No. 09-273

IN THE SUPREME COURT OF THE UNITED STATES

RICK THALER, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

***Petitioner*,**

v.
ANTHONY CARDELL HAYNES,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A. RICHARD ELLIS
Texas Bar No. 06560400
75 Magee Drive
Mill Valley, CA 94941
(415) 389-6771
FAX: (415) 389-0251
Counsel for Respondent, Anthony Cardell Haynes

(FORMER CAPITAL CASE)

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Did the unanimous opinion of the Court of Appeals for the Fifth Circuit correctly apply *Batson v. Kentucky,* 476 U.S. 79 (1986) in ordering a new trial when the prosecutor's strikes of prospective jurors were based on alleged demeanor evidence which was not observed by the trial judge who ruled on them?

2. Did the Fifth Circuit correctly conclude that the state courts' factual findings were objectively unreasonable where the trial judge could not reach the third step of the *Batson* analysis and neither the trial judge nor the state courts engaged in the "factual inquiry" required under *Batson*?

3. Was there any presumption of correctness for the state court ruling that the peremptory strikes were not racially motivated when they were based on a cold record for an issue that turned on demeanor that was not observed?

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COUNTER-STATEMENT OF THE CASE

A. Relevant Procedural History.

This is a capital habeas corpus matter brought by respondent Anthony Cardell Haynes, a Texas death row inmate, pursuant to 28 U.S.C. §§ 2253 & 2254. On April 23, 2008, in a published opinion, a unanimous panel of the Fifth Circuit granted Haynes a Certificate of Appealability ("COA") on "[w]hether the prosecution violated his rights under the Sixth and Fourteenth Amendments through the racially discriminatory use of its peremptory challenge as to potential juror Owens; and...as to potential juror McQueen." *Haynes v. Quarterman,* 526 F.3d 189, 202-203 (5th Cir. 2008)("*Haynes I*"), *see* App.[1] at 13-40).

After further briefing, oral argument was held in this matter on January 13, 2009. On March 10, 2009 (revised March 11, 2009), a unanimous panel of the Fifth Circuit issued another published opinion reversing the district court's denial of habeas relief and remanding the case to the state trial court with instructions to order the State to either grant Haynes a new trial or release him from custody within 180 days. *Haynes v. Quarterman,* 561 F.3d 535 (5th Cir. 2009)("*Haynes II*", *see* App. at 1-12).[2]

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[1] "App." refers to the Appendix to the Petition for Writ of Certiorari filed by Petitioner.

[2] The prosecutor struck four of the five African-Americans in the venire, Ms. Kirkling, Ms. Goodman, Mr. McQueen and Ms. Owens. App. 183-189. The Fifth Circuit granted a Certificate of Appealability as to two strikes, that of Mr. McQueen and Ms. Owens. *Haynes I,* 526 F.3d at 202. The *Haynes II* opinion held that "[b]ecause we find a *Batson* [*v. Kentucky,* 476 U.S. 79, 106 S. Ct. 1712 (1986)] violation as to prospective juror Owens, we need not analyze

Petitioner (hereafter "the Director") then filed for rehearing *en banc*, which was unanimously denied by the Fifth Circuit on June 2, 2009, no member of the panel or the Fifth Circuit having requested that the Court be polled. (App. at 180-181). The Director now asks this Court to grant certiorari. For the reasons discussed *infra,* the petition should be denied.

B. Facts Relevant To The Petition.

Respondent Anthony Haynes, an African-American, was convicted of killing off-duty Houston Police Officer Kent Kincaid on May 22, 1998. Tex. Penal Code § 19.03(a)(1). He was sentenced to death. At voir dire, the trial judge accepted without comment or elaboration the prosecutor's explanation of his strikes against four of the five African-American prospective jurors, Ms. Kirkling, Ms. Goodman, Mr. McQueen and Ms. Owens. (App. at 183-189). Additional relevant facts are summarized in the Fifth Circuit's opinion:

> Two different state trial judges took turns presiding over the jury selection process in this case at the state court level. Judge Wallace presided at the beginning of the jury selection process when the jurors were addressed and questioned as a group; Judge Harper presided during the next stage in which the attorneys questioned the prospective jurors individually; and Judge Wallace presided again during the final stage in which peremptory challenges were

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the alleged violation as to prospective juror McQueen." *Haynes II,* 561 F.3d at 541 n.2. Haynes presented extensive facts and evidence in the court below that showed the *Batson* violation as to Mr. McQueen was as strong as that involving Ms. Owens. (*See* Haynes's Fifth Circuit brief at 30-35; reply brief at 20-22). Because the Fifth Circuit first found a violation as to Ms. Owens and hence did not need to reach Mr. McQueen, the facts surrounding his strike will not be discussed herein.

> exercised and when *Batson* challenges were made, considered, and ruled upon. During the *Batson* hearing, the defendant established a *prima facie* case of a *Batson* violation, and the prosecutor justified his use of peremptory challenges against potential jurors McQueen and Owens *solely*[3] on his impression of their demeanor when responding to individual *voir dire* questioning (at which time Judge Wallace was not presiding).
> *Haynes II* , 561 F.3d at 537-538 (App. at 3)(emphasis and footnote in original).

REASONS FOR DENYING THE PETITION

Rule 10 of this Court ("Considerations Governing Review on Certiorari") states:

> [a] petition for writ of certiorari will be granted only for compelling reasons. The following...indicate the character of the reasons the Court considers:...(a) a United States court of appeals has entered a decision in conflict with another United States court of appeals on the same important matter...[or a] United States court of appeals has...decided an important federal question in a way that conflicts with relevant decisions of this Court."
> Supreme Court Rule 10.

Neither consideration is implicated here. The Fifth Circuit's decision is not in conflict with the decisions of other circuit court of appeals or with any decision of this Court. The Director's arguments for certiorari, however, are contrary to this Court's settled *Batson* jurisprudence, other circuits' precedents, and they do not comport with the facts of this case, as shown herein. The petition should be denied.

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[3] "The State agrees on appeal that the prosecutor relied solely on demeanor evidence in making these challenges."

I. A grant of *certiorari* is not warranted because the state court decision was contrary to clearly established federal law and an unreasonable determination of the facts.

The Director frames his question as follows:

"Is a capital defendant entitled to a new trial under *Batson v. Kentucky,* 476 U.S. 79 (1986), even where there has been no judicial finding of a racially motivated peremptory strike?" (Petition for Writ of Certiorari (hereafter, "Pet.") at i).

The Director amplifies this question in Question A:

> Specifically, does this Court's recent decision in *Snyder v. Louisiana,* 128 S. Ct. 1202 (2008), require a new trial—even where a prosecutor struck a prospective juror based on her friendly demeanor towards defense counsel, and not race—solely because the trial judge observed the prosecutor's unrebutted explanation for the strike, but did not also observe voir dire firsthand?
> (Pet. at i).

These questions and the Director's entire argument are based on a flawed reading of *Batson*, its progeny, and the facts of this case.

The Fifth Circuit held that Haynes met his burden under 28 U.S.C. §2254(d), that relief can be granted if the state court decision either 1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court (28 U.S.C.§2254(d)(i)), or 2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. (28 U.S.C.§2254(d)(ii)). Haynes' *Batson* claim met both prongs of §2254(d).

a) The Fifth Circuit correctly held that the state decision was contrary to, and involved an unreasonable application of clearly established Federal law (28 U.S.C.§2254(d)(i)).

