IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ANDRETTI CAMPER — APPELLANT

V. — NO. 2008-KA-1865-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

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ANDRETTI CAMPER **APPELLANT**

V. **NO. 2008-KA-1865-COA**

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Andretti Camper, Appellant
3. Honorable Eddie H. Bowen, District Attorney
4. Honorable Robert G. Evans, Circuit Court Judge

This the 16th day of April, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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STATEMENT OF THE ISSUES

I. **THE TRIAL COURT ERRED IN OVERRULING CAMPER'S OBJECTION TO THE STATE'S USE OF PEREMPTORY STRIKES AGAINST PROSPECTIVE JURORS JAMES WARREN, ANNETTE LAMPTON, AND SALRINA MCLAURIN.**

II. **THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Simpson County, Mississippi, and a judgment of conviction for aggravated assault entered against Andretti Camper after a jury trial held on September 22, 2008, the Honorable Robert G. Evans, Circuit Judge, presiding. (Tr. 132-33, C.P. 37, R.E. 3-4). Camper was sentenced to serve a term of eight (8) years in the Mississippi State penitentiary. (C.P. 37, R.E. 4). The trial court denied his motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. (C.P. 35-39, R.E. 5-7). Camper is presently incarcerated and now appeals to this honorable Court for relief.

STATEMENT OF THE FACTS

On Easter Sunday 2006, Camper was riding through D'Lo, Mississippi, in the passenger seat of his car as Precious Rose, Camper's girlfriend at the time, drove. (Tr. 86, 89). Meanwhile, Tony Edwards was playing dominos at a café on Jupiter Road when he noticed Camper's vehicle proceeding up the street. (Tr. 55). Edwards was mad at Camper because he believed that Camper was telling others that he (Edwards) worked for the police; when Edwards saw Camper's vehicle, he got up from the dominos game, ran down to the street, and stopped Camper's car to confront him. (Tr. 57, 86-7). An argument ensued; Edwards reached inside Camper's car window and slapped him; and Edwards ended up with a gunshot wound that entered the right side of his abdomen and exited his right mid-back. (Tr. 56-59, 74, 87-89, Ex. S-1). Rose then pulled the car forward a short

distance and stopped, because she did not want to drive anymore. (Tr. 103-106). Camper then got in the driver's seat and drove away. (Tr. 103-106). Edwards went to the hospital where he was treated: he left a few hours later, against the doctor's medical advice. (Tr. 59-60, 76-77, Ex. S-1). Camper was later indicted for aggravated assault. (C.P. 3). Camper and Rose broke up shortly after the incident. (Tr. 89, 104). More detailed facts are provided below in the discussion summarizing the testimony of the witnesses called at trial.

Jury Selection

During jury selection, the State exercised its first five peremptory challenges to strike five African-American prospective jurors, and Defense counsel raised a *Batson* challenge. (Tr. 33-34). The trial court then required, and the State then proffered, the following race-neutral reasons for the strikes of prospective jurors James Warren, Annette Lampton, and Salrina McLaurin (the three jurors challenged in Issue I of this brief), which the trial court accepted as valid:

> [PROSECUTOR]: I think Mr. Warren looked disinterested and he looked kind of sleepy. The State would also state that Mr. Warren lives in a known drug area, being Bill Womack Road.
>
> . . .
>
> [PROSECUTOR]: Yes, sir. [Ms. Lampton] did look disinterested and she had her hands crossed during the voir dire procedure.
>
> . . .
>
> [PROSECUTOR]: Your Honor, Ms. McLaurin looked kind of sleepy. She wasn't paying attention. And she was - - you know.

(Tr. 34-38).

Trial Testimony

At trial, Officer Bernard Gunter of the Simpson County Sheriff's Department testified that he spoke with Edwards at the hospital, and Edwards told him that Camper shot him. (Tr. 50-52).

Officer Gunter then went to the scene on Jupiter Road and recovered one .9 millimeter shell casing; the gun was never found. (Tr. 52). Officer Gunter also testified that he took a statement from Precious Rose. (Tr. 53-54, 109).

