No. _____

IN THE
Supreme Court of the United States

NATHAN RAY FOREMAN,
***Petitioner*,**

v.

STATE OF TEXAS
Respondent.

On Petition for Writ of Certiorari
to the Texas Court of Criminal Appeals
Rule 12.4

PETITION FOR A WRIT OF CERTIORARI

Stanley G. Schneider
Schneider & McKinney, P.C.
5300 Memorial Dr., Suite 750
Houston, Texas 77002
Telephone: (713) 951-9994
Email: stans3112@aol.com

Counsel for Petitioner

QUESTION PRESENTED

The investigation and presentation of a motion for new trial after a jury convicts a Defendant is a critical stage of the appellate process. The question herein presented is whether the failure of initial appellate counsel was deficient to require an out of time appeal or hearing on a motion for new trial based on initial appellate counsel's failure to investigate jury misconduct arising from a juror's relationship with a co-defendant and his family that would establish the juror's bias and the granting of a new trial.

PARTIES TO THE PROCEEDINGS

Nathan Ray Foreman. . . . . Petitioner
c/o Stanley G. Schneider
Schneider & McKinney, P.C.
5300 Memorial Drive, Suite 750
Houston, Texas 77002

State of Texas. . . . . Respondent

Because neither party is a corporation, a corporate disclosure statement is not required.

RELATED PROCEEDINGS

State of Texas v. Nathan Ray Foreman, Nos. 1374837 and 1374838, in the 177th District Court of Harris County, Texas; Judgments entered on November 19, 2015.

Foreman v. State, 2017 Tex. App. LEXIS 7584 (Tex. App. 14th 2017), Nos. 14-15-01005-CR and 14-15-1006-CR (Opinions issued on August 10, 2017); Rehearing en banc granted, Opinion issued *Foreman v. State*, 561 S.W. 3d 218 (Tex. App. 14th 2018)(en banc August 31, 2018).

Foreman v. State, 565 S.W. 3d 371 (Tex. App. 14th 2018). Order releasing Foreman on bond pending appeal.

Foreman v. State, 613 S.W. 3d 160 (Tex. Crim. App. 2020), Nos. PD-1090-18 and PD-1091-18, Opinion issued on November 25, 2020; Rehearing denied January 13, 2021.

Foreman v. State, No. 20-1445; Petition for Writ of Certiorari denied on May 17, 2021.

Ex parte Foreman, Nos. 1374837-A and 1374838-A; CCA Nos. WR-95,302-01 and WR-95,302-02; Relief denied on October 9, 2024.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statutes

State Statutes

PETITION FOR WRIT OF CERTIORARI

Petitioner Nathan Ray Foreman respectfully asks that the Court issue a writ of certiorari to review the decision of the Texas Court of Criminal Appeals.

CITATION TO LOWER COURT OPINIONS

The Texas Court of Criminal Appeals did not issue a published or unpublished opinion. The Texas Court of Criminal Appeals issued notices denying state habeas relief, these notices are in Appendix A and B.

STATEMENT OF JURISDICTION

Petitioner seeks review of two cases in the same petition pursuant to Rule 12.4.

This is an appeal from the Texas Court of Criminal Appeals. The Court of Criminal Appeals denied Petitioner's application for writ of habeas corpus pursuant to Tex. Code Crim. Proc. article 11.07 on October 9, 2024.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

Jurisdiction is specifically authorized by Supreme Court Rule 10(c) in that the Texas Court of Criminal Appeals on habeas corpus has decided an important federal question that conflicts with this Court's Sixth Amendment decisions requiring that counsel conduct a thorough and independent investigation of issues arising.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. VI

The Sixth Amendment to the United States Constitution provides:

> 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 defense.

U.S. CONST. amend XIV

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person without its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This application stems from the denial of habeas corpus relief by the Texas Court of Criminal Appeals based on the trial court's recommendation that relief be denied and the trial court's entering of findings of fact and conclusions of law.