The State has conceded that Haynes "made a *prima facie* showing that the peremptory challenge [of Owens] had been exercised on the basis of race." *Haynes II,* 561 F.3d at 539(App. at 7).[4] This is *Batson's* first step. At *Batson*'s second step, "the burden shifts to the prosecutor to present a race-neutral explanation for striking the jurors in question." *Batson v. Kentucky,* 476 U.S. 79, 97-98 (1986); *Snyder v. Louisiana,* 128 S. Ct. 1203, 1207 (2008). The Director's argument falters at *Batson*'s second step, as both *Haynes* opinions point out. In *Haynes I,* the Fifth Circuit held:

> Under *Snyder*'s application of *Batson,* therefore, an appellate court applying *Batson* should find clear error when the record reflects that the trial court was not able to verify the aspect of the juror's demeanor upon which the prosecutor based his or her peremptory challenge. Consequently, we conclude that the district court arguably erred in finding that the state courts properly relied upon the prosecution's 'demeanor' explanations for its peremptory challenges of jurors McQueen and Owens...
>
> In respect to Owens, the district court deferred to the Texas Court of Criminal Appeals' reliance on the prosecutor's allusion to Owens's demeanor as the sole justification for finding that the prosecution's peremptory challenge of her was 'race neutral.'...
>
> However, Judge Wallace, the state trial judge who upheld the peremptory challenges of McQueen and Owens, could not have possibly credited the prosecutor's assertion that they were struck because of their demeanor during individual questioning; Judge Wallace did not preside during the individual examination of the jurors...Further, the district court did not find another

[4] The same concession was made as to prospective juror McQueen, but the Fifth Circuit did not reach Mr. McQueen as they had already found a violation as to Owens. *Haynes II,* 561 F.3d at 541 n.2.

credible non-racial explanation that could justify the state court's determination that the peremptory challenge of Owens and McQueen was 'race-neutral.' Thus, arguably, the State has failed to satisfy *Batson*'s second step.
Haynes I, 526 F.3d 189, 200 (App. at 33).

As the *Haynes II* panel held:

In this case, the trial court and the state appellate court did not conduct a 'factual inquiry' or a 'sensitive' inquiry into the demeanor-based reasons because neither court applied the relevant observations of the juror's demeanor despite the trial court's role and experience overseeing the individual *voir dire.* The state appellate court in this case found that both the trial judge and the appellate court made their *Batson* determinations from the same appellate fact-finding position, *i.e.,* from the cold paper record, and therefore the state court concedes there was no trial fact-finding.
Haynes II, 561 F.3d at 541 (App. at 10-11).[5]

The state appellate court had earlier concluded that:

Because the trial court did not witness the actual voir dire at issue, his position as fact-finder with regard to the demeanor of the veniremembers at issue *is no better than that of this Court.* Thus, we owe him no deference...But regardless of whether the trial judge referred to the record, any concern arising from this situation is moot, because we have not given deference and have ourselves reviewed the voir dire record.
Haynes v. State, No. 73,685 (Tex. Crim. App. 2001)(App. at 173-174); cited in *Haynes II,* 561 F.3d at 541 (App. at 11)(emphasis in original).

As the Fifth Circuit panel explained, "[t]aking this conclusion to its logical end,

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[5] There were no comments or explanations by Judge Wallace in ruling on all four strikes of African-Americans. *See* App. at 185 (22 RR 16)(as to Twanna Kirkling, "I find that to be a reasonable race neutral reason"; App. at 186(22 RR 18)(as to Ms. Goodman, "I find it to be race neutral;" App. at 187 (22 RR 19)(as to Ms. McQueen, "[i]t's race neutral"); and App. at 189 (22 RR 20)(as to Ms. Owens, "[i]t's race neutral"). The rulings were in rapid succession, with no indications Judge Wallace read or referred to any transcript or record, and no recess or break for reflection or consideration. ("RR" refers to the Reporter's Record, the trial transcript in this case.)

we cannot correspondingly apply AEDPA deference to the state court, because the state courts engaged in pure appellate fact-finding for an issue that turns entirely on demeanor." *Haynes II,* 561 F.3d at 541 (App. at 11). This Court, as the Fifth Circuit pointed out, has held that "[i]t is clearly established that the cold record cannot accurately reveal the demeanor of live trial participants." *Id,* citing *Wainwright v. Witt,* 469 U.S. 412, 428 (1985); *Patton v. Yount,* 467 U.S. 1025, 1038 & n.14 (1984); *see also Ciccarello v. Graham,* 296 F.2d 858, 860 (5th Cir. 1961). Thus, the Director's argument falters at *Batson*'s second step: because the strikes were based on non-verifiable demeanor, the prosecutor failed to meet his burden to produce a race-neutral explanation for the strikes. As a result, neither the trial court nor the appellate court were able to conduct the necessary factual inquiry.[6]

The Director's argument is based on a flawed and impermissibly lenient reading of the requisite "factual inquiry" under *Batson.* This Court and numerous courts of appeal have held, in case after case, that an "inquiry" such as that made by the state courts here is insufficient. *See Batson,* 476 U.S. at 95 ("the trial court must undertake a 'factual inquiry' that 'takes into account *all possible explanatory factors'* in the particular case")(emphasis added); *Batson,* 476 U.S. at 93 (trial court must "undertake

[6] The Director notes that "[s]tep three of *Batson* 'involves evaluating the persuasiveness of the justification' proffered by the prosecutor...' (Pet. at 10, quoting *Rice v. Collins,* 546 U.S. 333, 338 (2006). This highlights the deficiencies of the inquiry at that step, as the trial court could never reach step three of *Batson* and "evaluate the persuasiveness" of the explanations.

'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available'", quoting *Arlington Heights v. Metro. Housing Development Corp.,* 429 U.S. 252, 266 (1977)); *Miller-El v. Dretke,* 545 U.S. 231, 239 (2005)("[h]ence *Batson*'s explanation that a defendant may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination"); *Johnson v. California,* 545 U.S. 162, 170 (2005)("we assumed in *Batson* that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the challenge was improperly motivated"); *Snyder,* 128 S.Ct. 1203, 1208 ("the [Supreme] Court made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be a *Batson* error, all of the circumstances that bear upon the issue of racial discrimination must be consulted"). *See also*, *Moody v. Quarterman,* 476 F.3d 260, 267-268 (5th Cir. 2007)(trial court's decision not to follow three-step analysis for *Batson* challenge was unreasonable application of clearly established law).

The Director's argument is directly contrary to *Snyder*'s clarification of *Batson*:

> The trial judge committed clear error in rejecting the *Batson* objection to the strike...[although] Deference is owed to a trial judge' finding that an attorney credibly relied on demeanor in exercising a strike, but here, the trial judge simply allowed the challenge without explanation...the trial court must evaluate not only whether...the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecution.
> *Snyder,* 128 S. Ct. at 1204-1205, 1208.

The Director makes another error in the formulation of the initial question, which assumes that the lack of a "judicial finding of a racially motivated peremptory strike" is at variance with this Court's *Batson* precedents. (Pet at i). Here again, this error stems from the Director's misconception of the *Batson* analytical framework and the inability of the trial or appellate courts in this case to reach step three of the analysis, where the explanation could be evaluated and the findings made. Both *Haynes I* ("the district court did not find another credible non-racial explanation that could justify the state courts' determination that the peremptory challenge of Owens and McQueen was "race-neutral." Thus, arguably, the State has failed to satisfy *Batson*'s second step," 526 F.3d at 200); and *Haynes II* ("[i]t is clearly established that the cold record cannot accurately reveal the demeanor of live trial participants," 561 F.3d at 541) point this out.

