No. 21-_____

In the
Supreme Court of the United States

_____

Keyaira Porter,

Petitioner,

v.

State of Arizona,

Respondent.

_____

On Petition for a Writ of Certiorari to the
Supreme Court of Arizona

_____

PETITION FOR WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

For over a decade now, Courts have found themselves intractably divided on two important issues regarding the enforcement of *Batson v. Kentucky*, 476 U.S. 79 (1986), both squarely presented in this Petition:

1. Whether a trial court must make express rulings at *Batson*'s third step.

2. Whether an appellate court should consider a comparative juror analysis presented for the first time on appeal.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Keyaira Porter petitions this Court for a writ of certiorari to review the judgment of the Arizona Supreme Court.

OPINIONS BELOW

The Arizona Supreme Court opinion is reported at 491 P.3d 1100 (Ariz. 2021) (attached as Appendix A). The Arizona Court of Appeals opinion is reported at 460 P.3d 1276 (Ariz. App. 2020) (attached as Appendix B).

JURISDICTIONAL STATEMENT

The Arizona Supreme Court issued its opinion on July 22, 2021. Ms. Porter is timely filing this Petition for Writ of Certiorari. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment provides, in pertinent part: "No person shall be … deprived of life, liberty, or property, without due process of law …."

The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

impartial jury of the State and district wherein the crime shall have been committed ….”

The Fourteenth Amendment provides, in pertinent part: “... nor shall any State deprive any person of life, liberty, or property without due process; nor deny to any person within its jurisdiction the equal protection of the laws.”

INTRODUCTION

For more than a decade, courts across the country have been split on two questions regarding the enforcement of *Batson v. Kentucky*, 476 U.S. 79 (1986).

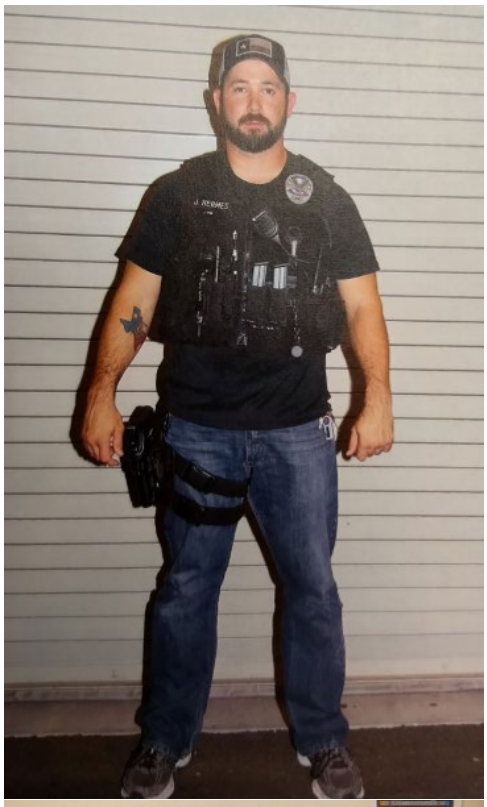
First, courts are divided as to whether trial courts must make express findings at *Batson*'s third step. *See Morgan v. City of Chicago*, 822 F.3d 317, 330 fn.30 (7th Cir. 2016) (recognizing split); *People v. Williams*, 299 P.3d 1185, 1235-36 (Cal. 2013) (Liu, J., dissenting) (describing split). Several state and federal jurisdictions require express findings, noting that without such findings there is nothing worthy of deference. Others, however, reject the requirement for express findings, instead deferring to implicit findings.

Second, courts have repeatedly reached different conclusions about whether an appellate court can consider a side-by-side juror comparison raised for the first time on appeal. Some courts find comparative juror analyses crucial to *Batson*'s totality-of-the-circumstances inquiry. Indeed, it is this very analysis that often roots out discrimination and pretext. *See McDaniels v. Kirkland*, 813 F.3d 770, 778-79 (9th 2006). Other courts have found juror comparisons waived unless made at the trial court level. *E.g. United States v. Houston*, 456 F.3d 1328, 1338 (11th Cir. 2006)

Each divide is well-established and in need of resolution. This case provides an ideal vehicle to resolve both splits.

STATEMENT OF THE CASE

1. Ms. Porter, a Black woman, was assaulted by a White officer and then charged with aggravated assault and resisting arrest.



Keyaira Porter, a Black woman, had received permission from police officers to remove property from her car before it would be impounded. Appendix D, 61a. As she removed her property, a White officer grabbed Ms. Porter, put her into a headlock, pulled her to the ground, and pushed her into the gravel. *Id.* at 63a-68a, 71a. Two more officers jumped in. *Id.* at 67a-68a, 72a-74a. As one of the officers forced Ms. Porter's head to the side, the first officer punched her twice the face. *Id.* at 67a-68a, 73a-76a. Ms. Porter became dizzy and her vision blurred. *Id.* at 75a. When EMTs eventually responded, they took Ms. Porter to the hospital for injuries to the side of her face. *Id.* at 76a-78a.

The state charged Ms. Porter with aggravated assault on a police officer and resisting arrest. *State v. Porter*, 491 P.3d 1100, ¶ 2 (Ariz. 2021).

2. **Ms. Ayers, a Black juror, was rejected from jury service, but a similarly situated juror who was not Black was allowed to serve.**

Ms. Ayers—Prospective Juror 2—went to jury duty on the morning of March 27, 2018, and was sworn in with the rest of the jurors. *See* Appendix C, 36a.

During voir dire, the trial court asked the panel: "Have any of you or any close family members ever been arrested, charged with, or convicted of a crime, other than the ones that we've already talked about." *Id.* at 38a-39a. Several jurors responded affirmatively, including Ms. Ayers. *Id.* at 39a.

