No. 09-273

In the Supreme Court of the United States

RICK THALER,
Petitioner,
v.
ANTHONY CARDELL HAYNES,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

GREG ABBOTT
Attorney General of Texas

C. ANDREW WEBER
First Assistant
Attorney General

ERIC J. R. NICHOLS
Deputy Attorney General
for Criminal Justice

JAMES C. HO
Solicitor General
Counsel of Record

JOSEPH D. HUGHES
BETH KLUSMANN
Assistant Solicitors General

JEREMY C. GREENWELL
Assistant Attorney General

P.O. Box 12548
Austin, Texas 78711
(512) 936-1700

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In his brief in opposition, Haynes introduces a number of factual allegations into this case that have nothing to do with, and are nowhere mentioned in, the ruling below—and bear no relevance to the strength or weakness of the State's petition for certiorari. The issues presented by the State remain the same:

The Fifth Circuit is forcing the State of Texas to release or retry a confessed murderer, a decade after he was duly convicted by a fairly selected jury—not because of evidence of a racially motivated strike, but precisely because of the *lack* of such evidence. The court below essentially reasoned that, because the trial judge who ruled on the *Batson* claim did not personally

witness the juror demeanor on which the prosecutor justified his strike, our legal system must *presume* that the strike was racially motivated and award new trial accordingly. This is not only a dramatic departure from this Court's established *Batson* jurisprudence and a misreading of this Court's recent ruling in *Snyder v. Louisiana*, 552 U.S. 472, 128 S.Ct. 1203 (2008). It also turns our legal system on its head, by presuming that a criminal conviction is invalid unless proven otherwise.

For his part, Haynes does not deny this understanding of the ruling below. To the contrary, his response brief proudly defends the awarding of relief under *Batson* in the absence of a judicial finding of a racially motivated strike. Resp., at 5-9. In so doing, his response only dramatizes the need for summary reversal to prevent further misapplications of *Snyder*.

Moreover, Haynes fails to address the growing circuit split over the proper interpretation of *Snyder*. In the twenty months since *Snyder*, federal courts of appeals have already split 2-2, including both criminal and civil cases. State supreme courts and intermediate appellate courts have also split, with courts in Kentucky, New Jersey, and Texas siding with Haynes, and courts in California, Mississippi, and New York against him. In sum, the split is real, and without this Court's attention, it will only continue to grow.

Accordingly, the Court should either summarily reverse the judgment below, or in the alternative, grant the petition for certiorari.

I. SUMMARY REVERSAL IS PROPER BECAUSE THERE IS NO RIGHT TO A NEW TRIAL ABSENT A JUDICIAL FINDING OF AN IMPROPERLY MOTIVATED STRIKE.

Haynes devotes several pages of his brief to alleging various defects in how the trial court handled the three-step *Batson* inquiry. Each of those allegations fail. But more importantly, Haynes says nothing to escape the conclusion that, under *Batson*'s three-step inquiry, he retains the ultimate burden of persuasion regarding racial motivation—and is not entitled to a new trial absent a judicial finding of a racially motivated strike.

First, Haynes erroneously asserts that "the prosecutor failed to meet his burden to produce a race-neutral explanation for the strikes." Resp., at 7. But as the panel recognized (and Haynes himself concedes), the prosecutor explained that he struck Ms. Owens based solely on her demeanor. App., at 187-88; *Haynes v. Quarterman*, 561 F.3d 535, 537 (CA5 2009) ("*Haynes II*"). Juror demeanor is, of course, a facially race-neutral reason, *see Snyder*, 128 S.Ct., at 1208—and that is all that *Batson* requires at step two, *see Rice v. Collins*, 546 U.S. 333, 338 (2006). (Haynes also criticizes the State for arguing below that the prosecutor gave "reasons for the strikes other than demeanor," Resp., at 26, but he concedes that Ms. Owens "was excused solely on the grounds of demeanor," *id.*, at 26 n.15, and that hers is the only strike at issue here, *id.*, at 1-2 n.2.).

Second, Haynes contends that the prosecutor had no right to rely on juror demeanor to justify the strike,

because the judge who ruled on the *Batson* challenge was not present during *voir dire* and thus could not have personally viewed the juror. But this contention misunderstands the *Batson* inquiry in two fundamental respects.

The purpose of *Batson* is to prohibit racially motivated strikes. Accordingly, a *Batson* challenge turns on the sincerity—not the accuracy—of the prosecutor's explanation for the strike. As this Court explained in *Hernandez*, and reaffirmed in *Snyder*, this stage of the *Batson* inquiry "involves an evaluation of the prosecutor's credibility, and 'the *best evidence [of discriminatory intent]* often will be the demeanor of the attorney who exercises the challenge.'" *Snyder*, 128 S.Ct., at 1208 (emphasis added) (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (plurality op.)). Haynes thus wrongly disparages the trial court for having relied exclusively on "the cold paper record." Quite the contrary, the trial court relied on the live testimony of the prosecutor, which is "the best evidence" under *Batson*.

