No. 21-6008

In the Supreme Court of the United States

KEYAIRA PORTER,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

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

BRIEF IN OPPOSITION

MARK BRNOVICH
Attorney General of Arizona

JOSEPH A. KANEFIELD
Chief Deputy / Chief of Staff

BRUNN W. ROYSDEN III
Solicitor General

LINLEY WILSON
Deputy Solicitor General / Section Chief of Criminal Appeals

MICHAEL T. O'TOOLE
Assistant Attorney General
(*Counsel of Record*)

JILLIAN B. FRANCIS
Assistant Attorney General

OFFICE OF THE ARIZONA ATTORNEY GENERAL
Criminal Appeals Section
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-8830
Michael.OToole@azag.gov
CADocket@azag.gov

Counsel for Respondent

QUESTIONS PRESENTED

1. Whether a trial court denying a *Batson* challenge must expressly state it is finding no purposeful discrimination when a peremptory strike is partially based on a prospective juror's demeanor and the other reason for the strike is not found to be pretextual.

2. Whether appellate courts are constitutionally required to conduct a comparative juror analysis for the first time on appeal when resolving a *Batson* claim.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Rules

INTRODUCTION

In the Petition for Writ of Certiorari, Petitioner Keyaira Porter presents two questions that implicate *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny. Neither of the questions presented warrant this Court's review. Contrary to Porter's contention, there is no significant split of authority concerning the scope of this Court's holding in *Snyder v. Louisiana*, 552 U.S. 472 (2008). Further, the Arizona Supreme Court relied on Arizona case law to conclude that Porter's comparative juror analysis claim was waived because it was not timely raised in the trial court. Pet. App., at 9–10a, ¶¶ 20–22. This constituted an adequate and independent state law ground for denying the claim, which bars federal review. Finally, Arizona recently became the first state in the country to eliminate peremptory challenges. BIO-App., at 2–7a. This renders this case a poor vehicle to resolve either issue presented. For these reasons and others discussed below, the petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

A. *Factual Background.*

On the evening of August 14, 2017, police officers conducted a traffic stop in Mesa, Arizona. BIO-App., at 131–32a. After concluding the stop, the officers called for the subject vehicle to be towed. *Id.* at 132–34a. The officers allowed Porter, a passenger in the vehicle, to retrieve items from the vehicle before the tow truck arrived. *Id.* at 132–33a. Sometime after the tow truck arrived, a police sergeant told Porter she had to move away from the vehicle so it could be safely towed. *Id.* at 133–34a. Porter, nonetheless, walked back to the vehicle to remove more items. *Id.* The sergeant explained that the tow-truck driver had to tow the vehicle, but Porter became argumentative and refused to move away from the vehicle. *Id.*

When the sergeant put his hand on Porter's shoulder to guide her away from the vehicle, she turned around and "swung at [him]," missing his face but hitting his arm. *Id.* at 134a, 141a. The sergeant tried to grab Porter to arrest her, but she pushed him. *Id.* at 134–35a. Porter engaged in a "pushing match" with the sergeant, and they wound

up falling to the ground. *Id.* at 141a. Porter was "screaming" and "cussing." *Id.* 142a.

While on the ground, the sergeant's right arm was pinned underneath Porter. *Id.* at 134–35a, 142–45a. Porter was "swinging and flailing her arms and legs," and the sergeant struggled to keep her pinned down. *Id.* at. 135a. When the sergeant ordered Porter to let go of his arm, she tried to bite it instead. *Id.* at 135a, 145a. At that point, the sergeant, consistent with his use-of-force training, struck Porter one time in the face. *Id.* at 130–31a, 135a, 139a, 145–46a. Porter immediately released the sergeant's arm, and the officers handcuffed her. *Id.* at 135a, 145a. Porter was arrested for aggravated assault and resisting arrest. Pet. App., at 2a, ¶ 2.

B. *Jury Selection.*

During jury selection, Porter challenged the prosecution's peremptory strikes of two minority jurors, Juror 2 and Juror 20. BIO-App., at 120–21a. The prosecutor stated she struck Juror 2 because the juror's brother was convicted of aggravated assault, which was the "same nature as this matter." *Id.* at 122a. The prosecutor added that this juror "did not seem to be very sure with her responses" when she

was asked if her brother's conviction would impact her ability to serve on the jury; thus, the prosecutor questioned the juror's impartiality in "an aggravated assault case." *Id.* The prosecutor struck Juror 20 because she had previously been the foreperson of a jury that returned a not-guilty verdict. *Id.* at 122–23a.