The court followed up with the jurors and asked if they could be fair and impartial. While all jurors responded that they could be fair, two jurors are of note—Ms. Ayers and Juror 22:

Juror 2 (Ms. Ayers):	**Juror 22:**
THE COURT: Okay. But you feel you could be fair and impartial? PROSPECTIVE JUROR: Yes, ma'am. *Id.* at 39a-40a.	THE COURT: All right. Juror number 22. PROSPECTIVE JUROR: I believe I could be impartial. *Id.* at 40a.

The prosecutor followed up with Ms. Ayers and Juror 22. Every step of the way, both jurors gave substantively identical answers regarding their respective abilities to be fair and impartial.

Ms. Ayers and Juror 22 both had a relative involved in the legal system:

Juror 2 (Ms. Ayers):	**Juror 22:**
[PROSECUTOR]: What kind of situation was it? PROSPECTIVE JUROR: Aggravated assault. [PROSECUTOR]: And was that a family member? PROSPECTIVE JUROR: Yes. It was my brother. Are you saying what were the charges or what were they arrested for — [PROSECUTOR]: Either or. I just asked if they were arrested? PROSPECTIVE JUROR: Oh. Yeah, aggravated assault and kidnap. But he was only charged with the aggravated assault. [PROSECUTOR]: Okay. And was he prosecuted? Did he go to court on it? PROSPECTIVE JUROR: Yes. [PROSECUTOR]: Did it get resolved? PROSPECTIVE JUROR: Yeah. He was found guilty for aggravated assault. *Id.* at 42a-43a.	[PROSECUTOR]: … Juror number 22, you also had stated that either yourself or someone you knew had been arrested. Could you expand on that a little bit? PROSPECTIVE JUROR: My son served eight years for breaking and entering and receiving stolen property for sale. *Id.* at 45a.

Both jurors felt their relative was treated fairly:

Juror 2 (Ms. Ayers):	**Juror 22:**
[PROSECUTOR]: And is there anything with regard to that incident, how your brother was treated, or how the matter was handled that causes you concern one way or another about the legal system? Do you believe he was treated fairly during the process? PROSPECTIVE JUROR: Yes. *Id.* at 43a.	[PROSECUTOR]: Do you think the matter was handled fairly and accurately? PROSPECTIVE JUROR: I do. *Id.* at 45a.

Both jurors confirmed that nothing about the experience would cause them to favor one side over the other in Ms. Porter's trial:

Juror 2 (Ms. Ayers):	**Juror 22:**
[PROSECUTOR]: And is there anything about that experience that your family went through with your brother that would influence your decision in any way in regards to hearing the matter? PROSPECTIVE JUROR: No. [PROSECUTOR]: You'd be able to listen to the instructions by the judge, and follow the rules provided? PROSPECTIVE JUROR: Yes, ma'am. *Id.* at 43a-44a.	[PROSECUTOR]: Okay. Is there anything about that process that would make you lean one way or another in the case? PROSPECTIVE JUROR: No. *Id.* at 45a.

The court took a break after voir dire and sent the prospective jurors out. *Id.* at 47a. When the prospective jurors returned, the list of trial jurors was announced. *Id.* at 56a. Ms. Ayers was not selected for the trial jury; Juror 22 was. *Id.*

There was a clear difference between Ms. Ayers and the jurors selected to serve on the petit jury: Ms. Ayers was Black; the selected jurors were not.

3. **The prosecutor struck Ms. Ayers, but not the similarly situated Juror; the jury acquitted Ms. Porter of aggravated assault, but convicted her of resisting arrest.**

After voir dire, the parties entered their peremptory strikes. The prosecutor struck Ms. Ayers, as well as other Black prospective jurors.

After peremptory strikes were recorded, Ms. Porter objected to the prosecutor's strikes under *Batson v. Kentucky*.

The prosecutor explained that she struck Ms. Ayers "due to the fact that her brother was convicted of a crime that is of the same nature as this matter, aggravated assault, where he was found guilty." Appendix C, 51a. The prosecutor also expressed discomfort with Ms. Ayers's responses: "She did not seem to be very sure with her responses to the State whether how that impacted her or not." *Id.*

Ms. Porter's attorney pointed out that the prosecution followed up with Ms. Ayers. *Id.* at 52a. "During the follow up, the State did ask about whether [he] was treated fairly. Her response was yes." *Id.* The defense also noted that Ms. Ayers had said that her experiences would not influence her and that she had assured the court she could follow the rules. *Id.* Ms. Porter thus argued that the strike of Ms. Ayers was improper. *Id.* at 52a-53a.

The trial court accepted the prosecutor's strikes, but made no findings regarding Ms. Ayala's (or the prosecutor's) credibility; the court was silent regarding the demeanor-based justification. *State v. Porter*, 460 P.3d 1276, ¶ 6 (Ariz. App. 2020); Appendix C, 53a-55a.

Ms. Porter went to trial with a jury that did not contain a single Black person. The jury acquitted Ms. Porter of aggravated assault, but convicted her of resisting arrest. *Porter*, 460 P.3d 1276, ¶ 7 (Ariz. App. 2020).

4. The Arizona Court of Appeals initially remanded because the trial court did not make express findings, but the Arizona Supreme Court reversed.

