No. _____

In the Supreme Court of the United States

NATHANIEL QUARTERMAN,
Petitioner,
v.
ANTHONY CARDELL HAYNES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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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FORMER CAPITAL CASE—QUESTIONS PRESENTED

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?

A. Specifically, does this Court's recent 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?

B. Was this purported right to an automatic new trial "clearly established" under this Court's precedents at the time of trial in 1999, as required under the Antiterrorism and Effective Death Penalty Act of 1996 (28 U.S.C. § 2254(d)(1))? And does this purported right prevent federal courts from applying the presumption of correctness to the state court finding that the peremptory strike was not racially motivated, as required under the AEDPA (28 U.S.C. § 2254(e)(1))?

LIST OF PARTIES

Petitioner is Nathaniel Quarterman, Director of the Texas Department of Criminal Justice, Correctional Institutions Division.

Respondent is Anthony Cardell Haynes, a prisoner currently in the custody of the Texas Department of Criminal Justice.

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Peremptory strikes are entirely constitutional so long as they are not motivated by either race or sex. Accordingly, this Court has never held—or even suggested—that a convicted criminal is entitled to a new trial under *Batson v. Kentucky*, 476 U.S. 79 (1986), absent a judicial determination that a peremptory strike was based on discriminatory intent. Yet that is precisely what the court of appeals ordered below.

Anthony Haynes confessed to the 1998 murder of a police officer. Prior to his capital murder trial, the prosecutor explained that he struck a prospective juror based on her friendly demeanor towards defense counsel, and not her race. The trial judge credited this explanation, and thus rejected a *Batson* objection by defense counsel, based on the prosecutor's unrebutted statement about the juror's demeanor.

The court below nevertheless granted habeas relief and awarded Haynes a new trial (a decade after the first one) despite the fact that no court has ever found a racially motivated peremptory strike in this case. The court did so solely on the ground that the trial judge heard the prosecutor's explanation for the strike and defense counsel's response, but did not personally observe the voir dire as well. This holding fundamentally misunderstands the purpose of *Batson* and the precedents of this Court—and, in particular, is based on a mistaken reading of this Court's recent decision in *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008).

The purpose of *Batson* is to forbid racially motivated peremptory strikes. Accordingly, 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*. *See Hernandez v. New York*, 500 U.S. 352, 365 (1991) (plurality op.). And it has specifically recognized that a trial court need not personally observe a prospective juror's demeanor in order to credit a prosecutor's explanation for striking the juror on that basis. *See Rice v. Collins*, 546 U.S. 333, 341 (2006). Nothing in *Snyder* contradicts this established framework.

The error below is compounded by the deferential lens through which federal habeas courts must review *Batson* challenges under the AEDPA. As the district court noted, the theory urged by Haynes (and later adopted by the Fifth Circuit) was nothing more than "a

vehicle to remove this case from AEDPA deference." 2007 WL 268374, at *16 n.10; App., at 80.

The mistaken application of this Court's recent decision in *Snyder* warrants the special remedy of summary reversal. *See Purkett v. Elem*, 514 U.S. 765 (1995) (per curiam). Alternatively, the Court should grant the petition for writ of certiorari and reverse.

OPINIONS BELOW

The Fifth Circuit panel opinion granting habeas relief is reported as *Haynes v. Quarterman*, 561 F.3d 535 (CA5 2009) ("*Haynes II*"). App., at 1-12. The Fifth Circuit order denying Quarterman's timely petition for rehearing en banc is unreported. App., at 180-81.

The Fifth Circuit panel opinion certifiying appealability on the *Batson* challenge is reported as *Haynes v. Quarterman*, 526 F.3d 189 (CA5 2008) ("*Haynes I*"). App., at 13-40. The district court opinion denying the federal habeas petition is unreported. *Haynes v. Quarterman*, No. H-05-3424, 2007 WL 268374 (S.D. Tex. Jan. 25, 2007). App., at 41-133.

The orders of the Harris County District Court and the Texas Court of Criminal Appeals denying state habeas relief in this matter are unreported and unavailable online. App., at 134-53, 154-55.

This Court's order denying Haynes's petition for writ of certiorari to the Texas Court of Criminal Appeals on direct appeal is reported at *Haynes v. Texas*, 535 U.S. 999 (2002) (mem.).

The decision of the Texas Court of Criminal Appeals affirming the conviction and sentence on direct appeal

is unreported and unavailable online. *Haynes v. State*, No. 73,685 (Tex. Crim. App. 2001). App., at 156-79.