Camper testified that he did not have a gun with him on the day in question. (Tr. 88). Camper explained that, when Edwards approached the car to stop it, he (Edwards) lifted his shirt and displayed a gun in his waistband. (Tr. 86-87). Edwards then walked over to the passenger-side window and angrily confronted Camper. (Tr. 87). During the confrontation, Edwards reached inside Camper's car window and slapped him. (Tr. 57, 87). Camper testified that Edwards then grabbed him, and the two tussled over the gun in Edward's waistband, which went off and hit Edwards. (Tr. 87-88, 91). Camper stated that he threw the gun out at the scene. (Tr. 87). Camper testified that he was very scared, he tried to calm Edwards down, and he did what he did out of fear that the disgruntled Edwards was about to shoot him with the gun in his waistband. (Tr. 89-90).

Edwards testified that he did not have a gun. (Tr. 57-8). He admitted that he intentionally stopped Camper's car in order to confront him, but he claimed that he flagged the car down instead of forcefully stopping the car by displaying a weapon. (Tr. 56-57, 60-61, 67). Edwards also admitted that he went over to the passenger-side window, an argument ensued, and he reached inside the car and slapped Camper. (Tr. 57, 68, 70). Edwards claimed that Camper pulled out a gun and shot him after he slapped Camper and turned to walk away. (Tr. 57-8). However, Edwards admitted that he testified in a previous unrelated trial against a defendant (Andre Turner); his testimony resulted in a conviction; and he later recanted his testimony in that trial and signed an affidavit admitting that the testimony he gave was not true. (Tr. 84-85).

The defense called Rose to testify, however she apparently had no recollection of the most significant details of the incident. Rose testified that she was driving Camper in his car when

Edwards stopped them; she heard them arguing; she heard a slap; and, a few seconds later, she heard a gunshot. (Tr. 97-98). Remarkably, Rose claimed that she never saw a gun during the incident, and she "[had] no idea where the gun came from." (Tr. 98, 99, 100). Rose testified that she saw Edwards go behind the car and, by her own decision, drove forward a short distance ("still in sight of the yard where it went on at"), stopped the car, and told Camper she could not drive anymore. (Tr. 103, 106). Rose also stated that she then noticed Camper throw something out of the car, and Camper got in the driver's seat and drove away. (Tr. 103-05).

Rose denied giving a statement to Officer Gunter and, more specifically, denied telling Officer Gunter that she saw a gun in Edward's waistband when he approached Camper's car, and that Camper shot Edwards with Edwards' pistol while the two were tussling. (Tr. 99-100). However, Officer Gunter, using the very statement he took from Rose, testified that Rose did in fact tell him that she saw a gun in Edwards' waistband and that Camper shot Edwards with Edwards' gun during the struggle. (Tr. 109-110).

At the conclusion of trial, the jury was instructed on aggravated assault and the theory of self-defense. (Tr. 119, C.P. 18, 26-27). The jury found Camper guilty of aggravated assault. (Tr. 132, C.P. 34, R.E. 3).

SUMMARY OF THE ARGUMENT

The trial court erred in overruling Camper's objection to the State's use of peremptory challenges against prospective jurors James Warren, Annette Lampton, and Salrina McLaurin. The State failed to meet its burden of providing valid race-neutral reasons for striking these jurors, and the trial court erred in accepting the State's reasons and ruling that the State did not engage in purposeful discrimination. The trial court was remiss in its duty to make specific findings as to each of the State's alleged race-neutral reasons and, therefore, erred under the United States Supreme

Court's recent decision in *Snyder v. Louisiana*, --- U.S. ---, ---, 128 S.Ct. 1203, 1208 (2008), as well as the Mississippi Supreme Court's decision in *Hatten v. State*, 628 So. 2d 294-95, 298 (Miss. 1993). The trial court also applied an incorrect (or incomplete) legal standard by focusing only on the issue of disparate treatment while ignoring numerous other indicia of pretext that were present such as failure to voir dire, lack of record support, and irrelevance. Further, the State's strike of Mr. Warren, based on his economic status, violated Mississippi Code Annotated Section 13-5-2 (Rev. 2002). Consequently, this Court should reverse Camper's conviction and sentence and remand this case for a new trial.