Relief has frequently been granted in *Batson* cases without the finding of a racially motivated strike. *See, e.g., Simmons v. Beyer,* 44 F.3d 1160 (3d Cir. 1995), *cert. denied,* 516 U.S. 905 (1995)(*Batson* violation found due to lost transcript; panel found prejudice because it could not fairly review the *Batson* claim); *Bui v. Haley,* 321 F.3d 1304 (11th Cir. 2003)(relief granted due to unreasonable state court fact-findings); *Henderson v. Walls,* 296 F.3d 541 (7th Cir. 2002), *cert. granted, judgment vacated,* 537 U.S. 1230 (2003)("First, we are not making a finding that this evidence

supports a finding of discrimination—such a finding would be appropriate only after a proper statistical analysis").

Here, as in *Snyder,* 128 S. Ct. at 1212*,* there is nothing in the record to indicate that the trial judge credited the prosecutor's demeanor claim, or his other explanations for the strike, when all the trial judge said was "[i]t's race neutral." (App. at 189). We cannot even tell what "it" referred to. The trial court's "factual inquiry" was certainly inadequate under all this Court's *Batson* precedents and those of the circuit courts.

b) The state decision was also based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. (28 U.S.C.§2254(d)(ii)).

The Fifth Circuit held that the Texas Court of Criminal Appeals' "factual inquiry" was inadequate, flawed and clearly erroneous because it merely rubber-stamped the trial court's finding without any evidence of a factual inquiry. *Haynes II,* 561 F.3d at 540-541 (App. at 10-13). Additionally, this finding was clearly erroneous, as the record contradicts the prosecutor's reasons for the strike.[7]

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[7] The Fifth Circuit in *Haynes II* did not delve into the factual record showing the pretextual nature of the prosecutor's explanations for the strikes because it was not necessary to do so. *See* analysis in section I(a) *supra.* Here, however, it will be necessary, as many of the Director's factual assertions are at variance with the record and this Court has held that all potentially relevant arguments and issues must be included in the Brief in Opposition. *See, e.g.,* Supreme Court Rule 15.2 ("non-jurisdictional argument not raised in respondent's brief in opposition to a petition for writ of certiorari may be deemed waived"); *Carcieri v. Salazar,* 129 S. Ct. 1058, 1068 (2009)(failure to dispute factual assertion in brief in opposition was "reason to accept this fact for purposes of our decision in this case").

The Director, with disregard for the record, states Question A as follows:

> Specifically, does this Court's decision in *Snyder v. Louisiana,* 128 S. Ct. 1203 (2008), require a new trial—even where a prosecutor struck a prospective juror based on her friendly demeanor towards defense counsel, and not race—solely because the trial judge observed the prosecutor's unrebutted explanation for the strike, but did not also observe voir dire firsthand?
> (Pet. at i).

This question seriously distorts the factual record in this matter, in multiple ways. The Director has cited nothing in the record that supports the prosecutor's statement that prospective juror Owens exhibited a "friendly demeanor" towards defense counsel.[8] Nor is it even clear what "explanation" the trial judge accepted.

Nor was the prosecutor's explanation "unrebutted."[9] Actually, defense attorney Jones stated that Ms. Owens' questionnaire responses indicated that she "was leaning towards the State's case...[and therefore] I think it is a misconception that I had a

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[8] In the court below and at oral argument the Director alleged that the "friendly demeanor" of Ms. Owens was shown when the defense attorney and Ms. Owens discussed women's basketball and one player in particular who Owens explained was "the bomb. She's the bomb." (18 RR 268). The record reveals a single question about this player and then one very brief comment about the game. (18 RR 268). The attempt to parlay this brief exchange into some sort of "friendly demeanor"or "rapport" with defense counsel is simply another indication of the specious nature of the attempt at non-racial explanations for this strike. Other non-African-American jurors had more extensive informal interactions with defense counsel, some of which related to sports. For instance, juror Michael Bonnin had a long discussion about coaching and baseball (6 RR 169-70); there was a discussion about the building of a baseball park with juror Marilyn Hitchcock (18 RR 204-205); and an interchange about the Civil War with juror Mr. Helton (10 RR 124).

[9] *See also* Pet. at 6-7 ("Notably, Jones did not dispute Vinson's assessment of Owens's demeanor; he argued only that Vinson's perception of defense counsel's view towards Owens was mistaken.")

feeling that she was friendly towards me and she was responsive to the questions." (App. at 188). This was a direct rebuttal of the prosecutor's claim.

The record backs up defense counsel's rebuttal. In fact, this potential juror gave many answers that were very pro-prosecution:

1) At voir dire, Ms. Owens had absolutely no opposition to capital punishment. (18 RR 231).

2) In fact, she supported it. Asked what she would do if she imposed the death penalty and she was confronted with someone who opposed capital punishment, Ms. Owens stated that "[t]his is a free country...just because I respect him...does not mean I have to think the same way that he thinks." (18 RR 233).

3) She agreed with the statement that the Bible "delegates to government authority to carry out...capital punishment." (18 RR 235).

4) Ms. Owens also stated that people accused of murder should be treated differently than people accused of other crimes. (18 RR 246).

5) She said she could answer the special issues "yes or no...it just depends upon what's presented to me." (18 RR 250).

6) Ms. Owens stated she had no prohibition against the death penalty simply because the defendant was young. (18 RR 251).

7) She repeatedly stated that the decision to give the death penalty would

depend on the evidence. (18 RR 252-253).

8) She even stated in the questionnaire that "any person, man or woman, young or old who commits murder should pay with his own life." (18 RR 254). In fact, she affirmed this answer twice. (*Id.*)

9) On her questionnaire, she stated that the death penalty should be used more often. (18 RR 259).

10) She also apparently thought the death penalty appropriate in areas where it was not permitted, until talked to by the judge in the initial group voir dire. (*Id.*)

11) Ms. Owens stated that she could consider the range of punishments available. (18 RR 266).

12) And on her questionnaire she wrote "a life is lost, and murder punishment should be harsher--" (18 RR 269).

13) Additionally, her ex-husband, with whom she was still in recent contact, used to be a Captain with the Texas Department of Corrections at the Ramsey Unit. (18 RR 235-236).