JURISDICTION

A panel of the United States Court of Appeals for the Fifth Circuit issued its decision granting habeas relief on March 10, 2009. The Fifth Circuit denied Quarterman's timely petition for rehearing en banc on June 2, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

"In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of

rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

STATEMENT OF THE CASE

Anthony Haynes is in prison for the 1998 capital murder of Houston Police Officer Kent Kincaid. Haynes shot Kincaid in the face after Kincaid, who was unarmed and not in uniform, told Haynes he was a police officer. Kincaid died hours later, leaving behind a wife and two young children.

Haynes confessed to shooting Kincaid and was subsequently tried for capital murder before Harris County District Judge Jim Wallace. Jury selection began on August 16, 1999 and consumed 17 days, during which time 118 prospective jurors were questioned by the prosecution and defense counsel. 1.RR.8-24. Judge Wallace presided at the beginning of the selection process, when the venire members were addressed and questioned as a group. For reasons unexplained in the record, Judge Lon Harper presided over the next stage, when the lawyers questioned the venire members individually. Judge Wallace then presided over the final stage of jury selection, when both sides exercised their peremptory strikes.

The State exercised four of its thirteen peremptory strikes on black venire members, including L.V. McQueen and Betty Owens. 22.RR.15. Haynes struck one of the two black venire members remaining, and the other served on the jury. 22.RR.16.

At the close of jury selection on September 13, Haynes—who is black—raised a *Batson* challenge to the State's four strikes of black venire members.

22.RR.14-15. Only the peremptory strike against Owens is at issue in this petition.

Under *Batson*, trial courts conduct a three-step process to assess challenges to peremptory strikes:

> [O]nce 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 strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Purkett, 514 U.S., at 767.

The prosecutor, Mr. Vinson, explained that he struck the first two black venire members because they expressed hesitation regarding imposition of the death penalty. App., at 184-86. Judge Wallace credited this explanation. App., at 185-86. The court also credited Vinson's explanation that he struck McQueen because his verbal responses and demeanor suggested he too was "very weak" on the death penalty. App., at 186-87.

Finally, the prosecutor explained that he struck Ms. Owens because of her demeanor during voir dire: she had a "humorous" attitude, her body language belied her verbal answers, and she was so friendly to defense counsel (Mr. Jones) that Vinson was "sure that Mr. Jones reasonably expected us to strike" Owens. App., at 187-88. 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. App., at 188. Jones also noted that the written questionnaire answers and verbal responses offered by Owens suggested she would be neutral or favorable toward the State. *Id.* After hearing the prosecutor's explanation and defense counsel's response, Judge Wallace accepted the prosecutor's reason for striking Owens. App., at 189.

Having overruled the *Batson* challenge, Judge Wallace seated the jury. Haynes was convicted of capital murder and sentenced to death. On direct appeal, the Texas Court of Criminal Appeals held that the record supported the prosecutor's reasons for striking the four black venirepersons. App., at 169-72.

The Court of Criminal Appeals separately addressed Haynes's complaint on appeal that Judge Wallace erred by adjudicating the *Batson* challenge when he had not presided over voir dire—an objection Haynes did not make at trial. The court rejected the argument that Judge Wallace's failure to observe voir dire categorically precluded him as a matter of law from evaluating the credibility of the prosecutor's asserted race-neutral reasons:

> We do not agree [] that a trial judge who did not witness the actual voir dire cannot, as a matter of law, fairly evaluate a *Batson* challenge. There are many factors which a trial judge—even one who did not preside over the voir dire examinations—can consider in determining whether the opponent of the peremptory strikes has met his burden. These include the nature and strength of the parties' arguments during the *Batson* hearing and the

> attorneys' demeanor and credibility. And, when necessary, a trial judge who has not witnessed the voir dire may refer to the record.

App., at 173-74. The court affirmed the conviction and sentence in all respects. This Court denied Haynes's petition for writ of certiorari on direct appeal.

After the Texas courts denied his state habeas claims, Haynes sought federal habeas relief under 28 U.S.C. § 2254. In a thorough opinion, U.S. District Judge Sim Lake rejected Haynes's various claims, including his *Batson* complaint:

> While it would be useful to have the same judge who viewed the prospective jurors' demeanor, facial expressions, and attitude rule on *Batson* issues, Haynes has not shown that the Constitution requires it. Instead, his claim seems to be a vehicle to remove this case from AEDPA deference. The Supreme Court has not held that 28 U.S.C. § 2254(e)(1) does not apply when the trial judge did not observe jury selection. Here, the trial court did not see the particular jurors, but still could observe and make credibility determinations about the prosecutor's motive in making the peremptory strikes.