In response, Porter did not assert that the prosecutor's reasons were not race-neutral, nor did she claim they were a pretext for discrimination. *Id.* at 123–24a. In fact, in regard to Juror 2, Porter said she "recognize[d]" the prosecutor's concern regarding the juror's "brother being arrested and charged and found guilty of an assault, which is the same situation here as far as assault . . . ." *Id.* And although Porter said the juror indicated she could be fair, she did not challenge the prosecutor's assertion that the juror "did not seem to be very sure with her responses" during *voir dire*. *Id.* at 122–24a. Porter did not have any response to the prosecutor's reasons for striking Juror 20. *Id.*

The trial court accepted the prosecutor's race-neutral explanations for the strikes and denied Porter's *Batson* challenge. *Id.* at 124–26a. In denying the challenge, the court noted: (1) the prosecutor struck

another panel member who had previously rendered a not-guilty verdict; (2) the prosecutor had struck another panel member who had been a foreperson; (3) it was reasonable for the State to strike a potential juror "that had an experience where their close family member was arrested for a similar charge to that which is involved in this case"; (4) it was reasonable to "strike jurors who may be stronger personalities," which was an apparent reference to the strike of a juror who had previously been a foreperson;[1] and (5) it was reasonable to strike jurors who had rendered not guilty verdicts in the past. *Id*.

Porter did not object to the trial court's findings or request that further findings be made. *Id*. at 126a.

C. *Arizona Court of Appeals Decision.*

Even though Porter did not raise these claims on appeal, a majority of the Arizona Court of Appeals held that that the trial court was required to make express findings regarding: (1) the prosecutor's

---

[1] In Arizona, jurors typically elect their own foreperson. *See* Ariz. R. Crim. P. 22.1(a)(2). The trial court, therefore, was acknowledging that forepersons may have stronger personalities than other jurors.

demeanor-based explanation for striking Juror 2; and (2) "the racially disproportionate impact of the strikes." Pet. App., at 13a, ¶ 1.

The dissenting judge, in contrast, concluded that the trial court "did exactly as was required under Arizona's current *Batson* jurisprudence; it considered the State's explanations and Porter's arguments, found one of the State's proffered reasons for striking Prospective Juror 2 credible—and, in fact, reasonable—and concluded Porter had not met her burden of showing the State was motivated by discriminatory intent." *Id*. at 25a, ¶ 33 (McMurdie, J., dissenting). The dissent also took issue with the majority adopting its "sweeping new rule" because Porter had made no such arguments either at trial *or* on appeal. *Id*. at 27a, ¶ 36, n.5.

D. *Arizona Supreme Court Decision.*

The Arizona Supreme Court granted review and, as an initial matter, chastised the court of appeals for resolving an issue on appeal that was not raised in the trial court or on appeal and doing so without briefing by the parties. Pet. App., at 3a, ¶ 5. The court held that neither federal law nor Arizona law require a trial court to "make express findings on the credibility of a demeanor-based justification for

a peremptory strike when a non-demeanor-based justification is also offered and there is no evidence that either justification is pretextual." *Id*. at 2a, ¶ 1.

In regard to federal law, the court found that *Snyder v. Louisiana*, 552 U.S. 472 (2008), was "inapplicable in cases where a demeanor-based and a nondemeanor-based justification are offered and neither is clearly pretextual." Pet. App., at 6a, ¶ 14. The court also found that "Arizona's *Batson* jurisprudence" likewise does not require "explicit findings on demeanor-based justifications when a non-demeanor-based justification is offered and there is no evidence that either justification is pretextual." *Id*. at 8a, ¶ 19.

Further, the court held that by failing to raise a comparative juror analysis claim in the trial court, Porter "deprived the prosecutor of the opportunity to distinguish allegedly similarly situated jurors and divested the trial court of the occasion to conduct an in-depth comparison of the jurors," and, thus, she waived on the claim on appeal. *Id*. at 9–10a, ¶ 22.

The Arizona Supreme Court ultimately upheld the trial court's denial of Porter's *Batson* challenge, stating that although express

findings are not required, trial courts are encouraged "to make them as they will bolster their rulings and facilitate review on appeal." *Id.* at 10–11a, ¶ 27.