On appeal, the Arizona Court of Appeals granted relief. All three judges on the Arizona Court of Appeals panel expressed concern about protecting and furthering *Batson*, and agreed that the record did not support the prosecutor's claimed concern regarding Ms. Ayers's brother. *See State v. Porter*, 460 P.3d 1276, ¶ 21 fn.3 (Ariz. App. 2020). As such, the focus turned to the prosecutor's demeanor-based justification. *Id.* at ¶¶ 21, 30. But nothing in the record suggested uncertainty. *Id.* at ¶¶ 21, 30. Without factual findings, the majority found itself unable to assess the prosecutor's demeanor-based justification. *Id.* at ¶ 21. The majority therefore remanded so that the trial court could make factual findings about whether Ms. Ayers had indeed shown uncertainty. *Id.* at ¶ 21.

The Arizona Supreme Court, however, reversed. *State v. Porter*, 491 P.3d 1100, ¶ 28 (Ariz. 2021). The court first concluded that there was no requirement for express findings at *Batson*'s third step. *Id.* at ¶¶ 13-19. Although the court implicitly recognized a jurisdictional split on the issue, it joined what it characterized as this Court and the majority of federal courts in not requiring a trial court to make express findings. *Id.* at ¶ 14. The Arizona Supreme Court also refused to conduct a comparative juror analysis, ruling that Ms. Porter had waived the side-by-side comparison. *Id.* at ¶¶ 20-22.

REASONS FOR GRANTING THE WRIT

Appellate courts at both the federal and state levels have been openly divided on two issues related to *Batson*.

First, courts are split on whether trial courts must make express findings at *Batson*'s third step. Some courts have ruled that without express findings at *Batson*'s third step, there is nothing the appellate courts can defer to. Other courts have concluded that express findings are not needed to warrant deference.

Second, courts are split on whether side-by-side juror comparisons should be conducted when the party did not advance a juror comparison argument at the trial court. Although this Court has conducted such comparisons at least three times, some courts have found the issue waived. Other courts have noted the value of juror comparisons when rooting out pretext and discrimination.

This Court's guidance is needed to resolve both issues.

1. This Court should grant certiorari to resolve the split regarding whether trial courts must make express findings at *Batson*'s third step.

This Court should first grant review in this case to resolve an issue that has split state and federal courts across the country: whether trial courts must make express findings at *Batson*'s third step. Courts are deeply divided on this question. This case offers an ideal vehicle to resolve this divide.

a. Courts are intractably split regarding whether trial courts must make express findings at *Batson*'s third step.

Batson's primary protection is in its third step. At *Batson*'s first step, the non-striking party must make a prima facie case that the questionable strike was motivated by race. *Purkett v. Elem*, 514 U.S. 765, 767 (1995). At *Batson*'s second step, the striking party is permitted to offer even the most outlandish of race-neutral justifications to explain a strike. *Id.* at 767-68. It is only at *Batson*'s third step that a court considers the propriety of a party's offered reason. *Id.* at 768.

Courts have split, however, regarding whether the trial court must place credibility findings on the record. This split has been repeatedly recognized by federal and state courts:

- "The circuits have disagreed on the extent to which *Snyder* [*v. Louisiana*, 552 U.S. 472, 479 (2008),] imposes an affirmative duty on the district court to make record findings where the prosecutor has offered only a demeanor-based justification." *United States v. Thompson*, 735 F.3d 291, 300 (5th Cir. 2013); *see also Morgan v. City of Chicago*, 822 F.3d 317, 330 fn.30 (7th Cir. 2016).

- "Following *Snyder*, the federal circuit courts are split regarding whether credibility findings by the trial court are required on the record." *Roach v. State*, 79 N.E.3d 925, 930 (Ind. Ct. App. 2017).

- "Today's decision deepens a split of authority among federal and state appellate courts on the adequacy of a *Batson* ruling where the trial court has engaged in no explicit analysis of the validity of the prosecutor's facially neutral explanation." *People v. Williams*, 299 P.3d 1185, 1235-36 (Cal. 2013) (Liu, J., dissenting).

The Arizona Supreme Court, too, recognized the split when it indicated it was joining "the majority of federal courts" in rejecting an express-finding requirement. *State v. Porter*, 491 P.3d 1100, ¶ 14 (Ariz. 2021).

Treatises have also identified the split. For example, in *Jurywork Systematic Techniques*, the authors recognize that, "[b]efore and after *Snyder*, the lower courts have been split on the deference question." 1 Jurywork Systematic Techniques § 4:38 (2020). And the authors of *Jury Selection: The Law, Art and Science of Selecting a Jury* noted that just some courts, not all, required express findings. *Jury Selection: The Law, Art and Science of Selecting a Jury* § 8.8 (2020).

Justice Liu, of the California Supreme Court, set forth the two sides of the split. On the one hand, "[s]ome cases have held that a trial court's denial of a *Batson* challenge, by itself, constitutes an implicit finding at the third step of the *Batson* analysis that the prosecutor's explanation was credible; these cases accord deference to this implicit finding." *People v. Williams*, 299 P.3d 1185, 1235 (Cal. 2013) (Liu, J., dissenting). Other cases, however, "have held that when a trial court has not provided any explicit analysis of the credibility of a prosecutor's explanation, a reviewing court has no basis for deferring to the trial court's ruling at *Batson*'s third step." *Id.* at 1235-36.

The first approach recognized by Justice Liu—a rejection of express findings—is illustrated by the Fifth Circuit's decision in *United States v.*

Thompson, 735 F.3d 291, 300 (5th Cir. 2013). In *Thompson*, the Fifth Circuit agreed with an unpublished Eleventh Circuit decision and held "that *Snyder* does not require a district court to make record findings of a juror's demeanor where the prosecutor justifies the strike based on demeanor alone." *Id.* (discussing *United States v. Prather*, 279 Fed.Appx. 761, 767 (11th Cir. 2008)); *see also United States v. Moore*, 651 F.3d 30, 41 (D.C. Cir. 2011).