The trial court also erred in failing to grant Camper's motion for a new trial, as the verdict was against the overwhelming weight of the evidence. The witnesses who provided the testimony necessary to convict Camper, were extraordinarily incredible. Edwards admitted that, in a previous trial, he gave false testimony that was used to convict the defendant therein. Rose's testimony that she saw no gun on Edwards on the day in question and that she did not giving a statement to Officer Gunter was impeached by the testimony of Officer Gunter himself, who, using the very statement he took from Rose, testified that Rose did in fact give a statement in which she reported seeing a gun in Edwards' waistband (as testified to by Camper). To allow Camper's conviction to stand based on such doubtful testimony would sanction an unconscionable injustice. Therefore, this Court should reverse Camper's conviction and sentence and remand this case for a new trial.

ARGUMENT

I. THE TRIAL COURT ERRED IN OVERRULING CAMPER'S OBJECTION TO THE STATE'S USE OF PEREMPTORY STRIKES AGAINST PROSPECTIVE JURORS JAMES WARREN, ANNETTE LAMPTON, AND SALRINA MCLAURIN.

The State exercised its peremptory challenges against prospective jurors James Warren,

Annette Lampton, and Salrina McLaurin in a racially-discriminatory manner in violation of *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S.Ct. 1712 (1986) and its progeny. As explained below, the trial made numerous errors in overruling Camper's *Batson* objection.

Resolution of a *Batson* challenge involves a three-step process. *Watson v. State*, 991 So. 2d 662, 664 (¶4) (Miss. Ct. App. 2008). First, the defendant must make a prima facie showing of discrimination in the State's exercise of a peremptory challenge. *Batson*, 476 U.S. at 96-98, 106 S.Ct. 1712; *Watson*, 991 So. 2d at 664 (¶4) (citation omitted). Second, the State must provide a race-neutral basis for the strike. *Wilson v. Strickland*, 953 So. 2d 306, 310 (¶6) (Miss. Ct. App. 2007) (citing *Batson*, 476 U.S. at 96-98, 106 S.Ct. 1712). To do this, "the prosecutor must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challeng[e]." *Miller-El v. Dretke*, 545 U.S. 231, 238, 125 S.Ct. 2317 (2005) (quoting *Batson*, 476 U.S. at 98, n. 20, 106 S.Ct. 1712)). Finally, the trial court must make a determination as to whether the State engaged in purposeful discrimination in exercising the strike, i.e., "if the reasons given by the prosecution were pretexts for intentional discrimination." *Thorson v. State*, 721 So. 2d 590, 593 (¶5) (Miss. 1998); *Wilson*, 953 So. 2d at 312 (¶13) (citing *Batson*, 476 U.S. at 97-98, 106 S.Ct. 1712).

On appeal, the Court affords great deference to a trial court's findings, as they are, in large part, based on attorney's credibility. *Flowers v. State*, 947 So. 2d 910, 917 (¶8) (Miss. 2007) (citing *Berry v. State*, 802 So. 2d 1033, 1037 (¶9) (Miss. 2001)). "The credibility of reasons given can be measured by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El v. Dretke*, 545 U.S. at 246, 125 S.Ct. 2317 (quoting *Ex parte Travis*, 776 So. 2d 874, 881 (Ala. 2000)). This Court will overrule a trial court's ruling on a *Batson* challenge when "the record indicates that the ruling was clearly erroneous or against the overwhelming weight of the evidence." *Flowers*, 947 So. 2d at 917 (¶8) (quoting

Thorson, 721 So. 2d at 593 (¶4)). "The standard is demanding but not insatiable . . . [d]eference does not by definition preclude relief." *Miller-El v. Dretke*, 545 U.S. at 240, 125 S.Ct. 2317 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029 (2003)).