E. *Arizona Eliminates Peremptory Challenges.*

Shortly after the Arizona Supreme Court affirmed Porter's conviction and sentence, it adopted rules eliminating peremptory challenges in both criminal and civil cases. BIO-App., at 2–7a. Consequently, Arizona has become the first state in the nation to abide by Justice Marshall's call for the complete elimination of peremptory challenges. *Batson*, 476 U.S. at 103–08 (1986) (Marshall, J., concurring) (encouraging the elimination of peremptory challenges "entirely").

REASONS FOR DENYING THE PETITION

I. The Court Should Deny the Petition Because There Is No Intractable Split of Authority Concerning the Scope of this Court's Decision in *Snyder*.

A. *There is no significant jurisdictional split regarding the scope of* Snyder.

Porter contends that certiorari should be granted on the first question presented (i.e., whether a trial court must make express findings at *Batson*'s third step) because state and federal courts are

divided on this question. Pet., at 10–25. The Arizona Supreme Court, however, did not determine whether, as a general matter, "trial courts must make express findings at *Batson*'s third step." *Id.* at 11. Instead, it decided the narrower, fact-intensive issue of whether federal or Arizona law requires a trial court to "make express findings on the credibility of a demeanor-based justification for a peremptory strike when a non-demeanor-based justification is also offered and there is no evidence that either justification is pretextual" in light of *Snyder*. Pet. App., at 2a, ¶ 1; *see also id.* at 5a, ¶ 12 ("The crux of this case concerns whether *Snyder* requires trial courts to make express findings on the credibility of a demeanor-based justification in response to a *Batson* challenge.").

Porter contends that the Arizona Supreme Court recognized "the split" in deciding her own case. Pet., at 12. But the court did not cite any cases embracing a contrary holding to its own when it noted that "the majority of federal courts" have concluded that "*Snyder*'s express-finding requirement is inapplicable in cases where a demeanor-based and a nondemeanor-based justification are offered and neither is clearly pretextual." Pet. App., 6–7a, ¶ 14. Further, as explained below,

although Porter suggests otherwise, only the Seventh Circuit has come to a contrary conclusion than the one reached by the Arizona Supreme Court on this issue.

Porter argues that the Fifth Circuit recognized a disagreement on the scope of *Snyder* in *United States v. Thompson*, 735 F.3d 291, 300 (5th Cir. 2013). Pet., at 11. *Thompson*, however, merely noted that the Seventh Circuit had taken a contrary view to the one taken in an unpublished Eleventh Circuit decision. 735 F.3d at 300. And the Fifth Circuit itself found *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.* This is consistent with the Arizona Supreme Court's decision below because it acknowledges that *Snyder*'s rule is limited to situations where a non-demeanor-based reason is found to be pretextual. Pet. App., 6–7a, ¶ 14.

Porter also cites the Indiana Court of Appeals' decision in *Roach v. State*, 79 N.E.3d 925, 930 (Ind. App. 2017), for the proposition that "the federal circuit courts are split regarding" the scope of *Snyder*. Pet., at 11. *Roach* does state that the federal circuit courts "are split," but it only cites a footnote from a Seventh Circuit case in support of that

proposition, i.e., *Morgan v. City of Chicago*, 822 F.3d 317, 330 n.30 (7th Cir. 2016). *Roach*, 79 N.E.3d at 930. That footnote, in turn, merely cites to the Fifth Circuit's decision in *Thompson*, *supra*, concerning the disagreement between the Seventh Circuit and an unpublished Eleventh Circuit decision. *Morgan*, 822 F.3d at 330 n.30 (7th Cir. 2016).

Porter also cites a dissent in a California Supreme Court case in support of her contention there is a split of authority. Pet., at 11. But the dissent asserts a split about the need for an explicit analysis when denying a *Batson* challenge in general; it does not support Porter's suggestion that there is a split of authority concerning the scope of *Snyder*. *See People v. Williams*, 299 P.3d 1185, 1235 (2013) (Liu, J. dissenting). Of the four cases cited by the dissent for the proposition that *Batson* requires an explicit analysis at the third step, the only one that addresses the scope of *Snyder* is—again—a Seventh Circuit case. *See United States v. Rutledge*, 648 F.3d 555, 559 (7th Cir. 2011) (following prior decision in *United States v. McMath*, 559 F.3d 657 (7th Cir. 2009)). The other three cases cited by the dissent, in contrast, do not concern the need for express findings when a peremptory strike is

based on demeanor. *See United States v. McAllister*, 693 F.3d 572, 581 (6th Cir. 2012) (prosecutor's reasons nondemeanor-based); *Coombs v. Diguglielmo*, 616 F.3d 255, 261–65 (3d Cir. 2010) (trial court appeared to dismiss defendant's *Batson* challenge out-of-hand and "improperly restrict[ed] the defendant's ability to prove discriminatory intent"); *Green v. LaMarque*, 532 F.3d 1028, 1031 (9th Cir. 2008) (prosecutor's three reasons all nondemeanor-based).

