

PETITION APPENDIX

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APPENDIX A

Notice of Denial of State Habeas Relief
WR-95-302-01
(October 9, 2024)

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

FILE COPY

10/9/2024

FOREMAN, NATHAN RAY Tr. Ct. No. 1374838-A

WR-95,302-01

This is to advise that the Court has denied without written order the application for writ of habeas corpus on the findings of the trial court and on the Court's independent review of the record.

Deana Williamson, Clerk

DISTRICT CLERK HARRIS COUNTY
POST CONVICTION/APPEALS SECTION
P.O. BOX 4651
HOUSTON, TX 77210-4651
* DELIVERED VIA E-MAIL *

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
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Deana Williamson, Clerk

ADMINISTRATOR HARRIS COUNTY
1201 FRANKLIN, 7TH FLOOR
HOUSTON, TX 77002
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WR-95,302-01

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Deana Williamson, Clerk

STANLEY G. SCHNEIDER
SCHNEIDER & MCKINNEY, P.C.
5300 MEMORIAL DRIVE, SUITE 750
HOUSTON, TX 77007

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10/9/2024

FOREMAN, NATHAN RAY Tr. Ct. No. 1374838-A

WR-95,302-01

This is to advise that the Court has denied without written order the application for writ of habeas corpus on the findings of the trial court and on the Court's independent review of the record.

Deana Williamson, Clerk

PRESIDING JUDGE 177TH DISTRICT COURT
1201 FRANKLIN, RM 19136
HOUSTON, TX 77002
* DELIVERED VIA E-MAIL *

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

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10/9/2024

FOREMAN, NATHAN RAY Tr. Ct. No. 1374838-A

WR-95,302-01

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Deana Williamson, Clerk

NATHAN RAY FOREMAN
STILES UNIT - TDC # 2035256
3060 FM 3514
BEAUMONT, TX 77705

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

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10/9/2024

FOREMAN, NATHAN RAY Tr. Ct. No. 1374838-A

WR-95,302-01

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Deana Williamson, Clerk

DISTRICT ATTORNEY HARRIS COUNTY
APPELLATE SECTION
1201 FRANKLIN ST. STE. 600
HOUSTON, TX 77002-1901
* DELIVERED VIA E-MAIL *

APPENDIX B

Notice of Denial of State Habeas Relief
WR-95-302-02
(October 9, 2024)

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

FILE COPY

10/9/2024

FOREMAN, NATHAN RAY Tr. Ct. No. 1374837-A

WR-95,302-02

This is to advise that the Court has denied without written order the application for writ of habeas corpus on the findings of the trial court and on the Court's independent review of the record.

Deana Williamson, Clerk

DISTRICT CLERK HARRIS COUNTY
POST CONVICTION/APPEALS SECTION
P.O. BOX 4651
HOUSTON, TX 77210-4651
* DELIVERED VIA E-MAIL *

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10/9/2024

FOREMAN, NATHAN RAY Tr. Ct. No. 1374837-A

WR-95,302-02

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Deana Williamson, Clerk

STANLEY G. SCHNEIDER
SCHNEIDER & MCKINNEY, P.C.
5300 MEMORIAL DRIVE, SUITE 750
HOUSTON, TX 77007
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FOREMAN, NATHAN RAY Tr. Ct. No. 1374837-A

WR-95,302-02

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Deana Williamson, Clerk

DISTRICT ATTORNEY HARRIS COUNTY
APPELLATE SECTION
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HOUSTON, TX 77002-1901
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WR-95,302-02

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NATHAN RAY FOREMAN
STILES UNIT - TDC # 2035256
3060 FM 3514
BEAUMONT, TX 77705

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FOREMAN, NATHAN RAY Tr. Ct. No. 1374837-A

WR-95,302-02

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Deana Williamson, Clerk

PRESIDING JUDGE 177TH DISTRICT COURT
1201 FRANKLIN, RM 19136
HOUSTON, TX 77002
* DELIVERED VIA E-MAIL *

APPENDIX C

Habeas court's unpublished findings of
fact and conclusions of law
(recommending habeas relief be denied)

No. 1374837-A
(July 3, 2024)

NO. 1374837-A

EX PARTE	§	IN THE 177TH
	§	DISTRICT COURT OF
NATHAN RAY FOREMAN,	§	HARRIS COUNTY, TEXAS
Applicant		

**STATE’S AMENDED PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER**

The Court has considered the application for writ of habeas corpus; the applicant’s legal memorandum; the applicant’s writ exhibits, including declarations of the applicant and his wife; the jury trial records, including all trial exhibits, pretrial hearings, and abatement proceedings; and official court records in the above-captioned and primary causes. The Court finds that there are no controverted, previously unresolved facts material to the legality of the applicant’s confinement that require an evidentiary hearing and recommends that habeas relief be **denied** based upon the following:

FINDINGS OF FACT

Confinement

1. The Court finds that the applicant, NATHAN RAY FOREMAN, is confined pursuant to judgments and sentences out of the 177th District Court of Harris County, Texas, where a jury convicted the applicant of aggravated robbery (cause number 1374837) and aggravated kidnapping (cause number 1374838).
2. On November 19, 2015, the trial court sentenced the applicant to 50 years confinement in the Texas Department of Criminal Justice—Institutional Division.
3. After the Fourteenth Court of Appeals reversed the applicant’s judgments and sentences (*Foreman v. State*, 561 S.W.3d 218, 245 (Tex. App.—Houston [14th Dist.] 2018)), the Court of Criminal Appeals reversed the lower court’s decision and affirmed the applicant’s convictions and sentences. *Foreman v. State*, 613

S.W.3d 160, 167 (Tex. Crim. App. 2020).

4. The mandate of affirmance issued on January 13, 2021.

Habeas Procedural History

5. Stanley Schneider represents the applicant on habeas.
6. On May 18, 2023, the applicant filed an application for writ of habeas corpus (“Writ App.”), legal memorandum (“Writ App. Memo”), and five exhibits (“App. Writ Ex. 1-5”).
7. On July 5, 2023, the applicant filed proposed findings of fact and conclusions of law.
8. On July 7, 2023, the habeas court designated the following issues: 1) whether the applicant was denied effective assistance of counsel; and 2) whether the applicant’s right to due process was violated.
9. On September 22, 2023, the applicant filed a request for an evidentiary hearing.
10. On November 21, 2023, pursuant to the statutory timeline, the Harris County District Clerk prepared and sent the habeas record, which was received by the Court of Criminal Appeals on December 1, 2023 and assigned case numbers WR-95,302-01 and WR-95,302-02.
11. On January 10, 2024, the Court of Criminal Appeals remanded this application to the habeas court to complete its evidentiary investigation and make findings of fact and conclusions of law.
12. On February 16, 2024, the applicant filed an amended request for evidentiary hearing, which the habeas court verbally denied the same day after hearing argument from both parties.
13. On March 25, 2024, the State filed proposed findings of fact and conclusions of law.

14. On March 26, 2024, the applicant filed an additional exhibit (“App. Writ Ex. A”) and amended proposed findings of fact and conclusions of law (“App. Amended Proposed Findings”).
15. On March 26, 2024, the State asked for leave to file amended proposed findings addressing the applicant’s additional exhibit.
16. The habeas court’s response to the Court of Criminal Appeals’ remand order is due April 9, 2024.

Summary of Trial Evidence

17. The Court of Criminal Appeals summarized the factual background as follows:

As far as con men go, [Complainants] Richard Merchant and Moses Glekiah are not what most people would call luminaries of their profession. They had concocted a plan to swindle [Applicant] Nathan Foreman into buying a batch of “black money,”¹ allegedly valued at \$200,000, for \$100,000 in cash. Of course, the “black money” was not money at all—it was construction paper. And at first, it seemed like the scam was working; Foreman appeared to be on board. Foreman agreed to conduct the transaction at Dreams Auto Customs, an auto-body shop owned by his wife. But somewhere along the way, the scam went awry.

Not long after Merchant and Glekiah arrived at the shop, they were ambushed. Foreman and some accomplices captured both men, tied them up, and tortured them.² Eventually, Merchant and Glekiah were forced into a van at gunpoint. Foreman ordered his accomplices to take the pair to “the spot” and said that he would “be there” when they arrived. Unfortunately for Foreman, Merchant and Glekiah managed to escape in transit.³ Glekiah eventually told the police what had happened to them and

¹ “In a ‘black money’ scam, a perpetrator defrauds an individual by persuading the individual that bundles of banknote-sized black paper are actually bundles of paper money that have been dyed black to avoid detection by authorities. Glekiah and Merchant represented to [the applicant] that they would exchange smuggled dyed money for cash at a two-for-one rate and provide chemicals to remove the dye.” *Foreman v. State*, 561 S.W.3d 218, 227 n. 3 (Tex. App.—Houston [14th Dist.] 2018), rev’d, 613 S.W.3d 160 (Tex. Crim. App. 2020).

