

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

TONY PHILLIPS,  
PETITIONER,

- VS. -

UNITED STATES OF AMERICA,  
RESPONDENT.

**CORRECTED PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

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## **QUESTION PRESENTED**

In *Snyder v. Louisiana*, 552 U.S. 472, 477-79 (2008), this Court made clear that when a prosecutor provides a demeanor-based explanation for the removal of a potential juror during jury selection, “the trial court must evaluate . . . whether the juror’s demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor.” Despite the clarity of this Court’s instruction in *Snyder*, there is a well developed circuit split as to whether this Court meant what it said. While five circuits have held that *Snyder* requires trial judges to make findings regarding a juror’s demeanor, two circuits have held that *Snyder* imposes no such requirement. This split is a subset of an even larger circuit split as to whether trial judges are required, as a general matter, to make findings at the third step of the three-step *Batson* analysis. The question presented is:

Whether a trial court at step three of *Batson* must make its own finding as to whether a juror’s demeanor can credibly be said to have exhibited the basis for a strike attributed to the juror by the prosecutor.

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TONY PHILLIPS,  
PETITIONER

– VS. –

UNITED STATES OF AMERICA,  
RESPONDENT.

**PETITION FOR A WRIT OF CERTIORARI**

Petitioner Tony Phillips respectfully prays that a writ of *certiorari* be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on June 4, 2025, in *United States v. Tony Phillips*, Third Circuit No. 18-3781, and as to which that court denied a petition for rehearing and rehearing en banc on September 2, 2025.

**OPINION BELOW**

The Third Circuit’s not precedential decision (Porter, Montgomery-Reeves, and Roth, JJ.) was filed on June 4, 2025. The judgment is attached at Appendix (“App’x”) A. The opinion of the Third Circuit is attached at App’x B and is available at 2025 WL 1577566. Application for en banc rehearing was denied by order dated September 2, 2025, a copy of which is attached at App’x C.

**JURISDICTIONAL GROUNDS**

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. That court issued its opinion and judgment on June 4, 2025. Rehearing by the panel and the court en banc was denied on September 2, 2025. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## **PARTIES TO THE PROCEEDINGS**

The caption of the case in this Court contains the names of the parties to this proceeding, namely, petitioner Tony Phillips and respondent United States. Appeals in the Court of Appeals for the Third Circuit were sought separately by Mr. Phillips and his two co-defendants: Ahmad Manley (Third Circuit No. 18-3782) and Corey Hamlet (Third Circuit No. 18-3116). The Third Circuit ordered the appeals to be consolidated for the purpose of disposition, and further permitted the government to file a consolidated brief, responding to the separate briefs submitted by the three appellants. The Third Circuit's opinion addressed issues raised by all three appellants. Mr. Phillips sought rehearing in the Third Circuit; appellants Manley and Hamlet did not file rehearing petitions.

## **CONSTITUTIONAL PROVISION INVOLVED**

The Fourteenth Amendment provides:

### Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor 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**

As has long been recognized, demeanor-based explanations for the removal of a juror during jury selection “are susceptible to abuse . . . [and] deserve[ ] particularly careful scrutiny.” *Brown v. Kelly*, 973 F.2d 116, 121 (2d Cir. 1992); *Harris v. Hardy*, 680 F.3d 942, 965 (7th Cir. 2012) (“Demeanor-based explanations for a strike are particularly susceptible to serving as pretexts for discrimination.”). Accordingly, this Court in *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) made clear that when a prosecutor provides a demeanor-based rationale, “the trial court

must evaluate not only whether the prosecutor’s demeanor belies a discriminatory intent, but also whether the juror’s demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor.”

Despite the clarity of this Court’s language, there is a 5-2 circuit split as to whether trial judges must make findings regarding a juror’s demeanor. This split is itself a subset of an even larger circuit split as to whether trial judges, as a general matter, must make findings at step three of *Batson*’s three-step analysis.