Haynes responds by arguing that the "best evidence" under *Hernandez* refers only to prosecutorial demeanor exhibited "during the questioning of the challenged juror," not during the *Batson* hearing. Resp., at 31. But *Hernandez*—the sole case Haynes cites—says no such thing. To the contrary, *Hernandez* clearly relied on the prosecutor's demeanor at the *Batson* hearing to determine "whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Hernandez*, 500 U.S., at 365 (plurality op.); *see also Miller-El v. Cockrell*, 537 U.S.

322, 339 (2003) ("*Miller-El I*") (noting that "[c]redibility can be measured by, among other factors, the prosecutor's demeanor").[1]

Haynes's explanation of *Hernandez* also defies logic. It would have made no sense for this Court to have emphasized prosecutor demeanor during *voir dire*. After all, the juror demeanor in question might have been displayed while *defense counsel* was interviewing the juror—as happened in this case. App., at 187. There would have been no reason for the judge to focus on the prosecutor's demeanor at that time.

Moreover, the ruling below violates basic *Batson* principles in yet another way. The "ultimate burden" to prove racial motivation "rests with, and never shifts from, the opponent of the strike." *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam). Yet that burden is eviscerated under the decision below. If the Fifth Circuit is correct, then an opponent of a juror strike based on demeanor is automatically entitled to relief whenever the judge who rules on the *Batson* challenge did not personally view the demeanor of the juror. This reversal of the burden of proof finds no support in

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1. Courts of appeals have likewise rejected Haynes's reading of *Hernandez*. *See, e.g.*, *Bryant v. Speckard*, 131 F.3d 1076, 1078 (CA2 1997) ("After . . . observing the prosecutor's testimony [during the *Batson* hearing], the state court judge found the prosecutor to be credible in his assertion that the challenge was not based on the juror's race."); *United States v. Perez*, 35 F.3d 632, 636 (CA1 1994) (upholding denial of *Batson* challenge because district court "was able to assess the prosecutor's demeanor at the moment the explanation was given").

this Court's established *Batson* jurisprudence and turns our legal system on its head, by presuming that a criminal conviction is invalid unless proven otherwise.

Haynes counters that relief is appropriate even in the absence of a judicial finding of a racially motivated strike, citing three lower court rulings. *See* Resp., at 9 (citing *Bui v. Haley*, 321 F.3d 1304 (CA11 2003); *Henderson v. Walls*, 296 F.3d 541 (CA7 2002); *Simmons v. Beyer*, 44 F.3d 1160 (CA3 1995)). The Fifth Circuit relied on none of these rulings—and for good reason. In *Bui*, the court granted a new trial only because, even after another opportunity on remand, the prosecutor failed to articulate *any* race-neutral reason for striking a juror. 321 F.3d, at 1315-16. And in *Henderson*, the court required a new *Batson* hearing—not a new trial—when the state court erroneously refused to require a race-neutral explanation. 296 F.3d, at 550. Finally, in *Simmons*, the court deemed the *Batson* challenge unreviewable, and therefore granted a new trial, because the voir dire transcript was lost and could not be reconstructed a decade later. 44 F.3d, at 1168-69, 1171. In other words, in *Simmons* there was no evidence of any kind with which to judge the race-neutrality of the strike, including the prosecutor's reasons and any allegations of pretext. Here, by contrast, the "best evidence" under *Batson*, the demeanor of the prosecutor, was available to the trial court and the entire jury selection process was recorded in the transcript. The ruling in *Simmons* also drew a strong dissent joined by then-Judge Alito, which condemned the fact that Mr. Simmons "is receiving relief in the face of the panel's

acknowledgment that it does 'not and cannot know whether Simmons' jury selection process was infected by racial discrimination.'" *Id.*, at 1177 (Greenberg, J., dissenting to denial of reh'g en banc).

