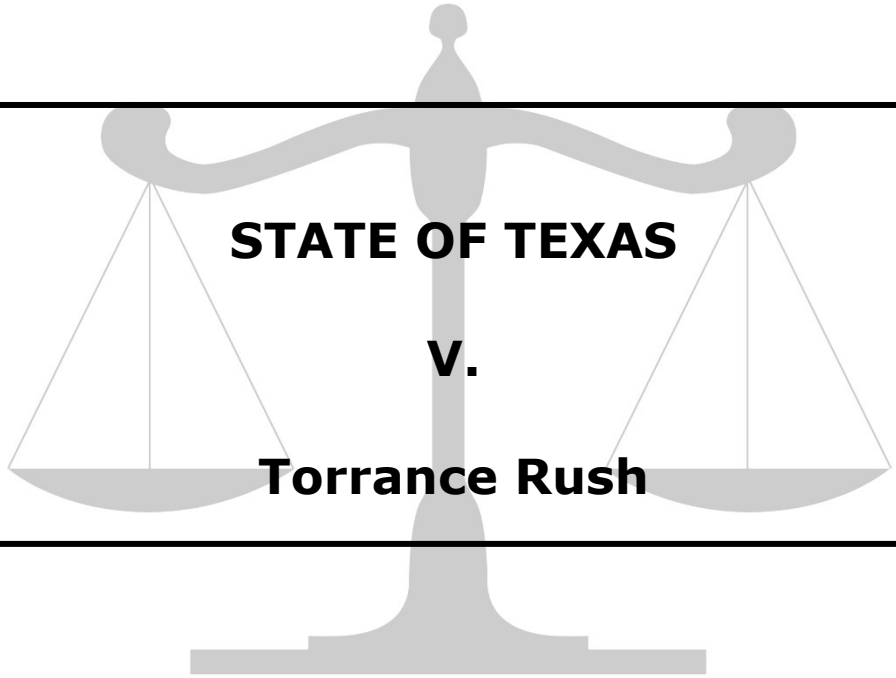
TEXAS YOUTH & GOVERNMENT

THE CASE OF
"A MINOR COLLISION"



STATE OF TEXAS

V.

Torrance Rush

2019-2020
APPELLATE COURT CASE

Case Materials Written By:
Hon. C. Tyler Atkinson, Judge Fort Worth Municipal Court
Hon. Melanie Houston, Judge Fort Worth Municipal Court

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FROM THE DESK OF THE CHIEF JUSTICE

Dear Judicial Delegates,

Oyez, oyez, oyez. Let the 2019-2020 YMCA YAG Appellate Competition Begin!!! Welcome Delegates!!!

As you know, our primary goal each year focuses on education. We want you to be exposed to two big areas of law that you will eventually be studying in college or law school. This year packs a punch. Although the underlying case is set in a Municipal Court as a citation, the legal debate before the Court of Criminal Appeals is bound to get interesting.

Issue One is *Batson*. The defense (appellant) is claiming that the prosecution (appellee) exercised their preemptory strikes during jury selection in a racially discriminatory fashion. If that doesn't makes sense, don't worry. There is plenty of material in this packet to help you learn all about jury selection – called Voir Dire (Pronouced: *vwar deer* if you want to sound more French or *vwar dire* with a southern drawl on *dire* if you want to sound more Texas.) *Batson* is both historically important to the development of law but also practically useful in trial. Every time a jury is being selected, the Judge and attorneys are thinking about Batson. Whether the prosecutor is racist isn't the question. Protecting the right to serve on a jury is.

Issue Two is Michael Morton. Michael Morton was wrongfully convicted of the gruesome murder of his wife and spent 25 years in prison. Through investigation by the Innocence Project of New York led by attorney Barry Scheck, it was discovered that the prosecution has hid evidence related to the actual murderer. There were witness statements describing the man and also a bandana found near the house with the murderer's sweat and the wife's blood on it. Mr. Morton is now free and enjoying time with his first grandchild. You can watch his documentary on Amazon. Our issue will focus on Texas Rule of Evidence 39.14

I encourage you all to not stop at just arguing this case. Speak out regarding the issues of actual innocence and conviction integrity. Research the Innocence Project of Texas and see if you can get involved in some way.

Sincerely,

Sebastiane Caballes

2019-2020 Chief Justice
Texas Court of Criminal Appeals

CASE SPECIFIC RULES AND INFORMATION

(1) You should familiarize yourself with the Trial Court packet. We do not have a developed trial court word-for-word transcript like a normal appellate case would have. However, the Trial Court packet will provide you with the general information about what evidence was considered at the trial. The trial court teams were only allowed to call three of the four witnesses. But, for our purposes you can assume that all four witnesses testified at trial.

(2) **This year's case is again a closed case.** When writing your briefs and arguments you are only allowed to cite to cases that are provided to you in this case packet.

Permitted: The following sources may be referenced in oral argument:

- Any information in the case packet, including in the fact pattern, relevant legislation and case law.
- Any section of the Constitution, including its amendments.
- A direct quotation, rephrasing or summary of a court case not included in the case packet, as long as that quotation, rephrasing or summary appears in the case packet.
- "Common knowledge," defined as information that reasonably intelligent high school senior with no legal expertise would know."

Prohibited: Any other sources may not be referenced in oral argument. These include:

- An excerpt of any legislation or case included in the case packet, if that excerpt is not included in the case packet.
- A concurring or dissenting opinion of a case included in the case packet, if that opinion is not included in the case packet.
- A direct quotation, rephrasing or summary of a court case not included in the case packet, if that quotation, rephrasing or summary does not appear in the case packet.

(3) This year we have a case that originated from the Municipal Court level. Historically, many of our groundbreaking Supreme Court cases have arisen from issues that involve traffic violations. So, even though most people dismiss traffic tickets as just a minor violation, the truth is they can have major impacts on the way the constitution is interpreted and applied.

(4) Appeals from a Municipal Court are first heard by a County Court at Law Judge. This Judge acts as an appellate Justice and hears the appeal. If the losing party at this level does not agree with the opinion, they would appeal the case to the intermediary Court of Appeals. From there the case would go to either the Texas Supreme Court (civil cases) or the Texas Court of Criminal Appeals (criminal cases). You will be arguing this case before the Texas Court of Criminal Appeals. The case packet contains the lower court's written opinion.

(5) Issue 2 contains two parts. Only one attorney will brief and argue this issue. You should approach the issue as if it were one argument with two parts.

(6) The attached case law has been edited to only contain necessary content. Some Supreme Court Opinions are over 100 pages in length. The case author did not find it necessary for you to print all of that content. However, in law school you will be tasked with reading and understanding full, unedited opinions.

TEXAS COURT OF CRIMINAL APPEALS

NO. 19-01234-CR

Torrance Rush, Appellant v.
The State of Texas, Appellee

FROM THE COURT OF APPEALS, SECOND DISTRICT, AT FORT WORTH

PETITION FOR DISCRETIONARY REVIEW

We grant the Torrance Rush, appellant, request that for review in this case as to the following issues:

(1) Whether the trial court erred in denying appellant's *Batson* challenge during *voir dire*,

(2a) Whether the trial court erred in denying appellant's motion for new trial due to an alleged *Brady* violation,

and

(2b) Whether the trial court erred in denying appellant's motion for new trial due to ineffective assistance of counsel?

TEXAS COURT OF APPEALS, SECOND DISTRICT,
AT FORT WORTH

NO. 02-19-01234-CR

Torrance Rush, Appellant v.
The State of Texas, Appellee

FROM THE COUNTY CRIMINAL COURT NO. 10 OF TARRANT COUNTY
NO. 19-1-12345, HONORABLE, JUDGE CASTILLO PRESIDING

OPINION

Justice Tara Lambert for the majority:

Appellant Torrance Rush was charged in the Fort Worth Municipal Court with the Class C Misdemeanor offenses of Minor Driving Under the Influence of Alcohol and Failure to Yield to a Pedestrian. Mr. Rush appeared by counsel at a jury trial and was found guilty of both offenses. Mr. Rush brought his first appeal before the County Court at Law in Tarrant County. County Judge Castillo affirmed the trial court's actions and Mr. Rush now seeks relief before this Court. We will also affirm the trial court's actions.

FACTUAL BACKGROUND

On April 19, 2019, a vehicle and a pedestrian forcefully met in an intersection in downtown Fort Worth. No significant injuries were experienced by either party. The appellant, being the driver of the vehicle, was issued a Class C Misdemeanor citation as being at fault for the accident. The investigating officer smelled alcohol on the appellant's breath and so he issued a citation for Minor Driving Under the Influence.

The appellant hired an attorney and the case was scheduled for a jury trial. The Municipal Court scheduled 50 cases for the same day as most of the cases are resolved with plea deals or warrants due to defendant's failure to appear. The appellant's defense attorney represented nine of these cases – two were assaults, 3 were theft tickets, and the rest were traffic. As the docket progressed it was clear that the appellant's case would be selected as the one to go to trial. Within 15 minutes of this decision, the appellant was brought up to counsel table for jury selection. When the jury list was first generated, within the first 12 jurors were 7 black panelists, 3 whites and 1 Hispanic. The gender makeup of this group was 8 women and 4 men. Before the jury panel was brought into the courtroom, the prosecutor reviewed the list and requested a jury shuffle. This is a procedural request that is allowed once during a trial, exercised by either party. The Judge requested that his clerk shuffle the juror's position on the list. The clerk used her computer program to shuffle the jurors randomly and produce the second and final juror list.

At the jury selection phase, the appellant's attorney objected to the State's use of their three preemptory strikes claiming that the strikes were discriminatory based on both race and gender. The State's strikes included two of the three remaining black jurors within the strike zone and two of the remaining three females within the strike zone. This resulted in a jury consisting entirely of male jurors, one of whom is a transgendered male, biological female. Five jurors were white, and one was Asian. The State struck Juror 3 (black female), Juror 9 (black female) and Juror 11 (white male). The State then provided race neutral reasons for each of the strikes. The State claimed Juror 3 worked with young people and thus might be more lenient to the defendant and that Juror 9 had extreme political positions that were antigovernment related. The defense made multiple points including the makeup of the Jury before the shuffle. Finally, the Judge determined that there was no *Batson* violation and the trial continued.

After all evidence was presented at trial, the jury found the defendant guilty of both offenses and issued punishment in the form of a fine, counseling classes related to alcohol abuse by minors and a driver's safety course. While everyone was walking out of the courtroom, the victim walked over to the defendant and said, "I'm sure glad ya'll didn't bring up all of my traffic tickets. I wouldn't have wanted the jury to know how bad of a driver I am." Mr. Rush conveyed the statement to his attorney. The attorney filed a motion for new trial on these grounds. After a hearing, the trial court Judge denied the motion for new trial.

The defendant then hired a new attorney to file this appeal.

STANDARD OF REVIEW

For issue one regarding the *Batson* challenge, we will look to the same factors as the trial court Judge but will give great deference to the decision made by that Judge. "Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Batson*, 476 U. S., at 98. As long as the Judge and the attorneys followed the steps laid out in *Batson* then our review of their decision is treated as "highly deferential." *Id*. The decision must be sustained unless it was clearly erroneous. *Id*.

We review the trial court's ruling on a motion for new trial for abuse of discretion, whether the trial court's decision was arbitrary or unreasonable when the evidence is viewed in the light most favorable to the ruling. See *Webb v. State*, 232 S.W.3D 109, 112 (Tex. Crim App. 2007).

ARGUMENTS ON APPEAL

Mr. Rush brought two points of error in this appeal.

Issue 1: *Batson* Challenge

A *Batson* Challenge is comparable to the children's game "Guess Who?" An attorney has exercised preemptory strikes against potential jurors. Bringing in the analogy, the attorney has flipped down the person's picture on their game board. An opposing party will then raise a *Batson* Challenge arguing that the strikes were made primarily because of the potential juror's race or gender. The party making the strikes will then need to point to other proper reasons for the strikes.

If the Judge agrees that the strikes were made for reasons other than race or gender, then improperly stricken juror would be reseated.

As we know, juries are chosen by who remains after the strikes are exercised. In a Municipal Court setting, we have six jurors on a trial and each side is allowed to exercise at most three preemptory strikes. If a party and the Judge believe that a person would legally not be allowed to serve on a jury then a "for cause" strike would used to eliminate this juror. So, if no strikes are used jury panelists numbered one through six would be the jury. If several strikes are used, the court just looks at who is left over after the strikes and then the first six of those become the jury. The only group that matters for *Batson* review is those panelists within the strike zone. We only look to those panelists who could potential end up being selected for a juror. So, if you add six jurors plus six strikes, then the only panelists who potentially make it onto the jury would be the first twelve panelists. We would look at the racial and gender makeup and the strikes used against this group.

When there is evidence that either side has used their strikes in a way that suggests racial or gender bias, the opposing side or even the court may raise a *Batson* challenge and begin the process for ensuring that the strikes were not exercised in an illegal manner.

Trial courts follow a three-step process when resolving Batson challenges. *Batson v. Kentucky*, 476 U.S. 79 (1986). First, the defense must make a prima facie case of racial discrimination. Second, if the prima facie showing has been made, the burden of production shifts to the State to articulate a race-neutral reason for its strike. Third, if the State tenders a race neutral explanation, the trial court must then decide whether the defendant has proved purposeful racial discrimination. *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019). Throughout the process, the defendant bears the burden of persuasion and must convince the court of the racial discrimination.

As to the first step, we agree that the defense made a prima facie case of racial discrimination. All black panelist and all female panelists were eliminated from the jury. Although a jury made up of the same race and gender would not necessarily violate due process requirements, if the strikes are exercised in a way to ensure homogony then the court must intervene.

Next, the State responded with the reasons for their strikes. The State felt that one juror would be overly sympathetic to the defendant because she has worked with young persons in the past and that another juror has anti-government beliefs and

thus would be unfair to the prosecution's case.
This satisfies the State's obligation to produce reasons for their strikes.

Finally, the court must decide based on all the evidence whether there was in fact racial discrimination in the way the State exercised their preemptory strikes. It is true that the State struck the only two black females within the strike zone. However, the State provided race neutral reasons for each of the strikes. There is ample evidence in the *voir dire* transcript of race neutral reasons. We see no compelling reasons to disagree with the trial court judge's determination that no racial discrimination took place. We deny the appellant's first point of error.

Issue 2: *Brady* and Michael Morton Violations

There are two separate legal issues at play regarding the evidence of the victim's prior criminal history which was discovered after the trial has concluded. The first issue is *Brady* – whether the prosecutor had a duty to disclose the evidence to the defendant before the trial. *Brady v. Maryland*, 373 U.S. 83 (1963). The second issue is Michael Morton – whether the defense attorney had a duty to request the information from the prosecutor before the trial. *See* Tex. Code Crim. Proc. Ann. art. 39.14 (West 2017). The first focuses on the prosecutor. The second focuses on the defense attorney. If either violation is sustained by the reviewing court, then the defendant is entitled to a new trial.

We will address *Brady* first. The prosecution violates a defendant's due process rights if it suppresses, either willfully or inadvertently, exculpatory or impeaching evidence that is material. *Brady v. Maryland*, 373 U.S. 83 (1963). Brady requires a three-step approach. The appellant must demonstrate that (1) the State failed to disclose evidence within its possession, (2) the withheld evidence is either impeachment evidence or exculpatory evidence, and (3) the evidence is material. *Hampton v. State*, 86 S.W.3d 603, 612 (Tex. Crim App. 2002). At the outset it is clear that the evidence was impeachment evidence.

In this case, the State has claimed that the evidence of the victim's criminal history was not in its possession and thus it had no duty to disclose the evidence. The prosecutor stated at the motion for new trial that they were not even aware of the victim's history. The prosecutor stated that there were 50 cases scheduled for jury trial that day and there was no way for them to review the history of every witness on all these cases. Most of the cases were resolved with plea agreements and then the

Judge called Mr. Rush's case for trial. Within 15 minutes the *voir dire* started.
There is nothing in the records that suggests the prosecutor had a physical copy of the victim's driving record. *See Reed v. State*, (Tex. App. – Fort Worth 2016)(unpub.). After trial, the victim disclosed this information to the defendant and the defendant obtained the records from the Municipal Court. It could be argued that the prosecutor has direct access to the municipal court's records. However, the defense attorney likewise could have obtained this evidence through pre-trial investigation. Regardless of whether the first step is met, we find that the appellant cannot meet the third step of *Brady*.

For a *Brady* violation, evidence is material if "there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different." *Ex Parte Richardson*, 70 S.W. 3d 865 (Tex. Crim. App. 2002). "The mere possibility that an item of undisclosed information might have aided the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Hampton v. State*, 86 S.W.3d 603, 612 (Tex. Crim App. 2002).

It is true that the prior convictions of the victim would have helped the defense's case. The victim had a few traffic tickets. The argument would have been that the tickets show a pattern of the victim not following traffic laws. This supports the defense argument that the victim was at fault for the accident not the defendant. However, the verdict in the case would not be undermined with this impeachment evidence. There was another witness who testified that the defendant was at fault for the accident. This witness had a clear line of sight to the intersection. Also, the fact that the defendant had alcohol in his system does suggest that his driving skills were impaired. Thus, we cannot conclude that the information about the victim would have changed the verdict. We find that there is no Brady violation.

Next, appellant argues that his own trial court attorney provided him ineffective assistance of counsel by not filing a Michael Morton request for the victim's criminal history under Texas Code of Criminal Procedure Section 39.14. This code section allows for a defendant or their attorney to request pre-trial discovery. Discovery is a request to see the evidence that the state may present at trial and also any evidence that might aid the defense. If the defense attorney files a Michael Morton request then the State is obligated to turn over all of this evidence.

To establish ineffective assistance of counsel, the appellant must show by a preponderance of the evidence that his counsel's representation was deficient and

that the deficiency prejudiced the defendant. *Strickland v. State*, 266 U.S. 668 (1984). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id. The evidence for this analysis is the same as above for our Brady discussion. We have already concluded that the evidence was not material as it would not have produced a different outcome. An ineffective assistance of counsel claim is only sustained if the error was so serious that the defendant was deprived a fair trial. We are not inclined to make such a pronouncement.

The intersection of ineffective assistance and pre-trial discovery requests was addressed by the El Paso Court of Appeals in *Blanco*. *Blanco v. State*, (Tex. App. – El Paso, 2015)(unpub.). There the Court recognized that a defendant does not have a constitutional right to discovery in a criminal case. We cannot lightly second guess the verdict on criminal cases simply because some additional evidence is discovered after the trial. There must be some finality in our convictions. In the present case, even if a discovery request was made there is no guarantee that it would have been specific enough to obtain the information regarding the victim's prior traffic tickets. We also point out that it is not the general practice of attorneys to submit discovery requests when handling matters in a Municipal Court setting.

We find that there was no ineffective assistance of counsel violation.

CONCLUSION

On both grounds, we affirm the decisions of the trial court.