² “When the two men arrived, several suspects grabbed them, tied them up, beat them, poured gasoline on them, and threatened to set them on fire.” *Foreman*, 561 S.W.3d at 224 (referring to the facts contained in the affidavit for search warrant).

³ “On December 24, 2012, witnesses driving on the service road of Highway 290 observed complainants Moses Glekiah and Richard Merchant tumble from the rear of a van onto the road.

where it had happened.⁴

Based on the information that Glekiah gave, the police applied for a warrant to search Dreams Auto Customs.... Pursuant to this warrant, the police seized three computer hard drives from Dreams Auto Customs. Upon analysis, one hard drive...was found to contain surveillance footage that depicted much of the incident at Dreams Auto Customs and Foreman's involvement in that incident. Foreman was charged with aggravated kidnapping and aggravated robbery....

Foreman was convicted of both offenses as charged and sentenced to fifty years' confinement.

Foreman v. State, 613 S.W.3d 160, 161-162 (Tex. Crim. App. 2020).

18. State's Trial Exhibit 28 is a disc containing surveillance video from Dreams Auto Customs on the date of the offense. *See also* 4 R.R. at 44-65, 92-94, 154-160, 187-188; 5 R.R. at 90-98, 120-122, 132-142, 158-160, 171-172 (testimony regarding various video files contained on St. Tr. Ex. 28).
19. State's Trial Exhibits 29-32, 34-35, 38, and 43 are still-shots from the surveillance videos.
20. The Court of Appeals summarized Homicide Investigator Hufstedler's trial testimony about the video surveillance as follows, referring to the applicant as "appellant":

When Hufstedler was on the stand, the State extensively played the video and elicited testimony about what it showed. The first person Hufstedler identified in the video was appellant. Hufstedler then repeatedly identified appellant in different parts of the video. In all, Hufstedler

Complainants were bound with zip ties and their mouths were taped shut with duct tape. Witnesses observed that complainants had been shot and were bleeding.... In addition to gunshot wounds and injuries from falling out of a moving vehicle, Merchant's abdomen had been burned with an iron." *Foreman*, 561 S.W.3d at 224 (summarizing the trial testimony). "At trial, the first five witnesses testified to the scene out on the highway where the two complainants tumbled out of the van while tied up." *Foreman*, 561 S.W.3d at 227 n. 2.

⁴ When presented with a photo array, "Glekiah positively identified Nathan Ray Foreman as" a suspect "who participated in punching Complainants, told other suspects what to do, poured the gasoline on Complainants and contacted two suspects to drive Complainant away from business." *Foreman*, 561 S.W.3d at 227 (quoting the search warrant affidavit). Two officers "testified that Glekiah identified appellant in a photo array." *Foreman*, 561 S.W.3d at 227 n. 4; *see also* St. Tr. Ex. 57 and 58 (Glekiah witness admonishment and photo array).

identified appellant in the video at least ten times. He testified that the video showed appellant walking in with duct tape in his hand. Hufstedler also testified that the video showed that one of the men at the body shop, Darren Franklin, had a gun, and later, was walking with an iron in his hand. Hufstedler explained that some of what occurred happened off camera. He testified that the video showed the van being parked inside the body shop. Hufstedler testified that the video showed appellant open the doors to the van and lay out a sheet or a blanket before pushing the two tied-up complainants into the back of the van and closing its doors....

On re-direct, Hufstedler testified that the video showed appellant and a co-defendant loading bags complainants had brought to the shop into the rental car driven by complainants before another co-defendant drove the car out of the auto shop. Hufstedler testified the rental car was later discovered “burned.” Hufstedler testified that the video and the zip ties and tape recovered at the shop corroborated what complainants told him. Hufstedler also testified that complainants’ injuries corroborated their stories.

Foreman, 561 S.W.3d at 228.

21. During closing argument, the State offered a timeline depicted on the video surveillance:

So I want to look at it in terms of the timeline. First of all, at 9:54 a.m. on the surveillance video, Nathan Foreman puts an object consistent with a firearm in the back of his belt. That right there is evidence that he was in possession of a firearm. At 9:54, also, you see Darren Franklin on the surveillance video putting a gun into his waistband. Folks, if they were just there for a friendly business deal, why are we putting weapons, why are we getting all weaponed up two hours before the incident actually occurs?

At 11:25, Moses Glekiah and Richard Merchant arrived at Dreams Auto Customs. At 11:30, Richard Merchant brings the money and the chemicals inside of the Dreams Auto Customs garage. At 11:37, mere minutes after Richard Merchant has peacefully entered the location with his suitcase and the backpack full of the items used to scam the defendant, Darren Franklin and Jason Cunningham enter the garage with objects in their hands -- you can see it on the video -- that are consistent with firearms.