Third, Haynes complains that the trial court concluded that the strike was race-neutral without specifying that the court was crediting the prosecutor's reliance on juror demeanor. Resp., at 19-20. But juror demeanor was the only reason offered by the prosecutor. And Haynes himself did not object to the form of the court's ruling at trial. "As long as a trial judge affords the parties a reasonable opportunity to make their respective records, he may express his *Batson* ruling . . . in the form of a clear rejection or acceptance of a *Batson* challenge." *Messiah v. Duncan*, 435 F.3d 186, 198 (CA2 2006) (noting that a trial court "need not engage in a talismanic recitation of specific words in order to satisfy *Batson*") (internal quotation marks omitted); *see Braxton v. Gansheimer*, 561 F.3d 453, 456, 466 (CA6 2009); *McKinney v. Artuz*, 326 F.3d 87, 100 (CA2 2003); *cf. Riley v. Taylor,* 277 F.3d 261, 321 (CA3 2001) (en banc) (Alito, J., dissenting) ("[N]either *Batson* nor any later Supreme Court . . . case suggests that a federal habeas court is free to reject the factual findings of a state court if the state court does not *comment* on all of the evidence or provide what the federal court regards as a satisfactory explanation for its finding.") (emphasis in original).

II. LOWER COURTS ARE DIVIDED OVER THE MEANING OF *SNYDER*.

In *Snyder*, the Court considered a peremptory strike that the prosecutor attempted to justify by asserting two facially race-neutral explanations: the juror's teaching obligations, and the juror's nervous demeanor. 128 S.Ct., at 1208-09. The trial court did not specify which reason it credited in rejecting the *Batson* challenge. This Court subsequently found the first reason pretextual. And because the trial court's denial of Mr. Snyder's *Batson* objection could have been based entirely on the pretextual reason, the Court concluded it could not "presume that the trial judge credited the prosecutor's assertion that Mr. Brooks was nervous." *Id.*, at 1209; *see also id.*, at 1212 ("[T]he record does not show that the prosecution would have pre-emptively challenged Mr. Brooks based on his nervousness alone.").

In *Snyder*, this Court "did not reverse Snyder's conviction because the district court had failed to explain itself clearly, but because it was unclear whether the district court's finding rested on a plausible or implausible explanation for the strike." *United States v. Prather*, 279 Fed. Appx. 761, 767 (CA11 2008). However, a number of courts have misread *Snyder* by giving undue emphasis to the majority's statement that, when assessing a demeanor-based explanation, "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.*" 128 S.Ct., at 1208 (emphasis added).

The Fifth and Seventh Circuits have elevated this dicta to a new constitutional mandate requiring specific findings based on demeanor, even when—unlike in *Snyder*—the demeanor-based explanation is the sole reason offered. *Haynes v. Quarterman*, 526 F.3d 189, 199 (CA5 2008) ("*Haynes I*"); *United States v. McMath*, 559 F.3d 657, 665-66 (CA7 2009); *see also McCurdy v. Montgomery Co.*, 240 F.3d 512, 521 (CA6 2001) (adopting similar rule pre-*Snyder*). By contrast, the Eighth and Eleventh Circuits have expressly rejected the claim that *Snyder* requires trial courts to "make detailed credibility findings in the third step of the three-part *Batson* test." *Cook v. City of Bella Villa*, 582 F.3d 840, 854 (CA8 2009) (citing *Smulls v. Roper*, 535 F.3d 853, 860 (CA8 2008) (en banc)); *see Prather*, 279 Fed. Appx., at 767 (rejecting argument that *Snyder* requires trial courts "to make on-the-record findings regarding the credibility of the prosecutor's explanations").

State courts are also closely split over *Snyder*, with Texas, Kentucky, and New Jersey following the Fifth Circuit's reading. *See Davis v. Fisk Elec. Co.*, 268 S.W.3d 508, 518 (Tex. 2008); *Frye v. Commonwealth*, No. 2007-CA-002030-MR, 2008 WL 4998794, *3 (Ky. App. 2008) (relying on *Haynes I* and *Snyder* to reverse denial of *Batson* challenge where trial court credited demeanor-based explanation but noted "that it had not personally noticed anything negatively noteworthy about Juror X"); *State v. Osorio*, 952 A.2d 1112, 1120 (N.J. App. 2008) (relying on *Snyder* to overturn denial of *Batson* challenge where trial judge credited prosecutor's explanation that she struck jurors for

giggling, making faces, and "high-fiving" each other but did not "make an express finding that the conduct of jurors . . . described by the assistant prosecutor had actually occurred"). California, Mississippi, and New York, however, reject the Fifth Circuit's interpretation. *See People v. Bramit*, 210 P.3d 1171, 1184 n.7 (Cal. 2009) ("[*Snyder*] did not hold that deference is only permissible when an express determination [regarding the credibility of a demeanor-based explanation] was made below."); *Pruitt v. State*, 986 So.2d 940, 945 n.3 (Miss. 2008) (rejecting that *Snyder* requires "that an appellate court should not defer to a trial court which did not make specific findings of fact on the record for each race-neutral reason proffered"); *People v. Miles*, 864 N.Y.S.2d 28, 29 (N.Y. App. 2008) ("We do not read [*Snyder*] as absolutely prohibiting a trial court from accepting a demeanor-based reason as nonpretextual unless the court personally observes the demeanor trait cited by the challenging party (*but see Haynes v. Quarterman*, 526 F.3d 189, 198-200 [5th Cir. 2008]).").

