juror at issue has a relative with a criminal conviction, a reason that has a disparate impact on African Americans. Should this Court grant certiorari to reiterate its admonition in *Hernandez v. New York,* 500 U.S. 352 (1991), that disparate impact should be considered at *Batson*'s third step?

[1] *Batson v. Kentucky,* 476 U.S. 79 (1986).

## Table of contents

## Table of authorities

**Federal cases**

**Federal Constitution**



## Federal Statutes



**State cases**

**State statutes**



**Other authorities**

## Petition for writ of certiorari

Petitioner Andrew Ceballos respectfully prays for a writ of certiorari to the California Court of Appeal, First Appellate District, Division Two, in People v. Ceballos, A148521.

## Opinions below

On August 2, 2018, the California Court of Appeal issued an unpublished opinion affirming Mr. Ceballos's convictions. (App. B.) Mr. Ceballos's petition for review was denied by the California Supreme Court on November 14, 2018. (App. A.) The relevant trial court proceedings are unpublished.

## Jurisdiction

The California Supreme Court denied discretionary review on November 14, 2018. (App. A.) This Court has jurisdiction pursuant to 28 U.S.C. section 1257(a).

## Constitutional provisions involved

The Fourteenth Amendment to the United States Constitution provides, in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## Statement of the case

Andrew Ceballos was charged with murder and assault with a semiautomatic firearm after he fired a weapon through a closed bedroom door, killing Willie Troy Johnson.

Mr. Ceballos is Black. During jury selection, at his trial, the prosecutor struck three of five Black jurors, and all three Black female jurors. After the prosecutor's strike of the third Black juror, defense counsel made a *Batson* motion, which the court denied. (*Batson v. Kentucky,* 476 U.S. 79 (1986); see App. C, pp. 121-122.)

After he was convicted of second degree murder and assault with a semiautomatic firearm, and sentenced to 55 years to life in state prison, Mr. Ceballos appealed. The Court of Appeal rejected Mr. Ceballos's *Batson* claim. (App. B.)[2] Mr. Ceballos's petition for review to the California Supreme Court was denied. (App. A.)

---

[2] The Court of Appeal affirmed Mr. Ceballos's conviction but remanded for a sentencing at which the trial court would be permitted to exercise its discretion to strike a firearm enhancement that had added 25 years to life to his sentence, based on a new state law granting courts that discretion to strike that previously mandatory enhancement. (App. B, p. 20; see Cal. Pen. Code § 12022.53(h).) Because the *Batson* issue will "survive and require decision regardless of the outcome of future state-court proceedings," this Court may treat the state court's decision

## Reasons for granting the writ

### This Court should grant certiorari to reiterate that disparate impact is relevant at *Batson*'s third step.

#### A. The trial court allowed the prosecutor to strike two Black jurors whose relatives had criminal convictions: He struck V.M., a Black juror who said that if anything, she might be "a little bit" biased against the defense, not the prosecution, and he struck G.B., incorrectly stating that she had portrayed the criminal justice system negatively.

After the prosecutor struck the third Black juror, V.M., the defense made a *Batson* motion. (App. C, pp. 121-122.)[3] V.M. had a friend who had worked in the prosecutor's office, had four friends who were correctional officers, and had been the victim of a sexual assault. (App. C, pp. 86-87.) V.M. had two relatives imprisoned for murder, but said that they had been treated fairly by the system

---

on the *Batson* issue as a final judgment for purposes of 28 U.S.C. § 1257 and "take[] jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." (*Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 477, 480 (1975).)

[3] Of the 27 jurors available to strike, five were Black. The prosecutor's strike of V.M. was his ninth and last strike. The defense exercised seven peremptory challenges. When defense counsel made the *Batson* motion, the prosecutor had excused sixty percent of the African-American jurors, yet only 27% of the non-African-American jurors. While Black prospective jurors constituted 18.5% of the relevant venire, the prosecutor used one third of his strikes to strike them.

and that nothing about their cases would cause her to be biased. (App. C, pp. 87-90.) She had a cousin who was the victim of an unsolved killing; she said that, if anything, that might bias her "a little bit" *against* Mr. Ceballos – not against the prosecution. (App. C, p. 104.)

G.B., another Black juror removed by the prosecution, had worked for the federal government for 28 years, first in the Army Reserves, and then at the EPA. (App. C, p. 39.) Her home had been burglarized within the past two years. (App. C, pp. 51-52.) She also told the court that her brother had psychiatric issues and had been convicted of attempted murder and rape in other states, she did not know whether her brother had been treated fairly or not, and she said that his experience would not bias her if she sat as a juror because "That was his life. Those were his choices." (App. C, pp. 52-53.)