Porter cites other cases in support of her contention that there is an intractable split, but to the extent she suggests that these cases establish a split regarding the scope of *Snyder*, this is misleading. Rather, these cases discuss the purported general need for explicit findings when addressing a *Batson* claim. *See McAllister,* 693 F.3d at 580 (stating that *Batson* requires stating "an explicit, on-the-record analysis of each of the elements") (internal quotation marks omitted); *Commonwealth v. Maldonado*, 788 N.E.2d 968, 973 (Mass. 2003) (requiring "specific findings by the judge as to whether the explanation offered by the challenging party is both adequate and genuine" once a prima facie *Batson* challenge is made) *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) ("In conducting a *Batson* analysis, a court may not simply 'accept' a prosecutor's race-neutral explanation and terminate the inquiry there."); *State v. Reiners*, 664 N.W.2d 826, 832 (Minn. 2003) (stating that "[i]t is important for the court to announce on the record its analysis of each of the three steps of the *Batson* analysis"); *State v. Alexander*, 851 S.E.2d 411, 419 (N.C. App. 2020) (requiring "specific findings of fact at each stage of the *Batson* inquiry"); *State v. Pona*, 926 A.2d 592, 608 (R.I. 2007) (prospectively requiring "finding[s] of credibility for each challenged strike" under *Batson*) (internal quotation marks omitted).

Thus, other than the Seventh Circuit, the decisions of every circuit court and every state court of last resort cited in Porter's petition that have considered the scope of *Snyder* have held, like Arizona, that a predicate to obtaining relief is the demonstration that a corollary non-demeanor-based reason was invalid. *See Thompson,* 735 F.3d at 300–01 ("*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."); *United States v. Moore*, 651 F.3d 30, 42 (D.C. Cir. 2011) ("*Snyder* does not establish a rule that trial courts must make

specific findings about demeanor."); *Smulls v. Roper*, 535 F.3d 853, 860–61 (8th Cir. 2008) (en banc) (distinguishing *Snyder* where "both proffered reasons [for the peremptory strikes] withstand scrutiny"); *People v. Beauvais*, 393 P.3d 509, 521, ¶ 41 (Colo. 2017) ("We agree with the courts that confine *Snyder* to its facts."); *Williams v. State*, 429 P.3d 301, 310 (Nev. 2018) (concluding that trial court erred in denying *Batson* challenge where the non-demeanor-based reason for the strike was pretextual and there was no credibility finding regarding the demeanor-based reason).

And even under Seventh Circuit precedent, the trial court's decision in this case would have been upheld. In *McMath*, the trial court summarily denied the defendant's *Batson* challenge, even though the defense challenged the prosecutor's demeanor-based reason for the strike. 559 F.3d at 661. On that record, the Seventh Circuit remanded for further findings and a possible evidentiary hearing. *Id.* at 666. Here, in contrast, even though the defense did not assert that the prosecutor's race-neutral reasons were pretextual, the trial court made factual findings and concluded there was no "purposefulness [sic] discrimination." BIO-App., at 125–26a. Under Seventh Circuit

precedent, the trial court's findings were sufficient. *See United States v. Cruse*, 805 F.3d 795, 807–09 (7th Cir. 2015) (upholding denial of *Batson* challenge where the trial judge found that the reasons given by the prosecutor were race-neutral and the that a strike was "not racially invidious").

Further, after the Seventh Circuit decided *McMath*, this Court upheld the denial of a *Batson* challenge even though the trial judge who denied the challenge did not personally observe the demeanor in question, and even though the judge denied the challenge "without further explanation" after finding the prosecutor's reason for the strike was race-neutral. *Thaler v. Haynes*, 559 U.S. 43, 45 (2010). More recently, this Court also rejected the contention that it was necessary to consider a demeanor-based reason for a strike when the other reason for the strike was valid. *Davis v. Ayala*, 576 U.S. 257, 275 (2015) ("As a result [of the valid reason for the strike], it is not necessary for us to consider the prosecutor's supplementary reason for this strike—the poor quality of [the juror's] responses ….''). The scope of this Court's decision in *Snyder*, therefore, is not seriously in question.

Therefore, contrary to Porter's suggestion, there is no intractable split regarding the scope of *Snyder*.