DISSENTING OPINION

Justice Alamin, dissents:

I disagree with the majority opinion on both issues brought before this court. Specifically, the court has chosen not to analyze the voir dire under the recent Supreme Court opinion of *Flowers*. Also, the court undervalues the impact of the newly discovered evidence and the deficiency of the appellant's trial attorney.

Issue 1: *Batson* Challenge

We can no longer simply play a game of back and forth when it comes to a *Batson* challenge. Stopping step two at the racial neutral excuse such as "he had a beard," "she looked at me funny," or "she listens to Lizzo" is no longer sufficient. Instead, the Supreme Court in *Flowers* has given us six categories of other evidence

to look to when determining if the preemptory strikes were exercised in a discriminatory manner. They are listed as follows:

1) Statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
2) Evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;
3) Side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
4) A prosecutor's misrepresentations of the record when defending the strikes during the Batson hearing;
5) Relevant history of the State's peremptory strikes in past cases; or
6) Other relevant circumstances that bear upon the issue of racial discrimination.

In the present case, we have some evident red flags with many of these categories – see 2, 3, 4, and 6. The record reflects disparate questioning, common characteristics between those struck and those left on the jury, misrepresentations about the State's reasons for the strikes, and a concerning exercise of the jury shuffle on a predominately black and female strike zone. If only one problem was present I would agree with the majority that we should not question the trial court's discretion. However, neither the trial court nor this court even used the correct legal framework when making their decision.

In looking at the record under *Flowers*, I would have reversed the trial court's decision and remanded for a new trial.

Issue 2: *Brady* and Michael Morton Violations

Both of these issues are similar even though they focus on different standards and evolved as points of law separately. Materiality is a concern common to both issues. I do not agree with the majority's determination that the evidence of the victim's prior tickets was immaterial. The main concern in the case was whether the appellant was at fault or the victim was at fault. Evidence that the victim has a pattern of violating traffic laws is highly material to the main point of the case. On this issue alone I would reverse and remand for a new trial.

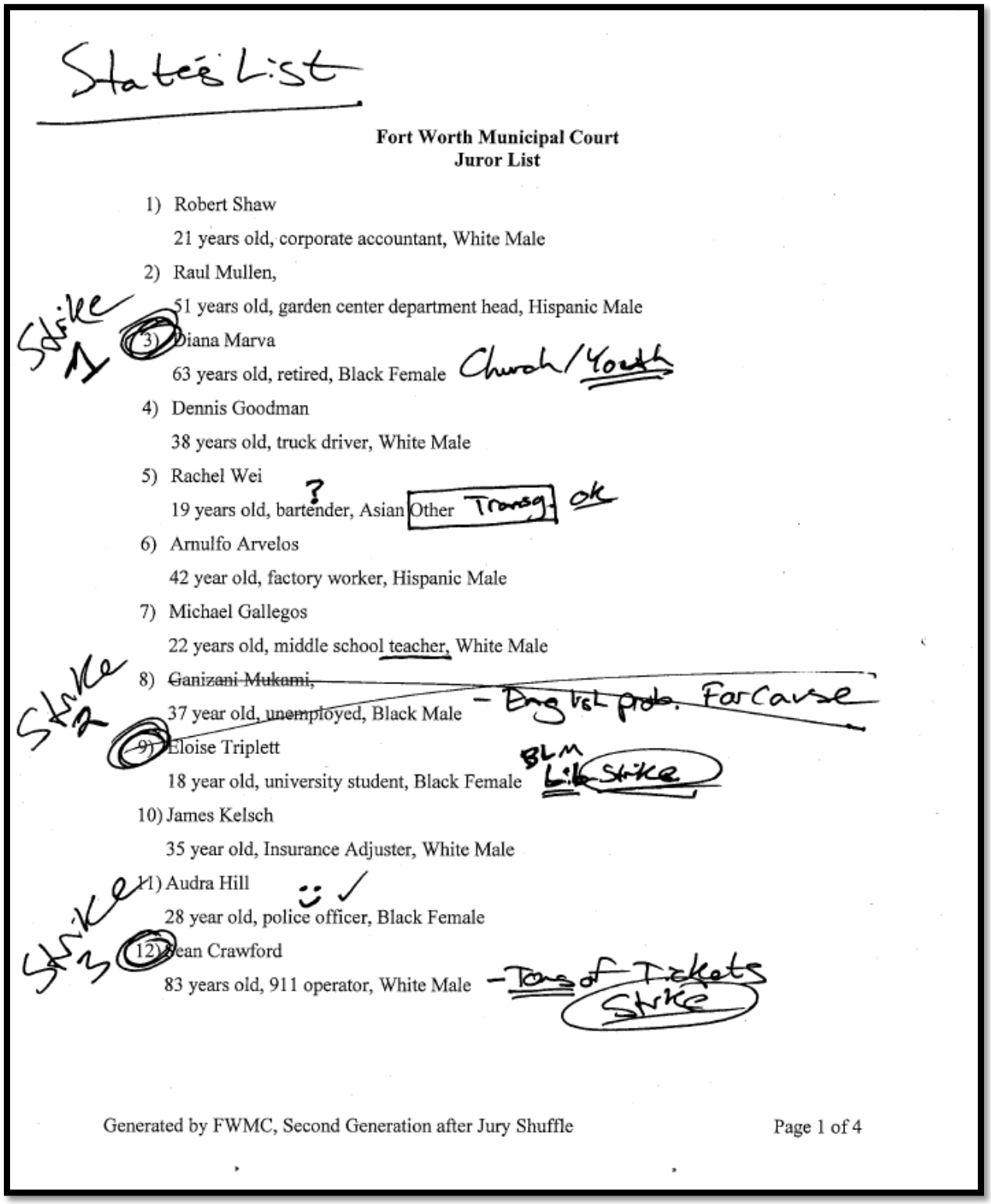
However, it is important to discuss the issues regarding ineffective assistance of the trial court counsel. When an attorney knows a case is headed for a trial, they have a duty to prepare the case for trial. At a minimum this involves doing a preliminary criminal history search on potential witnesses so discover impeachment

evidence. "It is fundamental that a criminal defense attorney must have a firm command of the facts of the case as well as the governing law before the attorney can render reasonably effective assistance of counsel." *Melton v. State*, 987 S.W.2d 72 (1998).

Also, the rights of a client to proper investigation of the case are not diminished solely because their attorney has chosen to represent multiple people. The attorney must ensure that they can handle the case load or not accept so many cases. They must conduct a basic investigation before trial.

On both the *Brady* and Michael Morton violations, I would have reversed and remanded for a new trial.

STATE'S STRIKE LIST FROM THE TRIAL COURT



State's List

Fort Worth Municipal Court
Juror List

1) Robert Shaw
   21 years old, corporate accountant, White Male
2) Raul Mullen,
   51 years old, garden center department head, Hispanic Male
3) Diana Marva
   63 years old, retired, Black Female — Church/Youth
4) Dennis Goodman
   38 years old, truck driver, White Male
5) Rachel Wei
   19 years old, bartender, Asian Other Transg. ok
6) Arnulfo Arvelos
   42 year old, factory worker, Hispanic Male
7) Michael Gallegos
   22 years old, middle school teacher, White Male
8) ~~Ganizani Mukami,~~
   37 year old, unemployed, Black Male — English prob. For Cause
9) Eloise Triplett
   18 year old, university student, Black Female — BLM Like Strike
10) James Kelsch
    35 year old, Insurance Adjuster, White Male
11) Audra Hill
    28 year old, police officer, Black Female
12) Dean Crawford
    83 years old, 911 operator, White Male — Tons of Tickets Strike

Generated by FWMC, Second Generation after Jury Shuffle

Page 1 of 4

PORTION OF TRANSCRIPT FROM VOIR DIRE

Fort Worth Municipal Court

Transcript of Voir Dire

	(Jury is seated in gallery)
Judge	Welcome everyone to Fort Worth Municipal Court. Thank you for taking time out of your busy schedule to be here today. The right to a jury trial and the right to serve on a jury trial is the second most important right that you hold – second only to the right to vote. We have 34 members of the jury panel today. However, only 6 of you will be asked to serve on the actual jury hearing the case today. The prosecutor, Ms. Crump and the defendant attorney, Mr. Vega will each have an opportunity to ask you questions to decide who will be the best 6 jurors to hear today's case. It is very important that you answer these questions honestly and candidly to the best of your ability. As such, before we begin I will administer an oath to you. If you will all please stand if you are able and raise your right hand. "Do you, and each of you, solemnly swear that you will make true answers to such questions as may be propounded to you by the court, or under its directions, touching your service and qualifications as a juror, so help you God?"
Jury Panelist	(murmuring) We do.
Judge	If there is a question that you are uncomfortable answering in front of the big group then let me know and we can discuss the matter up here at the bench. The prosecutor will now have 10 minutes to ask you questions.
Ms. Crump	Thank You, Your Honor. Good morning, ladies and gentlemen. My name is Connie Crump and as the Judge said, I am a prosecutor representing the State of Texas in today's trial. I will be asking you some questions. The point isn't to find bad people or racists people or something like that and exclude them from the jury. The main point of this process is to find the 6 best jurors to hear this case. You might be a great juror on a capital murder charge, but because of your past history and experiences you might not be the best juror on a traffic ticket charge. Todays case involves a traffic accident case – vehicle verses a pedestrian.
Mr. Vega	Objection, Your honor. My client was not a pedestrian. He was on a bicycle and that is what this whole case is about. The statement is improper.
Judge	Overruled. I'll allow it right now. Ms. Crump please continue, just try to stay away from going into the evidence of the case.
Ms. Crump	Yes, Your Honor. So, you all have juror numbers that the court assigned to you. Your number decided how you are sitting in the Courtroom. You, Shaw are juror number one so you are sitting way up here in the front. Juror number 34 is all the way in the back. If at the end of the process the law doesn't cause anyone to be eliminated from the jury then Jurors number one through six will be our six jurors for this case. If one person is eliminated in this first 6 then juror 7 would take their place and so forth. Does anyone have any questions about this.
	(No hands raised)
Ms. Crump	Alright, let's start with Juror 3 Ms. Marva. Good morning. I see that you are currently retired. What was your occupation before you retired?

Juror 3	I was a secretary at a church.
Ms. Crump	Ah, ok. And what did you do on a day to day basis at your job?
Juror 3	It was just basic paperwork. I helped some with the finances and I also served as an associate youth pastor.
Ms. Crump	This might sound like a generic question but who else on the jury panel was worked with youth either as a teacher or in a voluntary role? Ok, Juror Number 5, Mr Wei?
Juror 5	I am a bartender. I am constantly having kids come in trying to buy drinks. We just check their ID them and send them on their way.
Ms. Crump	Thank you for your answer. Juror Number 7, Mr. Gallegos?
Juror 7	I'm a middle school teacher. I deal with kids every day. I'm in a lower income school. We have lots of troublemakers that we have to deal with.
Ms. Crump	Thank you. As I said before today's case involves a traffic ticket. I'll ask the next question to, let's just go down the row here, Juror 8, Mr. Mukami. Have you ever had an interaction with a police officer?
Juror 8	There is a police who live in neighborhood, in house.
Ms. Crump	Ok. Have you ever been stopped by a police officer?
Juror 8	No, I don't know any police officers.
Ms. Crump	Your honor, may we approach with Juror 8.
Judge	Yes. Mr. Mukami you can come up here to the bench?
Ms. Crump	Your honor, may I continue my questions
Judge	Yes
Ms. Crump	Mr. Mukami, are you … is English your first language?
Juror 8	No, I am from Africa. I speak Swahili
Ms. Crump	How long have you lived in America?
Juror 8	I got here this morning at 8 o'clock and parked outside.
Ms. Crump	Ok, Can you read and write in English … like words on a paper
Juror 8	No, my daughter is here to help if you need.
Ms. Crump	No, thank you though.
Judge	Mr. Mukami, you can return to your seat.
Ms. Crump	I move to strike Juror 8 Mr. Mukami For Cause.
Judge	Granted. Mr. Mukami, please go with the bailiff. You are excused from jury duty today and may leave.
Ms. Crump	May I continue?
Judge	Yes

Ms. Crump	Ok, lets move to Juror 9, Ms Triplett I see that you are a college student. What are you studying, like what is your major?
Juror 9	I am studying 18th century literature as my major. My minor is environmental sciences.
Ms. Crump	Wow, so like English and Science mixed together there. What uhm … What is the ultimate goal … what profession are you hoping to join?
Juror 9	I hope to end the racial enslavement that is happening along our southern border. Any time of structure built along the border is a monument to slavery and will drastically increase the rate of climate change. I would also love to be the one who ends the cruelty to our planet by banning single use plastics.
Ms. Crump	Ok, very ambitious there. Alright. Lets talk to Juror 12, Mr. Crawford. Now Mr. Crawford, we know each other already don't we?
Juror 12	Yes, ma'am. Your making me pay money on that dad gone blast it all speeding ticket.
Ms. Crump	Now, you actually have a couple tickets that you are paying on, right.
Juror 12	Yeah, and I got another one this morning. Can these people dismiss that one instead of me having to talk to you again?
Ms. Crump	Ha, not today sir. We are hearing Mr. Rush's case today. Now, Juror 12 as much as you don't like paying on your own ticket, do you think you could put those feelings aside and be a fair juror on this case?
Juror 12	Yeah.
Ms. Crump	You are going to find the defendant Not Guilty just because you don't like getting tickets yourself, right?
Juror 12	No, if he did it, he can join me over here on the losers side.
Judge	Ms. Crump we are close on time.
Ms. Crump	I'll wrap up your honor. Thank you ladies and gentlemen for your time this morning. I look forward to presenting my case to the six of you that ultimately will serve on this jury.
Judge	Thanks you Ms. Crump. We will now here from the attorney representing Mr. Rush.
*****portion of transcript removed*****	
Judge	With that voir dire has concluded. The jury panel has retired to the jury room and we are ready to review for preemptory strikes. So far we only have one strike for cause, that was Juror 8 do to English language issues. Are there any other For Cause strikes being requested by the State?
Ms. Crump	No, your honor.
Judge	Defense?
Mr. Vega	No, Your honor.
Judge	Ok, 5 minutes. … Alright do we have our strikes ready? … So the State has struck Jurors 3, 9 and 12. Defense has struck only Juror 11.
Mr. Vega	Yes, your honor, the police officer. Now, uhm. Your honor, may we approach.
Judge	Yes

Mr. Vega	I know I struck a black female. However, I always have a habit of not allowing police officers on jury because they write tickets all the time. But, in looking at the State's strikes it looks like this kicks all blacks and all females off the jury. With that I make a Batson challenge.
Judge	State, response?
Ms. Crump	Your honor, I would have to point out that we have had a black male in our For Cause strike. That wasn't my fault it was just how it happened. And also, the defense is correct that they also struck a black female.
Mr. Vega	Your honor, Juror 11 wouldn't have made it onto the jury anyway. That strike doesn't really matter
Judge	State under Batson we need your reasons for striking the ones you did.
Ms. Crump	Yes, so off the top of my head Juror 3 was was a school teacher who worked with students close in age to the defendant. Juror 9 had some anti-government political views. And Juror 12 and I have history with tickets but he isn't included in the Batson review I think
Judge	Right, we are just looking at 3 and 9.
Ms. Crump	And I think it is important to note, we are looking at race and gender. For the gender part we still do have a biological female on the panel, Juror 5.
Judge	Huhm, I think we are going to leave that part out for now and just look at 3 and 9. You have given your reasons now its back to you Mr. Vega. Do you have a response?
Mr. Vega	Yes, I still think we have an unconstitutional jury. All white males. I know we did a shuffle at the request of the State but I'm not sure what our makeup was in that group. I'd like to look at that.
Judge	Let me see that original list. So just counting through the first 12 only, you know the strike zone, we have a total of 7 Blacks, 3 Whites and 1 Hispanics. 8 women and 4 men. Our transgendered person wasn't in this group.
Mr. Vega	So, I hate to accuse anyone of outright racism but that's not the standard here. We do need to look at all of these factors. So, we did have a significant number of black and female potential jurors, before the shuffle. There is an argument the exercise of the shuffle shows discriminatory intent.
Judge	Ok
Mr. Vega	Also, my notes have Juror 7 as our teacher and Juror 3 as a church employee.
Ms. Crump	Yes, I was mistaken on. Going off my notes here.
Judge	Ok. So I'm going to deny the Batson challenge. I think there are good race neutral reasons here. Under Batson I'm not pushing us out anymore than that.
*****portion of transcript removed*****	

SELECTED STATUTE / CASE LAW

Texas Code of Criminal Procedure 39.14

(a) Subject to the restrictions provided by Section 264.408, Family Code, and Article 39.15 of this code, as soon as practicable after receiving a timely request from the defendant the state shall produce and permit the inspection and the electronic duplication, copying, and photographing, by or on behalf of the defendant, of any offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers but not including the work product of counsel for the state in the case and their investigators and their notes or report, or any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state. The state may provide to the defendant electronic duplicates of any documents or other information described by this article. The rights granted to the defendant under this article do not extend to written communications between the state and an agent, representative, or employee of the state. This article does not authorize the removal of the documents, items, or information from the possession of the state, and any inspection shall be in the presence of a representative of the state.

…

(h) Notwithstanding any other provision of this article, the state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.

…

Tex. Code Crim. Proc. Ann. art. 39.14 (West 2017).

UNITED STATES SUPREME COURT

Batson v. Kentucky, 476 U.S. 79 (1986)

JUSTICE POWELL delivered the opinion of the Court.

OPINION

This case requires us to reexamine that portion of Swain v. Alabama, 380 U. S. 202 (1965), concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury.

I

Petitioner, a black man, was indicted in Kentucky on charges of second-degree burglary and receipt of stolen goods. On the first day of trial in Jefferson Circuit Court, the judge conducted voir dire examination of the venire, excused certain jurors for cause, and permitted the parties to exercise peremptory challenges. [Footnote 2] The prosecutor used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected. Defense counsel moved to discharge the jury before it was sworn on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross-section of the community, and under the Fourteenth Amendment to equal protection of the laws. Counsel requested a hearing on his motion. Without expressly ruling on the request for a hearing, the trial judge observed that the parties were entitled to use their peremptory challenges to "strike anybody they want to." The judge then denied petitioner's motion, reasoning that the cross-section requirement applies only to selection of the venire, and not to selection of the petit jury itself.

The jury convicted petitioner on both counts. On appeal to the Supreme Court of Kentucky, petitioner pressed, among other claims, the argument concerning the prosecutor's use of peremptory challenges. Conceding that Swain v. Alabama, supra, apparently foreclosed an equal protection claim based solely on the prosecutor's conduct in this case, petitioner urged the court to follow decisions of other States, People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979), and to hold that such conduct violated his rights under the Sixth Amendment and § 11 of the Kentucky Constitution to a jury drawn from a cross-section of the community. Petitioner also contended that the facts showed that the prosecutor had engaged in a "pattern" of discriminatory challenges in this case and established an equal protection violation under Swain.