Even more revealing, and central to the prosecutor's reason for his strike, was his claim that the defense "only talked to her a very short time because he was pleased with the things she said..." (22 RR 19)(App. at 187). This was actually the main justification for the strike because from that the prosecutor stated that because of the

alleged short questioning time "I drew a conclusion in my mind...that she already has a predisposition and would not look at it in a neutral fashion." (22 RR 19)(App. at 187). This is simply not true as the record indicates. Mr. Jones questioned Ms. Owens for a full *22 pages* of transcript. (18 RR 255-276). The prosecution had questioned her only slightly longer, 28 pages (18 RR 226-254), but, as with all the other jurors, they covered many introductory matters regarding her background, prior questioning, and procedures that did not need to be re-raised by the defense. (*E.g.,* at 18 RR 227-238). The length of Ms. Owens' questioning was not at all unusual or longer than defense questioning of some non-black jurors and alternates. For instance, non-black juror Michael Bonnin, juror no. 2 (2 CR 431) was questioned even less, for only 20 pages, by the defense. (6 RR 166-186). Non-black juror no. 10 Lois Thorn (2 CR 431) was questioned by the defense for only 21 pages. (15 RR 249-270). Alternate non-black juror Julie Kosatka (2 CR 431) was questioned for only 20 pages by the defense. (19 RR 192-212). Non-black alternate juror Karen Rodriguez (2 CR 431) was questioned by the defense for only 16 pages. (19 RR 247-263). Non-black juror Sharon Malazzo, juror no. 5 (2 CR 431), was questioned by the defense for a little less than 23 pages. (10 RR 288-311). Another indication the "very short" defense questioning was pretextual is that Patrick Nformangum, juror no. 1 (2 CR 431) was questioned for a little over 23 pages when the court stopped the questioning

and said "time's up." (5 RR 114-137).[10] If 23 pages was the full allotted time, 22 pages can hardly be seen as "very short." Thus, it should be seen as pretextual and evidence of a discriminatory motive.

Mis-characterizing a prospective juror's testimony to justify a strike supports an inference of discrimination. A basic principle is that "[t]he prosecution's proffer of [a] pretextual explanation naturally gives rise to an inference of discriminatory intent." *Snyder v. Louisiana*, 128 S. Ct. 1203, 1208. *See also Snyder* at 1212 ("the explanation for the strike...is by itself unconvincing and suffices for the determination that there was *Batson* error"); *Miller-El v. Dretke,* 545 U.S. 231, at 241 ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step"); *Id.* at 252 ("If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.");[11] *Purkett v. Elem,* 514 U.S. 765, 768 (1995)(*per*

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[10] Each side was given 30 minutes for questioning. (*See, e.g.,* 10 RR 199). In the questioning of juror Jacqueline Nelson, juror no. 4 (2 CR 431) the defense stated "I have gone here for almost my 30 minutes" (10 RR 199) which took 24 pages. This is another indication that the prosecutor's termination of 22 pages as "very short" was pretextual as it was close to the allotted 30-minute limit.

[11] As in *Miller-El,* a Dallas County case, there is also a long and well-documented history of racial discrimination in Harris County. *See, e.g., Harris v. Texas,* 467 U.S. 1261, 1263 (1984)(Marshall, J., dissenting, accepting "well-marshaled evidence" that Harris County

curiam)("At [the third] stage, implausable or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination"). There is a very obvious reason for this principle: short of an outright admission by the prosecutor that "yes, we challenged them for racial reasons," this is the best and most reliable evidence of a racial motivation for the strikes. Here, the prosecutor's reasons for striking both Ms. Owens do not comport with the record.

Thus, although this showing of an "unreasonable determination of the facts" was not discussed in *Haynes II,* as the Fifth Circuit found a violation under 2254(d)(i), it is clear that Haynes also was entitled to relief under 2254(d)(ii).

II. No AEDPA deference is due to the state court opinion and Haynes has shown "by clear and convincing evidence" under 28 U.S.C. §2254(e)(1) that the state court findings were erroneous.

In section V of the petition, the Director argues that the refusal of the Fifth

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prosecutors "had systematically excluded Negro jurors in case after case over an extended period of time"); *Tompkins v. State,* 774 S.W.2d 196, 203 (Tex.Crim.App. 1987)(Texas Court of Criminal Appeals acknowledged evidence that Harris County District Attorney's Office used its peremptory challenges to systematically exclude blacks from juries); *Whitsey v. State,* 796 S.W.2d 707, 716 (Tex. Crim. App. 1989)(Texas Court of Criminal Appeals reversed appellant's conviction, finding that Harris County prosecutor had "exercised peremptory challenges based solely on race"); *Williams v. State,* 804 S.W.2d 95, 107 (Tex. Crim. App. 1991)(documenting the evidence of systemic exclusion of prospective jurors of color by the Harris County District Attorney's Office); *Vargas v. State,* 859 S.W.2d 534, 535 (Tex.App.-Houston [1st Dist] 1993 (Harris County prosecutor found to engage in disparate treatment); *Emerson v. State,* 851 S.W.2d 269, 272 (Tex. Crim. App. 1993)(Texas Court of Criminal Appeals impugned Harris County prosecutor for engaging in disparate questioning and treatment of African-American veniremembers); *Thomas v. State,* 209 S.W.2d 268 (Tex. Crim. App. 2006)(appellant's conviction reversed, holding that Harris County prosecutor engaged in disparate treatment).

Circuit to apply "AEDPA deference" to the state court's ruling merits summary reversal. (Pet. at 25-29). This argument is without merit.

AEDPA does not use the word "deference." It talks in terms of a standard of review, discussed *supra* in section I as to §2254(d)i and (d)ii and in this section as to §2254(e)(i). The Director frames the issue of deference as follows:

> The Fifth Circuit also gave no deference to the trial court's factual conclusion that the prosecutor's demeanor-based reason for striking Ms. Owens was credible. App. at 189. In so doing, the court below disregarded not only the plain text of the AEDPA itself, but this Court's precedents implementing the AEDPA's required deference to trial courts' *Batson* decisions.
> Pet. at 27.[12]

The "deference" is actually a "presumption of correctness" that can be rebutted "by clear and convincing evidence." § 2254(e)(1). The Director frames the presumption as an insurmountable obstacle, whereas Haynes presented in the courts below voluminous evidence that rebutted it by clear and convincing evidence, as shown *supra* in section I. *See, e.g., Miller-El v. Cockrell,* 537 U.S. 322, 340 (2003) "[d]eference does not by definition preclude relief"); *Purkett v. Elem,* 514 U.S. at 769 (presumption of correctness of factual findings of state courts is rebuttable and can be set aside if they were "not fairly supported by the record"); *Hernandez v. New*

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[12] In a like vein, the Director also states that "[t]he Fifth Circuit's misunderstanding of § 2254(e)(1) originates in its misconception of the relevant factual inquiry...the issue at step three is not whether the prosecutor's perception of a juror is accurate, but simply 'whether the trial court finds the prosecutor's race-neutral explanations to be credible.'" (Pet. at 29), quoting *Miller-El,* 537 U.S. at 339.

York, 500 U.S. 352, 371-372 (1991)(policy of striking venirepersons "without regard to the particular circumstances of the trial or the individual responses of the jurors may be found by the trial judge to be a pretext for racial discrimination"); *Guidry v. Dretke,* 397 F.3d 306, 327 (5th Cir. 2005)(presumption of correctness rebutted when trial court made no findings on considerable conflicting evidence)("[a]ccording to the dissent, the district court must defer to trial court factual determinations, even when they are presented without explanation concerning extremely important and conflicting evidence. On the contrary, certainly on this record, such absence [of explanation] suggests an unreasonable determination"). Even just plain unconvincing justifications for the strike give rise to inferences of impermissible racial discrimination. *Snyder,* 128 S. Ct. at 1208 ("the explanation for the strike...was unconvincing and suffices for the determination that there was *Batson* error").

This Court and others have all made clear that a demeanor reason not credited by the trial judge or supported in the record does not carry any weight, is entitled to no deference, and is insufficient in itself. *Snyder,* 128 S. Ct. 1208-09; *Cabana v. Bullock,* 474 U.S. 376, 388 n.5 (1986), *overruled in part on other grounds, Pope v. Illinois,* 481 U.S. 497 (1987)("[t]here might be instances, however, in which the presumption [of correctness] would not apply to appellate factfinding...For example, the question...might in a given case turn on credibility determinations that could not

be accurately made by an appellate court on the basis of a paper record"); *see also United States v. Reed,* 277 Fed.Appx. 357, 364 n.6 (5th Cir. 2008)("In *Snyder*...the first reason, the juror's nervousness, was insufficient by itself because the record materials could not convey the juror's demeanor absent a specific finding by the trial judge...").