In the instant case, whether Camper established a *prima facie* case of discrimination is moot, as the trial court required, and the State offered, alleged race-neutral reasons for the strikes. *See e.g.*, *Hernandez v. New York*, 500 U.S. 352, 359, 111 S.Ct. 1859 (1991); *Burnett v. Fulton*, 854 So. 2d 1010, 1014 (¶9) (Miss. 2003); *Wilson*, 953 So. 2d at 312 (¶11). Consequently, this issue turns on (and the argument below addresses only) the second and third step of the *Batson* process.

Prospective juror James Warren

The State claimed that it struck Mr. Warren because he "liv[ed] in a known drug area" and he "looked kind of sleepy." (Tr. 35). As explained below, the trial court erred in accepting these as a race-neutral reasons and finding that the State did not engage in purposeful discrimination in striking Mr. Warren.

As to Mr. Warren's "kind of sleepy" demeanor, the trial judge made no finding whatsoever on the record. This was error. The Mississippi Supreme Court has mandated that "a trial judge make an on-the-record factual determination that *each reason* proffered by the State for exercising a peremptory challenge is, in fact, race neutral." *Hatten v. State*, 628 So. 2d 294-95, 298 (Miss. 1993) (emphasis added). Significantly, the United States Supreme Court has recently refused to "presume that the trial judge credited the prosecutor's assertion that [a prospective juror] was nervous[,]" where the trial court made no "specific findings on the record" as to this reason. *See Snyder v. Louisiana*, --- U.S. at ---, 128 S.Ct. 1203, 1209 (2008). In the instant case, the trial court made no finding whatsoever concerning Mr. Warren's "kind of sleepy" demeanor. Accordingly, this Court should not presume that the trial court credited the State's explanation that Mr. Warren

"looked kind of sleepy."

As to the State's other reason for striking Mr. Warren–that he lived in a "known drug area"–the trial court erred in accepting the this reason and finding no purposeful discrimination on the State's part in striking Mr. Warren.

First and foremost, the trial court did not make an on-the-record determination as to whether Mr. Warren lived in a drug area. In fact, the trial court did just the opposite: "Well, I don't know if it is or not. But that's not the issue." (Tr. 36). As explained above, this was error under *Hatten* and *Snyder*.

Additionally, the trial court applied an incorrect (and/or incomplete) legal standard, as evidenced by the following exchange:

> [Prosecutor]: I think Mr. Warren looked disinterested and he looked kind of sleepy. The State would also state that Mr. Warren lives in a known drug area, being Bill Womack Road.
>
> THE COURT: Are you excusing white jurors who live in that area?
>
> [PROSECUTOR 1]: I didn't see anyone else who lived on that road, Your Honor.
>
> . . .
>
> [DEFENSE COUNSEL]: Your Honor, that part of the disinterested, I watched him and I didn't see that he looked disinterested. As far as where he lives being in a drug area, I have no idea.
>
> THE COURT: Well, I don't know if it is or not. But that's not the issue. The issue is if we're excluding all white jurors also that live within suspected drug areas. If you can show me that he is not excusing white jurors for that reason, I'll allow this to stand as a race, gender, neutral reason.

(Tr. 35-36). Under the trial court's reasoning, the only indicia of pretext sufficient to show purposeful discrimination is disparate treatment; this is simply not the law. The Mississippi

Supreme Court recognizes five indicia of pretext tending to prove purposeful discrimination that a trial court should consider in analyzing the State's offered race-neutral reasons:

> (1) disparate treatment, that is, the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge; (2) the failure to voir dire as to the characteristic cited; ... (3) the characteristic cited is unrelated to the facts of the case; (4) lack of record support for the stated reason; and (5) group-based traits.