The Fifth and D.C. Circuits are joined by multiple states, including Arizona, Colorado, Kansas, Ohio, and Virginia. *Porter*, 491 P.3d 1100, ¶ 14 (Ariz. 2021); *People v. Beauvais*, 393 P.3d 509, ¶ 27 (Colo. 2017); *State v. McCullough*, 270 P.3d 1142, 1161-62 (Kan. 2012); *State v. Thompson*, 23 N.E.3d 1096, ¶ 63 (Ohio 2014); *Barksdale v. Commonwealth*, 438 S.E.2d 761, 763-64 (Va. App. 1993).

The Seventh Circuit is illustrative of the second approach recognized by Justice Liu—a requirement for express findings. In *United States v. Rutledge*, the Seventh Circuit explained why a trial court's findings must be express, not implied: "These findings must be explicit; without them there is a void that stymies appellate review, gives us no finding of fact to which we might defer, and ultimately precludes us from affirming the denial of the *Batson* challenge." *United States v. Rutledge*, 648 F.3d 555, 560 (7th Cir. 2011). The Seventh Circuit affirmed this approach five years later in *Morgan v. City of Chicago*, 822 F.3d 317, 329-30 (7th Cir. 2016). And the Sixth Circuit has emphasized the importance of explicit

adjudication of a party's credibility and the "need for an explicit, on-the-record analysis of each of the elements of a *Batson* challenge." *United States v. McAllister*, 693 F.3d 572, 580 (6th Cir. 2012) (quoting *McCurdy v. Montgomery Cnty.*, 240 F.3d 512, 521 (6th Cir. 2001)).

Several states have similarly required trial courts to make express findings at *Batson*'s third step, including Massachusetts, Michigan, Minnesota, North Carolina, and Rhode Island. *Commonwealth v. Maldonado*, 788 N.E.2d 968, 973 (Mass. 2003), *abrogated on different grounds by Marshall v. Commonwealth*, 977 N.E.2d 40 (Mass. 2012); *People v. Tennille*, 888 N.W.2d 278, 288 (Mich. App. 2016); *State v. Reiners*, 664 N.W.2d 826, 832 (Minn. 2003); *State v. Alexander*, 851 S.E.2d 411, 419 (N.C. App. 2020); *State v. Pona*, 926 A.2d 592, 608 (R.I. 2007).

Courts across the country are intractably split on the question of whether trial courts should be required to make express findings at *Batson*'s third step. This Court should accept review to resolve this issue.

b. Whether trial courts must make express findings at *Batson*'s third step is an important and recurring issue that should be resolved.

As the above makes clear, the split is already entrenched.

But a brief timeline also proves that there is no resolution in sight without this Court's guidance.

Express determinations not required	Year	Express determinations required
Eleventh Circuit reads this Court's decision in *Snyder* as not requiring any express determinations in *United States v. Prather*, 279 Fed.Appx. 761, 767 (11th Cir. 2008).	2008	
	2009	Seventh Circuit requires express determinations in *United States v. McMath*, 559 F.3d 657, 665-66 (7th Cir. 2009).
	2010	Third Circuit remands for express fact-finding because the trial "court did not make the findings required under *Batson*." *Coombs v. Diguglielmo*, 616 F.3d 255, 263 (3rd Cir. 2010).
D.C. Circuit concludes that there is no requirement for express findings. *United States v. Moore*, 651 F.3d 30, 42 (D.C. Cir. 2011).	2011	Seventh Circuit reiterates its requirement, relying upon its decision in *McMath* and the Third Circuit's *Coombs*. *United States v. Rutledge*, 648 F.3d 555, 560 (7th Cir. 2011).
Fifth Circuit recognizes the split and sides with the Eleventh Circuit. *United States v. Thompson*, 735 F.3d 291, 300 (5th Cir. 2013).	2013	
	2016	Seventh Circuit notes the discussion in the Fifth Circuit's *Thompson*, but again requires express findings. *Morgan v. City of Chicago*, 822 F.3d 317, 329-30 & 330 fn.30 (7th Cir. 2016).

Colorado Supreme Court, relying upon the Fifth Circuit's *Thompson* and D.C. Circuit's *Moore*, rules that there is no requirement for express credibility findings. *People v. Beauvais*, 393 P.3d 509, ¶ 40 (Colo. 2017).	2017	
	2018	Nevada Supreme Court requires express findings because it is impossible to assess the record without those findings. *Williams v. State*, 429 P.3d 301, 308-09 (Nev. 2018).
Arizona sides with the Fifth Circuit and rejects any express finding requirement. *State v. Porter*, 491 P.3d 1100, ¶ 14 (Ariz. 2021).	2021	

This issue has arisen time and again throughout several jurisdictions. The decisions have gone back and forth. And courts continue to settle on different sides of the divide. The constant back and forth demonstrates that this is an important and recurring issue.

It also proves the lower courts have been unable to resolve the question without this Court's intervention.

This matter has percolated. The divide is entrenched. This issue is ripe for this Court's consideration and resolution. This Court should accept review to finally address a split that continues to divide the state and federal courts.

c. This case is an ideal vehicle to resolve whether trial courts should be required to make factual findings at *Batson*'s third step.

This is an appropriate case to resolve this issue because 1) this case is on direct review, rather than habeas review; 2) the issue was properly addressed by the courts below; and 3) the issue is outcome determinative.

First, whether trial courts should be required to make factual findings at *Batson*'s third step is necessarily a question that must be addressed on direct review.