Addressing the *Batson* motion, the court stated:

> As to Ms. [M.], I'm not inclined to find a prima facie at this point. She did have the family members who are involved in several murder incidents, but at the same time she did say – I recognize she said she could be fair. There was one question where she said – sounds like she might actually be on the fence. It's not entirely clear, but, Mr. [prosecutor], let me hear your reasons. I'm not at this point finding a prima facie in light of the fact that her family members are

involved in these murder incidents. I will give you an opportunity to state your reasons on the record.

(App. C, p. 122.)

The prosecutor responded:

> The reasons for asking her to be excused, based on her answers I didn't feel – I had a for cause challenge. Based on her history, she has a cousin who was in prison for murder who was then murdered. That was never solved by the police and an uncle currently incarcerated in prison also I believe for murder or another serious crime in another state. She knows a bit about these cases, and I'm concerned any person irrespective, any class or group she might belong to, with that history would have trouble being fair in this case. I'm concerned about her ability to process, separate that out from our situation because she did seem to have a significant amount of knowledge about what happened in those situations involving her family.

(App. C, p. 123.)

The court ruled: "Let me take a look at my notes real quick. As to Ms. [M.] I won't find a *Batson Wheeler* violation. I except [sic] [the prosecutor's] representations, find it very credible that there was a non-race reason for the preemptory [sic] challenge." (App. C., p. 123.)

After the discussion regarding V.M., the prosecutor stated: ". . . Ms. [B.] . . . was the person who was the victim of a [burglary] first. Her brother has some I think psychological issues and was charged with a serious crime, I believe an attempted robbery. So

experience with the criminal justice system I viewed as her portraying negatively." (App. C, p. 124.)

The court ruled: "I have Ms. [B.], . . . looks like her brother was – I have in my notes rape and attempted murder charge, mental issues. Does not know if he was treated fairly, but didn't know either way. Okay. Again, I think there are non-race base[d] reasons for the peremptory challenges. So I'm not finding any *Batson* . . . at this point." (App. C, p. 124.) The court then noted that the jurors currently seated in seats six and nine were both African-American. (App. C, p. 124.)

The prosecutor's asserted reason for striking V.M. – that she had a "significant amount of knowledge" about her family members' cases – is called into question by his strike of G.B., who knew little about her brother's case. (App. C, pp. 52-53, 123.)

And the prosecutor's proffered reason for striking G.B., the former Army reservist – that she portrayed the criminal justice system negatively – was contradicted by the record. G.B. never said a negative word about the criminal justice system. (App. C, pp. 51-55.)

## B. The California Court of Appeal relied on the jurors' relatives' criminal convictions as a generic, all-purpose rationale for rejecting the *Batson* claim.

The Court of Appeal rejected Mr. Ceballos's *Batson* claim in a flawed decision that, among other things, never took account of the fact that Mr. Ceballos, like the excluded jurors, is Black,[4] and incorrectly conflated *Batson's* first and second steps, stating that Mr. Ceballos conceded that no prima facie case had been made because he "acknowledges that the explanations for the prosecutor's challenges were 'race neutral.'" (App. B, p. 10.)[5]

But the Court of Appeal's ruling exhibits a particularly troubling feature that warrants certiorari: it appears to treat the prospective jurors' relatives' experience as criminal defendants as an unassailable race-neutral reason for striking the jurors. At the heart of the Court of Appeal's erroneous ruling was its reasoning

---

[4] See *Johnson v. California,* 545 U.S. 162, 164, 167 (2005).

[5] *Batson*'s three-step procedure is as follows: First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if a prima facie case has been made, the prosecutor must offer a race-neutral reason for the strike; and third, the court must determine, in light of all the circumstances, whether the strike was motivated in substantial part by discriminatory intent. (*Foster v. Chatman,* 136 S.Ct. 1737, 1747 (2016).)

that "[p]ast experiences with law enforcement is well recognized as a race-neutral reason to exercise a peremptory challenge, even if that experience is not necessarily negative." App. B, p. 12.)

The Court of Appeal's reasoning implies that the juror's attitude regarding her relative's criminal conviction and incarceration is irrelevant. In keeping with such a view, the court ignored what the jurors actually said about their family members' criminal convictions (and about other matters): V.M. said that she believed her relatives had been treated fairly and that nothing about their cases would affect her service as a juror. (App. C, pp. 87-90.) In fact, she said, the unsolved killing of her cousin might cause her, if anything, to be biased against the defense. (App. C, pp. 103-104.) G.B. said that she did not know enough about her brother's case to know if he had been treated fairly, but said it would not affect her service as a juror and appeared to place responsibility for the convictions on her brother, not the criminal justice system: "That was his life. Those were his choices." (App. C, pp. 52-53.)