2007 WL 268374, at *16 n.10; App., at 80.

The Fifth Circuit certified appealability as to the peremptory strikes of McQueen and Owens and subsequently granted habeas relief. Based on its reading of *Snyder*, the panel found what it termed a "*Batson* violation" as to Owens. *Haynes II*, 561 F.3d, at

541 n.2. But the panel did *not* conclude that the prosecutor struck Owens for racial reasons. Instead, it concluded that the trial court made its *Batson* ruling "from the cold paper record," and that "no court, including ours, can now engage in a proper adjudication of [Haynes's] demeanor-based *Batson* challenge . . . because we will be relying solely on a paper record." *Id.*, at 541. It also concluded that "we cannot . . . 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." *Id.* Having found a "*Batson* violation" as to Owens, the court below declined to consider Haynes's *Batson* complaint as to McQueen. *Id.*, at 541 n.2. It ordered the State to retry Haynes—who was convicted a decade ago—or release him. *Id.*, at 541.

REASONS FOR GRANTING RELIEF

I. THIS UNIQUE CASE MERITS SUMMARY REVERSAL.

Summary reversal is appropriate to "correct a clear misapprehension" of federal law. *Brosseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004) (per curiam). The Court has invoked this special remedy to address significant misinterpretations of *Batson* and federal habeas law in previous cases, *see Purkett*, 514 U.S., at 765, and it should do so in this case as well.

Here, as in *Purkett*, "the Court of Appeals did not conclude or even attempt to conclude that the state court's finding of no racial motive was not fairly supported by the record." *Id.*, at 769. Instead, the panel granted habeas relief to Haynes—who admitted guilt and was convicted by a properly selected jury—on

a novel theory that contradicts this Court's *Batson* precedents, conflicts with other federal and state courts, and ignores the AEDPA's restrictive lens through which federal habeas courts must view state court factual findings and legal conclusions.

Summary reversal would allow the Court to clarify the law in these important areas and prevent injustice in this case while conserving the Court's scarce resources. This remedy is especially appropriate here, to ensure that lower courts do not persist in misconstruing this Court's recent ruling in *Snyder*.

II. The Decision Below Defies This Court's Precedents.

A. The Decision Below Is a Significant Departure From This Court's *Batson* Jurisprudence.

Step three of *Batson* "involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" *Rice*, 546 U.S., at 338 (quoting *Purkett*, 514 U.S. at 768). In this case, the State's reasons for striking Owens and McQueen focused on their demeanor during voir dire. Judge Wallace observed firsthand the prosecutor's explanations for striking both prospective jurors and found those race-neutral explanations credible.

The court below held that Judge Wallace's *Batson* ruling was based solely on "the cold paper record" and was therefore invalid *per se*. *Haynes II*, 561 F.3d, at 541. That holding ignores the trial court's firsthand

observation of the most relevant demeanor—that of the attorney exercising the strike. *See Hernandez*, 500 U.S., at 365. It contradicts *Rice*, which recognizes that a trial court may credit a peremptory strike based on juror demeanor the trial court did not personally observe. 546 U.S., at 341. And it disregards both *Purkett* and *Batson* itself. In short, if the decision below was correct, then *Batson* and its progeny must all be wrong.

1. *Rice v. Collins*

In *Rice*, the Court upheld a peremptory strike that was partly based on juror demeanor (eye-rolling) the trial court acknowledged it did not observe. *See id.*, at 341-42. Although the trial judge might have rejected that explanation, given its inability to independently confirm the demeanor alleged by the prosecutor, this Court held that the trial court was not required to "conclude the prosecutor lied about the eye rolling":

> Viewing the panel majority's concerns together, the most generous reading would suggest only that the trial court had reason to question the prosecutor's credibility regarding Juror 16's alleged improper demeanor. That does not, however, compel the conclusion that the trial court had no permissible alternative but to reject the prosecutor's race-neutral justifications and conclude Collins had shown a *Batson* violation. Reasonable minds reviewing the record might disagree about the prosecutor's credibility, but on habeas review that does not suffice to supersede the trial court's credibility determination.

Id. The panel decision below cannot be squared with this conclusion in *Rice*—namely, that a trial court decision to credit a strike based on juror demeanor merits deference, even though the trial court did not personally observe the juror's demeanor.

2. *Hernandez v. New York*

This Court has long recognized that the demeanor of *counsel*—and not that of the jurors themselves—is generally the "best evidence" in assessing a race-neutral explanation at step three of *Batson*:

> [I]n the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge will be believed. There will seldom be much evidence bearing on that issue, and *the best evidence often will be the demeanor of the attorney who exercises the challenge.* As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."

Hernandez, 500 U.S., at 365 (citations omitted, emphasis added).

The lower court's conclusion that a trial judge cannot evaluate the credibility of a demeanor-based strike unless the judge observed the cited demeanor of the prospective *juror* ignores the point in *Hernandez* that the most relevant demeanor to observe is that of the striking *attorney*. *Haynes II*, 561 F.3d, at 540 ("[W]e read *Batson* to require the application of the trial court's observations of individual jurors if relevant

to the prosecutor's explanation."). Similarly, the panel's assertion that the trial court made the credibility determination entirely "from the cold paper record," *id.*, at 541, 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. As the district court correctly concluded, Judge Wallace "did not see the particular jurors [during voir dire], but still could observe and make credibility determinations about the prosecutor's motive in making the peremptory strikes." 2007 WL 268374, at *16 n.10; App., at 80.