On November 19, 2015, Petitioner was found guilty in cause number 1374837 of the felony offense of aggravated robbery and sentenced to 50 years in the Texas Department of Criminal Justice by the trial court. He was found guilty by a jury in cause number 1374838 of the felony offense of aggravated kidnapping and sentenced by the trial court at 50 years confinement. The judgment in cause number 1374837 indicates that the sentence shall run concurrently. (1 CR 243).[1]

An allegation that newly discovered evidence that would impeach one of the complainants was also included in the motion for new trial. According to the motion

[1] CR references the record prepared by the Harris County District Clerk that was filed in *Foreman v. State*, Cause Nos. 14-15-01005-CR and 14-15-01006.

for new trial, one of the complainants supposedly stated that he was being paid to testify against Petitioner.

On December 15, 2015, Robert Sirianni, Jr., from Winter Park, Florida filed a motion for new trial on behalf of Petitioner. (1 CR 251). In the motion for new trial, Petitioner alleged in a preliminary statement that juror number 7 had previously worked with Rickey Bernard, a co-defendant, who she identified as Wingate. Allegedly, juror number 7 stated that she could not be impartial because she knew Wingate. The affidavits from Lillian Thorn, Petitioner's mother, and Charese Foreman, Petitioner's wife indicated that juror number 7 had communicated with Bernard and his mother during the trial. The motion for new trial lists an affidavit from Petitioner as an Exhibit A.

The motion for new trial was filed in cause number 1374837. A motion for new trial was not filed in 1374838.

The motion for new trial filed in cause number 1374837 was not presented to the trial court.[2]

The trial court in cause number 1374837 entered the following order on January 29, 2016:

> Defendant timely fax-filed his Motion for New Trial on December 15, 2015 and the Court was made aware of the Motion on January 22, 2016. After reviewing the Motion, the Exhibits (there is no "Exhibit A" attached) and the Court Reporter's Record, the Court finds no resemblance between the primary allegations in Parts lc, d, and j and the Record, Volume 3, pgs 14-20. Further, the Court Reporter informed the Court that there is no mention of the juror in

[2] The presentment of a motion for new trial is required by Tex. R. App. Rule 21.6 within ten days of filing.

question and these issues during the voir dire portion of the trial.

Defendant's Motion for a New Trial is DENIED.

(1 CR 303).

The trial record reflects that on November 12, 2015, a jury was selected in the above styled and numbered causes.[3] Prior to the commencement of proceedings on November 16, 2015, juror number 7, Zibora Rayshun Gilder asked to speak to the court. From the record, it appears as if the juror called the bailiff over the weekend and informed the bailiff that a witness was her mom's friend's son. (3 RR 14). Ms. Gilder told the Court that a Mr. Wingate was a witness in the case. (3 RR 14). The juror stated that she had known Wingate while growing up and worked with him for a bit. She told the court that her mother and his mother were very close. (3 RR 15). Ms. Gilder found out about the involvement in Petitioner's case when her mother called her told her that Wingate was a witness.

The State asked Ms. Gilder a couple of questions. The juror stated that she worked at his recording business and her mother helped start the business.

The defense asked no questions.

The record reflects the following:

Mr. Percely: I just asked something–apparently there is a co-defendant who's not going to testify at all in this case.

The Court: Is that who Wingate is?

---

[3] The Honorable Jay Burnett presided as Judge during jury selection. The Honorable Leslie Yates presided during trial. The elected judge of the 177th Judicial District Court, Ryan Patrick ruled on the motion for new trial.

Mr. Percely: He knows the co-defendant's family.

The Court: So Wingate knows the co-defendant's family

Mr. Percely: Yeah

The Court: So Wingate knows the co-defendant's family.

(3 RR 19-20).

The affidavits filed with the motion for new trial indicates that the juror was talking about a co-defendant and not a friend of the co-defendant's family. The juror was in contact with Petitioner's co-defendant, a man named Bernard while the trial was pending about the proceedings. Bernard later plead guilty.

Additional evidence was presented to the habeas court concerning the original proceedings and Petitioner's relationship to Bernard and the juror including Petitioner's affidavit that detailed what he told to trial counsel about his knowledge of the juror.

REASONS FOR GRANTING THE PETITION

The Texas Court of Criminal Appeals, by denying relief, has refused to consider the importance of the motion for new trial in vindicating the rights of an accused.