Dolphy v. Mantello, 552 F.3d 236 (2d Cir. 2009) once again makes clear that under AEDPA there is no need for deferential review in federal habeas proceedings when the state trial court fell short of adjudicating the defendant's *Batson* claim on the merits by simply accepting at face value the prosecutor's proffered race-neutral explanation. There, as in Mr. Haynes's case, the trial court made no inquiry or finding concerning the credibility of the prosecution's explanation. *Dolphy,* 552 F.3d at 237-238. Under *Batson,* the mere proffer of a facially neutral reason is insufficient. As here, in *Dolphy,* the

> the judge's words seemed to assume that a race-neutral explanation (*Batson* step two) was decisive and sufficient: 'I'm satisfied that is a race-neutral explanation, so the strike stands.'...such a conclusory statement does not necessarily indicate even by inference that the trial court credited the prosecutor's explanation, especially since i) the judge's words suggested that the proffer of a race-neutral explanation was itself enough, and ii) the explanation given here lends itself to pretext")

Dolphy, 552 F.3d at 239. *See also Jordan v. Lefevre,* 206 F.3d 196, 200 (2d Cir. 2000)("Jordan now declares that the district court's conclusory statement that the prosecutor's explanations were race neutral did not satisfy *Batson*. We agree");

Barnes v. Anderson, 202 F.3d 150, 156 (2d Cir. 1999)(holding that "denial of a *Batson* motion without explicit adjudication of the credibility of the non-movant's race-neutral explanations for challenged strikes" constitutes error); *Moody v. Quarterman,* 476 F.3d 260, 267-268 (5th Cir. 2007)("As to AEDPA's requirement that this court defer to the state trial court findings of fact, this directive is not applicable as to this state trial court because it failed to make any findings of fact relative to the heart of Moody's [*Batson*] claim").

The Director's arguments for "deference" are thus unavailing and Haynes showed by clear and convincing evidence that the state court findings were erroneous. 28 U.S.C. §2254(e)(1).

III. The petition should not be granted because there is no "circuit split" requiring this Court's intervention.

While the Director attempts to frame this case as a "mistaken reading" and "mistaken application" [of *Snyder v. Louisiana,* 128 S. Ct. 1203 (2008)] (Pet. at 2, 3, 17-20) upon which the Fifth Circuit allegedly "relied primarily" (Pet. at 17) the decision in *Haynes II* is a straightforward application of *Batson.*

The Director cites only one case in support of his contention that the Fifth and Seventh Circuits have "misinterpreted" *Snyder* and that there is a "circuit split" : *Smulls v. Roper,* 535 F.3d 853 (8th Cir. 2008)(*en banc*). (Pet. at 19, 26). But *Smulls* does not support the Director's contentions. In *Smulls,* the Eighth Circuit held that the

trial court's failure to make explicit findings did not relieve the court of appeals of its duty to reconstruct the record or view the trial court findings as presumptively correct. *Smulls,* 535 F.3d at 861-863. In that case, the trial judge, who had witnessed the voir dire, asked the prosecutor for his reasons for the strike, and he gave specific answers: a glare, an aversion of her eyes, an irritated answer, her occupation as a postal worker, his past bad experiences with such employees, and his striking of a white postal worker in the same matter. *Smulls,* 535 F.3d at 856, 864-867.

> In short, the trial court considered the challenge and the related circumstances and arguments, including its observations of [the struck juror] and made its ruling, a ruling it made four times in two days...the trial court immediately allowed the defense ample opportunity to make its argument that the proffered reasons were pretextual...it allowed the defense to make the record it chose to make, considered the arguments, and then denied the motion...The following day, the defense again raised the *Batson* challenge. The trial court allowed both parties to address the issue and supplement the record. The trial court once again denied the challenge, but only after once again listening to the arguments made by counsel...Given this extensive record, the trial court cannot be criticized for failing to afford the defense an opportunity to respond, nor can it be fairly criticized for failing to consider the relevant circumstances raised by the attorneys." *Id.* 535 F.3d at 863-864.

Contrast the situation in *Smulls* to the situation in *Haynes,* where both the trial court and the Texas Court of Criminal Appeals *did not and could not* make explicit fact findings, and therefore could not even reach *Batson*'s third step. Even if the trial court had done so, a reconstruction of the record reveals the prosecutor's explanations as false and pretextual. Again, the Director's argument falters because he fails to

consider the requirement of a *Batson* three-step analysis.

The Director quotes *Haynes II* as holding that it "interpret[s] *Batson* to require 'the trial court's observations of individual jurors if relevant to the prosecutor's explanation.'" (Pet. at 19, *quoting Haynes II,* 561 F.3d at 540). The Director has omitted a crucial word, however. The actual quote from *Haynes II* is "we read *Batson* to require the *application* of the trial court's observations of individual jurors if relevant to the prosecutor's explanation." (*Id.*) *Haynes II* never *requires* the observations, but like *Batson, Miller-El,* and *Snyder* it requires a full factual inquiry which would include the application of the judge's personal observations in that inquiry, if they are relevant.[13]

Nor has any "circuit split" yet appeared in terms of the impact of *Haynes II* in other circuit courts that would require summary reversal. (Pet. at 17-20). In more than seven months since *Haynes II* was handed down, it has been cited only twice, in unpublished district court opinions, neither of which involve a *Batson* issue. *Moore v. Norris,* 2009 WL 1616001 (E.D. Ark. Jun. 9, 2009); *Johnson v. Quarterman,* 2009

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[13] Nor does the state court case the Director cites, *People v. Bramit,* 210 P.3d 1171 (Cal. 2009) help his argument. (Pet at 19). In *Bramit* defense counsel argued that "deference to the trial court is inappropriate unless the court expressly states that it is excusing the juror on the basis of demeanor." As the *Bramit* court made clear, "*Snyder* said no such thing....the high court held that deference to the trial court is 'especially' appropriate when the judge actually makes a determination that an attorney relied on demeanor in exercising a strike. The court did not hold that deference is only permissible when such an express determination was made below" (citing *Snyder,* 128 S. Ct. at 1209. *Bramit,* 210 P.3d at 1184 n.7. The Director makes the identical argument here, and this misconception is central to his misreading of *Snyder* and *Haynes II.*

WL 22553238 (S.D. Tex July 27, 2009). It appears that other litigants and courts do not see *Haynes II* as the outlier from the heartland of this Court's *Batson* jurisprudence that the Director makes it out to be.

IV. The petition should be denied because the Fifth Circuit's decision is squarely in line with this Court's *Batson* jurisprudence.