At 11:45, Nathan Ray Foreman retrieves duct tape and then walks off camera with it to a location that is consistent to where the complainants are being held and tortured. At noon, Nathan Ray Foreman

is seen speaking on the phone, and then shortly thereafter Jason Washington, the Customs agent, enters in his uniform into the garage. And you heard testimony that the agent then helped by then looking at the GPS of the complainants and asking them where the money was....

At 1:00 p.m. Darren Franklin retrieves an iron, an iron that was identified by Moses and Richard as the iron that was used to torture a screaming Richard Merchant. You heard testimony from Moses about how terrified he was during that moment, how it hurt him to see his friend being hurt.

At 1:05, Charles Campbell wipes down the complainants' car. If these men, including Nathan Foreman, thought that they were in the right, if they weren't doing something that was terrible and wrong and illegal, there would be no need for them to try and wipe down and tamper with the evidence like what you see on the camera at 1:05 p.m....

And, finally, at 3:30 p.m., Nathan Ray Foreman places a blanket or tarp in the back of a van, a van where Moses Glekiah and Richard Merchant, without hope, believing that they were going to die that day, terrified, in pain, and alone, are loaded in. And if what you see Nathan Foreman doing on this video isn't aiding, assisting, encouraging and planning, I don't know what is. He is literally the person who was shutting the doors on the hope of our complaining witnesses. You heard their testimony. You heard what Moses said. Moses said that the words that Nathan Ray Foreman spoke that day were, "Take them to the spot. I'll meet you there." He told Moses and Richard, "You're going to die today." And you know that he meant it because he did everything he could to make sure that it happened and that there was nothing left of the evidence by burning the car.

6 R.R. at 48-52.

No Response from Counsel Needed to Evaluate Habeas Claims

22. According to the State Bar of Texas website, Alan Percely is deceased.
23. According to the State Bar of Texas website (accessed March 19, 2024), James Pons, bar number 24041707, was licensed in 2003 and is currently eligible to practice law in Texas.
24. According to the State Bar of Texas website (accessed March 19, 2024), Michael Strickland, bar number 24056389, was licensed in 2006 and is currently eligible to

practice law in Texas.

25. According to the State Bar of Texas website (accessed March 19, 2024), Robert Sirianni, bar number 24086378, was licensed in 2013 and is currently eligible to practice law in Texas.
26. The Court finds that responsive affidavits from the applicant's attorneys are not necessary because the record is sufficient to evaluate the merits of the applicant's claims.

Overview of Habeas Allegations

27. In his first ground for relief in his application for writ of habeas corpus, the applicant claims he "was denied effective assistance of counsel based on trial attorney's failure to present and investigate the relationship between a juror and a co-defendant and object to the juror being on the jury." Writ App. at 6-7 (referring to attorneys Mr. Percely, Mr. Pons, and Mr. Strickland).
28. In his second ground for relief, the applicant claims he "was denied effective assistance of counsel at a critical stage of the proceedings by his trial attorney's failure to file and present a motion for new trial that alleges jury misconduct" and "evidence that a State's witness had been paid for his testimony." Writ App. at 8-9 (referring to attorney Mr. Sirianni).
29. In his third ground for relief, the applicant claims his "right to due process was violated by the failure of the State to proffer evidence concerning the results of any charges pending against the complainants, any deals in exchange for their testimony as well as payments made to them in exchange for their testimony." Writ App. at 10.