In the instant case, the prosecutor explained his strike of a Black woman juror by asserting the juror’s supposed “strong personality.” (App. 313).<sup>1</sup> The district court judge, in denying the defendants’ *Batson* challenge, did not make her own findings as to whether the juror actually exhibited such a demeanor. Instead, the judge merely stated that this was a “race-neutral” reason. (App. 359). But finding the “strong personality” rationale to be “race-neutral” satisfied only step two of *Batson*, it did not constitute a step-three determination of whether, given the totality of circumstances, the prosecutor’s strike was racially motivated. *See United States v. Rutledge*, 648 F.3d 555, 557 (7th Cir. 2011) (holding that the district court “conflat[ed] the second and third steps of the *Batson* analysis” and that at step three, the district court must do more than simply repeat that the prosecutor’s demeanor-based rationale is “race-neutral;” the court “must evaluate . . . whether the juror’s demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor.”) (quoting *Snyder*, 552 U.S. at 477).

While this issue was directly presented on appeal, the Third Circuit failed to address it. The court’s failure in this regard is perhaps explained by the court’s misapprehension of the

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<sup>1</sup> As discussed further below, the prosecutor provided one other reason for the strike: the juror’s inactive membership in the NAACP. (App. 315).

district court's ruling. The Third Circuit characterized the district court as finding that the "strike of Juror 50 was not pretextual "in light of . . . Juror 50's personal confidence in responding to questions." App'x B at 13. But, as stated above, and as discussed further below, that is not what the district court held; the court did not find that the juror displayed personal confidence in responding to questions. Instead, the court merely held that the prosecutor's perception of [the juror] having a stronger personality [was a] race-neutral reason[ ]." (App. 359).

Certiorari should be granted to resolve the conflict between the circuits and make clear that *Snyder* meant precisely what this Court stated there: when a prosecutor advances a demeanor-based rationale, the trial court must make its own evaluation as to "whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." *Snyder*, 552 U.S. at 477. And in resolving this split, this Court can settle the broader circuit split as to whether a district court must make findings at step three of *Batson*, or whether a court can simply deny the *Batson* challenge without explanation.

#### **I. Proceedings before the district court**

Phillips was charged in eleven counts of a 25-count sixth superseding indictment with violations of the Racketeer Influenced and Corrupt Organization Act (RICO) 18 U.S.C. § 1926, 18 U.S.C. § 924(c), and 21 U.S.C. § 846, all stemming from his alleged involvement with the New Jersey Grape Street Crips. (App. 176-259).

Phillips and four of his co-defendants proceeded to trial in October 2017, which resulted in a mistrial due to the jury's inability to reach a unanimous verdict as to Counts 1-10 as to all the defendants. The jury did reach a verdict as to Phillips on Count 11, acquitting him of 21 U.S.C. § 846 (Conspiracy to Distribute Heroin). The jury also acquitted co-defendant Ahmad Manley of Count 11, and acquitted co-defendant Hamlet of Count 12.

Phillips, Hamlet and Manley proceeded to a second trial in May 2018. After a seventeen-day trial and four days of jury deliberations, Phillips was convicted of Counts 1-10. The district court subsequently imposed a sentence of life imprisonment, plus 240 months, five years of supervised release, restitution, and a special monetary assessment. (App. 3-10). Phillips promptly appealed. (App. 1).

**A. The *Batson* issue – the government’s removal of Black jurors and in particular the striking of Juror No. 50**

The prosecution, having failed to obtain a conviction at Phillips’s first trial, proceeded at Phillips’s second trial to exercise almost all of its peremptory challenges—five out of six—against Black jurors. (App. 331-32). The defendants raised *Batson* challenges as to three of the stricken jurors, and Phillips’s appeal, like the instant Petition, focused on one, Juror No. 50.<sup>2</sup>

The prosecutor’s initial rationale for striking Juror No. 50 was her membership in the NAACP. (App. 312). In response to the defendants’ *Batson* challenge, the district court questioned the prosecutor as to why he “had a problem with” Juror No. 50’s NAACP membership. (App. 312). The prosecutor responded: “[b]ecause it’s an organization that advocates against mandatory minimums, and it takes other sort of social positions about issues that bear directly on the case.” (App. 312). The court, however, was dismissive of these concerns. (App. 312).

