

**TEXAS
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& GOVERNMENT

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

Attorney Brief Book

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STATE OF TEXAS

NO. 19-01234-CR

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The State of Texas, Appellee

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

Brief for Appellant

Campbell Collins

Rachel Parrish

Southwest Homeschool Delegation

INTRODUCTION

This argument is directed to the Texas Court of Criminal Appeals.

STATEMENT OF THE CASE

Defendant Torrance Rush was charged and convicted with the Class C Misdemeanor offenses of Minor Driving Under the Influence of Alcohol and Failure to Yield to Pedestrians. Rush appeals this verdict on two points of error: (1) jury selection and (2) prosecutorial misconduct and ineffective assistance of counsel.

STATEMENT OF FACTS

On April 19, 2019, driver Torrance Rush, a minor, collided with Kieran Spokes, a pedestrian, at a Fort Worth intersection. Rush, the appellant, was issued two Class C Misdemeanors. During Rush's trial, his attorney raised a *Batson* challenge over the State's peremptory strikes. After the trial, Spokes told Rush, "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." Rush reported this to his attorney, who then filed a motion for new trial, citing prosecutorial misconduct and a *Batson* violation. The motion was denied.

ISSUES ON APPEAL

Point of Error 1: The trial court erred in denying appellant's *Batson* challenge during *voir dire*.

Point of Error 2a: The trial court erred in denying appellant's motion for new trial due to an alleged *Brady* violation.

Point of Error 2b: The trial court erred in denying appellant's motion for new trial due to ineffective assistance of counsel.

ARGUMENT

Point of Error 1: The trial court erred in denying appellant's *Batson* challenge during *voir dire*.

The State discriminated against Torrance Rush when it based its peremptory strikes of jurors on race and gender; thus, the trial court erred in denying the appellant's *Batson* challenge. A party raises a *Batson* challenge to object to the validity of the other party's peremptory strikes, claiming that jurors were struck because of their race or gender. *Batson v. Kentucky*, 476 U.S. 79 (1986).

When evaluating a *Batson* challenge, the Supreme Court lays out four factors for establishing whether peremptory strikes were discriminatory. *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019). These four factors are (1) the relevant history of the State's peremptory strikes throughout all trials; (2) apparent discrimination during the peremptory strikes of the most recent case; (3) evidence of the prosecutor disparately questioning black jurors; and (4) a side-by-side comparison of the black jurors who were struck and the white jurors who were not. *Id.* The standard of review for assessing the trial court's decision based on these factors is *clearly erroneous*. Record at 8. The trial court's decision must be reversed if the appellate court determines that the trial court has clearly made a mistake. *Id.* In this case, an analysis of the four factors shows a clearly erroneous decision.

a. The first factor from *Flowers* is not relevant.

In this case, the first factor is not relevant because we only have one trial to consider. There is no history of the State's peremptory strikes throughout multiple trials. However, the remaining three factors are relevant and show discrimination.

b. The second factor from Flowers indicates discrimination and is supported by a Texas Court of Appeals analysis.

In applying the second factor from *Flowers*—apparent discrimination—the State’s actions indicate discrimination. When dealing with the jury pool, the State consistently kept black women off the jury. The State called for a reshuffle of the original jury list, which was mostly black and female. Of the jurors on the reshuffled list, the State struck the two black women most likely to be on the jury. This resulted in no black and no female jurors in the first six juror positions.

Previously, the Austin Court of Appeals outlined three criteria for assessing responses to a *prima facie* case of discrimination. *Craig v. State* (Tex. App.—Austin, 2002). These criteria, which support our analysis from *Flowers*, state that peremptory strikes must (1) be clear, (2) be reasonably specific, and (3) contain legitimate reasons for a strike that are related to the case. *Id.*

The strike of Juror 3 immediately raises red flags on all three of these factors. The reason the prosecutor cited for the strike was unclear and unspecific. The prosecutor said it was due to the fact that Juror 3 was a teacher. Her actual occupation was a secretary and associate youth pastor at a church. The prosecutor then asserted that the main reason she was struck was her work with children. However, Rush was not a child; he was 19. The prosecutor’s reason for striking the juror was not specific.

Under the *Craig* analysis, the State’s strike of Juror 9 was equally discriminatory. After the defense’s *Batson* challenge, the prosecutor said her reason for striking Juror 9 was “some anti-government political views.” Record at 19.

Again, this statement is both unclear and unspecific. Additionally, the juror's statements about the government did not involve traffic violations in any way; they were unrelated to the case. The State did not give valid reasons for both strikes objected to in the *Batson* challenge, strongly indicating discriminatory strikes.

c. The third factor from *Flowers* indicates discrimination.

The third factor from *Flowers*—disparate questioning of jurors—also points to discrimination by the State during *voir dire*. The prosecutor focused her questions on black jurors:

- She questioned Juror 3 first, skipping Jurors 1 and 2. Record at 16.
- After asking who else, other than Juror 3, worked with children, she went straight to asking a black male, Juror 8, if he had ever had an interaction with a police officer. She didn't ask anyone but the black male if they had prior interactions with a police officer. Record at 17.
- After asking who had worked with kids, she seemed to brush over Juror 7 when he said he was a middle-school teacher, a job which requires a lot of interaction with young people. Record at 17.

These interactions indicate that the prosecutor disparately questioned black jurors.

d. The fourth factor from *Flowers* indicates discrimination.

When applying the fourth factor—a side-by-side comparison of jurors who were and were not struck—it is apparent that the State was racially discriminatory in its peremptory strikes. The prosecutor did not strike Juror 7, a middle-school

teacher and a white male. But she did strike Juror 3, a black female, because Juror 3 worked with students. As a middle-school teacher, Juror 7 had much more interaction with children than Juror 3, an associate youth pastor. Comparing these two jurors suggests that the prosecutor's strikes were racially biased.

The evidence from the case concerning these four factors demonstrates discrimination by the State and provides ample reason for a *Batson* challenge.

Point of Error 2a: The trial court erred in denying appellant's motion for new trial due to an alleged *Brady* violation.

The State denied Rush's due process rights and committed prosecutorial misconduct when it failed to disclose evidence about the victim's history of traffic violations. The standard of review for assessing this violation is abuse of discretion, that is, that the trial court's decision, when the evidence is considered with significant deference, was arbitrary or unreasonable. Record at 8. In this case, the trial court abused its discretion when it ruled that Rush's trial was fair despite the fact that his attorney could not cross examine the victim about his traffic violations.

The Supreme Court case *Brady v. Maryland* lays out a three-pronged test for determining whether the prosecution suppressed exculpatory evidence. *Brady v. Maryland*, 373 U.S 83 (1963). The appellant must demonstrate that (1) the State withheld evidence within its possession, (2) the evidence is either impeachment or exculpatory, and (3) the evidence is material. *Id.*

The State's suppression of evidence satisfies the first factor of the *Brady* test. The State claims that it did not have a copy of the victim's traffic history. This claim, however, is not in line with the definition of possession as laid out in the Texas Code of Criminal Procedure Section 39.14(a), which states that "after

receiving a timely request from the defendant, the state shall produce...any offense reports...of the defendant or a witness...that are in the possession, custody, or control of the state or any person under contract with the state.” In this case, the victim’s history of traffic violations is directly accessible through the municipal court’s records. Therefore, the evidence was within the State’s possession.

The evidence was also exculpatory, satisfying the second factor of the test. Exculpatory evidence is evidence that tends to clear a defendant of a charge. The main question at the trial was whether or not Spokes was lawfully in the intersection. One witness testified that Spokes sped through the intersection, that is, that he was not exercising due care. By not allowing the defense access to Spokes’s previous history of traffic violations, the State deprived the defense of the opportunity to assess the victim’s propensity to flout traffic laws.

If Spokes did speed through the intersection, as his history of traffic violations suggests, then Rush would not be at fault for the accident. This means that one of his Class C Misdemeanors—Failure to Yield to a Pedestrian—would be revoked. Hence, the evidence is exculpatory because it clears him of this charge.

The evidence was also material, satisfying the final factor of the *Brady* test. 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). As this court has held, assessing the third factor in a *Brady* violation involves “balancing the strength of the exculpatory evidence against the evidence supporting conviction” *Hampton v. State*, 86 S.W. 3d 603, 612 (Tex. Crim. App. 2002). In this case, the evidence against Rush is not strong enough to convict him when this new

evidence is taken into account. Because the evidence exculpates Rush, it would have cleared him of the misdemeanor Failure to Yield to Pedestrians and thus changed the outcome of the trial.

The State also had an affirmative duty to turn over the history of traffic violations. As this court held in *Ex Parte Richardson*, "the State had an affirmative constitutional duty under *Brady v. Maryland* to disclose material evidence that impeached [a witness's] testimony." *Ex Parte Richardson*, 70 S.W. 3d 865. As *Brady* also deals with exculpatory evidence, this affirmative duty extends to the evidence in this case. This affirmative duty was codified in the Texas Code of Criminal Procedure section 39.14(h). This section states "Notwithstanding any other provision of this article, the state shall disclose to the defendant any exculpatory...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." In this case, even without a request from the defendant, the State had a duty to turn over the victim's driving record.

The State's failure to disclose this information was prosecutorial misconduct due to suppression of evidence and infringes on the rights of the defendant outlined in the Texas Code of Criminal Procedure.

Point of Error 2b: The trial court erred in denying appellant's motion for new trial due to ineffective assistance of counsel.

The trial court abused its discretion when it denied the appellant's motion for new trial due to ineffective assistance of counsel. To justify an ineffective assistance of counsel claim, the appellant must prove two things: (1) that his attorney's performance was deficient, that is, that it fell below an objective standard of

reasonableness, and (2) that this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668 (1984). Texas courts consider the objective standard following the precedent of *Melton v. State*, which states that a defense attorney's representation is deficient if the attorney does not understand the facts of the client's 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." *Melton v. State*, 987 S.W.2d 72 (1998).

In this case, the defense attorney's performance was deficient, satisfying the first factor of the *Strickland* criteria. Searching the criminal history of key witnesses is a basic duty of criminal defense lawyer; not to do so demonstrates deficient performance under *Melton*. In this case, previous traffic violations are a relevant piece of criminal history that has the potential to be helpful to the defense, especially because both sides had only limited knowledge of what actually occurred at the crosswalk. The witness's credibility and history of lawfulness should have been key issues in the case. The defendant was denied the ability to adequately probe these areas due to his lawyer's ineffectiveness.

This deficiency also prejudiced the defense, satisfying the second factor of the *Strickland* criteria. Had the history of traffic violations been presented, it would have provided evidence for the victim's culpability in the accident. The lack of this evidence undermines credibility in the outcome of the trial, and therefore constitutes a "reasonable probability that . . . the result of the proceeding would have been different." *Strickland*, 466 U.S. 668. This meets the criteria for deficient performance that prejudiced the defense because with the evidence, Rush would

have been more likely to be cleared of the Class C Misdemeanor Failure to Yield to Pedestrians. The trial court abused its discretion when it denied the appellant's motion for new trial due to ineffective assistance of counsel.

CONCLUSION

The State's use of peremptory strikes was discriminatory and therefore constituted a *Batson* violation. Also, the State withheld exculpatory evidence and committed a *Brady* violation. Also, the defense counsel's assistance was ineffective.

PRAYER

For these reasons, we pray that this court will reverse the decision of the lower court and grant the appellant's motion for new trial.

Respectfully Submitted By

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Brief for Appellee

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INTRODUCTION

This argument is directed to the Texas Court of Criminal Appeals.

STATEMENT OF THE CASE

Defendant Torrance Rush was charged and convicted with the Class C Misdemeanor offenses of Minor Driving Under the Influence of Alcohol and Failure to Yield to Pedestrians. Rush appeals this verdict on two points of error: (1) jury selection and (2) prosecutorial misconduct and ineffective assistance of counsel.

STATEMENT OF FACTS

On April 19, 2019, driver Torrance Rush, minor, collided with Kieran Spokes at a crosswalk. Rush was issued citations for Failure to Yield to Pedestrians and Minor DUI. Before trial, the State requested a jury shuffle. During jury selection after the shuffle, Rush's attorney raised a *Batson* challenge over the State's peremptory strikes. After the trial, Spokes told Rush, "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." Rush informed his attorney, who then filed a motion for new trial, citing prosecutorial misconduct and a *Brady* violation. The motion was denied.

ISSUES ON APPEAL

Counterpoint 1: The trial court did not err in denying appellant's *Batson* challenge during *voir dire*.

Counterpoint 2a: The trial court did not err in denying appellant's motion for new trial due to an alleged *Brady* violation.

Counterpoint 2b: The trial court did not err in denying appellant's motion for new trial due to ineffective assistance of counsel.

ARGUMENT

Counterpoint 1: The trial court did not err in denying appellant's *Batson* challenge during *voir dire*.

The trial court did not clearly err in denying the defendant's *Batson* challenge. A party raises a *Batson* challenge to object to the other party's use of peremptory strikes, which cannot be based on race or gender. *Batson v. Kentucky*, 476 U.S. 79 (1986).

When evaluating a *Batson* challenge, the Supreme Court considers four factors to determine if discrimination occurred during jury selection. *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019). These four factors are (1) history of the State's peremptory strikes throughout all associated trials; (2) the prosecutor's use of peremptory strikes in the most recent case; (3) evidence of the prosecutor's disparate questioning of black and white prospective jurors; and (4) a side-by-side comparison of the black jurors who were struck and the white jurors who were not. The standard of review for assessing the trial court's decision based on these factors is *clearly erroneous*. The trial court's decision is only reversed when the appellate court determines that the trial court has clearly made a mistake. In this case, an analysis of the four factors does not indicate that the trial court rendered a clearly incorrect decision.

In this case, the first factor is irrelevant because we have only one trial to consider. There is no history of the State's peremptory strikes throughout multiple trials. The remaining three factors, however, are relevant and demonstrate that the prosecutor did not discriminate against jurors during *voir dire*.

Applying the second factor from *Flowers*—apparent discrimination—shows that prosecutor’s use of peremptory strikes was not discriminatory. The State used three peremptory strikes: one on a retired church secretary and associate youth pastor, one on a university student who had strong anti-government political ideas, and one on a man with many traffic tickets. The prosecutor’s explanation for the peremptory strikes was clear, reasonably specific, and contained legitimate reasons related to the case, meeting the three criteria laid out by *Craig v. State*, (Tex. App.—Austin, 2002). In this case, it is understandable that the State would not want jury members who were biased toward youth or against the government. Jurors sympathetic toward youth are more likely to be lenient toward Rush while jurors biased against the government would be less likely to fairly judge the trial because the State was prosecuting Rush.

The third factor from *Flowers*—disparate questioning of jurors—also shows that the State did not discriminate with its peremptory strikes. During *voir dire*, the prosecutor questioned six of the twelve jurors in the strike zone. Out of the six she talked to, three were black and the rest were not black. The two she spent the most time questioning were Juror 8, a black male, and Juror 12, a white male. Juror 8 took more time to question because she discovered that he could not read or write in English. Record at 17, 18. The relevant time spent on each prospective juror shows that the prosecutor did not disproportionately question black jurors.

When applying the fourth factor—a side-by-side comparison of jurors who were and were not struck—it is apparent that the State had a race-neutral reason for striking each juror. When comparing the white jurors who were not struck to the black jurors who were, only two jurors are comparable: Juror 3 and Juror 7. Juror 3

was struck for working with youth, and Juror 7, who worked with middle-school children, was not. There could be two reasons for this: first, only three peremptory strikes are allowed; the prosecution may have used their strikes on the juror most likely to be sympathetic to the defendant because she worked with youth closest to Rush's age. Second, Juror 7 stated that he worked with troublesome students, so it is unlikely that he would be sympathetic toward Rush. Record at 17. Therefore, in a side-by-side comparison of jurors, it is apparent that the State was not discriminatory. Based on the three *Flowers* criteria applicable to this case, no discrimination occurred during *voir dire*; therefore, the trial court did not clearly err when it denied the defendant's *Batson* challenge.

Counterpoint 2a: The trial court did not err in denying appellant's motion for new trial due to an alleged *Brady* violation.

The State did not suppress exculpatory evidence—and therefore did not commit a *Brady* violation—when it did not disclose Spokes's history of traffic tickets. Therefore, the trial court did not err when rendering its decision. The standard of review for assessing the trial court's decision is abuse of discretion; that is, the trial court rendered a decision that is so unreasonable in light of the facts of the case or is such an unreasonable deviation from legal precedent that the decision must be reversed. Record at 8. In denying the defendant's *Brady* motion, the trial court did not abuse its discretion.

The State violates a defendant's due process rights only when it fails to disclose material evidence that is exculpatory. *Brady v. Maryland*, 373 U.S. 83 (1963). *Brady* lays out a three-pronged test for determining whether the prosecution suppressed evidence. The appellant must demonstrate that (1) the

State withheld evidence within its possession, (2) the evidence was either impeachment or exculpatory, and (3) the evidence was material. *Id.* All three elements must be demonstrated to prove a *Brady* violation. In this case, there is compelling evidence that the second and third factors were not met.

The second factor requires that evidence be impeachment or exculpatory. In this case, the evidence did not undermine the credibility of a witness, so it is not impeachment. It would not tend to clear Rush of the charges against him, so it is not exculpatory. The evidence deals with traffic violations. Spokes himself stated that he is a bad *driver*. The traffic accident, however, was not between two cars; it was between a car and a bike or pedestrian. The victim's history of traffic violations in a car has no bearing on who was at fault for an accident with a biker or pedestrian. Thus, the evidence does not meet the second factor of the *Brady* test.

The third factor requires that evidence be "material," which means 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). Even if the State had disclosed Spoke's previous traffic tickets, the outcome of the trial would not have been different. 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 a constitutional sense." *Hampton v. State*, 86 S.W. 3d 603, 612 (Tex. Crim. App. 2002). In *Hampton*, this court also ruled, "a determination concerning the materiality prong of *Brady* involves balancing the strength of the exculpatory evidence against the evidence supporting conviction." *Id.*

In this case, there was already significant evidence against Rush. The driving record of the victim would only allow the defense to question and make inferences; it does not directly weigh in favor of the defendant. Again, the standard of review is abuse of discretion; there is nothing in the record suggesting that the trial court judge abused her discretion when assessing the credibility of witnesses and the varying explanations of what happened at the crosswalk. Based on these facts, the evidence of the victim's traffic violations would not have changed the outcome of the trial and therefore was not material.

Ultimately, regardless of whether it was exculpatory or material, the driving record of the victim is not evidence covered by *Brady*. The prosecutor has no duty to acquire and turn over evidence the defense could have obtained through other sources. *Reed v. State*, (Tex. App.—Fort Worth 2016) (unpub.) (citing *Pena v. State*, 353 S.W.3d 810 (Tex. Crim. App. 2011)). In this case, the defense counsel could have searched the municipal court records and obtained the evidence in question. Therefore, the State had no duty to turn over this information. The trial court did not abuse its discretion when it denied the defendant's *Brady* violation.

Counterpoint 2b: The trial court did not err in denying appellant's motion for new trial due to ineffective assistance of counsel.

Rush's attorney provided effective assistance of counsel during the trial. For an ineffective assistance of counsel claim, Rush must show by a preponderance of the evidence that (1) counsel's representation was deficient because it fell below an objective standard of reasonableness, and (2) the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* makes it clear that an error by counsel does *not* constitute ineffective assistance. *Id.*

In this case, the ineffective assistance of counsel claim deals with pre-trial discovery. Under Texas Code of Criminal Procedure Section 39.14, a defense attorney is allowed to request pre-trial discovery, including a request for the victim's criminal history. Rush argues that his attorney provided him ineffective assistance of counsel by not making such a request.

The key issue is whether Rush's attorney's failure to request the victim's driving record was "deficient" under *Strickland*. "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). If the victim's history of traffic tickets is assumed to constitute the "facts of the case," then the defense attorney's performance could be argued to be ineffective. But this is wrong on two accounts.

First, the facts in our case differ from those in *Melton*. In *Melton* the defense attorney lied to his client about the existence of a video, causing the client to plead guilty. *Id.* In our case, there was no false representation. Spokes's history of traffic violations was not material and only marginally related to the accident.

Second, in viewing Spokes's traffic history as obviously helpful to the defense, we are applying hindsight to a problem that was much less clear at the time of the trial. *Strickland* states that 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." *Strickland*, 466 U.S. 668. While preparing for the trial, the defense attorney had no reason to assume that the victim had a history of traffic tickets—much less that the history would be seen

as helpful to the defense. At the time of the accident, the victim was either walking or riding a bike. Therefore, at the time of the trial, a history of traffic tickets would have seemed irrelevant. Without applying hindsight to our view of the case, the argument for ineffective assistance of counsel dissolves.

At trial, the defense lawyer evidence from the trial that the defense's lawyer defended his client above an objective standard of reasonableness. He performed numerous actions at the trial that indicate sufficient performance, such as raising a *Batson* challenge, striking a juror, and questioning witnesses. These actions indicate that his conduct was not deficient under *Strickland*.

Finally, there is a clear policy reason for not finding ineffective assistance of counsel in this case. The question of deficiency involves whether a defense attorney *must* request pre-trial discovery in a municipal court setting. The answer would be different for a Class A Misdemeanor, felony, or capital punishment case in a Federal Court, but the system at this level is simply not set up for protracted pre-trial discovery. In fact, as the appellate court noted, there is generally no discovery in municipal court cases. Therefore, the defense attorney's conduct was not deficient when compared to other attorneys defending clients in the same court.

Even if we take the attorney's failure to discover Spokes's history of traffic violations to be an error, it still does not constitute ineffective assistance of counsel because the deficiency did not prejudice Rush. As established above, the evidence withheld from the defense was not material; therefore, it would not have changed the outcome of the trial. The trial court's decision should be affirmed.

CONCLUSION

The State's peremptory strikes were not discriminatory based on race or gender and therefore no *Batson* violation occurred. Also, the State did not withhold exculpatory evidence from the defense and therefore no *Brady* violation occurred and there was no ineffective assistance of counsel.

PRAYER

For these reasons, we pray this court will affirm the decision of the trial court and deny the appellant's motion for new trial.

Respectfully Submitted By:

Campbell Collins

Rachel Parrish

Attorneys for Appellee

Southwest Homeschool Delegation

IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

NO. 19-01234-CR

Torrance Rush, Appellant

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

Brief for Appellant

E'leyah Trevino

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I. Statement Of The Case

April 19, 2019, a vehicle and a pedestrian had a collision at the intersection of 9th Street and Houston in downtown Fort Worth. The appellant, Mr. Rush, was the driver of the vehicle. As the result of a very hurried investigation Mr. Rush, 19, was issued a Class C Misdemeanor citation due to the accusation that he was the cause of the accident. The investigating officer smelled alcohol on the appellant's breath and issued a citation for Driving Under the Influence. He did this without having a proper investigation. Mr. Rush was later wrongfully convicted of both, and appealed his case and the judge in the Appeals Court that upheld the lower court ruling. Due to the violation of Mr. Rush's constitutional rights and an ineffective lawyer, the only conclusion is to overturn Mr. Rush's convictions, provide justice and allow him to stand trial again for the very first time with fair and impartial jury.

II. Statement of Facts

Torrance Rush was wrongfully charged and convicted in the Fort Worth Municipal Court on two charges: Class C Misdemeanor offenses of Minor Driving Under the Influence of Alcohol and Failure to Yield to a Pedestrian. Mr. Rush brought his first appeal before the County Court at Law in Tarrant County. Here the Appeals Court upheld the lower court's ruling.

After all evidence was presented at the original 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. Now, Mr. Rush is appealing his case on two points of error. However, the facts still

remain the facts in this case. On April 19, 2019, in downtown Ft. Worth, Texas, Mr. Rush while driving a black car was **accused** of striking a person walking a bike across the street in a crosswalk.

His Appeal case is based on the very distorted or twisted aspects of the quickly done investigation and trial. Torrence Rush's attorney did not provide Mr. Rush with a very strong defense. The Prosecution has to provide everything in their possession or knowledge about the case to the defendant. They did not in this case. This becomes nothing more than a mere exercise of the abuse of police power and abuse of the court system on the youth of Texas.

III. Issues and Applicable Law: Points Of Error

A. Point of Error One: Whether the trial court erred in denying appellant's Batson challenge during voir dire

Our **6th amendment** guarantees that the people residing in the United States are given the right to a speedy and fair trial. It is stated that; "under 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."

If you have to call for a mistrial after the trial because of peremptory strikes of a prosecutor, you will no longer have a speedy trial. It is a case of speed versus justice and in that case justice should be more important than speed. Our constitution was made so that all people were rightfully and equally given justice. By the state trying to speed up this case they are denying Mr. Rush his constitutional right.

Second, all defendants are guaranteed equal protection when it comes to use of peremptory strikes of potential jurors

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

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.

For many years people of color were denied fair trials by being given an all white jury and being denied the right to have jurors of their own race. By not including all races we are not creating an equal representation of the community. In this case the jury panel was made of all males with the majority being racially white. No females, nor a racial diversity in the jury panel.

Third, The denial of African Americans as jurors during the peremptory period by the prosecutor Ms. Crump violates Mr. Rush's Equal Protection

The use of the jury pool reshuffle by the Prosecutor when presented with a jury pool of seven African American jurors and then use of the peremptory challenge on two of the African American after the reshuffle violates Equal Protection Clause. The Prosecutors clearly had an intention to remove race diversity in the jury.

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

In **Swain v. Alabama**, this Court recognized that a "State's purposeful or deliberate denial to Negroes on count 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.

Fourth, Due to the Racial Discrimination shown in the strikes of the potential jurors, a discrimination against our society is formed.

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

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. **Thiel v. Southern Pacific Co., (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... exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.

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

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)

The Appellee side did not provide correct reasons for their strikes. They made a big mistake when they confused a white juror's career with one of the African American's career in order to get away with the strike. Meaning the Prosecutor's answer to the Judge's request for the reason for the two strikes against African American jurors in the pool were not correct and therefore could not meet standard set in Batson.

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

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. 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

B. Point of Error Two: (2a) Whether the trial court erred in denying appellant's motion for a new trial due to an alleged Brady violation, And (2b) Whether the trial court erred in denying appellant's motion for a new trial due to ineffective assistance of counsel?

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

First, The mere withholding of vital evidence is enough to request a new retrial.

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

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.

Second, Fair Trials are Essential to Society

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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."

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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...

Fourth, The Evidence Makes A Difference

Take a look at the fact that on a busy street in downtown Ft. Worth, Texas there were only two witnesses of this accident on April 19, 2019. One was the alleged

victim and the other was a college student. Considering the fact that college student admittedly was not the strongest witness- then the evidence withheld would have been used to successfully against the remaining witness.

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

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.

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

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. This means that it is vitally important to have selected a standard to judge this claim.

A. Strickland Standard Used

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.

B. Failed To File For Discovery- Key to the Defense

Mr. Vega failed to file a discovery request under **Article 39.14** of the Texas Code of Criminal Procedure;

Art. 39.14. DISCOVERY. (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.

C. Mr. Vega's Performance meets Thompson's Standard-failed to ask for a jury reshuffle when he could have, failed to argue the fact that Batson

Challenge he called was not properly answered by the prosecutor in her answer to the judge, and failed to obtain discovery evidence before the trial.

Thompson v. State, 9 S.W.3d 808, 812 (Tex.Crim.App. 1999)

Under the first prong, the attorney's performance must be shown to have fallen below an objective under a standard of reasonableness.

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. "Reasonable probability" is that which is "sufficient to undermine confidence in the outcome."

IV. Conclusion

Mr. Rush's rights were violated due to the investigation that took place on April 19, 2019 by the Fort Worth police department. Officer Sun Dance issued a DUI ticket to him even though there was no physical evidence after he obtained the results after the breathalyzer test. Mr. Rush also was given a ticket for failing to yield to a pedestrian when that pedestrian was riding a bike. Both of these charges under a more thorough investigation would have resulted in no tickets with compounds the prone Mr. Rush's rights were violated because he had a poor ineffective defense council. His defense counsel failed to represent him and failed to recognize that these tickets should have never been written in the first place. Do not compound these

failure by once again by fringing upon these constitutional rights of Mr. Rush. He did nothing wrong and he should never gotten the tickets let alone been convicted for some he

V. Prayer

For these reasons we pray that the court overturn the convictions grants Mr. Rush a new fair trial.

Respectively Submitted By

E'leyah Trevino

Isis Garcia

Attorneys For The Appellant

Del Valle High School

IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

NO. 19-01234-CR

Torrance Rush, Appellee

v.

The State of Texas, Appellant

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

Brief for Appellee

E'leyah Trevino

Isis Garcia

Del Valle Highschool

I. Statement Of The Case

April 19, 2019, a vehicle crashed into a pedestrian at the intersection of 9th Street and Houston in downtown Fort Worth. The appellant, Torrance Rush, was the driver of the vehicle. After an investigation, done by Officer Sundance, Mr. Rush, 19, was issued a Class C Misdemeanor citation due to the fact that he was the cause of the accident. Mr. Rush was later convicted of both, and appealed his case and the judge in the Appeals Court upheld the lower court ruling. Due to no evidence that Mr. Rush's constitutional rights were violated, the only conclusion is to sustain Mr. Rush's convictions and maintain justice.

II. Statement of Facts

Mr. Rush was fairly charged and convicted in the Fort Worth Municipal Court on two charges. The charges being A Class C Misdemeanor offenses of Minor Driving Under the Influence of Alcohol and Failure to Yield to a Pedestrian. Mr. Rush brought his first appeal before the County Court at Law in Tarrant County. In this appeal, the Appeals Court upheld the lower court's ruling.

After all evidence was presented at the original 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. Now, Mr. Rush is appealing his case on two points of error. However, the facts still remain the facts in this case. On April 19, 2019, in downtown Ft. Worth, Texas, Mr. Rush while driving a black car was struck a person walking a bike across the street in a crosswalk.

His Appeal case is based on distorted or twisted aspects of the investigation and trial. Mr. Vega was hired by Mr. Rush to defend him. He was not appointed.

III. Issues and Applicable Law: Points Of Error

A. Point of Error One: Whether the trial court erred in denying appellant's *Batson* challenge during *voir dire*

According to the **6th amendment**, 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.

Your honors, the 6th amendment clearly shows that we are all guaranteed a fair trial. We implemented the constitution by having said fair and speedy trial. However we are not now nor should we be guaranteed to have who we want on the juror. We can not nor would we ever desire to vote for or against someone because of the color of their skin. The appellant has this completely backwards and wrong.

Second, Serving On The Jury is Very Important In Our Country

We can not just set aside a verdict simply because we did not win or we did not like the verdict. If we were able to do that then we have really set aside the verdict of the jury as well. To deny a person their right you deny the person their Country. It is interesting to not that the appellant attorney is arguing that we should throw out

the right of a lawfully seated jury and discard their opinion simply because his client lost that case. My question is what is next? Your rights or mine.

Swain v. Alabama, 380 U. S. 202 (1965) Court recognized that a “purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause” (14th amendment)

The appellant has this case backwards. They cannot use Swain or Batson because they were the cause of the last African American juror to be struck. How can you have discrimination on one side and not call the same discrimination on the other side. You cannot. Their claim of discrimination is simply that, a claim. If both sides exhibit the same behavior and is permit on behalf of Mr. Rush but discrimination with Ms. Crump something is wrong with the 14th amendment. Ms. Crump’s right to her challenges are at the same importance of Mr. Vega’s, so not be confused will ill thought of logic.

Akins v. Texas, 325 U. S. 398, 325 U. S. 403 (1945)

The defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.

It is important to make sure a duly selected jury would be given difference in this case because to do anything else you would be tearing up the constitution. By doing this you will be giving no one any rights at all.

Third, the question here is why Mr. Vega did not avail himself a reshuffle when Ms. Crump did. The problem here is that it is difficult if not impossible to blame one party for doing something they can do, if he could have done the same procedure himself.

The problem was not the use of the jury pool reshuffle by the Prosecutor when presented with jury pool of seven African American jurors and then use of the peremptory challenge on two of the African American after the reshuffle violates Equal Protection Clause- rather, it was the last strike by the defense attorney that caused this problem. Therefore the Judge recognized that the State didn't purposefully or deliberately strike any African American people from the jury panel. Mr. Vega struck the last juror creating the issue

Strauder v. West Virginia, 100 U. S. 303 (1880)

Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.

If Mr. Vega's intention was to get more african Americans on the jury panel he should have automatically asked for a reshuffle when more than 50% of the african american jurors were eliminated in the reshuffle.

Fourth, The Appellant Never Proved Racial Discrimination limits rights of jurors who have served

Akins v. Texas, 325 U. S. 398, 325 U. S. 403 (1945)

The defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.

The jury members were selected under no discriminatory circumstances. So to change them now would be discriminatory. Which, again, is against the 14th amendment and Akins.

Fifth, Race Is Not Guaranteed In The Constitution When It Comes To A Jury
Flowers v. Mississippi, 139 S.Ct. 2228 (2019)

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

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.

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." (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.

Sixth, The Prosecutor's answer to the Judge's request for the reason for the two strikes against African American jurors were given to the Judge and was accepted by the Judge.

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

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.

B. Point of Error Two: (2a) Whether the trial court erred in denying appellant's motion for a new trial due to an alleged *Brady* violation, And (2b) Whether the trial court erred in denying appellant's motion for a new trial due to ineffective assistance of counsel?

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

First, The Evidence Claimed To Have Been Withheld is Not Material To The Defense and Was Not Proved To Be So At Trial.

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

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.

Second, Fair Trials are Essential to Society- Having A Retrial In This Case Would In Effect Punish Society By Disallowing Their Decision

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.

You cannot just change material information on a whim unless you would like to effectively deny all people of their rights.

Third, This Was A Fair Trial- Defense Fails To Prove Differently

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

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

Fourth, A careful consideration of the affidavits clearly show that in this case with 4 people who witness the events of April 19,2019. Two affidavits fully match each other and the other two do not match each other. Nor did they match the other two statements. This leaves only one conclusion; Soyer Steel had a clear view of the accident and his version of what took place is clearly similar to Tenance Rush's events of that day.

Take a look at the fact that on a busy street in downtown Ft. Worth, Texas there were two witnesses of this accident on April 19, 2019. One was the victim and the other was a college student. Both of their stories were supportive of each other and opposed to defendant's story. The Witnesses are not on trial here, Mr. Rush is.

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

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.

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

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. This means that it is vitally important to have selected a standard to judge this claim.

A. Strickland Standard Used

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.

B. Failed To File For Discovery- Key to the Defense- Actually Supports The State's Case

Mr. Vega failed to file a discovery request under Article 39.14 of the Texas Code of Criminal Procedure. This argument fails because if taken seriously the prosecution should have given the information without discovery filed if they knew about it.

Art. 39.14. DISCOVERY. (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 possession, custody, or control of the state or any person under contract with the state.

C. Mr. Vega's Performance meets Thompson's Standard. By providing a Batson Challenge, Questioning the reshuffle and understanding about 39.14- Mr. Vega performed reasonably according to the standards

Thompson v. State, 9 S.W.3d 808, 812 (Tex.Crim.App. 1999)

Under the first prong, the attorney's performance must be shown to have fallen below an objective under a standard of reasonableness.

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. "Reasonable probability" is that which is "sufficient to undermine confidence in the outcome."

When looking at this aspect of the case it's essential for people to know that Mr. Vega did a very poor job of arguing he omitted clearly some important aspects that could have potentially help his client. Note we said potentially. We cannot vacate the jury's decision over claims on would of, could of, and should of. These are hypothetical and have no business in a court of law.

VI. Conclusion

In Houston April 19, 2019, a vehicle forcefully hit a pedestrian at the intersection of ninth and downtown Fort Worth. The appellant, being the driver of the vehicle was issued a Class C Misdemeanor citation for being at fault for the accident. The investigating officer smelled alcohol on the appellant's breath and issued a citation for Minor Driving Under the Influence. He was later convicted of both, he appealed his case and the judge in the Appeals Court upheld the lower court ruling. Faced with the facts presented today this is the only logical conclusion to come up with.

VII. Prayer

We humbly pray that you take into careful consideration all of the facts that we have presented today and vote to uphold the lower court's ruling in this case so that rule of law will be maintained.

Respectfully Submitted by

E'leyah Trevino

Isis Garcia

Attorneys For The Appellee

Del Valle High School

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NO. 19-01234-CR

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v.

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

Brief for Appellant

Miguel Saldivar

Heber Acuna

Del Valle High

School

I. Statement of the case

The defendant Mr. Rush was convicted and wrongfully accused of hitting a pedestrian while operating a motor vehicle. Rush appealed this conviction on two points of error. Whether the trial court erred in denying appellant's motion for a new trial due to alleged Brady violation and whether the trial court erred in denying appellant's motion for a new trial due to ineffective assistance of counsel.

II. Statement of the facts

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. Torrance Rush appeared represented by a counsel at a jury trial and was found guilty of both offenses. Torrance Rush brought his first appeal before the County Court at Law in Tarrant County. In this appeal, the Appeals Court upheld the lower court's ruling. After all evidence was presented at trial, the jury found the defendant guilty of both offenses. Now Torrance Rush is appealing his case based upon two points of error.

III. Issues and Applicable Law: Points Of Error

A. Point of Error One: Whether the trial court erred in denying appellant's Batson challenge during voir dire

First, all individuals are assured a quick and impartial trial

The 6th amendment guarantees that everyone will get:

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.

Calling of a mistrial after the trial due to peremptory strikes delays the process and infringes on the right to an impartial trial

Second, all individuals are assured equal protection in regards to the use of peremptory strikes of fellow jurors

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

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 States use of peremptory challenges to exclude members of his race from the petit jury.

Third Torrance Rush's equal protection rights were violated by Ms.Crump when she withdrew African Americans during the peremptory period

The use of the jury pool reshuffle by the Prosecutor when presented with jury pool of seven African American jurors and then use of the peremptory challenge on two of the African American after the reshuffle violates Equal Protection Clause.

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Fifth, Unfettered Exercise of Challenges Is Not Right Guaranteed In The Constitution
Reword in your own words

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

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.

Sixth, The Prosecutor's answer to the Judge's request for the reason for the two strikes against African American jurors in the pool were not correct and therefore could not meet standard set in Batson. Reword in your own words

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

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. 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

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B. Failed To File For Discovery- Key to the Defense Reword in your own words

Mr. Vega failed to file a discovery request under Article 39.14 of the Texas Code of Criminal Procedure; Reword in your own words

Art. 39.14. DISCOVERY. (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.

C. Mr. Vega's Performance meets Thompson's Standard-failed to ask for a jury reshuffle when he could have, failed to argue the fact that Batson Challenge he called was not properly answered by the prosecutor in her

answer to the judge, and failed to obtain discovery evidence before the trial.

Thompson v. State, 9 S.W.3d 808, 812 (Tex.Crim.App. 1999)

Under the first prong, the attorney's performance must be shown to have fallen below an objective under a standard of reasonableness.

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. "Reasonable probability" is that which is "sufficient to undermine confidence in the outcome."

IV. Conclusion

Today we have shown that on April 19, 2019, a vehicle and a pedestrian forcefully met in an intersection in downtown Fort Worth. The appellant, the driver of the vehicle, was issued a Class C Misdemeanor citation as being at fault for the accident. The investigating officer smelled alcohol and so he issued a citation for Minor Driving Under the Influence. He was later convicted of both, he appealed his case and the judge in the Appeals Court upheld the lower court ruling. This was not what happened and he should never had been convicted.

V. Prayer

We humbly pray that you take into careful consideration all of the facts that we have presented today and vote to protect Mr.Rush's constitutional rights.

Respectively Submitted By
Miguel Salivar
Heber Acuna
Attorneys For The Appellant
Del Valle High School

IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

NO. 19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellee

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

Brief for Appellee

Heber Acuna

Miguel Saldivar

Del Valle High

I. Statement Of The Case

On April 19, 2019 Torrence Rush hit Mr. Spokes in an intersection in downtown Fort Worth. No severe injuries occurred on either side. The appellant, being Mr. Rush, was issued a Class C Misdemeanor as being at fault for the accident. The officer that took place at the scene smelled alcohol on the driver's breath. The officer then gave him a citation for being a minor and driving under the influence of alcohol. This incident was then taken to trial where all the evidence and facts were offered to a jury. The defendant hired an attorney and his day in court. The decisions of two different courts proclaimed his guilt. The only logical conclusion here is to uphold Mr. Rush's convictions on these two counts and to side with the two judges and the jury.

II. Statement of Facts

On April 19, 2019 the appellant, being Mr. Rush, was issued a Class C Misdemeanor as being at fault for the accident. The officer that took place at the scene smelled alcohol on the drivers breath. The officer then led a citation for being a minor and driving under the influence of alcohol. This incident was then taken to trial where all the evidence and facts were presented. Then the case was appealed to the Tarrant County Court of Appeals District 2. Here the judge reviewed the briefs, heard the arguments and sided once again for the State. If we overturn this decision, it will set a horrible example for cases to follow in the future. We will have more and more cases in our courts and countless cases in the Appeals process.

III. Issues and Applicable Law: Points Of Error

A. Point of Error One: Whether the trial court erred in denying appellant's Batson challenge during voir dire

First, all defendants are guaranteed a speedy and fair trial.

The 6th amendment guarantees that everyone will get:

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.

Clearly your honors, it can be seen that we are all guaranteed a fair trial. However we are not now nor should we be guaranteed to have who we want on the juror- we can not nor would we ever desire to vote for or against someone because of the color of their skin. The appellant has this completely backwards and wrong.

Second, Serving On The Jury is Very Important In Our Country

We can not just set aside a verdict simply because we did not win or we did not like the verdict. If we were able to do that then we have really set aside the verdict of the jury as well.

Powers v. Ohio, 499 U.S. 400, 407 (1991)

Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process.

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

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.

Third, It was by striking of an African American Police Officer as a juror during the trial that Mr. Vega's Ended Up Causing the Batson Challenge.

It was not the use of the jury pool reshuffle by the Prosecutor when presented with jury pool of seven African American jurors and then use of the preemptory challenge on two of the African American after the reshuffle violates Equal Protection Clause- rather, it was the last strike by the defense attorney that caused this problem.

Therefore the Judge recognized that the State didn't purposefully or deliberately strike any African American people from the jury panel. **Batson v. Kentucky, 476 U.S. 79 (1986)** the Court recognized that a purposeful or deliberate denial to Negroes on count 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 repeated" reaffirmed,

Fourth, The Appellant Never Proved Racial Discrimination limits rights of jurors who have served

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

Flowers presented no evidence whatsoever of purposeful race discrimination by the State in selecting the jury during the trial below. 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," and then completely ignore the State's reasons

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

The Batson hearing was conducted immediately after voir dire, before a transcript was available. In explaining their strikes, counsel relied on handwritten notes taken during a fast-paced, multi day voir dire involving 156 potential jurors. Still, the majority 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.

Fifth, Race Is Not Guaranteed In The Constitution When It Comes To A Jury

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

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. Sixth, The Prosecutor's answer to the Judge's request for the reason for the two strikes against African American jurors were given to the Judge and was accepted by the Judge. 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.

B. Point of Error Two: (2a) Whether the trial court erred in denying appellant's motion for a 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?

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

First, The Evidence Claimed To Have Been Withheld is Not Material To The Defense and Was Not Proved To Be So At Trial.

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

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.

Second, Fair Trials are Essential to Society- Having A Retrial In This Case Would In Effect Punish Society By Disallowing Their Decision

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

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."

Third, This Was A Fair Trial- Defense Fails To Prove Differently

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

Appellant contends his attorney failed to prepare adequately for trial, asserting that he did not interview appellant, the complaining witness, or 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.

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

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. This means that it is vitally important to have selected a standard to judge this claim.

A. Strickland Standard Used

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.

B. Failed To File For Discovery- Key to the Defense- Actually Supports The States Case

Mr. Vega failed to file a discovery request under Article 39.14 of the Texas Code of Criminal Procedure. This argument fails because if taken seriously the prosecution should have given the information without discovery filed if they knew about it.

C. Mr. Vega's Performance meets Thompson's Standard. By providing a Batson Challenge, Questioning the reshuffle and understanding about 39.14- Mr. Vega performed reasonably according to the standards

Thompson v. State, 9 S.W.3d 808, 812 (Tex.Crim.App. 1999)

Under the first prong, the attorney's performance must be shown to have fallen below an objective under a standard of reasonableness. 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. "Reasonable probability" is that which is "sufficient to undermine confidence in the outcome."

IV. Conclusion

On April 19, 2019 Torrence Rush came across a pedestrian and hit him in an intersection in Fort Worth. No severe injuries occurred on either side. The appellant,

being Mr. Rush, was issued a Class C Misdemeanor as being at fault for the accident. The officer that took place at the scene smelled alcohol on the driver's breath. The officer then led a citation for being a minor and driving under the influence of alcohol. This incident was then taken to trial where all the evidence and facts would go into. The defendant hired an attorney and then was scheduled for trial. This trial stood out among the most that were taken place at that time. He was later convicted of both, he appealed his case and the judge in the Appeals Court upheld the lower court ruling. Faced with the facts presented today this is the only logical conclusion to come up with a vote for the State in this case.

V. Prayer

We humbly pray that you take into careful consideration all of the facts that we have presented today and vote to uphold the lower court's ruling in this case so that rule of law will be maintained.

Respectfully Submitted By:

Heber Acuna

Miguel Saldivar

Attorneys For The Appellee

Del Valle High School

**IN THE COURT OF CRIMINAL APPEALS,
STATE OF TEXAS**

NO. 19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellee

FROM THE COURT OF APPEALS, SECOND DISTRICT,

AT FORT WORTH

Brief for Appellant

Emma Castro

Valeria Dougherty

Del Valle High School

I.) STATE OF THE CASE

Mr. Rush was charged with a Class C Misdemeanor and a DUI. After the decision of the Municipal Court, Mr. Rush appealed, and now he is here on his second appeal, asking for the decision to be reversed.

II.) STATEMENT OF THE FACTS

After receiving a Class C Misdemeanor and a DUI, he went to Municipal Court. 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 quickly. The appellant's defense attorney represented 20% of these cases - two were assaults, 3 were theft tickets, and the rest were traffic. As the docket progressed, it was made clear that this case would be going to trial. Within 15 minutes of this decision, the appellant was brought to the counsel table for jury selection. When the appellant was first brought up for jury selection, the randomized jury of 12, consisting of 7 black panelists, 3 white panelists, and 1 Hispanic panelist, 8 of which were women. After seeing the potential candidates on the list that stated these facts, the Petitioner asked for a jury shuffle. The new and final jury list was randomized by an algorithm on the clerk's computer.

At the jury selection phase, the appellant's attorney noticed that the State used their three peremptory strikes in a discriminatory based on both race and gender. These strikes included two of the three remaining black jurors and two of the remaining three females. The result was an all male jury that consisted of white men and one Asian man. The state struck Juror 3 (black female) for a claim that because she was a teacher, she would be lenient, even though Juror 3 is a minister

in a church. They justified Juror 9 (black female) had been dismissed because she disagreed with some policies of our government, labeling it extreme political positions that were anti government related. Despite the defense making multiple points including the makeup of the jury, the judge determined there was no *Batson* violation. The defendant hired a new attorney to file this appeal.

III.) ISSUES AND APPLICABLE LAW

A. Point of Error One: *Whether the trial court erred in denying appellant's **Batson** challenge during voir dire*

There are four factors to consider, these being the defendant's right to a fair and speedy trial, the equal protection from the use of peremptory strikes of jurors, and the impact that this challenge may have on future trials.

To address the first point, all defendants are subject to the guarantee of a fair and speedy trial granted by the **6th amendment**, specifically reading "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." In this case, we are confronted with the **Batson** challenge due to the peremptory strikes of a prosecutor, thus delaying the trial. If you have to call for a because of the unlawful strikes of a prosecutor- you will no longer have a speedy trial.