Contrary to the Director's arguments, the decision of the Fifth Circuit is squarely in line with this Court's *Batson* jurisprudence and it is the Director's arguments that would represent a "significant departure." (Pet. at 10-17). None of the cited cases from this Court implicate or are contrary to the Fifth Circuit's holding in *Haynes II.*

The Director cites *Rice v. Collins,* 546 U.S. 333 (2006) for the proposition that "a trial court may credit a peremptory strike based on juror demeanor the trial court did not personally observe." (Pet. at 11). *Rice* however, provides no support for the Director's contentions as this was a case in which the Ninth Circuit "improperly substituted its evaluation of the record for that of the state trial court." *Rice* at 334. There, unlike here, nothing suggested that the trial court "failed to conduct a searching inquiry of the prosecutor's reasons for striking [the juror]." *Id.* at 337. In *Rice,* the prosecutor provided "a number of other permissible and plausible race-neutral reasons" for the strike other than the explanation the Ninth Circuit saw as unreasonable (eye-rolling) which the judge did not see. *Id.* at 339-342. Here, however,

the "searching inquiry" consisted, in its entirety, of three words, "it's race neutral" (App. at 189), and the prosecutor provided *no* plausible explanation beyond demeanor that the judge did not witness, and one implausible explanation that is contradicted in the record, that the defense attorney "only talked to her for a very short time." (App. at 187). Instead of *Rice*'s "searching inquiry" all we have here is "[i]t's race neutral." (App. at 189).

Nor does *Hernandez v. New York,* 500 U.S. 352 (1991) provide any help for the Director. (Pet. at 12-13). There, the responses and demeanor of some Spanish-surnamed prospective jurors led the prosecutor to doubt their ability to defer to the official translation of the Spanish language testimony, a plausible non-racial motive. *Hernandez,* at 363-364, 370. The judge observed the voir dire and the attorneys' interactions with the jury. The categories of who the prosecutor thought would defer to the translations and who would not included both Latinos and non-Latinos. Additionally, there was no motive for the prosecutor to exclude Latinos as both victims and witnesses were also Latino and the prosecutor did not know which prospective jurors were Latino. *Id.* at 369-370. Indeed, these were all factors that were specific to Hernandez's trial, but striking venirepersons "'without regard to the peculiar circumstances of the trial' might constitute a pretext for racial discrimination." *Purkett v. Elem,* 514 U.S. 765, 774 (1995), quoting *Hernandez,* 500

U.S. at 371-372. Here, the "demeanor" of the prospective jurors was a factor that had no relation to the circumstances of Haynes' trial, and *Hernandez* actually undermines the Director's argument.

Lastly, by overstating the Fifth Circuit's holding, the Director cites *Purkett v. Elam,* 514 U.S. 765 (1995) as standing for the proposition that "a trial court's failure to observe juror demeanor...does not render the court categorically ineligible to assess counsel's credibility." (Pet. at 14). But *Haynes II* does not hold this. The Director again falls into error in not analyzing *Batson*'s three step process. *Purkett* stresses the necessity of following this process, which the trial court here failed to do. The *Purkett* court held that

> "[u]nder our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the trike to come forward with a race-neutral explanation (step two).
> *Purkett,* 514 U.S. 765, 768.

The Court emphasizes that even a "silly or superstitious" reason will get the prosecutor to step three, but here the court could not even go on to that step because the reason offered, demeanor, was not observed by the court. *Purkett* emphasizes the need for the step three analysis, which was missing here. ("It is not until the *third* step that the persuasiveness of the justification becomes relevant–the step in which the trial court determines whether the opponent of the strike has carried his burden..."), *Id.* at

768).

Thus, none of this Court's authorities cited by the Director support his argument.

V. The Director has repeatedly changed his position on the reasons for the strikes.

The Director has once again, for the third time, changed his position and argument on the reasons for the strikes. In his initial brief in the Fifth Circuit, he asserted at length that there were reasons for the strikes other than demeanor. (*See* the Director's Brief at 6-7, 20-21, 26-30). However, at oral argument the Director asserted that the strikes and his argument were based "solely on demeanor."[14] The panel relied upon the Director's "demeanor only" argument in holding that "the prosecutor justified his use of peremptory challenges against potential jurors McQueen and Owens *solely* on his impression of their demeanor" and a footnote points out that "[t]he State agrees on appeal that the prosecutor relied solely on demeanor evidence in making these challenges." *Haynes II,* 561 F.3d at 538, n. 1(emphasis in original).[15]

However, in his petition for *en banc* rehearing, the Director switched back to

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[14] *See* the recording of the January 13, 2009 oral argument of this case on the Court's website at www.ca5.uscourts.gov/OralArgumentRecordings.

[15] As noted *supra,* the opinion addresses only potential juror Owens, who was excused solely on the grounds of demeanor, and did not consider McQueen.

"factors other than demeanor," as his second issue was:

> Was the trial court's credibility finding that a prosecutor's proffered justification for striking a juror based on demeanor was race-neutral entitled to a presumption of correctness *when the trial court necessarily relied on factors other than the juror's demeanor in making the determination*?
> Petition for Re-Hearing, at 2. (emphasis added).

Now, once again, the argument has shifted back to "demeanor only." The reason for these repeated shifts is clear, and it can be likened to an attempt to steer, like Odysseus, between the twin dangers of Scylla and Charybdis. On one hand there is the Scylla of "demeanor only," attempting to avoid the implications of *Snyder*, which holds that if there was more than one explanation for the strikes, and "the record does not show that the trial judge actually made a determination concerning [the prospective juror's] demeanor...[and] simply allowed the challenge without explanation," this is a violation of *Batson*. *Snyder,* 128 S. Ct. at 1209; *quoted in Haynes I,* 526 F.3d at 199. This was pointed out at oral argument in the Fifth Circuit. On the other hand, there is the Charybdis of asserting there were "other reasons than demeanor" for the strikes, which founders on *Snyder* as well as the other *Batson* factors. Both stances on the reasons for the strikes are equally unavailing.

VI. The Fifth Circuit's decision will not "drastically complicate" jury selection as the Director claims.

In section IV (Pet. at 23-25), the Director conjures up the scepter of dire consequences for jury selection, as "the Fifth Circuit's reasoning would require trial

courts to both observe and remember every venire member's behavior and demeanor—an impossible task given the many days and dozens of prospective jurors that often pass between voir dire and a *Batson* hearing." (Pet. at 24). This would allegedly "blink reality," impose a "heavy burden" on the trial courts, and be "unworkable. (*Id.*) Yet the Fifth Circuit's opinion imposes no new or heavier burden on courts than that which already exists. It is simply ludicrous to claim that the entire process depends on the memory of the judge, as it is common practice for judges to make either written or computerized notes on the bench during voir dire.[16] Additionally, it is somewhat insulting to the judiciary to assert that judges are incapable of doing what the attorneys currently *must* do in the *Batson* context. The defense attorney has to articulate a *Batson* challenge regarding a particular strike of a venire person, the prosecutor has to articulate his reasons for that strike, and the defense attorney has to refute the explanation. Both tasks require recalling and examining earlier questioning or demeanor, and the judge has no greater burden than the prosecutor or defense attorney. Of course, since the invention of writing (and the computer) the parties do not have to rely on memory, as the Director claims, but on their notes taken during the jury selection process.

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[16] The practice of judicial note-taking is not universal, however, and the record here indicates that Judge Harper was actually performing gun repair on two revolvers during the jury selection in Mr. Haynes' trial, not taking notes, for at least part of the voir dire. He was subsequently reprimanded for this conduct. (*See* note 20 *infra*).

Additionally, as discussed *supra* (*e.g.,* note 14), the Director's misguided alarm stems from a misreading of *Snyder* and *Haynes II.* Neither *Snyder* nor *Haynes II* hold that deference is permissible only when such an express determination regarding demeanor was made in the trial court. *Snyder,* 128 S. Ct. at 1207-1209. The Director's misreading of *Haynes II* leads to this error.