The court had earlier, at the prosecutor’s request, questioned Juror No. 50 about her involvement with the NAACP and whether she was aware of the organization’s criminal justice

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<sup>2</sup> The *Batson* issue was raised in Manley’s appellate brief and Phillips, in his brief, expressly adopted the issue.

advocacy. As the district court correctly recalled, the juror had no knowledge of the NAACP's advocacy and explained that her involvement was limited to community service:

I will say that I questioned her, and her involvement was limited in the Union County office. She had no policy – I asked her three times about the bigger issues, and she said, I did community service and I think education.

(App. 312).<sup>3</sup>

The prosecutor then pivoted to a new reason for striking Juror No. 50: her supposed “strong personality.” (App. 313). Attempting to explain this, the prosecutor stated that Juror No. 50 seemed “confident” and was “able to sort of interrupt Your Honor when answering questions.” *Id.* The prosecutor, however, provided no examples of this.

Contrary to the prosecutor's assertions, Juror No. 50 never interrupted the court. She did not do so when responding to the court's questions regarding her NAACP membership. Nor did she when responding earlier to the court's initial questions. On the contrary, Juror No. 50's responses were direct and to the point, largely limited to single-word answers, without elaboration, opinion, or editorialization. (App. 278-79). The following is a representative example:

THE COURT: Good afternoon.  
PROSPECTIVE JUROR NO. [50]: Good afternoon.  
THE COURT: Do you want a microphone?  
PROSPECTIVE JUROR NO. [50]: Sure.  
THE COURT: Thank you. All righty. Number one: your occupation?  
PROSPECTIVE JUROR NO. [50]: I'm an administrative coordinator.

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<sup>3</sup> Juror No. 50 not only had no knowledge of the NAACP's criminal justice advocacy, her involvement with the NAACP had ended two years earlier because of the death of her parents and the need to settle their estate. (App. 292). Juror No. 50 answered the judge's question affirmatively that her membership in the NAACP would not prevent her from being fair and impartial. (App. 294) (“Not at all.”)

THE COURT: Okay, and how long have you served in that kind of role?  
PROSPECTIVE JUROR NO. [50]: Nine years.  
THE COURT: Okay do you live with any other adults?  
PROSPECTIVE JUROR NO. [50]: No.  
THE COURT: And are you married?  
PROSPECTIVE JUROR NO. [50]: No.  
THE COURT: Children?  
PROSPECTIVE JUROR NO. [50]: No.  
THE COURT: Home owned or rented?  
PROSPECTIVE JUROR NO. [50]: Rented.  
THE COURT: Hobbies?  
PROSPECTIVE JUROR NO. [50]: Gardening, I coach girls' basketball, crochet, and I volunteer at a food pantry.  
THE COURT: Okay. Clubs or organizations that you belong to?  
PROSPECTIVE JUROR NO. [50]: Organizations in my church, and I'm a member of the N.A.A.C.P.  
THE COURT: Okay. Favorite TV show, if any?  
PROSPECTIVE JUROR NO. [50]: This Is Us, Lifetime Channel, Law & Order.  
THE COURT: Okay. Radio, media, newspaper magazines?  
PROSPECTIVE JUROR NO. [50]: Christian radio, local news, CNN.  
THE COURT: Okay. Educational level?  
PROSPECTIVE JUROR NO. [50]: A Master's  
THE COURT: Okay. And what's your course of study?  
PROSPECTIVE JUROR NO. [50]: Higher education.