This is illustrated by the divergent approaches taken in the Sixth Circuit. In *United States v. McAllister*, 693 F.3d 572, 580 (6th Cir. 2012)—a direct appeal case—the Sixth Circuit concluded a trial court's "perfunctory" acceptance of a prosecutor's claimed race-neutral reason for striking a minority juror did "not conform to the requirements that the district court make expressed findings" during its *Batson* analysis. Yet in *Mitchell v. LaRose*, 802 Fed.Appx 957, 960 (6th Cir. 2020, unpub.)—an unpublished habeas case—the Sixth Circuit concluded that a state court did "not obviously misapply *Batson*" in concluding that a state trial court's "clear rejection" of the *Batson* challenge was all that was required.

Habeas review—and AEDPA review specifically—drove this difference. In *Mitchell*, the defendant had relied upon the Second Circuit's decision in *Galarza v. Keane*, 252 F.3d 630, 639 (2d Cir. 2001). *See Mitchell*, 802 Fed.Appx. at 960. But the Sixth Circuit expressly pointed out that "*Galarza* did not apply AEDPA." *Id.*

Instead, the Sixth Circuit found the Second Circuit's discussion in *Messiah v. Duncan*, 435 F.3d 186 (2d Cir. 2006), more appropriate to an AEDPA analysis. *Mitchell*, 802 Fed.Appx. at 960.

Thus, while the Sixth Circuit itself requires trial courts to make express findings, they have appropriately recognized that there is no uniform federal rule or clearly established precedent from this Court that guides the state courts.

The only way to resolve the split regarding whether trial courts must make factual findings at *Batson*'s final step is to accept certiorari in a case on direct review. Because this case is on direct review, it is a superb vehicle to resolve this split.

Second, the lower courts squarely addressed the issue. While the state argued below that the matter had not been sufficiently preserved, the Arizona Supreme Court directly addressed the issue. *State v. Porter*, 491 P.3d 1100, ¶¶ 5, 14-19 (Ariz. 2021). This is not a case where the matter was not squarely presented; Arizona's court of last resort had the issue solidly before them, reviewed the precise issue, recognized the split, and selected a side.

And third, the question presented in this case is outcome determinative.

A majority of the Arizona Court of Appeals panel chose to require a trial court, when faced with a pattern of potentially discriminatory strikes, to make an express determination that the striking party's justification was genuine. *State v.*

Porter, 460 P.3d 1276, ¶ 19 (Ariz. App. 2020). Based on this requirement, the Arizona Court of Appeals remanded so the trial court could make that decision. *Id.* at ¶ 22.

The Arizona Supreme Court, however, rejected any requirement for express findings. *Porter*, 491 P.3d 1100, ¶¶ 14-19 (Ariz. 2021). The Arizona Supreme Court thus vacated the opinion of the Arizona Court of Appeals, thereby eliminating the remand. *Id.* at ¶ 28.

The implications of the question presented in this case—whether trial courts are required to make express findings at *Batson*'s third step—are thus dispositive in this case. If such express findings are required, Ms. Porter is entitled to at least a remand; if express findings are not required, Ms. Porter's conviction (by a jury that did not contain a single Black person) will be affirmed.

Ms. Porter's case is on direct appeal, the split was squarely addressed by the lower courts, and the issue is outcome determinative. This case is thus an ideal vehicle to resolve the question of whether trial courts should be required to make factual findings at *Batson*'s third step.

d. At *Batson*'s third step, trial courts should be required to make express factual determinations, or at least expressly determine demeanor justifications.

The benefits of express factual determinations are beyond dispute. Regardless of the split, all courts agree that trial courts *should* be making express factual determinations.

The First Circuit explained three benefits of express findings: "First, it fosters confidence in the administration of justice without racial animus. Second, it eases appellate review of a trial court's *Batson* ruling. Most importantly, it ensures that the trial court has indeed made the crucial credibility determination that is afforded such great respect on appeal." *United States v. Perez*, 35 F.3d 632, 636 (1st Cir. 1994); *accord Jones v. State*, 938 A.2d 626, 635 (Del. 2007).

Even jurisdictions that have not adopted an express determination requirement see the value in express factual findings, and thus encourage trial courts to make factual findings. The Eighth Circuit, for example, has said: "We strongly urge, however, as we have in the past, that trial judges make on-the-record rulings articulating the reasoning underlying a determination on a *Batson* objection." *U.S. Xpress Enterprises, Inc. v. J.B. Hunt Transp., Inc.*, 320 F.3d 809, 814 (8th Cir. 2003). The Tenth Circuit echoed the same sentiment: "Although we affirm the district court's ruling, we encourage district courts to make explicit factual findings on the record when ruling on *Batson* challenges." *United States v.*

Castorena-Jaime, 285 F.3d 916, 929 (10th Cir. 2002); *see also United States v. Vann*, 776 F.3d 746, 757 (10th Cir. 2015).

States rejecting an express findings requirement have also indicated a strong preference for on-the-record findings. The Iowa Supreme Court articulated this preference: "When an objection is made by the opposing party, a trial court does not need to make express findings regarding a *Batson* violation, but it is preferable for trial courts to do so." *State v. Mootz*, 808 N.W.2d 207, 219 (Iowa 2012). So did the Supreme Court of Louisiana: "[A]lthough the better practice is for the trial court to establish for the record its evaluation of the justification offered to rebut the inference of purposeful discrimination, the trial court here did not err in failing to rule expressly …." *State v. Sparks*, 68 So.3d 435, 474 (La. 2011). The Mississippi Supreme Court has also urged trial courts to make express findings: "We stated that, while the trial court should make on-the-record findings on each race-neutral reason provided by the State, as long as the record provides a basis in fact for the trial court's ruling, reversal is not required." *Carrothers v. State*, 148 So.3d 278, 307 (Miss. 2014).