The Court of Appeal in effect converted the jurors' relatives' criminal convictions into an all-purpose rationale for rejecting a

*Batson* claim – a rationale that could apply no matter what the juror has to say about the matter.

### C. In *Hernandez v. New York*, the plurality opinion admonished that disparate impact should be considered at *Batson*'s third step.

In *Hernandez v. New York*, this Court addressed a *Batson* challenge to the prosecution's strike of two Latino prospective jurors. (*Hernandez v. New York,* 500 U.S. 352 (1991).) One reason the prosecutor offered for the challenges was that the jurors were bilingual, and he was concerned that they might have difficulty listening to and following the court interpreter. (*Id.* at pp. 356-357.) The defendant contended on appeal that the reason was not race-neutral. (*Id.* at pp. 359-360.)

The plurality found that the disparate impact this reason would have on Latinos "does not answer the race-neutrality inquiry, [but] it does have relevance to the trial court's decision on this question. . . . If a prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination." (*Id.* at p. 363; *id.*

at p. 362 ["[D]isparate impact should be given appropriate weight in determining whether the prosecutor acted with forbidden intent."]; *id.* at p. 375 (O'Connor, J., joined by Scalia, J., concurring) ["Disproportionate effect may, of course, constitute evidence of intentional discrimination. The trial court may, because of such effect, disbelieve the prosecutor and find that the asserted justification is merely a pretexst for intentional race-based discrimination."].)

Significant, though, *Hernandez* emphasized that the prosecutor, in excusing bilingual jurors, "did not rely on language ability without more, but explained that the specific responses and the demeanor of the two individuals during *voir dire* caused him to doubt their ability to defer to the official translation of Spanish-language testimony." (*Hernandez, supra,* 500 U.S. at p. 360.) It thus did not decide whether striking a juror based on language ability alone would violate the Equal Protection Clause.[6]

---

[6] Since the plurality opinion in *Hernandez,* it appears that this Court has revisited the question of disparate impact only once in the *Batson* context. In *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127 (1994), the Court, in extending *Batson* to gender, noted that "[e]ven strikes based on characteristics that are disproportionately associated with one gender could be appropriate, absent a showing

### D. This Court should grant certiorari to reiterate that disparate impact analysis should be considered at *Batson*'s third step.

Mr. Ceballos submits that certiorari is warranted to reiterate *Hernandez*'s admonition that disparate impact should be weighed at *Batson*'s third step. (*Hernandez, supra,* 500 U.S. at p. 362).

In response to *Batson* motions, prosecutors frequently proffer, as a race neutral reason for a juror's excusal, the juror's family member's or relative's arrest or criminal conviction. (See *Sifuentes v. Brazelton,* 825 F.3d 506, 526 (9th Cir. 2016) [prosecutor stated, among other reasons, "[i]n the late '60s, her [brother] served time . . . brother-in-law and cousins . . . also served time. A lot of the criminal element in her family. I just can't have somebody on my jury that has those kinds of problems."]; *United States v. Morrison,* 594 F.3d 626, 633 (8th Cir. 2010) [prosecutor stated, among other reasons, that he excused a juror because "there wasn't a whole lot to know about her other than the criminal history of her family"]; see also, e.g., *Rhoades v.*

---

of pretext." (*Id.* at 143.) In *J.E.B.*, the Court did not address the relevance of disparate impact at *Batson*'s third step.

*Davis,* 852 F.3d 422, 435-436 (5th Cir. 2017); *United States v. Hawkins,* 796 F.3d 843, 864 (8th Cir. 2015); *Jamerson v. Runnels,* 713 F.3d 1218, 1230 (9th Cir. 2013); *Strong v. Roper,* 737 F.3d 506, 513-514 (8th Cir. 2013); *Rice v. White,* 660 F.3d 242, 244 (6th Cir. 2011); *United States v. Charlton,* 600 F.3d 43, 48, 53-54 (1st Cir. 2010); *Fields v. Thaler,* 588 F.3d 270, 274-275 (5th Cir. 2009); *United States v. Farrior,* 535 F.3d 210, 221 (4th Cir. 2008);[7] *United States v. Hendrix,* 509 F.3d 362, 370-371 (7th Cir. 2007); *Messiah v. Duncan,* 435 F.3d 186, 201 (2d Cir. 2006); *People v. Duff,* 58 Cal.4th 527, 546 (2014); *People v. Melendez,* 2 Cal.5th 1, 11-12 (2016); see also *People v. Smith,* 4 Cal.5th 1134, 1151 (2018) [prosecutor states that juror's brother was a juvenile delinquent]; *People v. Avila,* 38 Cal.4th 491, 554-555 (2006) [affirming, on appeal, trial court's finding that there was no prima facie case and noting juror's brother's manslaughter conviction].)