Secondly, all defendants are guaranteed equal protection when it comes to the use of peremptory strikes of potential jurors. **Batson v. Kentucky, 476 U.S. 79 (1986)** requires us to reexamine the portion of **Swain v. Alabama, 380 U. S. 202 (1965)** concerning the evidentiary burden placed on a criminal defendant that claims a denial of equal protection through the State's use of peremptory

challenges to exclude members of his race from the petit jury. The denial of African Americans as jurors during the peremptory period by the prosecutor, Ms. Crump, violates Mr. Rush's Equal Protection. The use of the jury pool reshuffle by the Prosecutor when presented with a jury pool of seven African American jurors and then use of the peremptory challenge on two of the African American after the reshuffle violates Equal Protection Clause. **Batson** cites **Swain** in which the 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." This principle has been "consistently and repeatedly" reaffirmed.

Moving forward, racial discrimination limits the rights of potential jurors to serve. Here we cite **Batson**, wherein it states that racial discrimination in the 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 the ability to remain impartial while considering any evidence presented at a trial. **Thiel v. Southern Pacific Co., (1946)** provides that a person's race "is unrelated to his fitness as a juror." Therefore, the Court recognized that, by denying a person participation in jury service on account of his race... [or] exclusion of black citizens from service as jurors constitutes a primary example of the issues the Fourteenth Amendment was designed to correct." Additionally, in **Craig v. State, (Tex. App.—Austin, 2002)** the appellant accuses the State of racial discrimination in the use of its peremptory strikes. This case cites **Tex. Code Crim. Proc. Ann. art. 35.261 (West 1989)** in stating that the State may not strike jury panelists in a purposefully and inappropriately discriminatory manner.

Additionally, the constitution does not guarantee the right to challenge unless there is cause as per **Batson**. The State contends that overruling of the initial decision 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 the exercise of such challenge is vital to the criminal justice system. While it's noted that the peremptory challenge occupies an important position in our trial procedures, the decision to uphold will not undermine the contribution the challenge generally makes to the administration of justice. The reality of practice, seen in many cases both federal and state, 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 further enforces equal protection under the law and provides justice.

Addressing the final contention of this point of error, the Prosecutor's answer to the Judge's request for the reason for the two strikes against African American jurors in the pool were not correct and therefore could not meet the standard set in **Batson**. **Batson** states that 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. 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.

B. *Point of Error Two: (2a) Whether the trial court erred in denying appellant's motion for a new trial due to an alleged Brady violation, and (2b) Whether the trial court erred in denying the appellant's motion for a new trial due to ineffective assistance of counsel?*

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

First, the mere withholding of vital evidence is enough to request a new retrial as per ***Brady v. Maryland, 373 U.S. 83 (1963)*** wherein it states: "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." This means that regardless of the intentions of the prosecution, because the evidence is material, they need to allow for a retrial.

Second, fair trials are essential to society as per ***Brady v. Maryland, 373 U.S. 83 (1963)*** that reasons that 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.” Thus, we must have a retrial to truly achieve justice.

IV.) CONCLUSION

Today we have proven that the defendant, Mr. Rush, received an unfair trial by way of racial discrimination in the jury, received inadequate legal representation, and had material evidence withheld from his defense. On the day of his trial, our legal system had failed Mr. Rush. Let’s not fail again.

V.) PRAYER

Because of these reasons, we pray that you overturn the lower court’s ruling.

Respectfully submitted by

Valeria Dougherty

Emma Castro

Del Valle High School

**IN THE COURT OF CRIMINAL APPEALS,
STATE OF TEXAS**

NO. 19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellee

FROM THE COURT OF APPEALS, SECOND DISTRICT,

AT FORT WORTH

Brief for Appellee

Emma Castro

Valeria Dougherty

Del Valle High School

I.) STATE OF THE CASE

Mr. 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 Pedestrian. Mr. Rush appeared, reserving Mr. Vega as his counsel, in front of a jury and was found guilty of both offenses. Mr. Rush brought his first appeal before the trial court's actions, and he now files another to gain a reversal.

II.) STATEMENT OF THE FACTS

On April 19th, 2019, a vehicle and a pedestrian collided at an intersection. After clearing the pedestrian of injuries the officer on scene smelled alcohol on the breath of the minor driving, leading to an immediate reprimand. After receiving a Class C Misdemeanor and a DUI, he went to Municipal Court. 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 quickly. The appellant's defense attorney represented 9 of these cases--two were assaults, 3 were theft tickets, and the rest were traffic. After the decision was made, the appellant was brought to the counsel table for jury selection. When the appellant was first brought up for jury selection, the randomized jury of 12, consisting of 7 black panelists, 3 white panelists, and 1 hispanic panelist, 8 of which were women. The Petitioner asked for a jury shuffle, which is a procedural request that is allowed once during the trial that can be exercised by either counsel. The new and final jury list was randomized by an algorithm on the clerk's computer.

At the jury selection phase, the appellant's attorney claimed that the State used their three peremptory strikes in a discriminatory based on both race and gender. These strikes included two of the three remaining black jurors and two of the remaining three females. The result was an all male jury that consisted of white men and one Asian man. The state struck Juror 3 (black female) for a claim that because she was a teacher, she would be lenient, even sympathetic, to the minor.

They justified Juror 9 (black female) had been dismissed because she had extreme political positions that were anti government related. The Judge ruled that there were no issues with these. The defense made multiple points including the makeup of the jury, claiming Batson after striking the last black, female juror. After careful deliberation, the Judge determined there was no *Batson* violation. The defendant hired a new attorney to file this appeal.

III.) ISSUES AND APPLICABLE LAW

A. Point of Error One: *Whether the trial court erred in denying appellant's Batson challenge during voir dire*

The **Sixth Amendment** affirms that all have the right to a fair and impartial trial. In this case, the juror selection process is in question. ***Flowers v. Mississippi, 139 S.Ct. 2228 (2019)*** provides that jury selection usually consists of three identifiable phases, these being begun firstly by a group being randomly called in to participate. The next phase consists of a subgrouping of collective to be assigned to a specific case, wherein they will receive questioning as to eliminate bias with strikes with cause. The final phase is the peremptory strikes that do not need a cause. This definition means that the peremptory strikes made would be clear cut in their legality. The reason that the ***Batson Challenge*** was called was because their perspective black, female jurors were all dismissed by the finalization of the jury, but therein lies the fact that this was the fault of the defense, not the state. The reason that there are no black, female jurors is because the defense attorney himself struck the last juror matching the description. Moreover, protection of due process is not a guarantee that the accused will have members of their own race on a jury. It is a guarantee that they be chosen indifferent to race.

Additionally, ***Powers v. Ohio, 499 U.S. 400, 407 (1991)*** provides “Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process.” The importance of the position of juror cannot be allowed to be diminished simply because Mr. Rush did not like his verdict. Further, despite what the defense tries to peddle, the jury shuffle was not made with discriminatory intent because it was a computer algorithm who randomly chose, not the prosecutor, so they would have no knowledge of the outcome. This simple fact discredits the claim made.

Regarding the use of peremptory strikes, the judge must be given deference in appeals as per ***Vargas v. State, 838 S.W.2d 552, 554 (Tex. Crim. App. 1992)***, which notes that unless clearly erroneous, the judge’s ruling must stand, even if another judge would rule differently. ***Batson v. Kentucky, 476 U.S. 79 (1986)*** quotes ***Swain v. Alabama, 380 U.S.202 (1965)*** in stating “that a State’s purposeful or deliberate denial....on account of race or participation as jurors in the administration of justice violates the Equal Protection Clause.” In our case, the strikes had been evaluated by two judges. First, the trial court judge who found no discriminatory justifications for the strikes then followed by the first appeals judge, who recognized that the State didn’t strike for race, thus not meeting the requirement of ***Batson***. It must be clarified that while new evidence can provide different circumstance, ***Flowers*** allows that a challenge will only hold if the defendant does not provide evidence of purposeful race discrimination by the State.

The appellant’s effort to prove discredit the appellee’s reasoning, to find fault where there is none, is not enough to prove a challenge. ***Flowers*** further provides that harmless errors that are race-neutral are not proof of discrimination. By not

having any evidence besides Ms. Crump's misspoken comments and different evaluations of details, the appellant does not offer any considerable evidence to reverse any ruling.

Moving forward, **Flowers** also states that "correlation is not causation." Though the racial makeup of the group was called into question, there is no prevailing decision that there was racial discrimination. This is because, as **Theil v. Southern Pacific Co., 384 U.S. 223-224 (1946)**, "a person's race is simply unrelated to their fitness as a juror." Any seemingly discriminatory anomalies do not prove anything of disproportionate impact because there was separate explanations provided and accepted by the judge.

It is because of this inalienable logic that the ruling must not be overturned.

B. Point of Error Two: (2a) Whether the trial court erred in denying appellant's motion for a new trial due to an alleged Brady violation, and (2b) Whether the trial court erred in denying appellant's motion for a new trial due to ineffective assistance of counsel?

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

First, there is the question of materiality to be addressed. **Brady v. Maryland, 373 U.S. 83 (1963)** contends that the State violates due process if it conceals evidence that aids the defense's arguments, but only if the evidence is "material to guilt or punishment." For the definition of materiality, we need only cite **Hampton v. State, 86 S.W. 3d 603 (2002)** which provides that, to be material, it must be established that the results of the trial would have been different had the evidence been present. The challenge will only hold if the evidence is material. We

further cite ***Ex Parte Richardson, 70 S.W.3d 865 (Tex. Crim. App. 2002)*** for this as it states that relief will only be granted if the appellant proves that the evidence would undeniably change the verdict. This is not a standard that the appellant can meet due to the fact that there were two witnesses statements that fault the accused for the collision, contradicting the defendant's story. This means that the verdict would not have changed, even if this evidence had been present.

Second, cross apply ***Brady*** and ***Mooney v. Holohan, 294 U.S. 103 112***, it can be concluded that the state must only be held as responsible for withholding evidence is it was willfully done so. However, in our case, there was no knowledge of the evidence before the trial. The ***Texas Code of Criminal Procedure 39.14*** provides that the state shall produce evidence that is material and in possession of the state, and we cite the exact terms of such in ***Kyles v. Whitney, 514 U.S. 419, 437-38, 115 S. t. 1555, 1567-68 (1995)*** which states that the state is not relieved of its duty if other "lawyers and employees in his office and other law connected to the investigation and prosecution of the case." In this case, the evidence in question was not held by an office connected to the investigators or prosecution, thus could not meet the standards set out. The prosecution was only interested in the accused's history, not that of a victim who was hit. All in all, this challenge does not meet any standards set out under ***Brady***.

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

In making this determination, a court hearing an ineffectiveness claim must

consider the totality of the evidence before the judge or jury. This means that it is vitally important to have selected a standard to judge this claim. This standard is given under ***Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)*** as it states that to determine whether a defendant received ineffective assistance of counsel, the Appellant must show that: (1) his attorney's performance was deficient; and (2) that his attorney's deficient performance prejudiced his defense. Additionally, according to ***Vasquez v. State, 830 S.W.2d 948, 949 (Tex.Crim.App. 1992)***, if either one of these is not met, then the ineffectiveness claim fails.

Under **Article 39.14 of the Texas Code of Criminal Procedure**, the state must bequest any evidence in their possession to the defense, but, as before explained, the circumstances in this case do not meet the standards of the code. Any question of Mr. Vega's ineffectiveness due to undisclosed evidence would be moot because, according to the evidence disclosure code, there was no evidence that wasn't in the defendant's hands already. Thus, the attorney failed to meet the second prong of the ***Strickland*** standard, and the ***Morton*** challenge would fail.

IV.) CONCLUSION

Today we have proven that the defendant, Mr. Rush, received a fair trial by way of racial indifference in the jury selection process, reasonable legal representation, and full disclosure of known evidence. We have upheld our laws regarding Mr. Rush before, and we must do it now.

V.) PRAYER

Because of these reasons, we pray that you uphold the lower court's ruling and maintain the Constitution that will project rights of our Country.

Respectfully submitted by

Valeria Dougherty

Emma Castro

Del Valle High School

IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

NO. 19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellee

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

Brief for Appellant

Jacob Cano

Alex Patino

Del Valle High School

I. Statement Of The Case

On April 19th, 2019 a vehicle and a bike forcefully met on a downtown Fort Worth street. The first responding officer came to the wrong conclusion that Mr. Rush had failed to yield to a pedestrian. Through further investigation Officer Sundance said that he had smelled alcohol on Mr. Rush's breath, so he issued Mr. Rush two tickets, one for failing to yield to a pedestrian and one DUI. Mr. Rush appealed his case to the Tarrant County Court of Appeals District Two and now has appealed it to the Criminal Court of Appeals at the Texas Supreme Court.

II. Statement of Facts

Torrance Rush was charged with two tickets, the first being failing to yield to a pedestrian and second being a DUI. He has appealed on the fact that he is innocent and that the police wrongfully charged him with two crimes that he didn't commit.

III. Issues and Applicable Law: Points Of Error

A. Point of Error One: Whether the trial court erred in denying appellant's *Batson* challenge during *voir dire*

First, everyone in the United States is guaranteed a fair, impartial and speedy trial when appearing before the court.

The 6th amendment guarantees that everyone will get:

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.

If you have to call for a mistrial after the trial because of peremptory strikes of a prosecutor- you will no longer have a speedy trial. This was also not an impartial trial because when presented with jury, the state reshuffled the AA jurors of the second jury, therefore excluding a certain group and making it impartial and violates torrance rush's rights.

Second, every person that is in the jury pool is given the same protection against peremptory strikes on potential jurors during voire dire.

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

This case requires us to reexamine that the 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.

Third, Ms.Crump violates Torrance Rush's rights of equal protection by purposefully excluding african americans in the jury panel during the peremptory period.

The use of the jury reshuffle by Ms.Crump and the exclusion of two african american jurors in the new jury is a violation of the 14th amendment equal protection clause.

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

In **Swain v. Alabama**, this Court recognized that a "State's purposeful or deliberate denial to Negroes on count of race of participation as jurors in the administration of justice violates the Equal Protection Clause." This principle has been "consistently and repeatedly" reaffirmed,

Fourth, the use of racially motivated jury reshuffles and strikes limits the rights of all potential jurors to serve in future cases.

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

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. *Thiel v. Southern Pacific Co.*, (1946). A person's race simply "is unrelated to his fitness as a juror."(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... exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.

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

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)**

Fifth, Unfettered Exercise of Challenges Is Not Right Guaranteed In The Constitution

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

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.

Sixth, The Prosecutor's answer to the Judge's request for the reason for the two strikes against African American jurors in the pool were not correct and therefore could not meet standard set in Batson.

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

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. 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

B. Point of Error Two: (2a) Whether the trial court erred in denying appellant's motion for a new trial due to an alleged *Brady* violation, And (2b) Whether the trial court erred in denying appellant's motion for a new trial due to ineffective assistance of counsel?

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

First, The mere withholding of vital evidence is enough to request a new retrial.

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

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.

Second, Fair Trials are Essential to Society

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

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."

Third, This Was Not A Fair Trial

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

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...

Fourth, The Evidence Makes A Difference

Take a look at the fact that on a busy street in downtown Ft. Worth, Texas there were only two witnesses of this accident on April 19, 2019. One was the alleged victim and the other was a college student. Considering the fact that college student admittedly was not the strongest witness- then the evidence withheld would have been used to successfully against the remaining witness.

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

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.

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

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. This means that it is vitally important to have selected a standard to judge this claim.

A. Strickland Standard Used

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.

B. Failed To File For Discovery- Key to the Defense

Mr. Vega failed to file a discovery request under Article 39.14 of the Texas Code of Criminal Procedure;

Art. 39.14. DISCOVERY. (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.

C. Mr. Vega's Performance meets Thompson's Standard-failed to ask for a jury reshuffle when he could have, failed to argue the fact that Batson Challenge he called was not properly answered by the prosecutor in her answer to the judge, and failed to obtain discovery evidence before the trial.

Thompson v. State, 9 S.W.3d 808, 812 (Tex.Crim.App. 1999)

Under the first prong, the attorney's performance must be shown to have fallen below an objective under a standard of reasonableness.

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. "Reasonable probability" is that which is "sufficient to undermine confidence in the outcome."

IV. Conclusion

On April 19th, 2019 a vehicle and a pedestrian collided at an intersection in downtown Fort Worth, Texas. Mr. Rush, the driver of the vehicle, was then charged with two tickets, one being a DUI and the other for failing to yield to a pedestrian. Torrance Rush was then convicted in a trial court of both tickets. Feeling that the trial was unfair and impartial Mr. Rush attempted to appeal his case and the judge upheld the lower court's ruling. Faced with the facts today, this is the only logical conclusion to draw from the case. He did not cause the accident, he was not guilty, he did not cause the accident, you must overturn the lower court's ruling in this case.

V. Prayer

We humbly pray that you take into careful consideration all of the facts that we have presented today and vote to overturn the lower court's ruling in this case so that justice may be maintained.

Respectfully submitted by

Jacob Cano

Alex Patino

Del Valle High School

IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

NO. 19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellee

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

Brief for Appellee

Alex Patino

Jacob Cano

Del Valle High School

I. Statement Of The Case

On April 19, 2019, a vehicle and a pedestrian forcefully met in an intersection in downtown Fort Worth. 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. He was later convicted of both, he appealed his case and the judge in the Appeals Court upheld the lower court ruling. Faced with the facts presented today and the decisions of two different courts the only logical conclusion is to uphold Mr. Rush's convictions on these two counts.

II. Statement of Facts

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. In this appeal, the Appeals Court upheld the lower court's ruling. 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. Now, Mr. Rush is trying to appeal his case on two points of error. However, the facts still remain the facts in this case. On April 19, 2019, in downtown Ft. Worth,

Texas, Mr. Rush driving a black car struck a person walking a bike across the street in a crosswalk. Much of the appeals case is based on distorted or twisted aspects of the truth. Mr. Vega was hired by Mr. Rush to defend him. He was not appointed. He can have more than one client and he did provide Mr. Rush with a defense. The Prosecution has to provide everything in their possession or knowledge about the case to the defendant. They can not provide what they do not know or have. This aspect of the appeal will set a horrible example for cases to follow in the future.

III. Issues and Applicable Law: Points Of Error

A. Point of Error One: Whether the trial court erred in denying appellant's Batson challenge during voir dire

First, all people under the Constitution are guaranteed a speedy and fair trial.

The 6th amendment guarantees that everyone will get:

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. We are all guaranteed a fair trial. However we are not now nor should we be guaranteed to have who we want on the juror- we can not nor would we ever desire to vote for or against someone because of the color of their skin. The appellant has this completely backwards and wrong.

Second, Serving On The Jury is Essential For Democracy Survival

We can not just set aside a verdict simply because we did not win or we did not like the verdict. If we were able to do that then we have really set aside the verdict of the jury as well. We are a country of rules and must obey these rules. Failure to do means the failure of our state.

Powers v. Ohio, 499 U.S. 400, 407 (1991)

Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process.

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

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.

Third, Mr. Vega Caused the Batson Challenge With His Strike

It was not the use of the jury pool reshuffle by the Prosecutor when presented with jury pool of seven African American jurors and then use of the peremptory challenge on two of the African American after the reshuffle violates the Equal Protection Clause rather, it was the last strike by the defense attorney that caused this problem. Therefore the Judge recognized that the State did not purposefully or deliberately strike any African American people from the jury panel.

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

In ***Swain v. Alabama***, this Court recognized that a purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause. This principle has been consistently and repeatedly reaffirmed.

Fourth, Mr. Rush Failed To Prove His Claims Of Discrimination

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

Flowers presented no evidence whatsoever of purposeful race discrimination by the State in selecting the jury during the trial below. 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,” and then completely ignore the State’s reasons

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

The Batson hearing was conducted immediately after voir dire, before a transcript was available. In explaining their strikes, counsel relied on handwritten notes taken during a fast-paced, multi day voir dire involving 156 potential jurors. Still, the majority 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.

Fifth, In The Constitution, Race Is Not Guaranteed When It Comes To A Jury

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

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

Sixth, The Prosecutor’s answer to the Judge’s request for the reason for the two strikes against African American jurors were given to the Judge and was accepted by the Judge.

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

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.

B. Point of Error Two: (2a) Whether the trial court erred in denying appellant's motion for a 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?

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

First, The Evidence Claimed To Have Been Withheld Was Not Known At Time of the Trial.

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

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.

Second, In A Retrial You Are Throwing Out A Jury That You Could Have Done Properly Either In A Reshuffle or In The Jury Panel Questioning Not Now.

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

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.

Third, This Was A Fair Trial- Throwing Out A Jury Because You Do Not Like The Verdict Is Wrong

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

Appellant contends his attorney failed to prepare adequately for trial, asserting that he did not interview appellant, the complaining witness, or appellants 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

Fourth, All Of The Witnesses Do Not Agree On The Events On April 19, 2019

Take a look at the fact that on a busy street in downtown Ft. Worth, Texas there were two witnesses of this accident on April 19, 2019. One was the victim and the other was a college student. Both of their stories were supportive of each other

and opposed to defendant's story. The witnesses are not on trial here, Mr. Rush is.

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

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.

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

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. This means that it is vitally important to have selected a standard to judge this claim.

A. Mr. Vega Met The Strickland Standard

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.

B. The Claim That The Defense Failed To File For Discovery- Key to the Defense- Actually Supports The State's Case

Mr. Vega failed to file a discovery request under Article 39.14 of the Texas Code of Criminal Procedure. This argument fails because if taken seriously the prosecution should have given the information without discovery filed if they knew about it.

Art. 39.14. DISCOVERY. (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.

C. Mr. Vega Was Successful In Giving Counsel To Mr. Rush.

Thompson v. State, 9 S.W.3d 808, 812 (Tex.Crim.App. 1999)

Under the first prong, the attorney's performance must be shown to have fallen below an objective under a standard of reasonableness. 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. "Reasonable probability" is that which is "sufficient to undermine confidence in the outcome."

VI. Conclusion

Clearly, the evidence proved that on April 19, 2019, a vehicle and a pedestrian forcefully met in an intersection in downtown Fort Worth. 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. He was later convicted of both, he appealed his case and the judge in the Appeals Court upheld the lower court ruling. Faced with the facts presented today this is the only logical conclusion to come up with. In this case the judge should and can only make up their mind on the three challenges that the Appellant that he presented before you in this court. This is not a retrial of the first case, it is an appeal and herein lies the problem. You can only rule on matters before you and these matters are the Batson Challenge, Brady Challenge, and Morton Challenge. When you do this, you will support justice

and vote the same as the jury and Appeals Court Judge did before you- you will vote down the appeal and uphold the lower court's ruling in this matter.

VII. Prayer

We humbly pray that you take into careful consideration all of the facts that we have presented today and vote to uphold the lower court's ruling in this case so that rule of law will be maintained.

Submitted By

Alex Patino

Jacob Cano

Del Valle High School

IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

NO. 19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellee

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

Brief for Appellant

Noel Mendez

Rebecca Martinez

Del Valle High

School

I. Statement Of The Case

On April 19, 2019, a bike rider and a vehicle driver forcefully met in downtown Fort Worth. The only questions are: 1) How caused the wreck? 2) Why did the police not properly investigate? Mr. Torrance Rush, the driver of the vehicle was wrongfully issued a Class C Misdemeanor citation as being at "fault" for the clash . The investigating officer smelled alcohol on the appellant's breath and he issued a citation for Minor Driving Under the Influence. Torrance Rush was later wrongfully convicted of both, he appealed his case and the judge in the Appeals Court in Tarrant County the appeals court upheld the lower court ruling. Faced with the actual facts presented today and the decisions of two different courts the only logical conclusion is to overrule Torrance Rush's convictions on both of these counts.

II. Statement of Facts

Appellant Torrance Rush was charged with a Class C Misdemeanor offenses of Minor Driving Under the Influence of Alcohol and failure to Yield to a Pedestrian in the Fort Worth Municipal Court. Torrance 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. In this appeal, the Appeals Court upheld the lower court's ruling.

After not all the evidence was presented at trial, the jury found the defendant guilty of both offenses and issued punishment in the form of a fine, AA meetings by minors and a driver's safety course. Torrance rush is now trying to appeal this case

on the two points of error . The facts of this case were not fully presented as Torrance Rush was not at fault and was wrongfully charged and later convicted for a non-crime. Torrance Rush's case is based on the truth of the case . Mr. Vega was hired by Torrance Rush to defend him. He can have more than one client and he did not provide Mr. Rush with an effective defense. Although Mr.Vega was there throughout the whole case physically he was still ineffective as he did not do everything possible to defend his client such as he did successfully receive the evidence from the prosecution . The Prosecution has to provide everything in their possession or knowledge about the case to the defendant. They can not provide what would have been impeaching and exculpatory evidence in this case knowing that it would be in favor of the defense . This aspect of the appeal will set a great precedent for cases to follow in the future.

III. Issues and Applicable Law: Points Of Error

A. Point of Error One: Whether the trial court erred in denying appellant's *Batson* challenge during *voir dire*

First, everyone living inside of the United States are guaranteed a fair and speedy trial when appearing in court .

The 6th amendment guarantees that everyone will get:

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.

You can't receive a fair and speedy trial if you have to call for a mistrial based on peremptory strikes from the prosecution . Torrance Rush didn't receive a fair trial because of the fact that his rights were denied . He also didn't receive a speedy trial because the case went on more than once and wasn't over after the wrongful conclusion.

Second, all people in the jury panel are guaranteed equal protection when it comes to use of peremptory strikes

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

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.

This is important because -

Third, the racially motivated strikes of African American jurors in the peremptory period by the prosecutor Ms. Crump violates Torrance Rush's Equal Protection

The reshuffle of the jury panel when presented with seven African American jurors and then racially motivated strikes of the jurors violates Torrance Rush's Equal Protection clause and the 14th Amendment .

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

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,

Fourth, Racial discrimination in jury selection

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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. **Thiel v. Southern Pacific Co., (1946)**. A person's race simply "is unrelated to his fitness as a juror." (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... exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.

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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)**

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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.

Sixth, The Prosecutor's answer to the Judge's request for the reason for the two strikes against African American jurors in the pool were not correct and therefore could not meet standard set in Batson.

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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. 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

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

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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.

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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."

Third, This Was Not A Fair Trial

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

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...

Fourth, The Evidence Makes A Difference

Take a look at the fact that on a busy street in downtown Ft. Worth, Texas there were only two witnesses of this accident on April 19, 2019. One was the alleged victim and the other was a college student. Considering the fact that college student admittedly was not the strongest witness- then the evidence withheld would have been used to successfully against the remaining witness.

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

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.

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

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. This means that it is vitally important to have selected a standard to judge this claim.

A. Strickland Standard Used

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.

B. Failed To File For Discovery- Key to the Defense

Mr. Vega failed to file a discovery request under Article 39.14 of the Texas Code of Criminal Procedure;

Art. 39.14. DISCOVERY. (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.

C. Mr. Vega's Performance meets Thompson's Standard-failed to ask for a jury reshuffle when he could have, failed to argue the fact that Batson Challenge he called was not properly answered by the prosecutor in her answer to the judge, and failed to obtain discovery evidence before the trial.

Thompson v. State, 9 S.W.3d 808, 812 (Tex.Crim.App. 1999)

Under the first prong, the attorney's performance must be shown to have fallen below an objective under a standard of reasonableness.

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. "Reasonable probability" is that which is "sufficient to undermine confidence in the outcome."

IV. CONCLUSION

In this case, one must clearly see the reverse the summary judgment of the trial court below towards Torrance Rush because of the three points of error, ineffective council, withholding of evidence , and the unfair jury. The law demands it and it is the only and just thing to do. The right thing to do here is to make up for the mistakes of the past and to allow Torrence Rush the freedom he ritually deserves.

V. PRAYER

We humbly request that after reviewing all the facts of the case you decide to grant Torrance Rush a fair new trial. This is the only correct thing to do as it is already granted in Torrance Rush's constitutional rights .

Respectfully Submitted by

Noel Mendez

Rebecca Martinez

Del Valle High School

IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

NO. 19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellee

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

Brief for Appellee

Noel Mendez

Rebecca Martinez

Del Valle High School

I. Statement Of The Case

On April 19, 2019, a bike walker and a car driver forcefully clashed in downtown Fort Worth. The appellant, Torrance ush, 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 also issued a citation for Minor Driving Under the Influence (DUI). Mr.Rush was later convicted of both, he appealed his case and the judge in the Appeals Court in Tarrant County Court of Appeals 2 upheld the lower court ruling. Faced with these facts presented today and the decisions of two different courts the only logical conclusion is to uphold Mr. Rush's convictions on both counts.

II. Statement of Facts

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 with counsel at a jury trial and was found guilty of both offenses. Mr. Rush brought his first appeal before the Appeals Court in Tarrant County 2, the Appeals Court upheld the lower court's ruling.

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. Now, Mr. Rush appealed his case on two points of error. However, the facts still remain the facts in this case. On April 19, 2019, in downtown Ft. Worth, Texas on or about 12:20,

Mr. Rush driving a black car struck a person walking a bike across the street in a crosswalk.

Much of the appeals case will be based on distorted or twisted aspects of the truth. Mr. Vega was hired by Mr. Rush to defend him. He was not appointed. He can have more than one client and he did provide Mr. Rush with an effective defense. The Prosecution has to provide everything in their possession or knowledge about the case to the defendant. They can not provide what they do not know or have. If you vote for this appeal will set a horrible example for cases to follow in the future. This would also destroy our Constitution and disrupt our legal system.

III. Issues and Applicable Law: Points Of Error

A. Point of Error One: Whether the trial court erred in denying appellant's *Batson* challenge during *voir dire*

First, all defendants are guaranteed a speedy and fair trial.

The 6th amendment guarantees that everyone will get:

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.

Clearly, it can be seen that we are all guaranteed a fair trial. However, we are not now nor should we be guaranteed to have who we want on the jury- we can not nor would we ever desire to vote for or against someone because of the color of their skin. The appellant has this completely backwards and wrong.

Second, Serving On The Jury is Very Important In Our Country

We can not just set aside jury verdicts without proof of wrongdoing simply because that verdict goes against us in that case.

Powers v. Ohio, 499 U.S. 400, 407 (1991)

Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process. By overturning the jury's decision you are in effect throwing away the entire jury process.

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

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.

Third, It was the striking of an African American Police Officer as a juror during the Mr. Vega's Strikes that Ended Up To Cause the Batson Challenge.

It was not the use of the jury pool reshuffle by the Prosecutor when presented with jury pool of seven African American jurors and then use of the peremptory challenge on two of the African American after the reshuffle violates Equal Protection Clause- rather, it was the last strike by the defense attorney that caused this problem. They struck the last African American female juror, therefore the Judge recognized that the State didn't purposefully or deliberately strike any African American people from the jury panel.

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

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,

Fourth, The Appellant Never Proved Racial Discrimination limits rights of jurors who have served

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

Flowers presented no evidence whatsoever of purposeful race discrimination by the State in selecting the jury during the trial below. 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," and then completely ignore the State's reasons

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

The *Batson* hearing was conducted immediately after voir dire, before a transcript was available. In explaining their strikes, counsel relied on handwritten notes taken during a fast-paced, multi day voir dire involving 156 potential jurors. Still, the majority 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.

Fifth, Race Is Not Guaranteed In The Constitution When It Comes To A Jury

Since 1791 our country has taken great pride in the fact that every citizen has the right to go to trial, the 6th amendment states fair and impartial , it does not require any test on race or ethic groups.

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

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

Sixth, The Prosecutor’s answer to the Judge’s request for the reason for the two strikes against African American jurors were given to the Judge and was accepted by the Judge.

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

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.

B. Point of Error Two: (2a) Whether the trial court erred in denying appellant's motion for a new trial due to an alleged *Brady* violation, And (2b) Whether the trial court erred in denying appellant's motion for a new trial due to ineffective assistance of counsel?

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

First, The Evidence Claimed To Have Been Withheld is Not Material To The Defense and Was Not Proved To Be So At Trial.

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

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.

Second, Fair Trials are Essential to Society- Having A Retrial In This Case Would In Effect Punish Society By Disallowing Their Decision

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

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."

Third, This Was A Fair Trial- Appellant Fails To Prove Differently

The appellant offers only claims to their arguments.

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

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- however, please note that Mr. Rush secured the services of Mr. Vega and was aware of his abilities.

Fourth, The Witnesses Make A Difference

Take a look at the fact that on a busy street in downtown Ft. Worth, Texas there were two witnesses of this accident on April 19, 2019. The police found only 2 witnesses one was a worker and the other was a college student. Both of their stories were supportive of each other and opposed to defendant's story. The witnesses are not on trial here, Mr. Rush is, therefore nobody else can be at fault.

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

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. The appellant failed to do so in this case.

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

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. This means that it is vitally important to have selected a standard to judge this claim.

A. Strickland Standard Used

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)

Apply the Strickland standard to this case 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.

B. Failed To File For Discovery- Key to the Defense- Actually Supports The State's Case

Mr. Vega failed to file a discovery request under Article 39.14 of the Texas Code of Criminal Procedure. This argument fails because if taken seriously the prosecution should have given the information without discovery filed if they knew about it. And since they had no idea about said evidence they could not hand it over to the defense .

Art. 39.14. DISCOVERY. (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.

C. Mr. Vega's Performance meets Thompson's Standard. By providing a Batson Challenge, Questioning the reshuffle and understanding about 39.14- Mr. Vega performed reasonably according to the standards

Thompson v. State, 9 S.W.3d 808, 812 (Tex.Crim.App. 1999)

Under the first prong, the attorney's performance must be shown to have fallen below an objective under a standard of reasonableness.

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. "Reasonable probability" is that which is "sufficient to undermine confidence in the outcome."

VI. Conclusion

Today one can clearly see that on April 19th on 2019, a vehicle and a pedestrian forcefully met in an intersection in downtown Fort Worth. 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. He was convicted of

both, he appealed his case and the judge in the Appeals Court upheld the lower court ruling. Faced with the facts presented today this is the only logical conclusion to come up with.

VII. Prayer

We humbly pray that you take into careful consideration all of the facts that we have presented today and vote to uphold the lower court's ruling in this case so that rule of law will be maintained and served.

Respectfully Submitted by

Noel Mendez

Rebecca Martinez

Del Valle High School

**IN THE COURT OF CRIMINAL APPEALS, STATE OF
TEXAS**

NO. 19-01234-CR h

Torrance Rush, Appellant

v.

The State of Texas, Appellee

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

Brief for Torrance Rush

Semira Morgan

Titus Brown

The Law Magnet

Statement of the Case

Appellant Torrance Rush was charged and convicted in the Fort Worth Municipal Court with Class C misdemeanors offenses of Minor Driving Under the Influence of Alcohol and Failure to yield to a pedestrian. Torrance Rush appealed to the County Court at Law in Tarrant County. The court ruled in favor of the State of Texas and Mr. rush appealed to the Texas Court of Appeals and lost. Rush then appealed to the Texas Court of Criminal Appeals.

Statement of the Facts

On April 19, 2019 appellant Torrence Rush collided with a Pedestrian at an intersection in downtown Fort Worth. The investigating officer concluded that Mr. Rush had been under the influence and issued a citation. 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 prosecutor then asked for a jury shuffle. 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. The State then provided race-neutral reasons for each of the strikes. 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 the trial, while everyone was walking out of the courtroom the victim approached the defendant and said "I'm sure glad yall didn't bring up all my traffic tickets. I

wouldn't have wanted the jury to know how bad of a driver I am" rush relayed the statement to his attorney and the attorney filed a motion for a new trial on these grounds.

Point of Error 1: The trial court erred in denying the appellants Batson challenge during voir dire

In **Swain v. Alabama** 380 U.S 204 the court held that "States purposeful or deliberate denial to Negroes on account of the race of participation as jurors in the administration of justice violates the Equal Protection Clause." Since Swain, this court has ruled that racial discrimination is not allowed during the jury selection process. The court later on in **Batson v. Kentucky** 476 U.S 79(1986) established the 3 step process for the courts to use when determining a Batson violation. First, the defendant must make a prima facie case of racial discrimination. Second once the prima facie case has been made it becomes up to the state to articulate a race-neutral reason for its strike. Third, it is up to the trial court to decide whether the defendant has proved purposeful racial discrimination. For the defendant to prove racial discrimination he has to show several factors. The court later in **Flowers v. Mississippi** 139 S.Ct 228 listed several factors. The first factor is the prosecution's history of strikes. The second factor is disparate questioning. " The prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose" **Batson v. Kentucky.** This offers a clue as to if the prosecutor is seeking to paper the record and disguise a discriminatory intent. The third factor is a side by side comparison of

black prospective jurors who were struck and white prospective jurors who were not struck. The fourth factor is the prosecutor's misrepresentations of the record when defending the strikes during the Batson hearing. Lastly, other relevant factors that bear upon the issue of other relevant circumstances.

Applying the standards set out in Batson and Flowers it was clear that there was a Batson violation. There was disparate questioning in our case during voir dire. The prosecutor skipped the white prospective jurors and went to the black prospective jurors. In the transcript, the prosecutor Ms. Crump, started by skipping to juror number 3 who is a black female and began questioning her about her job. She then proceeded to ask who else worked with youth which juror number 7, a white male, raised their hand. She asks juror 7 one question and proceeded to ask juror 8 a series of questions. She then proceeded to juror 9 who is a black female and asked her a series of questions asking about what she wants to pursue. Ms. Crump then proceeds to skip all the way to juror 12 a white male who she only questions because she recognizes him. This shows the disparate questioning by the prosecutor as she continuously skips to question the blacks. She is making an attempt to paper the record and hide her discriminatory intent. The more she gets the black jurors talking she is able to find more to cover her intent. Furthermore, along with the disparate questioning we can look at a side by side comparison of the black jurors struck and the white jurors who weren't struck. Specifically looking at juror 3 and juror 7. Juror number 3 is a black female who served as an associate youth pastor who was struck while juror 7 is a white male whose profession is a middle school teacher. The prosecutor's reasoning was because she worked with the youth, yet juror 7 also works with children on a daily basis. The court has held

in **Foster v. Chapman** 578 U.S., “When a 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.” These jurors are similar and the reasoning applies to both yet the white juror was permitted to serve while the black juror was struck. Furthermore, there was a misrepresentation in the record when the prosecutor was providing reasoning for the strikes. When asked about juror 3 Ms. Crump stated that she struck her because shes a teacher. This isn’t true as she worked with the church when in reality juror number 7 the white male is the middle school teacher. The prosecutor never actually provides a reason for the strike so, therefore, step 2 of the Bateson challenge was never met.

We will lastly look at other relevant circumstances that show discriminatory intent. For one before voir dire, the prosecution asked for a jury shuffle. The first jury’s racial makeup consisted of 7 blacks, 3 whites, and 1 Hispanic. The gender makeup of this group were 8 women and 4 men. After the shuffle, the state then used their strikes to get rid of the 2 of the remaining black jurors within the strike zone. The reasoning of this shuffle is that there were a majority of black prospective jurors that would have made it onto the jury. The shuffle was to make sure that they were moved around and there would be little chance for them to make it onto the jury.

Using the law established in Batson and applying the factors used to determine racial discrimination from Flowers it is clear that the trial court judge erred when determining that there was no Batson violation.

Point of error 2: The trial court erred in denying the appellant's claims of a Brady violation and ineffective assistance of counsel.

Brady v. Maryland, 375 U.S. 85 (1963) establishes that it is a violation of due process when a prosecutorial team withholds evidence from the defense, furthermore, **Ex parte Richardson** 70 S.W.3d 865(Tex.crim. App 2002) calls the court to apply a 3 prong test when considering Brady violations. The appellant must first prove that the state failed to disclose evidence regardless of good or bad faith, second, we must show that the evidence is favorable to the accused, finally, we 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. First to address prong 1. the language used in the Texas Code of Criminal Procedure suggests that this burden extends to every part of the state regardless of whether or not it is within the direct custody of the prosecuting attorney, furthermore

Ex parte Mitchell,977 S.W.2d 575,578 (Tex.crim.App 1997) as cited in **Reed v. State**,(Tex. App - Fort Worth 2016)(unpub.) notes that Brady requires the state disclose material exculpatory evidence in police agencies as well as any other part of the prosecutorial team, Therefore it is not enough to say that the prosecution simply did not have the evidence because the language in the state statute and ruling in Mitchell asserts that "persecution" includes police record where the traffic tickets at question are readily accessible. We also contend that the argument that the state had no duty to disclose the evidence due to the trial attorney's failure to file a Brady request is null because the language in the Texas code of criminal

procedure suggests that the prosecution has a duty to disclose all exculpatory, impeachment, or mitigating evidence regardless of whether or not it is requested by the defense.

Texas code of criminal procedure 39.14

...

(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.

...

Therefore any contention that the state had no duty to disclose the complainant's traffic tickets is completely devoid of substance. Prong 2 of the Richardson test requires that the evidence is in favor of the defense and because the tickets can display to the jury that the complainant cares not for traffic laws it alleviates much of the defendant's fault for the collision and could demonstrate that the complainant's role in the collision is greater than presented. The 3rd prong requires that the evidence has the likelihood the change the outcome of the case, note that the disparity to make here is that the evidence does not need to *negate guilt* but simply to change the outcome another disparity to note is the type of evidence. The Texas Code of Criminal Procedure says that it can be any type of evidence including impeachment. The tickets not only potentially hurt the complainant's credibility but also create the idea that the defendant was not entirely at fault for the collision

which could potentially alter the punishment administered. One cannot say that the tickets definitely play no role in this case, when asking what the guilt or punishment if the traffic tickets even raises the question of whether or not rush is guilty or if the correct punishment is applied it is enough to change the outcome thus the court should grant the appellee a retrial with the tickets as e evidence.

Onto our ineffective assistance argument. **Strickland v Washington** 466 U.S. 688 104 S.Ct 2053,2064,80 L.Ed.2d 674 (1984) gives us a 2 part test to apply for ineffective assistance, it rules that the appellant must show that (1) his attorney's performance was deficient and (2) that his attorneys performance prejudiced his defense, that is, the attorneys deficiency was harmful to the defendant's case. We the appellant must show that the attorney's performance fell under an objective standard of reasonableness and the record reflects this claim. The trial attorney's action in taking many cases was in itself was deficient, furthermore the fact that the trial attorney had 15 minutes to prepare means he obviously did not have time to prepare his thoughts. This combined with the fact that he failed to file a Brady motion and didn't research the complainant forms a sub-par defense at best. Not only that but the trial attorney failed to ask for an extension due to his lack of preparation and went to trial without a fully formed defense. This undoubtedly falls below an objective standard of reasonableness, any competent attorney would have at least researched the complainant and found the traffic tickets, and any competent attorney would follow basic procedure and file a Brady motion. These deficiencies ultimately killed Torrance Rush's defense. No attorney should be expected to argue efficiently with 15 minutes to prepare before jury selection,

furthermore, the lack of the attorney's lack of research or Brady motion allowed the tickets to slip through the cracks prejudicing the appellant's defense.

Conclusion

For all the reasons set above we pray that this honorable court reverse the lower courts decision in ruling there were no Batson and Brady violations along with the Micheal Morton violation and remand For further proceeding

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TEXAS**

NO. 19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellee

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

Brief for the State of Texas

Semira Morgan

Titus Brown

The Law Magnet

Statement of the Case

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Statement of facts

On April 19, 2019 appellant Torrence Rush collided with a Pedestrian at an intersection in downtown Fort Worth. The investigating officer concluded that Mr.Rush had been under the influence and issued a citation. The appellant was brought up to the 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 prosecutor then asked for a jury shuffle. 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. The State then provided race-neutral reasons for each of the strikes. 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 the trial while everyone was walking out of the courtroom the victim approached

the defendant and said "I'm sure glad yall didn't bring up all my traffic tickets. I wouldn't have wanted the jury to know how bad of a driver I am" rush relayed the statement to his attorney and the attorney filed a motion for a new trial on these grounds.

Counterpoint 1: The trial court did not clearly err when denying the appellants Batson challenge during voir dire.

In **Batson v. Kentucky, 476 U.S 79(1986)** the court has established a three-step process. First, the defense must make a prima facie case of racial discrimination. Second, once the prima facie case has been made it is up to the prosecution to provide a race-neutral explanation for their strikes. The race-neutral explanation does not have to show the juror would be unfair. In **Booker v. Washington 750 F.2d 1132**, the court said that "the prosecutor's explanation need not rise to the level justifying the exercise of a challenge for cause. Lastly, it becomes up to the trial court to decide whether or not there was a Batson violation **Flowers v. Mississippi**. The burden of proof falls on the defense throughout this entire process. When the trial court is making the decision the court "Rules on the ultimate question of intentional discrimination, it is the explanation and not the prima facie showing" **Malone v. Staten 919 S.W.2d 410,412**. In the case of **Flowers v. Mississippi**, the court laid out 6 standards for the trial court to use when determining a Batson violation. The first one is the statistical evidence about the prosecutor's use of peremptory strikes. Second is evidence of a prosecutors disparate questioning of black and white prospective jurors. Thirdly is the side by

side comparisons of black prospective jurors who were struck and white prospective jurors who weren't struck. Fourth is a prosecutor's misrepresentation of the record when defending the strikes. The fifth is the relevant history of the state's peremptory strikes in past cases. Lastly, are other relevant circumstances. The court in *Flowers* held that one alone does not automatically prove racial discrimination. It has to be several of these circumstances that would hint at racial discrimination.

The standard of review for a *Batson* challenge is an abuse of discretion. This means the appellate court must determine "whether or not the trial court decision was arbitrary or reasonable when the evidence is viewed in the light most favorable to the ruling" **Webb v. State**. The appellant has to show that the trial court was clearly erroneous. In **Vargas v. State, 838 SW.2d 552, 554**, the court held that "there must be a definite and firm conviction that a mistake has been committed."

When applying the law to our case it is clear that the trial court did not clearly err when determining there was no *Batson* violation. Now looking at the evidence that the trial court judge was presented during the *Batson* violation, there is not enough to determine a clear error. The appellant alleges that our case fits under *Flowers* because they believe it falls under four of *Flowers* categories. Those include disparate questioning, side by side comparisons, misrepresentation of the record when defending the strikes and other relevant circumstances. Starting off with the misrepresentation when defending the strikes it was a simple mistake made by the prosecutor. The prosecutor had no reason to lie when mistaken juror 3 the church employee for juror 7 the school teacher. This was a simple accident

made by the prosecutor which does not show racial discrimination. Second, when looking at the side by side comparison the state's reason applied more to juror 3 the church employee than juror 7 the middle school teacher. They may be similar as they work with youth on a daily basis but the difference is there views of children. Juror 3 is a retired associate youth pastor which is why the prosecutor has a reasonable belief that she would be overly sympathetic to youth due to her religious beliefs and the fact that she used to work to help and improve young people's lives. Juror 7, on the other hand, offered a negative connotation. As I stated earlier juror 7 when asked to elaborate said "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." from this the prosecutor can reasonably come to the conclusion that juror 7 would not have that much empathy for the youth. The prosecutor only has three strikes and has to use them wisely and juror 3 would further hinder her case in trial.

Next looking at disparate questioning, Flowers held "disparate questioning alone does not constitute a Batson violation. The disparate questioning or investigation of black and white prospective jurors may reflect ordinary race-neutral considerations." There were race-neutral reasons for disparate questioning. The reasoning for skipping to juror 3, was not because she was black but because she was retired and it had no information on her career. The prosecutor's reasoning is to quickly build a profile of the jurors so she can know who would have impartial biases against her case. She then asked an open-ended question to all the panelists on the jury asking who works with the youth on a daily basis. Juror 7 and 5 raised their hand. She then proceeded to ask both jurors to further elaborate on that.

Juror 7 states “we have lots of troublemakers that we have to deal with”. She then proceeded to question juror 8. She only asked him a series of questions because he did not know English and it was clear it was a strike for cause. Juror 9 also raised red flags when she was questioned by the prosecutor. She made several anti-government views. The reasoning for disparate questioning in our case was to learn more information about the jurors and investigate those red flags raised not because of discriminatory intent.

Lastly, we must look at the state’s reason as it ultimately falls down to the reasons **Malone v. State.** The reason for the strike against juror 3 was that she would be overly sympathetic to the defendant because she has worked with young persons in the past. The reason for striking juror 9 was because she has anti-government beliefs and would thus be unfair to the case of the prosecution. These are all valid reasons that have no relation to race but for the reason that they would all in a way be unfair to the prosecution’s case due to their beliefs and professions.

In conclusion, there is not enough evidence for the appellate court to reverse the trial court’s decision. The trial court rule was not clearly erroneous and we must, therefore, respect their decision when denying the Batson violation.