B. *The Arizona Supreme Court found that Arizona law does not generally require express findings, not that the federal constitution has no such requirement.*

As noted, in addition to suggesting that there is a split concerning the parameters of *Snyder*, Porter more broadly contends there is a split as to whether express findings must be made at *Batson*'s third step. Pet., at 11–16.

But, again, the Arizona Supreme Court did not generally consider the purported need for express findings at *Batson*'s third step—it only addressed the limited issue of whether "a trial court must make express findings on the credibility of a demeanor-based justification for a peremptory strike when a non-demeanor-based justification is also offered and there is no evidence that either justification is pretextual." Pet. App., at 2a, ¶ 1; *see also id*. at 3a, ¶ 4 (again setting forth the scope of the court's review).

The court rejected the contention that federal law, specifically *Snyder*, mandated such a requirement in Section I of its opinion. *Id*. at 4–7a, ¶¶ 7–14. Then in Section II, the supreme court considered

whether "Arizona's *Batson* jurisprudence requires express findings that the prosecutor's race-neutral reasons were credible and non-pretextual." *Id*. at 7a, ¶ 15. The court first rejected the contention that "Arizona law requires express findings of all proffered peremptory strike justifications in light of" a prior state court of appeals decision, *State v. Lucas*, 18 P.3d 160 (Ariz. App. 2001). Pet. App., at 7a, ¶ 16. Next, the court rejected Porter's invitation to implement an explicit-determination rule based on out-of-state case law. *Id*. at 7–8a, ¶ 17. Finally, the Arizona Supreme Court relied on its own precedent to conclude that express findings are not required under *Batson*'s third step. *Id*. at 8a, ¶ 18.

Accordingly, to the extent there is a jurisdictional split concerning whether a trial court must make express findings at *Batson*'s third step, this is not the case to consider that issue because the Arizona Supreme Court did not make any such determination; instead, it merely found that Arizona law imposes no such requirement. *See Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an

adequate and independent state ground."). And, in fact, because *Batson* declined to "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's [peremptory] challenges," 476 U.S. at 99, it is not surprising that various jurisdictions employ somewhat different standards for resolving *Batson* challenges.

II. Porter's Comparative Juror Analysis Claim Was Rejected on Adequate and Independent State Grounds; At Any Rate, There is No Jurisdictional Split as To Whether Appellate Courts Are Required to Conduct a Comparative Juror Analysis for the First Time on Appeal.

A. *The Arizona Supreme Court denied Porter's comparative juror analysis claim on adequate and independent state law grounds.*

It is a long-established principle that this Court will not review a state court decision supported by adequate and independent state law grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1945) ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds."). Under this principle, "the views of the [S]tate's highest court with respect to state law are binding on the federal courts." *Wainwright v. Goode*, 464 U.S. 78, 84 (1983); *see also Dretke v. Haley*, 541 U.S. 386, 392 (2004) ("[A]n adequate and

independent state procedural disposition strips this Court of certiorari jurisdiction to review a state court's judgment . . . .").

This Court has laid out the following guidance for determining when a state court decision is based on an adequate and independent state law ground. When the state court decision rests primarily on federal law, it, of course, is not based on a state law ground. *Long*, 463 U.S. at 1040–41. But if the federal authorities cited by the state court "are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached," the ruling is one of state law. *Id* at 1041. Finally, "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds," federal review is barred. *Id.*

Under this guidance, the decision below resolved Porter's comparative juror analysis claim on adequate and independent state-law grounds and, thus, that claim is not subject to review in this Court. The Arizona Supreme Court applied well-established state law holding that Porter's comparative juror analysis claim was precluded because she failed to raise it in the trial court. Pet. App., at 9–10a, ¶¶ 21–22 (collecting Arizona cases finding waiver of comparative analysis when

raised for the first time on appeal). The court did not rely on federal law in rejecting the claim on the basis of waiver. *Id.* Thus, consistent with *Snyder*'s suggestion that such claims can be defaulted in state court, Porter waived her comparative juror analysis claim by not raising the claim in the trial court in the first instance. *See Snyder*, 552 U.S. at 483 n.2 (noting that—in contrast to the instant case—that the state supreme court did not find that the petitioner "had procedurally defaulted reliance on a comparison of the African–American jurors whom the prosecution struck with white jurors whom the prosecution accepted").