(App. 278-79).<sup>4</sup>

Accordingly, the court did not concur with the prosecutor's observation of Juror No. 50 having a "strong personality." (App. 317). Regarding the prosecutor's claim that she seemed "confident," the court remarked, "half the jurors are that way. Some of them hesitate, some of them don't hesitate." (App. 313).<sup>5</sup>

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<sup>4</sup> That Juror No. 50 was church attending, civic minded, and a fan of "Law and Order" would have seemed to make her an ideal juror from the government's perspective.

<sup>5</sup> The government, in asserting that Juror No. 50 had a strong personality, represented that the one White juror it had struck was removed for this same reason. (App. 312-13). That juror, however, was hardly similar to Juror No. 50. Without prompting, he raised concerns with the court over possible jury sequestration because he did not want to leave his wife, a recovering

The defendants also refuted the characterization of Juror No. 50's "strong personality." They noted that she was respectful and answered the court's questions about her NAACP involvement without issue or objection. (App. 315). The prosecutor had no response to either the court's reaction or the defense position. (App. 316-17) (responding only that defendants have "absolutely no right" to "jurors of any particular race, religion, color or ethnicity.>").

The court ultimately ruled on the *Batson* challenge to Juror No. 50 together with a challenge that the defense had also made to the government's strike of Juror No. 149.<sup>6</sup> The court denied the *Batson* challenge as to both jurors. (App. 317). The court agreed with the government that Juror No. 149 had a "very strong personality," but the court contrasted him with Juror No. 50, who the court said it "was not so sure about." (App. 317). Nevertheless, the court denied the *Batson* challenge for both jurors, though the court made no findings with respect to Juror No. 50. Critical to the court was that the jury, as then composed, was "evenly split" between White jurors and Black jurors. (App. 317).

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drug addict, alone with their children. (App. 283). He also reported that his sister had been arrested multiple times and convicted for stealing drugs from the facility where she worked and then selling them. (App. 280-81).

<sup>6</sup> The government asserted that Juror No. 149 had a strong personality too—and that juror did. He engaged in a rather lengthy *voir dire*, during which he made jokes, offered opinions and commentary, and participated assertively in conversation with the district court. (App. 298-99). For example, when the district court asked Juror No. 149 whether he had other children, he responded: "Yeah . . . I had a stupid attack. I have a five-year-old and a three-year-old." (App. 298). When asked whether his home was owned or rented, he responded: "My home is owned, thanks to the union," a response which was followed by laughter. (App. 299). He and the district court also joked together about reading the juror questionnaire carefully so that he wouldn't be tricked by lawyers, again drawing laughter. (App. 303).

Two days later, after the stricken jurors had already been excused, the district court revisited the *Batson* challenges to add further analysis to the record, specifically with respect to Juror No. 50. (App. 338). The court noted that it “failed” to do the correct analysis when the *Batson* challenge was made, stating it should have looked “at the reason offered [to] see if there are other jurors who remained who are White who have the same quality who have not been challenged.” (App. 340). The court also acknowledged it had not “made a finding” as to Juror No. 50 when denying the *Batson* challenge. (App. 345).

The court then gave the prosecutor “an opportunity to answer.” The prosecutor restated Juror No. 50’s NAACP membership, but the prosecutor failed to explain how his concerns with the NAACP’s advocacy regarding mandatory minimum penalties had relevance to the removal of Juror No. 50 when the juror had no knowledge of that advocacy. The prosecutor also reiterated the “strong personality” reason, this time referring to the fact that Juror No. 50 “was a coach of some sort of sporting event.” (App. 359). The prosecutor added, “the way that she answered Your Honor’s questions, it was very apparent that she had a strong personality . . . and that’s all that I can say.” *Id.* Again, however, the government did not point to anything specific about Juror No. 50’s responses.

The defense again challenged the government’s grounds as being pretextual. (App. 359). Far from having a strong personality, the defense argued, Juror No. 50 was, if anything, “timid.” (App. 358).