Counterpoint 2: the trial court did not err in denying the motion for a new trial based on an alleged Brady violation and ineffective assistance of counsel.

Brady v Maryland, 373 U.S. 83 (1964) is the founding case for Brady violations.

It entails a prosecution team withholding confessions from the defense and violated due process "we now hold that the suppression by the prosecution of evidence that is favorable to the accused upon request violates due process" this has been a standard since and it is the appellants contention that the failure to disclose the complainants traffic tickets violated Mr. Rush's due process and thus deserves a retrial. However, we the appellee contend that the failure to disclose said traffic tickets is insufficient to warrant a retrial based on the three-prong test established in **Ex Parte Richardson 70 S.W.3d 865(Tex.crim. App 2002)**. In order to claim that due process was violated the appellant must first show that the state failed to disclose evidence regardless of good or bad faith, second, they must show that the withheld evidence is favorable to the accused and finally, the appellant must show that the evidence is material "that is, there us a reasonable probability that had the evidence been disclosed the outcome of the trial would have been different." We the appellee raise counterpoints on prong 1 and 2, note that when even 1 prong of the test is not satisfied it is not sufficient to establish a Brady violation. The prosecution had no duty to disclose evidence that the defense could have accessed from other sources

(see **Reed v. State, Tex.App.-Fort worth 2016 unpub.**). Traffic tickets are readily accessible and any defense attorney could have found the evidence at question thus not only did the prosecution team not have the tickets but the defense could be reasonably expected to obtain them without assistance from the prosecution thus the prosecutorial team had no duty to disclose the tickets. Furthermore, the 3rd prong of the Richardson test is not satisfied. Ex parte Richardson requires the

suppression of the evidence to be material. The record does not reflect what the traffic tickets are for in this specific case. Traffic tickets come from a variety of things ie. busted taillights outdated tags, etc and simply because he has tickets we cannot come up with an accurate judgment of the complainant so we cannot say that the tickets could be sufficient to undermine the outcome of the proceeding. Furthermore simply because he violated traffic laws in the past the jury cannot determine that he had a fault in the traffic collision in this case let alone the DUI portion of the trial. **Hampton v. State** 86 S.W 3d 603 (2002) engenders the scrutiny we use when considering materiality its rules that "the mere possibility that an item of undisclosed information might have helped the defense does not establish materiality.

Secondly, it is the appellant's contention that the attorney's trial performance was ineffective and thus should be a retrial on those grounds. **Strickland v. Washington** 466 U.S. 668 (1984) gives us a test to apply for ineffective assistance. The appellant must first show that the attorney's performance was deficient and second that the counsel's deficient performance prejudiced his defense Furthermore **Blanko v. State** (Tex. App.-El Paso, 2015) requires that deficient performance to be material to the case. Strickland recognizes the vast amount of choices afforded to the defense at trial "there are no strict standards for what is reasonable but there are only guidelines... Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have when making decisions. The court recognized the wide array of decisions a counsel can make and thus requires us not to strictly scrutinize the counsel's performance in our case. We must also take into account

professional norms among attorneys in municipal court, it is not uncommon for attorneys to take on multiple cases because traffic cases are typically quick and don't require much preparation thus we cannot say that the counsel's performance was deficient. Furthermore, any deficiencies the appellant contends are immaterial. All in all the attorneys deficiency is directly related to the importance of the consequences of said deficiency and in this case, if one were to say that the attorney was deficient and that caused him to overlook the traffic tickets we cannot say that the deficiency was material because as we've explained in our Brady argument the traffic tickets are immaterial.

Conclusion

For all the reasons set above we pray that this honorable court upholds the lower court decision in ruling there were no Batson and Brady violations along with the Micheal Morton violation.

In the Court of Criminal Appeals, State of Texas

NO. 19-01234-CR

TORRANCE RUSH, (APPELLANT)

V.

THE STATE OF TEXAS, (APPELLEE)

FROM THE COURT OF APPEALS, SECOND DISTRICT,

AT FORT WORTH

Brief of Appellant

Daniel Sawyers

Abby Park

Coppell YMCA

Creekview High School

TO THE HONORABLE COURT OF APPEALS:

Comes now, the Appellant, Torrance Rush, and files this appeals brief.

Statement of the Case

The Appellant, Torrance Rush, was charged for Minor Driving Under the Influence of Alcohol and Failure to Yield to a Pedestrian. Rush appealed due to alleged State of Texas violations of his Fourteenth and Sixth amendment rights. The Court of Appeals ruled in favor of the State of Texas; however, Rush appealed to the Texas Court of Criminal Appeals.

Statement of Facts

Torrance Rush was arrested for a MDUI and failure to yield to a pedestrian on April 19, 2019. At court, the State reviewed the list of the jury when it was first generated, which consisted of 7 black panelists, 3 whites, 1 Hispanic, and 1 Asian. The State requested a jury shuffle. At jury selection, the State's three preemptory strikes included two of the three remaining black jurors and two of the three remaining females within the strike zone, resulting in an entirely male jury, five jurors who were white, and one who was Asian. Rush's attorney raised a *Batson* challenge. In response, the State provided race neutral reasons for each of the strikes, claiming that Juror 3 worked with young people but Juror 7, a white male, also worked with young children as a middle school teacher and was not struck. Additionally, the defense brought up the diverse makeup of the jury before the State decided to shuffle it. However, the judge determined that there was no *Batson* violation. After court, the victim related to Rush that they had a history of traffic tickets, and due to the newfound information, Rush appealed for new trial.

Issues on Appeal

Counterpoint of Error 1: The trial court erred in denying Rush's *Batson* challenge during *voir dire*.

Counterpoint of Error 2a: The trial court erred in denying Rush's motion for new trial due to an alleged *Brady* violation.

Counterpoint of Error 2b: The trial court erred in denying Rush's motion for new trial due to ineffective assistance of counsel.

I. Considering the totality of circumstances with the evidence available to the court, the trial court erred in denying the defense's *Batson* challenge.

Under *Batson v. Kentucky*, 476 U.S. 79 (1986), no citizen can be disqualified from jury membership because of their race. *Batson* was a landmark case in a continuous ongoing effort to cease the practice of discriminatory actions during *voir dire* during a time when rampant strikes were being laid upon members of racially cognizable groups to give advantages to the acting party. In continuing this effort, *Batson v. Kentucky*, 476 U.S. 79 (1986) laid out a 3 step process in which a *prima facie* showing of racial discrimination is demonstrated against the State, the State responds with a race neutral reason for their question strike(s) and finally the trial court is left to determine whether racial motives were behind the striking actions of the prosecutor. Addressing a *prima facie* showing of discrimination, *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019) lays out six categories of evidence to look for when determining if peremptory strikes were exercised in a discriminatory manner. One of these examples includes "statistical evidence about the prosecutors". The appellant carried out their burden of presenting a "*prima facie*" showing of racial discrimination to the trial court by pointing out that the state struck all the blacks

and females off of the jury thus carrying out their duty of the first prong of *Batson v. Kentucky*, 476 U.S. 79 (1986). With the first step of *Batson v. Kentucky* being carried out, the burden shifted to the state to present race neutral reasons for their strikes.

i. The strike against juror 3 did not have race neutral reasoning and examining the strike under *Flowers v. Mississippi* shows the Court that the State had discriminatory intent in striking her.

The two individuals relevant to the *Batson* challenge in this case are jurors 3 and 9 as the disputed struck jurors. We do not contend the strikes either against juror 11 or 12. Addressing juror 3, the black juror was struck due to supposed potential bias since she worked with students close in age to the defendant in this case. However, when comparing this striking logic with other actions attorney Ms. Crump reasons for striking show clear racial bias. The Supreme Court in *Flowers v. Mississippi* stated, "Comparing prospective jurors who were struck and not struck can be an important step in determining whether a *Batson* violation occurred." *Flowers V. Mississippi*, 139 S.Ct. 2228 (2019). When looking at the strikes through the lens *Flowers v. Mississippi* provides us, discriminatory intent is clearly present. The reasoning the state provided for striking juror 3 was that her experience with youth might interfere with the individual's ability to consider evidence impartially at trial. See *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 328 U.S. 223-224 (1946). However, there was another juror, juror 7, who was a middle school teacher and stated that he also dealt with lower income kids in a troubled school, and yet the State did not take any action to strike juror 7. Juror 7 was a white male, in comparison. If Ms. Crump truly believed that juror 3 possessed a bias due to her

close affiliation with youth, why wouldn't she also believe juror 7 possessed the same bias - possibly even to a higher degree because as he states in *voir dire*, juror 7 deals with "troublemakers" in a "lower income school? It would be reasonable to assume that a middle school teacher would be more sympathetic towards a young defendant whenever they explicitly confirmed that they deal with "troublemakers" daily. Ms. Crump had no idea exactly what kind of children a youth pastor would be interacting with; however she chose to strike juror 3 instead. While alone the strike would qualify to most judges as justified, under the totality of the circumstances presented to the judge, especially the lack of consistency in the State's reasoning for strikes when applying the reasoning to other jurors like juror 7, and taking into account *Flowers v. Mississippi's* holding that "comparing prospective jurors who were struck and not struck can be an important step in determining whether a Batson violation occurred", the strike against juror 3, a *Batson* challenge would be very clearly justified to any judge, and the trial court judges holding that it was not, is clearly erroneous.

ii. The strike against juror 9 did not have race neutral reasons and the reasons provided for the strike were pretextual.

Batson v. Kentucky (Id.) states that "the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purposes. While the questions and statements alone to juror 7 seem nondiscriminatory at first look, when looking at the *voir dire* transcript in conjunction with the states notes there is a clear indication that the State's given reason for striking juror number 7 was pretextual and used to veil discrimination. The given reason by the state for striking juror 9

was that they had anti-government political views. This contention alone would be questionable when looking at the transcript of *voir dire* seeing as there was no explicit anti-government political views expressed by juror number 9 but when looking at the notes, Ms. Crump had the words BLM written next to juror 9 on their notes even though there was absolutely no mention of the black lives matter movement during *voir dire*. This is a strong indication to an ulterior motive when striking this juror other than the already questionable "anti-government" views the state used to justify their strikes earlier. The state made a disingenuous false correlation with a black juror by grouping them into a completely irrelevant black movement to justify their racially motivated strike.

II. The trial court abused its discretion in denying Rush's motion for a new trial in accordance with the three prong test of *Brady v. Maryland*, 373 U.S. 83 (1963).

i. The State failed to disclose pertinent evidence that was in its possession, thereby fulfilling the first prong of *Brady*.

The State contends that the victim's criminal history was not directly in its possession. However, it is stated in the record that "the prosecutor has direct access to the municipal court's records." *State v. Rush* (Tex. Crim. App. 2018) (*unpublished*). Regardless of whether the State was or was not aware of the evidence, and regardless of whether it was tangibly in its possession, according to *Ex parte Mitchell*, 977 S.W.2d 575, 578 (Tex. Crim. App. 1997), "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."

ii. The withheld evidence is impeachment evidence, fulfilling the second prong of *Brady*.

A record of the victim's criminal history would have raised numerous concerns that went unheard by the jury because of the State's suppression of it. Had the jury known the victim's previous lack of regard for the law, the credibility of his testimony would have been rightfully undermined. Therefore, the withheld evidence should be considered powerful impeachment evidence, and with respect to the first and second prongs of *Brady*, the State had a Constitutional duty to disclose this evidence.

iii. The evidence is material, as it would have resulted in a different and more favorable outcome to Rush, fulfilling the third prong of *Brady*.

The weight of case law requires that the *outcome* be different. *Blanco, Id. Strickland, Id. Melton v. State, 987 S.W.2d 72 (1998). Brady, Id. Ex Parte Richardson, Id. Hampton, Id. Reed v. State, (Tex. App. – Fort Worth 2016)(unpub.)*. A different outcome is not tantamount to a different verdict; for example, a guilty verdict to a 10 year sentence is different than a guilty verdict to a 5 year sentence. The newfound evidence of the victim's traffic tickets indicates two things in particular: the victim's lack of regard for the law and questionability of the reliability of his testimony. Due to these two factors, the jury could have given Rush a more lenient outcome. The ruling in *Brady* states that "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..." *Brady v. Maryland, Id.* When the ruling in *Brady* is applied to this case, the materiality of the

victim's criminal history indicates a violation of Rush's due process rights and entitles him to a new trial.

iv. According to Texas Statute, the evidence is mitigating, entitling Rush to a new trial; Texas Statute can require more than the Constitution.

The Texas Code of Criminal Procedure requires that the State has a duty, even if the Constitution does not require it, to disclose to the defendant any mitigating evidence if it can "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)*. The victim's criminal history comes within the statutory list of mitigating circumstances. *Id.* The presence of this evidence in particular could have reasonably reduced the punishment imposed on Rush. Therefore, the defendant is entitled to a new trial as the State failed in its duty to disclose mitigating evidence, which is required by Texas Statute.

II-B. The trial court abused its discretion in denying Rush's motion for a new trial due to ineffective assistance of counsel because the error does affect the outcome of the case.

i. The performance of Rush's attorney fell below a standard of reasonableness according to the first prong of *Strickland v. Washington, 466 U.S. 668 (1984)*.

It is expected of any reasonable attorney to file a *Michael Morton* request for the victim's criminal history in order to produce potential impeachment evidence, which could be crucial in aiding the defense. Under Texas Code of Criminal Procedure Section 39.14, the defendant or their attorney are allowed to request pre-trial discovery. Knowing this, the attorney should have kept the best interest of

his client in mind and requested this information from the prosecution before trial, as there was a reasonable possibility of there being evidence of pertinence to the case. Thus the attorney's representation fell below the range of reasonable and professional assistance.

ii. But for the deficient performance of his attorney, the outcome of Rush's case would have been different, fulfilling the second prong of *Strickland*.

Under the second prong of *Strickland*, Rush 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." *Strickland, Id; Thompson, 9 S.W.3d at 812*. "Reasonable probability" is that which is "sufficient to undermine confidence in the outcome." In accordance with this definition, there indeed was a reasonable probability that had Rush's attorney requested the victim's criminal history as evidence, the outcome would have been more favorable towards Rush (as explored in my earlier points). The jury would be inclined to favor Rush more than they had in the absence of such evidence.

Conclusion

In conclusion, the trial court erred in denying Rush's *Batson* challenge during *voir dire*. In addition, the trial court erred in denying Rush's motion for a new trial due to an alleged *Brady* violation, and in denying Rush's motion for a new trial due to ineffective assistance of counsel.

Prayer

For these reasons, we pray that this court reverses and remands the decision of the lower court and rules in favor of the Appellant.

Respectfully submitted,

Daniel Sawyers

Abby Park

Attorneys for Appellant

Coppell YMCA

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In the Court of Criminal Appeals, State of Texas

NO. 19-01234-CR

TORRANCE RUSH, (APPELLANT)

V.

THE STATE OF TEXAS, (APPELLEE)

FROM THE COURT OF APPEALS, SECOND DISTRICT,

AT FORT WORTH

Brief of Appellee

Daniel Sawyers

Abby Park

Coppell YMCA

Creekview High School

TO THE HONORABLE COURT OF APPEALS:

Comes now, the State of Texas, and files this appeals brief.

Statement of the Case

Torrance Rush, the Appellant, was charged for Minor Driving Under the Influence of Alcohol and Failure to Yield to a Pedestrian. Rush appealed due to alleged State of Texas violations of his Fourteenth and Sixth amendment rights. The Court of Appeals ruled in favor of the State of Texas; however, Rush appealed to the Texas Court of Criminal Appeals.

Statement of Facts

Torrance Rush was arrested for a MDUI and failure to yield to a pedestrian on April 19, 2019. At court during jury selection, the State's three preemptory strikes included two of the three remaining black jurors and two of the three remaining females within the strike zone; in response to a *Batson* challenge, the State provided race neutral reasons for each strike. The State claimed that Juror 3 worked with young people and Juror 9 had "antigovernment" political beliefs, and thus both might be more lenient to Rush. The Judge determined that there was no *Batson* violation. After court, the victim related to Rush that they had a history of traffic tickets, and due to the newfound information, Rush appealed for new trial.

Issues on Appeal

Point of Error 1: The trial court did not err in denying Rush's *Batson* challenge during *voir dire*.

Point of Error 2a: The trial court did not err in denying Rush's motion for new trial due to an alleged *Brady* violation.

Point of Error 2b: The trial court did not err in denying Rush's motion for new trial due to ineffective assistance of counsel.

I-A There is legitimate race neutral reasons for the states strikes

The two disputed jury members in this case are jury members 9 and jury member number 3 on a 12 person jury panel where both the prosecution and defence were offered 3 peremptory strikes. While the appellants would have you believe that ms. Crump had racially motivated reasons for striking these jury members there is ample evidence to suggest to a judge that the states proffered reasons for the strikes were legitimate. Thiel v. Southern Pacific Company states that competence to serve on a jury ultimately depends on an assessment of individual qualifications and ability to impartially consider evidence presented at trial. Ultimately as long as there is any non race or gender based reason for the state to believe that a jury member in the strike zone might have trouble "impartially considering evidence at trial", the strikes do not constitute a Batson challenge. Focusing on jury member number 3, during her interaction with Ms. Crump during voir dire, she stated that she worked as an associate youth pastor at a church. Keeping in mind that the defendant in this case was a minor, the concern that a jury member who worked in a field dealing with youth might be more lenient on the defendant is a completely legitimate and race neutral concern. While it is true that there was another jury member, jury member number 7 who stated that they also worked with children as he were a middle school teacher, there are many non racially motivated reasons for Ms. Crump to strike jury member number 3 over jury member number 7, for example the state could have reasoned that since a youth minister would be more likely to work with children of all ages, which more

importantly included high school aged children, she would be more likely to be lenient since she would deal with more kids closer in age to the defendant than a middle school teacher as we know the defendant in this case is at least 16 since he was not charged for driving without a license. The idea that the state has that we should automatically conclude racial discriminatory practice because Ms. Crump chose to strike jury member number 3 instead of 7 is irrational and refuses to take into account a number of plausible circumstances that would not constitute a Batson challenge. There are simply too many lines of reasoning applicable to striking jury member number 3 over jury member number 7 that concluding that there were racially motivated reasonings behind the strike is irrational. Moving to the striking of jury member number 9 using Thiel v. Pacific Company's competence test, Ms. Crump would also have good non racially motivated reason to believe that jury member 9's ability to impartially consider evidence at trial maybe lacking. During the second prong of the Batson test where the state provides a response for their striking of the contested jury member, Ms. Crump stated her concern about jury member 9's anti government political beliefs and looking at the transcripts of voir dire would back this claim up. When asked about her professional goals by Ms. Crump she responded that she wished to "end the racial enslavement that is happening along our southern border" and "any type of structure built along the border is a monument to slavery which will increase climate change". These are objectively radical anti government political beliefs held by jury member number 9, and just as jury member number 3, the states concern about the members ability to impartially consider evidence at trial is completely legitimate and the trial judges finding that these concerns were legitimate was not clearly erroneous.

I-B. There is not enough evidence pointing towards racial discrimination to conclude that the trial court's decision was clearly erroneous.

According to *Vargas v. State*, 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 light most favorable to the ruling. Even if there was some evidence that might suggest racial discrimination, there would not be enough to determine that the trial judge's decision in this case was clearly erroneous especially when looking at the evidence in the light most favorable to the ruling as *Vargas v. State* requires us to. The court in making the ruling of *Batson* would have not intended a *Batson* challenge to be upheld by little bits of disputable evidence that are not connected in any way. Comparing this case to the fact pattern in *Flowers v. Mississippi* shows us that the little evidence the appellants may conjure would be incomparable to the clear multiple pieces of connected evidence in those cases that directly pointed to racial discrimination. In *Flowers v. Mississippi* there was a long track record with the same prosecutors' misconduct resulting in most of the 6 retrials that took place, secondly during this track record the state used its peremptory strikes to attempt to strike 41 out of the 42 black prospective jurors before during these trials and also engaged in extreme disparate questioning of black jurors. Comparatively, in this case, there is no track record at all to suggest racial discrimination, the state only engaged in striking 3 black jury members on a 12 jury panelist in which one of those strikes, were for cause, which is far from striking 41 out of 42 black panelist placed before them, and there is hardly any evidence for disparate questioning,

especially not to the same degree as demonstrated in *Flowers*. Even if this court does find some evidence of disparate questioning according to *Flowers v. Mississippi* “disparate questioning or investigation alone does not constitute a Batson violation”. In almost every imaginable circumstance, the fact pattern in this case pales in comparison to the circumstances surrounding *Flowers v. Mississippi*.

II. The trial court did not abuse its discretion in denying Rush’s motion for a new trial due to an alleged *Brady* violation because the information in question was not compelling enough to change the verdict or outcome of the case significantly in any way.

i. Rush failed to fulfill the three prongs in accordance with the approach within *Brady v. Maryland, 373 U.S. 83 (1963)*.

In order to establish a violation of the Sixth Amendment, *Brady v. Maryland* requires a three-step burden on the defendant in particular: (1) to prove that the prosecution failed to disclose evidence within its possession, (2) to prove that the evidence is exculpatory or impeachment, (3) to prove that the withheld evidence is material to the case.

The first prong, whether the State failed to disclose evidence within its possession, is clearly unfulfilled. According to the prosecutor, the State could not disclose the evidence as the victim’s criminal history was not in its possession. Additionally, there were fifty cases scheduled for jury that day and no reasonable way for the State to review the history of every witness on all these cases.

The second prong, determining whether the withheld evidence is exculpatory or impeachment evidence, is also unfulfilled. The evidence cannot be exculpatory because it does not exonerate Rush; his crime is not affected by the simple

discovery of the victim's traffic history. The victim's traffic history has no effect on whether Rush committed the crime, and arguably it should have no effect on the outcome of the case as well. The evidence is impeachment evidence, but under the *Brady* rule, evidence other than exculpatory evidence must be suppressed. Given that the evidence is not exculpatory, the second prong cannot be demonstrated.

As the evidence is not material or compelling enough to change the outcome of the case in any significant way, the third prong is not fulfilled as well. The likelihood of the crime being committed is not affected by the evidence, particularly since the victim's traffic tickets do not have influence over whether Rush had been drinking while driving. According to *Ex Parte Richardson*, 70 S.W. 3d 865 (Tex. Crim. App. 2002), a *Brady* violation is only valid if "there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different." The information Rush bases his argument for the alleged *Brady* violation on is not compelling enough to change the case's outcome in any way; even if the victim's past traffic tickets had been present for the jury to consider, the crime that Rush committed still would not intrinsically change. Rush still had the duty to yield to the victim under law. Therefore, the traffic tickets are not pertinent in this context, as the likelihood of the crime having been committed does not change, the MDUI in particular. Additionally, it is unclear in this case whether the tickets were for a bicycle specifically.

II-B. The trial court did not err in denying Rush's motion for a new trial due to ineffective assistance of counsel because the error does not affect the outcome of the case.

i. As the victim's traffic records were not material, the alleged error by Rush's lawyer is irrelevant, and not below a standard of reasonableness.

According to *Blanco v. State*, (Tex. App. – El Paso, 2015)(unpub.), appellant must “satisfy both *Strickland* components, and the failure to show either deficient performance or prejudice will defeat an ineffectiveness claim.” The appellant has the burden to prove the first prong of *Strickland v. Washington*, 266 U.S. 668 (1984), which states that “the attorney’s performance must be shown to have fallen below an objective standard of reasonableness”. The record states that attorneys do not generally submit discovery requests when handling matters in Municipal Court. Additionally, according to *Blanco v. State*, “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.’” This one alleged error cannot prove incompetence when there is a range of reasonable choices an attorney can make, including trial strategy. There are several strategic reasons as to why the attorney might have made this decision; for example, he might have reasonably felt that it would be a waste of time perhaps because he did not feel that the tickets were a priority, especially since the likelihood of getting them was not very high. According to the record, even if Rush’s attorney had made a discovery request, it most likely would not have been specific enough to acquire the victim’s prior traffic tickets.

ii. The error is not serious enough as it does not affect the overall outcome of the case.

According to *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." The defense contends that the jury "might" be swayed by the evidence, but a mere whim does not give us substantial certainty that the outcome would have changed. According to *Hampton v. State*, "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." And according to *Strickland*, "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." In these ways, the appellant has not met his burden of demonstrating the alleged ineffective assistance of his attorney.

Conclusion

In conclusion, the trial court did not err in denying Rush's Batson challenge during *voir dire*. In addition, the trial court did not err in denying Rush's motion for new trial due to an alleged Brady violation, and in denying Rush's motion for new trial due to ineffective assistance of counsel.

Prayer

Given that the appellant has failed to fulfill both the *Brady* and *Strickland* tests, we pray that this court upholds the decision of the lower court and rules in favor of the Appellee.

Respectfully submitted,

Daniel Sawyers

Abby Park

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Coppell YMCA

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In the Texas Court of Appeals, State of Texas

NO. 03-18-01234-CR

TORRANCE RUSH, (APPELLANT)

V.

THE STATE OF TEXAS, (APPELLEE)

FROM THE COURT OF APPEALS, THIRD DISTRICT,

AT FORT WORTH

Brief of Appellant

Alexis Phan

Angela Nguyen

Coppell YMCA

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Introduction

This brief is directed to the Texas Court of Appeals by the Appellant, Torrance Rush.

Statement of the Case

Rush was found guilty in the Fort Worth Municipal Court with Class C Misdemeanor offenses of Minor Driving Under the Influence of Alcohol and Failure to Yield to a Pedestrian. He appealed to the County Court at Law in Tarrant County and the Texas Court of Appeals, second district at Fort Worth, which affirmed the trial court's actions.

Statement of the Facts

On April 19, 2019, a vehicle driven by Torrance Rush and a cycling pedestrian met at an intersection in downtown Fort Worth and the case was scheduled for a jury trial. The appellant was brought up to counsel table for jury selection. Among the jury list were 12 jurors: 7 blacks, 3 whites, 1 Hispanic and 1 Asian. The jurors were also 8 women and 4 men. At the jury selection phase, Rush's attorney objected to the State's use of their three peremptory strikes, claiming that the strikes were discriminatory based on both race and gender. The Judge determined that there was no Batson violation and the trial continued. The jury found the defendant guilty and issued punishment in the form of a fine, counseling classes related to alcohol abuse and a driver's safety course.

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Issues on Appeal

The following issues upon appeal are:

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

AND
2. Whether the trial court erred in denying the appellant's motion for a new trial due to an alleged Brady violation or ineffective assistance of counsel.

Point of Error 1: The trial court was justified in denying appellee's Batson challenge during voir dire.

During jury selection, an attorney is allowed three peremptory strikes against potential jurors. In a Batson challenge, the opposing attorney argues that the strikes were made because of a person's race or gender. The first attorney will then have to list their reasons for the strikes.

When resolving Batson challenges, courts use a three step test. *Batson v. Kentucky*, 476 U.S. 79 (1986). "First, the [appellee] 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 appellee bears the burden of persuasion and must convince the court of the racial discrimination.

Under the first prong, "the [appellant] must make a prima facie case of racial or gender discrimination." *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019). In the case before the court, there is neither a racial or gender discrimination case.

Under *Batson v. Kentucky*, “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.” Furthermore, “those on the venire must be “indifferently chosen,” to secure the defendant’s right under the Fourteenth Amendment to “protection of life and liberty against race or color prejudice.” *Strauder*.

Even if the court were to find that there is a *prima facie* case of racial or gender discrimination, the state can still offer a racial or gender neutral explanation. Although the venire was fully white, there was no racial discrimination because Juror 11, a white male, was also struck. Although the venire all identified as male, there was no gender discrimination because one juror was transgendered and originally female.

If a *prima facie* case has been made, then the court moves on to the second prong of the *Batson* test. Under the second prong, the State to articulate a race-neutral reason for its strike.

Under the third prong, the trial court must then decide whether the defendant has proved purposeful racial discrimination. There was no purposeful racial discrimination because the State provided a racial and gender neutral explanation for the preemptory strikes.

In total for the first point of error, the trial court was justified in denying appellee’s *Batson* challenge during *voir dire*.

Point of Error 2: The trial court erred in denying appellant’s motion for a new trial due to an alleged Brady violation and denying appellant’s motion for a new trial due to ineffective assistance of counsel.

Looking at the first point of the second issue, we must look to see if there was a Brady violation. When looking at the alleged Brady violation, we look to whether the prosecutor had a duty to disclose the evidence to the defendant before the trial *Brady v. Maryland*. The Brady violation can be used as a three prong test to see if there was a complete violation *Hampton v. State*. The first prong of the test is looking to see if the state had failed to disclose the evidence they were aware of. The second prong of the process is looking to see if the evidence was either exculpatory or impeachment evidence. The third, and last, prong of the process is looking to see if the evidence was material or immaterial. For there to be a valid Brady violation there must be a violation of all three steps *Hampton v. State*.

In today's case, there was indeed a violation of the Brady rule. Looking to the first prong of the test, if the state failed to disclose evidence that they were aware of. *Brady v. Maryland* holds that if there is evidence that the state is aware of, they must disclose that evidence to the court. The state was aware of the defendant's past records and failed to provide the court with that information. Looking to the second prong of the test, which is looking to see if the evidence was either exculpatory or impeachment evidence. The evidence was impeachment evidence because it alters the way that the court might look at the defendant's character.

The third, and last, step of the process is looking to see if the evidence was material or immaterial. The evidence was material because it was impeachment evidence.

The second part of this issue deals with the ineffective assistance of counsel. The attorney for Rush was not well prepared or given the proper materials. This burden cannot be placed on the attorney, but there was still a violation of the Micheal Morton rule because of these reasons.

Looking at the results of the test, it can be seen that all three prongs can be proven to be violated and there was an ineffective assistance of counsel. Therefore creating a complete Brady violation and showing that the court did indeed err in denying appellee's motion for a new trial.

Conclusion

In conclusion, the trial court did indeed err in denying the appellee's batson challenge, appellee's motion for a new trial due to an alleged Brady violation and appellee's motion for a new trial due to ineffective assistance of counsel.

Prayer

For these reasons, we pray that this court reverses and remands the decision of the lower court and rules in favor of the Appellee.

Alexis Phan

Angela Nguyen

Attorneys for Appellee

Coppell YMCA

Creekview High School

In the Texas Court of Appeals, State of Texas

NO. 03-18-01234-CR

TORRANCE RUSH, (APPELLANT)

V.

THE STATE OF TEXAS, (APPELLEE)

FROM THE COURT OF APPEALS, THIRD DISTRICT,

AT FORT WORTH

Brief of Appellee

Alexis Phan

Angela Nguyen

Coppell YMCA

Creekview High School

Introduction

This brief is directed to the Texas Court of Appeals by the Appellee, the State of Texas.

Statement of the Case

Rush was found guilty in the Fort Worth Municipal Court with Class C Misdemeanor offenses of Minor Driving Under the Influence of Alcohol and Failure to Yield to a Pedestrian. He appealed to the County Court at Law in Tarrant County and the Texas Court of Appeals, second district at Fort Worth, which affirmed with the trial court's actions.

Statement of the Facts

On April 19, 2019, a vehicle driven by Torrance Rush and a cycling pedestrian met at an intersection in downtown Fort Worth and the case was scheduled for a jury trial. The appellant was brought up to counsel table for jury selection. Among the jury list were 12 jurors: 7 blacks, 3 whites, 1 Hispanic and 1 Asian. The jurors were also 8 women and 4 men. At the jury selection phase, Rush's attorney objected to the State's use of their three peremptory strikes, claiming that the strikes were discriminatory based on both race and gender. The Judge determined that there was no Batson violation and the trial continued. The jury found the defendant guilty and issued punishment in the form of a fine, counseling classes related to alcohol abuse and a driver's safety course.

Issues on Appeal

The following issues upon appeal are:

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

AND

2. Whether the trial court erred in denying the appellant's motion for a new trial due to an alleged Brady violation or ineffective assistance of counsel.

Point of Error 1: The trial court was justified in denying appellee's Batson challenge during voir dire.

During jury selection, an attorney is allowed three peremptory strikes against potential jurors. In a Batson challenge, the opposing attorney argues that the strikes were made because of a person's race or gender. The first attorney will then have to list their reasons for the strikes.

When resolving Batson challenges, courts use a three step test. *Batson v. Kentucky*, 476 U.S. 79 (1986). "First, the [appellee] 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 appellee bears the burden of persuasion and must convince the court of the racial discrimination.

Under the first prong, "the [appellant] must make a prima facie case of racial or gender discrimination." *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019). In the case before the court, there is neither a racial or gender discrimination case.

Under *Batson v. Kentucky*, "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." Furthermore, "those on the venire must be "indifferently chosen," to secure the defendant's right under the Fourteenth Amendment to "protection of life and liberty against race or color prejudice." Strauder.

Even if the court were to find that there is a prima facie case of racial or gender discrimination, the state can still offer a racial or gender neutral explanation. Although the venire was fully white, there was no racial discrimination because Juror 11, a white male, was also struck. Although the venire all identified as male, there was no gender discrimination because one juror was transgendered and originally female.

If a prima facie case has been made, then the court moves on to the second prong of the Batson test. Under the second prong, the State to articulate a race-neutral reason for its strike.

Under the third prong, the trial court must then decide whether the defendant has proved purposeful racial discrimination. There was no purposeful racial discrimination because the State provided a racial and gender neutral explanation for the preemptory strikes.

In total for the first point of error, the trial court was justified in denying appellee's Batson challenge during voir dire.

Point of Error 2: The trial court did not err in denying appellant's motion for a new trial due to an alleged Brady violation and denying appellant's motion for a new trial due to ineffective assistance of counsel.

The first part of the second issue deals with the Brady violation. When looking at the alleged Brady violation, we look to whether the prosecutor had a duty to disclose the evidence to the defendant before the trial *Brady v. Maryland*. The Brady violation requires a 3 step process to show if there was a complete violation of the rule *Hampton v. State*. The first step of the process is looking to see if the state failed to disclose the evidence they were aware of. The second step of the process is looking to see if the evidence was either exculpatory or impeachment evidence. The third, and last, step of the process is looking to see if the evidence was material or immaterial. For there to be a Brady violation there must be a violation of all three steps *Hampton v. State*.

In today's case, there was no complete violation of the Brady rule. This can be seen when looking at each step of the process. In the first step, opposing counsel can argue that the state failed to disclose evidence that they were aware of. Although it is true that there were facts left out, the State did not find the compelling need to provide the information about the previous tickets and criminal records because it would not have changed the decision of the court. Because the evidence would not have changed the decision of the court, it does not violate the second step of the process. Looking to the third and last step of the process, we look to see if the evidence is material or immaterial. In this case, it is immaterial. Not only is the evidence immaterial but for there to be an alleged Brady violation, it must first pass the first two steps of the process as well, which in this case, it does not and therefore no complete violation.

The second part of the second issue deals with ineffective assistance of counsel, or otherwise referred to as the Micheal Morton violation. In this issue, we

look to whether the defense attorney had a duty to request the information from the prosecutor pre-trial.

When applying this rule to this case, we look to the facts on how much the attorney knew. In today's case, the attorney was not properly prepared to help counsel the defendant. That burden cannot be placed on the attorney, since he was given the case only minutes before the trial started.

Due to these reasons, there was no violation to either the Brady or the Micheal Morton Rule.

Conclusion

In conclusion, the trial court did not err in denying the appellee's batson challenge, appellee's motion for a new trial due to an alleged Brady violation and appellee's motion for a new trial due to ineffective assistance of counsel.

Prayer

For these reasons, we pray that this court reverses and remands the decision of the lower court and rules in favor of the Appellant.

Alexis Phan
Angela Nguyen
Attorneys for Appellant
Coppell YMCA
Creekview High School

**IN THE COURT OF CRIMINAL APPEALS, STATE OF
TEXAS**

NO. 19-01234-CR

Torrance Rush, Appellant

V.

The State of Texas, Appellee

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

Brief for Torrance Rush (Appellant)

Lauren Nutall

Niset Moreno

Judge Barefoot Sanders Law Magnet

TO THE HONORABLE TEXAS COURT OF CRIMINAL APPEAL:

STATEMENT OF THE CASE

Torrance Rush was charged with the Class C Misdemeanor of Minor Driving Under the Influence of Alcohol and Failure to Yield to a Pedestrian. A jury trial found Rush found guilty of both offenses. Rush appeals this conviction on 2 points of error, the first being a Batson challenge and the second a Brady and Michael Morton violation. Appellant, Torrance Rush petitions this court for a new trial.

STATEMENT OF FACTS

Appellant, Torrance Rush, was involved in a car accident with a cyclist at an intersection in Fort Worth. As Mr. Rush turned right, he collided with the complainant, H. Spokes. Despite evidence to the contrary, Spokes claimed that he was a pedestrian at the time which gave him the right of way. The appellant was issued a Class C Misdemeanor citation and charged with DUI. A jury trial ensued. When the Voir Dire panel arrived, 7 of the first 12 veniremen were black, suggesting a majority of the 6-person jury would be black. When the prosecutor saw the panel, she requested a jury shuffle. The result was only 4 blacks were in the "strike zone." By the time jury selection was over, prosecution had used $\frac{2}{3}$ of its strikes against black women, leaving an all male jury with no blacks. After raising a Batson challenge, the trial judge concluded that no Batson violation occurred. Rush was found guilty on both counts. After the trial, complainant Spokes said to Rush, "I'm sure glad y'all didn't bring up all my traffic tickets. I wouldn't want the jury to know how bad of a driver I am." Prior to that moment, the defense was unaware of the complainant's track record for ignoring traffic laws. Rush's attorney then filed a

Brady motion for a new trial on grounds the prosecution failed to disclose this exculpatory evidence. After being denied the request, Rush fired his attorney.

ISSUES ON APPEAL

Point of Error 1: The trial court erred in denying appellant's *Batson* challenge during *voir dire* because the evidence presented clearly established that the State of Texas exercised its peremptory strikes in a racially discriminatory manner.

Point of Error 2(a): The trial court erred in denying the Brady motion because the state withheld evidence that would have impeached the complainant.

Point of Error 3: The trial court erred in denying the appellant's motion for a new trial due to ineffective assistance of counsel caused by Mr. Rush's attorney failing to file a Michael Morton request which prejudiced the defense's case and deprived Mr. Rush of a fair Trial.

ARGUMENT

Point of Error 1: The trial court erred in denying appellant's *Batson* challenge during *voir dire* because the evidence presented clearly established that the State of Texas exercised its peremptory strikes in a racially discriminatory manner.

_____The petitioner Torrance Rush received an unfair trial due to the State's use of peremptory strikes. ***Martin v. Texas*** states that, "the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." Based on the facts of this case, the State abused its peremptory strikes by purposefully striking black jurors. *Whitus v. Georgia* states, the defendant must prove the existence of purposeful discrimination when alleging a discriminatory selection of potential jurors. ***Whitus v. Georgia, 385 U.S. at U.S. 550 (1967)***. Furthermore, all relevant circumstances must be taken into consideration when determining whether the defendant has made the requisite prima case of discrimination. ***Batson v. Kentucky, 476 U.S. 79 (1986)***. There are six categories in which a defendant may prove that the State used its peremptory strikes in a racially discriminatory manner. ***Flowers v. Mississippi, 139 S.Ct. 2228 (2019)***. Once the defendant has made a prima facie showing, the State must provide a race-neutral explanation for challenging black jurors; however, this explanation does not need to reach the level of justification for a challenge for cause. ***See McCray v. Abrams, 750 F.2d at 1132***. Following the State's explanation, the trial court must decide whether the defendant has successfully proven racial discrimination.

The first element is statistical evidence about the prosecutor's use of peremptory strikes against prospective black jurors. The state struck Juror 3 (black female retiree), Juror 9 (black female college student), and Juror 12 (white male with traffic tickets). Using 2 of its 3 strikes to remove black women from the jury is statistical evidence of bias.

The second element in establishing whether the State exercised its peremptory strikes in a racially discriminatory manner is evidence of disparate questioning and investigation of black and white prospective jurors. **Flowers** During the *voir dire* examination, the prosecutor began her questioning at Juror 3, Diana Marva, the first black juror. After Marva stated that she worked as an associate youth pastor, Ms. Crump asked the jury panel generally if anybody else had similar work experience. Following various interactions, the prosecutor directed the next question to Juror 8, Ganizani Mukami, who is a black male. Because of his limited understanding of English, he was struck for cause. Ms. Crump then directed her attention to the next black person, Juror 9, Eloise Triplet. During the entirety of the *voir dire* questioning, Ms. Crump directed specific questions to a total of four potential jurors, three of which were black, and the fourth of which had a personal history with Ms. Crump. This pattern of questioning indicates that the State purposefully avoided white jurors and instead questioned primarily black jurors.

The third element is comparison between the black struck jurors and the white jurors that remained. Juror 3 (black female) and Juror 7 (white male) both had a history of working with children. And although the state claimed it struck Juror 3 for this reason, the state kept Juror 7. Thus the state treated the jurors 3 and 7 differently, despite their obvious similarities. If the state had a genuine concern about jurors who work with children, she would have struck both jurors, not just the black one.

The fourth element is misrepresentation of the record by the prosecutor when defending the strikes. When presenting to the judge her reasons for striking Juror 3 (a black female), the prosecutor incorrectly stated that Juror 3 was a school

teacher working with students close in age to the defendant. In truth, Juror 3 had previously worked with her church and was involved with youth of unspecified ages. Thus, the prosecutor misrepresented the facts in the Batson hearing.

The fifth element is relevant history of the State's peremptory strikes in the past. However, the record does not include Ms. Crumps history of using strikes.

The sixth element is any other relevant circumstances that bear upon the issue of racial discrimination. Beginning with the request for a shuffle previously described and continuing through the notes on the States jury list (which includes a reference to Black Lives Matter next to a black jurors name), an examination of the prosecuting attorney's actions throughout Mr. Rush's trial indicate a racially discriminatory manner during the jury selection process enough to evoke skepticism.

The harm from discriminatory jury selection extends beyond that inflicted on the defendant to the excluded juror and the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. ***Batson*** By removing black jurors from the jury selection panel, the State denied the community, the jurors and Torrance Rush a fair jury, comprised of his peers.

Point of Error 2(a): The trial court erred in denying the Brady motion because the state withheld evidence that would have impeached the complainant and likely changed the verdict.

In ***Brady v. Maryland, 373 U.S. 83 (1963)***, the court held that the suppression of evidence favorable to the defendant violates due process guaranteed

to him by the 6th Amendment of the United States Constitution. Texas adopted this rule in Texas Code of Criminal Procedure 39.14. To prove a Brady Violation under this code, we have been given a three prong test: (1) the state failed to disclose evidence in its possession, (2) the withheld evidence is either impeachment or exculpatory, and that (3) the evidence was material. **Hampton v. State, 86 S.W.3d 603.**

To address the first prong, when the complainant disclosed information about his driving record to the Appellant, Rush was able to obtain these records from the Municipal Courts records. The prosecution has direct access to the Municipal Court's records. Moreover **Reed v. State** defines the prosecution team to include law enforcement, whose duty is to enter such traffic violations into record. Therefore if we are including "the state" described as the prosecutors and law enforcement, then by those standards, the state had possession of the complainant's driving record.

The state claims that just because access was afforded to them does not constitute possession but this misstates the state's burden to investigate its witnesses. Justice requires, and this court should hold, that the state has an absolute duty to investigate its witness' credibility, including a background check for criminal conviction. Allowing the state to go forward without any such investigation undermines justice and is contrary to the prosecution duty described in Brady. **supra**. In this case, the state alleging that the 50 cases scheduled for trial by jury restricted the state from reviewing the history of each witness cannot excuse them from this burden. The complainant's criminal record was crucial to his

credibility. **Ex Parte Richardson, 70 S.W.3d 865(Texas Crim. App. 2002), Hampton v. State, 86 S.W. 3d 603 (2002).**

The second prong requires that the evidence be exculpatory. This Court found in **Ex Parte Richardson, 70 S.W.3d 865(Texas Crim. App. 2002),** defined exculpatory evidence as having a "sufficient probability to undermine confidence in the outcome of the proceeding" and includes impeaching evidence,. Torrance Rush was charged with a traffic violation. However, the information discovered after the trial shows complainant disrespected traffic laws on a frequent basis. This evidence creates a reasonable doubt as to the credibility of his claim that he was following the law at the time of the accident. **Tex. C. Crim. Pro. 39.14** states that the state must disclose any evidence having "any matter involved" and that would "tend to negate the guilt of the defendant." It is highly unlikely that the state was not predisposed to this information, and it is evident that this information was exculpatory..

The third prong deals with materiality. **Hampton v. State, 86 S.W.3d 603, 612 (Tex. Crim App. 2002),** states "a determination concerning the materiality prong of Brady involves balancing the strength of the exculpatory evidence against the evidence supporting conviction." As Justice Alamin said in his dissent in the Court below, the complainant's previous record is essential to determining this case because it shows a tendency for the complainant to not obey traffic laws making it more possible that the incident was caused by the complainant not Mr. Rush. The only evidence in the record that complainant was a pedestrian was given by the complainant himself. Much of the evidence contradicted that testimony, especially the speed he was traveling, and the fact the bike was between his legs as

he lay on the ground after the accident. Nonetheless, at the end of this swearing match, the jury believed the complainant. Had the jury heard the evidence impeaching the complainant, it likely would have changed the outcome of this swearing match, and it probably would have created a reasonable doubt as to Mr. Rush's guilty, satisfying **Hampton's** standard.

Point of Error 3: The trial court erred in denying the appellant's motion for a new trial due to ineffective assistance of counsel caused by Mr. Rush's attorney failing to file a Michael Morton request which prejudiced the defense's case and deprived Mr. Rush of a fair Trial.

Strickland v. State, 266 U.S. 668 (1984), offers a two prong test in order to establish ineffective assistance of counsel: (1) 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. To address the first prong, Mr. Rush's Trial Attorney failed to discover the complainant's criminal history by either filing a Michael Morton request for the complainant's criminal history under **Texas Code of Criminal Procedure Section 39.14** or by failing to research the complainant himself. If filed, the request could have informed the defense on the complainant's driving record and aided defense's strategy to perform well during trial. Without this evidence, the attorney did not work effectively in advocating for Mr. Rush. This error led to Mr. Rush conviction and as mentioned before, if the evidence were to be presented to the jury, it would have created a reasonable doubt as to Appellant's guilt. **Melton v. State, 987 S.W.2d 72 (1998)** clearly states that counsel had a "duty to make an independent

investigation of the facts of his clients case and prepare for trial.” Which if Mr. Rush’s Trial Attorney did he would have found the complainants driving record. Therefore, the attorney assistance was deficient and caused the outcome of the Appellant’s trial depriving Mr. Rush of a fair trial.

CONCLUSION

During the *Voir Dire* process of the Appellant's trial, the State of Texas exercised its peremptory strikes in a racially discriminatory matter which warrants a Batson violation. The evidence discovered after trial was incriminating and exculpatory and in the possession of the state, meeting the requirement of a Brady violation. Trial counsel was deficient in assisting Appellant, Torrance Rush. Therefore, this court must find in favor of the Appellant and grant a new trial.

PRAYER

With these facts in mind, we pray that this honorable court reverse the decision of the trial court and remand for a new trial.

Respectfully Submitted By The Law Magnet, Attorneys for Appellant

Lauren Nutall and Niset Moreno

**IN THE COURT OF CRIMINAL APPEALS, STATE OF
TEXAS**

NO. 19-01234-CR

Torrance Rush, Appellant

V.

The State of Texas

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

Brief for The State of Texas (Appellee)

Lauren Nutall

Niset Moreno

Judge Barefoot Sanders Law Magnet

TO THE HONORABLE COURT OF APPEALS:

Comes now, The State of Texas, and files this appeals brief.

STATEMENT OF THE CASE

The defendant, Torrance Rush, was charged with the Class C Misdemeanor offenses of Minor Driving Under the Influence of Alcohol and Failure to Yield to a Pedestrian. Mr. Rush received a jury trial and was found guilty of both offenses. The defendant first appealed to the County Court at Law in Tarrant County. County Judge Castillo affirmed the decision of the trial court.