But requiring express rulings furthers the goals of *Batson*. Express rulings ensure that the trial and appellate courts have the tools needed to vigorously enforce *Batson*. *See Flowers v. Mississippi*, 588 U.S. ___, 139 S.Ct. 2228, 2243 (2019). Express rulings ensure the public can have high confidence that our justice

system does not exclude prospective jurors because of race or gender. *See Batson*, 476 U.S. at 87. And express rulings ensure an adequate record to protect a meaningful review on appeal. *See Draper v. Washington*, 372 U.S. 487, 497 (1963).

Indeed, this last point—the importance of generating a record that can accomplish a meaningful appellate review—is what many courts adopting an express rulings requirement have focused on. The Seventh Circuit observed: "if there is nothing in the record reflecting the trial court's decision, then there is nothing to which we can defer." *United States v. Rutledge*, 648 F.3d 555, 559 (7th Cir. 2011). The Supreme Court of Nevada similarly recognized that a record that did not contain the trial court's express findings "does not allow meaningful, much less deferential review." *Williams v. State*, 429 P.3d 301, 308 (Nev. 2018). And the Indiana Court of Appeals has recognized that without on-the-record credibility findings, "we are left … with little ability to review the trial court's decision …." *Roach v. State*, 79 N.E.3d 925, 931 (Ind. App. 2017); *see also Wimberly v. State*, 118 So.3d 816, 821 (Fla. 2012) (reiterating that an on-the-record "genuineness inquiry" is needed to allow for meaningful appellate review).

None of this amounts to a magic words test. There is no script that must be followed. But trial courts must make on-the-record findings to ensure that

appellants, appellees, and appellate courts have a record that can be meaningfully reviewed.

Indeed, the lack of express findings creates the very problem that the Arizona Supreme Court sought to avoid—judgment based upon a cold appellate record. *See State v. Porter*, 491 P.3d 1100, ¶ 21 (Ariz. 2021). The Supreme Court of Delaware observed this in *Jones v. State*: "a cold record can not replace a trial court's credibility determinations." *Jones v. State*, 938 A.2d 626, 635 (Del. 2007).

This is where the Arizona Supreme Court missed the premises underlying even cases that have refused to require express findings—courts that don't require express findings still largely insist that the trial court clearly rule on the striking party's proffered justification. *United States v. Thompson*, 735 F.3d 291 (5th Cir. 2013), and *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011), are perfect examples of this principle. In *Thompson*, the prosecutor justified their strike "solely on the juror's demeanor." *Thompson*, 735 F.3d at 299. In *Moore*, demeanor was the only basis for two of the prosecutor's strikes. *Moore*, 651 F.3d at 42-43. *Thompson* and *Moore* were thus premised upon the unique situation where a prosecutor relies only upon demeanor to justify a strike and the trial court otherwise complies with all three *Batson* steps.

But when a trial court does not make on-the-record credibility findings, a person in Ms. Porter's position is forced to rest her argument solely upon a cold

appellate record. Without express findings, Ms. Porter has nothing to point to, nothing to address, nothing to review. And an appellate court is left with nothing to rely upon, nothing to trust, nothing to defer to.

This reflects the fundamental problem this Court faced in *Snyder v. Louisiana*, 552 U.S. 472, 479 (2008). This Court recognized that "deference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike." *Id.* But where the record was unclear as to the trial court's ruling, "we cannot presume that the trial judge credited the prosecutor's assertion that [the prospective juror] was nervous." *Id.*

At its best, this deprives folks like Ms. Porter meaningful appellate review. At its worst, it insulates improper decisions.

To ensure that people in Ms. Porter's position can secure meaningful appellate review, this Court should grant certiorari and clarify that *Batson*'s third step requires trial courts to make on-the-record findings regarding a prosecutor's proffered race-neutral justifications.

2. This Court should grant certiorari to resolve the split regarding whether side-by-side juror comparisons are waived on appeal unless expressly argued by trial counsel.

This Court should also grant certiorari to address whether a side-by-side comparison of jurors can be conducted for the first time on appeal. Courts across

the country have split on this issue. This case is again an ideal vehicle to resolve the split on this important and recurring issue.

a. Courts across the country are split regarding whether an appellate court should consider a comparative juror analysis presented for the first time on appeal.

Courts are divided on the question of whether a person in Ms. Porter's position can raise a comparative juror analysis for the first time on appeal.

Recognizing the value of comparative juror analyses when evaluating whether a strike was motivated by race, many jurisdictions have conducted side-by-side comparisons for the first time on appeal. The Seventh Circuit, for example, conducted a side-by-side comparison for the first time in an appellate proceeding in *Harris v. Hardy*, 680 F.3d 942, 964-65 (7th Cir. 2012). That side-by-side comparison allowed the Seventh Circuit to conclude that the striking party's justifications were implausible and the strikes should not have been allowed. *Id.* The Ninth Circuit similarly conducted a side-by-side comparison for the first time on appeal in *McDaniels v. Kirkland*, 813 F.3d 770, 778-79 (9th 2006). The court noted that "comparative juror analysis is an important tool for assessing the state court's factual determinations" in *Batson* claims and "has, in some instances, revealed racial motivations behind peremptory strikes that convincingly undermined the prosecutor's stated justifications …." *Id.* at 779. Indeed, as the

Ninth Circuit explained in *Boyd v. Newland*: "Without engaging in comparative juror analysis, we are unable to review meaningfully whether the trial court's ruling at either step one or step three of *Batson* was unreasonable in light of Supreme Court precedent." *Boyd v. Newland*, 467 F.3d 1139, 1149 (9th Cir. 2006). The Fifth Circuit also conducted a side-by-side comparison of jurors for the first time—in habeas proceedings, no less—in *Reed v. Quarterman*, 555 F.3d 364, 372-75 (5th Cir. 2009).

