No. 13-494

IN THE

Supreme Court of the United States

GEORGE BRETT WILLIAMS,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

REPLY BRIEF

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether, as some courts have held, reviewing courts are required to accord "great deference" to unexplained *Batson* rulings where the trial court does not demonstrate on the record that it has evaluated "all of the circumstances that bear upon the issue of discrimination," or whether, in light of *Snyder* and as other courts have held, reviewing courts should not defer to the trial court's unexplained determination of a *Batson* objection?

2. Whether a reviewing court may defer to a trial court's *Batson* ruling where the trial court acknowledges that it is unable to independently evaluate the prosecutor's contested, demeanor-based explanation and denies a *Batson* motion by simply accepting the prosecutor's stated reason after observing that it comports with racial and gender stereotypes the judge believes to be true?

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INTRODUCTION

The prosecutor struck the first five African-American women prospective jurors in Mr. Williams's capital trial venire for virtually identical reasons. App. 166a, 168a, 171a, 177a, 180a, 184a. The strikes prompted three *Batson* motions, which the trial court denied. *Id*. at 24a. *See Batson v. Kentucky*, 476 U.S. 79 (1986). Admitting that it could not recall at least two of the jurors—beyond noting that the prosecutor's challenges comported with the racial and gender stereotypes the trial court believed to be true—the trial court ruled without explanation. App. 178a, 187a. Finding "no bias on the trial court's part," a majority of the California Supreme Court held that deference to the trial court's unexplained rulings was proper because "the prosecutor's stated reasons are both inherently plausible and supported by the record." *Id*. at 30a.

One dissenting Justice below observed that the majority had placed the California Supreme Court on the "wrong side" of the "split of authority among federal and state courts on the adequacy" of unexplained *Batson* rulings. *Id*. at 162a (Liu, J., dissenting). The other dissenting Justice declared that deference to the trial court's unexplained *Batson* decisions was unwarranted because "[t]he egregious circumstances of the present case" "amply establish" that the trial court failed to undertake a proper *Batson* step three analysis." *Id*. at 110a-11a.

Against this backdrop, Respondent rewrites the Questions Presented. Brief in Opposition ("BIO") i. Conceding that at least two of the trial court's *Batson* denials were unexplained, Respondent nevertheless posits that the issues do

not merit review by this Court because the trial court "appear[ed] to understand that it must assess the credibility of the prosecutor" at step three of the *Batson* inquiry, BIO i, and because Respondent infers an assessment from its reading of the record and identification of facts that might support some of the reasons offered by the prosecutor for his strikes. *Id.*

This Reply will demonstrate that Respondent engages in wholesale avoidance of the issue that is at the core of the split of authority squarely presented in this case: whether unexplained *Batson* rulings require appellate deference. This Reply will also show that Respondent mischaracterizes the record and relies on speculation and inference to describe what (in Respondent's view) the trial court supposedly understood. In so doing, Mr. Williams reveals that Respondent's arguments vividly illustrate the problems that ensue when trial courts make and appellate courts defer to unexplained *Batson* rulings, and underscore the need for certiorari review.

ARGUMENT

A. The Trial Court's Failure to Explain its *Batson* Rulings and the State Court's Deference to those Rulings Place the California Supreme Court Squarely on One Side of the Split of Authority.

1. Respondent concedes the circuit split but fails to address it.

In reframing the first Question Presented, Respondent concedes that the trial court "does not proffer an explanation for [its] denial" of the *Batson* motions. BIO i. This admission is fatal to Respondent's argument that Mr. Williams's case does not present an issue meriting review by this Court. And the majority's deference to the trial judge's unexplained rulings situates the California Supreme Court firmly on one side of the split in authority. *See* App. 162a (Liu, J., dissenting).

Respondent assiduously deflects attention away from the trial court's failure to explain its *Batson* rulings to the issue of whether the trial court "understood" its duty at step three of the *Batson* inquiry. *See* BIO i (asserting that the trial court "appears to understand that it must assess the credibility of the prosecutor").