The Supreme Court of Kentucky affirmed. In a single paragraph, the court declined petitioner's invitation to adopt the reasoning of People v. Wheeler, supra, and Commonwealth v. Soares, supra. The court observed that it recently had reaffirmed its reliance on Swain, and had held that a defendant alleging lack of a fair cross-section must demonstrate systematic exclusion of a group of jurors from the venire. See Commonwealth v. McFerron, 680 S.W.2d 924 (1984). We granted certiorari, 471 U.S. 1052 (1985), and now reverse.

II

In Swain v. Alabama, this Court recognized that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." 380 U.S. at 380 U. S. 203-204. This principle has been "consistently and repeatedly" reaffirmed, id. at 380 U. S. 204, in numerous decisions of this Court both preceding and following Swain. [Footnote 3] We reaffirm the principle today. [Footnote 4]

A

More than a century ago, the Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded. Strauder v. West Virginia, 100 U. S. 303 (1880). That decision laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn. In Strauder, the Court explained that the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race. Id. at 100 U. S. 306-307. Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.

In holding that racial discrimination in jury selection offends the Equal Protection Clause, the Court in Strauder recognized, however, that a defendant has

no right to a "petit jury composed in whole or in part of persons of his own race." Id. at 100 U. S. 305. [Footnote 5] "The number of our races and nationalities stands in the way of evolution of such a conception" of the demand of equal protection. Akins v. Texas, 325 U. S. 398, 325 U. S. 403 (1945). [Footnote 6] But the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria. Martin v. Texas, 200 U. S. 316, 200 U. S. 321 (1906); Ex parte Virginia, 100 U. S. 339, 100 U. S. 345 (1880). The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, Strauder, supra, at 100 U. S. 305, [Footnote 7] or on the false assumption that members of his race as a group are not qualified to serve as jurors, see Norris v. Alabama, 294 U. S. 587, 294 U. S. 599 (1935); Neal v. Delaware, 103 U. S. 370, 103 U. S. 397 (1881). Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection, because it denies him the protection that a trial by jury is intended to secure.

"The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." Strauder, supra, at 100 U. S. 308; see Carter v. Jury Comm'n of Greene County, 396 U. S. 320, 396 U. S. 330 (1970). The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge. Duncan v. Louisiana, 391 U. S. 145, 391 U. S. 156 (1968). [Footnote 8] Those on the venire must be "indifferently chosen," [Footnote 9] to secure the defendant's right under the Fourteenth Amendment to "protection of life and liberty against race or color prejudice." Strauder, supra, at 100 U. S. 309.

Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. See Thiel v. Southern Pacific Co., 328 U. S. 217, 328 U. S. 223-224 (1946). A person's race simply "is unrelated to his fitness as a juror." Id. at 328 U. S. 227 (Frankfurter, J., dissenting). As long ago as Strauder, therefore, the Court recognized that, by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror. 100 U.S. at 100 U. S. 308; see Carter v. Jury Comm'n of Greene County, supra, at 396 U. S. 329-330; Neal v. Delaware, supra, at 103 U. S. 386.

The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.

…

B

In Strauder, the Court invalidated a state statute that provided that only white men could serve as jurors. Id. at 100 U. S. 305. We can be confident that no State now has such a law. The Constitution requires, however, that we look beyond the face of the statute defining juror qualifications, and also consider challenged selection practices to afford "protection against action of the State through its administrative officers in effecting the prohibited discrimination." Norris v. Alabama, supra, at 294 U. S. 589; see Hernandez v. Texas, 347 U. S. 475, 347 U. S. 478-479 (1954); Ex parte Virginia, supra, at 100 U. S. 346-347.

…

III

…

A

Swain required the Court to decide, among other issues, whether a black defendant was denied equal protection by the State's exercise of peremptory challenges to exclude members of his race from the petit jury. 380 U.S. at 380 U. S. 209-210. The record in Swain showed that the prosecutor had used the State's peremptory challenges to strike the six black persons included on the petit jury venire. Id. at 380 U. S. 210. While rejecting the defendant's claim for failure to prove purposeful discrimination, the Court nonetheless indicated that the Equal Protection Clause placed some limits on the State's exercise of peremptory challenges. Id. at 380 U. S. 222-224.

…

B

Since the decision in Swain, we have explained that our cases concerning selection of the venire reflect the general equal protection principle that the "invidious quality" of governmental action claimed to be racially discriminatory "must ultimately be

traced to a racially discriminatory purpose." Washington v. Davis, 426 U. S. 229, 426 U. S. 240 (1976). As in any equal protection case, the "burden is, of course," on the defendant who alleges discriminatory selection of the venire "to prove the existence of purposeful discrimination." Whitus v. Georgia, 385 U.S. at 385 U. S. 550 (citing Tarrance v. Florida, 188 U. S. 519 (1903)). In deciding if the defendant has carried his burden of persuasion, a court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Arlington Heights v. Metropolitan Housing Development Corp., 429 U. S. 252, 429 U. S. 266 (1977). Circumstantial evidence of invidious intent may include proof of disproportionate impact. Washington v. Davis, 426 U.S. at 426 U. S. 242. We have observed that, under some circumstances, proof of discriminatory impact "may, for all practical purposes, demonstrate unconstitutionality because, in various circumstances, the discrimination is very difficult to explain on nonracial grounds." Ibid. For example, "total or seriously disproportionate exclusion of Negroes from jury venires," ibid., "is itself such an unequal application of the law . . . as to show intentional discrimination,'" id. at 426 U. S. 241 (quoting Akins v. Texas, 325 U.S. at 325 U. S. 404).

…

C

The standards for assessing a prima facie case in the context of discriminatory selection of the venire have been fully articulated since Swain. See Castaneda v. Partida, supra, at 430 U. S. 494-495; Washington v. Davis, 426 U.S. at 426 U. S. 241-242; Alexander v. Louisiana, supra, at 405 U. S. 629-631. These principles support our conclusion that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, Castaneda v. Partida, supra, at 430 U. S. 494, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Avery v. Georgia, 345 U.S. at 345 U. S. 562. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances.

For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.

Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. See McCray v. Abrams, 750 F.2d at 1132; Booker v. Jabe, 775 F.2d 762, 773 (CA6 1985), cert. pending, No. 85-1028. But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption -- or his intuitive judgment -- that they would be partial to the defendant because of their shared race. Cf. Norris v. Alabama, 294 U.S. at 294 U. S. 598-599; see Thompson v. United States, 469 U. S. 1024, 1026 (1984) (BRENNAN, J., dissenting from denial of certiorari). Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, supra, at 476 U. S. 86, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise

solely from the jurors' race. Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or "affirm[ing] [his] good faith in making individual selections." Alexander v. Louisiana, 405 U.S. at 405 U. S. 632. If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause "would be but a vain and illusory requirement." Norris v. Alabama, supra, at 294 U. S. 598. The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. [Footnote 20] The trial court then will have the duty to determine if the defendant has established purposeful discrimination. [Footnote 21]

IV

The State contends that our holding will eviscerate the fair trial values served by the peremptory challenge. Conceding that the Constitution does not guarantee a right to peremptory challenges and that Swain did state that their use ultimately is subject to the strictures of equal protection, the State argues that the privilege of unfettered exercise of the challenge is of vital importance to the criminal justice system.

While we recognize, of course, that the peremptory challenge occupies an important position in our trial procedures, we do not agree that our decision today will undermine the contribution the challenge generally makes to the administration of justice. The reality of practice, amply reflected in many state and federal court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors. By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. [Footnote 22] In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.

Nor are we persuaded by the State's suggestion that our holding will create serious administrative difficulties. In those States applying a version of the evidentiary standard we recognize today, courts have not experienced serious administrative burdens, [Footnote 23] and the peremptory challenge system has survived. We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges. [Footnote 24]

V

In this case, petitioner made a timely objection to the prosecutor's removal of all black persons on the venire. Because the trial court flatly rejected the objection without requiring the prosecutor to give an explanation for his action, we remand this case for further proceedings. If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed. E.g., Whitus v. Georgia, 385 U.S. at 385 U. S. 549-550; Hernandez v. Texas, 347 U.S. at 347 U. S. 482; Patton v. Mississippi, 332 U.S. at 469. [Footnote 25]

It is so ordered.

…

UNITED STATES SUPREME COURT

Flowers v. Mississippi, 139 S.Ct. 2228 (2019).

Justice Kavanaugh delivered the opinion of the Court.

OPINION

In Batson v. Kentucky, 476 U.S. 79 (1986), this Court ruled that a State may not discriminate on the basis of race when exercising peremptory challenges against prospective jurors in a criminal trial.
In 1996, Curtis Flowers allegedly murdered four people in Winona, Mississippi. Flowers is black. He has been tried six separate times before a jury for murder. The same lead prosecutor represented the State in all six trials.

…

In his sixth trial, which is the one at issue here, Flowers was convicted. The State struck five of the six black prospective jurors. On appeal, Flowers argued that the State again violated Batson in exercising peremptory strikes against black prospective jurors. In a divided 5-to-4 decision, the Mississippi Supreme Court affirmed the conviction. We granted certiorari on the Batson question and now reverse. See 586 U. S. ___ (2018).
Four critical facts, taken together, require reversal. First, in the six trials combined, the State employed its peremptory challenges to strike 41 of the 42 black prospective jurors that it could have struck—a statistic that the State acknowledged at oral argument in this Court. Tr. of Oral Arg. 32. Second, in the most recent trial, the sixth trial, the State exercised peremptory strikes against five of the six black prospective jurors. Third, at the sixth trial, in an apparent effort to find pretextual reasons to strike black prospective jurors, the State engaged in dramatically disparate questioning of black and white prospective jurors. Fourth, the State then struck at least one black prospective juror, Carolyn Wright, who was similarly situated to white prospective jurors who were not struck by the State.

We need not and do not decide that any one of those four facts alone would require reversal. All that we need to decide, and all that we do decide, is that all of the relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State's peremptory strike of black prospective juror Carolyn Wright was not "motivated in substantial part by discriminatory intent." Foster v. Chatman, 578 U. S. ___, ___ (2016) (slip op., at 23) (internal quotation marks omitted). In reaching that conclusion, we break no new legal ground. We simply enforce and reinforce Batson by applying it to the extraordinary facts of this case.

We reverse the judgment of the Supreme Court of Mississippi, and we remand the case for further proceedings not inconsistent with this opinion.

I

The underlying events that gave rise to this case took place in Winona, Mississippi. Winona is a small town in northern Mississippi, just off I–55 almost halfway between Jackson and Memphis. The total population of Winona is about 5,000. The town is about 53 percent black and about 46 percent white.
In 1996, Bertha Tardy, Robert Golden, Derrick Stewart, and Carmen Rigby were murdered at the Tardy Furniture store in Winona. All four victims worked at the Tardy Furniture store. Three of the four victims were white; one was black. In 1997, the State charged Curtis Flowers with murder. Flowers is black. Since then, Flowers has been tried six separate times for the murders. In each of the first two trials, Flowers was tried for one individual murder. In each subsequent trial, Flowers was tried for all four of the murders together. The same state prosecutor tried Flowers each time. The prosecutor is white.

At Flowers' first trial, 36 prospective jurors—5 black and 31 white—were presented to potentially serve on the jury. The State exercised a total of 12 peremptory strikes, and it used 5 of them to strike the five qualified black prospective jurors. Flowers objected, arguing under Batson that the State had exercised its peremptory strikes in a racially discriminatory manner. The trial court rejected the Batson challenge. Because the trial court allowed the State's peremptory strikes, Flowers was tried in front of an all-white jury. The jury convicted Flowers and sentenced him to death.

On appeal, the Mississippi Supreme Court reversed the conviction, concluding that the State had committed prosecutorial misconduct in front of the jury by, among other things, expressing baseless grounds for doubting the credibility of witnesses and mentioning facts that had not been allowed into evidence by the trial judge. Flowers, 773 So. 2d, at 317, 334. In its opinion, the Mississippi Supreme Court described "numerous instances of

prosecutorial misconduct" at the trial. Id., at 327. Because the Mississippi Supreme Court reversed based on prosecutorial misconduct at trial, the court did not reach Flowers' Batson argument. See Flowers, 773 So. 2d, at 327.

At the second trial, 30 prospective jurors—5 black and 25 white—were presented to potentially serve on the jury. As in Flowers' first trial, the State again used its strikes against all five black prospective jurors. But this time, the trial court determined that the State's asserted reason for one of the strikes was a pretext for discrimination. Specifically, the trial court determined that one of the State's proffered reasons—that the juror had been inattentive and was nodding off during jury selection—for striking that juror was false, and the trial court therefore sustained Flowers' Batson challenge. The trial court disallowed the strike and sat that black juror on the jury. The jury at Flowers' second trial consisted of 11 white jurors and 1 black juror. The jury convicted Flowers and sentenced him to death.

On appeal, the Mississippi Supreme Court again reversed. The court ruled that the prosecutor had again engaged in prosecutorial misconduct in front of the jury by, among other things, impermissibly referencing evidence and attempting to undermine witness credibility without a factual basis. See Flowers v. State, 842 So. 2d 531, 538, 553 (2003).
At Flowers' third trial, 45 prospective jurors—17 black and 28 white—were presented to potentially serve on the jury. One of the black prospective jurors was struck for cause, leaving 16. The State exercised a total of 15 peremptory strikes, and it used all 15 against black prospective jurors. Flowers again argued that the State had used its peremptory strikes in a racially discriminatory manner. The trial court found that the State had not discriminated on the basis of race. See Flowers, 947 So. 2d, at 916. The jury in Flowers' third trial consisted of 11 white jurors and 1 black juror. The lone black juror who served on the jury was seated after the State ran out of peremptory strikes. The jury convicted Flowers and sentenced him to death.

On appeal, the Mississippi Supreme Court yet again reversed, concluding that the State had again violated Batson by discriminating on the basis of race in exercising all 15 of its peremptory strikes against 15 black prospective jurors. See Flowers, 947 So. 2d, at 939. The court's lead opinion stated: "The instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a Batson challenge." Id., at 935. The opinion explained that although "each individual strike may have justifiably appeared to the trial court to be sufficiently race neutral, the trial court also has a duty to look at the State's use of peremptory challenges in toto." Id., at 937. The opinion emphasized that "trial judges should not blindly accept any and every reason put forth by the State, especially" when "the State continues to exercise challenge after challenge only upon members of a particular race." Ibid. The opinion added that the "State engaged in racially discriminatory practices" and that the "case evinces an effort by the State to exclude African-Americans from jury service." Id., at 937, 939.

At Flowers' fourth trial, 36 prospective jurors—16 black and 20 white—were presented to potentially serve on the jury. The State exercised a total of 11 peremptory strikes, and it used all 11 against black prospective jurors. But because of the relatively large number of prospective jurors who were black, the State did not have enough peremptory challenges to eliminate all of the black prospective jurors. The seated jury consisted of seven white jurors and five black jurors. That jury could not reach a verdict, and the proceeding ended in a mistrial.

As to the fifth trial, there is no available racial information about the prospective jurors, as distinct from the jurors who ultimately sat on the jury. The jury was composed of nine white jurors and three black jurors. The jury could not reach a verdict, and the trial again ended in a mistrial.

At the sixth trial, which we consider here, 26 prospective jurors—6 black and 20 white—were presented to potentially serve on the jury. The State exercised a total of six peremptory strikes, and it used five of the six against black prospective jurors, leaving one black juror to sit on the jury. Flowers again argued that the State had exercised its peremptory strikes in a racially discrimina-tory manner. The trial court concluded that the State had offered race-neutral reasons for each of the five peremp-tory strikes against the five black prospective jurors. The jury at Flowers' sixth trial consisted of 11 white jurors and 1 black juror. That jury convicted Flowers of murder and sentenced him to death.

In a divided decision, the Mississippi Supreme Court agreed with the trial court on the Batson issue and stated that the State's "race-neutral reasons were

valid and not merely pretextual." Flowers v. State, 158 So. 3d 1009, 1058 (2014). Flowers then sought review in this Court. This Court granted Flowers' petition for a writ of certio-rari, vacated the judgment of the Mississippi Supreme Court, and remanded for further consideration in light of the decision in Foster, 578 U. S. ___. Flowers v. Mississippi, 579 U. S. ___ (2016). In Foster, this Court held that the defendant Foster had established a Batson violation. 578 U. S., at ___ (slip op., at 25). On remand, the Mississippi Supreme Court by a 5-to-4 vote again upheld Flowers' conviction. See 240 So. 3d 1082 (2017). Justice King wrote a dissent for three justices. He stated: "I cannot conclude that Flowers received a fair trial, nor can I conclude that prospective jurors were not subjected to impermissible discrimination." Id., at 1172. According to Justice King, both the trial court and the Mississippi Supreme Court "completely disregard[ed] the constitutional right of prospective jurors to be free from a racially discriminatory selection process." Id., at 1171. We granted certiorari. See 586 U. S. ___.

II

A

Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process. See Powers v. Ohio, 499 U.S. 400, 407 (1991).

Jury selection in criminal cases varies significantly based on state and local rules and practices, but ordinarily consists of three phases, which we describe here in general terms. First, a group of citizens in the community is randomly summoned to the courthouse on a particular day for potential jury service. Second, a subgroup of those prospective jurors is called into a particular courtroom for a specific case. The prospective jurors are often questioned by the judge, as well as by the prosecutor and defense attorney. During that second phase, the judge may excuse certain prospective jurors based on their answers. Third, the prosecutor and defense attorney may challenge certain prospective jurors. The attorneys may challenge prospective jurors for cause, which usually stems from a potential juror's conflicts of interest or inability to be impartial. In addition to challenges for cause, each side is typically afforded a set number of peremptory challenges or strikes. Peremptory strikes have very old credentials and can be traced back to the common law. Those peremptory strikes traditionally may be used to remove any potential juror for any reason—no questions asked.

That blanket discretion to peremptorily strike prospective jurors for any reason can clash with the dictates of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. This case arises at the intersection of the peremptory challenge and the Equal Protection Clause. And to understand how equal protection law applies to peremptory challenges, it helps to begin at the beginning.

…

Under Batson, once a prima facie case of discrimination has been shown by a defendant, the State must provide race-neutral reasons for its peremptory strikes. The trial judge must determine whether the prosecutor's stated reasons were the actual reasons or instead were a pretext for discrimination. Id., at 97–98.

…

B

Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process. Enforcing that constitutional principle, Batson ended the widespread practice in which prosecutors could (and often would) routinely strike all black prospective jurors in cases involving black defendants. By taking steps to eradicate racial discrimination from the jury selection process, Batson sought to protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system. Batson immediately revolutionized the jury selection process that takes place every day in federal and state criminal courtrooms throughout the United States.