Accordingly, the Arizona Supreme Court's decision not to conduct a comparative juror analysis for the first time on appeal rests on an adequate and independent state law ground, and, is therefore not subject to review by this Court. *See Sochor v. Florida*, 504 U.S. 527, 533–34 (1992) (holding that when state supreme court found that a claim was "not preserved for appeal," this was an adequate and independent ground preventing federal review); *see also Edelman v. People of State of Cal.*, 344 U.S. 357, 358 (1953) ("It is clear that this Court is without power to decide whether constitutional rights have

been violated when the federal questions are not seasonably raised in accordance with the requirements of state law.").

B. *There is no jurisdictional split regarding a general requirement to conduct a comparative juror analysis for the first time on direct appeal.*

Porter contends the country is split on the question of whether appellate courts "should" consider a comparative juror analysis for the first time on appeal. Pet., at 24–25. But whether an appellate court *should* consider such claim for the first time on appeal does not raise a federal constitutional issue; rather, any split would have to necessarily concern a *requirement* that such claims be considered for the first time on appeal. In other words, if there is no constitutional right at issue, there is no case or controversy under Article III.

And to the extent Porter suggests there is a split between jurisdictions requiring a court to conduct a comparative juror analysis for the first time on direct appeal and those that forbid it, she is mistaken.

1. *Miller-El II*, *Snyder*, and *Flowers*.

To give context to Porter's supposed split, a quick discussion of this Court's decisions in *Miller-El II*, *Snyder*, and *Flowers* is warranted.

In each of these cases, the Court conducted a comparative juror analysis when one was not conducted in the trial court, but each case involved capital sentences and extraordinary circumstances that are not present in Porter's case.

In *Miller-El v. Dretke ("Miller-El II")*, 545 U.S. 231 (2005), this Court overturned a *Batson* challenge in a capital murder trial and granted habeas relief. *Miller-El II* relied on a number of factors in concluding there was a *Batson* violation, including: (1) the prosecutor's use of peremptory strikes to remove 91% of prospective black jurors; (2) a comparative juror analysis against similarly situated non-minority jury members; (3) disparate questioning between prospective non-minority and black jurors; (4) use of the "jury shuffling" procedure; and (5) evidence of historical discrimination supplemented by a manual outlining a specific policy of excluding blacks from juries. *Id.* at 253–66. Further, the evidence revealed that the prosecution struck a black juror who would have been an "ideal juror" in a death penalty case and did not strike similarly-situated white jurors. *Id.* at 241–52.

In *Snyder*, this Court again conducted a comparative juror analysis when one had not been made in the trial court; the Court

warned, however, of the difficulties inherent in conducting a comparative juror analysis for the first time on appeal. 552 U.S. at 483 (noting that "a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial"). The Court nevertheless concluded that the juror trait at issue—concern about serving on a sequestered jury due to conflicting obligations—was thoroughly explored by the trial court during *voir dire*, and it found that the prospective black juror was one of 50 members of the venire who expressed concern that the trial would interfere with his personal obligations. *Id.* at 480, 483. The reason given for striking the black juror was the juror's student teaching obligations, but the court called the juror's school and confirmed the juror would be able to fulfil his obligations without issue. *Id.* at 480–85. This Court found that the prosecutor's use of a peremptory strike against the black juror, when compared to similarly situated white jurors, constituted pretextual racial discrimination considering the prospective jurors' assertions of personal hardship if required to serve on a sequestered jury. *Id.* at 483–85.

More recently, in *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), the Court found that four facts required the reversal of a state court's rejection of a *Batson* claim: (1) in the defendant's six trials, the prosecution employed peremptory challenges to strike 41 of 42 black prospective jurors; (2) in the sixth and most recent trial, the prosecution exercised peremptory strikes against five of the six black prospective jurors; (3) the prosecution engaged in "dramatically disparate questioning of black and white prospective jurors"; and (4) the Court engaged in a comparative juror analysis and found that the prosecution struck one black prospective juror who was similarly situated to white prospective jurors who were not struck. 139 S. Ct. at 2235, 2248–49. The Court stated that it need not decide whether any of those facts alone would require reversal, but instead found that all the facts and circumstances taken together established clear error in denying the defendant's *Batson* challenge. *Id.* at 2251

These three cases are readily distinguishable from the facts present in this case. The numerous factors at issue in *Miller-El II* and the statistics showing a pattern of racially discriminatory challenges are simply not present here. Likewise, the "extraordinary facts" and

procedural history in *Flowers* are not present here. *Flowers*, 139 S. Ct. at 2235. And finally, unlike the *voir dire* in *Snyder*, in which the prosecutor's non-demeanor-based reason for striking the juror was "thoroughly explored" and plainly contradicted by the record, 552 U.S. at 482–83, here, the record is too sparse for appellate review. Moreover, *Miller-El II, Snyder*, and *Flowers* do not call for the proposition that a comparative juror analysis *must* be conducted on a cold record or that any singular discrepancy calls for reversal. Instead, in these capital cases the comparative juror analysis was one factor among many—contradictory evidence, a pattern of discrimination, disparate questioning, or extraordinary facts—that led to reversal.