STATEMENT OF FACTS

The defendant, Torrance Rush, was involved in a car accident with a pedestrian at an intersection in Fort Worth. No significant injuries occurred. The appellant was issued a Class C Misdemeanor citation and was considered at fault for the accident. The investigating officer smelled alcohol on Mr. Rush's breath, resulting in a citation for Minor Driving Under the Influence. The appellant received a jury trial. Upon being found guilty of both offenses, Mr. Rush appealed on two issues. The appeals court affirmed the lower court's decision and the appellant once again appealed to the Texas Court of Appeals.

ISSUES ON APPEAL

Counterpoint Number One: The trial court did not err in denying the appellant's *Batson* challenge during *voir dire*

Counterpoint Number Two (A): The trial court did not err in denying the appellant's motion for a new trial due to an alleged *Brady* violation.

Counterpoint Number Two (B): The trial court did not err in denying appellant's motion for a new trial due to ineffective assistance of counsel.

Counterpoint One - The County Criminal Court No. 10 of Tarrant County did not err in denying appellant's *Batson* challenge during *voir dire* because the State was able to provide race neutral reason for using their peremptory strikes.

_____The petitioner, Torrance Rush, claims that the trial court erred in denying his *Batson* challenge during *voir dire*. However, the State of Texas provided race neutral reasons for each peremptory strike, justifying the trial court's decision. To resolve a *Batson* challenge, a three-step process must be fulfilled. ***Flowers v. Mississippi, 139 S.Ct. 2228 (2019)***. First, the defense must make a prima facie case of race discrimination. Once a prima facie showing has been made, the State must provide race neutral reasons for their use of peremptory strikes. The third and final step to resolve a *Batson* challenge is the trial court's decision of whether the defendant has successfully proven racial discrimination.

The burden of proof relies heavily on the defendant who claims to have been denied equal protection due to the State's use of peremptory strikes to exclude members of his own race from the petit jury. ***Swain v. Alabama, 380 U.S. 79 (1986)***.

When determining whether the State exercised its peremptory strikes in a discriminatory manner, there are six categories that must be examined. The first category is the statistical evidence about the prosecutor's use of its strikes.

Although the State used its strikes on two black female jurors and one white male juror, there were legitimate reasons for each strike.

The State first struck Juror 3, a black female named Diana Marva. Marva previously worked with her church and was involved with the youth. Because of this, the prosecutor believed that Ms. Marva would be biased toward the appellant, Mr. Rush. The State then struck Juror 9, another black female named Elouise Triplet. Triplet held extremely liberal views, which the State reasonably assumed would interfere with her judgement during the trial. The third strike was exercised on a white male juror, Juror 12, named Sean Crawford. Crawford and the prosecuting attorney had previous encounters with each other due to the former's frequent traffic violation tickets. Because of this history as well as the possibility that he may be biased toward the defendant, Crawford was struck from the jury. One other juror, Ganizani Mukami, was struck for cause because of reasons unrelated to the *Batson* challenge. All of these reasons provided by the State, however, demonstrate that the trial court did not err in denying the appellant's *Batson* challenge.

The second category that must be examined when determining a *Batson* violation is evidence of disparate questioning. The State's attorney began questioning at Juror 3, Ms. Marva, who was eventually struck. The prosecutor questioned Ms. Marva on her occupation prior to her retirement, to which the juror responded was as a secretary at her church. The prosecutor then asked a general question to the entire panel, requesting information on whether anybody else on the jury has worked with youth. This question led her to interact with Juror 7, Michael Gallegos. Gallegos was a white male who worked as a middle school

teacher. The prosecutor briefly spoke to Gallegos before continuing down the row to Juror 8. Juror 8 was a black male named Ganizani Mukami, who was struck for cause due to his struggle with English.

The prosecutor then spoke to Juror 9, Ms. Triplet, the second juror struck by the State. After speaking to her, the State's attorney skipped to Juror 12, Sean Crawford. Crawford and the prosecutor had previous encounters because Crawford had many traffic tickets. Although the State began questioning at Juror 3, this is the only example of questionable juror hopping. Afterwards, the State's actions during questioning would be seen as reasonable to any judge.

The third category to be examined during a *Batson* challenge is a side by side comparison of back struck jurors and white struck jurors. Ultimately, the State struck two black jurors and one white juror. Upon looking at this, it is evident that this side by side comparison does not exhibit any racial discrimination.

The fourth category is misrepresentation of the record by the prosecutor during the *Batson* hearing. During the *Batson* hearing, the prosecutor incorrectly stated that Juror 3 was a school teacher who worked with students who were close in age to the appellant. In actuality, Juror 3 had previously worked as a secretary at her church. Although the prosecutor mistakenly stated that Juror 3 was a teacher, this was simply a misstatement and does not support the appellant's claim that the State acted in a racially discriminatory manner. An examination of every other piece of evidence supports the trial court's decision.

The fifth category is relevant history of the State's peremptory strikes in the past. The sixth category is any other relevant circumstances that bear upon the issue of racial discrimination. ***Flowers***. An overview of these facts clearly shows

that the State did not violate the *Batson* and that the trial court did not err in its determination.

Counterpoint two(a): The trial court did not error in denying the Brady motion because the state did not withheld evidence that fit the standards set in Brady v. Maryland.

The Supreme Court in **Brady v. Maryland** states that, “the prosecution violates a defendant’s due process rights if it suppresses, either willfully or inadvertently, exculpatory or impeaching evidence that is material.” The State of Texas adopted this rule in **Texas Code of Criminal Procedures 39.14**, and provided a 3 prong test to prove a Brady violation in *Hampton v. State*. (1) that the state failed to disclose evidence in its possession, (2) that the withheld evidence is either impeaching or exculpatory, and (3) that the evidence was material. As the appellant has claimed previously, the evidence of the complainant's driving record would have impeached his testimony. However, in order for a Brady Violation to occur all three prongs must be met.

To address the first prong, Brady explicitly states that the State is required to disclose material, exculpatory, and impeaching evidence that is in its possession. In this case, the state had no previous knowledge on the complainant's driving record and as a result no physical record to disclose. If the state does not hold the evidence in question within its possession, then under Texas Code of Criminal Appeals 39.14 the state has no duty to disclose. According to *Ex. Parte Richardson*, “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.” To prove the first prong the appellant must then prove that the state

either in good or bad faith withheld evidence from the defense, but in this case it is neither.

The second prong states that the evidence must be impeaching or exculpatory. However, just because evidence is impeaching (as in this case) it does not constitute materiality as required by the third prong required for a Brady violation. Materiality, in the Brady sense is defined by Ex Parte Richardson, "the reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different." The appellant claims that the complainant's driving record would exonerate Rush from his conviction. However, the state provided a handful of credible witnesses who testified to Rush's guilt. **Hampton v. State** clearly states "the mere possibility that an item of undisclosed information might have aided the defense, does not establish 'materiality' in the constitutional sense." The lower courts agreed that though this would have aided the defense in creating a pattern of traffic law violations and as a result, would have impeached the complainant's testimony does not show that the outcome would have been any different. Mr. Rush was under the influence, most likely impaired in some forms and is seen failing to yield to a pedestrian. Under Strickland v. State, the appellant has no entitlement to the luck of a decisionmaker, and therefore should have no entitlement to the luck of this court.

Counterpoint two(b): The trial court did not error in denying the appellant's motion for a new trial due to ineffective assistance of counsel Mr. Rush's attorney was under no obligation to file a Michael Morton request, and the law should not question defense strategies.

Secondly, the appellant claims that the court erred in denying an alleged Michael Morton violation due to trial counsel performance being deficient. A Michael Morton claim is the Texas adaptation of the ineffective assistance of counsel claim **Strickland v. State, 266 U.S. 668 (1984)**, offers a two prong test in order to establish ineffective assistance of counsel: (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. The appellant claims that trial counsel's failure to file a discovery request made counsel ineffective. It was mentioned in the lower court's opinion that filing a discovery request was rare. Moreover, *Blanco v. State* is clear when the court states, there is no general constitutional right to discovery in a criminal case." Trial counsel had no obligation to file a discovery request, even if it would have aided his defensive strategies. The Supreme Court held in *Strickland* that the courts are not at liberty to call into question any strategy or performance tactic used by the trial attorney because it is not relevant to preudicial enquiry. Nevertheless, *Craig v. State* adds an additional requirement in an ineffective assistance claim, "any allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness." In this case, nothing in the record suggests that the attorney's performance was deficient in any way.

However, we must consider the second prong, whether the deficient performance prejudiced the defense. *Strickland* claims that in order for an attorney to be ineffective, it must be based on a "preponderance of evidence." Again, the record does not show any evidence of deficiency within counsel's performance, therefore not meeting this standard. Even if counsel had made errors in judgement

as to his performance it would have not been enough to change the outcome of the proceedings. As we mentioned with the Brady issue, the evidence which would convict the appellant would have been sufficient enough to seal the verdict. Any error by counsel, even if professionally unreasonable, would have no effect on judgement. By analyzing the facts of this case, the state can confidently say that the standards of Strickland do not apply to this case, The evidence against Rush's trial attorney are not sufficient to warrant a Michael Morton violation and therefore posed no threat to the appellant receiving a fair trial.

Conclusion:

During the *Voir Dire* process of the State of Texas exercised it peremptory strikes in a race neutral matter which upheld the right to a fair trial, guaranteed to Mr. Rush by the 6th Amendment of the US Constitution. The evidence discovered after trial was not in the possession of the state, nor incriminating or exculpatory; not meeting the requirement of a Brady violation. I accordance to Texas Code of Criminal Procedure Mr. Rush's trial attorney was under no obligation to file a Michael Morton request and therefore should not be blamed for any inconsistencies that prohibited Mr. Rush from receiving a fair trial.

PRAYER

With these facts in mind, we pray that this honorable court uphold the decision of the trial court and remand for a new trial.

Respectfully Submitted By
The Law Magnet,

Attorneys for Appellee

Lauren Nutall

Niset Moreno

IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

NO. 19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellee

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

Brief for Appellant

Keyes Sumner

Dalton Burford

Highland Park High School

To the Honorable Court of Appeals:

Comes now, the State of Texas, and files this appeals brief.

Statement of the Case: Torrance Rush was charged with Minor Driving Under the Influence of Alcohol and Failure to Yield to a Pedestrian and was found guilty on both accounts. Rush petitions the court to reverse this conviction on the count of a Brady/Michael Morton violation and a Batson violation.

Statement of Facts: On April 19, 2019, a vehicle and a pedestrian forcefully met in an intersection in downtown Fort Worth. Neither party experienced significant injuries. Mr Rush was issued a Class C misdemeanor citation for allegedly being responsible for the accident. Alcohol was smelt by the investigating officer on the appellants breath. The officer issued a citation for Minor Driving Under the Influence. During jury selection the State used their peremptory strikes to strike Juror 3 (black female), Juror 9 (black female), and Juror 11 (white male). The defendant made a Batson Challenge. The Judge determined there was no Batson Violation. The jury found Mr Rush guilty of Minor Driving Under the Influence and Failure to Yield to a Pedestrian. Mr Rush appealed the court's verdict.

Issues on Appeal

Counterpoint #1: The trial court erred in denying the defendant's Batson Challenge.

Counterpoint #2: The trial court erred in not disclosing the victims criminal record.

Argument Counterpoint #1: *Batson v. Kentucky*, 476 U.S. 79 (1986)

upheld that a "State's purposeful or deliberate denial to negroes on account of race as participation of jurors in the administration of justice violates the Equal Protection Clause." *Swain v. Alabama* 380 U.S. at 380 U.S. 203-204. Also in *Swain v. Alabama* 380 U.S. at 380 U.S. 203-204 the Court indicated that the Equal Protection Clause places some limits on the states exercise of peremptory challenges.

In Mr Rush's trial two out of three of the State's peremptory strikes were black females, and the resulting jury was constituted of all white biological males. The defendant made a Batson Challenge, claiming that the State's peremptory strikes were made on the basis of race. The court allowed the State to give race-neutral reasons for their striking, the second step of a Batson Challenge. *Craig v. State*, (Tex. App.-Austin, 2002).

Ms. Crump struck Juror 3, Diana Marva, a black female. In the transcript, Ms. Crump claimed that Ms. Marva was a teacher, however, Ms. Marva actually works at a church. Ms. Crump also struck Juror 9, Eloise Triplett, a black female. Ms. Triplett expressed that "Any time of structure built along the border is a monument to slavery" and other extreme-left views. Ms. Crump's race-neutral reason for striking Juror 3 was that she worked as a teacher with youth similar in age of the defendant. When enlightened that Ms. Marva was in fact a church minister, not a school

teacher, Ms. Crump claimed it was a mistake in her notes. When giving her race-neutral reason for striking Juror 9 Ms. Crump claimed that she expressed anti-government views.

Both race-neutral reasons given are flawed. First, Ms. Crump mistook Michael Gallegos' (a white male) profession as Ms. Marva's. While it is legitimate to strike Mr Gallegos, a middle school teacher, for working with youth similar in age to the defendant, it is not justified to do so for Ms. Marva, a church minister. Ms. Marva did say that she works with youth but she did not specify the age of these youth, and the word youth could range anywhere from infants to seventeen year olds. Ms. Crump has no way of knowing if Ms. Marva really does work with youth similar in age to the defendant, and therefore is not justified in her peremptory strike. The second juror she struck, Eloise Triplett, who gave extreme-left views, did not give views that were specifically anti-government. Ms. Triplett mentioned the southern border wall, climate change, and plastic bags, but never the United States government as a whole. Just because someone may disagree with some members of the government doesn't mean they are opposed to the entire government, all the way down to a local court. These statements did not justify Ms. Crumps strike, and she had no reason to disclude Ms. Triplett from the possible jury.

In *Flowers v. Mississippi* the court affirms that there is a Batson violation on the basis that "(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". *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019). Each of these points have parallels in Mr. Rush's Batson challenge. While having no previous trials, before voir dire, the prosecutor did call for a shuffle of a jury that was predominantly black and female. Instead of the five of six referenced in Flowers' sixth trial it is two of three black females. There is also disparate questioning of black and white potential jurors. Four out of twelve potential jurors are black while three out of six questioned were black. That is a third of the jury vs half of the questioning. For the last parallel, there was indeed a strike used on a black juror that was similarly situated to a white juror. Ms. Crump cited Juror 3's work with youth in her church as reason to strike her, as she could sympathize more with the young defendant. However, Juror 7, Michael Gallegos, who was not struck, also worked with youth, being a teacher. These points of contention together proved worthy of a Batson violation in *Flowers*, and they also prompt a Batson violation in Mr. Rush's case. *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019).

Argument Counterpoint #2: *Strickland v. Washington*, 466 U.S. 668 (1984) upheld that "As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance." Also "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." *Strickland v. Washington*, 466 U.S. 668 (1984).

The Brady violation in this case is that the prosecutor did not hand over the criminal record of the victim. This would have been exculpatory evidence, as it would have supported the claim that the victim does not mind traffic laws and Mr. Rush is not at fault for the accident. This easily could have called into question who is at blame beyond a reasonable doubt. The State has access to Municipal Court records, so the prosecutor had the opportunity to give the evidence of these traffic violations to the defense.

In order for there to be a Brady Violation the evidence undisclosed by the Prosecutor must be exculpatory, and capable of reversing the outcome of the trial. "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." *Brady v. Maryland*, 373 U.S. 83 (1963). "Under Bagley, exculpatory evidence includes impeachment evidence". *Ex Parte Richardson*, 70 S.W.3d 865 (Tex. Crim. App. 2002). If the victim's criminal record had been cited, it would have called his credibility into question, which qualifies it as impeachment evidence. The victim is very central to the case, as it was either him or Mr. Rush at fault for the accident. In Mr Rush's case the victims criminal record was no doubt exculpatory, and could have very easily changed the outcome of the trial and was impeachment evidence. There is no evidence given that counters the fact that the victim does not heed driving laws, which could very easily swayed the jury's decision.

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

Taking into account the defense attorney's circumstances there is legitimate reason to believe that he did not represent the defendant as best he could and did not provide service within the range of reasonable professional assistance, therefore warranting a Michael Morton Violation.

The Michael Morton violation in this case is that Mr. Rush's previous attorney did not ask for the victim's criminal record which could have been both impeachment evidence, as it could possibly call into question the credibility of the victim's testimony, and exculpatory, because it calls into question who is really at fault for the accident if the victim does not pay attention to traffic laws. The defense attorney had a duty to request this important piece of evidence, which could have very easily changed the jury's decision.

Conclusion: The Petitioner was entitled to a fair and just trial, but the State's peremptory strikes were used in a discriminatory fashion. Also evidence that was absent in the trial should have been brought to light.

Prayer: For the above issues Torrance Rush prays that the court reverses the decision of the lower court and either acquits him or demand a new trial.

IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

NO. 19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellee

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

Brief for Appellee

Keyes Sumner

Dalton Burford

Highland Park High School

To the Honorable Court of Appeals:

Comes now, the State of Texas, and files this appeals brief.

Statement of the Case: Torrance Rush was charged with Minor Driving Under the Influence of Alcohol and Failure to Yield to a Pedestrian and was found guilty on both accounts. Rush petitions the court to reverse this conviction on the count of a Brady/Michael Morton violation and a Batson violation.

Statement of Facts: On April 19, 2019, a vehicle and a pedestrian forcefully met in an intersection in downtown Fort Worth. Neither party experienced significant injuries. Mr Rush was issued a Class C misdemeanor citation for allegedly being responsible for the accident. Alcohol was smelt by the investigating officer on the appellants breath. The officer issued a citation for Minor Driving Under the Influence. During jury selection the State used their peremptory strikes to strike Juror 3 (black female), Juror 9 (black female), and Juror 11 (white male). The defendant made a Batson Challenge. The Judge determined there was no Batson Violation. The jury found Mr Rush guilty of Minor Driving Under the Influence and Failure to Yield to a Pedestrian. Mr Rush appealed the court's verdict.

Issues on Appeal

Counterpoint #1: The trial court did not err in denying the defenses Batson Challenge.

Counterpoint #2: The trial court did not err in not disclosing the evidence of the victim's criminal record.

Argument Counterpoint #1: Under *Batson v. Kentucky*, 476 U.S. 79 (1986) there are three mandatory steps to conduct a Batson Challenge. First the defendant must 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." *Batson v. Kentucky*, 476 U.S. 79 (1986). Second, "the burden shifts to the State to come forward with neutral explanation for challenging black jurors." *Batson v. Kentucky*, 476 U.S. 79 (1986). Third, the judge makes a decision based off of the first two steps.

All three of these steps were evident in Mr Rush's trial. The prima facie was given by the defense attorney, saying that the prosecutors peremptory strikes eliminated all blacks and all females from the potential jury. Second, Ms. Crump cited her race-neutral reasons for striking Juror 3 and Juror 9 (both black females). Ms. Crump claimed that because Juror 3 works with youth, she could be sympathetic to the defendant. Also she claimed that Juror 9 expressed anti-government views. Third, the Judge made a decision based off of these first two steps, decreeing that there was no Batson Violation and that Ms. Crump's race neutral reasons were legitimate. With all of these steps executed properly, the Batson Violation was properly carried out, and the only question remaining is whether the Judge made the correct decision.

While Ms Crump was mistaken in the exact profession of Diana Marva, the underlying race-neutral reason was sound. Ms Marva does work with children of unspecified ages at her church. This makes it possible she works with youth of similar age of the defendant. Michael Gallegos is, indeed, a teacher, however he works with middle school children. The defendant was of age to be legally driving, so he was not of the same age range that Mr. Gallegos would be working with. The striking of Ms. Marva was non-discriminatory. Also, the end product of an all white male jury was not solely of the prosecution. They cannot use the end jury as a justification, as one black juror was struck by the state and one was struck for cause.

The striking of Ms Triplett was also justified. In her limited time being questioned she expressed extreme views. It was "off the top of [her] head" when Ms. Crump summarized why she struck them, so again, while she did not make any comments directly against the government, the principle of not wanting someone with radical views that seem not level-headed to not serve on a jury is a valid race-neutral reason.

Taking all this into account, we conclude that the Judge made the correct decision in denying the Batson Challenge.

Argument Counterpoint #2: "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." *Brady v. Maryland*, 373 U.S. 83 (1963). *Brady* lays out these three points to have a

violation: a)the prosecution must hold the evidence, b)the evidence must be favorable to the defense, and c)it must be material.

Going off of these three points the evidence qualifies as two of the three. First, the prosecution did hold the evidence, the municipal court had access to the victims criminal record. Second, the evidence was favorable to the defense. An obscene amount of traffic tickets could call into question the legitimacy of the victims testimony. However, the evidence does not meet the criteria of the third and final step, the question of whether it's material.

The evidence of the victim's criminal record is easily countered by the fact that the officer smelled alcohol on the defendants breath. This shows that the defendant's driving was most likely impaired, and the said evidence wouldn't sway the opinion of the jury.

"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." *Strickland v. Washington*, 466 U.S. 668 (1984). This can also be countered by the same argument that this would not have swayed the jury. The fact that he was drunk and his driving impaired is largely more important to who was at fault than the victim, a pedestrian's, past history of traffic law violations."The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance." *Strickland v. Washington*, 466 U.S. 668 (1984). The defense attorney did provide the defendant with his constitutional right of counsel, and any mistakes made in not requesting the information was minor and would not

have changed the outcome of the trial. There was no Michael Morton Violation.

Conclusion: The Petitioner was entitled to a fair and just trial, and received one. The States peremptory strikes were not used in a discriminatory fashion, and evidence not brought to light in the trial was not material to the case.

Prayer: For these reasons we pray that this court affirm the decision of the lower court.

IN THE COURT OF CRIMINAL APPEALS, STATE OF

TEXAS

NO. 19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellee

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

Brief for Appellant

Ehsan Kapadia

Carter Goetz

Highland Park High School

TO THE HONORABLE COURT OF APPEALS

Comes now, the State of Texas, and files this appeals brief.

STATEMENT OF THE CASE

Defendant Torrance Rush has been charged with misdemeanor offenses of alleged Minor Driving Under the Influence of Alcohol and alleged Failure to Yield to a Pedestrian. Mr. Rush was found guilty in trial court and proceeded to appeal to the County Court which upheld the decision of the trial court. The case at bar is contested in two main points: (1) the prosecutor's violation of *Batson* through their exercise of strikes, (2a) the trial court's error in denying a new trial due to a *Brady* violation, and (2b) the trial court's error in denying a new trial due to ineffective assistance of counsel.

STATEMENT OF THE FACTS

On April 19, 2019, a vehicle operated by appellant Torrance Rush ("Rush") forcefully met a pedestrian in Fort Worth. The officer on scene believed to smell alcohol on Rush's breath and issued him a citation for Minor Driving Under the Influence. The appellant proceeded to hire an attorney to represent him in the case. Notably, the attorney had nine other cases scheduled on that day in which he was representing a client. Some of these cases included somewhat more serious offenses such as assault. The majority of the 50 cases scheduled for that day would not require a trial. However, early on, it was clear that the case at bar would require a trial, and thus voir dire examination began. The first random generation of the jury list included 7 black prospective jurors, 3 whites and 1 Hispanic. After seeing the list, the prosecutor requested their one allowed jury shuffle. After the jury shuffle, the prosecutor struck two of the remaining three black jurors. Upon

the defendant's claim of a *Batson* violation, the prosecution produced race neutral reasons for the strikes. The defendant was eventually found guilty on both issues. The victim, while leaving the courtroom after the decision, said "I'm sure glad [y'all] 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."

ISSUES ON APPEAL

Point of Error Number 1: The lower courts erred in affirming the suppression of the prosecutor's violation of the *Batson* challenge.

Point of Error Number 2a: The lower court erred in affirming the suppression of material evidence in a *Brady* violation.

Point of Error Number 2b: The lower court erred in denying the appellant's motion for a new trial due to ineffective assistance of counsel.

ARGUMENT

Point of Error Number 1: The prosecutor ("Crump") violated *Batson* in their clear pattern of discrimination against black jurors. This is most evident in the prosecutor's use of pretextual evidence, which can be seen in the double standards in *voir dire* examination. Prospective Juror 7 ("Gallegos"), a white male, tells Crump that he is a middle school teacher and that he works at a "lower income school." Gallegos then goes on to state that those same students are troublemakers. Crump asserts that Gallegos' occupation is irrelevant to the case, saying that "[a]s I said before today's case involves a traffic ticket." However, Crump struck Juror 3 on her work with youth, despite her being less involved with teens than Gallegos. Additionally, Crump cited Juror 3 as working with individuals close to the defendant's age to justify the strike. However, Juror 3 never specifies the age of

the individuals that she works with. This situation has many parallels to *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019), in which a black prospective juror from Winona was struck by the prosecutor for having connections with 34 people involved in the case. However, on the same jury, there were caucasians who had connections to approximately the same number who were not struck. Judge Kavanaugh states in his opinion that “[the decision] likely comes down to whether we look at the Wright strike in isolation or instead look at the Wright strike in context of the facts and circumstances.” When looking in context of other jurors deemed fit to serve, a picture starts to form of Crump’s racial bias in *prime facie*.

Further evidence of Crump’s racial discrimination is the strike of prospective Juror 9. Juror 9 was struck for an attitude that was “anti government,” in which the prosecutor is assumingly referring to her support of Black Lives Matter. According to *Martinez v. State*, 824 S.W.2d 724, 726 (Tex. App.--Fort Worth 1992, *pet. ref'd*), a citation of a juror’s attitude as a justification for striking them is not a sufficient explanation in response to a *Batson* violation. Crump herself admits to striking the prospective juror for her attitude, which was not even anti-government to begin with.

As to why Juror 11 was not struck, the answer is clear; Juror 11 is a police officer and thus more likely to sympathize with the state despite her race and thus Crump does not strike her. This is seen on the prosecutor’s copy of the juror list, where she puts a check and a smiley over Juror 11’s occupation as to signify that her occupation overrides her race, as it would likely sway her decision in favor of the State. He does not put any affirmations on other prospective jurors’ jobs.

Batson v. Kentucky, 476 S. Ct. U.S. 79 (1986) tells us that the quantity of jurors struck is not an assured dismissal of a *Batson* violation. In *Batson v. Kentucky*, only four black jurors were struck compared to three in the case at bar. However, the case still went on to be the defining case for racial discrimination in the *prima facie*. *Batson* itself dismisses any notion that the small sample size disqualifies claims of a *Batson* violation.

Point of Error Number 2a: The trial court erred by affirming the suppression of material evidence in the clear *Brady* violation. *Brady v. Maryland* 373 U.S. 83 (1963) set the precedent that for a *Brady* violation to be successfully carried out, three main points must all be proven and fulfilled by the defendant: (1) the State failed to disclose evidence, either in good or bad faith, (2) the evidence withheld by the State is favorable for the defendant, and that (3) the evidence is material and there is reasonable probability the result of the trial would have been different if the evidence was disclosed. The *Brady* violation was called upon by the defendant because his attorneys were not provided with the victim's prior traffic violations which would have contributed significantly to Rush's argument. The main concern of the trial was to conclude whether the victim or Rush was at fault for the accident.

Firstly, the State failed to disclose evidence within its possession to Rush's attorney. Although the records show the prosecutors did not have the victim's traffic infractions in their possession at the time of the trial, the prosecutors are not the only individuals who must give the defendant facts, evidence, or testimony relevant to the case. Instead, "the State" is an overarching term which encompasses prosecutors, law enforcement, and employees which work for a government entity. In *Ex parte Miles*, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012),

the court concluded that, "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." The State had a lawful duty to provide all evidence to Rush, including criminal records and all relevant facts to the case despite if the prosecutors did not have all the information in their possession.

Secondly, the evidence the State withheld favored the defendant. If the victim's traffic records were disclosed to Rush's attorneys prior to the trial, the attorneys could have used the pattern of traffic infractions to further discredit the biker involved in the collision. A pattern of traffic infractions could have certainly supported the claim that the biker was at fault for the crash.

Lastly, the biker's previous traffic violations were material and there can be reasonable probability the evidence would have changed the results of the trial if presented. The precedent concerning reasonable probability was set that 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). Evidence of the biker's erratic driving behavior is highly significant to the main concern of the case and would have contributed heavily to Rush's main point of contention.

Point of Error Number 2b: The lower court erred in denying the appellant's motion for a new trial due to ineffective assistance of counsel. *Strickland v. State* 266 U.S. 668 (1984) set the precedent for proving if an attorney provided ineffective assistance of counsel throughout the duration of a case. The court

determined that two prongs must be fulfilled for ineffective assistance of counsel to be proven. The two prongs Rush had to prove were: (1) his attorney's performance was deficient and that (2) his attorney's deficient performance prejudiced his defense.

Rush's attorney failed to carry out many of the normal attorney procedures before the trial. *Melton v. State, 987 S.W.2d 72 (1998)* concluded that "[i]t 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." The conclusion given by the court preceding over *Melton v. State, 987 S.W.2d 72 (1998)* entails performing pre-trial investigation in order to gain an understanding of the basic facts in a case. Rush's attorney failed to access the Municipal Court records and thus was unaware of the biker's traffic infractions.

The deficient performance of Rush's attorney also heavily prejudiced his defense. Since his attorney failed to file a *Micheal Morton* request, the prosecutors had no reason to give him the evidence they had access to. Because Rush's attorney failed to discover the victim's prior traffic convictions, Rush had a significantly weaker case against the State. If the biker's tickets were disclosed to the court, the court would have further evidence that the biker was at fault for the collision because of his pattern of erratic driving. These two prongs satisfy the Strickland test and prove Rush's attorneys incompetence throughout the case.

CONCLUSION

Throughout the duration of the case, Rush was provided ineffective assistance of counsel and Rush's case was significantly undermined by the clear *Brady* violation.

In addition, the prosecutor's blatant targeting of prospective black jurors was cause for a *Batson* violation and thus a retrial.

PRAYER

For these reasons above, we pray the court reverse the decisions of the prior court regarding the *Batson*, *Michael Morton*, and *Brady* violations.

Respectfully Submitted By:

Ehsan Kapadia

Carter Goetz

Attorneys for Appellant

Highland Park High School

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TEXAS

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STATEMENT OF THE FACTS

On April 19, 2019, a vehicle operated by appellant Torrance Rush ("Rush") hit a pedestrian in urban Fort Worth. The officer on scene smelled alcohol on Rush and issued him a citation for Minor Driving Under the Influence. The appellant proceeded to hire an attorney to represent him in the case. The attorney representing Rush had other cases that day. These cases included other offenses similar to Rush's. The majority of the cases scheduled for that day would not require a trial. However, early on, it was clear that the case at bar would require a trial and thus voir dire examination began. The first generation of the jury list included 7 black prospective jurors, 3 whites and 1 Hispanic. After seeing the list, the prosecutor used their one allowed jury shuffle. After the jury shuffle, the prosecutor struck two prospective black jurors. Upon the defendant's claim of a *Batson* violation, the prosecution gave race neutral reasons for the strikes. The

defendant was eventually found guilty of both offenses by the jury. The victim, while leaving the courtroom after the decision, said "I'm sure glad [y'all] 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."

ISSUES ON APPEAL

Counterpoint Number 1: The lower courts were correct in denying the wrongful *Batson* violation accusations.

Counterpoint Number 2a: The lower courts were correct in denying the wrongful *Brady* violation accusations.

Counterpoint Number 2b: The lower courts were correct in denying the appellant's motion for a new trial due to wrongful accusations of ineffective assistance of counsel.

ARGUMENT

Counterpoint Number 1: The lower courts were correct in denying the *Batson* violations for a litany of reasons. Primarily, there are a number of incongruities with *Batson v. Kentucky*, 476 S. Ct. U.S. 79 (1986) and other relevant case law in which a *Batson* violation is present. Specifically, *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019) describes the need for sufficient evidence of a pattern of racial bias. No such pattern exists in the case at bar. The prosecutor ("Crump") provided justification for each strike made that were more than satisfactory for the requirement of a race-neutral explanation. Another reason that *Flowers* is inapplicable is the discrepancy between the number of jurors struck by the prosecution. Kavanaugh asserted that the sheer size of jurors that the prosecution struck, with 41 out of 42 prospective black jurors struck over 6 trials, demonstrated a consistent pattern of

discrimination. The pattern is not present in the case at bar, with a sample size of four struck jurors overall from both sides. The overwhelming amount of data present from *Flowers* was enough to justify a *Batson* violation in that case.

Crump has also fulfilled the requirements of addressing an accusation of a *Batson* violation as well. Similar statements are made by the prosecutor in *Craig v. State*, (Tex. App.—Austin, 2002) in which the prosecutor details that “[with particular questions], I felt that it was indicative of bias on their part in favor of the defendant.” Such statements were viewed as admissible by the reviewing court. Similarly, when Crump is asked about the strike of Juror 3, he states “that he worked with students close in age to the defendant.” In both instances, the prosecutor is detailing a logical conclusion regarding the potential effect that a juror’s bias could have on the outcome of the case. The lack of a pattern of discrimination in conjunction with the admissibility of the race-neutral explanations demonstrates that a *Batson* violation simply is not present in the case at bar.

Although some may argue that prospective Juror 3 and Juror 7 both worked with children, the nature of their work is different. Namely, prospective Juror 3, a youth pastor, primarily focuses on reaching out and connecting to kids whilst Juror 7 is focused solely on academic teaching. This demonstrates the rightful grievance of Crump regarding her concern of prospective Juror 3’s bias in favor of Rush.

Counterpoint Number 2a: The lower courts were correct in denying the wrongful *Brady* violation accusations. *Brady v. Maryland*, 373 U.S. 83 (1963) set the precedent that for a *Brady* violation to be successfully carried out, three main points must all be proven and fulfilled by the defendant: (1) the State failed to disclose evidence, either in good or bad faith, (2) the evidence withheld by the

State is favorable for the defendant, and (3) that the evidence is material and there is reasonable probability the result of the trial would have been different if the evidence was disclosed. The *Brady* violation which was brought to attention regards the victim's prior traffic tickets. Rush claims the State withheld the victim's traffic ticket history and that if the traffic ticket history was disclosed, the result of the trial would have changed.

Firstly, the State did not withhold any evidence from Rush's attorneys. The records show the prosecutor's did not have the victim's traffic ticket history in their possession at the time of the trial. Regardless, Rush's attorneys had access to the Municipal court records and could have just as easily accessed the victim's traffic records. *Melton v. State, 987 S.W.2d 72 (1998)* established that "[i]t 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." To provide reasonably effective assistance to a client, an attorney must actively seek information before the trial. The State cannot be put at fault if Rush's attorney failed to have a "firm command of the facts of the case". The prosecutors did not withhold any evidence from Rush or Rush's attorneys, and thus step one of substantiating a *Brady* violation is failed.

If the records happened to show the prosecutors withheld the victim's prior traffic tickets, there is still not a reasonable probability that the result of the trial would have changed if the evidence were to have been disclosed, making the evidence immaterial. The prosecutors presented the court with a witness who had a clear line of sight of the intersection where the crash occurred. The witness claimed Rush was at fault for the crash. In addition, Rush was heavily intoxicated, and thus

his driving skills were heavily impaired at the time of the accident. *Strickland v. State* 266 U.S. 668 (1984) established "reasonable probability" is that which is "sufficient to undermine confidence in the outcome." *Hampton v. State*, 86 S.W. 3d 603 (2002) further elaborates on this assessment, stating "[t]he 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 (2002) also expands upon the idea of "materiality," which is simply defined as the level at which specific evidence is relevant or significant to the proceedings of the trial. Rush failed to show that the victim's prior traffic tickets were withheld from his attorneys and failed to show the evidence was material. Since two steps to a *Brady* violation failed, the lower courts were correct in denying the wrongful violation accusations.

Counterpoint Number 2b: For a defendant to prove he was provided ineffective assistance of counsel, he must fulfill both prongs of the Strickland test. Rush had to prove that (1) his attorney's performance was deficient and that (2) his attorney's deficient performance prejudiced his defense. Rush argues his attorney did not file for a *Micheal Morton* request, which would have provided his attorney with the victim's prior traffic infractions and any other facts which would aid his defense. However, *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977) concluded that there is no general constitutional right to discovery in a criminal case. In addition, in *Jackson v. State*, 552 S.W.2d 798, 804 (Tex. Crim. App. 1976), the court concluded that the prosecution did not violate duty to disclose favorable evidence when the evidence was available to defendant through a subpoena.

Even if the information was requested and the State failed to comply, Rush would also have to prove that if the evidence was provided, the result of the trial would have been different. If the discovery was obtained, there is no guarantee it would have affected the results. According to *Strickland v. State* 266 U.S. 668 (1984), Rush must prove that “. . . there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” There is no reasonable probability that if the evidence was disclosed at trial, the results of the trial would have changed and thus Rush’s attorney was not provide ineffective assistance of counsel. The court which ruled for *Andrews v. State*, 159 S.W.3d 98, 102 (Tex.Crim.App. 2005) concluded, “The failure to make a showing under either of the required prongs of Strickland defeats a claim for ineffective assistance of counsel.” Since Rush failed to prove his attorney’s performance was deficient, he cannot substantiate his claim that he was provided ineffective assistance of counsel based on the first prong of the Strickland test.

CONCLUSION

The appellant’s trial was fairly conducted with no *Batson*, *Michael Morton*, or *Brady* violations present. The appellant was rightfully convicted in a fair trial with a just court.

PRAYER

For these reasons above, we pray the court affirm the decisions of the prior court by affirming the lower courts’ decisions regarding the *Batson* and *Michael Morton* violations.

Respectfully Submitted By:

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IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

NO. 02-19-01234-CR

Torrance Rush, Appellant

vs.

The State of Texas, Appellee

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

Appellant Brief

Makaylia Askew

Brian Kang

Creekview High School

Statement of the Case

The appellant Torrence Rush, was found guilty of the Class C Misdemeanor offenses of Minor Driving Under the Influence of Alcohol and Failure to Yield to a Pedestrian in the Fort Worth Municipal Court. His first appeal was before the County Court at Law in Tarrant County. The County judge affirmed the trial court's actions and Torrence Rush now seeks relief before the Texas Court of Criminal Appeals

Statement of the Facts

On April 19, 2019, a vehicle and a pedestrian forcefully met in an intersection in downtown Fort Worth. The investigating officer smelled alcohol on the Appellant's breath, issued a citation for Minor Driving under the Influence. Torrence Rush hired an attorney and the case was scheduled for a jury trial. When the venire was first generated, of the first 12 jurors, 7 were black, 3 Hispanic and 1 white; 8 were women and 4 men. Before potential jurors were brought into the courtroom, the prosecutor requested a jury shuffle. At the Jury selection phase, Rush's attorney objected to the Appellee's use of peremptory strikes claiming that the strikes were discriminatory based on both race and gender. The State strikes included two of the three remaining black jurors and two of the remaining females within the strike zone. This resulted in an entirely male jury with 5 white and 1 Asian juror.

Issues on Appeal

Point of Error 1: Whether the trial court erred in denying the appellant's Batson challenge during voir dire and

Point of Error 2: Whether the trial court erred in denying the appellant's motion for a new trial due to an alleged Brady violation and whether the trial court

erred in denying the appellant's motion for a new trial due to ineffective assistance of counsel.

Issue One

The trial court did err in denying the Appellant's Batson challenge during voir dire because the State did not meet the requirements set forth *Batson v. Kentucky*, 476 U.S. 79 (1986).

A Batson challenge is when an attorney has exercised peremptory strikes against potential jurors. Opposing parties will typically raise a Batson challenge when they believe that strikes were made primarily because of a potential juror's race or gender. *Batson v. Kentucky*, 476 U.S. 79 (1986) created a 3 step process to resolve a Batson Challenge. First, the defense must make a prima facie case of racial discrimination. Second, if the prima facie showing has been made, the burden of proof shifts to the State to articulate a race-neutral reason for its strike. Finally, the trial court must decide whether the defendant has proven purposeful racial discrimination. *Flowers v. Mississippi*, 139 Ct. 2228(2019). First, no party has previously alleged that there was no prima facie case in the lower courts, thus the argument is waived.

Second, because it is undisputed that the appellant has made a prima facie case, the burden of proof then shifts to the State of Texas to articulate a race-neutral reason for their strikes. Finally, if the Appellant does provide race-neutral reasons for their strikes, the court must decide based on all the evidence whether there was in fact racial discrimination in the way the Appellant exercised their peremptory strikes.

Addressing the second step of *Batson*, there is ample evidence to prove that there was in fact racial discrimination. *Swain v. Alabama*, 380 U.S. at 380 U. S. 203-204 states that a "State's purposeful or deliberate denial to Negroes on account of the race of participation as jurors in the administration of justice violates the Equal Protection Clause." *Batson v. Kentucky* 476 U.S. 76 (1986) then held that a State may not discriminate on the basis of race when exercising peremptory challenges against prospective jurors in a criminal trial. *Neal v. Delaware*, 103 U.S. 370, 103 U.S. 397 (1881) held that purposeful racial discrimination in the 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. Although the State did claim race neutral reasons for their peremptory strikes, *Batson* requires more. When looking at step three *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019) found that there are 6 categories of other evidence to look to when determining if the peremptory strikes were exercised in a discriminatory manner. In the case at bar, Justice Alamin red flagged categories 2,3,4 and 6. Category 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; 6) Other relevant circumstances that bear upon the issue of racial discrimination. When looking at category 2, there was clear disparate questioning because the State asked black prospective jurors twice the amount of questions they asked the white jurors. The State spent way too much time questioning the black prospective jurors than the accepted white jurors. For category 3, when

looking the juror's side by side, juror 3 was a black female who was struck because she worked with youth, however juror 7, who is a black male remained on the jury. And although the State decided to keep one black juror out of the strike zone, *Miller El II v. Dretke*, 545 U.S. 231 (2005) (*Miller-El II*) held that the States decision to keep one black juror might be an attempt to obscure the otherwise consistent pattern of opposition to "seating black jurors." And as found in *Snyder v. Louisiana*, 552 U.S. at 483-484, comparing prospective jurors who were struck and not struck can be an important step in determining whether a Batson violation occurred. The comparison can suggest that the prosecutor's proffered explanations for striking black prospective jurors were a pretext for discrimination. *Foster v. Chatman*, 578 U.S. S. Ct. (2016) held that a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black panelist who is not premitted to serve, that is evidence tending to prove purposeful discrimination. Regarding category 4, during the Baston hearing the state's attorney stated the they struck juror 3 because she was a middle school teacher; however, as stated in the record, Juror 3 is actually a retired youth pastor and it is actually juror 7, a white male, who worked with middle schoolers. Looking a category 6, the combination of the factors within the empaneling of the petit jury, as in selection of the venire raises the necessary inference of purposful discrimination. The clear pattern of strikes against black jurors, the comments and questions made during voir dire, and in exercising her challenges support an inference of discriminatory purpose. Thus, given all of the relevant facts and circumstances taken together, it was clear error in concluding that the State's peremptory strike of black prospective jurors was motivated by discriminatory intent.

Issue Two

The trial court erred in denying the appellant's motion for a new trial under either a Brady violation or ineffective assistance of counsel

To address the first part of the second issue, the trial court erred in denying the appellant's motion for a new trial under Brady. 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).

In the case before the court, the evidence not disclosed in this case is the victim's prior criminal history which shows a pattern of violating traffic laws. The first step of Brady is clear- the state did not disclose this evidence and it was in possession of the state because police and police records are a part of the state.

Addressing the second step of Brady, the evidence is exculpatory and impeachment evidence. 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 evidence not disclosed in this case shows a pattern of violating traffic laws from the victim which is highly material to the main point of the case and additionally, the prior convictions would have helped the defendant's case.

Furthermore, although the Supreme Court held in Brady that the state shall disclose to the defendant any exculpatory and impeachment evidence, under the Texas Code of Criminal Procedure, the state is additionally required to "disclose to the defendant any exculpatory, impeachment, or mitigating document." (Tex. Code

Crim. Proc. Ann. art. 39.14). Not only is the evidence of the victim's pattern of violating traffic laws impeachment evidence, but it is also mitigating evidence the state did not disclose.

Finally the third step of Brady was violated due to its materiality and therefore there was a Brady violation, in which the state failed to disclose the victim's pattern of violating traffic laws that could have helped the defendant in this case.

Under an alternate theory, the trial court erred in denying the appellant's motion for a new trial due to ineffective counsel under Michael Morton-whether the defense attorney had a duty to request the information from the prosecutor before the trial. (*Tex. Code. Crim. Proc. Ann. art. 39.14*).

The trial court attorney failed to provide Rush effective 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 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, the State is obligated to turn over all of this evidence. The evidence that was not disclosed regarding the past criminal records showing a pattern of violating traffic laws would have helped the defendant's 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. *Melton v. State*, 987 S.W. 2d 72 (1998). At a minimum, the defense attorney should have done a preliminary criminal history search on potential witnesses to discover impeachment

evidence. The attorney had chosen to represent multiple people but this does not excuse his duty to each client or supercede Mr. Rush's 6th amendment rights to counsel. The defense attorney did not conduct basic investigation before a trial and therefore was not an effective counsel for Rush. For these reasons, the trial court must allow a new trial due to ineffective counsel.

Conclusion

The trial court erred in denying Torrence Rush's Baston challenge due to not meeting the guidelines set forth in *Baston v. Kentucky*. The court also erred in denying Torrence Rush's motion for a new trial due to the Brady violation and ineffective assistance of counsel by not meeting the guidelines set forth in *Brady v. Maryland* and in *Tex. Code Crim. Proc. Ann. Art. 39.14 (West 2017)*.

Prayer

It is for these reasons we pray the court rule in favor of the Appellant, Torrence Rush, and reverse the lower court ruling.

Makaylia Askew

Brian Kang

IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

NO. 02-19-01234-CR

Torrance Rush, Appellant

vs.

The State of Texas, Appellee

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

Appellee Brief

Makaylia Askew

Brian Kang

Creekview High School

Statement of the Case

Appellant, Torrence Rush, was found guilty of the Class C Misdemeanor offenses of Minor Driving Under the Influence of Alcohol and Failure to Yield to a Pedestrian in the Fort Worth Municipal Court. His first appeal was before the County Court at Law in Tarrant County. The County judge affirmed the trial court's actions and Torrence Rush now seeks relief before the Texas Court of Criminal Appeals

Statement of Facts

On April 19, 2019, a vehicle and a pedestrian forcefully met in an intersection in downtown Fort Worth. The investigating officer, upon smelling alcohol on the Appellant's breath, issued a citation for Minor Driving under the Influence. Torrence Rush hired an attorney and the case was scheduled for a jury trial. The Municipal Court scheduled 50 cases for the same day; Rush's defense attorney represented nine of those cases. Within 15 minutes of the decision to select Rush's case to be presented to the court, the attorney was brought to counsel table for jury selection. When the venire was first generated, of the 12 jurors, 7 were black, 3 Hispanic, and 1 white; 8 were women and 4 men. Before potential jurors were brought into the courtroom, the prosecutor requested a jury shuffle. At the Jury selection phase, Rush's attorney objected to the Appellee's use of their peremptory strikes claiming that the strikes were discriminatory based on both race and gender. The State strikes included two of the three remaining black jurors within the strike zone and two of the remaining three females within the strike zone. After the State presented race neutral reasons for the strikes, the judge determined that there was no Baston violation. After all evidence was presented at trial, the jury found the defendant guilty of both offenses. The attorney filed a motion for a new trial and after, a

hearing, the trial court Judge denied the motion for new trial. Torrence Rush then hired a new attorney to file this appeal.

Issues on Appeal

Point of Error 1: Whether the trial court erred in denying the appellant's Batson challenge during voir dire.

Point of Error 2: Whether the trial court erred in denying the appellant's motion for a new trial due to an alleged Brady violation and Whether the trial court erred in denying the appellant's motion for a new trial due to ineffective assistance of counsel.

Issue one

The trial court did not err in denying the appellant's Batson challenge due to race neutral reasoning for the strikes and there not being a causal relationship between prosecutorial actions and the prima facie case. When there is evidence that either side has used their strikes in a way that suggests racial or gender bias, the opposing side may raise a Batson challenge and begin the process of ensuring that the strikes were not exercised in an illegal manner. *Batson v. Kentucky*, 467 U.S. 79 (1986) created a three-step process when resolving Batson challenges. First, the defense must make a prima facie case of racial discrimination. Second, if a 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 court must then decide whether the defendant has proved purposeful racial discrimination.