In the decades since Batson, this Court's cases have vigorously enforced and reinforced the decision, and guarded against any backsliding. See Foster, 578 U. S. ___; Snyder v. Louisiana, 552 U.S. 472 (2008); Miller-El v. Dretke, 545 U.S. 231 (2005) (Miller-El II). Moreover, the Court has extended Batson in certain ways. A defendant of any race may raise a Batson claim, and a defendant may raise a Batson claim even if the defendant and the excluded juror are of different races. See Hernandez, 347 U. S., at 477–478; Powers, 499 U. S., at 406. Moreover, Batson now applies to gender discrimination, to a criminal defendant's peremptory strikes, and to civil cases. See J. E. B. v. Alabama ex rel. T. B., 511 U.S. 127, 129 (1994); Georgia v. McCollum, 505 U.S. 42, 59 (1992); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991).

…

III

…

Four categories of evidence loom large in assessing the Batson issue in Flowers' case: (1) the history from Flowers' six trials, (2) the prosecutor's striking of five of six black prospective jurors at the sixth trial, (3) the prosecutor's dramatically disparate questioning of black and white prospective jurors at the sixth trial, and (4) the prosecutor's proffered reasons for striking one black juror (Carolyn Wright) while allowing other similarly situated white jurors to serve on the jury at the sixth trial. We address each in turn.

A

…

Here, our review of the history of the prosecutor's peremptory strikes in Flowers' first four trials strongly supports the conclusion that his use of peremptory strikes in Flowers' sixth trial was motivated in substantial part by discriminatory intent. (Recall that there is no record evidence from the fifth trial regarding the race of the prospective jurors.)

…

To summarize the most relevant history: In Flowers' first trial, the prosecutor successfully used peremptory strikes against all of the black prospective jurors. Flowers faced an all-white jury. In Flowers' second trial, the prosecutor tried again to strike all of the black prospective jurors, but the trial court decided that the State could not strike one of those jurors. The jury consisted of 11 white jurors and 1 black juror. In Flowers' third trial, there were 17 black prospective jurors. The prosecutor used 15 out of 15 peremptory strikes against black prospective jurors. After one black juror was struck for cause and the prosecutor ran out of strikes, one black juror remained. The jury again consisted of 11 white jurors and 1 black juror. In Flowers' fourth trial, the prosecutor again used 11 out of 11 peremptory strikes against black prospective jurors. Because of the large number of black prospective jurors at the trial, the prosecutor ran out of peremptory strikes before it could strike all of the black prospective jurors. The jury for that trial consisted of seven white jurors and five black jurors, and the jury was unable to reach a verdict. To reiterate, there is no available information about the race of prospective jurors in the fifth trial. The jury for that trial consisted of nine white jurors and three black jurors, and the jury was unable to reach a verdict.

…

The State's actions in the first four trials necessarily inform our assessment of the State's intent going into Flowers' sixth trial. We cannot ignore that history. We cannot take that history out of the case.

B

We turn now to the State's strikes of five of the six black prospective jurors at Flowers' sixth trial, the trial at issue here. As Batson noted, a " 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination." 476 U. S., at 97.

Flowers' sixth trial occurred in June 2010. At trial, 26 prospective jurors were presented to potentially serve on the jury. Six of the prospective jurors were black. The State accepted one black prospective juror—Alexander Robinson. The State struck the other five black prospective jurors—Carolyn Wright, Tashia Cunningham, Edith Burnside, Flancie Jones, and Dianne Copper. The resulting jury consisted of 11 white jurors and 1 black juror.

The State's use of peremptory strikes in Flowers' sixth trial followed the same pattern as the first four trials, with one modest exception: It is true that the State accepted one black juror for Flowers' sixth trial. But especially given the history of the case, that fact alone cannot insulate the State from a Batson challenge. In Miller-El II, this Court skeptically viewed the State's decision to accept one black juror, explaining that a prosecutor might do so in an attempt "to obscure the otherwise consistent pattern of opposition to" seating black jurors. 545 U. S., at 250. The overall record of this case suggests that the same tactic may have been employed here. In light of all of the circumstances here, the State's decision to strike five of the six black prospective jurors is further evidence suggesting that the State was motivated in substantial part by discriminatory intent.

C

We next consider the State's dramatically disparate questioning of black and white prospective jurors in the jury selection process for Flowers' sixth trial. As Batson explained, "the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discrimina-tory purpose." 476 U. S., at

97.

The questioning process occurred through an initial group voir dire and then more in-depth follow-up questioning by the prosecutor and defense counsel of individual prospective jurors. The State asked the five black prospective jurors who were struck a total of 145 questions. By contrast, the State asked the 11 seated white jurors a total of 12 questions. On average, therefore, the State asked 29 questions to each struck black prospective juror. The State asked an average of one question to each seated white juror.

One can slice and dice the statistics and come up with all sorts of ways to compare the State's questioning of excluded black jurors with the State's questioning of the accepted white jurors. But any meaningful comparison yields the same basic assessment: The State spent far more time questioning the black prospective jurors than the accepted white jurors.

The State acknowledges, as it must under our precedents, that disparate questioning can be probative of discriminatory intent. See Miller-El v. Cockrell, 537 U.S. 322, 331–332, 344–345 (2003) (Miller-El I). As Miller-El I stated, "if the use of disparate questioning is determined by race at the outset, it is likely [that] a justification for a strike based on the resulting divergent views would be pretextual. In this context the differences in the questions posed by the prosecutors are some evidence of purposeful discrimination."

…

A court confronting that kind of pattern cannot ignore it. The lopsidedness of the prosecutor's questioning and inquiry can itself be evidence of the prosecutor's objective as much as it is of the actual qualifications of the black and white prospective jurors who are struck or seated. The prosecutor's dramatically disparate questioning of black and white prospective jurors—at least if it rises to a certain level of disparity—can supply a clue that the prosecutor may have been seeking to paper the record and disguise a discriminatory intent. See ibid.

To be clear, disparate questioning or investigation alone does not constitute a Batson violation. The disparate questioning or investigation of black and white prospective jurors may reflect ordinary race-neutral considerations. But the disparate questioning or investigation can also, along with other evidence, inform the trial court's evaluation of whether discrimination occurred.

Here, along with the historical evidence we described above from the earlier trials, as well as the State's striking of five of six black prospective jurors at the sixth trial, the dramatically disparate questioning and investigation of black prospective jurors and white prospective jurors at the sixth trial strongly suggests that the State was motivated in substantial part by a discriminatory intent. We agree with the observation of the dissenting justices of the Mississippi Supreme Court: The "numbers described above are too disparate to be explained away or categorized as mere happenstance." 240 So. 3d, at 1161 (opinion of King, J.).

D

Finally, in combination with the other facts and circumstances in this case, the record of jury selection at the sixth trial shows that the peremptory strike of at least one of the black prospective jurors (Carolyn Wright) was motivated in substantial part by discriminatory intent. As this Court has stated, the Constitution forbids striking even a single prospective juror for a discriminatory purpose. See Foster, 578 U. S., at ___ (slip op., at 9).

Comparing prospective jurors who were struck and not struck can be an important step in determining whether a Batson violation occurred. See Snyder, 552 U. S., at 483–484; Miller-El II, 545 U. S., at 241. The comparison can suggest that the prosecutor's proffered explanations for striking black prospective jurors were a pretext for discrimination. When a prosecutor's "proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination." Foster, 578 U. S., at ___ (slip op., at 23) (quotation altered). Although a defendant ordinarily will try to identify a similar white prospective juror whom the State did not strike, a defendant is not required to identify an identical white juror for the side-by-side comparison to be suggestive of discriminatory intent. Miller-El II, 545 U. S., at 247, n. 6.

In this case, Carolyn Wright was a black prospective juror who said she was strongly in favor of the death penalty as a general matter. And she had a family member who was a prison security guard. Yet the State exercised a peremptory strike against Wright. The State said it struck Wright in part because she knew several defense witnesses and had worked at

Wal-Mart where Flowers' father also worked.

Winona is a small town. Wright had some sort of connection to 34 people involved in Flowers' case, both on the prosecution witness side and the defense witness side. See, 240 So. 3d, at 1126. But three white prospective jurors—Pamela Chesteen, Harold Waller, and Bobby Lester—also knew many individuals involved in the case. Chesteen knew 31 people, Waller knew 18 people, and Lester knew 27 people. See ibid. Yet as we explained above, the State did not ask Chesteen, Waller, and Lester individual follow-up questions about their connections to witnesses. That is a telling statistic. If the State were concerned about prospective jurors' connections to witnesses in the case, the State presumably would have used individual questioning to ask those potential white jurors whether they could remain impartial despite their relationships. A "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 II, 545 U. S., at 246 (internal quotation marks omitted).

…

The side-by-side comparison of Wright to white prospective jurors whom the State accepted for the jury cannot be considered in isolation in this case. In a different context, the Wright strike might be deemed permissible. But we must examine the whole picture. Our disagreement with the Mississippi courts (and our agreement with Justice King's dissent in the Mississippi Supreme Court) largely comes down to whether we look at the Wright strike in isolation or instead look at the Wright strike in the context of all the facts and circumstances. Our precedents require that we do the latter. As Justice King explained in his dissent in the Mississippi Supreme Court, the Mississippi courts appeared to do the former. 240 So. 3d, at 1163–1164. As we see it, the overall context here requires skepticism of the State's strike of Carolyn Wright. We must examine the Wright strike in light of the history of the State's use of peremptory strikes in the prior trials, the State's decision to strike five out of six black prospective jurors at Flowers' sixth trial, and the State's vastly disparate questioning of black and white prospective jurors during jury selection at the sixth trial. We cannot just look away. Nor can we focus on the Wright strike in isolation. In light of all the facts and circumstances, we conclude that the trial court clearly erred in ruling that the State's peremptory strike of Wright was not motivated in substantial part by discriminatory intent.

* * *

In sum, the State's pattern of striking black prospective jurors persisted from Flowers' first trial through Flowers' sixth trial. In the six trials combined, the State struck 41 of the 42 black prospective jurors it could have struck. At the sixth trial, the State struck five of six. At the sixth trial, moreover, the State engaged in dramatically disparate questioning of black and white prospective jurors. And it engaged in disparate treatment of black and white prospective jurors, in particular by striking black prospective juror Carolyn Wright.

To reiterate, we need not and do not decide that any one of those four facts alone would require reversal. All that we need to decide, and all that we do decide, is that all of the relevant facts and circumstances taken together establish that the trial court at Flowers' sixth trial committed clear error in concluding that the State's peremptory strike of black prospective juror Carolyn Wright was not motivated in substantial part by discriminatory intent. In reaching that conclusion, we break no new legal ground. We simply enforce and reinforce Batson by applying it to the extraordinary facts of this case.

We reverse the judgment of the Supreme Court of Mississippi, and we remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

DISSENT

Justice Thomas, with whom Justice Gorsuch joins as to Parts I, II, and III, dissenting.

…

The only clear errors in this case are committed by today's majority. Confirming that we never should have taken this case, the Court almost entirely ignores—and certainly does not refute—the race-neutral reasons given by the State for striking Wright and four other black prospective jurors. Two of these prospective jurors knew Flowers' family and had been sued by Tardy Furniture—the family business of one of the victims and also of one of the trial witnesses. One refused to consider the death penalty and apparently lied about working side-by-side with Flowers' sister. One was related to Flowers and lied about her opinion of the death penalty to try to get out of jury duty. And one said that because she worked with two of Flowers' family members, she might favor him and would not consider only the

evidence presented. The state courts' findings that these strikes were not based on race are the opposite of clearly erroneous; they are clearly correct. The Court attempts to overcome the evident race neutrality of jury selection in this trial by pointing to a supposed history of race discrimination in previous trials. But 49 of the State's 50 peremptory strikes in Flowers' previous trials were race neutral. The remaining strike occurred 20 years ago in a trial involving only one of Flowers' crimes and was never subject to appellate review; the majority offers no plausible connection between that strike and Wright's.

Today's decision distorts the record of this case, eviscerates our standard of review, and vacates four murder convictions because the State struck a juror who would have been stricken by any competent attorney. I dissent.

…

II

The majority's opinion is so manifestly incorrect that I must proceed to the merits. Flowers presented no evidence whatsoever of purposeful race discrimination by the State in selecting the jury during the trial below. Each of the five challenged strikes was amply justified on race-neutral grounds timely offered by the State at the Batson hearing. None of the struck black jurors was remotely comparable to the seated white jurors. And nothing else about the State's conduct at jury selection—whether trivial mistakes of fact or supposed disparate questioning—provides any evidence of purposeful discrimination based on race.

A

1

The majority focuses its discussion on potential juror Carolyn Wright, but the State offered multiple race-neutral reasons for striking her. To begin, Wright lost a lawsuit to Tardy Furniture soon after the murders, and a garnishment order was issued against her.

…

2

The majority, while admonishing trial courts to "consider the prosecutor's race-neutral explanations," ante, at 17, completely ignores the State's race-neutral explanations for striking the other four black jurors.

…

In terms of race-neutral validity, these five strikes are not remotely close calls. Each strike was supported by multiple race-neutral reasons articulated by the State at the Batson hearing and supported by the record. It makes a mockery of Batson for this Court to tell prosecutors to "provide race-neutral reasons for the strikes," and to tell trial judges to "consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances," ante, at 17, and then completely ignore the State's reasons for four out of five strikes.

…

C

…

The Batson hearing was conducted immediately after voir dire, before a transcript was available. App. 214; id., at 225–226. In explaining their strikes, counsel relied on handwritten notes taken during a fast-paced, multiday voir dire involving 156 potential jurors. Id., at 229, 258. Still, the major- ity comes up with only a few mistakes, and they are either imagined or utterly trivial.

…

In short, in the context of the trial below, a few trivial errors on secondary or tertiary race-neutral reasons for striking some jurors can hardly be counted as "telling" evidence of race discrimination.

D

Turning to even less probative evidence, the majority asserts that the State engaged in disparate—"dramatically disparate," the majority repeats, ante, at 2, 19, 23, 26, 31—questioning based on race. By the major- ity's count, "[t]he State asked the five black prospective jurors who were struck a total of 145 questions" and "the 11 seated white jurors a total of 12 questions." Ante, at 23. The majority's statistical "evidence" is irrelevant and misleading.

First, the majority finds that only one juror—Carolyn Wright—was struck on the basis of race, but it neglects to mention that the State asked her only five questions. See App. 71–72, 104–105. Of course, the majority refuses to identify the "certain level of disparity" that meets its "dramatically disparate" standard, ante, at 26, but its failure to recognize that the only juror supposedly discriminated against was asked hardly any questions suggests the majority is "slic[ing] and dic[ing]" statistics, ante, at 23. Asking other black jurors more questions would be an odd way of "try[ing] to find some pretextual reason" to strike Wright. Ante, at 25.

Second, both sides asked a similar number of questions to the jurors they peremptorily struck. This is to be expected—a party will often ask more questions of jurors whose answers raise potential problems. Among other reasons, a party may wish to build a case for a cause strike, and if a cause strike cannot be made, those jurors are more likely to be peremptorily struck. Here, Flowers asked the jurors he struck—all white, Tr. of Oral Arg. 57—an average of about 40 questions, and the State asked the black jurors it struck an average of about 28 questions. The number of questions asked by the State to these jurors is not evidence of race discrimination.

Moreover, the majority forgets that correlation is not causation. The majority appears to assume that the only relevant difference between the black jurors at issue and seated white jurors is their race. But reality is not so simple. Deciding whether a statistical disparity is caused by a particular factor requires controlling for other potentially relevant variables; otherwise, the difference could be explained by other influences. See Fisher, Multiple Regression in Legal Proceedings, 80 Colum. L. Rev. 702, 709 (1980); cf. Box v. Planned Parenthood of Indiana & Kentucky, Inc., 587 U. S. ___, ___, n. 4 (2019) (Thomas, J., concurring) (slip op., at 9, n. 4) (showing that bare statistical disparities can be used to support diametrically different theories of causation). Yet the majority's raw comparison of questions does not control for any of the important differences between struck and seated jurors. See supra, at 11–14. This defective analysis does not even begin to provide probative evidence of discrimination.

…

Because any "disparate questioning or investigation of black and white prospective jurors" here "reflect[s] ordinary race-neutral considerations," ante, at 26, this factor provides no evidence of racial discrimination in jury selection below.

E

If this case required us to decide whether the state courts were correct that no Batson violation occurred here, I would find the case easy enough. As I have demonstrated, the evidence overwhelmingly supports the conclusion that the State did not engage in purposeful race discrimination. Any competent prosecutor would have struck the jurors struck below. Indeed, some of the jurors' conflicts might even have justified for-cause strikes.

…

Instead of focusing on the possibility that a juror will misperceive a peremptory strike as threatening his dignity, I would return the Court's focus to the fairness of trials for the defendant whose liberty is at stake and to the People who seek justice under the law.

* * *

If the Court's opinion today has a redeeming quality, it is this: The State is perfectly free to convict Curtis Flowers again. Otherwise, the opinion distorts our legal standards, ignores the record, and reflects utter disrespect for the careful analysis of the Mississippi courts. Any competent prosecutor would have exercised the same strikes as the State did in this trial. And although the Court's opinion might boost its self-esteem, it also needlessly prolongs the suffering of four victims' families. I respectfully dissent.

TEXAS COURT OF APPEALS
THIRD DISTRICT, AT AUSTIN

Craig v. State, (Tex. App.—Austin, 2002).

OPINION

A jury found appellant George Thomas Craig, Jr., guilty of two counts of sexual assault for which it assessed twenty years' imprisonment. See Tex. Pen. Code Ann. § 22.011 (West Supp. 2002). Appellant complains of racial prejudice in the State's use of its peremptory challenges, error in the admission of evidence at the punishment stage, and ineffective assistance of counsel. We will overrule these contentions and affirm.

The complainant was waiting for a bus at 11:00 p.m. when appellant stopped his car beside her and offered her a ride. The complainant, who had been drinking, accepted the offer. After the complainant was in appellant's car, he asked her if she wanted to smoke some crack cocaine. She said she did, and appellant drove to a commercial area and parked behind a closed building. The complainant and appellant drank beer and smoked crack. When the complainant got out of the car to urinate, appellant also got out and seized the complainant while her pants were at her ankles. Appellant then sexually assaulted her.

Jury Selection

In his first point of error, appellant accuses the State of racial discrimination in the use of its peremptory strikes. The State may not strike jury panelists in a purposefully and inappropriately discriminatory manner. Tex. Code Crim. Proc. Ann. art. 35.261 (West 1989); Batson v. Kentucky, 476 U.S. 79, 88-89 (1986). The analysis used to test a Batson challenge consists of three steps. First, the defendant must make a prima facie showing of relevant circumstances that raise an inference that the State made a race-based strike against an eligible panelist. Mandujano v. State, 966 S.W.2d 816, 818 (Tex. App.--Austin 1998, pet. ref'd). Next, if a prima facie case is made, the State must come forward with a race-neutral reason for the strike. Id. The prosecutor's explanation must be clear and reasonably specific, and must contain legitimate reasons for the strike related to the case being tried. Id. Finally, once the State offers a race-neutral explanation, the burden shifts back to the defendant to persuade the trial court that the State's purported reasons for its peremptory strike are mere pretext and are in fact racially motivated. Id.; Lopez v. State, 940 S.W.2d 388, 389-90 (Tex. App.--Austin 1997), pet. ref'd, 954 S.W.2d 774 (Tex. Crim. App. 1997) (McCormick, P.J., dissenting to refusal of State's petition); see also Purkett v. Elem, 514 U.S. 765, 767 (1995); Hernandez v. New York, 500 U.S. 352, 359-60 (1991).