In other cases, even where such reasons are not proffered by the prosecutor, appellate courts hypothesize such reasons in finding that a prima facie case was not established. (See *People v.*

---

[7] *Farrior* has been abrogated on other grounds as recognized in *People v. Williams*, 808 F.3d 238, 246 (4th Cir. 2015).

*Reed,* 4 Cal.5th 989, 1001 (2018) [at first step, hypothesizing that Black jurors may have been struck because they had family members who had been convicted and incarcerated]; *People v. Harris,* 57 Cal.4th 804, 836 (2013) [in rejecting prima facie case, nothing that juror's brother was being prosecuted for marijuana sale by the prosecutor's office]; *People v. Farnam,* 28 Cal.4th 107, 138 (2002).)

In some cases such matters may give rise to a genuine and valid reason for a peremptory strike. But as this Court, and others, have recognized, in other cases, such reasons do not always withstand scrutiny. (*Miller-El v. Dretke,* 545 U.S. 231, 246 (2005) [prosecutor's assertion that he struck juror because of his brother's prior conviction "reeks of afterthought" and in any event was implausible because the juror said he was not close to his brother and did not know much about his conviction]; see *Foster v. Chatman*, *supra,* 136 S.Ct. at pp. 1752-1753 [prosecutor's implausible assertion that juror's son, who had been charged with theft, and defendant, who was charged with capital murder, had been charged with "basically the same thing" was pretextual]; *Rice v. White, supra,* 680 F.3d at 258 [where prospective jurors

stated they could be fair, prosecutor's proffered reason, that she excused them because of family members' criminal convictions, was "flimsy"]; *Green v. Lamarque*, 532 F.3d 1028, 1031-1032 (9th Cir. 2008) [rejecting prosecutor's proffered reason that juror had visited her stepfather in prison twice, based on comparison to white jurors whose relatives had been arrested or convicted].)[8]

Still, courts, like the Court of Appeal in this case, sometimes find such reasons race-neutral and reject *Batson* claims without much further analysis. (*People v. Farnam, supra,* 28 Cal.4th at p. 138; *Blackmon v. State*, 7 So.3d 397, 413-414 (Ala. Crim. App. 2005); see also *Akins v. Easterling,* 648 F.3d 380, 386-387 (6th Cir. 2011) [noting that trial court stated that it had always permitted a party to excuse a juror whose close relative had been convicted

---

[8] While recognizing that invoking a prospective juror's relative's criminal conviction may not always withstand scrutiny, this Court has focused on other matters that suggest pretext: inherent implausibility of the reason (*Foster v. Chatman, supra,* 136 S.Ct. at 1752-1753) and belated proffer of the reason (*Miller-El v. Dretke, supra,* 545 U.S. at 246.) While comparative juror analysis may in some cases (*Green v. Lamarque, supra,* 532 F.3d at 1031-1032) help to demonstrate that the prosecutor's reliance on a juror's family member's conviction is pretextual, in many cases, because of the disparate incarceration rate, there may be few or no white jurors who are similarly situated. (See pp. 17-18, below.)

of a crime or had been the victim of a crime]; App. B, p. 12.)

One court has gone so far as to say that "[t]here is no *Batson* violation when a juror is dismissed because the juror's relatives have been prosecuted or convicted of a crime, . . . ." (*United States v. Crawford,* 413 F.3d 873, 874-875 (8th Cir. 2005); accord, *United States v. Charlton, supra,* 600 F.3d at p. 54; *State v. Pona,* 66 A.3d 454, 473-474 (R.I. 2013).)