3. *Purkett v. Elem*

Purkett, like this case, involved a lower court's misunderstanding of *Batson* in the habeas context. In that case, the court of appeals had interpreted this Court's statement that the race-neutral reason given at step two of a *Batson* hearing must be "related to the particular case to be tried," 514 U.S., at 768-69 (quoting *Batson*, 476 U.S., at 98), to conclude that a trial court may not proceed to the credibility evaluation at step three when a prosecutor offers irrelevant or implausible (but facially race-neutral) grounds at step two, *id.*, at 767. This Court rejected the court of appeals's interpretation of *Batson*:

> [T]o say that a trial judge *may choose to disbelieve* a silly or superstitious reason at step three is quite different from saying that a trial judge *must terminate* the inquiry at step two when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion

> regarding racial motivation rests with, and never shifts from, the opponent of the strike.

Id., at 768 (emphasis in original). Likewise, a trial court's failure to observe juror demeanor that is cited as a race-neutral basis for striking the juror may affect the credibility of counsel's explanation, but it does not render the court categorically ineligible to assess counsel's credibility. The Fifth Circuit ignored *Purkett*'s identification of the trial court as the ultimate arbiter of credibility in *Batson* challenges.[1]

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1. Significantly, the dissent in *Purkett* noted that either an appellate court or "a trial court" (as opposed to *the* trial court, *i.e.*, the convicting court) can make a step three credibility finding if the trial court prematurely terminated the *Batson* inquiry:

> [A] new problem arises when [the Court of Appeals] (or, as in today's case, this Court) conducts the step-two inquiry and decides that the prosecutor's explanation was sufficient. Who may evaluate whether the prosecutor's explanation was pretextual under step three of *Batson*? Again, I think the question *whether the Court of Appeals decides, or whether it refers the question to a trial court,* should depend on the state of the record . . . .

514 U.S., at 776 (Stevens, J., dissenting) (emphasis added). If a different trial court judge or an appellate court may make a *Batson* credibility determination in the first instance based solely on the appellate record, then surely a trial court may rely on its own firsthand observation of the "best evidence" of credibility—the demeanor of counsel in explaining the reason for the strike.

4. *Batson v. Kentucky*

Batson stated that a court adjudicating a challenge to peremptory strikes must use "such circumstantial and direct evidence of intent *as may be available.*" 476 U.S., at 93 (emphasis added). In this case, the trial court considered the available evidence, which included its firsthand observation of the "best evidence"—the prosecutor's explanation and demeanor. *Batson* does not require more; indeed, the Court's disposition in that case further refutes the Fifth Circuit's reasoning.

The eponymous Mr. Batson was convicted of theft several years before his case reached the Supreme Court.[2] The prosecutor did not provide any race-neutral reasons for the peremptory strikes at issue, for the obvious reason that the law in effect at time of trial did not require any such explanations. *Id.*, at 100. The Court established such a right for the first time in *Batson*. Yet the Court did not award Batson himself a new trial. The Court instead remanded the case to give the prosecutor an initial opportunity to provide

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2. It is not clear what year Batson was tried. The Court's opinion does not indicate the year of trial, and the decisions below were unpublished and are unavailable online. Media sources report the year of conviction as either 1982 or 1983. *Man Whose Conviction Overturned By U.S. Supreme Court Pleads Guilty*, AP ONLINE, Oct. 30, 1986, *available at* 1986 WLNR 1436129 (1982 conviction); *When it Comes to Race, Batson Case Rules*, dallasnews.com, Jan. 24, 2006, http://www.dallasnews.com/sharedcontent/dws/news/longterm/stories/082105dnprobaston.7d30537f.html (1983 conviction). Batson's own certiorari petition indicates he was tried in 1984. The difference between the reported dates is not significant.

race-neutral reasons. *Id.* Notably, the Court did not state that only the original trial judge could assess the legitimacy of those reasons (presumably because that judge might not have been available in any event).[3]

Even assuming the original trial judge had been available, that judge hardly could have been expected to recall the demeanor of prospective jurors struck before trial several years earlier. Given that *Batson* provided the first practical method to challenge peremptory strikes on racial grounds, the trial judge had little reason to note—let alone recall years later—the demeanor of every venireperson struck before Batson's trial. By nevertheless remanding to assess the legitimacy of those strikes, rather than granting Batson a new trial, the Court rejected the remedy imposed by the court below in this case.