After the parties made their peremptory strikes, appellant objected that the State had used a strike to exclude "the only juror left within the strike zone that was a black male" and asked that the panelist be placed on the jury in lieu of the last juror selected. The court held that a prima facie case of racial discrimination had not been shown, but said it would allow the State to make a record of its reasons for striking the panelist. The prosecutor stated:

"Your Honor, the State exercised peremptory strikes against number five, number 10 and number 11 [the panelist in question] for the same reason in that during the defense voir dire, [counsel] asked the panel as a whole how many of them did not know whether or not the defendant was guilty, how many of them believed that he was, and how many of them believed that he was not.[(2)] Numbers five, 10 and 11, according to my notes, all indicated that they had an affirmative belief that the defendant was not guilty, despite the fact that they had not heard any evidence, and I noticed that number 11 was rather animated in nodding his head and indicating his belief in that regard.

Prior to that, I had not had any concerns about number 11 or for that matter, number five, but when I observed their answers to that particular question, I felt that it was indicative of bias on their part in favor of the defendant."

Defense counsel responded that he had been questioning the panelists regarding the presumption of innocence and that the panelist "was correctly stating the law. I think it is absolutely improper to challenge him for cause [sic] because he is stating the law properly, he was stating that he was presumed innocent." After further exchanges between counsel and the court, the prosecutor clarified the reasoning underlying the strike:

"[I]t [defense counsel's questioning] wasn't phrased to where it was apparent to me at the time that it was a question about the law. It was phrased as if it was a question about - designed to determine whether or not they had a present belief as to the defendant's

guilt or innocence, and at the time I assumed that one of [counsel's] concerns was determining whether or not there were people that actually thought the defendant was guilty, despite having heard no evidence. That was one of the things that was asked, and so I - I don't believe that it was phrased in such a way that it was apparent to the panel as a whole that he was inquiring about their understanding of the law. It was phrased as if he was inquiring about whether or not they had a present belief as to the defendant's guilt or innocence, a belief as to guilt or innocence in fact versus as a matter of law."

The court then ruled, "I agree with that. I think that is - that is the way it was asked. It wasn't asked as a statement of the law, and I agree with that and I cannot sit here - and I find the prosecutor's explanation credible and I don't believe it was racially based."

When the State offers an explanation for the contested strike and the trial court rules on the ultimate question of intentional discrimination, it is the explanation and not the prima facie showing that we review on appeal. Malone v. State, 919 S.W.2d 410, 412 (Tex. Crim. App. 1996). We review the court's decision for "clear error." Lopez, 940 S.W.2d at 390 (citing Hernandez, 500 U.S. at 364-65). To conclude that the trial court's decision was clearly erroneous, we must have a "definite and firm conviction that a mistake has been committed" after reviewing all of the evidence in the light most favorable to the ruling. Vargas v. State, 838 S.W.2d 552, 554 (Tex. Crim. App. 1992). If we cannot say that the trial court's ruling was clearly erroneous, we must uphold the ruling even if we would have weighed the evidence differently as the trier of fact. Lopez, 940 S.W.2d at 390 n.2.

Appellant argues that the panelist's belief that appellant was innocent until proved guilty beyond a reasonable doubt is not a legitimate race-neutral explanation for a peremptory strike that is challenged pursuant to Batson. He relies on the holding in Martinez v. State, 824 S.W.2d 724, 726 (Tex. App.--Fort Worth 1992, pet. ref'd). In that case, one of the State's explanations for a challenged strike was the panelist's "attitudes toward intoxication." Id. at 725. The court of appeals found this explanation to be inadequate:

"The only views expressed by the veniremember in effect were that the D.W.I. law made sense and he understood it. We do not consider that a peremptory challenge based upon a juror's response to the effect that he understands or agrees with the applicable law in the case is a legitimate reason for peremptory challenge as required by Batson and article 35.261."

We find the instant case to be distinguishable from Martinez. The prosecutor made it clear that his objection to the panelist was not based on the panelist's understanding of the law regarding the State's burden of proof, but rather on the panelist's seeming belief that appellant was not guilty as a matter of fact. The trial judge, who had the benefit of being present during voir dire, agreed that defense counsel's question to the panel "wasn't asked as a statement of the law." Viewing the record before us in the light most favorable to the ruling, we do not have a definite and firm conviction that the court was mistaken in concluding that the State's explanation for the challenged strike was race-neutral. We overrule appellant's first point of error.

…

Trial Counsel's Effectiveness

Finally, appellant contends his trial attorney did not provide him effective legal assistance. To prevail on this claim, appellant must show that his counsel made such serious errors that he was not functioning effectively as counsel and that these errors prejudiced the appellant's defense to such a degree that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687 (1984); Hernandez v. State, 988 S.W.2d 770, 771-72 (Tex. Crim. App. 1999); Hernandez v. State, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). We must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. See Jackson v. State, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). To overcome this presumption, any allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness. Mallett v. State, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001).

Appellant complains that his trial counsel failed to preserve the Batson error in jury selection. To the contrary, we concluded that the error was preserved. Appellant also argues that his attorney "failed to prepare a defense to the admissibility" of D. H.'s and S. M.'s punishment stage testimony. As we discussed, counsel successfully objected to any testimony by S. M. that appellant sexually assaulted her. Appellant offers no argument in support of his contention that counsel should have been able to prevent either D. H. or S. M. from testifying at all.

Appellant contends his attorney failed to prepare adequately for trial, asserting that he did not interview appellant, the complaining witness, or appellant's original attorney, and that he failed to read the clerk's record. Assuming these facts to be true, appellant fails to allege or show that counsel's alleged lack of preparation had any negative impact on the outcome of his trial.

Next, appellant asserts that counsel was ineffective because he "failed to prevent the jury from hearing [about] appellant's drug use." Appellant does not state a legal basis for excluding the evidence that he smoked crack cocaine before assaulting the complainant. The evidence appears to be admissible as same transaction contextual evidence. See Dusek v. State, 978 S.W.2d 129, 136 (Tex. App.--Austin 1998, pet. ref'd).

Appellant complains that trial counsel should have "fashion[ed] a way" to introduce evidence of the complainant's criminal record and history of drug and alcohol abuse. The record reflects that the complainant was convicted of felony delivery of a controlled substance in 1988 and placed on community supervision, which she successfully completed. The court ruled that this conviction was not admissible to impeach her testimony pursuant to rule 609(c)(2). Tex. R. Evid. 609(c)(2). Appellant argues that counsel should have urged the admission of the prior conviction under rule 609(b), on the theory that the probative value of the evidence outweighed its prejudicial value. Id. rule 609(b). Rule 609(b) was not applicable to the complainant's conviction because she had been discharged from probation less than ten years before appellant's trial.

Appellant argues that his attorney should have adduced evidence of the complainant's drug and alcohol abuse on the theory that it impaired her accurate ability to perceive events. He also complains that his attorney did not present this or any other effective arguments at either the guilt or punishment stage of trial. Both of these allegations relate to matters of trial strategy. We will not second-guess trial counsel in the absence of any record regarding the motives behind his actions.

As in many cases in which the effectiveness of trial counsel is challenged on direct appeal, the record before us is undeveloped and does not adequately reflect the motives behind trial counsel's actions. See Mallett, 65 S.W.3d at 63. Appellant has not met his burden of demonstrating that his trial attorney's performance was outside the range of reasonable professional assistance. We overrule appellant's second point of error.

The district court rendered separate judgments for each count. The judgments of conviction are affirmed.

TEXAS COURT OF APPEALS
EIGHTH DISTRICT, AT EL PASO

Blanco v. State, (Tex. App.—El Paso, 2015) (unpub.).

OPINION

Aldo Ivan Blanco was found guilty of burglary of a habitation on February 24, 2015. The trial court sentenced him to ten years' imprisonment in the Texas Department of Criminal Justice, but suspended execution of the sentence and placed him on community supervision for ten years. Appellant timely filed his motion for new trial and a hearing was held on April 15, 2015. At the hearing, Appellant asserted that his trial counsel, Jeff Allder, rendered ineffective assistance of counsel and as a result, he should be granted a new trial. For the reasons that follow, we affirm.

FACTUAL BACKGROUND

Guilt-Innocence Phase Testimony: On May 17, 2014, El Paso Police Department Officer James Morales and Officer Lorenzo Ontiveros responded to an assault-family violence call on Sun Fire Street in El Paso, Texas. They spoke with the victim, Nydia Garcia, regarding the events that took place. Garcia appeared emotional, excited, and upset while talking to the officers. She related that her former boyfriend, Appellant, showed up at her apartment, forced his way in, and assaulted her. Officer Morales recorded the interview with Garcia and took pictures of a few bruises on her arms. These pictures were admitted as State's Exhibit 1. Garcia testified that she and Appellant dated for approximately one year, but at the time of the assault, the relationship had been over for about a year.

On May 17, Garcia was alone in her apartment. Thirty minutes before Appellant arrived, her ex-husband picked up their three daughters. When Garcia heard the doorbell ring, she thought it might have been one her daughters, and she opened the door without checking to see who was there. Garcia opened the door only to find Appellant, who told her that he wanted to reconcile with her. Appellant put his foot in the door and pushed his way inside without her permission.

Right from the start, Appellant wanted to check Garcia's phone. He asked Garcia to unlock her phone, and when she told him she did not want to, he pushed her. Once the phone was unlocked, Appellant grabbed it and called a man by the name of Alex. Garcia testified that she and Alex were "kind of" in a relationship. Appellant told Alex to stop sending Garcia pictures and messages because he and Garcia were partners. Garcia and Appellant then began fighting over the phone and Appellant threw it at the living room floor. During their struggle over the phone, Appellant roughly grabbed Garcia by the arms, causing her arms to bruise.

After the struggle was over, Garcia told Appellant she was going to the bathroom to take a shower. Appellant pushed her and grabbed her by the arms again. Garcia screamed and returned to the living room. There, the two began arguing again and Garcia repeatedly told Appellant to leave. They struggled over the door and Appellant smashed Garcia's finger. Garcia was unsure if Appellant's finger had also been smashed in the door. Thereafter, Appellant left, and ten minutes later, Garcia called the police.

(Defendant was convicted of offense)

…

INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant raises eleven sub-issues on appeal to support the proposition that he received ineffective assistance of counsel. He complains that Allder failed to: (1) request a mistake-offact instruction; (2) file a discovery request under Article 39.14 of the Texas Code of Criminal Procedure; … (11) He finally contends that all of these alleged failings constitute cumulative error. We will address Appellant's First, Second, and Eleventh Issues. …

We follow the standard set forth in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), to determine whether a defendant received ineffective assistance of counsel. To prevail on an ineffective assistance of counsel claim, Appellant must show that: (1) his attorney's performance was deficient; and (2) that his attorney's deficient performance prejudiced his defense. Vasquez v. State, 830 S.W.2d 948, 949 (Tex.Crim.App. 1992). Appellant must satisfy both Strickland components, and the failure to show either deficient performance or prejudice will defeat an ineffectiveness claim. Perez v. State, 310 S.W.3d 890, 893 (Tex.Crim.App. 2010); Rylander v. State, 101 S.W.3d 107, 110-11 (Tex.Crim.App. 2003).

Under the first prong, the attorney's performance must be shown to have fallen below an objective

standard of reasonableness. Perez, 310 S.W.3d at 893; Thompson v. State, 9 S.W.3d 808, 812 (Tex.Crim.App. 1999). Under the second prong, Appellant must establish that there is a reasonable probability that but for his attorney's deficient performance, the outcome of his case would have been different. See Strickland, 466 U.S. at 694, 104 S.Ct. at 2069; Thompson, 9 S.W.3d at 812. "Reasonable probability" is that which is "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068; Jackson v. State, 973 S.W.2d 954, 956 (Tex.Crim.App. 1998). We presume that the attorney's representation fell within the wide range of reasonable and professional assistance. Mallett v. State, 65 S.W.3d 59, 63 (Tex.Crim.App. 2001).

Ineffective assistance claims must be firmly founded in the record to overcome this presumption. Thompson, 9 S.W.3d at 813. In most cases, this task is very difficult because the record on direct appeal is undeveloped and cannot reflect trial counsel's failings. Id. at 813-14. Where the record is silent and fails to provide an explanation for the attorney's conduct, the strong presumption of reasonable assistance is not overcome. Rylander, 101 S.W.3d at 110-11. We do not engage in speculation in order to find ineffective assistance when the record is silent as to an 7 attorney's trial strategy. Robinson v. State, 16 S.W.3d 808, 813 n.7 (Tex.Crim.App. 2000). When the record lacks evidence of the reasoning behind trial counsel's actions, his performance cannot be found to be deficient. Rylander, 101 S.W.3d at 110-11; Jackson v. State, 877 S.W.2d 768, 771 (Tex.Crim.App. 1994). Failure to Request a Mistake-of-Fact Instruction Section 8.02(a) of the Penal Code provides that it is a defense to prosecution if the actor, through a mistake, formed a reasonable belief about a matter of fact that negates the kind of culpability required for commission of the offense. See TEX.PEN.CODE ANN. § 8.02(a)(West 2011).

Specifically, Appellant contends that he was entitled to an instruction regarding his mistaken belief that Garcia invited him over to her apartment. The jury was instructed that, to find Appellant guilty of burglary of habitation, it must find that he did then and there enter the habitation of Garcia without her effective consent, and when he entered, he either had the intent to commit an assault, or, if after entering, committed an assault. The charge defined what is required to show that a defendant acted "with intent" or "intentionally." Appellant argues that due to Allder's failure to request a mistake of fact instruction, the jury was left with no basis to negate the culpable mental state required for the offense. However, the charge instructed the jury to find Appellant guilty only if it found beyond a reasonable doubt that Appellant entered Garcia's apartment without her effective consent and either had the intent to commit an assault or after entering, committed an assault. See TEX.PEN.CODE ANN. § 30.02(c)(2)(West 2011).

Given the charge, the jury necessarily had to determine whether it believed Appellant's testimony about his mistaken belief. When it found him guilty of burglary of a habitation, the jury chose not to believe Appellant's assertion that Garcia invited him into her apartment and implicitly rejected his claim that he was invited under the circumstances he described at trial. The jury had to consider his mistake of fact defense before finding him guilty of the offense of burglary of habitation. Had it believed Appellant's testimony that Garcia invited him into her apartment, the jury could not have found--as it necessarily did--that Appellant entered the habitation of Garcia without her effective consent. The jury could not have believed Appellant's testimony and also have found him guilty under the charge as given. There is not a reasonable probability that including a mistake of fact instruction in the charge would have changed the outcome in this case. See Bruno v. State, 845 S.W.2d 910, 913 (Tex.Crim.App. 1993)…

We thus conclude that Appellant has failed to show that there is a reasonable probability that, but for Allder's alleged deficient performance, the outcome of the proceeding would have been different. See Andrews v. State, 159 S.W.3d 98, 102 (Tex.Crim.App. 2005). The failure to make a showing under either of the required prongs of Strickland defeats a claim for ineffective assistance of counsel. Williams v. State, 301 S.W.3d 675, 687 (Tex.Crim.App. 2009). Issue One is overruled.

FAILURE TO FILE DISCOVERY REQUEST

Appellant next suggests that Allder rendered ineffective assistance when he failed to file a discovery request under Article 39.14 of the Texas Code of Criminal Procedure, thereby relieving the State of its obligation to produce any and all evidence it has against him. Appellant's argument is misplaced.

First, a discovery request from a defendant only

implicates the State's disclosure obligations under Article 39.14(a) and (b). TEX.CODE CRIM.PROC.ANN. art. 39.14(a), (b)(West Supp. 2016). The State correctly points out that its disclosure obligations under Article 39.14(h) are independent from a defense request under Article 39.14(a) and (b), and exist "[n]otwithstanding any other provision of [the] article." TEX.CODE CRIM.PROC.ANN. art. 39.14(h). Appellant also appears to argue that Allder's failure affected the State's obligation to disclose the names of three individuals who were identified in the State's case file but who were not listed in the State's witness list filed with the trial court. There is no general constitutional right to discovery in a criminal case. Weatherford v. Bursey, 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977). "Although the Due Process Clause confers upon defendants a right to be informed about the existence of exculpatory evidence, it does not require the prosecution to 'reveal before trial the names of all witnesses who will testify unfavorably.'" Ex parte Pruett, 207 S.W.3d 767, 767 (Tex.Crim.App. 2005), quoting Weatherford, 429 U.S. at 559, 97 S.Ct. at 845.

Although Article 39.14 affords a defendant the right to discovery of certain items, it does not mandate disclosure of witnesses generally but only of expert witnesses and then only when ordered by the trial court. TEX.CODE CRIM.PROC.ANN. art. 39.14; Woods v. State, No. 07-02- 0192-CR, 2003 WL 1738399, at *1 (Tex.App.--Amarillo Apr. 2, 2003, no pet.)(not designated for publication)(in the absence of a discovery order by the trial court or agreement by the parties, the State has no duty to provide a list of witnesses it intends to call at trial); Thornton v. State, 37 S.W.3d 490, 492 (Tex.App.--Texarkana 2000, pet. ref'd)(Article 39.14(a) does not specifically provide that a trial court can order the State to disclose its witnesses). The record does not reflect that the State was ordered to disclose its witnesses. Even if Allder had submitted a discovery request, nothing required the State to disclose the names of the individuals it ultimately did not call as witnesses. We overrule Issue Two.

…

We overrule Issue Eleven and affirm the judgment of the trial court.

UNITED STATES SUPREME COURT

Strickland v. Washington, 466 U.S. 668 (1984).

JUSTICE O'CONNOR delivered the opinion of the Court.

OPINION

This case requires us to consider the proper standards for judging a criminal defendant's contention that the Constitution requires a conviction or death sentence to be set aside because counsel's assistance at the trial or sentencing was ineffective.

I

A

During a 10-day period in September, 1976, respondent planned and committed three groups of crimes, which included three brutal stabbing murders, torture, kidnaping, severe assaults, attempted murders, attempted extortion, and theft. After his two accomplices were arrested, respondent surrendered to police and voluntarily gave a lengthy statement confessing to the third of the criminal episodes. The State of Florida indicted respondent for kidnaping and murder and appointed an experienced criminal lawyer to represent him.

Counsel actively pursued pretrial motions and discovery. He cut his efforts short, however, and he experienced a sense of hopelessness about the case, when he learned that, against his specific advice, respondent had also confessed to the first two murders. By the date set for trial, respondent was subject to indictment for three counts of first-degree murder and multiple counts of robbery, kidnaping for ransom, breaking and entering and assault, attempted murder, and conspiracy to commit robbery. Respondent waived his right to a jury trial, again acting against counsel's advice, and pleaded guilty to all charges, including the three capital murder charges.