Flowers, 947 So. 2d at 917 (¶9) (quoting *Manning v. State*, 765 So. 2d 516, 519 (¶9) (Miss. 2000) (citations omitted)). As can be clearly seen, disparate treatment is but one of the five indicia of pretext. Also, the United States Supreme Court has recently held that "in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder*, --- U.S. at ---, 128 S.Ct. at 1208 (citing *Miller-El v. Dretke*, 545 U.S., at 239, 125 S.Ct. 2317)). In restricting its *Batson* analysis to the sole issue of disparate treatment, the trial court ignored the other four indicia of pretext, which, as explained below, were present and weighed heavily in favor of a finding of purposeful discrimination.

Furthermore, the State's reason that Mr. Warren lived in a drug area was unrelated to the facts of Camper's case. *Batson* requires that the prosecutor "articulate a neutral explanation *related to the particular case to be tried.*" *Batson*, 476 U.S. at 98, 106 S.Ct. 1712 (citations omitted) (emphasis added). Accordingly, under Mississippi law a race-neutral reason unrelated to the facts of the case indicates pretext and/or purposeful discrimination. *See e.g.*, *Flowers*, 947 So. 2d at 917 (¶9); *Manning*, 765 So. 2d at 519 (¶9). The fact that Mr. Warren may have lived in a known drug area was not related to Camper's case; Camper was on trial for aggravated assault, not for a drug offense. Additionally, aside from the prosecutor's assertion, the record lacks support for this reason. *Id.* ("lack of record support for the stated reason" is an indicia of pretext.). The irrelevance of Mr. Warren's residence and the lack of record support for this reason tend to show that the State engaged

in purposeful discrimination.

Moreover, the State's failed to voir dire on the issue of residence in a known drug area further suggests that Mr. Warren's residence had little or nothing to do with the State's decision to strike him. *Id.* ("failure to voir dire as to the characteristic cited" is an indicia of pretext.). In *Miller-El v. Dretke*, the United States Supreme Court stated that "the State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." *Miller-El v. Dretke*, 545 U.S. at 246, 125 S.Ct. 2328 (quoting *Ex parte Travis*, 776 So. 2d at 881). If the State was so concerned with a juror's residence in a "known drug area," it begs to question why the State did not voir dire the jury panel about their residence to determine whether such residence would affect their judgment in Camper's aggravated assault case.

Additionally, Mr. Warren's strike based on his residence was arguably a "group-based trait," which is also an indicia of pretext. *Flowers*, 947 So. 2d at 917 (¶9); *see also Hernandez*, 500 U.S. at 363, 111 S.Ct. at 1868 ("an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [classification] bears more heavily on one race than another.") (quotation omitted). While unfortunate, it is beyond reasoned debate, that a much higher percentage of residents living in high drug areas are low-income persons, as compared to middle and/or upper-class persons of higher income. Although *Batson* and its progeny have not explicitly precluded discrimination on the basis of economic status, the Mississippi Legislature has. Mississippi Code Annotated Section 13-5-2 provides:

> It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with this chapter to be considered for jury service in this state and an obligation to serve as jurors when summoned for that purpose. ***A citizen shall not be excluded from jury service in this***

state on account of race, color, religion, sex, national origin, or ***economic status***. Miss. Code Ann. §13-5-2 (emphasis added). The Mississippi Supreme Court has interpreted Section 13-5-2 to mandate that "peremptory strikes cannot be exercised to exclude a juror for any of the[] reasons [stated in Section 13-5-2]." *Thorson*, 721 So. 2d at 594-95 (holding that Section 13-5-2 was violated where State struck potential juror based on religion). The State struck Mr. Warren for a reason intimately associated with and undivorceable from his economic status. Therefore, the State violated Section 13-5-2 in striking Mr. Warren.

In sum, the trial court erred in numerous respects in overruling Camper's *Batson* objection as to Mr. Warren. The trial court committed reversible error in failing to make the required findings as to each of the State's purported reasons for striking Mr. Warren, and it applied an incorrect legal standard in making its determination, which was clearly erroneous in light of the numerous ignored indicia of pretext. Additionally, Mr. Warren's strike violated Section 13-5-2, as it was made on the basis of his economic status. Accordingly, Camper is entitled to a new trial..