The Applicant Fails to Prove Trial Counsel was Ineffective Regarding Juror #7

30. In Ground One, the applicant claims that trial counsel was ineffective for failing to present and investigate the relationship between Juror Number 7 (Zibora Rayshun Gilder) and “a co-defendant,” and for failing to object to Ms. Gilder being on the jury. Writ App. at 6-7.
31. The record reveals the following: On Friday, November 13, 2015, Juror Number 7, Zibora Rayshun Gilder, was empaneled on the jury and told to return on Monday at 10 o’clock (2 R.R. at 154-155, 159). On Monday, November 16, 2015, before the jury was sworn, the trial court spoke with Ms. Gilder, in the presence of lawyers from the State and defense (3 R.R. at 13-19). Ms. Gilder had called the bailiff over the weekend (3 R.R. at 14). Ms. Gilder explained that her mother had called her and told her “Wingate” was involved in the case (3 R.R. at 16). Ms. Gilder wanted the court to know that she knew Wingate (3 R.R. at 14). Ms. Gilder was under the impression that Wingate might be called as a trial witness (3 R.R. at 14). Ms. Gilder explained to the court that she had known Wingate since she was young; she worked with Wingate at his record label; her mother and Wingate’s mother are close friends; and her mother helped Wingate start one of his businesses (3 R.R. at 15, 17-18). Ms. Gilder “wanted to be forthcoming” (3 R.R. at 18). But, Ms. Gilder was “not to the place where I feel like it would alter my opinion about the case” (3 R.R. at 17). She averred, “I would treat him like any other witness” (3 R.R. at 17). She continued, “I want to just listen to the evidence and do what’s right” (3 R.R. at 17). When asked about the potential of family pressure, Ms. Gilder said “I’m grown, and I’m going to make my own decision...I wouldn’t let nobody influence my decision one way or the other” (3 R.R. at 17). When asked by the judge whether Ms. Gilder “felt like [it] might influence your verdict one way or the other,” Ms. Gilder responded “no” (3 R.R. at 18-19). When asked by the judge if she still believed she could be

- a fair juror, Ms. Gilder nodded (3 R.R. at 19). Neither the State nor defense objected to Ms. Gilder serving on the jury (3 R.R. at 20). Ms. Gilder was sworn and seated on the jury (3 R.R. at 30). *See also* App. Writ Ex. 3 (3 R.R. at 8-20).
32. Outside Ms. Gilder's presence, the State told the trial court there is no Wingate on her witness list (3 R.R. at 19).
 33. Defense attorney Mr. Percely said, "I just asked something – apparently there is a co-defendant who's not going to testify at all in this case" (3 R.R. at 19).
 34. Mr. Percely said that Wingate knows the co-defendant's family (3 R.R. at 19).
 35. Both sides confirmed they were not going to call Wingate as a witness (3 R.R. at 20).
 36. No one named Wingate testified in the applicant's trial, and no trial witness mentioned someone named Wingate.
 37. Other than the seven pages of discussion with Ms. Gilder (3 R.R. at 14-20), "Wingate" does not appear in the trial record.
 38. The habeas prosecutor avers "Wingate" does not appear in the 82-page offense report (HPD 161435712).
 39. The applicant and the applicant's wife claim that Wingate is the applicant's co-defendant Ricky Bernard. App. Writ Ex. 1, Applicant's 2022 Unsworn Declaration at 4-5; App. Writ Ex. 2, Charese Foreman's 2022 Affidavit at 1; Excerpt from App. Writ Ex. 4, Charese Foreman's 2015 Affidavit at 1.
 40. When questioned on the record, Ms. Gilder never mentioned Ricky Bernard, and Ms. Gilder did not state that Wingate is also called Ricky Bernard.
 41. The habeas prosecutor avers "Wingate" does not appear in the 21-page amended pre-sentence investigation (PSI) report for co-defendant Ricky Bernard (cause numbers 1385788 and 1385789; original report dated March 1, 2018; amended

report dated March 9, 2018).⁵

42. Ricky Bernard did not testify in the applicant's trial.
43. Assuming *arguendo* the applicant told trial counsel that Wingate is co-defendant Ricky Bernard, the applicant fails to prove his trial counsel was deficient for failing to present and investigate the relationship between Ms. Gilder and Bernard.
44. Assuming *arguendo* Wingate is co-defendant Ricky Bernard, the applicant fails to prove his trial counsel was deficient for failing to present and investigate the relationship between Ms. Gilder and Bernard.
45. The applicant fails to prove trial counsel was deficient for deciding to not reveal to the trial court what his client allegedly told him and/or deciding to not question a juror who is potentially a "friend" of his client's co-defendant.
46. Assuming *arguendo* Wingate is co-defendant Ricky Bernard, the applicant fails to prove his trial counsel was deficient for failing to object to Ms. Gilder serving on the jury.
47. The applicant fails to prove trial counsel was deficient for failing to object to a juror who told the court she would be fair despite knowing a potential witness. *See* Tex. Code Crim. Proc. Art. 35.16, Reasons for Challenge for Cause.
48. Assuming *arguendo* Wingate is co-defendant Ricky Bernard, the applicant fails to prove he was harmed by Ms. Gilder previously working with Bernard or by Ms. Gilder's mother being friends with Bernard's mother.
49. According to the applicant's wife, Bernard and his mother believed Ms. Gilder "better do the right thing." Writ Ex. 2, Charese Foreman's 2022 Affidavit at 2;

⁵ Bernard's PSI was conducted under the authority of the applicant's current habeas judge, the Honorable Robert Johnson, Presiding Judge of the 177th District Court of Harris County, Texas.