Crucially, *Miller-El-II, Snyder*, and *Flowers* were all death penalty cases. Capital cases routinely involve extensive and thorough *voir dire* questioning to determine whether prospective jurors' views on capital punishment would hinder the performance of their duties.[2] *See Morgan v. Illinois*, 504 U.S. 719, 726–28 (1992) (emphasizing that in a capital

---

[2] For example, the *voir dire* in *Miller-El II* lasted five weeks and the transcripts consisted of 4,662 pages. 545 U.S. at 283 (Thomas, J., dissenting).

case, jurors must be impartial as to both culpability and punishment); *Wainwright v. Witt*, 469 U.S. 412, 424–26 (1985) (noting that, in capital cases, "many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'"). Accordingly, the *voir dire* record in capital cases tends to be more thorough and therefore more appropriate for a first-time comparative juror analysis than a *voir dire* record in a non-capital case, like Porter's, where a race-neutral reason for a strike will likely not have been "thoroughly explored." *Snyder*, 552 U.S. at 483.

2. There is no split of authority concerning whether an appellate court is required to conduct a comparative juror analysis for the first time on appeal.

Porter cites circuit court cases where a comparative analysis was used by federal habeas courts in determining whether a state court's decision was based on an unreasonable determination of the facts. Pet., at 25–26. For example, in a capital habeas case, the Seventh Circuit conducted a comparative juror analysis as part of the "totality of the circumstances" in concluding that the habeas petitioner had demonstrated purposeful discrimination in the jury selection by establishing that the state court's contrary determination was based on

"an unreasonable determination of the facts." *Harris v. Hardy*, 680 F.3d 942, 964–65 (7th Cir. 2012). But in another case on direct review, the Seventh Circuit found that the defendant "forfeited [his] juror-comparison arguments by not presenting them to the district court," *United States v. Lovies*, 16 F.4th 493, 502 (7th Cir. 2021) (noting that "[o]ther circuits have held that where a defendant fails to argue for comparative juror analysis at trial, the appellate court need not conduct such an analysis"). The Seventh Circuit ultimately declined to decide whether a comparative juror analysis is subject to any "review on [direct] appeal, or if it may be reviewed only for plain error." *Id.* at 502. The point, however, is that the Court did *not* hold that a comparative juror analysis is constitutionally required on direct appeal. *Id.* at 502–03.

Likewise, the Fifth Circuit conducted a comparative juror analysis in a federal capital case for the first time in finding that the state court's determination of the facts underlying a *Batson* claim was unreasonable. *Reed v. Quarterman*, 555 F.3d 364, 370–71 (5th Cir. 2009). That court, however, has also recognized that there is no clearly established law that courts "*must*, of their own accord, uncover and

resolve all facts and circumstances that may bear on whether a peremptory strike was racially motivated when the strike's challenger has not identified those facts and circumstances." *Ramey v. Lumpkin*, 7 F.4th 271, 280 (5th Cir. 2021) (emphasis in original). And, in fact, the Fifth Circuit has also found that, on direct appeal, a defendant "robb[ed] the Government of the opportunity to demonstrate other meaningful distinctions" between jurors by not raising the comparisons at trial. *United States v. Wilkerson*, 556 Fed. Appx. 360, 365 (5th Cir. 2014) (unpublished). And although *Wilkerson* ultimately compared the jurors at issue, it did not hold that it was *required* to so by federal law. *Id.*

Further, although the Ninth Circuit will employ a comparative juror analysis in a federal habeas case when no such comparison had been requested in the trial court, this again is in the context of a federal habeas court determining whether the state court's determination of the facts underlying a *Batson* claim was unreasonable. *See McDaniels v. Kirkland*, 813 F.3d 770, 778–79 (9th Cir. 2015). And, in fact, even though the Ninth Circuit has suggested that comparative juror analysis should be used on appeal, it has held that such analysis is not always

"compelled at the appellate level." *Boyd v. Newland*, 467 F.3d 1139, 1148 (9th Cir. 2006).