* * *

The panel opinion cited several decisions recognizing that the "presumed observation" of prospective jurors in voir dire by trial judges supports the great deference that their *Batson* credibility determinations merit on appeal. *Haynes II*, 561 F.3d, at 541 (citing, inter alia, *Rice*, 546 U.S., at 336). But there is a significant difference between relying on a trial court's observation of the venire as a *sufficient* basis for deferring to its credibility determination, on the one hand, and declaring such trial-court observation *necessary* to adjudicate the legitimacy of a

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3. No *Batson* hearing was held on remand because Batson pleaded guilty following the Court's decision. AP ONLINE, *supra* note 2.

demeanor-based strike, on the other hand—especially considering that the "best evidence" on the issue (the statements of the attorney) will always be available to the trial court. As the federal district court explained: "While it would be useful to have the same judge who viewed the prospective jurors' demeanor . . . rule on *Batson* issues, . . . the Constitution [does not] require[] it." 2007 WL 268374, at *16 n.10; App., at 80.

B. Both the Fifth and Seventh Circuits Have Misinterpreted *Snyder v. Louisiana*.

To support its novel holding, the Fifth Circuit relied primarily on *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008). But *Snyder* never suggested that *Batson* entitles a defendant to a new trial in the absence of any finding of improper motive. The misreading of *dicta* in *Snyder* by both the Fifth and Seventh Circuits has caused both courts to undermine established practices for assessing *Batson* challenges.

At Snyder's state-court trial, two race-neutral reasons for striking a juror were given: one involving the juror's "nervous" demeanor, and the other involving his teaching obligations. *Id.*, at 1208. The trial court overruled Snyder's *Batson* objection without comment. *Id.* This Court found the teaching-related reason pretextual, *id.*, at 1209-12, but not the demeanor-based reason. However, the Court declined to presume that the trial court credited the demeanor-based explanation when the trial court's conclusory ruling could reflect its choice to rely entirely on the teaching-related explanation. *Id.*, at 1209. That holding does not apply to this case, in which no court has found the prosecutor's sole reason—which was based "entirely on

demeanor"—pretextual. 561 F.3d, at 539. By applying *Snyder* far beyond its narrow holding, the Fifth Circuit—like the Seventh—has significantly altered *Batson* protocol as to demeanor-based strikes.

The *Snyder* majority asserted that its holding did not abandon the established principle that trial courts' credibility determinations involving strikes based on juror demeanor are entitled to great deference:

> [R]ace-neutral reasons for peremptory challenges often invoke a juror's demeanor (*e.g.*, nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, 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.* We have recognized that these determinations of credibility and demeanor lie "'peculiarly within a trial judge's province,' and we have stated that 'in the absence of exceptional circumstances, we would defer to [the trial court].'"

Id., at 1208 (emphasis added) (quoting *Hernandez*, 500 U.S., at 365-66). This *dicta* was presumably intended simply to reaffirm appellate deference to trial court credibility findings, in response to the dissent's criticism that the majority was "only paying lipservice to the pivotal role of the trial court." *Id.*, at 1213 (Thomas, J., dissenting). But the Fifth Circuit read it to *eliminate* such deference in certain circumstances.

The court below read *Snyder* as a sweeping decision that precludes trial courts from determining the legitimacy of demeanor-based peremptory strikes whenever "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." *Haynes I*, 526 F.3d, at 199; *see also Haynes II*, 561 F.3d, at 540 (interpreting *Batson* to require "the trial court's observations of individual jurors if relevant to the prosecutor's explanation."). But "*Snyder* said no such thing." *People v. Bramit*, 210 P.3d 1171, 1184 n.7 (Cal. 2009). *Snyder* held only that a court reviewing a *Batson* challenge to a strike dually justified on both sincere and pretextual grounds may not assume that the trial court credited the valid reason, instead of the pretexual one, if the trial court did not specify its basis for overruling the challenge. 128 S. Ct., at 1209.

The Eighth Circuit, like the California Supreme Court, recognizes that *Snyder* does not require trial courts to make findings on juror demeanor when considering a *Batson* challenge to a demeanor-based strike. *See Smulls v. Roper*, 535 F.3d 853, 860-61 (CA8 2008). The Seventh Circuit, however, reads *Snyder*'s dicta as requiring trial courts to make such explicit findings—even if (unlike in *Snyder*) the demeanor-based reason was the *sole* race-neutral reason given. *See United States v. McMath*, 559 F.3d 657, 661, 665-66 (CA7 2009). The Sixth Circuit had adopted a similar rule even before *Snyder*. *See McCurdy v. Montgomery Co.*, 240 F.3d 512, 521 (CA6 2001) (upholding denial of demeanor-based *Batson* challenge only "because the district court did not merely credit

the explanation of the County," but specifically "found that [the juror] was passive and disinterested").