Having heard from counsel, the district court again denied the *Batson* challenge, finding that the government had proffered race-neutral reasons:

Okay. So at the time when I made my finding as to [Juror No. 50], I, maybe implicitly, not explicitly, made a finding that I would allow the challenge and I remain convinced that that was an appropriate ruling yesterday or the day before, when I made it,

because, at the end of the day, the Government has come forward with race-neutral reasons for the challenge, and I am satisfied that those reasons, her being a member of an organization that advocates on a broader basis for mandatory minimums, together with their perception for having a stronger personality, were race-neutral reasons that convinced me that the strike was appropriate, and therefore ending the *Batson* inquiry.

(App. 359).

But, while the court found that the prosecutor's rationales were "race neutral," the court failed to make its own finding or evaluation as to whether Juror No. 50 actually exhibited a strong personality.

### **B. Third Circuit Decision**

The Third Circuit affirmed but failed to address the issue.<sup>7</sup> The court's failure is perhaps explained by its misapprehension of the district court's ruling. The Third Circuit states that the district court "issued a lengthy summation of her finding that the strike of Juror 50 was not pretextual in light of the NAACP's policy advocacy and Juror 50's *personal confidence in responding to questions*." App'x B at 13 (emphasis added). As can be seen from the above quotation from the district court's decision, the district court did not find that Juror No. 50 displayed "personal confidence in responding to questions." Rather, the district court merely stated that the prosecutor's "perception [of Juror No. 50] having a stronger personality [was a] race-neutral reason[ ]." (App. 359).

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<sup>7</sup> The issue was squarely presented to the court. See Brief for Ahmad Manley at 37: "The district court erred at *Batson*'s Step Three by focusing exclusively on the racial composition of the jury and by failing to make a finding about Juror No. 50's demeanor." Twelve pages of discussion then followed.

## REASONS FOR GRANTING THE PETITION

A 5-2 judicially recognized circuit split exists regarding the meaning of this Court’s decision in *Snyder v. Louisiana*, 552 U.S. 472 (2008). *Snyder* instructed that when a prosecutor provides a demeanor-based explanation for the removal of a potential juror during jury selection, “the trial court must evaluate . . . whether the juror’s demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor.” *Id.* at 477. Despite the clarity of this Court’s instruction, the federal courts are divided on this issue. Five circuits have held that *Snyder* requires trial judges to make their own findings regarding demeanor, while two circuits have held that *Snyder* imposes no such requirement. This split, in turn, calls into question an even larger circuit split as to whether trial judges are generally required to make findings at the third step of the three-step *Batson* analysis. Four circuits have held that such findings are required while four circuits have held that they are not. Review by this Court is necessary to resolve these important constitutional issues.

### **I. The Circuit Split**

Five federal courts of appeal—the Sixth, Seventh, Eighth, Ninth and Eleventh—have squarely held, in accord with *Snyder*, that trial judges must make findings regarding a juror’s demeanor when a prosecutor provides a demeanor-based rationale for the removal of that juror. *See McCurdy v. Montgomery Cnty.*, 240 F.3d 512, 521-22 (6th Cir. 2001) (holding that district courts “must explicitly adjudicat[e] the credibility of the non-moving or challenging party’s race neutral explanations” and that it was not until the “district court made its own findings pertaining to [the juror’s] demeanor [that it] complied with the requirements of *Batson*.”) (internal citation omitted); *United States v. Rutledge*, 648 F.3d 555, 560 (7th Cir. 2011) (holding that district court failed to comply with *Snyder* where the court failed to “explicit[ly]” evaluate whether the