For step one, It is undisputed that the Appellant has made a prima facie case. *Castaneda v. Partida, supra, at 430 U.S. 494-495*; established three steps in order to establish a prima facie case. First, they must establish that they are a member of a cognizable racial class 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 that, as in 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.

Second,

if a prima facie showing has been made, the burden of proof shifts to the State to articulate a race-neutral reason for its strike. Then, the trial court must decide whether the defendant has proven purposeful racial discrimination. Regarding the second step, For Juror 3, because of her work with youth the state believed she would be biased against the state. For Juror 9 she had anti-government and Juror 12 was struck because of his history with speeding tickets. Thus the second step is satisfied.

Finally, addressing the third step, *Flowers v. Mississippi, 139 S. Ct. 228 (2019)* created six other categories of evidence to look at to determine whether the strikes were exercised in a discriminatory manner. Justice Alamin's dissent below

addresses categories 2,3,4, and 6. For category 2, which talks about disparate questioning, there was none because they asked the same amount of questions to both the white and black jurors. For category 3, *Flowers* states that we have to view the circumstances as a whole, when viewing the jurors, they have nothing in common in regards to the reasoning for their strikes. For category 4, which addresses misrepresentation, there was none because the attorney had race-neutral reasoning for their strikes. And according to category 6, which talks about any other relevant circumstances, because there are no other facts that show discrimination, there was no racial discrimination.

To address the factors that lead up to an all white jury, if even one of those was not in the exclusive control of the State, regardless of what the state did, there is no causal link between having an all white jury and what caused there to be an all white jury. *Foster v. Chatman* 578 U.S. (2016) held "that we need to decide whether the facts and circumstances taken together establish that the trial court committed an error." There are two clear factors that lead up to an all white jury; 1. The jury shuffle and 2. The Appellant striking the only black juror left on the jury. Before the jurors were brought before the court, the prosecution requested a jury shuffle. The potential jurors were then shuffled the juror members electronically. It is unreasonable to assume that the state would have known what the outcome of the shuffle would have been, and make plans on who to strike as a result. Despite the fact that the state struck two black jurors, there would still be a black juror on the jury had the Appellee not struck the remaining one.

Issue Two

The trial court did not err in denying the appellant's motion for a new trial.

To address the first part of the second issue, the trial court did not err in denying the appellant's motion for a new trial under Brady. Brady requires a three-step approach. If even one of these steps is not proven, a Brady violation has not occurred

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)

To address the first step, there is nothing in the record that suggests the prosecutor had a physical copy of the victim's driving record. After trial, the victim disclosed this information to the defendant and the defendant obtained the records from the Municipal Court. Therefore, due to this information not being disclosed before the actual trial, the state did not have possession over the disclosed evidence.

Moving on to the second step of a Brady violation, the withheld evidence is not exculpatory evidence or impeachment evidence. The evidence shows a pattern of the victim not following traffic laws, however, the verdict in the case would not be undermined with this piece of evidence. The two charges Mr. Rush was charged for was the Class C Misdemeanor offenses of Minor Driving Under the Influence of Alcohol and Failure to Yield to a Pedestrian. The past records of the pedestrian will not disprove any of the two charges. Also, the fact that the defendant had alcohol in his system does suggest that his driving skills were impaired. Thus, the information about the victim would have not changed the verdict. The traffic tickets

are also not impeachment evidence because the evidence does not discredit his testimony regarding the elements that was brought up in court. There was another witness who testified that the defendant was at fault for the accident. The records of the pedestrian are improper and is character evidence instead of impeachment evidence. It does not discredit his testimony but makes the pedestrian look bad for the mistakes he made in the past.

Finally, to address the third step of the Brady violation, the evidence is not material. 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 evidence that was not disclosed did not meet the second step and therefore cannot meet the third step. The evidence was not material and information about the victim would not have changed the outcome of the trial Thus, with the three-step test, it is clear that the disclosed evidence did not violate Brady.

Additionally, there was no ineffective assistance of counsel violation. To establish ineffective counsel, the appellant must show by (1) a preponderance of the evidence that his counsel's representation was deficient and (2) 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." The evidence for this analysis is the same as the requirements for Brady. The evidence disclosed was not material as it would not have produced a different outcome on the verdict. Ultimately, it is not the general practice of attorneys to submit discovery requests when handling matters in a Municipal Court

setting. Thus, there was no ineffective assistance of counsel violation. For these reasons, there was no Brady and Michael Morton violations.

Conclusion

The trial court did not err in denying Torrence Rush's *Boston* challenge due to meeting the guidelines set forth in *Boston v. Kentucky*. The court also did not err in denying Torrence Rush's motion for a new trial due to there neither being a Brady violation nor ineffective assistance of counsel violation by meeting guidelines set forth in *Brady v. Maryland* and in *Tex. Code Crim. Proc. Ann. Art. 39.14 (West 2017)*.

Prayer

It is for these reasons we pray the court rule in favor of the Appellee, The State of Texas, and uphold the lower court ruling.

Makaylia Askew

Brian Kang

IN THE COURT OF CRIMINAL APPEALS,

STATE OF TEXAS

No. 02-19-01234-CR

Torrance Rush

Appellant

v.

The State of Texas

Appellee

From the Court Of Appeals, Second District, at Fort Worth

Brief for Appellant

To the honorable court of appeals:

Come now, Torrance Rush, and files this appeals brief.

Statement of the Case

Torrence Rush was charged with and found guilty of a Class C Misdemeanor offense of a Minor Driving Under the Influence of Alcohol, Failure to Yield to a Pedestrian, and a Class C Misdemeanor offense in the Fort Worth Municipal Court. After the trials, he brought his case before the Tarrant County County Court of Law and Judge Castillo affirmed the previous ruling. Rush appealed his case next to the Texas Court of Criminal Appeals and the ruling was reaffirmed.

Statement of the Facts

On April 19, in the year 2019, there was a violent meeting of a car and a bike that resulted in no significant injuries. The driver of the car, Torrence Rush was first issued with a Class C Misdemeanor. The officer at the scene smelled alcohol on Rush and issued a second citation for Minor Driving Under the Influence. Rush acquired an attorney and was appointed a date for a jury trial. Out of the first twelve jurors on the jury list, seven were black, three were white, one was Hispanic, and one was Asian. The gender makeup was 8 women and 4 men. After there was a jury shuffle at the request of the prosecutor she used all three of her peremptory strikes. The defense raised a Batson challenge, deeming these strikes as racist and sexist which was rejected by the trial court judge.

Issues on Appeal

(1)The question of whether there was an error in denying the appellant's Batson challenge.

(2a) Whether or not the prosecutor had to release a piece of evidence

(2b) Whether or not the defense lawyer had a duty to request that evidence.

Issue One

Response to Point of Error One: The trial court erred in denying the Batson challenge because...

The trial court judge erred in finding that the Batson challenge was invalid for numerous reasons.

First, the trial court failed to analyze the case under *Flowers v Mississippi* 139 S.Ct. 2228 (2019), despite *Flowers* being more recent and comprehensive. There are six categories of information that can be analyzed under *Flowers*, and there is evidence of discrimination under the first, second, third, and sixth prongs of *Flowers*.

The prosecution exercised their strikes in such a way that they removed most of the black jurors. The jurors who were eliminated were juror 3, juror 9, and juror 12, not including juror 8, who was eliminated in a for cause strike. All but one of the jurors eliminated by the prosecution were black. This is seen as discriminatory under the first prong of *Flowers*, even though there was a single black person left on the jury by the prosecution. This case runs parallel to the case discussed in *Flowers*, as there was also a single black juror left on the jury by the prosecution in that case as well. In *Flowers* it is said that "that fact alone cannot insulate the State from a Batson challenge

Batson v Kentucky, 476 U.S. 79 (1986) established that not only is it unconstitutional to remove jurors based on race, but that racial discrimination does not have to be explicitly stated to be discriminatory. "For example, a "pattern" of strikes against black jurors ... [or] the prosecutor's questions and statements during

voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose.” Disparate questioning also falls under the second prong of Flowers “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 prosecution first questioned juror 3, a black woman, who was later eliminated by the prosecution. After questioning juror 3 the prosecution questioned all jurors who worked with children. One of the people who worked with kids was juror 5, who was a bartender, and in that capacity was required to card minors often. The other person who worked with children was juror 7, who was a middle school teacher. The second juror the prosecution questioned was juror 8, a black man, who was eliminated in a for cause strike. The next juror questioned by the prosecution was a black woman. The last juror questioned was a white man who the prosecution already knew, as she had prosecuted him previously. Although questioning any of these jurors individually would not be discriminatory, that all but one of the questions, discounting follow-up questions, were posed to black jurors does show a clear pattern of discrimination on the part of the prosecution. In addition to a disparately questioning more black jurors than white jurors, the prosecution conducted more in depth questionings of black jurors than non-black jurors, asking an average of around one question to every non-black juror, while asking black jurors an average of three questions each.

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In the third prong of Flowers, it is established that it is possible to compare the reasons jurors were eliminated with the information surrounding the jurors who

were not eliminated to prove discriminatory intent. Juror number three was eliminated, ostensibly because she had worked with youth in some capacity before her retirement. This alone might not be problematic, but there was another juror, a white man, who was currently a middle school teacher. If a juror working with kids had really been a concern for the prosecution, they would have eliminated juror seven before juror three. Although it would not be unreasonable to strike juror 9, she did have some concerning political beliefs, that she was struck does fit a pattern. Furthermore, in the prosecution's notes on juror 9, it is noted that she is involved with BLM. This is untrue. In the prosecution's notes on juror 11, a black woman who was eliminated by the defense, there is a notation on her employment as a police officer that is positive. It appears her being a cop was what prevented the prosecution from eliminating a black woman, despite the prosecution never having interacted with juror 11. Juro 9 is also the only juror that the prosecution did not interact with that the prosecution took notes on.

In conclusion, the appellee has demonstrated discriminatory intent under both Batson and Flowers, and the court should reverse the previous decision.

Issue Two

Response to Point of Error Two: The trial court failed to regard the materiality of the victim's criminal history and the lack of adequate counsel, thus committing a Brady and Morton violation.

The court did commit a Brady and Morton violation by failing to recognize the materiality of the withheld evidence and the ineffective aid of counsel. As it states in *Brady v. Maryland*, 373 U.S. 83 (1963): "The prosecution violates a defendant's due process rights if it suppresses, either willfully or inadvertently, exculpatory or

impeaching evidence that is material. " Therefore the requirements for a Brady violation is 1) The prosecution withheld evidence from the defense, unwillingly or intentionally, 2) The undisclosed evidence is impeachment or exculpatory evidence, and 3) The evidence is material. Requirements 1 and 2 are indisputably met, but requirement 3 is disputed. As defined by Ex Parte Richardson, 70 S.W. 3D 865 (Tex. Crim. App. 2002), the evidence is only material if "there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different." However, as demonstrated in the same case: Ex Parte Richardson, 70 S.W. 3d 865 (Tex. Crim. App. 2002), in which a significant piece of withheld evidence not only impeached and severely undermined the trustworthiness of an extremely important witness, but also played a very significant role in the outcome of the case and the verdict, as the cases states, "exculpatory evidence includes impeachment evidence." The evidence withheld by the prosecution- the victim's traffic tickets, impeaches the victim, who is the most important witness and source of information that inculpates Rush. Therefore the exculpatory evidence withheld by the prosecution, could and should be interpreted as material, thus fulfilling the requirements for a Brady violation. And because of the aforementioned failure of the prosecution to disclose the exculpatory evidence undermines significant confidence in the outcome of the case, the additional eyewitness testimony is not significant.

The requirements for a Morton violation according to Strickland v. Washington, 466 U.S. 668 (1984) is that "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 to such a degree that the defendant was deprived of a fair trial.” Rush claims that there was a Morton violation when his defense attorney did not request a Michael Morton request under Texas Code of Criminal Procedure Section 39.14, which would have allowed him to do a pretrial discovery, giving him the ability to see the evidence that the prosecution will present at trial and see any evidence that may aid him in Rush’s defense. A Morton request would also make the prosecution obligated to turn over all of this evidence. A reasonable lawyer would have opted to utilize a Morton request to his advantage, to properly aid his client, but failed to do so; therefore being an unprofessional error. The mere fact that he was busy, does not justify his inability to file Morton request; he could have motioned to delay the trial, to buy him enough time to at least attempt to file the Morton request, to give his client the fairest trial possible. While this would not have been as big of an issue if there was no significant exculpatory evidence that was withheld by the prosecution, but as stated previously, the undisclosed exculpatory evidence withheld by the prosecution would be considered material and significant enough to potentially change the verdict of the case. Therefore the Michael Morton violation claimed by Rush is legitimate and justified and should be awarded a new trial.

Conclusion:

The claim for a Batson violation is completely legitimate, as the judge showed a clear biased pattern for striking female and African American jurors. The judge attempts to explain these strikes by claiming that their backgrounds would potentially cause conflicts of interest and impact their decision about the verdict. However, the judge is inconsistent about these claims, often striking an African American juror for one particular reason, but not striking a white juror with the

same potential issues, therefore targeting African American jurors, and is a Batson violation. A Brady violation is justified by the fact that the undisclosed impeachment evidence could have a significant impact on the verdict, and be considered as exculpatory. Therefore, the failure of the defense attorney to file a Morton request should be considered ineffective counsel and be considered a Morton violation.

PRAYER

It is for these reasons that we pray that the court rules in favor of the Appellant Torrance Rush and reverse the decision of the lower court.

Maeve Durkee

Isaac Yoo

IN THE COURT OF CRIMINAL APPEALS,

STATE OF TEXAS

No. 02-19-01234-CR

Torrance Rush

Appellant

v.

The State of Texas

Appellee

From the Court Of Appeals, Second District, at Fort Worth

Brief for Appellee

Maeve Durkee

Isaac Yoo

Creekview High School

To the honorable Court of Appeals:

Come now, the State of Texas, and files this appeals brief.

Statement of the Case

Torrence Rush was charged with a Class C Misdemeanor offence of Minor Driving Under the Influence of Alcohol as well as Failure to Yield to a Pedestrian, also a Class C Misdemeanor offence in the Fort Worth Municipal Court. Rush was found guilty of both offenses at a jury trial. After this he brought his case before the Tarrant County County Court of Law and Judge Castillo affirmed the previous ruling. Rush brought his case next to the Texas Court of Criminal Appeals and the ruling was reaffirmed.

Statement of the Facts

On April 19, in the year 2019, there was a violent meeting of a car and a bike that resulted in no significant injuries. The driver of the car, Torrence Rush was first issued with a Class C Misdemeanor, as he was the driver of the vehicle, and therefore at fault for the accident. The officer at the scene smelled alcohol on Rush and issued a second citation for Minor Driving Under the Influence. Rush acquired an attorney and was appointed a date for a jury trial. The out of the first 12 jurors in the jury list, 7 were black, 3 were white, one was hispanic, and one was asian. The gender makeup was 8 women and 4 men, including one transgender man. After there was a jury shuffle at the request of the prosecutor she used all three of her peremptory strikes. The defense deemed these strikes both racist and sexist and filed a batson challenge which was rejected by the trial court judge.

Issues on Appeal

(1)The question of whether there was error in denying the appellant's Batson challenge.

(2a) Whether or not the prosecutor had to release a piece of evidence

(2b) Whether or not the defense lawyer had a duty to request that evidence.

Response to Point of Error One: The trial court erred in denying the batson challenge because ...

The trial court did not err in denying the appellant's batson challenge. The prosecution was well within their rights to strike the jurors they did during voir dire. A batson challenge requires that the party making it construct a case for discrimination, the other party gives their reasons for making the strikes. The judge then decides whether or not there was discrimination. According to Batson v Kentucky there is "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 descrimination." The trial judge in this case has made his decision, and it should be upheld.

Response to Point of Error Two: The trial court failed to regard the materiality of the victim's criminal history and the lack of adequate counsel, thus committing a Brady and Morton violation.

The Brady and Morton violations are invalid or this case due to the insignificance of the withheld criminal record information. As it states in Brady v. Maryland, 373 U.S. 83 (1963): "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." While this case claims that any evidence that would be significant in exculpating the victim from their charges or reducing their sentence, shall not be withheld by the prosecution, this argument is invalid as the criminal records may have undermined the victim's credibility, but only serves as impeachment evidence and not exculpatory evidence, which would have had no significant effect on the verdict of the case. This evidence also fails to effectively challenge the eyewitness testimony that stated that Rush indeed was responsible for the accident and the blood test results that confirm that he did have alcohol in his system, potentially impairing his driving abilities. Therefore this Brady violation would be irrelevant and would not have had a significant effect on the verdict.

Rush also claims that he had a severe lack of effective counsel and which he believes is a Morton violation. This is incorrect according to the standards set by *Strickland v. Washington, 466 U.S. 668 (1984)* the attorney may have provided counsel. As the case states, " 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. From counsel's function as an 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." By all accounts and records, Rush's counsel did just this, with no clear

conflicts of interest or prejudices coming into play, and kept Rush informed about the developments of the case. The claim for a Morton violation is ultimately invalidated because, as Strickland v. Washington, 466 U.S. 668 (1984) states: "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." As stated previously, the evidence that Rush claimed should have been used in the case, merely served as an impeachment evidence against one witness, wouldn't have any real significance in the ultimate verdict of the trial.

Conclusion:

The claim of a Batson violation is invalid as the striking of the jurors did not involve the race, gender, sexual orientation, or religion of the juror; rather it was determined by other legitimate factors, that might create conflicts of interest and have a significant effect on their ruling of the case. And the Brady violation is nullified by the fact that the undisclosed evidence withheld by the prosecution served as impeachment evidence, with no real significance on the verdict of the case, therefore the inability of the defense attorney to file a Michael Mroton request should not be considered ineffective assistance of counsel and should not be a Morton violation.

PRAYER

It is for these reasons that we pray that the court rule in favor of the Appellee, the
state of Texas

Maeve Durkee

Isaac Yoo

IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

NO. 19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellant

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

Brief for Appellant

Scott Garcia-Calvillo

Avery Rose

Judge Barefoot Sanders Law Magnet

Statement of the Case

Torrence Rush was issued a citation for Minor Driving Under the Influence and Failure to Yield Right of Way to a Pedestrian. After a jury trial, he was convicted on both counts. Rush appeals the conviction, and presents two points of error on appeal.

Statement of Facts

On April 29, 2019 in downtown Fort Worth, defendant and complainant were involved in a traffic accident. Rush, the defendant, was given a class C misdemeanor citation for the accident and a Minor Driving Under the Influence citation. When the voir dire panel first arrived, 7 of the 12 members within the strike zone were Black. After the shuffle, the strike zone consisted of 4 blacks. The prosecutor then struck 3 of the Black panelists: one for cause and two with peremptory strikes. The defense raised a Batson challenge alleging racial and gender discrimination, but the judge found no such violation. Rush was found guilty on both charges. Following the trial the complainant said to Rush "I'm sure glad y'all 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." Prosecution failed to disclose this impeachment information, and defense attorneys failed to gain access to it. Rush's attorney filed a motion for a new trial based on a statement made outside of the trial, renewing their Batson challenge, alleging a Brady violation, and alternatively, ineffective assistance of counsel.; however, the motion was denied.

POINT OF ERROR 1

The trial court erred in denying appellant's *Batson* challenge.

The 14th Amendment guarantees that no "State [can] deprive any person of life, liberty, or property, without due process of law" As one of the core foundations for our justice system, the 14th Amendment has been reviewed multiple times throughout history. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court of the United States found that no prosecutor may strike jurors based on race. The overall purpose of *Batson* is to promote a jury "body...composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is... having the same legal status in society as that which he holds. *Strauder v. West Virginia*, 100 U.S. 303 (1880).

How we enforce this view (when striking a juror) is explained in 3 parts by *Batson*: 1, the opposing counsel must make a *prima facie* case of racial discrimination. 2, the counsel wishing to strike, must provide a race-neutral reason for their strike. And 3, The court must ultimately decide whether or not purposeful racial discrimination was the intent behind the strike

In *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019) The 3rd prong of the *Batson* challenge was expanded upon. The Supreme Court gave us guidelines to follow for a better way to promote the overall view described in *Strauder*. Four categories of evidence are to be considered when a *Batson* challenge arises: the attorney's track record; patterns of the strikes during the trial; any desperate questioning between jurors of different races; and a side-by-side comparison using the attorney's race neutral reason for the strike. The Texas Court of Appeals, however, failed to properly follow these guidelines.

First, it is important to point out that the prosecution drastically changed the makeup of the jury from 7 to 3 blacks. Even if we were to assume that this extreme

change in the makeup of the jury was not intentional, just proof of discriminatory impact “may, for all practical purposes, demonstrate unconstitutionality because, in various circumstances, the discrimination is very difficult to explain on non racial grounds.” *Akins v. Texas*, 325 U.S. 398, 403 (1945).

Additional and much more tenacious evidence is also present when the stricken jurors are analyzed in-depth. Starting with juror 3, when the prosecutor asks her what she used to do “on a day to day basis” juror 3 answers with “I helped some with the finance and I also served as an associate youth pastor.” Later on in the voir dire, prosecution questions juror 7, who responds with “I’m a middle school teacher. I deal with kids every day.” Based on the panelist’s bland answer of “associate youth pastor”, prosecution decides to strike juror 3, but not juror 7 who “works with kids everyday”. As said in *Flowers* (quoting *Foster*), when a prosecutor’s “proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination.” *Foster v. Chatman*, 578 U.S. (2016).

Moreover, when prosecution is asked for her race-neutral response she answers with “juror 3 was a school teacher who worked with students close in age to the defendant.” The prosecutor falsely attributes juror 7 as the teacher, and when corrected prosecution continues to try and strike juror 3. The prosecutor made it clear that working with children is not why she wanted to strike jurors. When the prosecution stated a race-neutral reason for juror 7, and did not disclose one for juror 3, the prosecution failed to provide a race-neutral reason for striking juror 3 which violates the 2nd step in *Batson*. This does not only make the strike invalid, but because the judge approved of a strike which was not provided with a

race-neutral reason this court must automatically overrule the lower court's opinion. *Hernandez v. Texas*, 347 U.S. 477; *Patton v. Mississippi*, 332 U.S. 469; and *Tarrance v. Georgia*, 188 U.S. 519 (1903).

Next, the prosecutor's first question towards juror 9 arises suspicion. The prosecution asks for her major, which couldn't possibly be used to prove bias. But her racially discriminatory intent becomes clear when she asks "wow, so like English and Science mixed together. What uhm... What is you the ultimate goal.. what profession are you hoping to join?". If it isn't obvious, college goals and curriculum have nothing to do with the bias of being a juror in a traffic ticket case. Competence to serve as a juror is about being able to impartially considered evidence presented at trial. *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946). As said in *Miller-El v. Dretke*, 545 U.S. 231 (2005) The "State's failure to engage in any meaningful voir dire exam on a subject the state alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination."

Furthermore, no other non-black juror has been asked a question this in depth and individualized which "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 difference in the questions posed by the prosecutor are evidence of purposeful discrimination." *Miller-El v. Cockrell*, 537 U.S. 322 (2003). In fact, throughout the entire case, no non-black panelist was asked a direct or individual question. This also is evidence to suggest that the prosecution had a racial discriminatory motive.

Additionally, when the prosecution is asked about the reasoning behind the strike she says "Juror 9 had some anti-government political views..." Although it is true that juror 9 did express some extremely left-wing views "We do not consider... a juror's response to the effect that he understands or agrees with the applicable law... a legitimate reason for peremptory challenges as required by Batson..."

Martinez v. State, 824 S.W.2d 724

Due to the fact that not a single one of the seven original panelists made it into the jury; that only black panelists were asked direct questions; that the prosecution's voir dire questioning of juror 9 was a clear attempt to fish for a reason to strike; that juror 3 and juror 9 are so similar that they should have been struck together or not all; and that the prosecution did not provide a race-neutral reason for striking juror 3; a clear error by the lower court becomes clear. One anomaly by itself is suspicious, but five in the same trial is not a coincidence, it's a clear violation of the 14th amendment. A *Batson* violation is clear, and this court must find that there was an abuse of discretion when the lower court said otherwise.

POINT OF ERROR 2A

The trial court erred in denying appellant's motion for a new trial due to an alleged *Brady* motion.

Criminal defendants cannot be "[deprived] of life, liberty, or property, without due process of law" under the Fourteenth Amendment. In *Brady v. Maryland*, the Supreme Court extended this right to include "the suppression by the prosecution of evidence favorable to an accused upon request where the evidence

is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. 83 (1963).

As a result, many states, Texas included, have passed laws to further regulate the discovery process. Contrary to the original *Brady* ruling, Texas has removed the requirement of filing a request when seeking exculpatory evidence. Tex. Code Crim. Proc. Art. 39.14.

To properly assess the outcome of this case, we must persuade this court of the three-pronged test set forth by *Ex Parte Richardson*, 70 S.W. 3d 865 Tex. Crim. App. (2002). The State did not disclose evidence in its possession; the evidence was exculpatory or impeachment evidence; and the evidence was material. *Ex Parte Richardson*. We have satisfied all three prongs.

We have proven the first prong that the State did not hand over the traffic tickets in its possession. Although the State may argue that it was not in possession of the traffic tickets, the law says otherwise. On multiple occasions, courts have ruled that the State is required to gather evidence known by its members. *Kyles v. Whitley*, 514 U.S. 419, 437–38, 115 S. Ct. 1555, 1567–68 (1995). Police officers keep records of all the tickets they hand out. Considering that law enforcement personnel have access to traffic ticket records, and law enforcement work in conjunction with prosecutors to form the State, the State was in possession of the tickets. Despite having been in possession of the complainant’s traffic history, the State failed to hand the records over to the defense team.

Regarding the second prong, we have proven that the evidence was impeachment evidence. Impeachment evidence is evidence that would damage the complainant’s credibility. Impeachment evidence has been ruled to constitute

exculpatory evidence under *Bagley v. United States* [citation not in record]. This was crystallized in the Texas Code of Criminal Procedure which states: "the state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information". If the complainant was known to frequently violate traffic laws, then his testimony about following traffic laws in this case would be called into question.

Last, we have proven the third prong. This states that the impeachment evidence was material to the outcome of the case. Materiality is demonstrated when there is "a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different." *Ex Parte Richardson*, supra. The complainant's account of the incident is crucial to the Failure to Yield Right of Way to a Pedestrian charge, the main point of contention being whether the complainant was on his bicycle or not. There was only one eyewitness to the complainant's state right before the crash -- the complainant himself. Entering evidence that discredits the complainant's testimony would create reasonable doubt on its own; however, the damaged credibility of the complainant, combined with the cuts sustained on the inside of his pant-leg, and the testimony about the complainant straddling the bicycle on the ground immediately following the crash would change the outcome of the case, establishing materiality.

POINT OF ERROR 2B

The trial court erred in denying appellant's motion for a new trial due to ineffective assistance of counsel.

If you find our argument on the merits of a *Brady* violation unconvincing, we can prove that defense counsel's assistance was ineffective.

The U.S. legal system has expanded the Sixth Amendment to include a criminal defendant's right to reasonably effective assistance of counsel. *See Cuyler v. Sullivan*, at 446 U. S. 344. We must demonstrate a two-pronged standard by a preponderance of the evidence to prove ineffective assistance of counsel: counsel's performance was deficient; and but-for counsel's deficient performance, 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). This information must be founded in the record. *Mallett v. State*, 65 S.W.3d 59,63 (2001).

With respect to the first prong, the defense counsel's performance was deficient. The defense counsel chose to represent nine cases all scheduled for the same day. Having done so, counsel failed to investigate these cases, missing crucial impeachment evidence on the complainant. This deficiency led to a gap in knowledge on a crucial piece of evidence -- the complainant's traffic tickets.

We are also charged with proving by a preponderance of the evidence that the defense counsel's deficient performance deprived Mr. Rush of a fair trial. As we demonstrated during our discussion of materiality, the jury was on the verge of siding in favor of the defendant. By removing the complainant's traffic tickets from consideration, the case was unfairly slanted towards the State. Reasonable doubt was obscured from the jury's view, depriving Mr. Rush of a fair trial.

CONCLUSION

Appellant was denied justice when the judge erroneously found that there was no Batson violation, no Brady violation, and/or no ineffective assistance of counsel.

PRAYER

For these reasons we pray that this Honorable Court reverse the lower court's decision and remand for a new trial.

IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

NO. 19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellee

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

Brief for Appellee

Scott Garcia-Calvillo

Avery Rose

Judge Barefoot Sanders Law Magnet

Statement of Facts

On April 29, 2019 in downtown Fort Worth, defendant and complainant were involved in a traffic accident. Rush, the defendant, was given a class C misdemeanor citation for the accident and a Minor Driving Under the Influence citation. When the voir dire panel first arrived, 7 of the 12 members within the strike zone were Black. After the shuffle, the strike zone consisted of 4 black panelists. The prosecutor then struck 3 of the Black panelists: one for cause and two with peremptory strikes. The defense raised a *Batson* challenge alleging racial and gender discrimination, but the judge found no such violation. Rush was found guilty on both charges. Rush's attorney filed a motion for a new trial based on a statement made outside of the trial, renewing their *Batson* challenge, alleging a *Brady* violation, and alternatively, ineffective assistance of counsel. The appellant's motion was denied on all issues.

POINT OF ERROR 1

The trial court did not err by denying appellant's *Batson* challenge.

Batson v. Kentucky, 476 U.S. 79 (1986) made it clear that the prosecution may not discriminate on the basis of race. Although the intent is clear, how we apply and enforce *Batson* is something that has still not been perfected. A *Batson* challenge is split into 3 parts: the opposing counsel must make a *prima facie* case of racial discrimination; prosecution must provide a race-neutral reason; and the judge must decide if racial discrimination was the intent behind the strike.

Flowers v. Mississippi, 139 S.Ct. 2228 gave us guidelines to try and further define the 3rd prong of *Batson*; however, the facts from *Flowers* are far too extreme to render the same judgement in this case.

First, we aren't in possession of the prosecution's track record during jury selection. In *Flowers*, the prosecutor's track record was overwhelming: in the first trial the prosecutor struck 15 of 15 black people; in the second 14 of 15; in the third 13 of 15; in the fourth 11 of 11 and in the sixth 5 of 6. In this case, however, there is no proof of such an egregious record.

Second, the pattern of strikes in *Flowers* was almost certainly discriminatory. As previously stated, Flower's latest trial had 6 blacks among the 26 prospective jurors. 5 of them were struck by the prosecution. The final jury was made up of 11 whites and 1 black.

With this case, however, the change in the jury cannot be perfectly pinned on any racially discriminatory intent. The prosecution was granted a random jury shuffle and random grants the possibility that the same amount of black jurors will not remain. The appellant cannot claim discriminatory intent based on a random jury shuffle, nor can they claim discriminatory intent on the fact that juror 8 spoke English poorly. Either way, *for cause* strikes are not often reviewed on appeal because of court discretion (see *McCray v. Abrams*, 750 F.2d 1132 and *Booker v. Jabe*, 775 F.2d 762).

After the jury shuffle and the one *for cause* strike, the jury was left with 3 black jurors, all of which were free from the prosecution's supposed discriminatory intent. He then went on to strike two of them. Striking 2 of 3 prospective jurors is not enough to satisfy *Flower's* 2nd prong. As said by Justice King in Curtis Flower's appeal to the Supreme Court of Mississippi, 240 So.3d 1161 "The numbers described above are too disparate to be explained away categorized as mere happenstance." The numbers he is referring to are the 83%, 86%, 93% and 100%

of blacks struck during Flower's trials. Furthermore, in *Swain v. Alabama*, 380 U.S. 202 (1965) the court considered 6 of 6 or 100% of blacks struck as "[the] State's purposeful or deliberate denial to Negro's... participation as jurors..." The mere 66% of black panelists struck by the prosecution in this case is a clear outlier when compared to Flower's cases and other similar precedent. The numbers in this case can be "categorized as mere happenstance."

Third, The appellant would have you believe that the prosecution purposefully went after black people during Voir dire through the use of disparate questioning. If we look at the transcript it becomes apparent that is simply not the case. Although the prosecution did start off voir dire with a black person first, it was not racially-motivated. Juror 3's "retired" status means that the attorney knows the least about this person than anyone else at first glance, so naturally it is not hard to believe that the prosecutor would inquiry about Juror 3 first. Competence to serve as a juror depends on an assessment of individual qualifications and ability to impartially consider evidence presented at trial. *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946). A juror's profession, or in this case former profession, is critical to identify any bias the juror might have.

Furthermore, after the prosecution asked juror 3 about her involvement with youth, the prosecution asked the entire jury about similar experiences. This indicates that the prosecution was not just asking juror 3 because she is black, but anyone else who might have a bias towards youth. This is further illustrated by the fact that the prosecution also questioned juror 7, who was a middle school teacher.

We can also apply *Thiel* to juror 9's questioning. Well although at first glance it might seem very motive driven, the opposite is true. Both sides can agree that

the prosecution wasn't planning on questioning juror 9, his questioning makes that clear. However it's not because the prosecution had some hidden racially discriminatory intent. Voir Dire is about picking out the best jury, so the prosecution having been left with time, decided to have a shot in the dark as to who might also have some secret bias. Some might object as to why juror 9 out of so many. The answer is relatively simply. No one is more likely to have an anti-state stance than a college student. Every other juror with an occupation has it within the private sector or the government. A very liberal college student is most likely to have an anti-government stance and therefore bias against the state of Texas. It's a rare occurrence, but even rare happens once.

Lastly, we can't compare juror 3 to 7 in a side-by-side comparison. *Flower's* last guideline relies on the opinion in *Foster v. Chatman*, 578 U.S. 477. In it the court said that when a prosecutor's "proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination."

Prosecution's reason for striking juror 3 was because she might feel sympathy for the defendant due to his age. Juror 3 is not at all like juror 7. Juror 7 is a middle school teacher who doesn't have a positive view on children. In juror 7's answer, he refers to them as "troublemakers". Compare that to the much more religious and often understanding youth pastor. As an example, although both Fox News and MSNBC are news channels, you can't say that both have the same views towards the president. Similarly this is the difference in views that denies the court to compare Juror 3 and juror 7 side-by-side. Viewing the same thing does not mean viewing it the same way.

As Justice Thomas said in *Flowers* (dissent) everyone “forgets that correlation is not causation.” The numbers above are bare statistical disparities that can be used to support diametrically different theories of causation, for either proving or disproving racial discrimination. *Box v. Planned Parenthood of Indiana & Kentucky, inc.*, U.S. (2019). Even if this court were to adopt the appellant’s view and consider the possibility of a *Batson* violation, that fact is that in order to reverse the lower court’s ruling it is the duty of the appellant to show “definite and firm conviction that a mistake has been committed” *Vargas v. State*, 838 S.W.2d 552 (Tex. Crim. App. 1992). It's impossible for the appellant to show that the Texas Court of Appeals was clearly wrong. The only possible outcome is to affirm the lower court’s decision on the first point of error.

POINT OF ERROR 2A

The trial court did not err in denying appellant’s motion for a new trial due to an alleged *Brady* motion.

Criminal defendants cannot be “[deprived] of life, liberty, or property, without due process of law” under the Fourteenth Amendment. In *Brady v. Maryland*, the Supreme Court extended this right to include “the suppression by the prosecution of evidence favorable to an accused upon request where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. 83 (1963).

As a result, many states, Texas included, have passed laws to further regulate the discovery process. Contrary to the original *Brady* ruling, Texas has

removed the requirement of filing a request when seeking exculpatory evidence. Tex. Code Crim. Proc. Art. 39.14.

To properly assess the outcome of this case, we must persuade this court of the three-pronged test set forth by *Ex Parte Richardson*, 70 S.W. 3d 865 Tex. Crim. App. (2002). The State did not disclose evidence in its possession; the evidence was exculpatory or impeachment evidence; and the evidence was material. *Ex Parte Richardson*. The appellant has not satisfied any of the prongs.

The appellant cannot satisfy the first prong because the State was not in possession of the evidence. The State was unable to access the complainant's traffic records due to time constraints, thus they had no possession of these records. Additionally, the defendant's counsel could have easily accessed the complainant's traffic records through a search through an online database. Because of this, "The State does not have [a duty to turn over exculpatory evidence] if the defendant was actually aware of the evidence or could have accessed it from other sources." *Reed v. State*, (Tex. App. – Fort Worth 2016) (unpub.).

The appellant also failed to address the second prong outlined in *Richardson*. Because the traffic violations were not part of the record, we cannot be sure that they were in relation to the charge brought against the defendant. The only thing that the record reflects is that the complainant's traffic tickets were a result of their actions as a driver and not a pedestrian, meaning the complainant's traffic issues could be completely irrelevant to the Failure to Yield Right of Way to a Pedestrian charge. Even if the tickets were related to the charge brought against the defendant, the fact that Mr. Spokes behaved poorly on a prior occasion does not

mean that he acted in accordance with that poor behavior on the day of the incident. It would be improper to assert otherwise.

Regarding the third prong of materiality, the appellant's argument also falls short. Materiality is established by proving that "there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different." *Ex Parte Richardson*, supra. The totality of the evidence compiled in this case is overwhelmingly in favor of the State. Impeaching the complainant's credibility would do little to impact the jury's verdict. The main issue to be addressed in the Failure to Yield Right of Way to a Pedestrian charge is if the complainant was on their bicycle or walking beside it at the time of the crash. Of the three witnesses who were present when the complainant was hit, two of them testified that Mr. Spokes appeared to be walking beside his bicycle before the crash. Nothing suggests that the complainant's impeachment would hamper the State's case against Mr. Rush.

POINT OF ERROR 2B

The trial court did not err in denying appellant's motion for a new trial due to ineffective assistance of counsel.

UThe U.S. legal system has expanded the Sixth Amendment to include a criminal defendant's right to reasonably effective assistance of counsel. *See Cuyler v. Sullivan*, at 446 U. S. 344. We must demonstrate a two-pronged standard by a preponderance of the evidence to prove ineffective assistance of counsel: counsel's performance was deficient; and but-for counsel's deficient performance, 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). This information must be founded in the record. *Mallett v. State*, 65 S.W.3d 59,63 (2001). "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". See *Michel v. Louisiana*, at 350 U. S. 101. The appellant must meet both prongs to prevail on the claim. *Perez v. State*, 310 S.W.3d 890, 893; *Rylander v. State*, 101 S.W.3d 107, 110-11. The appellant, however, cannot satisfy either step of the standard.

Addressing the first prong, the defense counsel's performance was not deficient. 50 cases were randomly scheduled to be heard that day. Because of this, the defense attorney would have no idea if any of their cases would go to trial. Being a municipal court attorney is a high-volume business as well. Most cases seen by these attorneys are never sent to trial. It is perfectly reasonable to see a municipal defense attorney take on a large amount of cases that they are often unable to fully investigate as a result.

Even if counsel's performance is deemed deficient, this deficiency did not deprive the defendant of a fair trial. "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." *Strickland v. Washington*, supra. Our argument about materiality applies here as well. The defense team was faced with an insurmountable task in clearing Mr. Rush of these charges. The defendant was not unfairly prejudiced.

CONCLUSION

The judge's ruling on the Batson violation, Brady violation, and ineffective assistance of counsel claims were correct.

PRAYER

For these reasons we pray that this Honorable Court uphold the lower court's decision.

In the Court of Criminal Appeals, State of Texas

NO. 19-01234-CR

TORRANCE RUSH, (APPELLANT)

V.

THE STATE OF TEXAS, (APPELLEE)

FROM THE COURT OF APPEALS, SECOND DISTRICT,

AT FORT WORTH

Brief of Appellant

Ishaan Panjwani

Christian Velasquez

Coppell YMCA

Creekview High School

Statement of the Case

Torrance Rush was charged with Class C Misdemeanor offenses of Minor Driving Under the Influence of Alcohol and Failure to Yield to a Pedestrian. Rush was found guilty of both offenses. Rush appealed both offenses before the County Court at Law in Tarrant County.

Statement of the Facts

Rush did not yield to a pedestrian in his vehicle at an intersection. The State made three strikes which included two black jurors and two of the remaining three females in the strike zone. The jury ended up consisting of entirely males. The State claimed Juror 3 worked with young people and would likely be more lenient to the defendant and Juror 9 had too extreme political positions. The judge determined that there was no Batson violation, but after the trial, the victim talked to the defendant about his/her traffic tickets and how bad of a driver he/she was. Rush filed another appeal.

Issues on Appeal

There were two issues that Rush was appealing.

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 a new trial due to an alleged Brady violation
 - 2b) Whether the trial court erred in denying appellant's motion for new trial due to ineffective assistance of counsel.

Point of Error 2a: The trial court erred in denying Rush's motion for a new trial due to an alleged Brady violation.

According to Brady vs. Maryland, the prosecution violates a defendant's due process rights if it suppresses, either willfully or inadvertently, exculpatory or impeaching evidence that is material. Rush must prove these steps:

- 1.** Demonstrate that the State failed to disclose evidence within its possession
- 2.** Withheld evidence is either impeachment evidence or exculpatory evidence
- 3.** The evidence is material

The State did not disclose evidence within its possession which means the first prong of Brady vs. Maryland was fulfilled. According to Ex Parte Mitchell, 977 S.W.2d 575, 578 (Texas Criminal App. 1997, "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." This means that although the State wasn't required to reveal the evidence, they had a constitutional duty to disclose this information.

The second prong requires the evidence to be impeachment or exculpatory evidence and the evidence is clearly impeachment evidence since it undermines the credibility of the victim. The victim is accusing someone else of violating traffic laws when the victim has done the same in the past except it hasn't led to accidents. This means that the second prong of Brady vs. Maryland is fulfilled.

The third prong requires that the evidence be material. The evidence is material if it is able to change the outcome of the case or it is able to change the sentencing of Rush. The evidence would easily be able to change the sentencing of the case since it undermines the credibility of the victim and can change the jury's opinion on the victim. This can lead to the jury favoring a lesser sentence for Rush. This makes the evidence material.

According to *Ex Parte Richardson*, evidence is considered material "if there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different." This means that evidence is only material if it sways the outcome of the case. The traffic tickets of the victim are clearly material towards the case. There is evidence that the victim has a pattern for violating traffic laws which could have a huge effect on the outcome of the case. This could have led to a lesser sentence for Rush since the victim is known for disregarding basic traffic laws.

According to the Texas Statute, the state is required to "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). The evidence that the state wasn't disclosing was clearly mitigating since it dismisses the integrity of the victim. Although this may not change the stance on the outcome of the case, it could have

possibly lessened the punishment from the judge and improved the defenses chances.

Point of Error 2b: The trial court erred in denying Rush a new trial due to ineffective assistance of counsel.

According to Melton vs. State, "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."

Attorney's jobs are to prepare the case for trial when they know it is headed that way. At the very minimum, they should be researching the opposing counsel's criminal history so that they have evidence to impeach them. A reasonable attorney would have represented in the best interest of his client and file a discovery request since it is very possible that the evidence can help aid the defense. Although other attorney's don't typically file discovery requests, those are different cases and in those cases its possible that the evidence didn't have much of an effect on the outcome of the case while in this case, the traffic tickets have a substantial effect on the case.

The attorney has chosen to handle multiple people and that shouldn't diminish the rights of the client for a proper investigation. If the attorney can't handle the amount of cases he is taking on, then he shouldn't represent so many people because its unfair to his clients that he isn't giving enough of his time to them. According to Wilkerson vs. State, "In Texas, a defendant in a criminal case is entitled to reasonably effective assistance of counsel."

According to Strickland vs. Scott, "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgement of a criminal proceeding if the error had no effect on the judgement." In this case, a proper attorney would have recommended that Rush ask for past records of the victim which he is required to receive. Since the traffic tickets would have changed the outcome of the case as explained before, that means a proper attorney asking for a discovery would have changed the outcome of the case.

The sixth amendment states that "the accused shall enjoy the right to a speedy and public trial... and to have the Assistance of Counsel for his defense." This means that the accused has the right to have a competent lawyer. This includes asking for a discovery request if necessary. Even if it didn't change the outcome drastically, the accused still deserves a fair trial which includes having a competent lawyer.

Conclusion

In Conclusion, the trial court erred in denying Rush's Batson Challenge, Brady violation, and ineffective assistance of counsel.

Prayer

We pray that the court rules in favor of the appellant and remands the decision of the lower court.

In the Texas Court of Appeals, State of Texas

NO. 02-19-01234-CR

TORRANCE RUSH, (APPELLANT)

V.

STATE OF TEXAS, (APPELLEE)

FROM THE TEXAS COURT OF APPEALS, SECOND DISTRICT,

AT FORTH WORTH

Brief of Appellee

Ishaan Panjwani

Christian Velazquez

Coppell YMCA

Creekview High School

Statement of the Case

Torrance Rush was charged with Class C Misdemeanor offenses of Minor Driving Under the Influence of Alcohol and Failure to Yield to a Pedestrian. Rush was found guilty of both offenses. Rush appealed both offenses before the County Court at Law in Tarrant County.

Statement of the Facts

Rush did not yield to a pedestrian in his vehicle at an intersection. The State made three strikes which included two black jurors and two of the remaining three females in the strike zone. The jury ended up consisting of entirely males. The State claimed Juror 3 worked with young people and would likely be more lenient to the defendant and Juror 9 had too extreme political positions. The judge determined that there was no Batson violation, but after the trial, the victim talked to the defendant about his/her traffic tickets and how bad of a driver he/she was. Rush filed another appeal.

Issues on Appeal

There were two issues that Rush was appealing.

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 a 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.

Point of Error 1:

According to *Batson v. Kentucky*, 476 U.S.79 when resolving Batson challenges. First the defense must make a prima facie case of racial discrimination. Second, if a prima facie showing has been made, the State has to articulate a race neutral reason for it's strike.

And third, the trial court must then decide whether the defendant has proved purposeful racial discrimination.

In *Flowers v Mississippi*, 139 SCt. 2228, " Throughout the process, the defendant bears the burden of persuasion and must convince the court of the racial discrimination" Therefore, the appellant needs to convince the court that there is racial discrimination from the eliminations of certain jurors during the trial. In the Dissenting opinion, Justice Alamin disagrees with the court by saying " neither the trial court nor this even used correct legal framework when making their decision." When determining if the peremptory strikes were exercised the supreme court in *Flowers* had given six categories. The State doesn't take in value the 3rd prong which is a "side by side comparisons of black prospective jurors who were struck and white prosecutors jurors who were not struck in the case" The State failed to provide that information in order to explain why the strikes were necessary and not of racial discrimination.

Point of Error 2a: The trial court did not err in denying Rush's motion for a new trial due to an alleged Brady violation.

According to *Brady vs. Maryland*, the prosecution violates a defendant's due process rights if it suppresses, either willfully or inadvertently, exculpatory or impeaching evidence that is material. Rush must follow all of these steps:

1. Demonstrate that the State failed to disclose evidence within its possession
2. Withheld evidence is either impeachment evidence or exculpatory evidence
3. The evidence is material

Addressing the first prong, the state did not have possession of the victim's traffic tickets. The prosecutor also stated that they weren't aware of the victim's history. There is nothing that suggests the prosecutor had a physical copy of the traffic tickets or driving history of the victim. There were around 50 cases scheduled that day according to the prosecutor so there was no way for the state to be able to review the history of every witness on all these cases. So if the state did not know about the victim's criminal record, then they would not be able to disclose the evidence to Rush or his lawyer, which does not fulfill the first prong. All three prongs have to be fulfilled in *Brady vs. Maryland* for Rush to prove that his due process rights were violated. Since the first prong isn't fulfilled, the court is required to be in favor with the State.

Secondly, Rush failed to fulfill the second step because the traffic tickets doesn't change the outcome of the case. The evidence does not exonerate Rush which means the evidence was not exculpatory. However, the evidence is impeachment evidence, meaning that it would change the credibility of the victim. However, the evidence would not be enough to change the outcome of the case.

Third, the evidence is not material. For evidence to be material, they would have to be able to change the outcome of the trial. According to *Ex Parte Richardson*, evidence is material if "there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different." The

outcome of the case doesn't change based off of traffic tickets or bad driving history. Because Rush still hit the pedestrian, and was then convicted of the crime, so the outcome would not have changed if the history were to be introduced. Therefore, Rush failed to fulfill the third step of Brady vs Maryland.