A. Critical State Rights

As a matter of federal constitutional law, counsel is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected, and this includes the first appeal as of right. *Mempa v. Rhay*, 389 U.S. 128, 134 (1967); *Douglas v. California*, 372 U.S. 353, 357 (1963). Following this precedent, the court of criminal appeals has held that the 30-day period following sentencing—during which

an appellant may file a motion for new trial—is considered a "critical stage" of criminal proceedings during which a defendant is entitled to effective assistance of counsel. *Cooks v. State*, 240 S.W.3d 906 (Tex. Crim. App. 2007) (requiring motions for new trial to be filed no more than 30 days after sentencing). A defendant may file a motion for new trial in order to adduce facts not otherwise in the record in order to preserve an issue for appeal, such as a complaint of ineffective assistance of counsel. Tex. R. App. P. 21.2; *Cooks*, 240 S.W.3d at 910 n.5 (citing, among others, *King v. State*, 613 So. 2d 888, 891 (Ala. Crim. App. 1993) ("post-trial motion is necessary in certain instances to preserve issues for appellate review, most notably claims of ineffective assistance of counsel")).

In this case, initial appellate counsel failed to present a filed motion for new trial in one of the cases in which Petitioner was convicted, failed to present the motion for new trial to the trial court, failed to present evidence to support the motion for new trial filed and failed to bring proof that a juror's relationship with a co-defendant disqualified the juror from serving on the jury that convicted Petitioner.

Thus, Petitioner's right to effective assistance of counsel was abrogated by counsel failure to establish jury misconduct and juror bias which would have required the granting of a new trial.

It is clear that the "Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (quoting *United States v. Wade*, 388 U.S. 218, 227-228 (1967)). Unmistakenly, the filing of a motion for new trial is has long been

recognized as the mechanism to expand the record on appeal and receive a hearing. *See Trevino v. Thaler*, 569 U.S. 413 (2013). Thus, when an attorney fails to present and investigate a motion for new trial when the attorney is aware of a factual basis or reason why the record must be expanded, the attorney's representation must be viewed through the spectrum of this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984).

This Court in *Strickland,* established a two prong test for reviewing courts to apply to determine whether a defendant was denied effective assistance of counsel. Under the first prong of the *Strickland* test, an a defendant must show that counsel's performance was "deficient." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. To be successful, an appellant must "show that counsel's representation fell below an objective standard of reasonableness." *Id*., 466 U.S. at 688.

Under the second prong, an appellant must show that the "deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. The appropriate standard for judging prejudice requires an appellant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A defendant must prove that his attorney's errors, judged by the totality of the representation and not by isolated instances of error, denied him a fair trial.

It is not enough for the appellant to show that the errors had some conceivable

effect on the outcome of the proceedings. The appellant must show that there is a reasonable probability that, but for his or her attorney's errors, the fact-finder would have had a reasonable doubt about his or her guilt or that the extent of the punishment imposed would have been less. *See Id*. The prejudice required by *Strickland* can be established by showing that the proceedings are fundamentally unfair. *Weaver v. Massachusetts*, 582 U.S. 286 (2017). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

B. Instant Proceedings

No hearing was held incident to the motion for new trial. No evidence was presented concerning the newly discovered evidence or jury misconduct. The motion for new trial was not filed in both cases. An affidavit from Petitioner was not included nor was a portion of the record that referenced the juror in question was not included with the pleadings filed.

Under Texas law, a defendant in a criminal case must present a motion for new trial "to the trial court within 10 days of filing it, unless the trial court in its discretion permits it to be presented and heard within 75 days from the date when the court imposes or suspends sentence in open court." Tex. R. App. P. 21.6. Presentment means more than "simply filing the motion for new trial with the clerk of the trial court; '[t]he presentment must result in actual notice to the trial court and may be evidenced by the judge's signature or notation on a proposed order or by a hearing date set on the docket.'" *Burrus v. State*, 266 S.W.3d 107, 115 (Tex. App.—Fort Worth 2008,

no pet.) (mem. op.) (quoting *Carranza v. State*, 960 S.W.2d 76, 79 (Tex. Crim. App. 1998)).