Several states have joined the Fifth, Seventh, and Ninth Circuits, and conducted juror comparisons for the first time on appeal, including California, Colorado, Indiana, and Kentucky. *People v. Lenix*, 187 P.3d 946, 961 (Cal. 2008) ("Thus, evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons."); *People v. Bauvais*, 393 P.3d 509, ¶ 52 (Colo. 2017); *Addison v. State*, 962 N.E.2d 1202, 1213 (Ind. 2012); *Clay v. Commonwealth*, 291 S.W.3d 210, 215 (Ky. 2008).

Other jurisdictions have refused to conduct a side-by-side analysis when raised for the first time on appeal. The Eighth Circuit, for example, has ruled: "Our cases hold, however, that we will not consider claims of pretext based upon the failure to strike similarly situated jurors unless the point was raised in the district court." *United States v. Walley*, 567 F.3d 354, 358 (8th Cir. 2009). The Eleventh

and D.C. Circuits have also refused to consider comparative juror analyses for the first time on appeal. *United States v. Houston*, 456 F.3d 1328, 1338 (11th Cir. 2006); *United States v. Gooch*, 665 F.3d 1318, 1331 (D.C. Cir. 2012). And beyond Arizona, courts in Connecticut, Missouri, and Rhode Island have all refused to consider comparative juror analyses for the first time on appeal. *State v. Hodge*, 726 A.2d 531, 544 (Conn. 1999); *State v. Johnson*, 220 S.W.3d 377, 383 (Mo. App. 2007); *State v. Pona*, 926 A.2d 592, 609-10 (R.I. 2007).

This divide demonstrates the need for resolution. The divide has been well-established, with decisions on both sides spanning the last two decades.

b. Whether courts should compare jurors for the first time on appeal is an important and recurring issue.

The cases listed above show that this issue is recurring. Several jurisdictions reached their decision in the mid-2000s. Since then, courts have continued to fall on both sides of the issue.

The Supreme Court of California, for example, reiterated its holding that comparative juror evidence must be considered, even when raised for the first time on appeal, just three years ago in *People v. Woodruff*, 421 P.3d 588, 631-32 (Cal. 2018). The Colorado Supreme Court also approved of considering comparative juror analyses for the first time on appeal when the record is sufficient to accomplish such a review in *People v. Beauvis*, 393 P.3d 509, ¶ 52 (Colo. 2017).

Arizona stands on the other side of the aisle, repeatedly refusing to consider a comparative juror analysis unless the trial attorney raised the argument. *State v. Porter*, 491 P.3d 1100, ¶ 22 (Ariz. 2021); *State v. Smith*, 475 P.3d 558, ¶ 71 (Ariz. 2020).

This issue has had ample time to percolate through the courts, yet no consensus has been reached. Courts continue to issue decisions on both sides of the split. This Court should thus grant certiorari to resolve this split and decide whether courts should consider comparative juror analyses for the first time on appeal.

c. This case is an ideal vehicle to resolve whether appellate courts should consider juror comparisons raised for the first time on appeal.

This case is also an ideal vehicle to resolve whether appellate courts should consider juror comparisons first raised on appeal because 1) this case is on direct review, 2) the issue was addressed by the courts below, and 3) the issue is outcome determinative.

First, this issue must be addressed in a direct appeal case, rather than a habeas case. Judge Ikuta of the Ninth Circuit explained in a concurring opinion that this Court's decisions have not provided a clear answer "to the question whether a state court must conduct comparative juror analysis as part of its *Batson*

inquiry ….” *McDaniels v. Kirkland*, 813 F.3d 770, 783 (9th Cir. 2015) (Ikuta, J., concurring). Because there has not yet been a clear answer, Judge Ikuta concluded the Ninth Circuit could not “hold that a state court which fails to conduct comparative juror analysis violates clearly established Federal law ….” *Id.* The Fifth Circuit found Judge Ikuta’s position compelling just last year in *Nelson v. Davis*, 952 F.3d 651, 676 fn.4 (5th Cir. 2020).

Habeas review is not conducive to deciding whether trial courts should be engaging with comparative juror analyses when offered for the first time on appeal. The core question in habeas review is fundamentally different—the question is whether a failure violates clearly established federal law, not whether the failure violates *Batson* or a defendant’s rights.

This case is thus an ideal vehicle because it is on direct appeal.

Second, the issue was expressly addressed below. In her initial briefing before the Arizona Court of Appeals, Ms. Porter advanced a juror comparison. *See State v. Porter*, 460 P.3d 1276, ¶ 35 fn.4 (Ariz. App. 2020) (McMurdie, J., dissenting). Although the Arizona Court of Appeals didn’t address the issue, *see id.*, the Arizona Supreme Court expressly rejected the juror comparison because it had not been raised at the trial court level, *see State v. Porter*, 491 P.3d 1100, ¶ 22 (Ariz. 2021).

And third, the issue is outcome determinative. The record shows the prosecutor treated jurors differently based upon race. Ms. Ayers (Juror 2) and Juror 22 both had family members who had been arrested, charged with, or convicted of a crime. Appendix C, 38a-39a. Both said they could be fair and impartial. *Id.* at 39a-40a. Both believed their family members had been treated fairly. *Id.* at 43a, 45a. Both avowed the experience would not have any impact on their ability to be fair and impartial. *Id.* at 43a-45a. But the prosecutor treated them differently: the prosecutor believed Juror 22, but found Ms Ayers uncertain. *Id.* at 51a. The comparative analysis in this case shows that the prosecutor's demeanor-based justification was pretextual.

d. Comparative juror analyses should be conducted for the first time on appeal to enforce *Batson* and protect a defendant's right to meaningful review.