Excerpt from App. Writ Ex. 4, Charese Foreman's 2015 Affidavit at 1.⁶

50. The applicant fails to prove that any witness or hearsay statement indicated Ms. Gilder was biased against the applicant.
51. Assuming *arguendo* that Ms. Gilder was biased for Bernard, the applicant fails to prove Ms. Gilder was biased against the applicant or that he was harmed by her serving on the jury. *See supra* at 3-6, "Summary of Trial Evidence" (findings #15-19), for evidence of the applicant's guilt, which is considered in the harm analysis.
52. The applicant fails to overcome Ms. Gilder's declaration on the record that she would not let anyone influence her decision one way or the other. *See* 3 R.R. at 17.
53. The applicant fails to overcome Ms. Gilder's declaration on the record that she would be a fair juror. *See* 3 R.R. at 19.
54. The applicant fails to prove that trial counsel would have prevailed had he objected to Ms. Gilder serving on the jury. *See* Tex. Code Crim. Proc. Art. 35.16.
55. The applicant fails to establish, by a preponderance of the evidence, that the harm resulting from trial counsel's alleged deficiency undermines the confidence in the trial's outcome. *See Ex parte Parra*, 420 S.W.3d 821, 826-828 (Tex. Crim. App. 2013) (finding no ineffective assistance of counsel when trial counsel allegedly failed to properly voir dire a juror who may have been a victim of both domestic abuse and sexual assault of a child in the applicant's trial for aggravated sexual assault of a child); *see also supra* at 3-6, "Summary of Trial Evidence" (findings #15-19), for evidence of the applicant's guilt, which is considered in the harm analysis.

⁶ In his memorandum and proposed findings, the applicant mentions an affidavit from Lillian Thorn, but no such affidavit appears in the habeas record. *See* Writ App. Memo at 3; App. Amended Proposed Findings at 3 (#13).

Applicant Fails to Prove Counsel was Ineffective Regarding Motion for New Trial

56. In his second ground for relief, the applicant claims he was denied effective assistance of counsel by Mr. Sirianni's alleged failure to file and present a motion for new trial based on juror misconduct and evidence that a State's witness was paid for his testimony. *See* Writ App. at 8-9.
57. The applicant claims that a private investigator spoke with Ms. Gilder on December 17, 2015 and, according to the investigator in an unsworn, unauthenticated document, Ms. Gilder told the investigator:
- a. In her opinion, the applicant had a fair trial.
 - b. She does not know the applicant.
 - c. She does not know the applicant's wife and has never spoken to the applicant's wife "Mrs. Foreman."
 - d. She did not know Ricky Bernard was involved in the case until she was actually on the jury.
 - e. She did not know any of the trial witnesses.
 - f. When Bernadette Wingate reached out to her, Ms. Gilder told her, "I was going to do the right thing and I was going to do my civic duty."
- App. Writ Ex. A.
58. To establish harm on habeas, the applicant must prove that, had Mr. Sirianni not been deficient in his representation of the applicant's motion for new trial, the applicant would have prevailed on the merits of the motion.
59. Without deciding whether Mr. Sirianni was deficient, the applicant fails to prove Mr. Sirianni was ineffective because he cannot prove he would have prevailed on his motion for new trial, had Mr. Sirianni acted in an objectively reasonable manner.
60. The applicant fails to prove both allegations in the motion for new trial—juror misconduct and witness misconduct.

61. Alleged Witness Misconduct: The applicant has offered no admissible evidence of the State paying a witness for his testimony. To the motion for new trial, Mr. Sirianni attached an alleged transcript of a phone call that is not authenticated, was not under oath, is not accompanied by the actual audio recording (if it exists), and does not establish that the State paid the witness for his testimony. *See* App. Writ Ex. 4 and 5.⁷ The applicant has offered no additional evidence on habeas to support this claim.⁸
62. Alleged Juror Misconduct: Jury misconduct must be material and have caused harm. *Magdaleno v. State*, No. 14-18-00972-CR, 2020 WL 206185, at *4 (Tex. App.—Houston [14th Dist.] Jan. 14, 2020, no pet.) (not designated for publication) (citing *Ryser v. State*, 453 S.W.3d 17, 39 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd)).
63. “To be entitled to relief on the basis of juror misconduct, the defendant must establish that an outside influence was improperly brought to bear on any juror. 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) (citing Tex. R. Evid 606(b); *McQuarrie v. State*, 380 S.W.3d 145, 154 (Tex. Crim. App. 2012); *Colyer v. State*, 428 S.W.3d 117, 129-130 (Tex. Crim. App. 2014)).
64. An “outside influence” is “something originating from a source outside of the jury room and other than from the jurors themselves.” *McQuarrie*, 380 S.W.3d at 154.