Point of Error 2b: The trial court did not err in denying Rush's motion for a new trial.

Rush must show that his counsel's representation was deficient and that the deficiency prejudiced the defendant to be able to establish the ineffective assistance of counsel.

According to Strickland vs. Washington, "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgement of a criminal proceeding if the error had no effect on the judgement." This is basically saying the same thing as Brady vs Maryland. In Brady vs. Maryland, the evidence was not material if it didn't have the significance to change the outcome of the case. With Strickland vs. Washington, an ineffective assistance of counsel is only sustained if the error was so significant that Rush was robbed of a fair trial. The supposed error made by Rush's counsel was not significant enough for the outcome of the case to be changed. One small mistake should not determine whether an attorney was giving ineffective assistance or not.

The sixth amendment does state that "the accused shall have the Assistance of Counsel for his defence." The sixth amendment doesn't specify requirements for effective counsel. All it states is that the court will provide a counsel for the accused, so this means that the proper measure for an attorney is simply

reasonableness under current professional norms. There aren't necessarily any guidelines that the attorney has to follow which means you can't judge an attorney based on not filing a discovery request or not. There are possibly reasons that we do not know of of him not filing the discovery request.

According to *Blanco vs. State*, the Court recognized that a defendant does not have a constitutional right to discovery in a criminal case. This means that there is no guarantee that the defendant will be able to obtain the information regarding the traffic tickets even if they made a discovery request. So any reasonable lawyer would not have tried to do so, so when Rush's attorney did not file a request, he was well within what a reasonable attorney would do, meaning that his attorney was not ineffective. They would need some finality to be able to give them the information. Additionally, the attorneys generally don't even submit discovery requests in a Municipal Court setting.

Conclusion:

In Conclusion, the court was right to deny both Rush's motion to apply for a new trial due to the Brady violation and due to ineffective assistance of counsel.

Prayer:

It is for these reasons that we pray the court rule in favor of the appellee, the State of Texas and uphold the decision of the lower court.

IN THE SUPREME COURT OF
THE STATE OF TEXAS

No. YAG-APP-2019

THE STATE OF TEXAS, Appellee

vs.

TORRANCE RUSH, Appellant

On Appeal from

The 15th Court of Appeals

Appellant

Anna Strohmeyer (Attorney #1)

Judah Powell (Attorney #2)

The Episcopal School of Dallas

Statement of the Case

The appellant, Torrance Rush, was charged with a Class C Misdemeanor for Minor Driving Under the Influence of Alcohol, and Failure to Yield to a Pedestrian. He was found guilty of both charges. He then filed this appeal on two points: the dimmise of his Batson Challenge, and the admission of evidence potentially relevant to the case. Rush petitions the court to reverse the verdict on these grounds.

Statement of the Facts

On April 19, 2019, Torrance Rush collided with a pedestrian on an intersection in downtown Fort Worth. No one was injured, but Rush was issued a Class C Misdemeanor for being the driver of the vehicle. At some point during the proceedings, the arresting officer thought he smelled alcohol on Rush's breath, and thus issued him a citation for Minor Driving Under the Influence of Alcohol.

As the case was going to court, Rush hired an attorney and prepared for trial. On the day of the trial, Rush's attorney represent nine other cases, and the court itself scheduled fifty cases for that day, as most tend to be resolved with plea deals or other such things and do not go to trial. However, Rush's case was chosen to go to trial. The original jury list for his case consisted of primarily African Americans and women. However, before being brought into the court, the State reviewed said list, and decided to use their one jury shuffle. This generated the final jury list, which was eventually used for the trial.

During the jury selection process, the State struck two of the remaining three women from the jury as well as two of the three remaining African American people. This resulted in a priamily Cacuasian male jury--consiting of five cacuasian

male jurors and one transgender asian juror. The appellant's attorney took issue with this, and claimed that it was discriminatory based on race and gender. The state then provided neutral reasons for each of the strikes, and the claim was dismissed.

Terrance Rush was found guilty. However, after the trial, the victim approached him as everyone was walking out. The victim then went on to explain that he was glad that they did not bring up his traffic tickets, as he did not want the jury to know how bad he was at driving. Rush then told his attorney this, and they filed for a motion for a new trial on these grounds, but the judge dismissed this motion. The defendant then filed this appeal.

Issues on Appeal

Point of Error 1: Whether the trial court erred in denying appellant's Batson challenge during voir dire,

Point of Error 2: Whether the trial court erred in denying appellant's motion for new trial due to an alleged Brady violation, and whether the trial court erred in denying appellant's motion for a new trial due to ineffective assistance of counsel

Argument

Point of Error 1: *The trial court erred in denying the appellant's Batson challenge during the voir dire*

To begin with, it is perhaps best to begin with defining what the issue is at hand: whether Torrance Rush received a fair and just trial as he is entitled to as a United States citizen according to the sixth amendment. It is our contention that he did not, as the selection of the jury violated the principles of *Martin v. Texas*, which states that “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). However, when we apply the process outlined by *Batson v. Kentucky*, 476 U.S. 79 (1986), as well as examine the strikes in accordance with the criteria set forth by *Flowers v. State*, we can see that the jury was selected with discriminatory intent, and thus violated his rights to a fair trial.

The process outlined by *Batson v. Kentucky*, 476 U.S. 79 (1989) is as follows:

- 1) The defense must provide a prima facie case of discrimination before the judge.
- 2) If the prima facie showing has been made, the burden shifts to the state to articulate a race-neutral reason for its strike
- 3) 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).

In regards to step one, Torrance Rush does provide a prima facie case, as he shows that he is a member of a “cognizable racial group”, *Castaneda v. Partida*, supra, at 430 U.C 494, that the prosecutor exercised his strikes and other measures to remove members of his race from the venire, and that the circumstances raise an “inference that the prosecutor used that practice to exclude

the veniremen from the petit jury on account of their race." The prosecution does strike African Americans--the "cognizable racial group" of which Rush is a part of-- from the potential jury, and two of their three strikes were used against African American people. This establishes a pattern of strikes against African American jurors, which according to *Batson v. Kentucky* can serve to give "rise to an inference of discrimination." () Thusly, *Torrance Rush* establishes a prima facie case, and the burden then shifts to the state to give neutral reasons for the strikes. In the case, the state did provide this. However, the state's reasons do not hold up under close scrutiny, and when looked at in context of *Flowers v. Mississippi* can be seen as a pretext for discriminatory intent.

Flowers v. Mississippi gives six categories of evidence to apply when looking at strikes in regards to a *Batson* challenge. They are 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 regards to these criteria, it is evident that the State's proceedings in this case show ample evidence of these practices--specifically 1, 2, 3, 4, and 6. The strikes used by the state were primarily against African Americans and women, as two-thirds of their strikes were excised against this group. This can serve as an example of the State's practices of the first prong, as the statistical evidence shows the state had a statistical higher rate of striking African American and women jurors over Caucasian and male jurors. This discrimination carries over to the questioning portion of the jury selection, in which Mrs. Crumble--the prosecution--ask a total of six questions. Four of the six questions are addressed to people of color, while only two are addressed to the other jurors. This establishes a ratio of two questions to people of color for every question asked to a Caucasian juror, which very neatly falls under the circumstances established in category two. Furthermore, in terms of category three, the similarities between Mrs. Marva--a retired African American church secretary doubling as an associate youth pastor--and Mr. Gallegos--a Caucasian middle school teacher--are fairly obvious. They both were involved in careers which involve interacting with children on a frequent basis. Both potential jurors worked with children in their careers, but yet only Mrs. Marva was struck for it. This comparison sheds doubt on the State's reason for striking Mrs. Marva, as if they struck her for having worked with children, why did they not strike Mr. Gallegos whose work arguably had much more involvement with children? This confusion carries over even to the Batson hearing where the State's prosecutor confuses the two, and says that Mrs. Marva was a "school teacher who worked with kids close an age with our defendant." However, as it says in the court transcript, she was in fact previously employed as "a secretary at a church", where she mainly

did “just basic paperwork”, not a school teacher. Finally, the State’s use of jury shuffle can be seen as evidence, as it drastically changed the racial and gender make-up of the potential jury (originally consisting of 7 black panelists, 3 whites and 1 Hispanic. The gender makeup of this group was 8 women and 4 men) into one consisting largely of Caucasian men. Thus, in conclusion, the trial court erred in denying the appellant's Batson challenge, as he presented a Prima Facie case, and the State’s selection of the jury can be seen as discriminatory when applied to the test found in *Flowers v. Mississippi*.

Point of Error 2: The trial court erred in denying appellant’s motion for new trial

due to an alleged Brady violation, and the trial court erred in denying appellant’s motion for a new trial due to ineffective assistance of counsel

To begin with, both of these issues are similar, even if they focus on different standards. Materiality is a concern common to both issues. I do not agree with the majority’s decision of the victim’s prior traffic tickets being considered immaterial evidence and fails Brady’s second prong. This case’s main concern is whether the victim or the defendant was at fault. Evidence that a victim has a pattern of violating traffic laws is highly material to this case’s main point. Thusly it meets all three prongs of Brady. On this issue alone I would reverse the trial’s decision.

However, it is important to discuss the issues regarding ineffective assistance of the trial court counsel. When attorney's know a case is heading for trial, they have a duty to prepare for it. At minimum this requires conducting a preliminary search of a witnesses criminal history in order to 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 counsel.” Melton v. State, 987 S.W.2d 72 (1988). Morton states that the defense attorney had a duty to request information from the prosecutor before the trial, see Tex. Code. Crim. Proc. Ann. art. 39.14 (West 2017).

Also a client's rights to a proper investigation of a case are not diminished solely by the fact that their attorney had chosen to represent multiple cases. An attorney must ensure that they are able to handle the case load or at least not accept as many cases. They also have to conduct a basic investigation before trial.

On both Brady and Morton violations, I would reverse and remand for a new trial.

Conclusion

We believe that the court should reverse its decision to deny a new trial due to the points of the validity of a Batson Charge and the Brady and Morton violations.

Prayer

We pray that the court finds favor in allowing a new trial for Mr. Torrence Rush.

Respectfully submitted,

Anna Strohmeier

Judah Powell

Attorneys for Appellant

IN THE SUPREME COURT OF
THE STATE OF TEXAS

No. YAG-APP-2019

THE STATE OF TEXAS, Appellee

vs.

TORRANCE RUSH, Appellant

On Appeal from
The 15th Court of Appeals

Appellee

Judah Powell (Attorney #1)

Anna Strohmeyer (Attorney #2)

The Episcopal School of Dallas

Statement of the Case

The appellant, Torrance Rush, was charged with a Class C Misdemeanor for Minor Driving Under the Influence of Alcohol, and Failure to Yield to a Pedestrian. He was found guilty of both charges. He then filed this appeal on two points: the demise of his Batson Challenge, and the admission of evidence potentially relevant to the case. Rush petitions the court to reverse the verdict on these grounds.

Statement of the Facts

On April 19, 2019, Torrance Rush collided with a pedestrian on an intersection in downtown Fort Worth. No one was injured, but Rush was issued a Class C Misdemeanor for being the driver of the vehicle. At some point during the proceedings, the arresting officer thought he smelled alcohol on Rush's breath, and thus issued him a citation for Minor Driving Under the Influence of Alcohol.

As the case was going to court, Rush hired an attorney and prepared for trial. On the day of the trial, Rush's attorney represent nine other cases, and the court itself scheduled fifty cases for that day, as most tend to be resolved with plea deals or other such things and do not go to trial. However, Rush's case was chosen to go to trial. The original jury list for his case consisted of primarily African Americans and women. However, before being brought into the court, the State reviewed said list, and decided to use their one jury shuffle. This generated the final jury list, which was eventually used for the trial

During the jury selection process, the State struck two of the remaining three women from the jury as well as two of the three remaining African American people. This resulted in a primarily Caucasian male jury--consisting of five Caucasian

male jurors and one transgender asian juror. The appellant's attorney took issue with this, and claimed that it was discriminatory based on race and gender. The state then provided neutral reasons for each of the strikes, and the claim was dismissed.

Terrance Rush was found guilty. However, after the trial, the victim approached him as everyone was walking out. The victim then went on to explain that he was glad that they did not bring up his traffic tickets, as he did not want the jury to know how bad he was at driving. Rush then told his attorney this, and they filed for a motion for a new trial on these grounds, but the judge dismissed this motion. The defendant then filed this appeal.

Issues on Appeal

Point of Error 1: Whether the trial court erred in denying appellant's Batson challenge during voir dire,

Point of Error 2: Whether the trial court erred in denying appellant's motion for new trial due to an alleged Brady violation, and whether the trial court erred in denying appellant's motion for a new trial due to ineffective assistance of counsel

Argument

Point of Error 1: *The trial court did not error in denying the appellant's Batson challenge during the voir dire*

To begin with, it is perhaps best to begin with defining what the issue is at hand: whether Torrance Rush received a fair and just trial as he is entitled to as a United States citizen according to the sixth amendment. It is our contention that he did, as while a jury may not be selected for racial reasons, 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. . As long as the State had legitimate reasons for striking the potential jurors they did, they have no legal burden to produce a jury in which the appellant's race is present. It can not be considered discriminatory purely for the fact that no members of a specific race are part of the jury. However, if the jurors were struck for racial reasons, it can be considered discriminatory. If an attorney suspects that the jury selection was purposefully discriminatory, he or she may put forth a Batson challenge, in which the attorney must prove that the strikes were based upon racial reasons. When resolving a Batson challenge, it is necessary to follow the process established by *Batson v. Kentucky*, 476 U.S. 79 (1986). It is as follows:

- 1) The defense must provide a prima facie case of discrimination before the judge.
- 2) If the prima facie showing has been made, the burden shifts to the state to articulate a race-neutral reason for its strike
- 3) 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).

While the appellant does establish a prima facie case of discrimination, the state does supply race-neutral reasons for the strikes. They struck Mrs. Marva because of

her involvement with children, as they did not want a juror who worked with children "close in age to the defendant." They struck Miss. Triplet because she had anti-government views, and they thought that could potentially bias her against the State. By providing said explanations the State has satisfied their burden.

We will now move on to the second facet of the appellant's argument: that the State's strikes were discriminatory when you apply the criteria outlined by *Flowers v. Mississippi*. These criteria are 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.

First, I would like to address the fact that category one is irrelevant to this particular case, as the fact that the attorney's can only strike three jurors negates the statistical evidence that could be used, because it only requires for the attorney to strike two jurors of a certain group to reach a majority percentage. When addressing the second category, I would like to preference with the fact that this

category alone can not serve to prove discriminatory intent. According to *Flowers v. Mississippi*, “disparate questioning or investigation alone does not constitute a Batson violation”, and thus it can not be used as the primary source of evidence of racial discrimination. Furthermore, even if it is found, it can still be written off as reflecting “ordinary race neutral considerations”, and is not directly proof of racial concerns. *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019). In regards to the third category, there is little to argue. While both Mrs. Marva and Mr. Gallegos work with children, Mr. Gallegos specifically works in a middle school, which is out of the age range of Mr. Rush, and thus not of concern to the State. In comparison, Mrs. Marva only says that she served as an “associate youth pastor”, which does not give a specific age range, and implies that she could of worked with children around the same age as Mr. Rush. Therefore, in the best interest of impartiality, it was necessary for the State to strike her. For those reasons, we hold that the trial court did not error in denying the appellant's Batson’s challenge during the voir dire.

Point of Error 2: The trial court did not error in denying appellant’s motion for new trial due to an alleged Brady violation, and the trial court did not error in denying appellant’s motion for a new trial due to ineffective assistance of counsel

To begin with, there are two separate issues here in regards to the evidence of the victim’s previous criminal history which came to light after the trials conclusion. Our first issue is Brady - whether the prosecutor had a duty to disclose the evidence to the defendant before the trial. See *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 issue 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.

First we will address Brady. The prosecution violated a defendant's due process rights, if it suppresses impeaching or exculpatory evidence that is material. See *Brady v. Maryland*, 373 U.S. 83 (1963). Brady requires a three step approach. The appellant must show 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. See *Hampton v. State*, 86 S.W.3d 603, 612 (Tex. Crim. Ann. 2002). Looking at this, it is clear that the evidence was impeachment evidence. In this case, the State has claimed that evidence of the victim's criminal history was not in its possession thus it had no duty to disclose the evidence. The prosecutor stated at the motion for a new trial that even they were not aware of the victim's history. The prosecutor stated that there were 50 cases scheduled for jury trial that day and thus there was no possible way for them to review all of their witnesses' histories on all their cases. Most of those 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 suggest the prosecutor had a physical copy of the victim's driving record. See *Reed v. State*, (Tex. App. - Fort Worth 2016)(unpub.). After the trial the victim disclosed to the defendant and the defendant obtained the records from the Municipal Court. It could be argued that the prosecutor had direct access to the

municipal court's records. But, the defense attorney likewise could have obtained the evidence through a pre-trial investigation. Regardless of whether or not 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 effected, 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 arguments 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 changed with this evidence. There are two points in this case that show the evidence's inclusion in the defense argument would not change the verdict itself, (1) the victim was a pedestrian, not a driver, therefore the traffic violations would not apply to someone who was not using a vehicle in the collision, and (2) The fact that the defendant had alcohol in his system does suggest that his driving skills were impaired. Thus, we cannot conclude that the evidence about the victim would have changed the verdict. We find that there is no Brady violation.

Next, the appellant argues that his trial court attorney provided him ineffective assistance of counsel by not filing a Micheal Morton request for the victim's criminal history under Texas Code of Criminal Procedure Section 39.14. The Michael Morton Act requires that State prosecutors have an open file policy so that

the defense has access to any non-privileged materials in possession of the prosecutors and any state actors. To establish ineffective assistance of counsel, the appellant must show a great amount of evidence that his counsel's representation was deficient and that the deficiency prejudiced the defendant. "An error by counsel, even if professionally unreasonable, does not warrant setting aside judgement of a criminal proceeding if the error had no effect on the judgement." Strickland v. State, 266 U.S. 668 (1984). The evidence for this is the same as Brady thusly it is not material. An ineffective assistance of counsel claim is only sustained if the error was serious enough to deprive the defendant of a fair trial. We are not inclined to state this. The intersection of ineffective assistance and Pre-trial discovery requests are addressed by Blanco v. State, (Tex. App. - El Paso, 2015)(unpub.). The court recognized that a defendant does not have a constitutional right to discovery in a criminal case. We cannot second guess the verdict on criminal cases because some additional evidence is discovered post-trial. There must be some finality in 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 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 decision of the trial court due to the invalidation of the Batson charge and the lack of Brady and Morton violations.

Prayer

The State of Texas prays that court affirms its decision on the previous ruling, and
denies the appeal

Respectfully submitted,

Judah Powell

Anna Strohmeyer

Attorneys for Appellee

IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

NO.19-01234-CR

Torrance Rush, Appellant

V.

The State of Texas, Appellee

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

Brief for Torrance Rush

(Appellant)

Steven Lopez

Nicholas Johnson

Judge Barefoot Sanders Law Magnet

TO THE HONORABLE COURTS OF TEXAS APPEAL

Comes now, Appellant, and files this is appeals brief.

STATEMENT OF THE CASE

Torrance Rush, Appellant, was charged with Class C misdemeanor offenses of Failure to Yield to a Pedestrian and Minor Driving Under the Influence of Alcohol. Torrance rush was found guilty of both offenses decided by a jury. Mr. Rush brought his appeals to the County Court of Law in Tarrant County. County Judge Castillo affirmed trial courts actions and Mr. Rush now seeks relief before this court.

STATEMENT OF THE FACTS

On April 19,2019, a pedestrian and a vehicle forcefully met. A Class C Misdemeanor citation was issued to the appellant after the officer smelled alcohol on the appellant's breath, Torrance Rush. When the first jury list was made, it was composed of 12 jurors, which had 7 black panelists, 3 whites, and 1 hispanic. The gender makeup of this jury list was 8 women and 4 men. The prosecutor requested a juror shuffle after reviewing the list of jurors. During jury selection the appellants attorney objected to the State's three peremptory strikes, claiming they were discriminatory based on gender and race. The states strikes included two of the three remaining black jurors as well as two of the three remaining females within the strike zone. The result of this was a jury of entirely male jurors. Five jurors were white, and one was Asain. Upon the state striking juror 3 (black female), juror 9 (black female), and juror 11 (white male), a Batson challenge³ was raised. After all the evidence was presented at trial, the defendant was found guilty of both offenses. After everyone was leaving 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 then

brought the information up 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.

ISSUES ON APPEAL

Point of error 1: The trial court did error in denying appellants Batson's challenge during voir dire.

Point of error 2a : The trial court did error in denying appellant's motion for a new trial due to an alleged Brady Violation.

Point of error 2b : The trial court did error in denying appellant's motion for a new trial due to ineffective assistance of counsel.

ARGUMENT

Point of error 1: The trial court did error in denying appellants Batson's challenge during voir dire.

Under the Fourteenth Amendment's Equal Protection Clause, in the United States Constitution, "no state shall deny to any person within its jurisdiction the equal protection of the laws." **Batson v. Kentucky**, 476 U.S. 79 (1986) establishes that when a Batson challenge is made the State must provide race neutral reasons for striking jurors, if they cannot do so, then the strikes are considered discriminatory and are a violation of the fourteenth amendment. The State responded to the defendants Batson challenge by providing race neutral reasons. In the voir dire transcript there is ample evidence of race neutral reasons provided by the State.

Flowers v. Mississippi, 139 S.Ct. 2228 (2019) provides a list used to determine whether the use of the State's peremptory strikes were discriminatory.

- 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 our case numbers 2,3,and 4 are red flags of discrimination. The state only questioned the jurors that were struck (all black), and did not question any white people. In the voir dire transcript it is clear that the state compared each juror side by side and struck two of the three black panelist. There was a misrepresentation of one of the jurors struck and when giving race neutral reasons the state said that they struck the black female because, "she was a teacher", when in fact she was a part of a church youth program.

The state struck jurors in a discriminatory manner as provided by the list above.

Point of error 2a : The trial court did error in denying appellant's motion for a new trial due to an alleged Brady Violation.

Point of error 2b : The trial court did error in denying appellant's motion for a new trial due to ineffective assistance of counsel.

The **Brady Rule** requires the appellant to prove beyond a reasonable doubt that the state failed to disclose evidence, the evidence was exculpatory, and that

the evidence was material. The state failed to complete their duty of disclosing the evidence as stated in the **Texas Code of Criminal Procedure 39.14(h)**. This states that "The state shall disclose to the defense 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." Exculpatory evidence can be defined as evidence that would have cleared the defendant of guilt. Material evidence can be defined as "a matter of law that probably sufficient to undermine confidence in the outcome of the proceeding", as stated in **Ex Parte Richardson**. This statute requires that the prosecution must disclose all evidence to the defense as soon as obtained. The prosecution did not inform the defense of the complainant's traffic tickets which would have played an important role in the jury's decision which can be seen as material. This piece of evidence would have made the complainant less credible and the defendant more reliable. The prosecution's job is to promote justice, by not disclosing this information, they are not completing their duty. A three-pronged test is set forth in **Ex Parte Richardson**. The applicant must first show that the state failed to disclose evidence, regardless of the prosecution's good or bad faith. Second, he must show that the withheld evidence is favorable to the applicant, and finally, 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. **Harm v. State** states that "This duty also requires the state to learn of Brady evidence known to others acting on the state's behalf in a case". Just because the prosecution does not have the evidence, does not relieve them of their duty of obtaining it and handing it over to the defense.

This means that the state was obligated to search the complainant's criminal history and inform the defense of it. If this court disagrees and finds that the prosecution was not obligated to turn this evidence over, then it was the defense's job to look for this evidence and his lack to do so results in counsel's ineffective assistance. Which brings me to my second argument. A two-part standard is set forth in **Strickland v. Washington** that determines ineffective assistance. In this test, the appellant must show that his attorney's performance was deficient; and that his attorney's deficient performance prejudiced his defense. **Blanco v. State** says that, "Appellant must satisfy both Strickland components , and the failure to show either deficient performance or prejudice will defeat an ineffectiveness claim". Attorney's deficiency can be seen through his lack to search the complainants criminal history due to his mishandeling of cases. Counsel agreed that he was handling multiple cases held on the same day. The purpose of having an attorney is to receive a fair trial. In order to have a fair trial, a good lawyer must be appointed to represent the case as stated in **Strickland v. Washington** . A good lawyer would have completed his duty of fully representing Rush by focusing more on his case. If counsel would have searched the criminal history and brought up the traffic tickets , Mr. Rush would have been seen as more credible, putting a doubt in the jury's mind which would have changed the outcome of the case. Both counsel's failure to bring up the traffic tickets deprived Rush from having a fair trial which is required by the 6th amendment.

Conclusion

Under **Batson v. Kentucky**, 476 U.S. 79 (1986) the state did discriminate against jurors, solely because of the fact that race neutral reasons given were

inadequate. The voir dire transcript provides evidence that the state did not look at race neutral reasons when striking jurors. There is enough compelling evidence to reverse the trial court's decision using **Batson v. Kentucky**, 476 U.S. 79 (1986).

Flowers v. Mississippi, 139 S.Ct. 2228 (2019) is very specific with ways in determining whether peremptory strikes were used in a discriminatory manner. This case does an excellent job in compelling that the state used their peremptory strikes in a discriminatory manner.

The appellant satisfies both test set forth in **Strickland v. Washington** and in the **Brady Rule**. Since **Strickland v. Washington** requires the appellant to prove all requirements, there is ineffective assistance because the appellant is able to prove all. The appellant is also able to prove the standards set in the Brady rule, therefore there is a Brady Violation on the state's behalf.

Prayer

Seeing as the state's discrimination towards the jury is obvious and that Rush was deprived of a fair trial due to both counsels failure to bring up the exculpatory evidence Torrance Rush prays that this court reverses the trial court's decision.

Respectfully submitted by The Law Magnet, Attorneys for Appellant

Steven Lopez and Nicholas Johnson

IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

NO.19-01234-CR

Torrance Rush, Appellant

V.

The State of Texas, Appellee

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

Brief for The State of Texas

(Appellee)

Steven Lopez

Nicholas Johnson

Judge Barefoot Sanders Law Magnet

TO THE HONORABLE COURTS OF TEXAS APPEAL

Comes now, Appellee, The States of Texas, and files this is appeals brief.

STATEMENT OF THE CASE

Torrance Rush, Appellant, was charged with Class C misdemeanor offenses of Failure to Yield to a Pedestrian and Minor Driving Under the Influence of Alcohol. Torrance rush was found guilty of both offenses decided by a jury. Mr. Rush brought his appeals to the County Court of Law in Tarrant County. County Judge Castillo affirmed trial courts actions and Mr. Rush now seeks relief before this court.

STATEMENT OF THE FACTS

On April 19,2019, a pedestrian and a vehicle forcefully met. A Class C Misdemeanor citation was issued to the appellant after the officer smelled alcohol on the appellant's breath, Torrance Rush. When the first jury list was made, it was composed of 12 jurors, which had 7 black panelists, 3 whites, and 1 hispanic. The gender makeup of this jury list was 8 women and 4 men. The prosecutor requested a juror shuffle after reviewing the list of jurors. During jury selection the appellants attorney objected to the State's three peremptory strikes, claiming they were discriminatory based on gender and race. The states strikes included two of the three remaining black jurors as well as two of the three remaining females within the strike zone. The result of this was a jury of entirely male jurors. Five jurors were white, and one was Asain. Upon the state striking juror 3 (black female), juror 9 (black female), and juror 11 (white male), a Batson challenge³ was raised. After all the evidence was presented at trial, the defendant was found guilty of both offenses. After everyone was leaving 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 then brought the information up 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.

ISSUES ON APPEAL

Point of error 1: The trial court did not error in denying appellants Batson's challenge during voir dire.

Point of error 2a : The trial court did not error in denying appellant's motion for a new trial due to an alleged Brady Violation.

Point of error 2b : The trial court did not error in denying appellant's motion for a new trial due to ineffective assistance of counsel.

ARGUMENTS

Point of error 1: The trial court did not error in denying appellants Batson's challenge during voir dire.

In *Batson v. Kentucky*, the petitioner, a black man was charged with second degree burglary and receipt of stolen goods. During jury selection, the defendant and prosecution exercised their peremptory challenges. The prosecutor struck all 4 of the black people on the venire and the final jury was made up of all white people. The defendant moved to discharge the jury on the grounds that the prosecutor's removal of the black jurors violated the petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross-section of the jury and under the Fourteenth Amendment to equal protection of the laws. When trial courts are presented with a *Batson* challenge, the trial court must follow a three step process. First, the defense must make a prima facie case of racial

discrimination. Rush's attorney raised a Batson challenge when the State of Texas used their 3 peremptory strikes to strike 2 of the 3 remaining black jurors and 2 of the 3 remaining female jurors. The appellant claimed that this was discriminatory based on race and gender. Next, if a prima facie case has been made, the State must provide a race-neutral reason for its strikes. The State struck Juror 3, a black female, because she worked with the youth in her church. Since she worked with the youth, she would have been more lenient towards Rush. Juror 9 was struck because of her strong anti government views which would have caused her to be more lenient towards Rush since she had such strong feelings about the government. *Flowers v. Mississippi* states that "correlation is not causation." Even though the State struck 2 black females does not mean that they were struck for racial reasons. Finally, the judge had to determine if there was a Batson violation. In this case the judge ruled that there was no Batson violation. We must give great deference to the trial judge because *Batson v. Kentucky* stated, "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." Since the steps in Batson were followed by the judge and the attorneys, we must give great deference to the judge's decision unless it was clearly erroneous. According to *Vargas v. State*, there must be a "definite and firm conviction that a mistake has been committed" in order to prove that the trial court's decision was clearly erroneous. The transcript shows that the Juror 3 and Juror 9 were struck for race neutral reasons which proves that the trial court was not erroneous. In *Flowers v. Mississippi*, Flowers, who is black, was being tried six different times before a jury for murder. In the sixth trial, the State struck five of

the six black jurors. During the appeal, Flowers argued that the State violated Batson by using their peremptory strikes against black jurors. The Mississippi Supreme Court affirmed the conviction in a 5-4 decision. *Flowers v. Mississippi* provided 6 categories to look at when determining if the peremptory strikes were used in a discriminatory manner. I will be focusing on categories 2, 3, 4, and 6. Category 2 states that "evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case." Flowers states that "a party will often ask more questions of jurors whose answers raise potential problems." The questioned Juror 3 and Juror 9 because they were showing red flags with their answers that would have caused problems such as being unfair and leaning towards Rush. Category 3 states, "side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case." *Miller-El v. Dretke* states "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." In this case though, similar jurors have been found. Juror 3, Juror 5, and Juror 7 are all similar because they have all worked with the youth. As I stated before, Juror 3 worked with the youth at her church. Juror 5 works at a bar and always has kids going to buy drinks. Juror 9 is a middle school teacher in a low income neighborhood. Even though they are similar, they do have a key difference. Juror 3 would have been more lenient towards Rush while Juror 5 and Juror 9 would have not. Juror 5 stated that he checks kids' ID's and sends them away. Juror 9 said that the school he worked at was full of trouble makers. Therefore, Juror 5 and Juror 9 would not have been

more lenient towards Rush. Next, category 4 is "a prosecutor's misrepresentations of the record when defending the strikes during the Batson hearing." It was clear that the prosecutor made a simple mistake. Both Juror 3 and Juror 7 were similar because they worked with the youth. The prosecutor misspoke and does not mean that she had racist intentions. Finally, category 6 is "other relevant circumstances that bear upon the issue of racial discrimination." Rush claimed that the State had a concerning exercise of the jury shuffle on a predominantly black and female strike zone. During the jury selection phase, either party may request a jury shuffle but this can only happen once during the trial.

Point of error 2a : The trial court did not error in denying appellant's motion for a new trial due to an alleged Brady Violation.

Point of error 2b : The trial court did not error in denying appellant's motion for a new trial due to ineffective assistance of counsel.

There was not a Brady violation and denying the presence of ineffective of counsel was in fact correct, for a Brady violation, the appellant must prove (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. All three of these prongs must be met. If even one prong is not met then there is no Brady Violation.

(1) On the 1st prong , the evidence of the victim's criminal history was not in the states possession and thus there was 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. And There is nothing in the records that suggests the prosecutor

had a physical copy of the victim's driving record. The State does not have a duty to disclose evidence 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)** . Therefore the prosecution did not have a duty to disclose favorable evidence when the evidence was available to defendant through a subpoena. Also "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(secondary blanco case)**, This means that there is no expectation to have full knowledge of the case's witnesses.

(2) On to the second prong, The evidence was not favorable to mr.rush, it was not impeachment evidence or exculpatory evidence, because the traffic tickets are so insignificant compared to the evidence that was introduced into the case, including that of an eye witness that testifies and aligns with the victims recalling of events. Justice The traffic tickets do not change the fact that The investigating officer smelled alcohol on the appellant's breath, that a cup with the smell of alcohol was found inside mr.rush's car. The traffic tickets do not change The victims and the intox operators testifying and agreeing that mr. rush smelled like alcohol. With all this evidence, traffic tickets do no prove someone or isn't guilty therefore the second prong was not met (3) now with all this being said the evidence is not Material, there was too much evidence against rush that these traffic tickets would not have changed the outcome of the case. Small traffic tickets will not change the

jurors perspective of the case, the evidence is just too appealing. Now onto 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 so justice if even one of these is not proved there is no ineffective assistance of counsel, 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)**. Now it is reasonable for a traffic law defendant to not have complete knowledge on every witness of every case, after all the defendants counsel did state that there were 50 other cases that day. 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, now we already proved that the evidence is not material therefore it does not matter whether a motion was filed or not because no matter the answer the outcome of the case would not have changed. Also let me add 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 (**weatherford**). We cannot lightly second guess the verdict on criminal cases simply because some additional evidence is discovered after the trial. Also the victims traffic Is a non

important piece of evidence that a michael morton request would Not have guaranteed for the evidence to be disclosed.

Conclusion

Under **Batson v. Kentucky**, 476 U.S. 79 (1986) the state didn't discriminate against jurors, solely because of the fact that race neutral reasons given, were inadequate. The voir dire transcript provides evidence that the state did look at race neutral reasons when striking jurors. There is enough compelling evidence to uphold the trial court's decision using **Batson v. Kentucky**, 476 U.S. 79 (1986). **Flowers v. Mississippi**, 139 S.Ct. 2228 (2019) is very specific with ways in determining whether peremptory strikes were not used in a discriminatory manner. This case does an excellent job in compelling that the state used their peremptory strikes in a nondiscriminatory manner. The appellee satisfies both test set forth in **Strickland v. Washington** and in the **Brady Rule**. Since **Strickland v. Washington** requires the appellant to prove all requirements, there is no accessible ineffective assistance of counsel because the appellant is able to prove all prongs. The appellant was also unable to prove the standards set in the Brady rule, therefore there is no Brady Violation on the state's behalf.

Prayer

Seeing as the state's discrimination towards the jury is imperceptible and Mr. Rush was not deprived of a fair trial due to both counsel's actions which question the possibility of exculpatory evidence. The State prays that this court uphold the trial court's decision.

Respectfully submitted by The Law Magnet, Attorneys for Appellant
Steven Lopez and Nicholas Johnson

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

Brief for Appellant

Veronica Rodriguez

Johanna Carmona

Duncanville High School

STATEMENT OF THE CASE

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.

STATEMENT OF FACTS

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 peremptory 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. Page 8 Case Materials Created for YMCA Texas Youth & Government 2019-2020 (Revised 10/24/19) 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.

ISSUES ON APPEAL

Issue Number One: Whether the trial court erred in denying appellant's Batson challenge during voir dire.

Issue Number Two: Whether the trial court erred in denying appellant's motion for new trial due to an alleged Brady violation, and whether the trial court erred in denying appellant's motion for a new trial due to ineffective assistance of counsel?

ARGUMENT

Issue Number One: Whether the trial court erred in denying appellant's Batson challenge during voir dire.

The trial court did not make an error in denying the Batson Challenge, because there was no evidence were made based on racial or gender bias. Page 8 " Batson Challenge arguing that the strikes were made primarily because of the potential juror's race or gender. " although if there was evidence to show, page 9 " Where there is evidence that either side has used their strikes in way that suggest 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.

Issue Number Two: Whether the trial court erred in denying appellant's motion for a new trial due to an alleged Brady violation, and whether the trial court erred in denying appellant's motion for a new trial due to ineffective assistance of counsel?

The court did not make an error by appellants motion for a new trial due to an alleged brady violation, because there was not sufficient evidence to prove that page 10 "

The prosecution violates a defendant's due process rights if it suppresses, either willfully or inadvertently, exculpatory or impeachment evidence that is material ". Now brady requires a three-step approach that he needs to have to help his case " (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. " Lastly the trial court did not make in error in denying the appellants motion for a new trial due to an ineffective assistance of counsel, because page 12 " 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 ".

CONCLUSION

I agree with the majority of the case in the trial court. Also, the court undervalues the impact of the newly discovered evidence and the deficiency of the appellant's trial attorney. It also shows the point of why the appeal is guilty.

PRAYER

For these reasons we pray that this court reverses the decision of the lower court.

Respectfully Submitted By:

Johanna Carmona

Veronica Rodriguez

Attorneys for Appellant

Duncanville High School

TEXAS COURT OF CRIMINAL APPEALS

NO. 19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellee

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

Brief for Appellant

Emily Zylka(Attorney #1)

Joynae Tennison (Attorney #2)

Duncanville High School

STATEMENT OF THE CASE

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.

STATEMENT OF FACTS

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 anti government 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. Page 8 Case Materials Created for YMCA Texas Youth & Government 2019-2020 (Revised 10/24/19) 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 y'all 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.

ISSUES ON APPEAL

Issue Number One: Whether the trial court erred in denying appellant's Batson challenge during voir dire.

Issue Number Two: Whether the trial court erred in denying appellant's motion for a new trial due to an alleged Brady violation, and whether the trial court erred in denying appellant's motion for a new trial due to ineffective assistance of counsel?

ARGUMENT

Issue Number One: Whether the trial court erred in denying appellant's Batson challenge during voir dire.

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 Page 13 Case Materials Created for YMCA Texas Youth & Government 2019-2020 (Revised 10/24/19) 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 preemptory 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 Number Two: Whether the trial court erred in denying appellant's motion for a new trial due to an alleged Brady violation, and whether the trial court erred in denying appellant's motion for a new trial due to ineffective assistance of counsel?

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 Page 14 Case Materials Created for YMCA Texas Youth & Government 2019-2020 (Revised 10/24/19) 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.

CONCLUSION

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.

PRAYER

For these reasons we pray that this court reverses the decision of the lower court.

Respectfully Submitted By:

Emily Zylka (Attorney

#1)

Joynae Tennison (Attorney #2)

Attorneys for Appellant

Duncanville High School

TEXAS COURT OF CRIMINAL APPEALS

NO. 19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellee

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

Brief for Appellee

Emily Zylka (Attorney #1)

Joynae Tennison (Attorney #2)

Duncanville High School

STATEMENT OF THE CASE

_____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.

STATEMENT OF FACTS

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 anti government 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. Page 8 Case Materials Created for YMCA Texas Youth & Government 2019-2020 (Revised 10/24/19) 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 y'all 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.

ISSUES ON APPEAL

Issue Number One: Whether the trial court erred in denying appellant's Batson challenge during voir dire.

Issue Number Two: Whether the trial court erred in denying appellant's motion for a new trial due to an alleged Brady violation, and whether the trial court erred in denying appellant's motion for a new trial due to ineffective assistance of counsel?

ARGUMENT

Issue Number One: Whether the trial court erred in denying appellant's motion for a new trial due to an alleged Brady violation, and whether the trial court erred in denying appellant's motion for a new trial due to ineffective assistance of counsel?

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 Page 13 Case Materials Created for YMCA Texas Youth & Government 2019-2020 (Revised 10/24/19) 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 preemptory 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 Number Two: Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw.

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 Page 11 Case Materials Created for YMCA Texas Youth & Government 2019-2020 (Revised 10/24/19) 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

Page 12 Case Materials Created for YMCA Texas Youth & Government 2019-2020 (Revised 10/24/19) 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.

PRAYER

For these reasons we pray that this court affirms the decision of the lower court.

Respectfully Submitted By:

Emily Zylka (Attorney

#1)

Joynae Tennison (Attorney

#2)

Attorneys for Appellee

Duncanville High School

**IN THE COURT OF CRIMINAL APPEALS, STATE OF
TEXAS**

NO. 02-19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellee

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

Brief for Appellant

Isabel K. Markham (Attorney #1)

Graham W. Wolfe (Attorney #2)

Christian Life Preparatory School

Introduction

This brief and its contents are directed towards the honorable Texas Criminal Court of Appeals.

Statement of the Case

Torrence Rush was tried and convicted of the charges of a minor driving under the influence and failure to yield to a pedestrian. The case went to Municipal Court and the verdict went to the state. Then, the case went to the County criminal court of Tarrant County #10 where the verdict was the same. Mr. Rush presented two issues on appeal: (1): that the Batson challenge he raised should have been recognized and (2): that the judge should have accepted Rush's motion for a new trial due to his attorney's failure to make a discovery motion of the traffic history of the Kieran Spokes, and that his legal counsel's failure to do so warranted an ineffective assistance of counsel claim. The case then traveled to the 2nd Texas Court of Appeals in Fort Worth, where that court affirmed. The case is now in the Texas Criminal Court of Appeals for a final verdict and consideration.

Statement of the Facts

A vehicular accident occurred on April 19, 2019. A vehicular driver collided with a pedestrian on a bicycle within the limits of Downtown Fort Worth; no major injuries were experienced by either party. The driver was issued a Class C Misdemeanor for driving under the influence and a failure to yield to a pedestrian. At the Municipal Court, whose docket had 50 cases that day, it became obvious that the case would go to trial rather than be a plea deal. Within 15 minutes the case went to trial, where the first jury group had a makeup of 7 black, 3 white, and 1 Hispanic panelist. The prosecutor requested a shuffle, then she made 4 strikes: 1

for cause and 3 peremptory strikes. The prosecutor struck Juror 3 saying that she worked with people too close in age to the defendant, Juror 9 due to her "anti-governmental" views, and Juror 12 due to his plethora of tickets and as a result excessive contact with law enforcement. The resulting jury was all white with no members of color. The defense council saw this and issued a Batson challenge which was overruled by the Judge after a few minutes of discussion. The defense council brought up a Baston challenge which was after a few minutes discussion ruled out of the question. At the end of the trial, the jury found the defendant guilty of both offenses. After the trial had convened, the victim walked over to the defendant and said that he was glad that his past traffic violations had not entered the trial. Mr. Rush told this to his attorney, who then filed for a new trial; the judge denied. Mr. Rush then hired a new attorney to continue on appeal through the Appeals system of Texas.

Issues on Appeal

Mr. Rush requests for review in this case as to the following issues:

(1): Whether the trial court erred in denying appellant's Baston challenge during *Voir dire*,

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

And

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

Arguments

The first issue on appeal deals with the Supreme Court case *Batson v Kentucky*, 476 U.S. 79 (1986). The Supreme Court designed their opinion in the case of *Batson v Kentucky* to broadly protect the Constitutional rights of people of color to sit and voice their opinion on a jury panel. The key concept that *Batson* emphasizes is equal protection; no discrimination of race is permitted. The Court outlined a 3 step process by which all United States judges and attorneys may deduce the possibility of racial discrimination. First, the attorneys who believe that racial discrimination has occurred must make a prima facie (initial case) that discrimination has taken place. Second, the state must provide a race-neutral reason for why the strike occurred, and then third, the judge must make a ruling as to whether the accused racial discrimination has occurred after the two previous steps have been completed. As to a prima facie case, it is clear that initial concerns about racial discrimination should be taken into consideration. Both parties agree as to the legitimacy of the prima facie case. It is important to understand that this initial case is taken into consideration in determining the totality of circumstances approach to racial discrimination. This initial case is important in a totality of circumstance approach to possible race discrimination. Every black juror was eliminated by either the initial shuffle by the prosecution or through desperate questioning of potential black jurors. However, the second prong of *Batson* was not met by the State in the case before us in any way whatsoever. The State claimed at trial that Juror 3 would be overly-sympathetic to the defendant due to her previous work with youth, and that Juror 9 possessed anti-governmental views. It doesn't take more than a moment's glance at the documents of the court to know that the State is engaging in an act of deception. Juror 7 also worked with youth

(as a teacher), and the State failed to strike him. Under the State's reasoning, both of the adults who worked with youth should have been struck under the pretext of removing people who could possibly be overly-sympathetic to the defendant's plight. However, the fact that only the person of color was struck, among many additional factors, indicates a presence of the State's racial discrimination. The State displays its discrimination with even greater clarity in its treatment of Juror 9. The claim that Juror 9 possessed anti-governmental is clearly absurd for two reasons. Being for the abolition of single-use-plastics and for the abolishment of borders doesn't make you an anti-governmental radical: it makes you a liberal. The abbreviation for liberal (lib) is also found in the Prosecution's notes. This fact shocks the defense today and it should shock the court as well. The reasons that the State provides are mere pretext for their end game: the unjust prosecution of our client. As to our second point Justice Kavanaugh in the case of *Flowers v Mississippi* outlines 6 additional and clarificational points for lower courts to reference when evaluating race discrimination claims in the jury process. Justice Kavanaugh designed the Court's opinion to be very broad in scope, and for good reason. He addressed an issue that this case displays quite well: the falsification of race-neutral reasons. The criteria of *Flowers* is outlined in page 2 of Justice Alamine's dissent opinion in our case materials. The first prong does not apply to this case because it requires the use of statistics, i.e. multiple trials, which we don't have. However the second prong shows that the disparate questioning must occur for a claim of racial discrimination to be made and we can see this clearly. The second prong shows that disparate questioning must occur for a claim of racial discrimination to be made. We can see this clearly. The prosecutor

doesn't ask questions to verify who would best fit the jury, otherwise she would have asked Juror 7 more questions if impartiality was her first priority. Instead, the prosecutor goes down the jury line with rare deviation, and picks people of color off one by one. She executes a search and destroy mission. The 3rd prong of Flowers shows side-by-side comparison where white people with the same "problems" as the people of color got to stay. Juror 7 (who was white) was permitted to serve on the jury despite his job as a teacher, while Juror 3 (who was a person of color) was struck for the reason of working with youth. Juror 7 even worked with kids closer to the age of the defendant than Juror 3 did. Thus, the State's claim that they were attempting to remove overly-sympathetic people from the jury holds no merit. The 4th prong of Flowers talks about misrepresentation of the record, which is done in our case with the "anti governmental" juror. The state lied to the court. The prosecutor literally wrote "Lib" on her notepad, turned around, and struck another person of color under a lie. This is a clear misrepresentation of the court record. Finally, prong 6 deals illustrates a prosecutor on a search and destroy mission. The State's Prosecutor will shuffle, question, and even lie to keep people of color off her jury.

The second issue contains two parts. The first prong revolves around the case of *Brady v. Maryland*. Brady requires three steps to prove a suppression of due process. "The appellant must demonstrate that (1) the State failed to disclosed evidence within its possession, (2) the withheld evidence is either impeachment evidence or exculpatory evidence, and (3) the evidence is material." *Brady v. Maryland, 373 U.S. 80 (1963)*. The key word in the majority opinion of the County Criminal Court is "possess". The State claims that since it didn't have

knowledge of the evidence that, therefore, they are not liable for a Brady violation. The State fails to understand that by making such an argument they are not only legally wrong, but have also revealed their incompetence of understanding the law. The Texas Code of Criminal Procedure points out that the State must disclose evidence to the defense that could possibly be impeachment or exculpatory evidence regardless of whether the defense requests it of them. This is not a grey area, it is black and white, and the State is completely in the wrong. The State uses the excuse that too many cases were scheduled for that day, and therefore, their burden is received, and their excuse may sound compelling on the surface but if the argument is accepted attorneys for decades will use the decision today as an excuse to shirk their Constitutional duties. Precedent is key to ponder as far as how this case will impact future ones to come. Attorneys should understand all the facts of the case, and if they don't, that problem is on them, and not the opposite side. The burden is always on the State in the first trial and this was intentional and good for the goal of a fair trial. If the Court rules with the State today, it will be reversing that doctrine and letting the State off the hook from doing their Constitutionally mandated job. The second prong of Brady states that evidence must be either impeachment or exculpatory evidence to warrant a Brady Violation. Both sides agree that this evidence is impeachment evidence, since the state's key victim would have his credibility questioned given this new evidence. Finally, the question of materiality comes into play. If this evidence could have affected the outcome of the trial, then a new trial is required. This evidence impeaches the victim of the accident, and his testimony carries significant weight in the original trial. It is blatantly obvious that if the main accuser in the trial is impeached, that a

new trial must be conducted. The presence of possible doubt in the conviction of Mr. Rush by definition means that a fair trial must be conducted to determine his conviction and sentencing.