"Comparing prospective jurors who were struck and not struck can be an important step in determining whether a *Batson* violation occurred." *Flowers v. Mississippi*, 588 U.S. ___, 139 S.Ct. 2228, 2248 (2019). In *Snyder*, this Court explained: "In *Miller-El v. Dretke*, [545 U.S. 231 (2005),] the Court made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder*, 552 U.S. at 478. And this Court has conducted a side-

by-side comparison on at least three occasions when not argued at the trial court level: *Flowers*, 139 S.Ct. at 2248-49 (majority comparing jurors), 2264 (Thomas, J., dissenting in part because trial counsel did not argue comparison); *Snyder*, 552 U.S. at 483-84 (majority comparing jurors), 489 (Thomas, J., dissenting in part because trial counsel failed to compare jurors); *Miller-El v. Dretke (Miller-El II)*, 545 U.S. at 241 & 241 fn.2 (majority comparing jurors), 279-80 (Thomas, J., dissenting in part because comparisons had not been put before state courts).

By simply refusing to consider juror comparison arguments, the Arizona Supreme Court has blatantly declined to consider "all of the circumstances that bear upon the issue of racial animosity …." *See Snyder*, 552 U.S. at 478.

To justify its refusal, the Arizona Supreme Court ruled Porter waived a side-by-side comparison of jurors when she did not argue the comparisons to the trial court. *Porter*, 251 Ariz. 293, ¶ 22.

Application of waiver, however, analyzes the issue too narrowly. As the Colorado Supreme Court explained, an issue is preserved when there is an objection: "this question is not one of issue preservation; both the voir dire record and the *Batson* objection were properly before the courts below." *Beauvais*, 393 P.3d 509, ¶ 50; *accord Addison v. State*, 962 N.E.2d 1202, 1213 (Ind. 2012). The issue is the *Batson* claim, which was preserved in this case by Ms. Porter's *Batson*

objection below. The comparative analysis was a component of her argument on appeal regarding the totality of circumstances.

Indeed, this Court disposed of a similar issue in *Miller-El II*, 545 U.S. at 241 fn.2. Miller-El raised a juror comparison for the first time during habeas proceedings. *Id.* Justice Thomas would have rejected the issue on the basis that the habeas petitioner had not put the issue "before the Texas courts." *Id.* at 241 fn.2 (majority), 279 (Thomas, J., dissenting). This Court rejected this view, noting the assertion "conflates the difference between evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence." *Id.* at 241 fn.2. The voir dire transcript contained all of the evidence necessary for a meaningful appeal and was properly before the state courts. *Id.* It was thus appropriate for this Court to consider the argument. *Id.*

Here, Ms. Porter did not even await habeas proceedings in federal court as Miller-El had; Ms. Porter raised the side-by-side comparisons on direct appeal. Like in *Miller-El II*, this case contains the voir dire transcript. Consequently, the evidence necessary to conduct the side-by-side comparison is available.

True, the weight that will be given a juror comparison analysis when raised for the first time on appeal is limited. This Court has recognized that an appellate review of a cold record can be "misleading when alleged similarities were not raised at trial." *Snyder*, 552 U.S. at 483. Some courts have thus applied more

limited review standards when considering a comparative juror analysis for the first time on appeal. *E.g. Addison v. State*, 962 N.E.2d at 1213.

But in light of *Miller-El II*, *Snyder*, and *Flowers*, this Court's encouragement that lower courts tread carefully cannot be construed as supporting an outright ban on conducting a comparative juror analysis for the first time on appeal.

Finally, as this Court observed in *Flowers*, "this Court's cases have vigorously enforced and reinforced [*Batson*], and guarded against any backsliding." *Flowers*, 139 S.Ct. at 2234. Juror comparisons—even those conducted for the first time on appeal—are a necessary tool to vigorously enforce *Batson*. In *Miller-El II*, *Snyder*, and *Flowers*, this Court found that the prosecutors had discriminated during the jury selection process. This Court reached these decisions in part because of comparative analyses. *See Flowers*, 139 S.Ct. at 2248-49; *Snyder*, 552 U.S. at 483-84; *Miler-El II*, 545 U.S. at 241. Had this Court simply ignored the side-by-side comparisons, the discriminatory use of peremptory strikes could have gone unchecked. It is for this reason that the Ninth Circuit observed: "Our application of this tool on heabeas review has, in some instances, revealed racial motivations behind peremptory strikes that convincingly undermined the prosecutor's stated justifications, and in others led us to uphold state court findings of lack of discrimination." *McDaniels*, 813 F.3d at 779 (cleaned up).

To vigorously enforce *Batson*, "all of the circumstances that bear upon the issue of racial animosity must be consulted." *See Snyder*, 552 U.S. at 478. Side-by-side comparison is an important tool that bears upon the question of racial animosity and pretext precisely because it considers whether the striking party consistently applied their rationale. For a state or federal appellate court to refuse to consider such comparisons would allow the very backsliding that this Court has consistently and rightly protected against. *See Flowers*, 139 S.Ct. at 2243.

CONCLUSION

For more than a decade, courts have been deeply divided on two issues regarding the enforcement of *Batson v. Kentucky*, 476 U.S. 79 (1986). First, appellate courts across the country are split regarding whether trial courts should be required to make express findings at *Batson*'s third step. Second, jurisdictions are divided regarding whether side-by-side jury comparisons should be considered for the first time on appeal.

Because this case provides an ideal vehicle to resolve both splits, Ms. Keyaira Porter asks this Court to grant this Petition for Writ of Certiorari and ultimately reverse the decision of the Arizona Supreme Court.

Respectfully submitted this 15th day of October, 2021.

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