Therefore, any requirement to conduct a comparative juror analysis, even if one was not requested in the trial court, has only been recognized in federal habeas cases in determining whether a state court's factual findings underlying a *Batson* claim were unreasonable, not on direct appeal.

Moreover, while Porter cites state court cases that have conducted a comparative juror analysis for the first time on appeal, none of these cases stand for the proposition that the analysis is constitutionally required in all cases. *See People v. Lenix*, 187 P.3d 946, 961 (Cal. 2008) (stating that a comparative juror analysis should be considered 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) ("Unargued juror comparisons can be appropriate tools for discovering discriminatory animus, but their use should be limited to instances in which the reviewing court can make an informed comparison."); *Addison v. State*, 962 N.E.2d 1202, 1213–17 (Ind. 2012) (reviewing comparative juror claim for the first time on

appeal under fundamental error review, which applies in only "extremely narrow" circumstances) (internal quotation marks omitted); *Clay v. Commonwealth*, 291 S.W.3d 210, 215 (Ky. 2008) (conducting comparative juror analysis for the first time on appeal where "the record [was] fully developed").

Accordingly, because no courts have found that conducting a comparative juror analysis is constitutionally required when raised for the first time on direct appeal, there is no split that warrants this Court's intervention.

C. *Porter's claim would fail even if a comparative juror analysis were conducted.*

Even if the Arizona Supreme Court had conducted a comparative juror analysis in this case, the outcome here would have been the same, making this case a poor vehicle for resolving the alleged split of authority. *Cf. Herb*, 324 U.S. at 126 ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.").

Any argument that a comparative analysis of the jury at issue in this case would have altered the Arizona Supreme Court's decision is

unavailing, because the record does not reveal that the seated and struck jurors were significantly similar. Porter contends that Juror 2 was comparable to Juror 22 because both had family members who had been convicted of a crime and because both said they could be fair. Pet., at 30. But as discussed, the prosecutor struck Juror 2 "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." BIO-App., at 122a (emphasis added). In response to this assertion, Porter recognized the prosecutor's concern regarding the juror's "brother being arrested and charged and found guilty of an assault, which is the same situation here as far as assault . . . ." *Id.* at 123–24a. Moreover, Juror 22's son had been convicted for entirely different crimes—breaking and entering and receiving stolen property. *Id.* at 105a.

And although both prospective jurors said they could be fair, the prosecutor averred that Juror 2 "did not seem to be very sure with her responses" during *voir dire*. *Id.* at 122a. Porter did not challenge this observation. *Id.* at 122–24a. Moreover, the record reflects that Juror 22 had strong ties to law enforcement, as her mother and her "best friend" had both been police officers. *Id.* at 49–50a. Accordingly, even if

a comparative juror analysis had been conducted, there is no basis to conclude that the prosecutor's strike of Juror 22 was a pretext for purposeful discrimination. *See United States v. Brown*, 809 F.3d 371, 375 (7th Cir. 2016) (stating that prospective jurors were not similarly situated where, *inter alia*, one juror "had relatives in law enforcement, whereas [the other juror] did not").

Because the outcome would be the same even if a comparative juror analysis were required, this case is a poor vehicle for review of Porter's alleged "split."

III. Arizona's Elimination of Peremptory Challenges Renders This Case A Poor Vehicle to Consider *Any Batson*-Related Issues.

As noted, the Arizona Supreme Court adopted rule changes shortly after it rendered its decision below, thereby making Arizona the first state in the nation to eliminate peremptory challenges. BIO-App., at 2–7a. By eliminating peremptory strikes, Arizona has removed itself from the dictates of *Batson* in the future. Because Arizona no longer has a significant interest in this Court's resolution of any *Batson*-related issues, review is not warranted here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARK BRNOVICH
Attorney General of Arizona

JOSEPH A. KANEFIELD
Chief Deputy and Chief of Staff

BRUNN W. ROYSDEN III
Solicitor General

LINLEY WILSON
Deputy Solicitor General/ Section Chief of Criminal Appeals

MICHAEL T. O'TOOLE
Assistant Attorney General
(*Counsel of Record*)

JILLIAN B. FRANCIS
Assistant Attorney General

OFFICE OF THE ARIZONA ATTORNEY GENERAL
Criminal Appeals Section
2005 N. Central Ave.
Phoenix, AZ 85004
Michael.OToole@azag.gov
CADocket@azag.gov

Counsel for Respondent