The second part of this issue revolves around the case *Strickland v. State*. The Defense argues that the attorney at the trial provided ineffective assistance of counsel due to the failure to make a Discovery Motion. The Defense also points out to the court that not both prongs of the second issue have to be ruled in their favor for this case to go back for another trial. Only one is needed to prevail. The State uses the high burden in *Strickland* as the cornerstone of their argument; the Defense however understand this high bar, and knows with certainty that it is legally right on this point despite the claims of the State. What may surprise the reader of our case material is that both references to *Strickland*, even in the case of the reference to it in the majority opinion in the lower court, supports the Defense. Justice Lambert references *Strickland* which says that "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the same error had no effect on the judgment." *Strickland v. State*, 266 U.S. 668 (1984). This very quote can be used against the State's argument. The failure to make a discovery request is what possibly lost the Defense their case. So even in a light most favorable to the State, the Defense still prevails. Also, in *Melton v. State* the court wrote 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." *Melting. State*, 987 S.W.2d 72 (1998). One can see that given the 15 minute time gap is not

adequate time for preparation. Under both sides of the previous opinion, the Defense prevails.

Conclusion

The purpose of a Supreme Court of a state or nation is to provide a final decision that carries weight and clarity. The rights of people of color cannot be ignored or denied. If the lower court's ruling prevails, it would do so against the precedent of Flowers. Also, the performance of attorneys must be kept up to par. If this court does not rule in favor of the appellant, attorneys will be given more space to simply make up excuses for their actions. We must allow the principles of the Constitution, to prevail.

Prayer

For all of the reasons above, we pray that the Texas Criminal Court of Appeals finds with the appellant today on both issues and reverses the decisions of the lower courts.

**IN THE COURT OF CRIMINAL APPEALS, STATE OF
TEXAS**

NO. 02-19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellee

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

Brief for Appellee

Isabel K. Markham

Graham W. Wolfe

Christian Life Preparatory School

Introduction

This brief and its contents are directed towards the honorable Texas Criminal Court of Appeals.

Statement of the Case

Torrence Rush was tried and convicted of the charges of a minor driving under the influence and failure to yield to a pedestrian. The case went to Municipal Court and the verdict went to the state. Then, the case went to the County criminal court of Tarrant County #10, where the verdict was the same. Mr. Rush presented two issues on appeal: (1): that the Batson challenge he raised should have been recognized and (2): that the judge should have accepted his motion for a new trial due to his attorney's failure to make a discovery motion of the traffic history of the Kieran Spokes and that his legal counsel's failure to do so warranted an ineffective assistance of counsel claim. The case then traveled to the 2nd Texas Court of Appeals in Fort Worth, where that court affirmed. The case is now in the Texas Criminal Court of Appeals for a final verdict and consideration.

Statement of the Facts

A vehicular accident occurred on April 19, 2019. A vehicular driver collided with a pedestrian on a bicycle within the limits of Downtown Fort Worth; no major injuries were experienced by either party. The driver was issued a Class C Misdemeanor for driving under the influence and a failure to yield to a pedestrian. At the Municipal Court, whose docket had 50 cases that day, it became obvious that the case would go to trial rather than be a plea deal. Within 15 minutes the case went to trial, where the first jury group had a makeup of 7 black, 3 white, and 1 Hispanic panelist. The prosecutor requested a shuffle, then she made 4 strikes: 1

for cause and 3 peremptory strikes. The prosecutor struck Juror 3 saying that she worked with people too close in age to the defendant, Juror 9 due to her "anti-governmental" views, and Juror 12 due to his plethora of tickets and as a result excessive contact with law enforcement. The resulting jury was all white with no members of color. The defense council saw this and issued a Batson challenge which was overruled by the Judge after a few minutes of discussion. The defense council brought up a Baston challenge which was after a few minutes discussion ruled out of the question. At the end of the trial, the jury found the defendant guilty of both offenses. After the trial had convened, the victim walked over to the defendant and said that he was glad that his past traffic violations had not entered the trial. Mr. Rush told this to his attorney, who then filed for a new trial; the judge denied. Mr. Rush then hired a new attorney to continue on appeal through the Appeals system of Texas.

Issues on Appeal

Mr. Rush requests for review in this case as to the following issues:

(1): Whether the trial court erred in denying appellant's Baston challenge during *Voir dire*,

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

And

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

Arguments

The first issue involves the case *Batson v. Kentucky* 476 U.S. 79 (1986). No violation of any rights occurred under any possible viewing of the facts. The State commands precedent in this case. The Doctrine of Stare Decisis dictates that precedent is strong, and unless clear and strong evidence exists to the contrary, the ruling must stand. 3 different courts have ruled in favor of the State. A significant burden is required to override the precedent set by the previous cases before us. When the Supreme Court issued their opinion in *Batson v. Kentucky*, 476 U.S. 79 (1986), they designed it to combat racism within the jury selection across the nation. The Federal Constitution protects the right for people of color to serve on juries in the 6th and 14th amendments. The State of Texas understands and values this right to the highest degree. In order to combat racism within the courts, the Supreme Court created a 3 step process to call a "Batson violation", or to call for consideration of racial discrimination. First, the defense must make a challenge to a strike they believe to be race based. Then, the prosecutor must provide a race-neutral reason for the strike. Finally, the judge must make a decision based on the challenge. In our case, the defense declared a prima facie (initial) case of discrimination and the State agrees to the initial case's merit. As shown in trial, race-neutral reasons were given for each strike. I will go through them in turn, addressing the counterargument first. The Defense argues that since both Juror 3 and 7 worked with youth, but only Juror 3 was struck, the State's actions must have been race based. This correlation is weak at best. In this point, the defense attempts to apply prong 3 of *Flowers* to this case, but what the defense fails to realize that only one comparison can be made. The prosecutor stated that the reason for her strike was to eliminate bias, and she thought she was eliminating

the school teacher. This shows her reasoning to be sound since teachers would gravitate towards overt sympathy since they are around kids all the time. Her motives were impartial, which fulfill her Constitutional obligations. The Court today must tread carefully so as not to use 20/20 hindsight. It is easy, from the Court's standpoint today, to paint a picture of what they want to see. However, we must approach these facts from the view of the Prosecution, especially given the shift in burden that the Appellant now carries. We must also keep prong 4 of *Flowers* in mind, given that the Defense makes it the crux of their counterpoint towards this section of argumentation. Juror 9 is against the protection of a border a very strong idea that any government holds to deeply to maintain an economy and even a social fabric. The fact that the Juror desired to eliminate borders does indeed give the State reason to believe that the Juror was anti governmental. Mind the Court that her reasoning does not have to be perfect from a 20/20 hindsight standpoint; it merely must make sense and be race neutral, which it clearly is. *Flowers v. Mississippi, 139 S. Ct 2228 (2019)* is woven within the Defense's arguments, but it can easily be shown to support the position of the State. The defense argues that points 2, 3, 4, and 6 apply strongly to the case before us. The *Flowers* case was dramatic. Every question except one was directed towards someone of color and multiple trials illustrated the devious motives of the prosecutor. Our case it is far more tame. The Prosecution tries to decipher the truth, and she asks questions of both white and colored prospective jurors. The last prong discussed by the Defense is prong 6. They argue that the totality of the circumstances warrants a case for racial discrimination. As mentioned throughout above each and every argument that the Defense makes can be easily dismantled

using the Law and plain common sense. It is no coincidence that 3 different courts of found with the State up to this hearing. The Defence searches for racism where none exists. The reasons of the State were legitimately race neutral, and completely follow the precedences of Batson and Flowers.

The second issue revolves around the case of *Brady v. Maryland*, 373 U.S. 83 (1963). The key for this section is if the State had the evidence in question in its possession. The 15 minute time period for preparation left no time to search for evidence at all; it is unfair to give a burden to the State that it can't control. That issue is something the Judicial system has to address. But do to the wonderful separation of powers in our country and State Governments it is impossible for the executive department to solve this or be held accountable for this issue. Stare Decisis demands that unless strong reasoning exists for the other side, the current verdict should prevail. As to the second prong of Brady, both parties agree as to the impeachment nature of the evidence. The third prong of Brady deals with materiality. The State had another witness, Satoshi Umbreon, who provided the exact same facts as the victim did. The outcome of the trial would have been the same since the same facts would have arisen from different witnesses. The police officer is one of the main witnesses, and his testimony in a way is even stronger because it isn't tainted with shock or bias. He has no conflict of interest, and he was just executing his job during the scene of the accident. From all this, the argument comes to stand that materiality would not apply to this case. The outcome would not change. making a materiality claim mute.

The second part of this issue revolves around the case *Strickland v. State*. The burden for ineffective assistance of counsel is extraordinarily high. It can't just

be professionally unreasonable; it must be something beyond that. Strickland states that "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." *Strickland v. State*, 266 U.S. 668 (1984). As discussed above, the outcome of the case would have remained the same regardless. In addition to this point, the attorney is far from professionally unreasonable. He simply doesn't make a request for documents relevant to the case. This is a simple mistake, and one mistake does not qualify as ineffective, according to Strickland. In order to meet that hypothetical standard of ineffectiveness, the attorney has to be deficient far more than that. The only case in our applicable law to reference that fits the definition of ineffective, is *Melton v. State*. In this case, the defense counsel tells his client that camera footage exists of him committing a robbery, when no such footage existed. The attorney didn't take the time, which he had ample amounts of, to check if such a video even existed. This made the defendant change his plea. By Strickland's standards, those circumstances are ineffective and deficient. Strickland is a dramatic case, and the case before us does not reach this level of deficient as the Defense would lead you to believe. The State also offers to the court the idea that when the "record is silent and faults 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. The Defense has every burden and must meet this burden to convince this panel of the State's wrongdoing. The record for the most part is silent and thus the reasonable assistance of counsel cannot be called into question. The only time the Defense can meet this precedent in law is the failure for the defense attorney to make discovery

motion which as the State has discussed is simply a mistake and falls well within the boundaries of reasonable.

Conclusion

The State values more than anything the fairness of the law and the uniformity of its rulings. Racial discrimination presents problems even in our modern society, and the State of Texas has no desire to see them displayed within the Court system. No Batson violation took place, either by a traditional understanding of Batson, or a modified one under Flowers. Essentially, the State wins the argument on both accounts. The State did not have the evidence in question for the discovery request in hand. The Judge is at fault, not the attorneys, for the rushed time. The burden of a lack of time can not be the State's, or the Defenses for that matter. The Counsel for the Defense made only one error, but it falls far below the standard of professionally unreasonable. Ultimately, there must be finality to the convictions of the accused. Stare Decisis, (the idea that the conviction in a case aside from new evidence/new legal reasoning must stand), as Chief Justice Roberts pointed out in his confirmation hearings is vital to a thriving society and a judiciary. We hope that the Texas Court of Criminal Appeals sees and applies the principles of Batson, Flowers, Brady, and Strickland in a manner consistent with the proper understandings of each.

Prayer

For the reasons above, we pray that the Texas Criminal Court of Appeals finds with the State of Texas on both issues and upholds the rulings of the lower courts.

**IN THE COURT OF CRIMINAL APPEALS, STATE OF
TEXAS**

NO. 02-19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellee

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

Brief for Appellant

T. Cole Green

Topher C. Fryman

Christian Life Preparatory School

TO THE HONORABLE COURT OF APPEALS:

Comes now, Torrance Rush, and files this brief.

STATEMENT OF THE CASE

Appellant, Torrance Rush, was charged with the Class C Misdemeanor citations Failure to Yield Right of Way to a Pedestrian and Minor Driving Under the Influence. Rush was convicted for both offenses and was issued a fine, counseling classes relating to alcohol abuse by minors, and a driver's safety course. Two issues are presented on appeal.

STATEMENT OF THE FACTS

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. Torrance Rush, the driver of the vehicle, was turning right at an intersection. Kieran Spokes was an artist from the Main Street Arts Festival who was selling his paintings. Mr. Spokes turned right onto 9th Street on a rented bicycle, where Torrance Rush had just stopped in his vehicle at the red light. The vehicle and the bicycle then collided. On April 19, Sgt Mike Sundance was on duty. He was notified by dispatch at around 12:20 p.m. of a minor vehicle collision involving a pedestrian at the intersection of 9th Street and Houston. After his arrival at the scene, Sgt Sundance cleared the accident to allow traffic flow to resume as normal. After speaking with Torrance Rush, Sgt Sundance issued two Class C Misdemeanor citations, Failure to Yield Right of Way to a Pedestrian and Minor Driving Under the Influence, to Mr. Rush. Mr. Rush was then driven to the Fort Worth Detention Facility, where an intoxilyzer machine was located. The test results showed a blood alcohol concentration (BAC) of 0.00.

ISSUES ON APPEAL

Counterpoint Number One: The trial court erred in denying appellant's Batson Challenge during *voir dire*.

Counterpoint Number Two: The trial court erred in denying appellant's motion for a new trial due to a Brady violation and Ineffective Assistance of Counsel.

ARGUMENT

Counterpoint Number One: The trial court erred in denying appellant's Batson Challenge during *voir dire*.

In this case, the outcome may have been completely different if the trial judge had observed the Batson violation and allowed the African American females to sit on the bench. Since Amendments 6 and 14 were put in place to help give all citizens fair treatment, by striking all African American prospective jurors, the trial is no longer fair or just due to bias from the all-white jury.

According to the *Flowers v. Mississippi* case, there are six prongs to the Batson Challenge. The ones at issue are prongs 1, 2, 3, and 4.

The first is statistical evidence regarding African American jurors struck as compared to white jurors. Ms. Crump struck 3 black jurors, another juror For Cause, and another white juror. Striking the other two African American jurors left only white males to sit on the jury. For these reasons, there is evidence of a Batson violation.

The second category is disparate questioning of white and African American prospective jurors. Ms. Crump began her questioning with an African American and then moved to the other two on the jury, excluding a broad question asked to all of

the jurors. She asked the black prospective jurors around 9 questions, while only 2 questions were asked to white jurors. This point is bolstered by *Flowers v. Mississippi*. During that case, the "State asked the five African American prospective jurors a total of 145 questions. By contrast, the State asked the 11 seated white jurors a total of 12 questions." *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019). Although this is drastic, Ms. Crump asked questions focused toward African American individuals, excluding the broad question involving all members of the jury. Firstly, she questioned Juror 3 twice. Immediately, she moved to Juror 8 and asked him a question before striking him For Cause. Then, she asked an African American, college student two questions. *Flowers v. Mississippi* states that, "if the State were concerned about prospective jurors' connection to witnesses in the case, the State presumably would have used individual questioning to ask those potential (...) jurors whether they could remain impartial..." *Id.* By singling out certain jurors for questioning, Ms. Crump was looking for reasons to strike them. This is evidence of a Batson violation.

Category three is side-by-side comparison of African American jurors who were struck as opposed to white jurors who were not. Ms. Crump struck juror 3, an African American, because she worked closely with youth in the past. However, Juror 7, a middle school teacher, worked in close proximity to youth when teaching 5 days a week. Also, Juror 9, the college student, only opposed building a wall along the southern border. This is favoring one governmental party over another, but in itself is not anti-government. When looking at these statistics, there are no sensible reasons for striking Juror 3 and not 7, since they both worked with youth. Because of this, a Batson violation is evident.

For category number 4, misinterpretation of the record, Ms. Crump struck Juror Number 3 because she was a school teacher, which was not factually correct. She was, in fact, a youth pastor's assistant. This means that she was in contact with youth for one day or two days a week, whereas Juror 7 was in contact with them 5 days a week. Ms. Crump's reason for striking Juror 3 is a possible cover-up for another purpose: it was not accurate. This other purpose is an attempt to avoid a Batson violation. When we look at the actual school teacher, he was not struck. By Ms. Crump's logic, he ought to have been, since the reason the African American woman was struck was because she worked in a school with young people. This proves that a Batson violation exists.

Counterpoint Number Two: The trial court erred in denying appellant's motion for a new trial due to a Brady violation and Ineffective Assistance of Counsel.

The three prongs of *Brady v. Maryland's* precedent are (1) "The State fail[ing] to disclose evidence," (2) "The evidence [being] favorable," and (3) "The evidence [being] material." *Ex Parte Richardson*, 70 S.W.3d 865 (Tex. Crim. App. 2002). There are three parts to the first prong of *Brady v. Maryland's* precedent.

Firstly, the State possessed the evidence because it was recorded in the Texas Department of Public Safety, or Texas DPS. The traffic law violations of Mr. Spokes were in possession of the State and could have been accessed at any time before the trial by the prosecutor. Also, as we can glean from *Reed v. State*, "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." *Reed v. State*, (Tex. App. – Fort Worth 2016) (unpub.)

citing *Ex Parte Mitchell*, 977 S.W.2d 575, 578 (Tex. Crim. App. 1997), cert. denied, 525 U.S. 873 (1998). It is reasonable to assume that the Texas DPS and the prosecutors involved in traffic cases are linked and work together regularly. Thus, the Texas DPS is connected to the investigation and prosecution of the case, which affirms that the State was in possession of the traffic law violations.

Secondly, the State's failed disclosure of the traffic law violations is not related to the prosecutor's good or bad faith. Whether the suppression was intentional or unintentional, *Brady v. Maryland* holds that it falls under its precedent. The fact that the prosecution was unaware of the traffic tickets at the time of the trial did not relieve them of the obligation to disclose them to the defense.

Thirdly, the State failed to disclose the evidence. The traffic law violations, which were in the State's possession through the Texas DPS, could have been accessed at any time before the trial. The evidence, however, was not disclosed.

According to *Brady v. Maryland*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process." *Brady v. Maryland*, 373 U.S. 83 (1963). The State of Texas failed to disclose Kieran Spokes' traffic law violations.

Concerning prong two, because Kieran Spokes' testimony includes evidence for Torrance Rush's conviction, its elimination would be favorable to Mr. Rush.

The final, third prong concerns materiality. Materiality is the capacity of the evidence to change the outcome of the trial. There are two parts to this prong, which also concerns the three testimonies of the accident.

Firstly, it is reasonable to assume that, in the case of Mr. Umbreon and Mr. Steele, two conflicting testimonies would cancel each other out. Thus, these testimonies are no longer credible, which leaves only Mr. Spokes' testimony as both credible and containing evidence for Mr. Rush's conviction.

Secondly, according to *Hampton v. State*, "A determination concerning the materiality prong of Brady involves balancing the strength of the exculpatory [impeachment] evidence against the evidence supporting conviction." *Hampton v. State*, 86 S.W.3d 603 (2002). This rule can be used for determining the materiality of Mr. Spokes' testimony. When balancing Mr. Spokes' testimony against the other evidence provided during the trial, one can conclude that a heavy reliance was placed upon Mr. Rush's testimony because of the unreliability of the other two witnesses.

There is reasonable probability that the impeachment of Mr. Spokes' testimony as a consequence of the traffic law violations would have changed the outcome of the trial.

The second issue at hand is the Ineffective Assistance of Counsel. According to *Strickland v. Washington*, the two prongs to this are, "deficien[cy]" of the "attorney's performance," and "prejudice [on] the defense" by that "deficient performance." *Blanco v. State*, (Tex. App.—El Paso, 2015) (unpub.) citing *Vasquez v. State*, 830 S.W.2d 948, 949 (Tex. Crim. App. 1992).

Deficiency is a wide spectrum. However, it can be narrowed down through *Melton v. State*, which defines deficiency as an "[in]firm command of the facts." *Melton v. State*, 987 S.W.2d 72 (1998) citing *Ex Parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990). To address prong one, in this case, the defense

attorney failed to access the traffic law violations, which would have been favorable to Torrance Rush. This makes an infirm command of the facts because the defense attorney had an incomplete knowledge of the record.

Additionally, the testimony of Kieran Spokes was highly prejudicial to Mr. Rush. Furthermore, the subject case involved a traffic accident, and investigation into the traffic history of the parties involved would be critical to adequately defending Mr. Rush. Kieran Spokes represented a key witness at trial, and the defense attorney made no effort to impeach his testimony.

Also, *Melton v. State* states, "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." *Melton v. State*, 987 S.W.2d 72 citing *Ex Parte Langley*, 833 S.W.2d 141, 143 (Tex. Crim. App. 1992) citing *Ex Parte Pool*, 738 S.W.2d at 286. In this case, Rush's counsel did not make a proper investigation of the facts because he did not request a pre-trial discovery, nor did he independently investigate the history of traffic violations on part of Mr. Spokes, which would have even been accessible without the discovery request.

The second and final prong of *Strickland v. Washington's* precedent concerns prejudice on the defense. *Strickland v. Washington* states that "prejudice finds its roots in the materiality of the evidence." *Strickland v. Washington*, 466 U.S. 668 (1984) citing *United States v. Agurs*, 427 U.S. at 427 U.S. 104, 427 U.S. 112-113. There has to be a definite probability that the outcome of the trial would have been changed by the traffic law violations. As stated before, Kieran Spokes' testimony contained conviction evidence crucial to the State. However, the traffic law

violations eliminate his credibility in a traffic accident. This leaves no credible conviction evidence.

Ergo, Mr. Rush's defense was prejudiced by the deficiency of his attorney's performance.

Conclusion

In this case, Torrance Rush filed a Batson Challenge. Firstly, by her disparate questioning, Ms. Crump showed ulterior motives for striking the jurors, not just because they were unsuitable for jury duty. Secondly, if Ms. Crump were truly concerned with striking jurors who worked around the age of the defendant, she would have struck Jurors 5 and 7. Lastly, since 4 of the 6 categories lined out in *Flowers* are in question, there is sufficiently strong evidence that a Batson violation occurred. Additionally, Torrance Rush filed a Brady Challenge. *Brady v. Maryland's* precedent was violated because Kieran Spokes' traffic tickets satisfied all three prongs. Finally, Torrance Rush claimed that there was Ineffective Assistance of Counsel. Mr. Rush's counsel's performance satisfied both prongs of this rule as well. Therefore, this Court must find in favor of the Petitioner.

Prayer

For these reasons we pray that this Court would reverse the decisions of the lower court.

Respectfully Submitted By:

T. Cole Green

Topher C. Fryman

Attorneys for Petitioner

Christian Life Preparatory School

**IN THE COURT OF CRIMINAL APPEALS, STATE OF
TEXAS**

NO. 02-19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellee

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

Brief for Appellee

T. Cole Green

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TO THE HONORABLE COURT OF APPEALS:

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STATEMENT OF THE CASE

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ISSUES ON APPEAL

Counterpoint Number One: The trial court did not err in denying appellant's Batson Challenge during *voir dire*.

Counterpoint Number Two: The trial court did not err in denying appellant's motion for a new trial due to a Brady violation and Ineffective Assistance of Counsel.

ARGUMENT

Counterpoint Number One: The trial court did not err in denying appellant's Batson Challenge during *voir dire*.

It is important to look at the 6 key clues to a Batson violation offered in *Flowers v. Mississippi* to prove a Batson violation did not occur and that the Court did not err.

The first is statistical evidence about the prosecutor's use of peremptory strikes against African American prospective jurors as compared to white prospective jurors. Ms. Crump struck 3 African American jurors, one white juror, and another African American juror For Cause. Juror 3 was struck because she worked with youth, not as a middle school teacher, like Juror 7, but as a youth assistant leader. Although Ms. Crump accidentally switched these occupations, she struck Juror 3 because of the fact she worked with youth. Ms. Crump struck Juror 9 due to her views being anti-government. Juror 12 was struck by Ms. Crump because he was already fuming about having to pay for a parking ticket by Ms. Crump herself. Although he stated he could put aside his differences for this case, his attitude showed otherwise, which was the reason he was struck. This shows that category one from *Flowers* does not prove a Batson violation.

Category two from *Flowers v. Mississippi* is disparate questioning and investigation of both African American and white jurors. Ms. Crump began her questioning with Juror 3, an African American woman and asked her the question of, "What was your occupation before you retired?" Later, Ms. Crump went from Juror numbers 7 to 8. Then, she shortly questioned Juror 9 and moved to Juror 12, with whom she was already acquainted with. She asked him a few questions to decide whether or not he could put aside his frustrations from his own parking ticket and then struck him. From *Flowers v. Mississippi*, "...a party will often ask more questions of jurors whose answers raise potential problems." *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019). The questions that Ms. Crump asked the African American jurors were clarifying questions. As a result, there is no indisputable evidence of a Batson violation from category two of the *Flowers* case, either, so the Court did not err in this category.

When moving to category three, at first glance, it appears that a Batson violation must have occurred when comparing the fact that Juror 3 was struck and Juror 7 was not struck. Juror Number 3 testified to being a youth pastor, meaning that she likely worked with youth between ages 12 to 18, which is the average middle school to high school age. Juror Number 7, however, testified that he worked in a middle school, meaning he worked with kids between the ages of 12 and 14. Ms. Crump was worried that Juror Number 3 would be sympathetic to the 19-year-old defendant because she worked with youth closer to the age of the defendant than Juror 7. For this reason, category three does not prove a Batson violation.

Category 4 is the misrepresentation of the record. When Ms. Crump gave her reasons for striking the jurors, she incorrectly switched the occupation of two jurors: Juror Number 3, an associate youth pastor, and Juror Number 7, a middle school teacher. Ms. Crump was going off of the top of her head when she was giving reasons. Human error could reasonably account for this. Also, Ms. Crump, after hearing learning that Juror 3 worked with youth as a Sunday school teacher, realized that it would be best to strike her since she worked with youth closer in age to the defendant. Plus, she stated that she remembered Juror 3 being a "school teacher." Since Ms. Crump only said "school teacher" and not "middle school teacher," there is no actual evidence that suggests a Batson violation. Ms. Crump had recalled the fact that Juror 3 was a youth teacher at her church, and merely stated this incorrectly. From *Flowers v. Mississippi*, "...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." *Id.*

For category number five, there are no past records given, so this prong of *Flowers v. Mississippi* cannot constitute a Batson violation.

For category 6, Ms. Crump shuffled the jury, which was well within her right to do so. She may have shuffled the jury due to the occupations of the members or, possibly, the ages. There are many different factors in play for why she may have requested the jury shuffle, so category six does not definitively constitute a Batson violation.

Counterpoint Number Two: The trial court did not err in denying appellant's motion for a new trial due to a Brady violation and Ineffective Assistance of Counsel.

Torrance Rush filed a Brady Challenge on the evidence of the traffic tickets. *Ex Parte Richardson*, summarizing *Brady v. Maryland*, states, "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 the applicant. Finally, the applicant must show that the evidence is material." *Ex Parte Richardson*, 70 S.W.3d 865 (Tex. Crim. App. 2002). There are three prongs of *Brady v. Maryland's* precedent that the traffic tickets must fulfill for Mr. Rush's challenge to be sustained.

The determination of the first prong rests upon the duty of the State to disclose the evidence. The State has the burden to disclose evidence in its possession. At issue is whether the traffic law violation records were in possession of the prosecutor. In this case, the prosecutor did not possess the traffic law violations. According to *Reed v. State*, "This duty also requires the State to learn of Brady evidence known to others acting on the State's behalf in a particular case." *Reed v. State*, (Tex. App. – Fort Worth 2016) (unpub.) citing *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). In the subject case, the traffic law violation records are maintained by the Texas Department of Public Safety, or Texas DPS. In order for the prosecutor to be deemed in possession of the traffic law violations, the Texas DPS must be "acting on the State's behalf." *Id.*

The Texas DPS does not investigate. The Texas DPS does not prosecute. It is not connected to the State in this case. This proves that the prosecutor was not in possession of the traffic law violation records, which relieves the State of its duty to disclose the violations.

Prong three is also at issue. Materiality of evidence is its capacity to change the outcome of a trial. *Hampton v. State* dictates that “The mere possibility that an item may have affected the outcome of the trial does not establish ‘materiality.’” *Hampton v. State*, 86 S.W.3d 603 (2002). The traffic law violations fall under this “mere possibility” rather than a strong likelihood of changing the outcome of a trial. *Id.*

The traffic law violations represent impeachment evidence of one of three witnesses. However, it is likely that the outcome of the original trial was based on other information and testimony, not solely on the testimony of Kieran Spokes. Therefore, there is no certainty that the impeachment of Mr. Spokes’ testimony would have changed the outcome of the trial. Additionally, it is unknown as to the nature of the traffic law violations involved and the degree at which they would have impeached Mr. Spokes’ testimony.

These unknowns and lack of certainty put the traffic law violations in the zone of “mere possibility” of changing the outcome of the trial. *Id.* Ergo, the traffic law violations were not material evidence.

To address the second issue, there are two prongs to *Strickland v. Washington’s* precedent. These prongs are deficiency and prejudice on the defense by the attorney’s performance.

According to *Strickland v. Washington*, “[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgement.” *Strickland v. Washington*, 466 U.S. 668 (1984). In this manner, Mr. Rush’s counsel is assumed to have performed reasonably. This makes it more difficult to reach the high bar of deficiency. As said

in *Craig v. State*, Mr. Rush must show that his counsel made “such serious errors that he was not functioning effectively.” *Craig v. State*, (Tex. App.—Austin, 2002) citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984) citing *Hernandez v. State*, 988 S.W.2d 770, 771-72 (Tex. Crim. App. 1999) citing *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986).

Mr. Rush specifically claimed that his counsel’s performance was deficient because he failed to request a pre-trial discovery. Mr. Rush’s argument for inefficiency is inadequate and undeveloped because he only cites one aspect of the overall performance of his counsel. In the absence of any further argument, the presumption is that the essence of the counsel’s performance was deemed to be adequate assistance. The fact that his counsel did not request a discovery alone is not enough to meet the high bar of deficiency.

The second prong, prejudice on the defense by the deficiency of the attorney, returns to materiality of the traffic law violations. There has to be a reasonable probability that, but for the attorney’s deficient performance, the outcome of the trial would have been different. According to *Blanco v. State*, “‘Reasonable probability’ is that which is ‘sufficient to undermine confidence in the outcome.’” *Blanco v. State*, (Tex. App.—El Paso, 2015) (unpub.) citing *Strickland v. Washington*, 466 U.S. at 694, 104 S.Ct. at 2068, citing *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). This requires a high standard of confidence. As argued before, the traffic law violations fall under the “mere possibility” of changing the outcome of the trial. *Hampton v. State*, 86 S.W.3d 603. Mr. Rush failed to demonstrate that the impeachment of a single witness would

have undermined the confidence in the change of the outcome of the trial. In this manner, the bar for prejudice on the defense is not met.

Conclusion

Torrance Rush filed a Batson Challenge. Firstly, Ms. Crump asked questions to both African American and white jurors. Although more were asked of the African American jurors, they were clarifying questions. Also, when juror 3 was struck, it was because she worked with youth, and even since she was struck for being a school teacher, this was just a small error on the part of Ms. Crump. The Court did not err in their decision to deny the Batson violation. Additionally, Mr. Rush filed a Brady Challenge on the evidence of the traffic tickets. However, the traffic tickets do not meet the first and third prongs of Brady's precedent. Torrance Rush also claimed that there was Ineffective Assistance of Counsel. The high bars of deficiency and prejudice were not met by his counsel. Therefore, this Court must find in favor of the Respondent.

Prayer

For these reasons we pray that this Court would uphold the decisions of the lower court.

Respectfully Submitted By:

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NO. 19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellee

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

Brief for Appellant

Alexis Boehmer

Ashlyn Dodson

Keller High School

Statement of the Case

Torrance Rush was charged and convicted with the Class C Misdemeanor offenses of Minor Driving Under the Influence of Alcohol and Failure to Yield to a Pedestrian. Rush appeals this conviction points of error including a Batson violation, Brady violation, and an ineffective assistance of counsel claim.

Statement of the Facts

Torrance Rush and Kieran Spokes forcefully met in an intersection. Torrance was issued a Class C Misdemeanor citation for being at fault for the accident. The investigating officer also smelled alcohol on Rush so he was issued a citation for Minor Driving Under the Influence. The case was scheduled for a jury trial and when the jury list was first generated it consisted of 7 black panelists, 3 whites and 1 Hispanic. The prosecution requested and was granted a jury shuffle. One for cause strike was made by the prosecution and then both the prosecution and defense made their strikes. The appellant's attorney objected to the prosecution's use of their preemptory strikes claiming that they were discriminatory based on both race and gender. The judge determined there was no Batson violation and the trial proceeded. Rush was convicted on both offenses. Afterwards the victim approached him, saying, "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." Rush's motion for a new trial was denied. Rush then appealed the trial court's decision but the findings of the trial court were affirmed. Rush now appeals again at this court.

Issues on Appeal

- (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?

Point of Error #1: Whether the trial court erred in denying appellant's Batson challenge during voir dire

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, the burden of production shifts to the State to articulate a race-neutral reason for its strike. Third, the trial court must then decide whether the defendant has proved purposeful racial discrimination with the burden lying on the defense to persuade the court of racial discrimination." The establishment of a prima facie is not being contested. The second step of Batson is for the state to provide race neutral reason for their strikes. The state gave the reasons that juror 3 worked in a school with students who were close in age with the defendant and that juror 9 had anti government views. However this should not automatically qualify a rejection of Batson because as stated in *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019) "trial judges should not blindly accept any and every reason put forth by the State" and this especially should not be accepted given that one of the race neutral reasons was false. Juror 3 was not a middle school teacher but instead a retired church secretary. Despite this the judge then proceeded to deny the Batson challenge without ever meeting the second step of providing a legitimate race neutral reason. That alone should be enough proof of the trial courts mishandling of the case because it shows that there is a blatant failure to meet the required steps of a Batson challenge. Furthermore there is still

ample evidence that these reasons are merely pretense for racial discrimination which brings us to the six factors determined to be important by *Flowers v. Mississippi*, 139 S.Ct. 2228 . In this case the appellant raises issue with categories 2, 3, 4, and 6.

Category 2 is *Id.* "evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case." Throughout the questioning process Ms. Crump, the attorney for the prosecution, asked direct questions to juror 3, juror 8, juror 9, and juror 12, three black jurors, and then someone she knew. All other questions were posed as group questions asking them to all of the prospective jurors. Given that she directly questioned 3 of the 4 black jurors and only one white juror this acts as proof of discriminatory intent and as *Miller-El v. Dretke*, 545 U.S. 231 (2005) 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." Meaning that the reasons the prosecution would later provide as a result of those direct questions are likely pretextual.

Category 3 of *Flowers v. Mississippi*, 139 states "side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case acts as evidence of discrimination." Juror 3 is one of the black prospective jurors who was cut for working with children as a church secretary and juror 7 is the actual middle school teacher on the jury list. He is a white male and stated that he works with kids on a daily basis. *Foster v. Chatman*, 578 U. S. ____, ____ (2016) states 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.” and our case goes above and beyond because the proffered reasoning doesn't just fit another panelist as well as the struck panelist, it fits juror 7 more than it fits juror 3. Now it can be reasonably assumed that juror 7 works with children on a much more regular basis than juror three whose main occupation involved doing paperwork meaning that juror 7 would have a more understanding relationship with children. Furthermore juror 7 stated that the children he works with are typically troubled kids which would give him more sympathy towards someone, young and deviant, like the defendant. Juror 7's position goes to show that he fits the proffered reasoning for juror 3 just as well if not better.

Moving to category 4 which discusses a prosecutor's misrepresentations of the record when defending the strikes during the Batson hearing. This is already met by the false statement that juror 3 works as a middle school teacher but this is further helped by the prosecution's reasoning for juror 9's strike. The prosecution's reasoning for juror 9's strike was that she had anti government political views however nowhere in her statement did she say that she was anti government only stating that she wanted to work to end racism and help the environment. It is a pretty big stretch to say that wanting a ban on plastics is anti government. Looking to the prosecution jury notes there are no notes about juror 7 being anti government instead having BLM and Lib written by her name. The most common usage of these terms would be that theses mean black lives matter and liberal which again neither of which mean anti government. The prosecution's statement that their reasoning for striking juror 9 were due to her being anti government go directly against what is shown in the record.

Finally in category 6 of *Flowers v. Mississippi* it discusses “other relevant circumstances that bear upon the issue of racial discrimination”. I would like to remind the court when the first jury list was generated it produced a mainly non white jury, the prosecutor then requested a jury shuffle which was granted. This shows from the beginning the prosecution was looking to limit black panelist on the jury. In total this goes to show that 4 of the 6 categories put forth in *Flowers v. Mississippi* are present in this case.

Taking all of the evidence into account including the prosecutions failure to provide a race neutral reason for striking juror 3, the disparate questioning between black and white prospective jurors, the similarities between juror 3 and 7, misrepresentations of the record and a pattern of striking non white jurors this court cannot affirm the trial courts ruling without setting the standard that attorneys can get away with racial discrimination as long as they put forth any flimsy reasoning to counter claims of discrimination.

Point of error #2: The trial court erred in denying appellant’s motion for a new trial due to Brady violation and ineffective assistance of counsel.

(2a) I will first address counterpoint 2a, how the court erred in denying appellant’s motion for a new trial due to a Brady violation *Brady v. Maryland, 373 U.S. 83 (1963)*. To establish reversible error for a Brady violation, appellant 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; 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. Today, I will demonstrate how the appellant, Torrance Rush, has satisfied each of these prongs.

Following the trial that resulted in the conviction of Mr. Rush, 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." Clearly, the prosecution failed to disclose this evidence, in violation of Texas Code of Criminal Procedure 39.14, which articulates that "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." Seeing as the traffic tickets were within the custody and control of the state, and the state failed to disclose said evidence, the first prong of *Brady v. Maryland*, 373 U.S. 83 is satisfied.

In showing that the withheld evidence was favorable to the defendant (the second step in *Brady v. Maryland*, 373), we must revisit the issue at trial court. In his dissent, Justice Alman notes that "the main concern in the case was whether the appellant was at fault or the victim was at fault." Had these traffic tickets been disclosed, they would have aided the defendant in his argument against this point. Thus, the second step of *Brady v. Maryland* is satisfied.

The third and final step of *Brady* requires the appellant to show that the evidence is material, that is, there is a reasonable probability that had the evidence of the trial been disclosed, the outcome of the trial would have been different. To address this, we look again at Texas Code 39.14, which says that the State must disclose evidence that "tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged." The traffic tickets, showing a

pattern of violating traffic laws on the part of the victim, certainly negate the guilt of Mr. Rush, and could have altered the trial court's decision. In determining whether a piece of evidence is material, the court must also remember that, according to *Brady*, "we cannot put ourselves in the place of the jury, and assume what their views would have been." It is not the duty of the appeals court to assume the role of jury. The traffic tickets, from the viewpoint of a reasonable person, could easily have affected the sentencing of Mr. Rush, meeting the third step of *Brady*. With each of these prongs satisfied, the appellant prays that the court will reverse the court's decision due to the *Brady* violation.

(2b) I will now address counterpoint 2b, how the court erred in denying appellant's motion for a new trial due to ineffective assistance of counsel. To determine whether or not a defendant received ineffective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668 (1984) established a two-pronged test. To pass this test, the appellant must show that (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 jury. *Powell v. Alabama*, 287 U.S. 45 (1932) established that "counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable process." Part of being a knowledgeable counsel is being aware of information about the defendant and the prosecution that would aid the defendant in their case. Evidence of the victim's traffic tickets, as addressed in our discussion of prong two of the *Brady* process, clearly favors Mr. Rush, and the failure of counsel to obtain that information exhibits inefficiency. To demonstrate how this lack of research qualifies as ineffective assistance of counsel, the petitioner cites *Melton v. State*, 987

S.W.2d 72 (1998), where the court determined that “counsel had a duty to make an independent investigation of the facts of his client’s case and prepare for trial.” Counsel in this case simply did not do the required preparation to effectively assist Mr. Rush, satisfying the first step of the process established in *Strickland*.

The second step in *Strickland v. Washington, 466 U.S. 668* requires the appellant to show that the deficient performance of counsel prejudiced the jury. In this case, where the main point was determining “whether the appellant was at fault or the victim was at fault”, the failure to disclose evidence undeniably prejudiced the jury. While Mr. Rush was presented as a misguided adolescent, a driver under the influence, the victim was presented as just that--victim only, faultless, with no prior record indicating otherwise. Had counsel obtained evidence of the traffic tickets, the jury would have a completely new perspective, and potentially change its ruling. Thus, the appellant satisfies the second and final step of the process established in *Strickland v. Washington, 466*.

Conclusion

The discrimination in the trial process and the missing material evidence prove that Torrance Rush was not given the fair trial he rightly deserved.

Prayer

For these reasons, we pray the court reverse the findings of the trial court.

Respectfully submitted,

Alexis Boehmer

Ashlyn Dodson

Attorneys for Petitioner

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v.

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

Brief for Appellee

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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?

Point of Error #1: The trial court did not err in denying appellant's Batson challenge during voir dire.

Batson v. Kentucky, 476 U.S. 79 (1986) established a process of review in determining whether or not an attorney has exercised peremptory strikes in a discriminatory manner. According to *Batson v. Kentucky*, 476 U.S. 79, "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." The state does not contest the first step of the *Batson v. Kentucky*, 476 process, however the state did fulfill the second step. The defense alleged that jurors 3 and 9 were struck because of discriminatory reasons, but the state provided race-neutral reasons for both of these strikes. Juror 3 was struck because the prosecution believed she "was a school teacher" and juror 9 was struck due to "anti-government political views". While the prosecution admitted to being mistaken about the occupation of juror 3, Ms. Crump noted that she was "going off [her] notes", and juror 3 had been an associate youth pastor. In evaluating the validity of these reasons, there are a few factors the court must consider. One, that the trial court's decision must be treated as highly deferential, and must be sustained unless it was clearly erroneous; Two, that according to *Batson v. Kentucky*, "the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause"; Three, that "peremptory strikes traditionally may be used to remove any potential juror for any reason--no

questions asked." *Flowers v. Mississippi* (pg. 28). To summarize, it is not the duty of this court to determine whether or not the reasons are "good enough" to strike a juror, because peremptory strikes don't require substantial reasoning in the first place. This court need only determine that the reasons are legitimate and race-neutral, and the State has demonstrated the validity of its reasons, satisfying the second step of the *Batson* process.

In determining whether or not strikes have been used in a discriminatory manner, courts also look at patterns of behavior as well as the resulting makeup of the jury. In *Flowers v. Mississippi*, the petitioner was able to establish a clear pattern in the prosecution's use of peremptory strikes. In *Flowers'* six trials, the prosecution struck 41 of the 42 black jurors total, using all 15 of its peremptory strikes against black jurors in the trial at question. *Flowers* was able to establish a pattern based on a history of discriminatory actions. In this case, with no history to observe, the petitioner has indicated no such patterns. Two out of three black jurors were struck. With only three black jurors on the original list, it's almost impossible to establish a pattern. The opposing counsel may argue that striking the "majority" of the black jurors constitutes proof of discrimination, but that logic creates the false idea that just because one black juror has been struck means that the next cannot be. This thought process neglects to account for the fact that each juror is independent of the other, and the decision to strike one juror does not and should not affect the next. In *Flowers*, the staggeringly disproportionate numbers spoke for themselves, but we simply do not have enough data in this case to make any claims of "patterned" behaviors.

Along with analyzing patterns, the court also looks at the makeup of the jury in cases where the *Batson* challenge is raised. The court must intervene if strikes are used in a way to ensure homogeneity, but this case doesn't lend itself to such action. The prosecution struck only two of three black jurors as well as one white juror. If the purpose of the prosecution was to ensure homogeneity in the jury, it would have struck all three black jurors. Furthermore, the court must remember that in accordance with *Batson* and *Strauder*, "the defendant has no right to a 'petit jury composed in whole or in part of persons of his own race.'" We must not assume that simply because the jury has no members of the defendant's own race that he is automatically subject to an unfair trial. The ruling in *Batson* was intended to protect petitioners' sixth and fourteenth amendment rights, but concedes that such equal protection clauses "place some limits on the State's exercise of peremptory challenges." This court must be wary of prohibiting fair trials by limiting the exercises of the State. Unless the petitioner is able to prove that the jury's decision was clearly erroneous, no violation of due process was committed.

Lastly, in determining whether the trial court's ruling was clearly erroneous, we must have a "definite and firm conviction that a mistake has been committed" after reviewing all the evidence in the light most favorable to the [trial court] ruling" *Vargas v. State*. evaluate the sentencing. The defendant was issued a fine, counseling classes related to alcohol abuse by minors and a driver's safety course. Considering the gravity of DUI charges, the fact that Mr. Rush didn't receive a harsher sentence is evidence that the trial court made no erroneous error. As such, we must "uphold [this] ruling even if we would have weighed the evidence differently as the trier of fact." *Lopez, 940 s.w.2d at 390 n.2.*

Summary

Allowing a reversal of the trial court's decision undermines the efficiency and productivity of the judicial system. If this court rules in favor of Mr. Rush, it allows for the second-guessing and questioning of the credibility of trial courts. It allows defendants to subvert the rulings of courts any time jurors of minority population are struck, and forces prosecutors not to strike jurors they otherwise would for fear of being accused of discrimination.

Point of Error #2: Whether the trial court erred in denying appellant's motion for a new trial due to an alleged Brady violation, and (2b) Whether the trial court erred in denying appellant's motion for a new trial due to ineffective assistance of counsel?

The first issue is whether or not an alleged Brady Violation took place. *Brady v. Maryland*, 373 U.S. 83 (1963) states that "The prosecution violates a defendant's due process rights if it suppresses, either willfully or inadvertently, exculpatory or impeaching evidence that is material." and determining whether a violation took place 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". The state concedes the second step but denies the first and third steps. The first step requires that the state disclose evidence in its possession. The State has claimed that the evidence of the victim's criminal history was not in its possession and there is nothing in the record to show otherwise. Furthermore as stated in *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) "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.” and based on the fact that the reason for the evidence coming to light was the defendant seeking it out after the trial it is clear that the defendant can and did access the information relieving the state of its duty to do so.

Even if the court sides with the appellant on the first point, the third point of Brady states that for their to be a violation, the evidence withheld must be material evidence. For evidence to be material there must be “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).” First we must consider what the evidence may have possibly accomplished. The impeachment of the victim as a witness would have resulted in the loss of his testimony in which he stated that Mr. Rush was at fault for the accident. However unlike cases such as *Ex Parte Richardson*, 70 S.W. 3d 865 (Tex. Crim. App.) this case has multiple witnesses so losing one or the other wouldn't affect the outcome of the case. Even if the victim had been impeached it would still be the word Mr. Rush, the drunk driver, against the words of a sober, unbiased witness. Because of this the victims traffic history fails to meet the standard of material evidence and does not meet the qualifications of Brady. Moving to the second issue which is whether or not Mr. Rush’s 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 which is a request to see the evidence that the state may present at trial and also any evidence that might aid the defense. According to *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), "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." When determining whether these requirements are met "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.). The issue at hand is that the appellant's attorney failed to file for discovery however there is no constitutional right to discovery nor is it common in magistrate court. Because it is not a requirement of the law it was up to the counsel to make the decision determining the evidences importance and that would fall under trial strategy, But "We cannot raise that trial strategy to the dignity of a constitutional right and say that the deprivation 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."as stated in *Brady v. Maryland*, 373 U.S. 83 and since there's no reasoning behind his decision in the record we must follow *Jackson v. State*, 877 S.W.2d 768, 771 which affirms that "When the record lacks evidence of the reasoning behind trial counsel's actions, his performance cannot be found to be deficient." With a wide range of reasonability for counsel and the lack of legal requirement it cannot be claimed the appellant's attorney was deficient. As for the

second point that his attorney's deficient performance prejudiced his defense. I previously discussed the lack of materiality with the existence of a second witness.