Equally troubling, in many cases, as in this one, courts do not consider the disparate impact that invoking a juror's relative's involvement with the criminal justice system has on African-American jurors. (See, e.g., *United States v. Hendrix, supra,* 509 F.3d at pp. 367, 370; *Akins v. Easterling, supra,* 648 F.3d at pp. 388-394 [noting, in second step analysis, that disparate impact does not demonstrate that a reason is not race-neutral, but not considering disparate impact at step three]; *United States v. Morrison, supra,* 594 F.3d at pp. 630, 632-634; *Strong v. Roper, supra,* 737 F.3d at pp. 510, 513-514; *Messiah v. Duncan, supra,* 435 F.3d at p. 201;[9] *United States v. Charlton, supra,* 600 F.3d at

[9] Though the Second Circuit's opinion in this case does not appear to make clear that the juror at issue was Black, the District Court's opinion states that explicitly. (*Messiah v. Duncan,*

p. 54; *United States v. Hawkins, supra,* 796 F.3d at p. 859, 864; *People v. Smith, supra,* 4 Cal.5th at 1153 [finding that one of prosecutor's proffered reasons, that juror's brother had been convicted of theft, did not withstand scrutiny, but not considering disparate impact, and upholding trial court's third-step denial]; *People v. Reed, supra,* 4 Cal.5th at 1001 [at first step, hypothesizing that Black jurors may have been struck because they had family members who had been convicted and incarcerated]; *People v. Bonilla,* 41 Cal.4th 313, 342-343 (2007); see App. B, p. 12; but see, e.g., *People v. Melendez, supra,* 2 Cal.5th at 16-18.)

As Mr. Ceballos argued in the Court of Appeal, that disparate impact is indisputable. For the period 2005-2015, African-Americans had an imprisonment rate that was more than five times higher than that for non-Hispanic whites. (U.S. Department of Justice, Bureau of Justice Statistics, Prisoners in 2015, p. 8, Table 5, available at www.bjs.gov/content/pub/pdf/

---

2004 WL 1924791, at *5.)

p15.pdf [Black imprisonment rate 1,745 per 100,000; non-Hispanic white imprisonment rate 312 per 100,000].)[10]

Failure to consider that disparate impact is particularly problematic in cases like this one, where the jurors at issue did not provide any indication that their relatives' experience as criminal defendants would bias them against the prosecution. (Compare *Hernandez, supra,* 500 U.S. at p. 360 [noting that prosecutor did not rely on language ability alone but invoked the jurors' responses during voir dire on the question of whether they could follow the court interpreter].) Indeed, the court here stated that "[p]ast experiences with law enforcement is well recognized as a race-neutral reason to exercise a peremptory challenge, even if that experience is not necessarily negative." (App. B, p. 12; App. C, p. 123 [prosecutor: "I'm concerned any person . . . with that history would have trouble being fair in this case."]; see also

---

[10] Excluding jurors whose family members have been homicide victims (as was the case with Prospective Juror G.B. here) also has a disproportionate impact on African-Americans. (U.S. Department of Justice, Bureau of Justice Statistics, Homicide in the U.S. Known to Law Enforcement, 2011, p. 4 & Table 1, available at www.bjs.gov/content/pub/ pdf/hus11.pdf [from 2002 to 2011, the homicide rate for Blacks was 6.3 times higher than the rate for whites].)

*Strong v. Roper, supra,* 737 F.3d at 513-514 [appearing to accept as credible and race-neutral, prosecutor's statement that he excused juror because his second cousin was in prison for murder, though juror stated that it would not prevent him from being fair and impartial and that he was so removed from the situation that he did not know whether his cousin had been treated fairly or not]; *United States v. Hughes*, 970 F.2d 227, 230-232 (7th Cir. 1992) [despite juror's attestation to the contrary, prosecutor was entitled to rely on his "intuitive assumptions" in concluding that juror's cousin's legal troubles called into question her ability to be impartial].)

The need to address the disparate impact of invoking a prospective juror's relative's criminal conviction or incarceration is all the more pressing because of *Batson*'s important role in fostering public confidence in the criminal justice system. (*Batson v. Kentucky, supra,* 476 U.S. at p. 88.) It remains "a troubling reality, rooted in history and social context, that our black citizens are generally more skeptical about the fairness of our criminal justice system than other citizens." (*People v. Hardy,* 5 Cal.5th 56, 125 (2018) [Liu, J., dissenting].) When Black prospective jurors

who do *not* express skepticism about the fairness of the criminal justice system are excluded from jury service for frequently-invoked reasons that have a disparate impact on Black citizens, public confidence in our courts and their verdicts only incurs further damage.

## Conclusion

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

DATED: February 4, 2019

Respectfully submitted,

Laura S. Kelly
*Counsel of Record*
4521 Campus Drive #175
Irvine, CA 92612
lkelly@lkellylaw.net
(949) 737-2042