“juror’s demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor.”) (quoting *Snyder*, 552 U.S at 477); *United States v. Young*, 753 F.3d 757, 782 (8th Cir. 2014) (observing that under *Snyder* “the trial court has the responsibility to evaluate a juror’s demeanor[,]” and holding that “the district court properly addressed [the juror’s] confused demeanor on the record . . . [and] properly fulfilled its *Snyder* duty . . . .”); *Reynoso v. Hall*, 395 F.App’x 344, 350 (9th Cir. 2010) (citing *Snyder*, and holding that “the trial court . . . failed to make a factual finding regarding [the juror’s] demeanor,” and determining that the prosecutor’s claim that the juror was inattentive was belied by the record and therefore pretextual); *United States v. Diaz*, 26 F.3d 1533, 1543 (11th Cir. 1994) (recognizing that demeanor-based explanations are “particularly susceptible to . . . abuse” and holding that “trial judges should fully develop the record regarding the specific behavior by a venireperson that leads to a peremptory strike and should verify that the stricken venireperson’s conduct was conspicuously different from that of the other venirepersons.”); *Smith v. Commissioner, Alabama Dep’t of Corrections*, 924 F.3d 1330, 1347 (11th Cir. 2019) (holding that trial court complied with *Snyder* when it “noted its own observations about venire members . . . to corroborate the prosecutor’s own explanations about a venire member’s demeanor . . . .”).

The D.C and Fifth Circuits have held to the contrary. See *United States v. Moore*, 651 F.3d 30, 42 (D.C. Cir. 2011) (“And contrary to appellants’ assertion, *Snyder* does not establish a rule that trial courts must make specific findings about demeanor.”); *United States v. Thompson*, 735 F.3d 291, 300 (5th Cir. 2013) (recognizing that “[t]he circuits have disagreed on the extent to which *Snyder* imposes an affirmative duty on the district court to make record findings where

the prosecutor has offered only a demeanor-based justification[.]” and holding that *Snyder* does not impose such a duty).<sup>8</sup>

This split between the circuits is part and parcel of an even larger split between the circuits, also judicially recognized, as to whether district courts, as a general matter, must make findings at *Batson*’s third step.<sup>9</sup> Four circuits, the Third, Sixth, Seventh and Ninth have held that such findings are required. *See Coombs v. Diguglielmo*, 616 F.3d 255, 263 (3rd Cir. 2010) (holding that the trial court “did not make the findings required under *Batson*” and that “[w]here the state court fails to undertake a full step three analysis, as required by *Batson*, we will remand for the district court to engage in independent fact-finding.”);<sup>10</sup> *Braxton v. Gansheimer*, 561 F.3d 453, 462 (6th Cir. 2009) (holding that “trial court adhered to the *Batson* three-step inquiry” where it “adequately and reasonably conveyed its decision that the prosecution’s race-neutral, demeanor-based justification . . . was credible and that Braxton failed to carry his burden on the ultimate issue of purposeful discrimination.”); *United States v. Rutledge*, 648 F.3d 555, 560 (7th Cir. 2011) (holding that trial judges must make “explicit” findings at *Batson*’s third-step because “without them there is a void that stymies appellate review . . . .”); *United States v. Alvarez-*

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<sup>8</sup> The Fifth Circuit in *Thompson* cites a non-precedential Eleventh Circuit case as reaching the same conclusion. *Id.* (citing *United States v. Prather*, 279 F. Appx. 761, 767 (11th Cir. 2008)). However, as set forth above, the Eleventh Circuit in precedential decisions, both before and after *Snyder*, has recognized the need for district courts to make demeanor-based findings.

<sup>9</sup> The three-step *Batson* protocol is as follows: first, the defense must make a *prima facie* showing that the strike was made on the basis of race; second, the burden of production shifts to the government to articulate a race-neutral explanation for the strike; and third, the district court must determine whether the defendant has proven by a preponderance of the evidence purposeful discrimination on the part of the government. *Hernandez v. New York*, 500 U.S. 352, 358-59 (1991).

<sup>10</sup> The Third Circuit’s holding in *Coombs* regarding the failings of a state court stands in marked juxtaposition to the Court’s avoidance of the issue in the instant federal case.