VII. The Director misstates and overstates the holding of the Fifth Circuit.

Repeatedly, the Director frames the holding of the Fifth Circuit as requiring "a new trial...solely because the trial judge observed the prosecutor's unrebutted explanation for the strike, but did not also observe voir dire beforehand." (Pet. at i) ("Questions Presented"). *See also* Pet. at 2 ("a trial court need not personally observe a prospective juror's demeanor in order to credit a prosecutor's explanation...[this] mistaken application..."); at 10 ("a novel theory"); at 11 ("if the decision below was correct, then *Batson* and its progeny must all be wrong").

The *Haynes II* opinion does not hold what the Director represents it to hold, that the trial judge must observe the demeanor. Here again, the Director confuses the holding in *Haynes II.* It did not hold that deference is only permissible when an express determination of demeanor was made. But *Haynes II* and *Snyder* make clear that a demeanor reason not credited by the trial judge or supported in the record does not carry any weight, is entitled to no deference, and is insufficient in itself. *Snyder,*

128 S. Ct. 1208-09; *Haynes II,* 561 F.3d at 541.

Thus, it is misleading to state that "[t]he court below held that Judge Wallace's *Batson* ruling was based solely on 'the cold paper record' and was therefore invalid per se," citing *Haynes II* 561 F.3d at 541. (Pet. at 10). What the opinion actually held was that "[t]he state appellate court in this case found that both the trial judge and the appellate court made their *Batson* determinations from the same appellate fact-finding position, i.e., from the cold paper record, and, therefore, the state court concedes there was no trial fact-finding." *Haynes II,* 561 F.3d at 541. The opinion was talking about the findings of the state court and the deficiencies of the trial court fact-finding, not holding that findings from a "cold paper record" are invalid per se in all cases. As discussed *supra* in section I, it is also abundantly clear from the record that Judge Wallace's ruling was not based on any "fact-finding" at all, when all he says is "[i]t's race neutral" or "I find it to be race neutral" four times in quick succession without a pause or even an explanation. (*See* App. at 185-189).

VIII. The petition should be denied because the Director's arguments regarding the demeanor of the prosecutor are unavailing.

The Director states that a "key" part of his argument is that

> a *Batson* challenge turns on the sincerity—not the accuracy—of the prosecutor's reason for striking a prospective juror. The Court has recognized that the credibility of the prosecutor—completely ignored by the Court

below—is the key issue in determining intent under *Batson*."
(Pet. at 2).

The Director argues that the Fifth Circuit's decision was wrong because "[t]hat holding ignores the trial court's firsthand observation of the most relevant demeanor—that of the attorney exercising the strike." (Pet.at 10-11). He attempts to buttress this argument by citing language from *Hernandez* which states that when there is not much evidence on the believability of the prosecutor's explanation, that "the best evidence often will be the demeanor of the attorney who exercises the challenge." *Hernandez v. New York,* 500 U.S. 352*,* 365 (Pet. at 12-13).[17]

This "key" argument completely ignores the fact that the relevant "attorney demeanor" discussed in *Hernandez* is the demeanor of the attorney during the questioning of the challenged juror, in terms of their interactions, not the attorney's later demeanor (or persuasiveness) in front of a different judge who did not see the attorney-juror interactions. *Hernandez,* 500 U.S. at 361-365.[18] The judge in

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[17] As at the Fifth Circuit oral argument, the Director again puts great weight on this argument: "Similarly, the panel's assertion that the trial court made the credibility determination entirely 'from the cold paper record'...disregards the trial court's firsthand observation of both the prosecutor's demeanor in explaining his race-neutral reasons as well as defense counsel's response." (Pet. at 13). And again: "the Fifth Circuit did not cite a single decision holding that a trial judge cannot assess a prosecutor's demeanor-based reason for striking a juror based on the trial court's firsthand observation of the prosecutor's credibility." (Pet. at 26).

[18] In *Hernandez,* unlike Mr. Haynes' trial, the judge *did* observe the voir dire and the prosecutor's strikes, and the factors the prosecutor offered there, such as ability to speak Spanish, were observed by the trial judge. In contrast to *Hernandez* and most cases where "[t]here will seldom be much evidence bearing on [the believability of the prosecutor's explanation] here there is abundant record-based evidence that directly contradicts the

Hernandez did observe the attorneys and the prospective jurors at voir dire. *Hernandez,* 500 U.S. 355-358. But the only "attorney demeanor" Judge Wallace could access at the *Batson* hearing was the persuasiveness of the prosecutor and defense attorney's statements regarding conduct he had not observed. The Director's argument, if accepted, would virtually gut this Court's *Batson* jurisprudence, as any after-the-fact explanation could be accepted on the premise that the trial judge found the prosecutor's demeanor at the *Batson* hearing persuasive or "credible," even if the proffered explanation was not supported by the facts or the record. In effect, the Director is inviting this Court to accept the persuasiveness or glibness of the prosecutor's after-the-fact argument as a valid basis for a *Batson* strike.[19] This dangerously *ad hoc* standard would provide a virtual *carte blanche* for the re-legitimization of racial discrimination in jury selection, exactly what the *Batson* line of cases intended to eliminate. Thus, *Hernandez* is not at all similar to the situation here, nor is it helpful to the Director.

The Director's argument clearly does not comport with *Batson,* 476 U.S. 79 at 98("If these general assertions [prosecutor's denial of a discriminatory motive or assertions of good faith] were accepted as rebutting a defendant's prima facie case, the

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prosecutor's explanations. All this evidence is ignored by the Director in his petition.

[19] Here, in fact, it would be the entire basis for the strikes.

Equal Protection Clause 'would be but a vain and illusory requirement'"); *Miller-El,* 545 U.S. 231 at 240 (2005)("If any factually neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*" [*v. Alabama,* 380 U.S. 202 (1965); and *Purkett v. Elem,* 514 U.S. 765, 769 (1995)("this [*Batson*] warning was meant to refute the notion that a prosecutor could satisfy his burden of production by merely denying that he had a discriminatory motive or by merely affirming his good faith"). The Director's "demeanor" argument is precisely the nebulous, prejudice-prone, subjective standard that these *Batson* cases seek to eliminate.

IX. The petition should not be granted because the Fifth Circuit's decision to grant a new trial and not a *Batson* hearing is not contrary to "established practice" and there are compelling reasons why the Fifth Circuit did so.

The Director asserts that the Fifth Circuit should have remanded the case for a reconstruction *Batson* hearing before a federal or state court judge rather than ordering a new trial. (Pet. at 20-22). However, the Director's claim that this is "routine" is overstated and incorrect. "The typical relief granted in federal habeas corpus is a conditional order of release unless the State elects to retry the successful habeas petitioner." *Herrera v. Collins,* 506 U.S. 390, 403 (1993). Many courts have ordered new trials upon the finding of a *Batson* violation. In fact, in the circumstances here,

over ten years after Haynes' trial, this Court has expressly dictated a new trial: "[n]or is there any realistic possibility that this subtle question of causation could be profitably explored further on remand at this late date, more than a decade after petitioner's trial." *Snyder,* 128 S.Ct. at 1212. The factors that inclined the *Snyder* court to decline a remand for a new trial were the absence in the record of the demeanor explanation, and the proffer of a pretextual explanation by the prosecutor. *Id.* Both factors are operative here: the Director can point to nothing in the record that supports the alleged demeanor explanation and the prosecutor based his challenge on alleged "short questioning" which has been shown to be false. Other courts have similarly ordered new trials rather than a remand for a *Batson* reconstruction hearing. *See, e.g., Simmons v. Beyer,* 44 F.3d 1160 (3d. Cir. 1995)(remanded for new trial); *Turner v. Marshall,* 121 F.3d 1248, 1251 (9th Cir. 1997); *Riley v. Taylor,* 277 F.3d 261, 294 (3rd Cir. 2001)(*en banc*); *Bui v. Haley,* 279 F.3d 1327, 1336-1339 (11th Cir. 2002); *Reed v. Quarterman,* 555 F.3d 364 (5th Cir. 2009).