⁷ The transcript implies the opposite—that the “guy who robbed [Glekiah],” who he has “known [] for years,” offered to pay Moses. *See* App. Writ Ex. 5 at 11.

⁸ The applicant has not proposed any findings of fact or conclusions of law that claim the applicant established on habeas that the State paid Glekiah for his testimony. *See* App. Amended Proposed Findings.

65. “[O]utside influence has been interpreted by Texas courts to include factual or legal information conveyed to the jurors by a bailiff or some other unauthorized person who intends to affect the deliberations. But the outside influence exception does not include influences such as coercion by a fellow juror or the discussion of a juror’s own personal knowledge.” *Colyer*, 428 S.W.3d at 117, 125.
66. “An outside influence is problematic only if it has the effect of improperly affecting a juror’s verdict in a particular manner—for or against a particular party.... [E]ven if [a juror] had testified to an improper outside influence under Rule 606(b) he would still be prohibited from testifying about the effect of that information on him. Courts use the objective reasonable person test to decide what effect the particular outside influence in a case would have on the hypothetical average juror. We do not allow testimony about the effect had upon this particular juror.” *Colyer*, 428 S.W.3d at 129-130.
67. “[C]ourts conduct an objective analysis to determine whether there is a reasonable possibility that the outside influence had a prejudicial effect on the hypothetical average juror in order to determine whether a juror affidavit regarding the outside influence is admissible under Rule 606(b).” *Becerra v. State*, No. PD-0280-22, 2024 WL 461928, at *16 (Tex. Crim. App. Feb. 7, 2024).
68. “A motion for new trial based on jury misconduct must be supported by a juror’s affidavit alleging that ‘outside influence’ affected the jury’s decision.” *Tate v. State*, 414 S.W.3d 260, 264 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (noting that, even if an appellant established the existence of an outside influence, he is not entitled to an inquiry under *McQuarrie* when he has not shown that the jurors who sat on his case were actually biased by the outside influence, and determining that the record did not contain any evidence or allegation that the foreman’s knowledge affected the jury’s decision).

69. If the trial court in the applicant's case had held a hearing or considered a juror affidavit before ruling on the applicant's motion for new trial, the Rules would have permitted only limited testimony from Ms. Gilder:

During an Inquiry into the Validity of a Verdict or Indictment.

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify:

(A) about whether an outside influence was improperly brought to bear on any juror; or

(B) to rebut a claim that the juror was not qualified to serve.

Tex. R. Evid. 606.

70. "A Rule 606(b) inquiry is limited to that which occurs outside of the jury room and outside of the juror's personal knowledge and experience." *McQuarrie*, 380 S.W.3d at 153.
71. "Whether an affidavit is admissible pursuant to Rule 606(b) is reviewed under an abuse of discretion standard like other evidentiary rulings." *Becerra*, 2024 WL 461928, at *20.
72. "[T]he trial court is the sole fact-finder and judge of the credibility of the testifying jurors." *Scales v. State*, 380 S.W.3d 780, 784 (Tex. Crim. App. 2012).
73. A trial court's denial of a motion for new trial is reviewed under an abuse of discretion standard. *McQuarrie*, 380 S.W.3d at 150.
74. It is within the trial court's discretion to rule on a motion for new trial on affidavits without oral testimony. *Cruz-Garcia v. State*, No. AP-77,025, 2015 WL 6528727, at *29 (Tex. Crim. App. Oct. 28, 2015) (not designated for publication) (determining that the trial court did not abuse its discretion when it denied the appellant's request for an evidentiary hearing on his motion for new trial when

the admissible evidence would not have met the burden of proof).