Respondent also departs from the majority's reasoning. Whereas the majority combed the record in search of facts from which it could infer that the prosecution's justifications for his strikes "were not inherently implausible," App. 31a, Respondent instead scrutinizes the trial court's statements to infer that the trial court understood its *Batson*

obligations and assessed the prosecutor's credibility. *See, e.g.*, BIO 15-17. And only by resorting to sheer speculation about what the trial judge might have been thinking—speculation this Court rejected in *Snyder v. Louisiana,* 552 U.S. 472 (2008)—does Respondent construct an imagined assessment. The fact that the majority and Respondent adopt divergent approaches in their attempts to show that the trial court complied with *Batson*, and that both efforts are predicated on speculation, inference and presumption, confirms what Respondent ignores: this case, with its unexplained *Batson* rulings and the deference afforded them on appeal, not only presents an issue that has deeply divided appellate courts, but also exemplifies how discrimination is allowed to prevail when appellate courts defer to such rulings.

Respondent's struggle to tease from the record proof that the trial court understood its *Batson* duties is misguided.[1] The issue is not whether the trial court understood its obligation at *Batson*'s step

[1] Respondent argues that the trial court's comment when it denied the first *Batson* motion—"I have to say that I did have some of them marked that I expected to be exercised on," App. 167a—shows that the trial court understood its step three obligation and, presumably, applied that understanding when it ruled on the strikes of Jurors Payton and Jordan. *See* BIO 4, 15. But to which jurors is the court referring: the three African-American women the prosecutor challenged; the jurors it surmised would be struck by the defense; or other jurors whom it flagged but the parties did not? *See People v. Mai*, 56 Cal. 4th 989, 1062 (2013) (Liu, J., concurring) (noting the "massive pile of presumptions" a reviewing court makes in deferring to a trial court's unexplained *Batson* ruling).

three, but whether the trial court *met* that obligation and did so in a manner sufficiently transparent to warrant deference by a reviewing court. *See Miller-El v. Dretke*, 545 U.S. 231, 252 (2005) ("*Miller-El II*") (relying on *Batson*, 476 U.S. at 96-97) (requiring that, at step three, the trial court "assess the plausibility of [the prosecutor's] reason in light of all evidence with a bearing on it"); *Miller-El v. Cockrell*, 537 U.S. 322, 338-39 (2003) (holding that *Batson*'s inquiry culminates at step three where the "critical question" to be decided by the trial court "is the persuasiveness of the prosecutor's justification for his peremptory strike").

2. This case presents a clear record from which this Court can resolve the split in authority.

Respondent asserts that California Supreme Court precedent aligns with this Court's jurisprudence with regard to the circumstances that trigger appellate deference and that, therefore, this case is not appropriate for certiorari review. *See* BIO 20 (quoting the requirement in *People v. Silva*, 25 Cal. 4th 345, 385-86 (2001) that a trial court must make "the sincere and reasoned attempt to evaluate each stated reason").[2] While paying lip service to the

[2] Respondent later argues that "even assuming the California Supreme Court's precedent is in conflict with this Court's precedent . . .," certiorari is unwarranted. BIO 21-22. In so arguing, Respondent adopts the majority's flawed approach to deference in which the Court "scours the record for statements by the struck jurors that might support the prosecutor's explanations" even where, as here "the prosecutor

language in *Silva*, Respondent ignores the shift in the state supreme court's approach from one obligating the trial court to explain its step three ruling to one that is satisfied if the reviewing court finds that "the prosecutor's stated reasons are both inherently plausible and supported by the record." *People v. Reynoso*, 31 Cal. 4th 903, 923 (2003). For the approach pre-dating *Reynoso*, which required more than a summary denial to warrant deference, *see, e.g., People v. Fuentes,* 54 Cal. 3d 707, 716, n.5 (1991) (holding that deference is appropriate only "when the trial court has clearly expressed its findings and rulings and bases therefor"); *see also People v. Mai*, 57 Cal. 4th at 1067-76 (Liu, J., concurring) (tracing the erosion of the California Supreme Court's rule from one that afforded deference only to explained step three rulings to one that is grounded in "unwarranted deference, speculative inference and overreliance on gap-filling presumptions").

Mr. Williams's case presents an even more compelling basis for withholding deference than *Snyder*. There, the trial judge made no comment about the prosecution's demeanor-based reason, which led this Court to observe "it is possible" to infer several versions of the trial judge's thinking, some incompatible with the judge's duty at step three of the *Batson* inquiry. 552 U.S. at 479. The Court held that deference under such circumstances was unjustifiable because "the record does not show that the trial judge actually made a determination concerning [the juror's] demeanor . . . For these

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did not specifically rely on any of the statements that the court cites." App. 151a (Liu, J., dissenting).

reasons, we cannot presume that the trial judge credited the prosecutor's assertion that [the juror] was nervous." *Id.*

Here the trial court admitted it had no memory of either Ms. Payton or Ms. Jordan and so had no basis on which to assess the prosecutor's reasons for striking them. *See* App. 178a-179a (trial court stating, "I don't have anything on [Retha Payton] . . . but I would accept [the prosecutor's explanation]"); *id.* at 187a (trial court stating, "I cannot say anything about [Ruth Jordan]. I can only go by what [the prosecutor] is saying because I stopped making notes . . . ."). *See also id.* at 174a, 182a.