In the plea colloquy, respondent told the trial judge that, although he had committed a string of burglaries, he had no significant prior criminal record, and that, at the time of his criminal spree, he was under extreme stress caused by his inability to support his family. App. 50-53. He also stated, however, that he accepted responsibility for the crimes. *E.g., id.* at 54, 57. The trial judge told respondent that he had "a great deal of respect for people who are willing to step forward and admit their responsibility," but that he was making no statement at all about his likely sentencing decision. *Id.* at 62.

Counsel advised respondent to invoke his right under Florida law to an advisory jury at his capital sentencing hearing. Respondent rejected the advice and waived the right. He chose instead to be sentenced by the trial judge without a jury recommendation.

In preparing for the sentencing hearing, counsel spoke with respondent about his background. He also spoke on the telephone with respondent's wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses for respondent. App. to Pet. for Cert. A265. Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems. *Id.* at A266.

Counsel decided not to present, and hence not to look further for, evidence concerning respondent's character and emotional state. That decision reflected trial counsel's sense of hopelessness about overcoming the evidentiary effect of respondent's confessions to the gruesome crimes. *See id.* at A282. It also reflected the judgment that it was advisable to rely on the plea colloquy for evidence about respondent's background and about his claim of emotional stress: the plea colloquy communicated sufficient information about these subjects, and by forgoing the opportunity to present new evidence on these subjects, counsel prevented the State from cross-examining respondent on his claim and from putting on psychiatric evidence of its own. *Id.* at A223-A225.

Counsel also excluded from the sentencing hearing other evidence he thought was potentially damaging. He successfully moved to exclude respondent's "rap sheet." *Id.* at A227; App. 311. Because he judged that a presentence report might prove more detrimental than helpful, as it would have included respondent's criminal history and thereby would have undermined the claim of no significant history of criminal activity, he did not request that one be prepared. App. to Pet. for Cert. A227-A228, A265-

A266.

At the sentencing hearing, counsel's strategy was based primarily on the trial judge's remarks at the plea colloquy as well as on his reputation as a sentencing judge who thought it important for a convicted defendant to own up to his crime. Counsel argued that respondent's remorse and acceptance of responsibility justified sparing him from the death penalty. *Id.* at A265-A266. Counsel also argued that respondent had no history of criminal activity, and that respondent committed the crimes under extreme mental or emotional disturbance, thus coming within the statutory list of mitigating circumstances. He further argued that respondent should be spared death because he had surrendered, confessed, and offered to testify against a codefendant, and because respondent was fundamentally a good person who had briefly gone badly wrong in extremely stressful circumstances. The State put on evidence and witnesses largely for the purpose of describing the details of the crimes. Counsel did not cross-examine the medical experts who testified about the manner of death of respondent's victims.

The trial judge found several aggravating circumstances with respect to each of the three murders. He found that all three murders were especially heinous, atrocious, and cruel, all involving repeated stabbings. All three murders were committed in the course of at least one other dangerous and violent felony, and since all involved robbery, the murders were for pecuniary gain. All three murders were committed to avoid arrest for the accompanying crimes and to hinder law enforcement. In the course of one of the murders, respondent knowingly subjected numerous persons to a grave risk of death by deliberately stabbing and shooting the murder victim's sisters-in-law, who sustained severe -- in one case, ultimately fatal -- injuries.

With respect to mitigating circumstances, the trial judge made the same findings for all three capital murders. First, although there was no admitted evidence of prior convictions, respondent had stated that he had engaged in a course of stealing. In any case, even if respondent had no significant history of criminal activity, the aggravating circumstances "would still clearly far outweigh" that mitigating factor. Second, the judge found that, during all three crimes, respondent was not suffering from extreme mental or emotional disturbance, and could appreciate the criminality of his acts. Third, none of the victims was a participant in, or consented to, respondent's conduct. Fourth, respondent's participation in the crimes was neither minor nor the result of duress or domination by an accomplice. Finally, respondent's age (26) could not be considered a factor in mitigation, especially when viewed in light of respondent's planning of the crimes and disposition of the proceeds of the various accompanying thefts.

In short, the trial judge found numerous aggravating circumstances and no (or a single comparatively insignificant) mitigating circumstance. With respect to each of the three convictions for capital murder, the trial judge concluded:

"A careful consideration of all matters presented to the court impels the conclusion that there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances."

See Washington v. State, 362 So.2d 658, 663-664 (Fla.1978) (quoting trial court findings), *cert. denied,* 441 U.S. 937 (1979). He therefore sentenced respondent to death on each of the three counts of murder and to prison terms for the other crimes. The Florida Supreme Court upheld the convictions and sentences on direct appeal.

…

II

In a long line of cases that includes *Powell v. Alabama,* 287 U. S. 45 (1932), *Johnson v. Zerbst,* 304 U. S. 458(1938), and *Gideon v. Wainwright,* 372 U. S. 335 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

…

A

As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. *See Trapnell v. United States,* 725 F.2d at 151-152. The Court indirectly recognized as much when it stated in *McMann v. Richardson, supra,* at 397 U. S. 770, 397 U. S. 771, that a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not "a reasonably competent attorney" and the advice was not "within the range of competence demanded of attorneys in criminal cases." *See also Cuyler v. Sullivan, supra,* at 446 U. S. 344. When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.

More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. *See Michel v. Louisiana,* 350 U. S. 91, 350 U. S. 100-101 (1955). The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. *See Cuyler v. Sullivan, supra,* at 446 U. S. 346. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *See Powell v. Alabama,* 287 U.S. at 287 U. S. 68-69.

These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.,* ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed.1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. *See United States v. Decoster,* 199 U.S.App.D.C. at 371, 624 F.2d at 208. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac,* 456 U. S. 107, 456 U. S. 133-134 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *See Michel v. Louisiana, supra,* at 350 U.

S. 101. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. *See* Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 343 (1983).

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

…

B

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. *Cf. United States v. Morrison,* 449 U. S. 361,449 U. S. 364-365 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

…

Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, *United States v. Agurs,* 427 U.S. at 427 U. S. 104,427 U. S. 112-113, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, *United States v. Valenzuela-Bernal, supra,* at 458 U. S. 872-874. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law.

An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

...

V

Having articulated general standards for judging ineffectiveness claims, we think it useful to apply those standards to the facts of this case in order to illustrate the meaning of the general principles. The record makes it possible to do so. There are no conflicts between the state and federal courts over findings of fact, and the principles we have articulated are sufficiently close to the principles applied both in the Florida courts and in the District Court that it is clear that the factfinding was not affected by erroneous legal principles. *See Pullman-Standard v. Swint,* 456 U. S. 273, 456 U. S. 291-292 (1982).

Application of the governing principles is not difficult in this case. The facts as described above, *see supra* at466 U. S. 671-678, make clear that the conduct of respondent's counsel at and before respondent's sentencing proceeding cannot be found unreasonable. They also make clear that, even assuming the challenged conduct of counsel was unreasonable, respondent suffered insufficient prejudice to warrant setting aside his death sentence.

With respect to the performance component, the record shows that respondent's counsel made a strategic choice to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on respondent's acceptance of responsibility for his crimes. Although counsel understandably felt hopeless about respondent's prospects, *see* App. 383-384, 400-401, nothing in the record indicates, as one possible reading of the District Court's opinion suggests, *see* App. to Pet. for Cert. A282, that counsel's sense of hopelessness distorted his professional judgment. Counsel's strategy choice was well within the range of professionally reasonable judgments, and the decision not to seek more character or psychological evidence than was already in hand was likewise reasonable.

The trial judge's views on the importance of owning up to one's crimes were well known to counsel. The aggravating circumstances were utterly overwhelming. Trial counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help. Respondent had already been able to mention at the plea colloquy the substance of what there was to know about his financial and emotional troubles. Restricting testimony on respondent's character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and respondent's criminal history, which counsel had successfully moved to exclude, would not come in. On these facts, there can be little question, even without application of the presumption of adequate performance, that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment.

With respect to the prejudice component, the lack of merit of respondent's claim is even more stark. The evidence that respondent says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented

to the sentencing judge. As the state courts and District Court found, at most, this evidence shows that numerous people who knew respondent thought he was generally a good person and that a psychiatrist and a psychologist believed he was under considerable emotional stress that did not rise to the level of extreme disturbance. Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed. Indeed, admission of the evidence respondent now offers might even have been harmful to his case: his "rap sheet" would probably have been admitted into evidence, and the psychological reports would have directly contradicted respondent's claim that the mitigating circumstance of extreme emotional disturbance applied to his case.

Our conclusions on both the prejudice and performance components of the ineffectiveness inquiry do not depend on the trial judge's testimony at the District Court hearing. We therefore need not consider the general admissibility of that testimony, although, as noted *supra,* at 466 U. S. 695, that testimony is irrelevant to the prejudice inquiry. Moreover, the prejudice question is resolvable, and hence the ineffectiveness claim can be rejected, without regard to the evidence presented at the District Court hearing. The state courts properly concluded that the ineffectiveness claim was meritless without holding an evidentiary hearing.

Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Here there is a double failure. More generally, respondent has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance. Respondent's sentencing proceeding was not fundamentally unfair.

We conclude, therefore, that the District Court properly declined to issue a writ of habeas corpus. The judgment of the Court of Appeals is accordingly *reversed.*

TEXAS COURT OF APPEALS
FIFTH DISTRICT, AT DALLAS

Melton v. State, 987 S.W.2d 72 (1998).

ROACH, Justice.

OPINION

We must decide whether Rodney Dwight Melton, who contends he was erroneously informed by his court-appointed trial attorney that he had been captured on videotape committing the charged crime, was denied effective assistance of counsel, resulting in an involuntary guilty plea. Appellant pleaded guilty to aggravated robbery and was sentenced to ten years in prison and fined $1000. On appeal, he complains his plea of guilty was involuntary due to ineffective assistance of counsel. We agree with appellant; accordingly, we reverse the trial court's judgment and remand for a new trial.

Appellant was arrested on November 5, 1995 and charged with robbing a pet shop employee at knifepoint one week earlier. Appellant was indigent, and the trial court appointed an attorney to represent him. On January 5, 1996, appellant pleaded guilty to the charge of aggravated robbery without an agreement as to punishment. After a sentencing hearing one week later, the trial court sentenced him to ten years in prison and fined him $1000. Appellant did not testify at either the plea hearing or sentencing hearing.

Appellant timely filed a motion for new trial claiming his plea was involuntary and that he received ineffective assistance of counsel. Specifically, appellant asserted that he suffered alcohol blackouts and had no memory of committing the offense. He asserted that he pleaded guilty only because his trial counsel told him he had been captured on videotape committing the crime when, in fact, no such videotape existed. Once told a videotape existed, appellant "felt that he must have committed the aggravated robbery" even though he could not remember the event.

The trial court conducted a hearing on appellant's motion. At the hearing, appellant testified he told trial counsel at their first meeting he was pleading not guilty. A couple of days later, appellant spoke to trial counsel by telephone. At that time, trial counsel asked him about the robbery, and appellant again told him he was not guilty. Sometime later, appellant spoke with his attorney again. During this conversation, appellant said trial counsel told him the robbery had been videotaped. Appellant testified counsel advised him to "call my wife and tell her that I committed the robbery because they saw me on film committing the robbery and I had to change my plea from not guilty to guilty." Appellant asked to see the videotape, but trial counsel told him there was "no chance" of that. After this conversation, appellant agreed to plead guilty. When asked why he changed his plea, appellant said he had no memory of committing the crime, but "[trial counsel] said they had me on film and they watched me doing the crime, so I must have felt like I had to be guilty." Appellant said he did not remember committing the robbery because he has a drinking problem. Appellant testified he would not have pleaded guilty had he known there was no film of the robbery.

Two of appellant's relatives confirmed that appellant had an alcohol problem and had suffered blackouts in the past. Additionally, they testified that trial counsel represented that a videotape existed of appellant committing the robbery. Nathaniel Williams, appellant's brother-in-law, said he talked with trial counsel a couple of weeks after appellant's arrest. During that telephone conversation, Williams said trial counsel told him it did not "look good" for appellant because "[t]hey got him on tape." Appellant's sister Diane Melton testified she visited trial counsel and asked to see the videotape. Trial counsel told her that would be "difficult and if we forced the issue with the District Attorney's office, that it would make it worse for [appellant]." Ms. Melton said her family, not wanting to "make the case any worse on [appellant]," did not force the issue.

Trial counsel also acknowledged that appellant originally planned to plead not guilty and had told him he had no memory of committing the robbery. When asked specifically whether he told appellant, at any point, that there was a videotape of him committing aggravated robbery, trial counsel gave a lengthy response, in which he acknowledged telling appellant there "might" be a videotape.[1] Further, on cross-examination, trial *75 counsel testified that he told appellant "if there was a videotape and he turned out to be on the videotape, that that [sic] would be hard to claim that he was innocent of the offense."

Both sides stipulated there was no videotape of the crime for which appellant was charged. In fact, the State told the trial court that "there are no notes made in the prosecution file that there was a videotape." Following testimony and argument, the trial court denied the motion for new trial. Appellant timely appealed. In two points of error, he contends (i) the trial court abused its discretion in denying his motion for new trial because his plea was involuntary due to ineffective assistance of counsel and (ii) he was denied effective assistance of counsel.[2]

The grant or denial of a motion for new trial is a matter entirely within the trial court's discretion. State v. Gonzalez, 855 S.W.2d 692, 696 (Tex.Crim.App.1993); Appleman v. State, 531 S.W.2d 806, 810 (Tex.Crim. App.1975). An abuse of discretion occurs when the trial court's decision is so clearly wrong as to lie outside the zone within which reasonable persons disagree. Cantu v. State, 842 S.W.2d 667, 682 (Tex.Crim.App.1992), cert. denied, 509 U.S. 926, 113 S. Ct. 3046, 125 L. Ed. 2d 731 (1993); Helton v. State, 909 S.W.2d 298, 301 (Tex.App.—Beaumont 1995, pet. ref'd). At the hearing on the motion for new trial, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. Lewis v. State, 911 S.W.2d 1, 7 (Tex.Crim.App.1995). The trial judge may properly consider the interest and bias of any witness and is not required to accept as true testimony of the accused or any defense witness simply because it is uncontradicted. Reissig v. State, 929 S.W.2d 109, 113 (Tex.App.—Houston [14th Dist.] 1996, pet. ref'd); Messer v. State, 757 S.W.2d 820, 828 (Tex.App.—Houston [1st Dist.] 1988, pet. ref'd).

In Texas, a defendant in a criminal case is entitled to reasonably effective assistance of counsel. Wilkerson v. State, 726 S.W.2d 542, 548 (Tex.Crim.App.1986), cert. denied, 480 U.S. 940, 107 S. Ct. 1590, 94 L. Ed. 2d 779 (1987). To show ineffective assistance of counsel at the guilt/innocence stage of trial, a convicted defendant must show (1) his trial counsel's performance was deficient, in that counsel made such serious errors he was not functioning effectively as counsel, and (2) the deficient performance prejudiced the defense *76 to such a degree that the defendant was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). The two-pronged test of Strickland applies to guilty pleas. Hill v. Lockhart, 474 U.S. 52, 58, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985); Ex parte Pool, 738 S.W.2d 285, 286 (Tex.Crim. App.1987). To satisfy the second prong of the Strickland test, an appellant must show there is a reasonable probability that, but for counsel's errors, appellant would not have entered his plea and would have insisted on going to trial. Hill, 474 U.S. at 59, 106 S.Ct. at 370-71; Ex parte Pool, 738 S.W.2d at 286.

Whether the Strickland standard has been met is judged by the totality of the representation rather than by isolated acts or omissions of trial counsel, and the test is applied at the time of the trial, not through hindsight. Bridge v. State, 726 S.W.2d 558, 571 (Tex.Crim.App.1986). The convicted defendant bears the burden of proving ineffective assistance of counsel by a preponderance of the evidence. Moore v. State, 694 S.W.2d 528, 531 (Tex.Crim.App.1985). The particular facts and circumstances of each case must be considered in any claim of ineffective assistance. Johnson v. State, 691 S.W.2d 619, 626 (Tex.Crim.App.1984), cert. denied, 474 U.S. 865, 106 S. Ct. 184, 88 L. Ed. 2d 152 (1985).

In this case, appellant testified he had no memory of committing the aggravated robbery because he suffered alcohol blackouts. From the outset, he planned to plead not guilty. However, he changed his plea when his trial counsel told him he had been captured on videotape committing the crime. At that point, appellant concluded he must have committed the crime during one of his blackout periods.

Two family members corroborated appellant's story about the videotape. His brother-in-law testified that trial counsel told him appellant was "on tape" committing the robbery. His sister testified that appellant told her he had no memory of committing the robbery. Consequently, she went to see trial counsel in hopes of viewing the videotape so there could be "some resolution in our family to know that this had happened ... and accept it if it were true." However, trial counsel told her it would be "very difficult" to get the tape from the district attorney's office, and the family would hurt appellant's case by forcing the issue.

Finally, trial counsel testified at the new trial hearing. When directly and unambigously asked whether he told appellant, at any point, that there was a videotape of appellant committing the crime, trial counsel never directly answered the question.

Instead, trial counsel provided a lengthy, nonresponsive answer to a simple question. When asked a second time, he responded, "I relayed everything that I told the defendant." Although the direct answer was within trial counsel's knowledge, he never gave it. Trial counsel had every opportunity to deny appellant's allegation about the videotape—but he never did.[3]

Despite the fact that trial counsel was evasive in his answers, his testimony did not conflict with appellant's. Like appellant, trial counsel testified appellant originally intended to plead not guilty because he had no memory of the event. Thereafter, trial counsel talked with the district attorney's office and was told there "might" be a videotape. Trial counsel testified that after he passed this information on to appellant, appellant changed his plea to guilty. Consequently, even if we disregard all testimony by appellant and his witnesses, the only other evidence before the trial judge was that trial counsel told appellant a videotape of him committing the offense "might" exist, and if so, that it would be "hard" for appellant "to claim that he was innocent of the offense." We now review whether counsel's statements constitute ineffective assistance of counsel in this case.

It is fundamental that a criminal defense attorney must have a firm command of the facts of the case as well as the governing law before the attorney can render reasonably effective assistance of counsel. Ex parte Welborn, 785 S.W.2d 391, 393 (Tex. Crim.App.1990). Rather than rely on the facts as represented by the district attorney's office, counsel had a duty to make an independent investigation of the facts of his client's case and prepare for trial. Ex parte Langley, 833 S.W.2d 141, 143 (Tex.Crim.App. 1992); Ex parte Pool, 738 S.W.2d at 286. This duty included determining with certainty whether a videotape existed and whether appellant was depicted on the videotape. Counsel was obligated to discuss his findings with appellant so that an informed decision could be made on how to proceed in the case. Here, such an investigation would have revealed that, in fact, no videotape existed. We conclude these circumstances combine to verify that appellant's trial counsel's representation fell below an objective standard of reasonableness.