Prospective jurors Annette Lampton and Salrina McLaurin

The State claimed that it struck Ms. Lampton because she looked disinterested and had her hands crossed; the State claimed it struck Ms. McLaurin because, like Mr. Warren, she "looked kind of sleepy." (Tr. 36-37). As to Lampton and McLaurin, the following exchange took place:

> [PROSECUTOR 1]: Yes, sir. [Lampton] did look disinterested and she had her hands crossed during the voir dire procedure.
>
> [DEFENSE COUNSEL]: Well, I don't think that's enough to - - I saw her too, and I didn't notice that. And I don't think that's nearly enough.
>
> THE COURT: Are you striking all white jurors who appeared disinterested and had their hands crossed?
>
> [PROSECUTOR 1]: Yes, sir, the ones that had their hands crossed.

. . .

THE COURT: Okay. All right. Without anything to rebut that, I will accept that as a race, gender, neutral reason.
Number 15, Salrina McLaurin.

[PROSECUTOR 1]: Your Honor, Ms. McLaurin looked kind of sleepy. She wasn't paying attention. And she was - - you know.

[PROSECUTOR 2]: Plus, her body language of being sleepy.

THE COURT: Anything to rebut it?

[DEFENSE COUNSEL]: All right. Again, I saw it and I don't think it was bad body language. I'd like to know what white jurors they're striking that had bad body language as well.

THE COURT: **Well, they've not stricken any white ones yet.**

[DEFENSE COUNSEL]: **That's right.**

THE COURT: So I think bad body language is a pretty subjective thing. Inattentiveness, the supreme court has said, is a permissible reason provided it's equally applied. In the absence of any evidence to the contrary, I accept it as a race, gender, neutral reason. . .

(Tr. 36-38) (emphasis added).

As explained below, the trial court erred in striking Ms. Lampton and Ms. McLaurin based solely on these nuances of personal demeanor, which were apparently (and not surprisingly) noticed only by the prosecution's keen eye for such conduct. The argument below is also applicable to the State's challenge of Mr. Warren as to his appearing "disinterested" and "kind of sleepy."

It is acknowledged that "inattentiveness, demeanor, sleeping during voir dire, lack of eye contact, educational level and hostility have all been held by [the Mississippi Supreme Court] to be race neutral reasons in keeping with *Batson*." *See, e.g., Irby v. Travis*, 935 So. 2d 884, 937 (¶164) (Miss. 2006) (quoting *Burnett*, 854 So. 2d at 1014). [The Mississippi Supreme Court] has cautioned,

however, that previous opinions holding reasons to be race-neutral should not be construed to hold those reasons to be automatically race-neutral in any other case. *Pruitt v. State*, 986 So. 2d 940, 945 (¶17) (Miss. 2008) (citing *Lockett v. State*, 517 So. 2d 1346, 1353 (Miss. 1987)).

In his concurring opinion in *Batson*, Justice Marshall warned:

> Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons . . . If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.

Batson, 476 U.S. at 106, 106 S.Ct. 1712 (Marshall, J., Concurring). More recently, the Court echoed Justice Marshall's concerns and acknowledged the practical reality that, "[i]f any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much. . . ." *Miller-El v. Dretke*, 545 U.S. at 239-40, 125 S.Ct. 2317. The Court also felt the need to reiterate that "[the third step of *Batson*] requires the judge to assess the plausibility of [the prosecutor's race-neutral reason]." *Id.* at 251-52, 125 S.Ct. 2317 (citing *Batson*, 476 U.S., at 96-97, 106 S.Ct. 1712)).

In overruling Camper's objection as to Ms. Lampton and Ms. McLaurin, the trial court again, as with Mr. Warren, focused solely on disparate treatment. This is evident from the above-cited portion of the transcript. The trial court again applied an incorrect (or incomplete) legal standard, as he failed to consider "all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder*, --- U.S. at ---, 128 S.Ct. at1208 (citing *Miller-El v. Dretke*, 545 U.S., at 239, 125 S.Ct. 2317)).