C. Ineffective Assistance of Counsel

1. Petitioner asserts that he was denied effective assistance of counsel based on counsel's failure to object to juror Gilder or present any evidence concerning her relationship to a co-defendant Bernard. Petitioner told his lawyers who juror Gilder was. Yet trial counsel failed to object or present any evidence concerning the relationship.

2. Initial appellate counsel had a duty to investigate and challenge a juror who has biased or has knowledge of the parties to the proceedings. An interested party should not be allowed on the jury. Counsel's conduct was deficient and requires a new trial be granted.

3. The general rule is that when a juror converses with an unauthorized person about the case, "injury to the accused is presumed" and a new trial may be warranted. *Robinson v. State*, 851 S.W.2d 216, 230 (Tex. Crim. App. 1991), cert. denied, 512 U.S. 1246 (1994); *see also* Tex. Code Crim. Proc., Art. 36.22; former Tex. R. App. P. 30(b)(7)(1996)(now Tex. R. App. P. 21.3(f)). The communication need not rise to the level of a conversation. *Mize v. State*, 754 S.W.2d 732, 739 (Tex. App.—Corpus Christi 1988, pet. ref'd) (citing *McIntire v. State*, 698 S.W.2d 652, 659 (Tex. Crim. App. 1985)).

To warrant the granting of a new trial based on juror misconduct or improper communication to the jury, an appellant must demonstrate (1) that misconduct

occurred, (2) that such misconduct was material, and (3) that such misconduct probably caused injury. Tex. R. Civ. Proc. 327(a); *see also Zane v. Surber*, 194 S.W.3d 108, 133 (Tex. App.--Corpus Christi 2006, pet. filed). The appellant has the burden of proving that any improper conversations occurring between a juror and another party touched on a matter concerning the case at trial. *See Marquez v. State*, 620 S.W.2d 131 (Tex. Crim. App. 1981); *Starvaggi v. State*, 593 S.W.2d 323 (Tex. Crim. App. 1979); *Bogue v. State*, 204 S.W.3d 828, 829, (Tex. App.-Texarkana 2006, pet. ref'd).

To constitute juror misconduct, there must be an outside influence brought to bear on the jury's verdict. An outside influence "must emanate from outside the jury and its deliberations." *Soliz v. Saenz*, 779 S.W.2d 929, 931-32 (Tex. App.--Corpus Christi 1989, writ denied); *King v. Bauer*, 767 S.W.2d 197, 198 (Tex. App.--Corpus Christi 1989, writ denied)).

The crucial question that the state habeas court ignored is that a defendant has a constitutional right to an impartial jury *Holbrook v. Flynn*, 475 U.S. 560 (1986). And, when a juror expresses a close familial relationship with a co-defendant of the Petitioner, the juror's impartiality must be closely examined. It is important to determine whether the juror had any contact with the co-defendant and if so whether the contact constitutes an outside influence that would prejudice Petitioner.

And, a juror is not permitted to converse with anyone about the case on trial except in the presence, and with the permission of, the court. Tex. Code. Crim. Proc. art. 36.22 (Vernon 1981). When a juror engages in unauthorized conversation, injury is presumed. *Alba v. State*, 905 S.W.2d 581, 587 (Tex. Crim. App. 1995). The

presumption is rebuttable by a showing that the case was not discussed or that nothing prejudicial to the accused was said. *Id*.

In *Ites v. State*, 923 S.W.2d 675, 676 (Tex. App.--Houston [1st Dist.] 1996, pet. ref'd), the Court of Appeals reversed a conviction for failure to rebut presumed injury when the defendant's son had been running down in front of the jurors saying that if he had to spend an hour with his daddy, he would kill himself. Ites was being tried for aggravated sexual assault of his daughter, and his son had been sworn as a witness. *Id*. at 676.

In *Williams v. State*, 463 S.W.2d 436, 437-40 (Tex. Crim. App. 1971), a police witness conversed with a juror, indicating that the trial would probably not last much longer and that the officer would probably be the last witness. The Court of Criminal Appeals held that the presumption of harm was rebutted because no facts of the case were discussed and no harm was shown, after the trial court had fully developed the facts of the unauthorized communication. *Id*. at 440. *See also Gates v. State*, 24 S.W.3d 439, 442-443(Tex. App. 2000).