Snyder supports neither the Fifth Circuit's novel *Batson* rule nor the similar approach taken by the Seventh and Sixth Circuits. Summary reversal is warranted because those circuits (and likely other courts) will continue to misread *Snyder* until the Court clarifies its decision.

III. The Decision Below Conflicts With the Established Practice of Numerous Courts Nationwide That Routinely Order *Batson* Hearings Before Judges Other Than the Original Trial Judge.

Federal appellate courts routinely remand cases originally tried in state court for *Batson* hearings before federal district courts. *See Jordan v. Lefevre*, 293 F.3d 587, 593 (CA2 2002) ("When the *Batson* claim is asserted by a state prisoner petitioning for habeas corpus in federal court, if the state court has not performed this task adequately, the responsibility for assessing the prosecutor's credibility and determining his intent falls on the [federal] district judge."). In those circumstances, the *Batson* challenge is heard by a judge who did not observe voir dire. *See Harris v. Haeberlin*, 526 F.3d 903, 912-14 (CA6 2008); *Brinson v. Vaughn*, 398 F.3d 225, 235 (CA3 2005) (per Alito, J.); *Fernandez v. Roe*, 286 F.3d 1073, 1080 (CA9 2002); *Rosa v. Peters*, 36 F.3d 625, 635 (CA7 1994); *Wilson v. Jones*, 902 F.2d 923, 924 (CA11 1990). The Fifth Circuit's blanket rule conflicts with the view of the six

federal circuits that remand cases tried in state courts for *Batson* hearings before federal judges.[4]

Nor is this conflict latent. The Second Circuit has repeatedly rejected the notion that a judge other than the original trial judge cannot adjudicate a *Batson* hearing on remand involving demeanor-based challenges. *See Guzman v. Duncan*, No. 02-2405, 74 F. App'x 76, 78 (CA2 2003) (unpublished) ("In this case, the reconstruction judge, in addition to finding a clearly articulated reason in the record for the prosecutor's exercise of these two [demeanor-based] challenges, had the opportunity to assess the prosecutor's demeanor as he discussed the other three jurors."), *cert. denied*, 540 U.S. 1119 (2004); *Bryant v. Speckard*, 131 F.3d 1076, 1078 (CA2 1997) (rejecting

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4. Several state appellate courts have also squarely rejected the Fifth Circuit's premise that the *Batson* judge must have personally observed voir dire. *See, e.g., State v. McCord*, 582 S.E.2d 33, 36 (N.C. Ct. App. 2003) ("While the trial judge presiding over the *Batson* hearing in this case was not the same judge who presided over jury selection, he still had the ability to observe the testimony of the prosecutor firsthand."); *People v. Mack*, 538 N.E.2d 1107 (Ill. 1989) (affirming trial court's determination that State's race-neutral reasons for striking jurors were credible (including 5 based on demeanor), although *Batson* judge had not observed voir dire). The California Supreme Court has expressly relied on the federal courts' use of "reconstruction hearings" to conclude that the original trial judge need not preside over a *Batson* hearing on remand. *See People v. Johnson*, 136 P.3d 804, 807 (Cal. 2006) ("Every time a hearing is held in federal district court on habeas corpus review of a state case the hearing will be before someone other than the state trial court judge.").

claim that "reconstruction judge," who had not observed voir dire, could not make credibility determination regarding demeanor-based strike), *cert. denied*, 524 U.S. 907 (1998); *Brown v. Kelly*, 973 F.2d 116, 121 (CA2 1992) (holding that federal district court could, six years after trial, fairly evaluate demeanor-based reasons for striking prospective jurors).

Even when a case is remanded to state court for a *Batson* hearing, the passage of time may make it unlikely that the original trial judge will still be available to make the credibility determination on remand. But that reality has not prevented federal appeals courts from ordering reconstruction hearings instead of new trials.[5] *See, e.g.*, *Coulter v. Gilmore*, 155 F.3d 912 (CA7 1998) (remanding for *Batson* hearing in state court 11 years after voir dire). In one case, the Second Circuit upheld the district court's conclusion that the state courts erred in finding no prima facie *Batson* violation, but vacated the district court's order granting a new trial and instead remanded for a reconstruction hearing, 15 years after the trial, even though the trial judge had since retired. *See Harris v. Kuhlmann*, 346 F.3d 330, 347-49 (CA2 2003).

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5. Nor has the passage of intervening years kept federal habeas courts from remanding cases tried in state courts for *Batson* hearings in federal district court, sometimes decades later. *See, e.g.*, *Jones v. West*, 555 F.3d 90, 102 (CA2 2009) (remanding for *Batson* hearing 10 years after defendant's trial); *Hardcastle v. Horn*, 368 F.3d 246, 261-62 (CA3 2004) (remanding for *Batson* hearing 22 years after trial).