In summary the lack of material evidence within the record proves that neither Brady nor the ineffective assistance of counsel claim are fulfilled. With no evidence on the record that the state was in possession of the victims history as well as clear proof that the defendant could have accessed those files Brady is not fulfilled. Given the wide range of acceptable actions for counsel and that the fact that there is no constitutional right to discovery the appellant's counsel cannot be considered deficient. Finally, as for the materiality of the evidence the existence of other witnesses proves even if the victim's history had been brought to light the outcome of the trial would not change. Given the overall lack of material evidence and the court's duty to favor the previous ruling it is clear that the court should favor the appellee in this case.

Conclusion

There is not enough evidence to prove purposeful discrimination and the missing evidence was not material.

Prayer

For these reasons we pray the court affirm the findings of the lower court.

Respectfully submitted,

Alexis Boehmer

Ashlyn Dodson

Attorneys for Respondent



TEXAS YOUTH AND GOVERNMENT

IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

NO. 19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellee

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

Brief for _____ (Appellee or Appellant)

Name (Attorney #1)

Appellant Full Name

**Daniel Ling
Joshua Assef
Vic Coppinger YMCA**

Statement of the Case

After being found guilty of Class C Misdemeanor citation for being at fault for a collision and a citation for Minor driving under the influence, Torrance Rush filed an appeal

Statement of the Facts

On April 19, 2019, a vehicle hit a pedestrian at an intersection in Fort Worth. Neither. The driver, Torrance Rush and later to become the appellant, was issued a Class C Misdemeanor citation for being at fault for the accident. The investigating officer smelled alcohol in the appellant's breath and issued a citation for Minor Driving under the influence. The appellant hired a jury and the case was scheduled for a jury trial. During jury selection, first jury list was generated, but before the first 12 jurors were brought into the courtroom, the prosecuting attorney requested a jury shuffle. The makeup of this panel was 7 blacks, 1 Hispanic, and 3 whites, 8 of whom were female and 4 were male. Following the request for the shuffle, a new panel was generated consisting of 4 blacks, 2 Hispanics, 1 Asian, and 5 whites, 8 of whom were male, 3 were female, and one was a transgender female. During the jury selection phase, the prosecuting attorney only directly questioned the black jurors except for the 12th juror, who she already knew. The 8th juror, who is black, was struck for language issues. The state then struck jurors 3, 9, and 12, and the defense struck juror 11, a police officer. Jurors 3, 9, and 11 are black, so the appellant's attorney made a Baston challenge as no black jurors were left on the jury. The state's provided race neutral reason's under Baston for the strikes were that Juror 3 was a schoolteacher,

and would therefore be more sympathetic towards children, and Juror 9 had antigovernment political views. The appellant's attorney pointed out that Juror 3 was actually a Church employee, and it was Juror 7 that was the teacher. The judge determined that there was no Baston violation and the trial proceeded. Torrance Rush was found guilty of both charges and fined. Following the verdict, the victim, Kieran Spokes, ran to Mr. Rush and said that "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." Following this statement, Rush told his attorney of what happened, and his attorney filed for a new trial. After a hearing, the trial court Judge denied this request.

Argument

Issue 1: The trial court erred in denying the defense's Baston challenge.

Based on the evidence of these court proceedings, we believe that there are grounds for a remand of this trial. The selection process of the jury was clearly tainted with bias from the prosecutor from the beginning. From the pattern of questioning of potential jurors, to the pattern of striking, the prosecution clearly molds their jury based on both racial and gender-based lines.

To start, the prosecution excessively questioned certain jurors, while others with similar professional backgrounds but different races or genders were skipped. For instance, juror 7 only answers one question throughout the entire questioning period, yet he is a middle school teacher, a profession

based solely on interacting with kids, including dealing with troublemakers. The only question he answers is one directed to the entire jury, and no direct questioning is posed to him. He is a young white man. In contrast, Juror 3 is questioned multiple times. She is an older retired black woman, and her previous professional experience was tangentially related to children. Although she definitely merited questioning, it can be argued that Juror 7 merited the same level, if not more, of questioning that Juror 3 received.

Another indicator of racially selecting a jury was the way the strikes were used, and the resulting final jury clearly indicates racial motivations for selection and grounds for a remand.

The prosecution specifically singles out Juror 8, a young black woman, and questions her about her political beliefs. Meanwhile, Juror 1 and Juror 5, both young as well, are not asked any personal belief questions at all. In fact, Juror 1 is not questioned at all throughout the process, being a young white male accountant. Juror 5 is a transgender Asian bartender, and she is the only biological woman left on the final jury. Meanwhile, 2 black women were specifically singled out for striking, with one black male struck for just cause. Although there is one black woman left on the jury, she is only left because she is a police officer, clearly influencing her biases on this case.

Another indicator of racial selection was how the prosecuting attorney confused Juror 3 and Juror 7. She stated that she struck Juror 3 for being a teacher; however, Juror 7 was the teacher on the panel. This negates the credibility of her supposed race neutral explanations as she should have struck Juror 7 if she wanted to strike the teacher, yet she still struck Juror 3.

According to *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019)., each point alone would be insufficient to prove racial bias; however, when taking these points into account with the fact that the diverse jury was shuffled, there is significant evidence that there was racial biases in the selection of the jury.

The error is grounds alone for a remanding a retrial. The simple reason alone that serving on a jury is one of the few ways that citizens can ensure that justice is properly dispensed in their community makes the exclusion of citizens based on race an egregious offense. This court should not allow such errors to stand to ensure that the community's faith in the courts stays strong.

Issue 2a: The trial court erred in denying the defense's motion for new trial due to the alleged Brady violation.

In order to constitute a Brady violation, a defendant must show that, the state failed to disclose evidence, that the evidence was favorable to them (the defendant), and that the evidence is material (meaning there is a high possibility that the outcome of the case would have been different had the evidence been submitted. *Brady v. Maryland*, 373 U.S. 83 (1963).

For the first prong, it must be proven that the state withheld evidence from the trial. According to *Reed v. State*, (Tex. App. – Fort Worth 2016) (unpub.), the state includes law enforcement connected to the investigation and prosecution of the case. Seeing as a police officer is serving as witness and submitting other evidence for the case to aid the prosecution, Sergeant Mike Sundance should be considered as part of the state. Since, he would

have access to such traffic tickets in Fort Worth, these tickets were withheld by the State.

The second prong is met as proving that Spokes is a bad driver will aid the defense in proving to the jury that he could have had the lapse of judgement required to cross a crosswalk at the incorrect time.

For the third prong, the evidence is material as revealing it would have greatly impacted whether the jury would have placed Spokes at fault for the accident. In an appeal, all evidence must be considered in context with the rest of the evidence in the case. *Hampton v. State*, 86 S.W. 3d 603 (2002). Alone, this traffic tickets seem rather trivial, however, when placed in context with that other evidence the state has, it seems to be rather significant. Out of the State's three witnesses, only two were present when the collision took place. Furthermore, one of them was playing Pokémon Go! During the collision and his view was obstructed by a tree and a lamppost. The external factors present will weaken the credulity of the prosecution's case. Finally, the last witness was the victim himself. This evidence could serve to weaken the credibility of the victim as a large number of traffic violations could hint that a person is more prone to being careless when it comes to following the law, and maybe he was careless enough to walk at the wrong time. This would be similar to *Ex Parte Richardson*, 70 S.W.3d 865 (Tex. Crim.App. 2002), in which evidence was considered material after the State lost the credibility of its one (and all) witness.

Issue 2b: The trial court erred in denying the Appellant's motion for a new trial due to ineffective assistance of counsel.

In order to determine ineffective counsel, it is paramount for two preconditions to be met, otherwise referred to as the Strickland Components Strickland v. Washington, 466 U.S. 668 (1984). The first prong of the components state that there must be certifiable evidence that the performance was deficient. The second prong states that the deficient performance must hurt the defense of the defendant. According to the Morton Violation, both conditions must be met in order to constitute the violation.

For the first prong, the evidence for the attorney's mistake is merely the appellants attorney did not file for Discovery in a trial where all evidence as to what happened was witness testimony. Filing for discovery could have provided evidence, such as the tickets, to help sway the jury into not believing the prosecution's witnesses. According to Melton v. State, 987 S.W.2d 72 (1998)., a counselor must have a firm command of the facts, which should include evidence surrounding the credibility of the witnesses who would be on trial.

For the second prong, not being able to disprove the two witness testimonies to who was at fault for the accident leaves the jury to most likely believe that they are right, and they will probably side with them. If the prosecution's witnesses had been proven as unreliable, then their argument would have been extremely weak.

Conclusion

The fact that there was a seemingly systematic striking of black jurors by the prosecution during the jury selection phase indicates that a Baston

violation has been made. Secondly, the excluded traffic tickets from the trial do constitute a Brady violation, as the tickets were known by the prosecution, would have aided the defense, and had the potential to overturn the outcome of the case given that spokes might have made an error in traffic safety rules. Third, the appellant's defense attorney provided ineffective assistance of counsel, as he made no attempt to find these tickets or other impeachment evidence throughout the trial. Each of these issues individually, harmed the rights of either the defendant or the Fort Worth community, and is therefore exigent for remanding a new trial.

Prayer

For these reasons, we pray that this court would reverse the decision of the trial court.

Respectfully Submitted By:

Daniel Ling

Joshua Assef

Attorneys for Petitioner

Vic Coppinger Family YMCA



TEXAS YOUTH AND GOVERNMENT

**IN THE COURT OF CRIMINAL APPEALS, STATE OF
TEXAS**

NO. 19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellee

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

Brief for _____ (Appellee or Appellant)

Name (Attorney #1)
Name (Attorney #2)
School Name or YMCA Delegation

Appellee

3-1
Final Version – August 21, 2019

**Daniel Ling
Joshua Assef
Vic Coppinger YMCA**

Statement of the Case

After being found guilty of Class C Misdemeanor citation for being at fault for a collision and a citation for Minor driving under the influence, Torrance Rush filed an appeal stating that a Baston violation was present,

Statement of the Facts

On April 19, 2019, a vehicle hit a pedestrian at an intersection in Fort Worth. Neither the driver nor the pedestrian was harmed. The driver, Torrance Rush and later to become the appellant, was issued a Class C Misdemeanor citation for being at fault for the accident. The investigating officer smelled alcohol in the appellant's breath and issued a citation for Minor Driving under the influence. The appellant hired a jury and the case was scheduled for a jury trial. During jury selection, after then first jury list was generated, but before the first 12 jurors were brought into the courtroom, the prosecuting attorney requested a jury shuffle. The makeup of this panel was 7 blacks, 1 Hispanic, and 3 whites, 8 of whom were female and 4 were male. Following the request for the shuffle, a new panel was generated consisting of 4 blacks, 2 Hispanics, 1 Asian, and 5 whites, 8 of whom were male, 3 were female, and one was a transgender female. During the jury selection phase, the prosecuting attorney only directly questioned the black jurors except for the 12th juror, who she already knew. The 8th juror, who is black, was struck for language issues. The state then struck jurors 3, 9, and 12, and the defense struck juror 11, a police officer. Jurors 3, 9, and 11 are black, so the appellant's attorney made a Baston challenge as no black jurors were left on the jury. The state's provided race neutral

reason's under Baston for the strikes were that Juror 3 was a schoolteacher, and would therefore be more sympathetic towards children, and Juror 9 had antigovernment political views. The appellant's attorney pointed out that Juror 3 was a Church employee and it was Juror 7 that was the teacher. The judge determined that there was no Baston violation and the trial proceeded. Torrance Rush was found guilty of both charges and fined. Following the verdict, the victim, Kieran Spokes, ran to Mr. Rush and said that "I'm sure glad y'all 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." following this statement, Rush told his attorney of what happened, and his attorney filed for a new trial. After a hearing, the trial court Judge denied this request.

Argument

Issue 1: The trial court did not err in denying the defense's Baston challenge.

The prosecution used their pre-emptive strikes effectively by removing jurors with potential personal bias. They also directed questions to the pool of potential jurors based on relevant qualifications that would affect this case, not based on race. The claimed discrimination both on race and gender are merely coincidental, and the jurors that were removed were clearly picked based on their own personal backgrounds. All strikes clearly fall within prosecutorial discretion, and there is no basis for a remand.

To begin, the questioning of the jury was fair and was clearly based on the professional and personal backgrounds of the potential jurors, not their race or gender. Throughout the jury questioning process, the prosecution

clearly questions potential jurors that they believe have personal biases that prevent them from being objective during the trial. For example, Juror 3 was questioned extensively because the prosecution wanted to determine the full extent of their professional involvement with children. Since she was retired, her professional background was not clear, and the additional questioning was justified based on these grounds. Although certain jurors are not targeted specifically with questions, they still responded to questions posed to the entire group, and this helped the prosecution get an accurate picture of the composition of the jury. All jurors struck had valid, race-neutral reasons and fall within prosecutorial discretion.

Secondly, the final racial makeup of the jury was only coincidental and still a fair jury composed of peers. The argument that the final jury is not a fair representation of the defendant's peers is simply untrue. According to *Batson v. Kentucky*, 476 U.S. 79 (1986), jurors cannot be excluded based on their race. As long as the initial pool is a fair cross-section of the community, any resulting pool is fair too as long as the jurors are not struck for race-based reasons. In this case, all jurors are struck for race-neutral reasons. Additionally, the appellant's argument that the jury is not a good cross section of the community is simply untrue. There were still two biological females remaining, and there were two Hispanics on the jury, indicating that there was a good mix of races and genders present.

According to *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019)., even if one of these points is disproven, that is not grounds for saying that the jury was picked based on race. This court cannot call an attorney racist simply

because a coincidence occurred in which the best jurors to strike happened to all be black.

Issue 2a: The trial court did not err in denying the defense's motion for new trial due to the alleged Brady violation.

In order to constitute a Brady violation, a defendant must show that, the state failed to disclose evidence, that the evidence was favorable to them (the defendant), and that the evidence is material (meaning there is a high possibility that the outcome of the case would have been different had the evidence been submitted. *Brady v. Maryland*, 373 U.S. 83 (1963).

In order to satisfy the first prong, the state had failed to access evidence that is relevant to the case and present them to the court, the first prong is not met as there is no indication that the State, using the definition in *Reed v. State*, (Tex. App. – Fort Worth 2016) (unpub.). Even though there was a police officer who was a witness and submitted evidence, there is no indication that he was helping the prosecution with their argument or had access to the tickets if they were from outside the Fort Worth area.

Moving on to the second prong, that prong is met. The evidence would support the defense's case to prove that there was a possibility that Kieran Spokes was irresponsible to cross the road when he was not supposed to.

Regardless of whether the first two prongs are met, the third prong is still not met. The evidence must be material. Just as in *Brady v. Maryland*, 373 U.S. 83 (1963), it would have been impossible for the appeals court to determine whether Brady being an accomplice or the murderer in the murder

would have changed the outcome of the trial, it would be impossible to determine whether this evidence would have persuaded the jury to change their decision. In convicting Rush of being at fault, the jury is saying that he was in the intersection at the wrong time. There is no way to prove that Kieran Spokes being more prone to breaking the law would have caused the jury to say Rush was in the intersection at the wrong time. There was also evidence that Rush was irresponsible in this situation as indicated by the alcoholic beverage in his car. With the amount of evidence that puts Rush at fault, this new evidence of traffic tickets indicating merely that Spokes was a bad driver would be insufficient to change the outcome of the trial.

Issue 2b: The trial court did not err in denying the Appellant's motion for a new trial due to ineffective assistance of counsel.

According to *Strickland v. Washington*, 466 U.S. 668 (1984), a counsel's performance should be judged on whether decisions were reasonable or not rather than the outcome of the case. Secondly, like a Brady violation it must be proven that had the appellant's counsel been competent, the outcome of the case would have been different which we have stated it wouldn't.

In considering whether a counsel's actions were unreasonable, it must be assumed that the counsel's performance fell within a standard of reasonable assistance. If this is not true, then evidence must be submitted showing that the counsel made unreasonable decisions during the case. If no evidence is submitted, then the counsel's performance was reasonable. *Blanco v. State*, (Tex. App.—El Paso, 2015) (unpub.). Seeing as there is no

direct evidence to the defense attorney being incompetent during the trial this assumption can be made.

Additionally, all considerations must be made with the counselor's perspective at that time taken into account. Furthermore, this court simply cannot remand for new trial because this new evidence was revealed. *Strickland v. Washington*, 466 U.S. 668 (1984). The appellant's attorney was unaware that this evidence existed and likely would have thought that traffic tickets would be worth his time in finding, considering the work he had to prepare for this case and other people he was defending throughout the day.

Finally, comparing this case to other cases where ineffective counsel was present, this case does not exhibit circumstances similar to those in other cases such as *Melton v. State*, 987 S.W.2d 72 (1998). In this particular case, the defendant pleaded guilty because his lawyer saw a video which he believed to show the defendant committing the alleged crime and persuaded his client to plead guilty despite the fact that he did not remember committing any crime. The appellant attorney cannot be said to have made a similar mistake in not filing for discovery to find something as insignificant as traffic tickets against a bicyclist/pedestrian (depending on which witnesses were correct).

Conclusion

There is no reason to believe that the jury in the trial court case was chosen based on race, that the tickets mattered, and that not using it as evidence was incompetent counsel.

Prayer

For these reasons, we pray that this court upholds the decision of the trial court.

Respectfully Submitted By:

Daniel Ling

Joshua Assef

Attorneys for Respondent

Vic Coppinger Family YMCA

**IN THE COURT OF CRIMINAL APPEALS, STATE OF
TEXAS**

NO. 19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellee

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

Brief for Appellant

De'ja Livingston

Khloe Warren

Carl Wunsche Senior High

School

TO THE HONORABLE COURT OF APPEALS:

Comes now, the Appellant Torrance Rush, and files this appeals brief

Statement of the Case

The defendant, Torrance Rush, was charged with Class C Misdemeanor offenses of Minor Driving Under the Influence of Alcohol and Failure to Yield to a Pedestrian. Mr. Rush was found guilty on both offenses and given a fine along with counseling classes. Rush petitions this court for a new trial

Statement of the Facts

On the day of April 19, 2019, Torrance Rush "Rush" came to a complete stop at a red light in his vehicle on 9th and Houston in downtown Fort Worth. When the light turned green Rush proceeded to turn right. That is when Kieran Spokes "Spokes" started crossing the street with his bike in front of Appellant's vehicle. Rush immediately slammed on the breaks; however, Rush's vehicle and Spokes collided. Neither party sustained any injuries. Sergeant Mike Sundance was called to the scene. While interviewing Rush on the events surrounding the accident, Sergeant Mike Sundance allegedly smelled alcohol on Rush's breath. The officer searched the defendant's vehicle without the defendant's consent, and bagged a red cup as evidence. The Marshall who was also called to the scene then transported Rush to the Fort Worth detention facility where the State's intoxilyzer machine was located. Rush's results came back 0.00. Sergeant Mike Sundance then wrote Rush a citation for Minor DUI and probable cause.

Issues on Appeal

Point of Error Number 1: The trial court erred in denying Appellant's *Batson* challenge during *voir dire*.

Point of Error Number 2a: The trial court erred in denying Appellant's motion for a new trial due to an alleged *Brady* violation.

Point of Error Number 2b: The trial court erred in denying Appellant's motion for a new trial due to ineffective assistance of counsel.

Argument

Point of Error Number 1: The trial court erred in denying Appellant's *Batson* challenge during *voir dire*.

Flowers v. Mississippi, 139 S.Ct.2228 (2019) established that the "State may not discriminate on the basis of race when exercising peremptory challenges against prospective jurors in a trial", "[p]urposeful racial discrimination in selection of venire violates a defendant's right to equal protection, because it denies him the protection that a trial by jury is intended to secure *Batson v. Kentucky*, 476 U.S. 79 (1986). In this case the prosecutor requested a shuffle of the jury list before the *voir dire* started and then during *voir dire*, the prosecution struck Juror 3, a black female and Juror 9, a black female.

First, the original jury list had a make-up of 7 black panelists, 3 whites and 1 Hispanic with a gender makeup of 8 women and 4 men. The makeup of the first potential juror list had significantly more black women than white males. Racially motivated, the State manipulated his right to request for a jury shuffle and then used his peremptory strikes to exclude black females from participating on the jury service.

To examine the first juror that the State exercised their peremptory strikes on was Juror 3. She was a secretary at a church and an associate youth pastor. The State claimed to the Judge during the *Batson* challenge that arose during *voir dire*

that “Juror 3 was a school teacher who worked with students close in age to the defendant.” However, Juror 3 was in fact a secretary at a church and associate youth pastor. In addition, the State did not strike Juror 7 who was a white male middle school teacher.

When the *Batson* challenge arose the prosecution's race neutral reason for striking Juror 9 was, she “had extreme political positions that were antigovernment,” and wrote in his notes that she was a part of the Black Lives Matter. In truth she is a college student studying 18th century literature and minoring in environmental sciences. Juror 9 never stated that she was a part of Black Lives Matter.

Point of Error Number 2a: The trial court erred in denying Appellant’s motion for a new trial due to an alleged *Brady* violation.

Brady V. Maryland, 373 U.S. 83 (1963) established the prosecution has a constitutional duty to disclose exculpatory or impeaching evidence. *Brady* requires a three-pronged test. The Appellant must (1) show that the State failed to disclose evidence, (2) show that the withheld evidence is favorable to applicant, and (3) show evidence is material.

In this case, the prosecution admittedly neglected to seek out any defendant or potential witness’ offense reports in the lower courts. In *Reed v. State, (Tex. App. — Fort Worth 2016)(unpub.)*, the Court held 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 lawyers and employees of his office and members of law enforcement connected to the investigation and prosecution, and material exculpatory evidence in the

possession of police agencies and other parts of the prosecutorial team. Therefore, the State had a clear duty to disclose Spoke's offense reports and did not.

The exception of the State not violating its duty to disclose if the evidence was available to defendant through a subpoena does not apply here. *Reed v. State*, (Tex. App — Fort Worth 2016) (unpub.). There was no suspicion by the Appellant of Spokes having a criminal history until after the trial phase and sentencing phase had concluded. It was then that Spokes approached the defendant and disclosed the evidence.

Under the second prong, the evidence is favorable to Appellant because multiple traffic tickets for violations establishes Spokes has a history of disregarding the rules of the road. The basis of concern during the trial was whether the Appellant was at fault for the accident or the Spokes was at fault. Spoke's only witness was distracted playing a video game on his phone during the time of the accident. This same witness admitted to having a view "blocked by a tree and the signal light pole" and hearing the accident but not seeing it.

The lower court made the argument that Appellant has alcohol in his system which was demonstrated to be false by Appellant's 0.00 intoxilyzer results on the date of the incident. In addition, the defendant provided the only witness with a clear line of sight of the incident. That witness testified in his affidavit to seeing the complaining witness speed out into the intersection and right in front of Appellant's vehicle from behind a building.

Under the third prong, the evidence is material because it shows Spokes is a habitually breaks traffic laws, and clearly doesn't understand the rules of the road.

That fact matters in this case because the main burden in the case was whether the Spokes was at fault or the Appellant was at fault.

Therefore, the verdict in this case would have been undermined with this impeaching evidence.

Point of Error Number 2b: The trial court erred in denying Appellant's motion for a new trial due to ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, the Appellant must show: (1) his attorney's performance was deficient, and (2) that his attorney's deficient performance prejudiced his defense. *Strickland v. State*, 266 U.S 668 (1984).

Appellant's attorney failed to file a discovery request under Article 39.14 (a) of the Texas Code of Criminal Procedure. Had Appellant's attorney filed for this request, the State would have been compelled to find and produce Spoke's criminal history.

Under the second prong, Spoke's history clearly would have produced a different outcome in the trial phase because it met all the requirements of the *Brady* test.

Conclusion

Appellant was entitled to a fair and just trial, but the consideration of Appellant not receiving a trial judged by his peers, the withheld criminal history by the State, demonstrated favorability and of materiality of the criminal history, Appellant did not receive. Along with the fact that Appellant received ineffective assistance of counsel that prejudiced the defense. For these reasons, your honor,

we respectfully request that you find in favor of the Appellant and reverse the lower court's decision and grant Appellant a new trial.

Prayer

Torrance Rush prays that this court reverse and render and remand for a new trial, and for such other and further relief to which he may be entitled.

Respectfully submitted by,

De'ja Livingston

Khloe Warren

Attorneys for Appellant

Carl Wunsche Sr. High School

**IN THE COURT OF CRIMINAL APPEALS, STATE OF
TEXAS**

NO. 19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellee

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

Brief for Appellee

De'ja Livingston

Khloe Warren

Carl Wunsche Senior High School

HONORABLE COURT APPEALS

Comes now, the State of Texas, and files this is appeals brief

STATEMENT OF THE CASE

The defendant, Torrance Rush, was charged with Class C Misdemeanor offenses of Minor Driving Under the Influence of Alcohol and Failure to Yield to a Pedestrian. Mr. Rush was found guilty on both offenses and given a fine along with counseling classes.

STATEMENT OF FACTS

On April 19th, 2019 the victim Kieran Spokes "Spokes" was struck by the defendant Torrance Rush's "Rush" vehicle. Spokes was on his way back from getting coffee from a nearby coffee shop. The victim waited at the pedestrian crossing for the signal showing him that it was safe to walk. When the light flashed white meaning, it was Spokes turn to walk, the Appellant, Rush, failed to yield on a right turn and hit Kieran Spokes who was walking his bicycle. While Spokes sustained no physical injuries, he will be mentally scared by the incident. Not too long after Spokes was hit, Sergeant Mike Sundance was called to the scene. That was when Sergeant Mike Sundance witnessed Rush suspiciously throwing a red cup into the backseat of his vehicle. While interviewing Rush later on, Sergeant Mike Sundance allegedly smelled alcohol on Rush's breath, proceeded to search Rush's vehicle, and bagged the red cup as evidence. The Marshall who was also called to the scene then transported Rush to the Fort Worth detention facility where the State's intoxilyzer machine was located.

ISSUES ON APPEAL

Counterpoint Number 1: The trial court did not err in denying Appellant's *Batson* challenge during *voir dire*.

Counterpoint Number 2a: The trial court did not err in denying Appellant's motion for a new trial due to an alleged *Brady* violation.

Counterpoint Number 2b: The trial court did not err in denying Appellant's motion for a new trial due to ineffective assistance of counsel.

ARGUMENT

Counterpoint Number 1: The trial court did not err in denying Appellant's *Batson* challenge during *voir dire*

The State used their peremptory strikes in a strategical manner by striking juror 3 a woman who worked with the youth, juror 9 a college student with strong political views and juror 12 a 911 operator. These strikes were not used to discriminate against any of the juror applicants the striking was used so that both victim and defendant can have a fair and concise trial. *Batson v. Kentucky*, 476 U.S. 79 (1986) states that "parties are entitled to use their peremptory challenges to strike anybody they want to" the state provided race and gender neutral reasons as to why the 3 strikes were used on those certain jurors. Juror 3 was struck because of her work with young people and thus she might be more lenient towards the defendant. Juror 9 was struck due to her over interest in government activities which would have interfered with the progress of the trial. Juror 12 was struck due to his run ins with the law juror 12 has had multiple traffic tickets he even stated "I got another this morning". The state decided to strike juror 12 due to his traffic tickets that he had accumulated hence he would show favoritism toward the defendant since the trial is traffic related.

Counterpoint Number 2a: The trial court did not err in denying Appellant's motion for a new trial due to an alleged *Brady* violation.

Brady v. Maryland, established the prosecution has a constitutional duty to disclose exculpatory or impeaching evidence. *Brady* requires a three-pronged test. The Appellant must (1) show that the State failed to disclose evidence, (2) show that the withheld evidence is favorable to applicant, and (3) show evidence is material. *Brady V. Maryland*, 373 U.S. 83 (1963).

Article 39.14(h) of the Texas Code of Criminal procedures states, the State does not have a duty to disclose to the defendant "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(h)*. In this case, the State did not have a duty to disclose the victim's, Kieran Spokes', offense reports because the defense could potentially argue that they show the victim possible could have been at fault for the collision.

The *Reed v. State* exemption rule of the evidence being available to the defendant through a subpoena applies here because the main concern was whether the Appellant was at fault for the collision or the victim was at fault for the collision. *Reed v. State. (Tex. App. — Fort Worth 2016) (unpub.)*. Therefore, as a possible defense strategy Appellant's counsel logically should have sought the victim's offense reports.

Although the withheld evidence is potentially favorable to Appellant, it is not material because several credible witnesses testified during trial to Appellant's guilt.

There is no guarantee the evidence would have undermined the outcome of the trial; failing to meet the third prong of the *Brady* test.

Counterpoint Number 2b: The trial court did not err in denying Appellant's motion for a new trial due to ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, the Appellant must show: (1) his attorney's performance was deficient, and (2) that his attorney's deficient performance prejudiced his defense. *Strickland v. State*, 266 U.S 668 (1984).

In *Blanco v. State*, (Tex. App — El Paso, 2015), the court upheld, "[w]hen the record lacks evidence of the reasoning behind trial counsel's actions, his performance cannot be found to be deficient." Appellant's claim of ineffective assistance of counsel cannot meet the first prong of the *Strickland* test.

The timely filing for a discovery request by Appellant's lawyer would not have made a difference in the outcome of the trial because in *Blanco v. State*, the court held the State's "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.'" *Blanco v. State* (Tex. App. — El Paso, 2015) (unpub.); Tex. Code Crim. Proc. Ann. art. 39.14(h). The State had no obligation to disclose the victim's offense reports had Appellant's lawyer timely filed a request for discovery. Accordingly, since Appellant's claim of ineffective assistance of counsel rests solely on the filing of Article 39.14 of the Texas Criminal Code of Procedures, Appellant does not meet the second prong of the *Strickland* test.

Conclusion

Appellant failed to meet the requirements of the *Batson* test, the requirements of the *Brady* test, and the *Strickland* test. The lower court did not err in its affirmation of the trial court's decision. For these reasons, your honor, we respectfully ask that you uphold the decision of the lower court and find in favor of the great state of Texas.

Prayer

The Great State of Texas prays that this court affirm the decisions of the lower court.

Respectfully submitted by,

De'ja Livingston

Khloe Warren

Attorneys for Appellee

Carl Wunsche Sr. High School

IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

NO. 19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellee

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

Brief for Appellant

Victoria Cao (Attorney 1)

Catherine Bai (Attorney 2)

Vic Coppinger YMCA

TO THE HONORABLE COURT OF APPEALS:

STATEMENT OF THE CASE

The defendant, Torrance Rush, was found guilty of Class C Misdemeanor offenses of Failure to Yield to a Pedestrian and Minor Driving Under the Influence. Rush filed an appeal on the grounds of *Batson*, *Brady*, and Michael Morton violations.

STATEMENT OF THE FACTS

On April 19, 2019, a vehicle hit a pedestrian at an intersection in Fort Worth. The driver, Torrance Rush, was issued a Class C Misdemeanor citation for being at fault for the accident. The investigating officer smelled alcohol in the appellant's breath and issued a citation for Minor Driving Under the Influence. The Municipal Court scheduled 50 cases for the same day as the jury trial. The appellant's defense attorney represented nine of these cases.

Before jury selection, the prosecuting attorney requested a jury shuffle for the original list generated. The first panel was majority black (7) and female (8). After the shuffle request, the new panel was majority white (5) and male (8). During jury selection, the prosecuting attorney mainly questioned the black jurors. The State then struck jurors 3, 9, and 12, and the defense struck juror 11, a police officer. Jurors 3, 9, and 11 are black, so the appellant's attorney made a *Batson* challenge as no black jurors were left on the jury. The State's provided race neutral reasons under *Batson* for the strikes were that Juror 3 was a schoolteacher, and would therefore be more sympathetic towards children, and Juror 9 had radical antigovernment political views. The appellant's attorney pointed out that Juror 3 was actually a Church employee, and it was Juror 7 that was the teacher. However, the

judge determined that there was no *Batson* violation and the trial proceeded. Torrance Rush was found guilty of both charges and fined.

Following the verdict, the victim, Kieran Spokes, said to Mr. Rush, "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." Following this statement, Rush told his attorney of this new evidence, and his attorney filed for a new trial. The trial court Judge denied this request.

ISSUES ON APPEAL

Issue 1: The trial court erred in denying the appellant's *Batson* challenges during *voir dire*.

Issue 2a: The trial court erred in denying the appellant's motion for new trial due to an alleged Brady violation.

Issue 2b: The trial court erred in denying the appellant's motion for new trial due to ineffective assistance of counsel.

ARGUMENT

Issue 1: The trial court erred in denying the appellant's *Batson* challenges during *voir dire*.

Batson v Kentucky forbids the State to strike blacks on the assumption that they will be biased in a particular case simply because the defendant is black. 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. The prosecutor, Mrs. Crump, struck two of the three black

prospective jurors on jury, her only reasons being that one was a retired youth minister and another had radical liberal ideas.

Mrs. Crump strikes Diana Marva (Juror 3), a black female, because of close relations to kids in her occupation as a youth minister, but Rachel Wei (Juror 5), an Asian transgender bartender, says that she interacts with kids all the time when they try to sneak in. Additionally, Michael Gallegos, a white male, is a middle school teacher. Diana Marva and Michael Gallegos have very similar backgrounds, but Mrs. Crump still strikes only Diana Marva, even though she is retired and does not interact with kids daily anymore. A similar court was held in *Flowers v. Mississippi* where Carolyn Wright, a black female with a similar background as the white jurors on jury, was struck because the prosecutor said she had a connection to 34 people involved in Flowers' case, but 3 other white jurors, Chesteen, Waller, and Lester, knew many people in the case. Chesteen knew 31, Waller 18, and Lester 27. None of the white jurors were struck. (Juror 3)

Without any background information or asked questions, the prosecutor immediately requested a shuffle, the original jury consisted of 12 jurors, 7 black, 3 white and 1 Hispanic. Knowing she stuck all blacks in her final juror list it's not a coincidence that she requested a shuffle seeing that blacks dominated in race for jurors. Jury cannot be selected based upon race because it violates equal protection rights and defeats the purpose of a jury of peers, but one does not have a right to a jury with their race represented. Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment. *Batson v. Kentucky*. Ms. Crump shouldn't be allowed to assume someone's ability in trial based

on race and the fact that she excluded blacks from jury with no information on them is an act against the 14th amendment.

Ms. Crump's questions were mainly directed toward blacks. She chose to keep mainly all whites even though she never questioned or investigated their background history. She had no way in finding out if the other jurors had similar or worse backgrounds as the black prospectors, she struck without trying to investigate them. Your ability to serve on a jury should not be based on the color of your skin but by your citizenship to your country, your knowledge in the case, and your ability to know the country's language. In *Flowers v. Mississippi*, 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 the state asked 29 questions to each struck black prospective juror and asked an average of one question to each seated white juror. If Mrs. Crump was so invested into making a fair trial or who was the best choice to put on jury and best to strike, she would have asked more questions to the whole jury. 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 *Flowers v. Mississippi*.

Issue 2a: The trial court erred in denying the appellant's motion for new trial due to an alleged Brady violation.

A Brady violation requires three prongs to be fulfilled: the state failed to disclose evidence, the evidence is favorable to the defendant, and that the evidence is material (meaning there is a reasonable probability that had the evidence been

disclosed, the outcome of the trial would've been different). *Brady v. Maryland*, 373 U.S. 83 (1963).

For the first prong, the State withheld evidence from the trial. The State claims they had no possession of the victim's traffic tickets, but the Municipal Court had all driving records. Furthermore, Sergeant Mike Sundance should be considered part of the State. He testified as a witness and submitted other evidence. According to *Reed v. State*, (Tex. App. – Fort Worth 2016) (unpub.), the State includes law enforcement connected to the investigation and prosecution of the case. Since Sundance had access to the traffic tickets in Fort Worth, these tickets were withheld by the State.

The second prong is met because Spokes's history of traffic tickets demeans his credibility, so there's a larger chance that he incorrectly crossed the crosswalk. Additionally, Rush stated that Spokes was going too fast to simply be walking. He said that Spokes must have been riding his bicycle and is therefore considered a vehicle. Had the victim been on the bike and shown to regularly break traffic laws, the accident would not have been the defendant's fault.

For the third prong, the evidence is material as revealing it would have placed Spokes at fault for the accident instead. Alone, these traffic tickets seem rather trivial, however, they are significant relative to the State's other evidence. Out of the State's three witnesses, only two were present when the collision took place. Furthermore, one of them was distracted while playing Pokémon Go! during the collision, and his view was obstructed by a tree and lamppost. Finally, the last witness was the victim himself. This evidence weakens the credibility of the victim as several traffic violations suggest carelessness and disregard for the law. In *Hampton v. State*, 86 S.W. 3d 603 (2002), the prosecutor had hidden a police report that identified two other witnesses

at the scene that could have testified in the appellant's favor, and the court of appeals analyzed its materiality. Like the police report's witnesses, the traffic tickets could have "testified" in Rush's favor by inculcating the victim, Kieran Spokes.

Issue 2b: The trial court erred in denying the appellant's motion for new trial due to ineffective assistance of counsel.

To determine ineffective counsel, two conditions must be met, otherwise referred to as the Strickland Components from *Strickland v. Washington*, 466 U.S. 668 (1984). The appellant must (1) prove that the counsel's performance was deficient and (2) that the deficiency harmed the defendant.

For the first prong, the evidence for the attorney's mistake is that they did not file for Discovery in a trial where all evidence was witness testimony. Filing for discovery could have provided evidence, such as the tickets, to help sway the jury into not believing the prosecution's witnesses. It is the duty of the attorney to prepare for the trial, and that duty includes a preliminary criminal history search of potential witnesses. The attorney must have a firm command of the facts. *Melton v. State*, 987 S.W.2d 72 (1998). The attorney's large number of cases does not matter because the attorney must ensure that they can handle the case load. An attorney must conduct basic investigation to guarantee a fair, just trial.

For the second prong, there was nothing to disprove the two witness testimonies, so the jury could only side with them. However, the traffic tickets show the victim's pattern of traffic violations and would prove him at fault and an unreliable witness. The attorney's failure to do their research and find impeachment evidence put the defendant at a serious disadvantage. Additionally, if the attorney failed to

find this crucial piece of evidence, they could have erred in other aspects too, and there could be other hidden impeachment evidence.

CONCLUSION

The seemingly systematic striking of black jurors by the prosecution during the jury selection phase indicates a Batson violation. Secondly, the excluded traffic tickets from the trial do constitute a Brady violation as the tickets were known and withheld by the prosecution, would have aided the defense, and had the potential to overturn the outcome of the case because the victim would be at fault. Third, the appellant's defense attorney provided ineffective assistance of counsel because he made no attempt to find these tickets or other impeachment evidence throughout the trial. Each of these issues is so severe, and even one demands a new trial.

PRAYER

For these reasons, we pray that this court would reverse the decision of the trial court.

Respectfully Submitted By:

Victoria Cao

Catherine Bai

Attorneys for Petitioner

Vic Coppinger Family YMCA

IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

NO. 19-01234-CR

Torrance Rush, Appellant

v.

The State of Texas, Appellee

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

Brief for Appellee

Victoria Cao (Attorney 1)

Catherine Bai (Attorney 2)

Vic Coppinger YMCA

TO THE HONORABLE COURT OF APPEALS:

STATEMENT OF THE CASE

The defendant, Torrance Rush, was found guilty of Class C Misdemeanor offenses of Failure to Yield to a Pedestrian and Minor Driving Under the Influence. Rush filed an appeal on the grounds of *Batson*, *Brady*, and *Michael Morton* violations.

STATEMENT OF THE FACTS

On April 19, 2019, a vehicle hit a pedestrian at an intersection in Fort Worth. The driver, Torrance Rush, was issued a Class C Misdemeanor citation for being at fault for the accident. The investigating officer smelled alcohol in the appellant's breath and issued a citation for Minor Driving Under the Influence. The Municipal Court scheduled 50 cases for the same day as the jury trial. The appellant's defense attorney represented nine of these cases.

Before jury selection, the prosecuting attorney requested a jury shuffle for the original list generated. the new panel was majority white (5) and male (8). During jury selection, the prosecuting attorney mainly questioned the black jurors. The 8th juror, who is black, was struck for language issues. The State then struck jurors 3, 9, and 12, and the defense struck juror 11, a police officer. Jurors 3, 9, and 11 are black, so the appellant's attorney made a *Batson* challenge as no black jurors were left on the jury. The State's provided race neutral reasons under *Batson* for the strikes were that Juror 3 was a schoolteacher, and would therefore be more sympathetic towards children, and Juror 9 had radical antigovernment political views. The appellant's attorney pointed out that Juror 3 was actually a Church employee, and it was Juror 7 that was the teacher. However, the judge determined that there was no

Batson violation and the trial proceeded. Torrance Rush was found guilty of both charges and fined.

Following the verdict, the victim, Kieran Spokes, said to Mr. Rush, "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." Following this statement, Rush told his attorney of this new evidence, and his attorney filed for a new trial. The trial court Judge denied this request.

ISSUES ON APPEAL

Issue 1: The trial court erred in denying the appellant's *Batson* challenges during *voir dire*.

Issue 2a: The trial court erred in denying the appellant's motion for new trial due to an alleged Brady violation.

Issue 2b: The trial court erred in denying the appellant's motion for new trial due to ineffective assistance of counsel.

ARGUMENT

Ms. Crump was not targeting any races and gave race neutral reasons to everyone struck. She stated she struck Juror 3 for close association with kids, juror 9 for having anti-government political views, and juror 12 for a history with the prosecutor. In **Flowers v. Mississippi** Two prospective jurors knew Flowers' family and had been sued by Tardy Furniture, 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. These

statements and facts prove race neutral evidence, saying that prosecutors do have reliable statements and facts prove a race neutral trail. No race neutral reasons were refuted.

The prosecutor kept Michael Gallegos (juror 7) a middle schoolteacher and Rachel Wei (juror 5) a bartender because they showed they didn't like youth who broke rules showing no sympathy to youth, leading to a fair juror, fair trial. In **Craig v. State** 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, indicative of bias on their part in favor of the defendant.

Ms.Crump shows professional grounds through the questioning process as the prosecution clearly questions potential jurors that they believe have personal biases that prevent them from being objective during the trial. Juror number 3 was questioned continually to confirm their relationship with children clearly because her background information was not clear. Ms.Crump was only told that she was retired, causing more unclarity in her profession and involvement with children. Additionally questioning toward juror 3 would help to make a fair bias trail. In **Flowers v. Mississippi** "dramatically disparate," "[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." The majority's statistical "evidence" is irrelevant and misleading. 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. the only juror supposedly discriminated against was asked hardly any questions.

The racial makeup of the jurors composed a fair jury of peers, saying that the makeup of the final jury is just a false statement. In **Batson v. Kentucky** jurors cannot be excluded based on their race. As long as the initial pool is a fair cross-section of the community, any resulting pool is fair too as long as the jurors are not struck for race-based reasons. In this case, all jurors are struck for race-neutral reasons. The cross selection in the community is proudly shown when consisting of two biological females remaining, and two Hispanics on the jury, indicating that there was a good mix of races and genders present.

Issue 2a: The trial court erred in denying the appellant's motion for new trial due to an alleged *Brady* violation.

A Brady violation requires three prongs to be fulfilled: the state failed to disclose evidence, the evidence is favorable to the defendant, and that the evidence is material (meaning there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would've been different). *Brady v. Maryland*, 373 U.S. 83 (1963).

The first prong is not met because it was not the State's duty to provide this evidence if the defendant was aware or could have accessed it from other sources. *Reed v. State*, (Tex. App. – Fort Worth 2016) (unpub.). The defense attorney also had access to the Municipal Court's records and easily obtained them after Spokes's little confession once the trial ended.

The second prong is not satisfied either because the tickets do not overrule the defendant's Minor DUI. Some might argue that the traffic tickets suggest the victim's irresponsibility and that he may have been riding his bicycle. However, the

Spokes's traffic violations were only done in a vehicle and do not apply to him as a pedestrian. According to witness Santoshi Umbreon, he was clearly walking the bike and identifies as a pedestrian. The evidence is insufficient and not impeach.

Most importantly the third prong is not fulfilled either. Regardless of whether the State withheld possibly favorable evidence, it is still not material compared to other evidence. In *Brady v. Maryland*, 373 U.S. 83 (1963), it was impossible to determine whether Brady being an accomplice or the murderer would have changed the outcome of the trial. It would also be impossible to determine whether the traffic tickets would have persuaded the jury to change their decision. There is no way to prove that Kieran Spokes's pattern of breaking the law would have caused the jury to blame him. Additionally, Rush was also partly irresponsible because he was in possession of an alcoholic beverage while operating a motor vehicle. Officer Myers and Sundance, both trained and certified police officers, detected alcohol on him. Sergeant Sundance found a cup with alcohol residue in the car. Rush's confirmed DUI greatly overweighs the tiny possibility of the victim's carelessness. As previously stated, the traffic tickets do not overrule the DUI and witness testimonies.

Issue 2b: The trial court erred in denying the appellant's motion for new trial due to ineffective assistance of counsel.

According to *Strickland v. Washington*, 466 U.S. 668 (1984), a counsel's performance should be judged on the reasoning of decisions rather than the outcome of the case. Error of counsel does not warrant setting aside the judgment if the error had no effect. Secondly, like a Brady violation, it must be proven that had the appellant's counsel been competent, the outcome of the case would have been

different; however, it has already been established that there was no certainty in a different outcome with the new evidence.

In considering whether a counsel's actions were unreasonable, it must be assumed that the counsel's performance fell within a standard of reasonable assistance. If this is not true, then evidence must be submitted showing that the counsel made unreasonable decisions during the case. If no evidence is submitted, then the counsel's performance was reasonable. *Blanco v. State*, (Tex. App.—El Paso, 2015) (unpub.). There was no direct evidence of the defense attorney being incompetent during the trial this assumption can be made.

Additionally, the attorney's perspective at that time must be considered. *Strickland v. Washington*, 466 U.S. 668 (1984). In this case, the court cannot remand for new trial simply because this new evidence was revealed. The appellant's attorney was unaware that this evidence existed and likely would have thought that traffic tickets would not be worth his time to research. He also had to prepare for the rest of this case and other people he was defending throughout the day.

Finally, the attorney did not need to present or find the tickets because the witness testimonies and affidavits prove everything else. There was no need to file for further evidence. The counsel was not ineffective because they did their job and could not have overruled the witnesses or DUI.

CONCLUSION

There is no reason to believe that the jury in the trial court case was chosen based on race. The State did not have to present the victim's traffic tickets as evidence, and they did not even matter. Finally, not using the tickets does not qualify as incompetent counsel.

PRAYER

For these reasons, we pray that this court would affirm the decision of the trial court.

Respectfully Submitted By:

Victoria Cao

Catherine Bai

Attorneys for Petitioner

Vic Coppinger Family YMCA

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

Brief for Appellee

Johanna Carmona

Veronica Rodriguez

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STATEMENT OF THE CASE

___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.

STATEMENT OF FACTS

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. Page 8 Case Materials Created for YMCA Texas Youth & Government 2019-2020 (Revised 10/24/19) 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.

ISSUES ON APPEAL

Issue Number One: Whether the trial court erred in denying appellant's Batson challenge during voir dire.

Issue Number Two: Whether the trial court erred in denying appellant's motion for new trial due to an alleged Brady violation, and whether the trial court erred in denying appellant's motion for new trial due to ineffective assistance of counsel?

ARGUMENT

Issue Number One: Whether the trial court erred in denying appellant's motion for new trial due to an alleged Brady violation, and whether the trial court erred in denying appellant's motion for new trial due to ineffective assistance of counsel?

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 Page 13 Case Materials Created for YMCA Texas Youth & Government 2019-2020 (Revised 10/24/19) 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 preemptory 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 Number Two: Whether the trial court erred in denying the motion to suppress the results of the warrantless blood draw.

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 Page 11 Case Materials Created for YMCA Texas Youth & Government 2019-2020 (Revised 10/24/19) 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

Page 12 Case Materials Created for YMCA Texas Youth & Government 2019-2020 (Revised 10/24/19) 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.

PRAYER

For these reasons we pray that this court affirms the decision of the lower court.