Under Texas law, to establish grounds for relief from a jury verdict on the basis of juror misconduct, a defendant first must establish that an outside influence was improperly brought to bear on any juror, and then, without delving into the jury's deliberations, the trial court must conduct an objective analysis to determine whether there is a reasonable probability that the outside influence had a prejudicial effect on the "hypothetical average juror." *Woodman v. State*, 491 S.W.3d 424, 431 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd).

The trial court may deny a jury-misconduct motion for new trial if the only evidence offered to support the motion is the post-trial testimony of a juror who endorsed the verdict in open court during a jury poll. *Colyer v. State*, 428 S.W.3d 117, 126-27 (Tex. Crim. App. 2014). An inquiry into whether any outside influence was improperly brought to bear upon any juror is limited to that which occurs both outside of the jury room and outside of the jurors' personal knowledge and experience. *Colyer*, 428 S.W.3d at 125.

During the state habeas proceedings, no hearing was held. Petitioner asserted that at a hearing, he would have established four things. First, a juror worked for and knew one of the Petitioner's co-defendants and she was a close family friend of the co-defendant. Second, the trial attorneys were told about the relationship but did not object. Third, the juror had communication with that co-defendant during the trial. Fourth, a recorded statement made by the complainant was presented that established that the complainant had been paid.

In the instant case, the evidence that could have been presented at a motion for new trial hearing was that juror number 7 knew one of Petitioner's co-defendants, a man named Bernard. Her mother and his mother, a woman named Wingate, were best friends. And the record would also show that the juror worked with Bernard in the past at a recording studio and were very close friends.

Trial counsel failed to make inquiry as to the exact relationship between the juror and Bernard. Petitioner told his attorneys who the juror was but they did not listen. Petitioner's attorney who filed the motion for new trial failed to obtain the

record or present the motion for new trial to the trial court and explain why a hearing was necessary. It is clear from the affidavits presented a juror and a co-defendant discussed the proceedings and that the co-defendant influenced the juror's verdict.

Given the allegations in the motion for new trial and presented in the habeas petition, it is likely that the trial court would have granted Petitioner a new trial.

Petitioner was denied effective assistance of counsel at a critical stage of the proceedings.

Clearly, a motion for new trial based on jury misconduct or outside influence must include an affidavit of "a juror or some other person who was in a position to know the facts, or must state some reason or excuse for failing to produce the affidavits."

The harm to Petitioner is evident. "A decision to grant or deny a motion for new trial based on jury misconduct is in the sound discretion of the trial court." *In re J.F. Jr.*, 948 S.W.2d 807, 810 (Tex. App.-San Antonio 1997, no writ). The Texas Rules of Appellate Procedure set forth a number of instances in which a criminal defendant must be granted a new trial. Tex. R. App. P. 21.3.

A criminal defendant "is entitled to have his guilt or punishment determined without reference to any outside influence." *Cortez v. State*, 683 S.W.2d 419, 420 (Tex. Crim. App. 1984) (en banc). A "threat to the safety of a juror" is an example of improper outside influence. *Buentello v. State*, 826 S.W.2d 610, 613 (Tex. Crim. App. 1992) (en banc). However, "conduct from bystanders which interferes with the normal proceedings of a trial will not result in reversible error unless the defendant shows a

reasonable probability that the conduct interfered with the jury's verdict." *Landry v. State*, 706 S.W.2d 105, 112 (Tex. Crim. App. 1985) (en banc).

CONCLUSION

For the foregoing reasons, Mr. Foreman respectfully requests that this Court grant his petition for a writ of certiorari and review or remand for further consideration.

Respectfully submitted,

SCHNEIDER & McKINNEY, P.C.

/s/ Stanley G. Schneider

Stanley G. Schneider
5300 Memorial Drive, Suite 750
Houston, Texas 77007
Telephone: 713-951-9994
Facsimile: 713-224-6008
Email: stans3112@aol.com

Counsel for Petitioner