IV. The Decision Below Threatens To Dramatically Complicate Jury Selection Procedures.

The premise underlying the decision below is that a trial court cannot fairly consider a *Batson* challenge to a peremptory strike based on juror demeanor if the court did not observe the demeanor cited. *Haynes II*, 561 F.3d, at 540-41. But this reasoning cannot be squared with the many federal and state decisions recognizing that a trial judge who did not personally observe a juror's demeanor or other non-verbal behavior that is the stated ground for peremptory dismissal may nonetheless consider—and overrule—a *Batson* challenge. *See Rice*, 546 U.S., at 341-42; *United States v. Maxwell*, 473 F.3d 868, 872 (CA8 2007); *State v. Robinson*, 724 N.W.2d 35, 60 (Neb. 2006); *State v. Higginbotham*, 917 P.2d 545, 548 (Utah 1996); *People v. Munson*, 662 N.E.2d 1265, 1275 (Ill. 1996); *but see Dorsey v. State*, 868 So.2d 1192 (Fla. 2003).

Peremptory challenges are often based on "subtle, intangible impressions." *McCrory v. Henderson*, 82 F.3d 1243, 1248 (CA2 1996). Even when a juror's behavior or demeanor is "related in good faith, [it] may simply not have been seen by . . . the court," or "might not even be present by the time it is called to the court's attention." *Robinson*, 724 N.W.2d, at 60. A rule limiting demeanor-based peremptory strikes to only those involving juror demeanor observed by the trial court would "require[] a trial judge to constantly scan the trial proceedings with eyes like an eagle." *Hatten v. State*, 628 So.2d 294, 297 (Miss. 1993).

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. In *Snyder*, the Court noted that a passage of a *single day* between voir dire and the *Batson* hearing may have caused the trial court to forget a prospective juror's demeanor. 128 S. Ct., at 1209. In this case, nearly a month passed between the start of voir dire and the *Batson* hearing, with 118 jurors questioned individually over 17 days.[6] 1.RR.8-30. It would blink reality to expect trial courts to observe and recall every specific instance in which a prospective juror displayed eye contact (or lack thereof), inattention, hostility, boredom, levity, or any number of behaviors or emotions that may prompt a legitimate peremptory strike. Neither the Constitution nor common sense justifies placing such a heavy burden on trial courts.

The Fifth Circuit's reasoning would also preclude remanding for a *Batson* hearing any time the original trial judge has since retired, *see Guzman*, 74 Fed. App'x, at 77 n.1; joined the appellate bench, *see Johnson*, 136 P.3d, at 807; died, *see Brinson*, 398 F.3d, at 228; or simply cannot recall particular instances of demeanor that prompted a peremptory strike years ago. Indeed, a new trial would have to be awarded almost any time a lower court is found to have erred in

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6. The individual voir dire of Ms. Owens took place six days before the *Batson* hearing, with a dozen venire members questioned in the interim. 1.RR.22-24, 30.

applying *Batson*. Because the Fifth Circuit's rule is unworkable and contrary to this Court's precedents, the Court should reverse the decision below.

V. THE REFUSAL OF THE COURT BELOW TO APPLY AEDPA DEFERENCE WARRANTS SUMMARY REVERSAL.

Although it acknowledged the AEDPA's applicability to Haynes's habeas petition, the Fifth Circuit gave no deference to the state court's *Batson* ruling—as to either its legal conclusion or its factual determination. *Haynes II*, 561 F.3d, at 538, 541. In so doing, the court below ignored both relevant prongs of the AEDPA. *See* 28 U.S.C. § 2254(d)(1), (e)(1).

A. The Decision Below Applies a New *Batson* Rule in Violation of the AEDPA's Anti-Retroactivity Principle.

Under the AEDPA, a federal court can act only when a state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). But the trial judge's relevant legal conclusion—that his absence from voir dire did not preclude him from hearing Haynes's *Batson* challenge—was not "opposite to that reached by this Court on a question of law." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). Rather, it is the decision below that is contrary to established federal law—the interpretation of both *Batson* and the AEDPA.

Any analysis under § 2254(d)(1) must be based on law that was clearly established "at the time the state

court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). Here, the relevant cutoff is September 1999—when the trial court overruled the *Batson* challenge. Further, "clearly established law as determined by this Court 'refers to the holdings, as opposed to the dicta, of this Court's decisions.'" *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004) (quoting *Williams*, 529 U.S., at 412). No holdings of this Court—let alone its pre-2000 holdings—support the decision below. *See supra* Part II(A).