Having found the first prong of Strickland is met, we must now determine whether counsel's constitutionally ineffective performance prejudiced appellant's defense. The question we must decide is whether appellant has shown a reasonable probability that, but for counsel's misstatement of the evidence, he would not have pleaded guilty and would have insisted on going to trial. Again, we conclude appellant has met his burden. Appellant testified that he did not remember committing the robbery because he suffered alcohol blackouts. Linda Robles, a certified alcohol and drug abuse counselor, testified appellant was an alcoholic. She also testified that a blackout, or "chemically induced amnesia," is a recognized phenomenon among alcoholics. She said appellant had been exhibiting blackouts since his teens. Although appellant testified he did not remember committing the offense, he said he changed his plea to guilty after trial counsel told him there was a videotape of the crime. Trial counsel acknowledged telling appellant that a videotape would make it "hard to claim that he was innocent of the offense." Moreover, appellant testified he would not have pleaded guilty if he had known there was no videotape. Effective representation would have revealed that fact. On the record before us, we conclude appellant has satisfied both prongs of the Strickland test and was denied effective assistance of counsel at trial.

One basic tenet of our criminal jurisprudence is that before a trial court accepts a plea of guilty, the plea must be freely and voluntarily given by a mentally competent defendant. See TEX.CODE CRIM. PROC. ANN. art. 26.13(b) (Vernon 1989); Ex parte Battle, 817 S.W.2d 81, 83 (Tex.Crim.App.1991). A guilty plea is not knowing or voluntary if made as a result of ineffective assistance of counsel. Ex parte Burns, 601 S.W.2d 370, 372 (Tex.Crim.App.1980); Diaz v. State, 905 S.W.2d 302, 308 (Tex.App.—Corpus Christi 1995, no pet.).

Having concluded appellant was denied effective assistance of counsel, we likewise conclude his guilty plea was rendered involuntary by the failure of trial counsel, through an independent investigation, to determine that, in fact, a videotape did not exist and to convey that information to appellant. See McGuire v. State, 617 S.W.2d 259, 261 (Tex.Crim.App.1981); Gomez v. State, 921 S.W.2d 329, 333 (Tex.App.—Corpus Christi 1996, no pet.); Messer v. State, 757 S.W.2d 820, 824 (Tex.App.—Houston [1st Dist.] 1988, pet. ref'd). Accordingly, the trial court abused its discretion in

denying appellant's motion for new trial. We sustain appellant's first point of error. Our disposition of appellant's first point of error makes it unnecessary for us to consider his remaining point of error. TEX.R.APP. P. 47.1.

We reverse the trial court's judgment and remand for a new trial.

UNITED STATES SUMPREME COURT

Brady v. Maryland, 373 U.S. 83 (1963).

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE BRENNAN.

OPINION

Petitioner and a companion, Boblit, were found guilty of murder in the first degree and were sentenced to death, their convictions being affirmed by the Court of Appeals of Maryland. 220 Md. 454, 154 A.2d 434. Their trials were separate, petitioner being tried first. At his trial, Brady took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. And, in his summation to the jury, Brady's counsel conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict "without capital punishment." Prior to the trial, petitioner's counsel had requested the prosecution to allow him to examine Boblit's extrajudicial statements. Several of those statements were shown to him, but one dated July 9, 1958, in which Boblit admitted the actual homicide, was withheld by the prosecution, and did not come to petitioner's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed.

Petitioner moved the trial court for a new trial based on the newly discovered evidence that had been suppressed by the prosecution. Petitioner's appeal from a denial of that motion was dismissed by the Court of Appeals without prejudice to relief under the Maryland

Post-Conviction Procedure Act. 222 Md. 442, 160 A.2d 912. The petition for post-conviction relief was dismissed by the trial court, and, on appeal, the Court of Appeals held that suppression of the evidence by the prosecution denied petitioner due process of law, and remanded the case for a retrial of the question of punishment, not the question of guilt. 226 Md. 422, 174 A.2d 167. The case is here on certiorari, 371 U.S. 812. [Footnote 1]

The crime in question was murder committed in the perpetration of a robbery. Punishment for that crime in Maryland is life imprisonment or death, the jury being empowered to restrict the punishment to life by addition of the words "without capital punishment." 3 Md.Ann.Code, 1957, Art. 27, § 413. In Maryland, by reason of the state constitution, the jury in a criminal case are "the Judges of Law, as well as of fact." Art. XV, § 5. The question presented is whether petitioner was denied a federal right when the Court of Appeals restricted the new trial to the question of punishment.

We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment. The Court of Appeals relied, in the main, on two decisions from the Third Circuit Court of Appeals United States ex rel. *Almeida v. Baldi*, 195 F.2d 815, 33 A.L.R.2d 1407, and *United States ex rel. Thompson v. Dye*, 221 F.2d 763 which, we agree, state the correct constitutional rule.

This ruling is an extension of *Mooney v. Holohan*, 294 U. S. 103, 112, where the Court ruled on what nondisclosure by a prosecutor violates due process:

"It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which, in truth, is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."

In *Pyle v. Kansas*, 317 U. S. 213, 215-216, we phrased the rule in broader terms:

"Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. *Mooney v. Holohan*, 294 U. S. 103. "

The Third Circuit, in the *Baldi* case, construed that statement in *Pyle v. Kansas* to mean that the "suppression of evidence favorable" to the accused was itself sufficient to amount to a denial of due

process. 195 F.2d at 820. In *Napue v. Illinois*, 360 U. S. 264, 269, we extended the test formulated in *Mooney v. Holohan* when we said: "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *And see Alcorta v. Texas*, 355 U. S. 28; *Wilde v. Wyoming*,. *Cf. Durley v. Mayo*, 351 U. S. 277, 285 (dissenting opinion).

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor, but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted, but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts." A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile," to use the words of the Court of Appeals. 226 Md. at 427, 174 A.2d at 169.

The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment. In justification of that ruling, the Court of Appeals stated:

"There is considerable doubt as to how much good Boblit's undisclosed confession would have done Brady if it had been before the jury. It clearly implicated Brady as being the one who wanted to strangle the victim, Brooks. Boblit, according to this statement, also favored killing him, but he wanted to do it by shooting. We cannot put ourselves in the place of the jury, and assume what their views would have been as to whether it did or did not matter whether it was Brady's hands or Boblit's hands that twisted the shirt about the victim's neck. . . . [I]t would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence *in considering the punishment of the defendant Brady.*"

"Not without some doubt, we conclude that the withholding of this particular confession of Boblit's was prejudicial to the defendant Brady. . . . "

"The appellant's sole claim of prejudice goes to the punishment imposed. *If Boblit's withheld confession had been before the jury, nothing in it could have reduced the appellant Brady's offense below murder in the first degree.* We therefore see no occasion to retry that issue." 226 Md. at 429 430, 174 A.2d at 171. (Italics added.)

If this were a jurisdiction where the jury was not the judge of the law, a different question would be presented. But since it is, how can the Maryland Court of Appeals state that nothing in the suppressed confession could have reduced petitioner's offense "below murder in the first degree"? If, as a matter of Maryland law, juries in criminal cases could determine the admissibility of such evidence on the issue of innocence or guilt, the question would seem to be foreclosed.

But Maryland's constitutional provision making the jury in criminal cases "the Judges of Law" does not mean precisely what it seems to say. [Footnote 3] The present status of that provision was reviewed recently in *Giles v. State*, 229 Md. 370, 183 A.2d 359, *appeal dismissed*, 372 U. S. 767, where the several exceptions, added by statute or carved out by judicial construction, are reviewed. One of those exceptions material here is that "Trial courts have always passed, and still pass, upon the admissibility of evidence the jury may consider on the issue of the innocence or guilt of the accused." 229 Md. at 383, 183 A.2d at 365. The cases cited make up a long line going back nearly a century. *Wheeler v. State*, 42 Md. 563, 570, stated that instructions to the jury were advisory only, "except in regard to questions as to what shall be considered as evidence." And the court "having such right, it follows of course, that it also has the right to prevent counsel from arguing against such an instruction." *Bell v. State*, 57 Md. 108, 120. *And see Beard v. State*, 71 Md. 275, 280, 17 A. 1044, 1045; *Dick v. State*, 107 Md. 11, 21, 68 A. 286, 290. *Cf. Vogel v. State*, 163 Md. 267, 162 A. 705.

We usually walk on treacherous ground when we explore state law, [Footnote 4] for state courts, state agencies, and state legislatures are its final expositors under our federal regime. But, as we read the Maryland decisions, it is the court, not the jury, that passes on the "admissibility of evidence" pertinent to "the issue of the innocence or guilt of the accused." *Giles v. State, supra.* In the present case, a unanimous Court of Appeals has said that nothing in the suppressed confession "could have reduced the appellant Brady's offense below murder in the first degree." We read that statement as a ruling on the admissibility of the confession on the issue of innocence or guilt. A sporting theory of justice might assume that, if the suppressed confession had been used at the first trial, the judge's ruling that it was not admissible on the issue of innocence or guilt might have been flouted by the jury just as might have been done if the court had first admitted a confession and then stricken it from the record. [Footnote 5] But we cannot raise that trial strategy to the dignity of a constitutional right and say that the deprival of this defendant of that sporting chance through the use of a bifurcated trial (*cf. Williams v. New York*, 337 U. S. 241) denies him due process or violates the Equal Protection Clause of the Fourteenth Amendment.

Affirmed.

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COURT OF CRIMINAL APPEALS TEXAS

Ex Parte Richardson, 70 S.W.3d 865 (Tex. Crim. App. 2002)

COCHRAN, J.

OPINION

In his application for a writ of habeas corpus, applicant alleges twenty points of constitutional error in his conviction for capital murder under Texas Penal Code, Sections 19.02(a)(1) and 19.03(a)(6)(A). This Court ordered points 13, 14, 15, and 17 filed and set for submission. Because we agree that the credibility of the State's only eyewitness, Anita Hanson, was a crucial issue in applicant's trial, we conclude that the State had an affirmative constitutional duty under Brady v. Maryland to disclose material evidence that impeached her testimony. We further find that applicant has satisfied his burden of proving, by a preponderance of the evidence, the facts that entitle him to habeas relief. Therefore, we grant habeas relief.

I.

In our published opinion on applicant's direct appeal from his capital murder conviction, this Court described the key evidence at trial. We briefly recite that evidence here.

A grand jury indicted applicant and three co-defendants (Michael Stearnes, Lambert Wilson, and Rodney Childress) for the September 10, 1987, capital murders of Napoleon Ellison, Quinnie Smith, and Vivian Webb. Mr. Ellison allegedly worked for applicant, dealing cocaine that applicant smuggled into Lubbock; Ms. Smith and Ms. Webb were members of Ellison's household. The co-defendants were tried separately; applicant stood trial first.

Anita Hanson, who claimed longtime association with applicant, was the State's star witness. Ms. Hanson provided crucial eyewitness testimony regarding applicant's participation in the murders. She testified to attending a September 7th party with applicant and Lambert Wilson at a mutual friend's home in Lubbock. While there, she overheard applicant tell Mr. Wilson that he planned to kill Webb and Ellison, and that Wilson agreed to participate in the killings if applicant paid him to do so.

Ms. Hanson testified that Wilson and Michael Stearnes picked her up in a car at a Lubbock park around 12:30 a.m. on September 10, 1987. They drove to Ellison's residence. Wilson, the driver, parked the car about two blocks away. Wilson and Mr. Stearnes left Hanson in the car and walked quickly toward the residence. Wilson carried an Uzi machine gun, and Stearnes carried a shotgun. Hanson testified that she believed Wilson and Stearnes intended only to frighten Ellison.

Hanson waited in the car for approximately twenty minutes before deciding to walk to Ellison's residence herself. She heard "a loud boom" when she reached Ellison's driveway, and she ran inside the house. There she saw applicant, Wilson, Stearnes, Mr. Childress, and Napoleon Ellison. Ellison was slumped in a chair with his head down, and `there was blood on him.' Hanson testified that applicant carried a pistol, Childress had a shotgun, and Wilson still carried an Uzi. Applicant and Wilson both wore rubber gloves. Mr. Childress told Hanson that applicant had forced him to kill Webb. Ellison then raised his head and asked Hanson to help him. Hanson asked applicant, who appeared to be in charge, whether she could telephone a doctor, but he said no. Applicant then took the Uzi from Wilson, handed it to Hanson, and ordered her to shoot Ellison. Hanson testified that applicant threatened to kill her if she did not. Hanson complied, firing three shots into Ellison. Applicant then instructed Wilson to remove some "drugs" from a cabinet beneath the kitchen sink, and Wilson did so. Shortly thereafter, Hanson left the residence with Wilson and Stearnes.

Webb, Smith, and Ellison were found dead in the Ellison residence on the afternoon of September 10. A forensic pathologist testified that all of the victims died of multiple gunshot wounds. A search of the residence revealed two plastic bags of marijuana, two shotgun shells, several nine-millimeter shell casings, and some photographs of applicant. A Department of Public Safety firearms examiner testified that all of the nine-millimeter shell casing came from the same weapon and that the weapon could have been an Uzi machine gun.

An anonymous telephone call brought Hanson's possible knowledge of the murders to the attention of the District Attorney's Office. Police detectives questioned Hanson, and on September 15, 1987 she gave her first of six sworn statements regarding the murders. The District Attorney's Office placed

Hanson under "protective custody" as a material witness beginning shortly after her first statement. By October 15, 1987 Hanson had identified herself as a participant, having sworn that she fired three bullets from an Uzi machine gun into Napoleon Ellis. Nonetheless, Hanson remained unindicted and in protective custody in various locations around Lubbock for approximately a year, until she testified at applicant's trial in late September 1988. A security detail composed of two Lubbock police officers per shift watched over Hanson twenty-four hours a day. After she testified at applicant's trial, Hanson received a $4,000 relocation allowance from the District Attorney's Office.

Applicant stood trial in the 72nd District Court of Lubbock County in late September and early October of 1988. A jury found him guilty as a party to the capital murder of three individuals during a single criminal transaction and answered all punishment questions affirmatively. The trial judge sentenced applicant to death. Direct appeal to this Court was automatic under Article 37.071(h). We affirmed the trial court's judgement and sentence.

Applicant's co-defendants fared significantly better. Michael Stearnes was acquitted in 1990 after a bench trial in which his defense counsel fatally impeached Anita Hanson's credibility, confronting her with her prior inconsistent sworn statements and eliciting her admission to having lied under oath. During Lambert Wilson's subsequent jury trial, Ms. Hanson admitted that she had not always told the truth while testifying in Michael Stearnes' trial. The jury in Mr. Wilson's trial deliberated for merely two hours before returning a `not guilty' verdict. Rodney Childress never stood trial for the murders. On the State's motion, the trial court dismissed the indictment against Mr. Childress, finding that the evidence was insufficient to sustain a conviction, even though Hanson had named Childress as Vivian Webb's actual killer.

Applicant filed his present application for a writ of habeas corpus. After a fifteen-day habeas hearing, the trial court entered extensive factual findings that are supported by the habeas record transmitted to this Court.

II.

To prevail upon a post-conviction writ of habeas corpus, applicant bears the burden of proving, by a preponderance of the evidence, the facts that would entitle him to relief. Where, as here, the applicant claims that the prosecution suppressed exculpatory evidence and thereby violated his right to due process, applicant must satisfy a three-pronged test. Applicant must first show that the State failed to disclose evidence, regardless of the prosecution's good or bad faith. He must then show that the withheld evidence is favorable to applicant. Finally, the applicant must show that the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. As in any habeas proceeding, the applicant must prove the constitutional violation and his entitlement to habeas relief by a preponderance of the evidence.

III.

Applicant complains that the District Attorney failed to disclose the existence of a diary kept by Tonya Goldston, formerly a police officer with the Lubbock Police Department, which would have provided the defense team with powerful impeachment evidence against the State's only eyewitness, Anita Hanson. Applicant further contends that, with the credibility of the State's star witness thus compromised, there is a reasonable probability that the jury would not have convicted applicant.

Officer Goldston, who did not testify at applicant's capital murder trial, served on Hanson's security detail and maintained a diary or log of the time she spent guarding Hanson. At the habeas hearing, Officer Goldston identified a copy of her original diary and testified that in late April or early May of 1988, she gave the diary to then-Assistant Chief of Police, Michael Huffman, at Huffman's request. Assistant Chief Huffman identified a memorandum regarding Goldston's diary that he prepared and sent to the District Attorney, along with the diary, on May 10, 1988. Although applicant's trial did not begin until September 6, 1988, some three months later, members of the prosecution team testified at the habeas hearing that they had not seen the diary nor were they aware that it existed. The diary was found in applicant's file at the District Attorney's Office, however, at some point after applicant's conviction. Based on this and other testimony, the habeas judge found that Officer Goldston's diary was not disclosed to applicant's defense team. Although we are not bound to follow the habeas judge's findings of fact, we find that the record supports his findings. Accordingly, we find that applicant has met the first of the three required tests for habeas relief.

Applicant must also show that the diary constituted

exculpatory evidence. After identifying her diary and affirming the truth of its contents, Officer Goldston testified that the State's star witness was not a truthful person and that she, Goldston, kept the log to protect herself from any false accusations or complaints Hanson might make about her, as Hanson had made such complaints about other officers who guarded her. Goldston's diary identified fellow officers on the security detail and described her interactions with Hanson, as well as information other officers conveyed to her. Applicant's habeas counsel called five of the officers that Goldston's diary had identified as members of the protective detail and elicited each officer's opinion regarding Hanson's truthfulness.

Without exception, each officer testified that Hanson was not a truthful person.

Under Bagley, exculpatory evidence includes impeachment evidence. The live testimony of six law enforcement officers who had extensive personal contact with Hanson and were therefore in a position to form an opinion regarding her credibility was extremely powerful impeachment evidence. We find that the diary and the testimony it led to were favorable to applicant.

Lastly, applicant must show that the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. Applicant's habeas hearing spanned fifteen full days and included testimony from forty-five witnesses. Among his many factual findings regarding applicant's claims, the habeas trial judge determined that "[t]here [was] no question but that by the time of applicant's trial Anita Hanson's credibility was a major issue in the case." The habeas trial judge heard extensive testimony regarding Anita Hanson's credibility (or lack thereof), the State's knowledge of her credibility problems, the circumstances of her year secreted away in protective custody, and whether Hanson had agreed to testify against applicant in return for the District Attorney's explicit or implicit promise not to prosecute her for killing Napoleon Ellis.