Snyder's meaning has caused division even within two state supreme courts. *Compare Pruitt*, 986 So.2d at 949 (Diaz, P.J., dissenting) (arguing that *Snyder* prohibits deference unless trial court makes specific findings as to each race-neutral explanation), *with id.*, at 945 n.3 ("This is a generalization and overstatement simply not found in *Snyder*."); *and compare Davis*, 268 S.W.3d, at 518 (reading *Snyder* to require "that the [nonverbal] communication be proved and reflected in an appellate record"), *with id.*, at 528 (Brister, J., concurring) (opining that majority's reading of *Snyder* "goes overboard by prohibiting peremptory strikes based on a juror's nonverbal conduct unless (1) the

conduct is identified on the record 'with some specificity,' and (2) the juror is questioned about it") (quoting *id.*, at 518).

The *Davis* concurrence dramatically captures the practical difficulties that accompany the majority's interpretation of *Snyder*, which requires that

> attorneys must publicly announce any reaction they saw on the record, question the juror about it, allow opposing counsel to rebut, and obtain a ruling that the conduct occurred. This sounds like a good way to antagonize jurors; any attorney who complies can expect exchanges like the following:
>
> | | |
> |---|---|
> | Counsel: | Juror No. 7, I notice that you are yawning. Why is that? |
> | Juror No. 7: | I wasn't yawning. |
> | Counsel: | Judge, I want the record to reflect that Juror No. 7 was yawning, even though he denies it. |
> | Opposing Counsel: | No he was not. |
> | Counsel: | Yes he was. Judge, may I have a ruling? |
> | Court: | I wasn't watching him, so your request is denied. And now you can't strike Juror No. 7, even though |

> you have thoroughly embarrassed him.

Id., at 528-29 (Brister, J., concurring).

"If the Constitution requires precise specification and explicit interrogation about [jurors'] nonverbal reactions, it is odd that the Supreme Court has never said so." *Id.* Indeed, if *Snyder* means what the Fifth Circuit proclaimed, it is a watershed decision that imposes significant changes in *Batson* procedure. Until the Court clarifies *Snyder*'s meaning, courts nationwide will remain deadlocked as to whether *Snyder* imposes a novel constitutional mandate not previously discussed in *Batson* or its progeny.

III. HAYNES'S FACT-BASED ARGUMENTS ARE IRRELEVANT TO THE QUESTIONS PRESENTED AND SHOULD BE ADDRESSED BY THE FIFTH CIRCUIT ON REMAND.

In an effort to avoid the panel's significant errors of law, Haynes urges this Court to determine in the first instance whether the trial court's credibility finding was an unreasonable determination of fact under AEDPA §2254(d)(2). Resp., at 10-16. This is precisely the analysis that the Fifth Circuit declined to perform, *Haynes II*, 561 F.3d at 541—as Haynes eventually concedes, Resp., at 16. Rather than waste its scarce resources on this previously unaddressed argument, the Court should remand to allow the Fifth Circuit to consider it in the first instance, giving appropriate

AEDPA deference to the trial court's credibility determination.[2]

* * * *

Granting Haynes a new trial flouts both the AEDPA and this Court's precedents. "At bottom, the panel orders the release of a murderer . . . subject only to the possibility that somehow the state can retry him [12] years after the murder." *Simmons*, 44 F.3d, at 1178 (Greenberg, J., dissenting to denial of reh'g en banc) (joined by Alito, J.). The decision below should not be allowed to stand.

CONCLUSION

The Court should summarily reverse the judgment below, or in the alternative, grant the petition for certiorari.

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2. Haynes's claim that the AEDPA does not require "deference," Resp., at 17, is perplexing, as the Court itself has used the same shorthand. *See Miller-El I*, 537 U.S., at 340 (2003) ("AEDPA deference"); *Waddington v. Sarausad*, 129 S.Ct. 823, 833 (2009) ("deferential lens of AEDPA").

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

C. ANDREW WEBER
First Assistant
Attorney General

ERIC J. R. NICHOLS
Deputy Attorney General
for Criminal Justice

JAMES C. HO
Solicitor General
Counsel of Record

JOSEPH D. HUGHES
BETH KLUSMANN
Assistant Solicitors General

JEREMY C. GREENWELL
Assistant Attorney General

P.O. Box 12548
Austin, Texas 78711
(512) 936-1700

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