As Justice Werdegar observed in dissent, the record "amply establish[es] that the trial court failed to make the 'sincere and reasoned attempt to evaluate each stated reason' required for appellate deference under . . . *Silva* . . . ." App. 111a (citation omitted). *Accord id.* at 112a (Liu, J., dissenting) (stating "there is no indication that the trial court made a sincere and reasoned effort to evaluate 'all of the circumstances that bear upon the issue' of purposeful discrimination") (quoting *Snyder*, 552 U.S. at 478).

According to Respondent, this Court's decision in *Thaler v. Haynes*, 559 U.S. 43 (2010) (per curiam), "foreclose[s]" Mr. Williams's argument that "the trial court's failure to remember Payton's and Jordan's demeanor during voir dire indicates that the court did not undertake a proper analysis." BIO 18 n.5. Respondent stretches *Haynes* well beyond its narrow holding and misapprehends Mr. Williams's position.

Haynes was decided within the confines of the Antiterrorism and Effective Death Penalty Act ("AEPDA"), specifically 28 USC sec. 2254(d)(1).[3] 559 U.S. at 47. The question before the Court in *Haynes*, which it answered in the negative, was whether, under clearly established Supreme Court law, "a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor." *Id*. at 48. The circumstances of the jury selection in *Haynes*—one judge presided over the voir dire, another over the exercise of peremptory challenges—were unlike those in *Snyder*, and the Court accordingly "had no occasion to consider how *Batson* applies" in the *Haynes* scenario. *Id*. Mr. Williams's case is before this Court on direct appeal and so involves questions of deference normally afforded to trial court *Batson* rulings by reviewing courts. *See Snyder,* 552 U.S. at 477 *(*citing *Hernandez v. New York*, 500 U.S. 352, 365 (1991)). This difference, ignored by Respondent, was decisive in the Court's rejection of the "categorical rule" adopted by the federal appellate court. *Haynes*, 559 U.S. at 49.

This Court remarked in *Haynes* that "the best evidence of the intent of the attorney exercising a strike is often that attorney's demeanor." 559 U.S. at 49. The Court's reference to the potential relevance of the attorney's demeanor does not strengthen Respondent's hand because the trial court here never evaluated the prosecution's

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[3] *See Haynes*, 559 U.S. at 49 n.2 (observing that *Snyder* was decided "nearly six years after [Thaler's] conviction became final and more than six years after the relevant state-court decision").

demeanor.[4] Rather, the trial court stated that, having no recollection of either Ms. Payton or Ms. Jordan, it could "only go by" the prosecutor's proffered reason. App. 174a, 178a, 187a. This comment is neither a finding that the prosecutor "credibly relied" on the jurors' demeanor nor a determination that the trial court credited the prosecutor's demeanor. Indeed, when viewed in light of the entire record, the trial court's remark—that it could "only go by" the prosecutor's explanation for striking African-American women—reflected its understanding that the prosecutor shared the belief it later voiced: "black women are very reluctant to impose the death penalty." App. 187a.

Further, while *Haynes* clarified *Snyder*'s reach in the context of federal habeas review, it also reiterated *Batson*'s holding that the trial judge must "'undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" 559 U.S. at 48 (internal quotation marks and citations omitted). The Court observed that this "general requirement" was affirmed in *Miller-El II*, 545 U.S. at 239 and *Johnson v. California*, 545 U.S. 162, 170 (2005). *Id.* On the merits, Mr. Williams claims that the trial judge did not fulfill its duty at step three. For purposes of certiorari review, the question is whether deference

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[4] Respondent rightly stops short of claiming that the trial court in fact assessed the prosecutor's credibility. Instead, Respondent speculates that the trial court "*could* consider" certain facts upon which it "*could* find" the prosecutor credible. BIO 24-25 (emphasis added) (invoking the prosecutor's reference to voir dire notes and transcripts). In so doing, Respondent highlights the uncertain inferences spawned by unexplained *Batson* rulings.

is required when the trial court fails to demonstrate that it engaged in *Batson*'s step three credibility determination. This Court's holding in *Snyder*, which *Haynes* did not alter, should lead the Court to answer "no."