There is another compelling reason why a remand for a *Batson* reconstruction hearing, at least to the state court, would be ill-advised. This is the fact, discussed at the oral argument in the Fifth Circuit, that the record shows that the judge who conducted the voir dire, Judge H. Lon Harper, was actually cleaning two pistols on the bench when the prospective jurors were being questioned during Mr. Haynes' voir

dire.[20] As Fifth Circuit Judge Clement observed at the oral argument, a *Batson* "reconstruction hearing" 10 years after the trial would be futile, as Judge Harper likely wouldn't remember what occurred as he was preoccupied with his gun repairs. There could hardly be any more persuasive showing of racial prejudice in Mr. Haynes' trial than the officially-condemned behavior of this judge.

X. Even if the same judge had witnessed both the voir dire and the explanations, Haynes would still be entitled to relief under *Batson*.

The Director attempts to frame this case as holding that *Haynes II* required a new trial "solely because the trial judge...did not also observe voir dire firsthand." (Pet. at i). This view is erroneous, as discussed *supra*. But even if Judge Wallace *had* observed the voir dire, Haynes would clearly still be entitled to relief.

This case does not depend on the difference in judges, although it certainly

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[20] *See, e.g.,* Affidavit of Patrica Davis, Exhibit 11 to the district court petition ("During the part where the jury was chosen, the judge presiding over it, Judge Lon Harper, was cleaning a pistol while he was on the bench, in full view of the potential jurors."). Judge H. Lon Harper was officially reprimanded for his conduct at the voir dire in this case. *See* "*Judge Reprimanded For Repairing Revolvers On Bench*" by Mary Flood, *Houston Chronicle,* July 13, 2000, Sec. A page 25 ("Visiting state District Judge H. Lon Harper was reprimanded for trying to repair two guns on the bench during a capital trial proceeding, the State Commission on Judicial Conduct announced today...Harper was sitting as a visiting judge in the fall of 1999 picking a capital murder jury in the case of Anthony Cardell Haynes..."); *see also* "*Houston Judge Faulted For Fixing Guns In Court*," *Dallas Morning News*, July 13, 2000; "*Pistol-Packing Judge Is Told Off*," Telegraph (UK), by Philip Belves Broughton, July 14, 2000 ("Judge H. Ron Harper was admonished..."for failing "to maintain order and decorum in the courtroom...Mr. Harper, a visiting state District Judge, was supposed to be overseeing jury selection in the case of Anthony Cardell Haynes, who was facing the death penalty..."); *Public Reprimand of H. Lon Harper, Former District Court Judge,* Texas Commission on Judicial Conduct (06/28/00)("The judge disassembled and reassembled two revolvers during voir dire in a capital murder case.")

makes the violation much clearer and more egregious. However, if Judge Wallace had observed the voir dire, Haynes would still be entitled to relief because of the failure of the judge to conduct an adequate enquiry at *Batson*'s third step as his ruling was ambiguous—what explanation was "race neutral"? Was it demeanor, alleged short questioning by the defense or anti-death penalty attitudes? (App. at 187-189). This violates *Batson, Miller-El* and *Snyder.* Secondly, there was no indication the trial judge even referred to the record, as in *Snyder*. Third, it is clear that Judge Wallace failed to consider all available evidence, such as defense counsel's rebuttals, which he refused to reference, which violates both *Batson* and *Miller-El.* And fourth, Judge Wallace's ruling is contradicted by the record, which shows no anti-death penalty bias or short questioning of Ms. Owens. All of these factors, individually and in combination, show a failure at step three of the *Batson* analysis even if Judge Wallace had been present during the voir dire.

XI. The Director's non-retroactivity argument is without merit.

In section V(A) of the petition, the Director argues that *Haynes II* announces a new *Batson* rule. (Pet. at 25-27). Contrary to the Director's assertions, non-retroactivity is no bar to relief. The Fifth Circuit opinion recognized that Haynes sought only the application of a fair reading of *Batson,* decided in 1986, well before his conviction became final. *Haynes II,* 561 F.3d at 539-541 (Section B of the opinion is

entitled "*A Batson Violation Occurred and Habeas relief is required"*). The *Haynes II* opinion was not a "new rule" nor did *Snyder* announce any such "new rule" as that case is framed wholly in terms of the earlier *Batson* decision. *See Snyder,* 128 S. Ct. 1203, 1204 (holding that the trial judge committed clear error in rejecting the *Batson* challenge); *Id.* at 1208 ("the explanation for the strike of Mr. Brooks is by itself unconvincing and suffices for the determination that there was *Batson* error"); 1212("the question presented at the third stage of the *Batson* inquiry is..."); *Id.* at 1206-1212 (entire analysis in *Snyder* is dictated by *Batson*). Courts interpreting *Snyder,* including the Fifth Circuit, have come to similar conclusions. *See, e.g., Haynes I,* 526 F.3d at 199 ("[u]nder *Snyder's* application of Batson "*Snyder*...applied its understanding of *Batson* to a similar factual issue" (*Id.* at 200); *United States v. Williamson,* 533 F.3d 269, 274 (5th Cir. 2008)("the Supreme Court has made plain that appellate review of alleged *Batson* errors is not a hollow act," citing *Snyder*); *Abu-Jamal v. Horn,* 520 F.3d 272, 282 (3rd Cir. 2008)("The most recent guidance from the Supreme Court on *Batson* comes from *Snyder v. Louisiana*..."); *United States v. Girouard,* 521 F.3d 110, 113 (1st Cir. 2008)("the basic framework for challenging jury composition has remained unchanged," citing *Snyder*).

Here too, in an attempt to find a "new rule," the Director's arguments founder on a mis-perception of the holding of *Haynes II.* The Director states that "[s]ignificantly, the Fifth Circuit did not cite a single decision holding that a trial judge cannot assess a

prosecutor's demeanor-based reason for striking a juror based on the trial court's firsthand observation of the prosecutor's credibility." Pet. at 26. The Fifth Circuit did not cite any such decisions because that was not the holding of *Haynes II,* which was squarely within the *Batson* framework.

The Director's mistaken reliance on non-retroactivity arises from a failure to appreciate that *Snyder* is firmly rooted in *Batson,* announces no "new rule" and merely confirms the correct resolution of Mr. Haynes' *Batson* claim.

CONCLUSION

For the foregoing reasons, the Director's petition for certiorari should be denied.

DATED: October 26, 2009.

Respectfully submitted,

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A. RICHARD ELLIS
Texas Bar No. 06560400
75 Magee Drive
Mill Valley, CA94941
(415) 389-6771
FAX: (415) 389-0251
Attorney for Respondent Anthony Haynes