Further, the trial court again failed to make specific findings as to each of the State's purported reasons as required by *Hatten* and *Snyder*. As alluded to above, deference to the trial court's decision necessarily requires that the trial court make findings, not simply overrule the defendant's objection. In *Snyder*, a case specifically addressing a juror's non-verbal conduct and/or

demeanor, the United States Supreme Court recently outlined the nature and/or specificity of the required findings, stating:

> [R]ace-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention [, appearing "kind of sleepy" or "disinterested"]), 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.***

Snyder, ---, U.S. at ---, 128 S.Ct. at 1208 (emphasis added). This is nothing new; rather, it is a reaffirmation of trial court's well-established duty to "undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.' " *Batson*, 476 U.S. at 93, 106 S.Ct. 1712 (quoting *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555 (1977)). See also *Miller-El v. Dretke*, 545 U.S. at 251-52, 125 S.Ct. 2317 ("[T]he rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, *and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it.*") (emphasis added); *Hatten*, 628 So. 2d at 298 ("a trial judge make an on-the-record factual determination that each reason proffered by the State for exercising a peremptory challenge is, in fact, race neutral.").

Moreover, the trial court's abbreviated quasi-ruling was inherently contradictory, in that, the trial court focused solely on disparate treatment, then pointed out on its own initiative that the State had not stricken any white jurors for the reason given by the State. In this, the clearly erroneous nature of the trial court's ruling is highlighted.

In the instant case, the trial court made no specific finding as to Ms. Lampton's, Ms. McLaurin's (or Mr. Warren's) demeanor and whether their demeanor could credibly be said to support the reason given by the State. How could it? The jurors' demeanor(s) cited by the State

were so negligible and so insignificant that (apparently) the only the prosecutor's keen eye for such conduct noticed it. prosecutor. Such negligible aspects of personal appearance or demeanor are doubtless subject to strained personal interpretation, readily noticeable only to those predisposed to or desirous of asserting such conduct against a juror for the purpose of striking that person from the jury. Common sense compels one to seriously question what practical effect, *if any at all*, *Batson* possesses if reasons as insignificant as appearing "kind of sleepy" or "disinterested," without more, are sufficient to overcome a *Batson* objection. Such nuanced expressions are so commonplace as a matter of human nature that any given juror could, in the eyes of one readily inclined to notice, be charged with exhibiting them. As a matter of practice, it is essentially impossible for an attorney or a trial judge to notice, discern, and keep track of all expressions of all jurors which might somehow, through strained interpretation, be considered sleepiness, or disinterest.

As a result, it is impossible to engage in any reasoned debate on the issue. This is so, because a trial judge must first observe a juror's demeanor to be able to make findings as to "whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." *Snyder*, ---, U.S. at ---, 128 S.Ct. at 1208. The critical focus of a trial court in determining whether the State has engaged in purposeful discrimination "is the persuasiveness of the prosecutor's justification for his peremptory strike." *Miller-El v. Cockrell*, 537 U.S. at 338-39, 123 S.Ct. 1029 (citing *Purkett v. Elem*, 514 U.S., 765, 768, 115 S.Ct. 1769 (1995)). When a prosecutor gives a reason concerning a demeanor so insignificant that neither the trial judge nor the opposing attorney even noticed it, the reason draws very near to (and arguably warrants) the characterization of a "fantastic justification," and such a reason given under such circumstances is certainly "implausible" and, thereby, should be considered a pretext for discrimination. *Id.* ("implausible or fantastic justifications may (and probably will) be found to be pretexts for

purposeful discrimination.").[1] Simply put, a reason so insignificant so as to deprive the trial court of the ability to make a finding as to the reason's credibility and deprive opposing counsel of any meaningful opportunity to rebut, escapes the ambit of reasoned debate and enters that of implausibility.