*Ulloa*, 784 F.3d 558, 565 (9th Cir. 2015) (“The court cannot simply accept the prosecutor's reasons as facially neutral and stop there; it must make an explicit determination at the third step.”).

Four circuits, in contrast—the Second, Fifth, Eighth and Tenth—have held that step-three findings are not required. *McKinney v. Artuz*, 326 F.3d 87, 100 (2d Cir. 2003) (holding that the trial court, by saying “it saw no reason for the juror not to be seated,” gave an implicit factual determination that was sufficient; “[a]lthough reviewing courts might have preferred the trial court to provide express reasons for each credibility determination, no clearly established federal law required the trial court to do so.”); *United States v. Ongaga*, 820 F.3d 152, 166 (5th Cir. 2016) (holding that “there is no requirement in this circuit that a district court make explicit factual findings during *Batson*’s third step” and that a “district court may make implicit findings while performing the *Batson* analysis.”) (internal citation omitted); *Higgins v. Cain*, 720 F.3d 255, 268 (5th Cir. 2013) (acknowledging the circuit split regarding whether a trial judge must make explicit findings of fact at *Batson*’s third step); *United States v. Adams*, 996 F.3d 514, 521 (8th Cir. 2021) (“Indeed, we do not even require district courts to make an explicit factual finding that no discrimination has been shown because the denial of a *Batson* objection is itself a finding at *Batson*’s third step . . . .”);<sup>11</sup> *United States v. Vann*, 776 F.3d 746, 754 n.4 (10th Cir. 2015) (recognizing existence of circuit split and holding that “our case law makes clear that the district court does not need to make a finding on the record with respect to *how* it assessed the evidence to rule on the *Batson* challenge.”).

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<sup>11</sup> The Eighth Circuit’s decision in *Adams* could be seen as being in tension with its decision in *Young* set forth above that an express finding at step three is required when a demeanor-based rationale is provided by the prosecution. While unstated, the Eighth Circuit may view *Snyder* as creating a special requirement where demeanor is at issue.

**A. This Court should use this case to resolve this important and frequently recurring issue.**

There can be no serious dispute that the question presented is extremely important. As this Court recognized at the time of *Batson*, “[r]acial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try[;]” it additionally harms “the excluded juror” and the “entire community.” *Batson v. Kentucky*, 476 U.S. 79, 87 (1986). As commentators have recognized, the problem has hardly disappeared. Hon. Gregg Costa, *A Judge Comments*, 48 *Litigation* 5, 14 (2022) (“Thirty-five years in, racial discrimination still pervades jury selection.”).<sup>12</sup> “Demeanor-based explanations . . . [moreover] are particularly susceptible to serving as pretexts for discrimination.” *Harris*, 680 F.3d at 965. Accordingly, the question of how trial courts should address demeanor-based explanations is critical and the circuits, despite the seeming clarity of *Snyder*, are completely divided on the issue.

This case presents a suitable opportunity to resolve this conflict, as well as the larger conflict as to whether findings are generally required at the third step of *Batson*. The issue is starkly presented here. The prosecution repeatedly offered a demeanor-based rationale for the strike of Juror No. 50, the assertion that she displayed a “strong personality,” with the explanations for that assertion becoming increasingly implausible, ultimately culminating in the prosecutor’s reliance on the fact that “she was the coach of some type of sporting event.” (App. 359).<sup>13</sup> While the implausibility of such an explanation is itself evidence of racial pretext, *see Purkett v. Elem*, 514 U.S. 765, 768 (1995) (“[I]mplausible or fantastic justifications may (and

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<sup>12</sup> Judge Costa was a judge on the Court of Appeals for the Fifth Circuit before returning to private practice.