The Fifth Circuit certified appealibility of Haynes's *Batson* claims "in light of the Supreme Court's decision in *Snyder*," *Haynes I*, 526 F.3d, at 200, and granted habeas relief based on *Snyder*, *Haynes II*, 561 F.3d, at 540-41. But *Snyder* was decided nearly a decade after Haynes's trial. As in *Smulls*, "*Snyder* was not clearly established law at the time of the state courts' rejection of [Haynes's] *Batson* claim and cannot provide the basis for habeas relief under § 2254(d)(1)." *Smulls*, 535 F.3d, at 861. The panel's reliance on *Snyder* blatantly ignores the AEDPA's anti-retroactivity principle.

As the federal district court correctly stated, a trial court's firsthand observation of voir dire is helpful in evaluating a demeanor-based *Batson* challenge, but this Court has never held that the Federal Constitution requires it. 2007 WL 268374, at *16 n.10; App., at 80. Significantly, 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. By gauging the trial court's legal analysis using *dicta* mostly from

Texas and Fifth Circuit decisions, instead of Supreme Court holdings in effect in 1999, the court below ignored the AEDPA's mandate defining the relevant yardstick as "clearly established" federal law. *See, e.g.*, *Yarborough*, 541 U.S., at 660-61.

B. The Court Below Ignored the Deference to a State Court Factual Determination of Credibility Required by the AEDPA.

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.

"The credibility of the prosecutor's explanation goes to the heart of [*Batson*'s] equal protection analysis." *Hernandez*, 500 U.S., at 367. The "ultimate question" of whether the strikes at issue were motivated by discriminatory intent is a "pure issue of fact"; thus, even in cases not subject to the AEDPA's restrictive lens, the trial court's credibility determination is "accorded great deference on appeal." *Id.*, at 364; *see id.*, at 372 (O'Connor, J., concurring). And for cases (like this one) to which the AEDPA applies, the trial court's credibility determination at step three must be "presumed correct absent clear and convincing evidence to the contrary." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003); *see* 28 U.S.C. § 2254(e)(1).

Haynes did not offer such evidence, nor did the Fifth Circuit require any in disregarding the state court's factual finding. Instead, the panel concluded that AEDPA deference was unwarranted "because the state courts engaged in pure appellate fact-finding for an issue that turns entirely on demeanor." 561 F.3d, at 541. Its focus on the jurors' demeanor ignores not only the trial court's observation of the prosecutor's demeanor, but also the AEDPA's restrictive lens. As the federal district court noted, this Court "has not held that 28 U.S.C. § 2254(e)(1) does not apply when the trial judge did not observe jury selection."[7] 2007 WL 268374, at *16 n.10; App., at 80.

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7. Nor can the Fifth Circuit's decision be justified by its erroneous statement that the Court of Criminal Appeals "concedes there was no trial fact-finding." 561 F.3d, at 541. The fact-finding discussed by the Texas appellate court related to "the demeanor of the veniremembers at issue"—a subject as to which the trial court neither made, nor was required to make, specific findings. *Id.* (quoting *Haynes v. Texas*, App., at 173). The factual finding relevant to Haynes's *Batson* claim was the trial court's credibility determination, which is entitled to a presumption of correctness under the AEDPA. 28 U.S.C. § 2254(e)(1). The Court of Criminal Appeals did not make any factual findings that contradicted the trial court's credibility determination, and it upheld the trial court's *Batson* ruling in its entirety. App., at 173-74. Whatever statements the Court of Criminal Appeals made regarding the deference *it* applied on direct appeal to the trial court's hypothetical findings regarding the veniremembers' demeanor are irrelevant under the AEDPA, which required the Fifth Circuit to defer to the trial court's factual determination that the prosecutor's race-neutral reason for striking Owens was credible.

The Fifth Circuit's misunderstanding of § 2254(e)(1) originates in its misconception of the relevant factual inquiry. The court below viewed the issue at *Batson*'s step three as whether the juror actually exhibited the demeanor alleged. *Haynes II*, 561 F.3d, at 541 ("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."). But 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." *Miller-El*, 537 U.S., at 339; *see Snyder*, 128 S. Ct. at 1207-08; *Rice*, 546 U.S. at 338; *Hernandez*, 500 U.S. at 367.

The *Batson* burden of proving discrimination never shifted from Haynes, *see Rice*, 546 U.S., at 338, nor did the AEDPA burden of rebutting the trial court's factual determination with "clear and convincing" evidence, 28 U.S.C. § 2254(e)(1). The Fifth Circuit's decision eliminating both burdens is supported by neither the text of the AEDPA nor the Court's AEDPA precedents. The Court should not let the decision below stand.

CONCLUSION

The Court should summarily reverse the judgment of the Court of Appeals and remand for that court to address Haynes's *Batson* challenge, giving appropriate AEDPA deference to the trial court's ruling. In the alternative, the Court should grant the petition for writ of certiorari and reverse the judgment below.

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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