Where, as here, a prosecutor challenges a juror based solely on *de minimus* aspects of a juror's demeanor, the prosecutor's motive or credibility should seriously be called into question, as the arbitrary nature of the reason is inherently suspect and strongly suggests purposeful discrimination; the inference being that the only one who noticed such conduct was the only one standing to benefit from it, and necessarily must have exercised extraordinarily focused attention on the particular juror, in order to point to some facial expression that could, through strained interpretation, be used as the basis of a strike.

In sum, the trial court reversibly erred in failing to make the required on-the-record findings as to each of the State's reasons and in applying an incorrect (or incomplete) legal standard. Additionally, the trial court's decision to overrule Camper's objection to the State's striking of Ms. Lampton, Ms. McLaurin (and Mr. Warren) was clearly erroneous, as the State's proffered reasons were implausible, incredible, and offered only as a transparent mask in an attempt to hide the purposeful discrimination emanating from underneath. Accordingly, Camper respectfully requests this Court to reverse his conviction and sentence and remand this case for a new trial.

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[1] Recognizing the reality that challenges based on subjective considerations or juror body language can readily be used as pretexts for discrimination, courts from other jurisdictions hold that strikes based on subjective data such as body language or demeanor are suspect and subject to heightened scrutiny. See e.g., *U.S. v. Jenkins*, 52 F.3d 743, 746 (8th Cir. 1995); *Zakour v. UT Medical Group, Inc.*, 215 S.W. 3d 763, 774 (Tenn. 2007) (same); *Com. v. Maldonado*, 439 Mass. 460, 788 N.E.2d 968 (Mass. 2003); *Epps v. U. S.*, 683 A.2d 749, 753 (D.C. 1996). Camper respectfully requests this Court to do this as well.

II. THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In reviewing a challenge to the weight of the evidence, the verdict will be only be disturbed "when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Bush v. State*, 895 So. 2d 836, 844 (¶18) (Miss. 2005) (citing *Herring v. State*, 691 So. 2d 948, 957 (Miss.1997)). The evidence is viewed in the light most favorable to the verdict. *Id.* This Court "sits as a hypothetical thirteenth juror." *Lamar v. State*, 983 So. 2d 364, 367 (¶5) (Miss. Ct. App. 2008) (citing *Bush*, 895 So. 2d at 844 (¶18)). "If, in this position, the Court disagrees with the verdict of the jury, 'the proper remedy is to grant a new trial.'" *Id.*

In the instant case, the witnesses whose testimony provided the evidence necessary to convict Camper was remarkably suspect and incredible. Edwards testified that he did not have a gun and that Camper had his own gun with which he (Camper) shot him (Edwards). (Tr. 57-58). However, Edwards also admitted that he previously testified against a defendant who was convicted on his testimony, and he later recanted that testimony and signed an affidavit admitting that he testified falsely. (Tr. 84-85). Further, Rose claimed that she never gave a statement to Officer Gunter, and she even saw a gun during the incident, on either Camper or Edwards. (Tr. 98, 99, 100). However, Officer Gunter, with the aid of the very statement that he took from Rose, testified that Rose did in fact tell him that she saw a gun in Edwards' waistband and that Camper shot Edwards with Edwards' gun. (Tr. 109-110).

While a witness's credibility is ordinarily a determination for the jury, *Turner v. State* 3 So.3d 742 (¶15) (Miss. 2009), this Court sits as a thirteenth juror in evaluating a challenge to the weight of the evidence and may reverse where the Court disagrees with the jury's resolution of the

evidence, which preponderates heavily against the verdict. *Bush*, 895 So. 2d at 844-45 (¶¶18-19). To allow Camper's conviction to stand on such incredible testimony would sanction an unconscionable injustice. Accordingly, this Court should reverse his conviction and sentence and remand this case for a new trial.

CONCLUSION

Based on the arguments raised above and the authority cited in support thereof, together with any plain error noticed by this Court which has not been specifically raised, Camper respectfully requests this Court to reverse his conviction and sentence and remand this case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Hunter N. Aikens, Counsel for Andretti Camper, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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This the 16th day of April, 2009.

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