<sup>13</sup> As set forth above, Juror No. 50, in answering the court’s standard voir dire questions, stated that she coaches girls’ basketball. (App. 278).

probably will) be found to be pretexts for purposeful discrimination.”), the district court here failed to address the explanation, and most importantly, never “evaluate[d] . . . whether the juror’s demeanor [could] credibly be said to have exhibited” the strong personality asserted by the prosecutor. *Snyder*, 552 U.S. at 477. Instead, the court merely stated that this was a “race-neutral” explanation. (App. 354). But, as the Seventh Circuit held in *Rutledge*, finding that a reason is “race-neutral” only satisfies step two of *Batson*, it is not a step three determination, and it certainly does not constitute the “evaluat[ion]” which this Court called for in *Snyder*. *Rutledge*, 648 F.3d at 557.

The circuits that do not require trial courts to make their own evaluation of demeanor, and that, more generally, do not require any step three findings at all, are not only misreading *Snyder*, they are not being faithful to the requirements of *Batson*. As this Court made clear there, trial courts “must undertake a sensitive inquiry into such circumstantial and direct evidence of [racial] intent as may be available.” *Batson*, 476 U.S. at 93 (internal citation omitted). Accordingly, in making a step three determination as to whether racial discrimination has been shown, a “trial court should consider all relevant circumstances.” *Id.* at 96. Plainly, a relevant circumstance, in cases such as this, is whether the juror’s demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. The circuits that fail to require such a finding, or any step three findings at all, are effectively providing a rubber stamp to *Batson* denials and failing to insure the “sensitive inquiry” that *Batson* requires. This is precisely why a former Judge of the Fifth Circuit has proclaimed that [t]hirty-five years in, racial discrimination still pervades jury selection.” Hon. Gregg Costa, *supra*, at 14.

The suitability of this case as a vehicle for addressing this issue is not diminished by the fact that the prosecutor gave a second reason for the strike of Juror No. 50—her inactive

membership in the NAACP. As set forth above, that reason was also dubious, the juror had no knowledge of the NAACP's advocacy on mandatory minimum penalties, the prosecutor's supposed concern with the NAACP. A determination that the prosecutor's "strong personality" rationale was pretextual, moreover, would "bear[ ] on the plausibility" of his NAACP explanation *Harris*, 680 F.3d at 960; *Snyder*, 552 U.S. at 478 (recognizing that "all of the circumstances that bear upon the issue of racial animosity must be consulted.")

Even more fundamentally, as this Court's recent *Batson* jurisprudence makes clear, "[t]he ultimate inquiry is whether the State was 'motivated in substantial part by discriminatory intent.'" *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019) (quoting *Foster v. Chatman*, 136 S. Ct. 1737, 1754 (2016)); *Snyder*, 552 U.S. at 485 (finding a *Batson* violation after concluding that one of the prosecutor's two grounds was pretextual and observing that "a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution."). Accordingly, if it is ultimately determined that one of the two rationales provided by the prosecutor was pretextual, it necessarily follows that the prosecutor was motivated in substantial part by discriminatory intent.

Finally, the suitability of this case is also not diminished by the Third Circuit's failure to address the issue. The issue was squarely presented to the court. *See* Brief for Ahmad Manley at 37: "The district court erred at *Batson*'s Step Three by focusing exclusively on the racial composition of the jury and by failing to make a finding about Juror No. 50's demeanor." Twelve pages of discussion then followed. While "[o]rdinarily this Court does not decide questions not raised or resolved in the lower court[.]" this Court has also made clear that "the rule is not inflexible . . . . [when] exceptional cases" are presented. *Youakim v. Miller*, 425 U.S. 231, 234 (1975) (vacating judgement on basis of issue that had not been raised or addressed

below). This is an exceptional case for all the reasons discussed above. Phillips is serving a life sentence after a trial in which the prosecutor used virtually all of his peremptories to remove Black jurors, justifying his final strike by pointing to the juror's supposed "strong personality," an assertion which the district court failed to evaluate. The Third Circuit's failure to address this exceptionally important constitutional issue, an issue that has divided the circuits, should not preclude this Court's review.

### **CONCLUSION**

For the foregoing reasons, Tony Phillips respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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