Anita Hanson's eyewitness testimony clearly was crucial to the State's capital murder case against applicant. Her account placed applicant at the murder scene at the time of the killings and assigned primary responsibility for the murders to applicant, whom Hanson claimed was in charge and ordered Hanson to shoot Ellison. She was the only eyewitness who testified to the actual killings and applicant's participation. The State's other witnesses established only that (i) appellant possessed a motive to commit the murders and intended to act on that motive, and (ii) two witnesses had observed him firing a machine gun on some prior date. It was upon her testimony that the jury convicted applicant of capital murder and sentenced him to death. Applicant's co-defendants, however, who were tried separately, were either acquitted or their indictments were dismissed as, over time, Anita Hanson's credibility was fatally impeached by her ever-increasing number of self-admitted perjurious statements. Her story unraveled entirely in subsequent trials. We find that applicant has demonstrated a reasonable probability that, had the Goldston diary been timely disclosed and the six law enforcement officers testified, Anita Hanson's credibility would have not only been impeached, but severely undermined. Because her testimony was critical to the State's case, we agree with the habeas judge who concluded: "I find as a matter of law that the evidence would, in all likelihood, create the probability sufficient to undermine the confidence in the outcome of the proceeding."

Accordingly, we grant relief on applicant's fourteenth constitutional claim and set aside the conviction. Applicant is remanded to the custody of the Lubbock County Sheriff to answer the indictment.

TEXAS COURT OF CRIMINAL APPEALS

Hampton v. State, 86 S.W. 3d 603 (2002).

COCHRAN, J., delivered the unanimous opinion of the Court.

OPINION

When police officers took appellant, a juvenile, into custody, they told his mother that they were doing so because he had absconded from juvenile probation. The next morning, without re-establishing contact with appellant's mother, an Odessa officer questioned appellant about a March 1999 murder. Appellant gave a videotaped statement in which he admitted to killing the victim. Because we find that the police officer properly notified appellant's mother "of the reason for taking the child into custody," as required by Family Code section 52.02(b), he was not also statutorily required to tell her that he suspected her son of committing a murder or to notify her again before questioning appellant. In a separate issue, we also find that the court of appeals erred in confusing the standard for reversal for Brady error with the standard for reversal for constitutional error under Tex.R.App.P. 44.2(a). We therefore reverse the El Paso Court of Appeals' decision that the officer violated section 52.02(b) and therefore illegally obtained appellant's confession. Hampton v. State, 36 S.W.3d 921, 924 (Tex.App.-El Paso 2001). We remand the case to the court of appeals for it to determine whether appellant has demonstrated that the State's failure to timely produce a police officer's supplementary report was material and thus created "a probability sufficient to undermine . . . confidence in the outcome of the proceeding."

I.

On March 18, 1999, Jarvis Preston and his sister, Lashara Preston, were watching TV when they heard gunshots outside Lashara's apartment at La Promesa Apartments in Odessa, Texas. Two or three minutes later, they saw someone run past her back window in the alley. Jarvis recognized that person as the appellant, "Tweet." Appellant was standing on the back porch and said, "Open the door for me." Lashara did not want appellant to come inside, but Jarvis considered appellant "just like a home boy," and so he asked Lashara for the keys to her car and offered to drive appellant home. Appellant told Jarvis that he thought he had shot somebody in self-defense. Appellant and Jarvis then spent the rest of the night driving around.

Meanwhile, police officers responded to a 911 call, came to the apartment complex, and found the body of William Nance, who had been shot to death. During their investigation, the officers obtained information which focused suspicion on appellant as the shooter. Four days after the murder and upon discovering that appellant was a probation absconder, Detective McCann and other officers arrested appellant at his friend's apartment. When appellant heard police officers at the front door, he ran out the back, but the officers caught him.

Appellant's mother, Deborah Jackson, arrived at the friend's apartment while the Odessa police were taking her son into custody. She asked Det. McCann why they were taking appellant into custody and he told her that they were picking him up for a probation violation — he was an absconder from juvenile probation. She told Det. McCann that appellant was a juvenile.

Det. McCann, mistakenly believing that appellant was seventeen because he had booking photos and information from the Sheriff's Department that appellant had previously been arrested as an adult, drove him to the Odessa police station instead of the Ector County Youth Center. Appellant subsequently admitted to the detective that he had lied about his age when he was previously arrested by the Sheriff's Department and that he was really just sixteen. Det. McCann called the Youth Center to verify that appellant was indeed still a juvenile. Meanwhile, Det. McCann asked appellant several times if he wanted to give a statement at some time, although he did not ask him any questions. At first appellant was very "vocal and profane," but he soon "settled down" and said he would give a statement. Once appellant's age was verified, Det. McCann drove appellant to the Youth Center at about 12:30 a.m. and left him in the center's custody.

Det. McCann returned the next morning, was permitted to check appellant out of the juvenile detention center, and took him back to the police station, where a magistrate advised appellant of his rights and asked him whether he wanted to waive those rights and talk to Det. McCann. Appellant did. Both appellant's interview with the magistrate and his two hour interview with Detective McCann were videotaped and transcribed. Appellant stated that he had killed Mr. Nance, but claimed that he shot in self-defense.

Appellant explained that he had been at an apartment with several people that night, talking and watching TV while they smoked crack cocaine. At about 4:00 a.m., appellant went outside to visit another friend and saw Mr. Nance. Appellant stated that Mr. Nance wanted some dope and he mistakenly thought appellant sold drugs. When appellant told Mr. Nance that he was not a drug dealer, Mr. Nance became hostile and threatening. As Mr. Nance started toward appellant, Nance slipped and appellant pulled his gun out of his pants and cocked it. The victim hit appellant's hand and the gun "went off." According to appellant, he started to run away, but Mr. Nance kept coming after him and so he shot twice more. He then ran back to the apartment where he had been watching T.V., but his friends refused to let him come in. They threw his jacket out to him, and he then ran to the apartment where Jarvis Preston and his sister were.

While Det. McCann was questioning appellant at the police department, Ms. Jackson called the Youth Center to see how appellant was doing. She was told that a police officer had checked him out of the facility. She then called the Odessa police department and discovered that an officer was questioning her son about a murder.

Appellant filed a pretrial motion to suppress his videotaped confession. He claimed, inter alia, that Det. McCann did not notify appellant's mother that, although appellant was taken into custody as a juvenile probation absconder, the police also suspected him of killing Mr. Nance. After hearing testimony, the trial judge denied the motion to suppress and admitted appellant's videotaped statement at trial.

Other evidence offered by the State at trial included the eyewitness testimony of John Cooper, who testified that he was "smoking crack" at a friend's apartment. Looking out the upstairs window, he had seen appellant, whom he knew as "Tweet," and another man outside arguing. After he turned away from the window, he heard a gunshot. When he looked back out the window, he saw a man run across the street and fall down. He also saw appellant with his arm extended and heard several more shots. Mr. Cooper said that appellant was the only other person in the area.

Fourteen-year-old Anthony Tuda testified that he was asleep in his bed at La Promesa Apartments at about 4:20 a.m. on March 18th when he heard a gunshot. He got up and looked out his window and saw "the one that got shot, he like, struggled across the street and just fell down." He said he saw three people in all, the victim and two other people. Anthony Tuda explained that, at first, he saw only the shooter and his victim, but then after the shooter ran away, he thought he saw someone else drive off in a pick-up truck. He did not recognize any of the people. He called 911.

Andrea Travioli testified that she was at the apartment at La Promesa that night with appellant. He left, she heard shots, then, shortly thereafter, appellant banged on the door and said he needed his jacket because he "need[ed] to get the hell out of here." Jermaine Session testified that appellant came to his apartment the next morning and told him he had argued with Mr. Nance and shot him. Jason Yielding testified that appellant later came to his apartment and asked him for a ride into the country. Jason did so and saw appellant throw a sack out of the window at a location where officers later recovered parts of a gun of the same type used to kill Mr. Nance.

After all of the State's witnesses testified, appellant's attorney told the judge that he had just discovered that the prosecutor had a supplemental police report which he had not previously seen. He said that this report, prepared by Sgt. Roberts of the Odessa Police Department, contained potentially exculpatory information, namely the first names of two girls who had lived in the apartment complex when the shooting occurred (but who had since moved). Appellant's attorney said that the girls told police officers shortly after the murder that they had seen two black males running away from the shooting scene, one of who was Jarvis Preston, appellant's friend who drove him away from the murder scene. Appellant requested a continuance for his investigator to try to track down the two missing girls. The trial judge denied this request and then appellant asked for a mistrial which was also denied. Appellant did not file a motion for new trial or request a hearing to present further evidence relating to this issue.

A jury convicted appellant and sentenced him to 35 years imprisonment. The El Paso Court of Appeals, finding that: 1) appellant's videotaped statement was taken in violation of section 52.02(b); and 2) the State's failure to disclose potentially exculpatory material was harmful, reversed the conviction and

ordered a new trial. We granted the State Prosecuting Attorney's petition for review.

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III.

In a separate ground for review, the State argues that the court of appeals employed an improper standard for reviewing a potential Brady violation by replacing the third prong of the Bagley test with the constitutional harmless-error standard of Rule 44.2(a). In its opinion, the court of appeals stated that: "Although this [three-pronged test for reversal under Brady] predates our present Tex.R.App.P. 44.2, because Brady violations implicate constitutional rights, we believe the result under either formulation of the harm test is the same." Appellant argues that the State has misconstrued the lower court opinion, and that the court of appeals did conduct a separate Rule 44.2(a) harm analysis for constitutional error.

The court of appeals, after noting that Sergeant Roger's supplementary report contained the first names of two witnesses who said they had seen two black males running away from the shooting scene, one of whom was Jarvis Preston, concluded that, had the defense timely known this information, appellant "might well have chosen a different strategy which could have exonerated him." The reviewing court did not elaborate on how the defensive strategy might have differed or what would be the probable impact of discovering the names of these two possible witnesses at an earlier time. The court then concluded: "All three Brady harm elements are satisfied, as is the harm requirement of Tex.R.App.P. 44.02(a)." From its opinion, we cannot determine whether the court of appeals applied the standard for Brady error rather than an inappropriate general harmless error standard for reversal for constitutional error. In both Brady and Bagley, the Supreme Court explicitly rejected the use of a harmless error rule when the prosecutor fails to disclose certain evidence favorable to the accused because, under that rule, every nondisclosure would be treated as error, "thus imposing on the prosecutor a constitutional duty to deliver his entire file to defense counsel." Although reversible error under Brady will always constitute reversible error under Rule 44.2(a), the converse is not true.

The three-pronged test for reversible error for a Brady violation is entirely different from the constitutional harmless error standard set out in Tex.R.App.P. 44.2(a). To find reversible error under Brady and Bagley, a defendant must show that:

1) the State failed to disclose evidence, regardless of the prosecution's good or bad faith;
2) the withheld evidence is favorable to him;
3) the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different.

Under Brady, the defendant bears the burden of showing that, in light of all the evidence, it is reasonably probable that the outcome of the trial would have been different had the prosecutor made a timely disclosure. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish `materiality' in the constitutional sense."

In the present case, the court of appeals did not analyze the prosecutor's failure to timely disclose the existence of the supplementary report in light of all the other evidence adduced at trial. In particular, the court did not discuss the report's materiality in light of appellant's own videotaped statement admitting that he alone had shot Mr. Nance. This omission is entirely understandable because the court of appeals had previously held that appellant's videotaped statement should not have been admitted. The reviewing court's analysis upon remand should consider this properly admitted evidence as well as the remainder of the evidence, including the testimony of John Cooper, Anthony Tuda, Andrea Travioli, Jermaine Session, and Jason Yielding.

Usually, a determination concerning the materiality prong of Brady involves balancing the strength of the exculpatory evidence against the evidence supporting conviction. Sometimes, what appears to be a relatively inconsequential piece of potentially exculpatory evidence may take on added significance in light of other evidence at trial. In that case, a reviewing court should explain why a particular Brady item is especially material in light of the entire body of evidence.

Therefore, we reverse the court of appeals' judgment, uphold the trial court's admission of appellant's videotaped statement, and remand the case to the court of appeals to analyze the materiality of the prosecutor's failure to timely produce Sgt.

Rogers' supplementary report under the standards set out above.

TEXAS COURT OF APPEALS
SECOND DISTRICT, AT FORT WORTH

Reed v. State, (Tex. App. – Fort Worth 2016) (unpub.).

OPINION

Appellant Travis Reed appeals from his conviction for indecency with a child by contact. See Tex. Penal Code Ann. § 21.11(a)(1) (West 2011). In [two] points, appellant complains that his due process rights were violated when the State failed to disclose impeachment evidence, [and] that the jury charge on punishment violated his due process and due course of law rights.

Background

Appellant was a volunteer firefighter and medic and a volunteer with the children's ministry and the youth program at a church in Azle. The complainant in this case met appellant through the children's ministry. The complainant, who was fourteen years old at the time of trial, testified that during a father-son campout sponsored by the church, appellant put his hands inside of the complainant's sleeping bag and rubbed the complainant's stomach and buttocks. The complainant was nine or ten years old at the time, and he did not tell anyone about what had happened at the time because he was scared. Appellant testified at trial and denied touching the complainant.

A little less than a year later, appellant hosted a bonfire and sleepover at his home for male church members. The complainant testified that appellant suggested that they share a sleeping bag but that he found a spare sleeping bag in appellant's shed and slept in it by himself. That night, appellant put his hands inside the complainant's pants and touched his genitals, stomach, and back. This allegation formed the basis for the charged offense.

The complainant again testified that he did not tell anyone what had happened at the time because he was scared, and appellant testified that the contact did not occur. An adult chaperone at the bonfire testified that due to the number of people present and the size of the room, the contact could not have occurred because there were "way too many people that were present for that to occur."

Appellant, along with two other adults, taught Mixed Martial Arts (MMA) classes at the church. The complainant attended the classes. He testified that appellant told the boys to order very short MMA shorts and wear them to class. He further testified that appellant picked him up by his shorts and looked under them. At trial, appellant denied that this took place.

The complainant also testified that on another occasion, appellant took him and another child to a movie and that during the movie, appellant rubbed and tickled the complainant. The complainant further testified that on another occasion, appellant took him to eat at a Dairy Queen on the way home from a Pee Wee football game. Appellant sat next to the complainant in a booth and rubbed the complainant's thigh. Appellant denied sitting next to the complainant
and rubbing his thigh.

The State called D.D. as a rebuttal witness. D.D. was seventeen at the time of the trial. D.D. testified that he attended the same church as appellant and the complainant and that he knew both of them through church. D.D. further testified that appellant took a special interest in him and tried to be a "special friend" to him. The two of them would do things together and hang out together.

D.D. testified that he took MMA classes with the complainant at church. According to D.D., appellant required the boys to wear very short shorts during the classes. D.D. stated that he felt very uncomfortable in class when appellant made them spread their legs to stretch and that he noticed appellant trying to look up his shorts in order to see his "privates." D.D. also testified that during a tour of the fire department, appellant "pantsed" him, meaning that appellant yanked D.D's shorts and underwear down to the ground, leaving D.D. uncovered from the waist down. D.D. was fourteen or fifteen at the time. Appellant denied that he "pantsed" D.D.

The jury found appellant guilty of indecency with a child as charged in the indictment. At punishment, the jury charge contained language authorized by statute regarding good conduct time. See Tex. Code Crim. Proc. Ann. art. 37.07, § (4)(a) (West Supp. 2016). The jury assessed appellant's punishment at eight years' confinement, and the trial court sentenced him accordingly.

Appellant timely filed a motion for new trial that

claimed, in part, that the State withheld exculpatory evidence relevant to D.D. No hearing was held on the motion. Appellant's motion for new trial was deemed denied on December 30, 2014. See Tex. R. App. P. 21.8(a) ("The court must rule on a motion for new trial within 75 days after imposing or suspending sentence in open court."), (c)("A motion not timely ruled on by written order will be deemed denied when the period prescribed in (a) expires.").

Alleged Brady Violation

Appellant argues in his first point that his due process rights were violated when the State failed to disclose evidence that he could have used to impeach D.D., the State's rebuttal witness. D.D. testified that he left public school in the middle of his sophomore year, was homeschooled, and graduated from homeschool in June 2014. Appellant alleges that the State violated the dictates of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), by failing to disclose D.D.'s school records, which appellant contends show that D.D. had disciplinary problems, was removed from school due to repeated disciplinary problems, had poor grades and was considered an "at risk" pupil at the time he withdrew from public school. Appellant asserts that had this information been provided to him, he could have cross-examined D.D. more effectively because "[D.D.'s] lack of veracity as demonstrated by explicit reference to the education records would have shown the jury that [he] lacked all credibility." Appellant contends that there is a reasonable probability that had this evidence been disclosed, the outcome of the trial would have been different.

To establish reversible error for a Brady violation, appellant was required to show that: (1) the State failed to disclose evidence, regardless of the prosecution's good or bad faith; (2) the withheld evidence is favorable to him; and (3) the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. See Pena, 353 S.W.3d at 809; Hampton v. State, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002). With respect to the first prong, the State has a constitutional duty to disclose to a defendant material exculpatory and impeachment evidence in its possession. See Pittman v. State, 372 S.W.3d 261, 269 (Tex. App.—Fort Worth 2012, pet. ref'd) (citing Pena, 353 S.W.3d at 810). This duty also requires the State to learn of Brady evidence known to others acting on the State's behalf in a particular case. Harm v. State, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006) (citing Kyles v. Whitley, 514 U.S. 419, 437–38, 115 S. Ct. 1555, 1567–68 (1995)); see Ex parte Miles, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012) ("Even if the prosecutor was not personally aware of the evidence, the State is not relieved of its duty to disclose because 'the State' includes, in addition to the prosecutor, other lawyers and employees in his office and members of law enforcement connected to the investigation and prosecution of the case."); Ex parte Mitchell, 977 S.W.2d 575, 578 (Tex. Crim. App. 1997), cert. denied, 525 U.S. 873 (1998) (noting that Brady requires the State to disclose material exculpatory evidence in the possession of police agencies and other parts of the prosecutorial team). The State does not have such a duty if the defendant was actually aware of the evidence or could have accessed it from other sources. Pena, 353 S.W.3d at 810; see Jackson v. State, 552 S.W.2d 798, 804 (Tex. Crim. App. 1976), cert. denied, 434 U.S. 1047 (1978) (concluding prosecution did not violate duty to disclose favorable evidence when the evidence was available to defendant through a subpoena).

No evidence was attached to appellant's motion for new trial. But, on December 23, 2014, the same day appellant filed his untimely amended motion for new trial, appellant filed with the trial court a business records affidavit executed by a custodian of records for Azle I.S.D. with D.D.'s school records attached. We have reviewed those records, which appellant obtained with a subpoena. Appellant does not argue nor does the record before us show that the State or anyone acting on the State's behalf had possession of D.D.'s school records or had knowledge of the information contained therein. Appellant also does not argue nor does the record show that Azle I.S.D. was acting on the State's behalf in this case. Accordingly, appellant has not satisfied the first prong of the three-pronged test to establish reversible error under Brady. We overrule appellant's first point.

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Conclusion

Having overruled each of appellant's points, we affirm the trial court's judgment.