B. Respondent's Attempts to Expand the Prosecutor's Justification Beyond Demeanor Misstate the Record and Exemplify the Likelihood that Discrimination Will Prevail When Deference is Afforded Unexplained *Batson* Decisions.

The record does not support Respondent's claim that the prosecutor ultimately relied on non-demeanor justifications for striking Retha Payton and Ruth Jordan.

With respect to Ms. Payton, Respondent fails to mention that while the prosecutor initially relied on both her "answers" and demeanor to defend his strike, after defense counsel rebutted his assertion that Ms. Payton's answers reflected a hesitancy to impose the death penalty, App. at 176a-177a, the prosecutor expressly disavowed that his reason for striking Ms. Payton's rested on her answers:

> It was just my impression she didn't have the ability *in spite of what her answers were* . . . . It *clearly isn't* from the words that are written down. It was my general impression from the way she answered the questions, *not what she said*.

Id. at 177a (emphasis added). *See also* App. 141a (Liu, J., dissenting) (consulting the voir dire transcript "resulted in the prosecutor admitting that his perception of [Payton's] reluctance "clearly" wasn't supported by "the words that are written down").

Nor did the prosecutor rely on a non-demeanor justification for striking Ruth Jordan. Respondent's claim to the contrary, *see* BIO 9, 21-22, fails because Respondent disregards two key record facts. First, the prosecution referred only in passing to Ms. Jordan's "responses," App. 181a, and her "answers to the questions," *id.* at 184a; he never identified a single word, phrase, or even partially-formed thought expressed by Ms. Jordan that prompted him to conclude that she was unable to "impose the death penalty on any case." *Id.*[5] Second, the prosecutor retreated again to a demeanor-based justification when challenged by defense counsel. After the prosecutor asserted that Ms. Jordan's strike "has to do with her responses," App. 182a, defense counsel countered that he had "heard nothing wrong with . . . Miss Jordan," *id.* at 183a. Replying, the prosecutor moved away from the juror's responses and again relied solely on demeanor to justify his strike:

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[5] In fact, Ms. Jordan's answers reflect her ability to render a death verdict. *See* App. 158a-161a (Liu, J., dissenting) (noting that Ms. Jordan's answers "confirmed her willingness to impose the death penalty," and "fail to distinguish her from other jurors who were permitted to serve").

> I don't know how to exactly express it for the record.
>
> * * *
>
> But sometimes you get a feel for a person that you just know that they can't impose [the death penalty] based upon the nature of *the way* that they say something.

App. 185a (emphasis added).[6]

Finally, Respondent selectively quotes another part of the record to bolster its argument that the prosecutor relied on non-demeanor reasons for striking Ms. Payton and Ms. Jordan. *See* BIO 8, 21 (arguing that "the prosecutor . . . emphasized that he based his peremptory challenge [of Jordan], in part, on the answers that she gave"). When the relevant passage is viewed in context, it is evident that the prosecutor was not explaining his specific strikes of Ms. Payton or Ms. Jordan but was instead mounting a general defense against the disturbing recognition that the larger pattern of his strikes yielded dramatic racial and statistical disparities, App. 177a-178a—a defense he repeated at several points. *See also* App. 181a-182a, 183a, 190a-192a.

Respondent's attempts to recast the prosecutor's justifications are made possible by the vacuum left by the trial court's unexplained *Batson* rulings. Those attempts are further fueled by the

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[6] The prosecutor's retrenchment to a solely demeanor-based reason for both strikes after defense counsel rebutted his mischaracterization of the record "reeks of [the same] afterthought" this Court condemned in *Miller-El II*. 545 U.S. at 246.

California Supreme Court's resort to speculation when deferring to and then affirming those rulings. Had the trial court explained its *Batson* step three rulings, there would be no need to speculate, infer or presume about the justification(s) relied on by the prosecution at *Batson*'s step two. Respondent steadfastly ignores the significance of the unexplained *Batson* decisions below and the need for this Court to resolve the nationwide split about the deference owed such rulings.

CONCLUSION

For the foregoing reasons and those set for in his Petition for Writ of Certiorari, Mr. Williams respectfully requests that a writ of certiorari issue.

Dated: December 10, 2013

Respectfully submitted,

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