75. A trial court abuses its discretion in denying a motion for new trial only if no reasonable view of the record could support the trial court's ruling. *McQuarrie*, 380 S.W.3d at 150; *see also Campbell v. State*, No. 01-21-00332-CR, 2022 WL 3648891, at *7-8 (Tex. App.—Houston [1st Dist.] Aug. 25, 2022, pet. ref'd) (not designated for publication) (holding that the trial court did not err in denying the appellant's motion for new trial when a juror, outside of court, accessed a news story and reviewed a video containing a gunshot and subsequent interview of a witness; the video was not admitted in trial and directly contradicted the appellant's claim of self-defense; the juror reported back to the other jurors that the video existed but "did not show anything"; and the juror testified he only considered the trial testimony).
76. The applicant fails to prove Ms. Gilder's alleged familiarity with the applicant's co-defendant constitutes an outside influence. *Parra*, 420 S.W.3d at 827 (noting that a juror's personal experience, including being a victim of the same type of crime for which the applicant is on trial, is not an outside influence for the purposes of a Rule 606(b) inquiry).
77. The applicant fails to show that the trial court erred by discrediting the affidavit submitted by the applicant's wife containing a hearsay statement from a co-defendant who claimed to have spoken with Ms. Gilder, particularly in light of Ms. Gilder's statements on the record, which the trial court acknowledged it reviewed prior to its decision.⁹ *See Davis v. State*, No. 14-14-00778-CR, 2015 WL

⁹ In the order denying the motion for new trial, the trial court wrote, "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 Part 1c, 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 question and these issues during the voir dire portion of the trial." 1 C.R. at 303, Court's Ruling on Defendant's Motion for New Trial, January 29, 2016 (showing that the trial court correctly did not find mention of Ms. Gilder's concern during voir dire in Volume 2, and reviewed Ms. Gilder's statements to the court, after voir dire, in Volume 3). In the abatement proceeding, the trial court

8730935, at *4-5 (Tex. App.—Houston [14th Dist.] Dec. 10, 2015, no pet.) (not designated for publication) (noting that a trial court could properly deny a motion for new trial after hearing no live testimony and instead discrediting a lawyer’s affidavit that a juror conducted an out-of-court experiment related to the believability of a witness’ identification of the appellant as the suspect, which the juror then reported back to the rest of the jury).

78. Assuming *arguendo* that Ms. Gilder’s “friend” Bernard told Ms. Gilder to “do the right thing” (as the applicant’s wife claims she was told), the applicant cannot prove that the trial court would have abused its discretion denying the applicant’s motion for new trial without any showing of harm. *Jordan v. State*, No. 01-14-00721-CR, 2015 WL 6768497, at *4 (Tex. App.—Houston [1st Dist.] Nov. 5, 2015, no pet.) (not designated for publication) (determining that the appellant could not prove harm when the outside influence would have improperly affected the juror in favor of the appellant).
79. Assuming *arguendo* that Ms. Gilder told Bernadette Wingate that Ms. Gilder “was going to do the right thing and [she] was going to do [her] civic duty” (*see* App. Writ Ex. A at 4), the applicant fails to prove Mrs. Wingate’s alleged outside influence was legally “problematic” and fails to prove Ms. Gilder serving on the jury harmed the applicant. *See Colyer*, 428 S.W.3d at 129-130 (“[a]n outside influence is problematic only if it has the effect of improperly affecting a juror’s verdict in a particular manner” and “[c]ourts use the objective reasonable person test to decide what effect the particular outside influence in a case would have on the hypothetical average juror”).

stated “I recall ruling on the motion [for new trial]. Partly my rulings were based on some allegations made in the Motion For New Trial. Once I reviewed the record of what was appropriate, that the record simply did not reflect at all -- now, I was not present for the trial; but going back and reviewing the transcript of the few pages that were appropriate, the Motion For New Trial just did not -- it -- it made no sense with -- with what the -- the record reflected.” Reporter’s Record of Abatement Hearing (April 4, 2016) at 16; *compare* App. Writ Ex. 4 (allegations in the motion for new trial regarding Ms. Gilder) *with* 3 R.R. at 14-20 (Ms. Gilder’s statements in the trial record).

The Applicant Fails to Prove a Complainant was Paid for His Testimony

80. In his third ground for relief, the applicant claims his “right to due process was violated by the failure of the State to proffer evidence concerning the results of any charges pending against the complainants, any deals in exchange for their testimony as well as payments made to them in exchange for their testimony.” Writ App. at 10.
81. As established above, the applicant has offered no admissible evidence of the State paying a complainant for his testimony. *See supra* at 13, finding #61.
82. The applicant fails to prove that the State violated the applicant’s right to due process of law.

CONCLUSIONS OF LAW

1. “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.” *Ex parte Richardson*, 70 S.W.3d 865, 870 (Tex. Crim. App. 2002).
2. The applicant’s conclusory allegations, even if sworn to, do not overcome the State’s denial and are insufficient to warrant habeas relief. *Ex parte Empey*, 757 S.W.2d 771, 775 (Tex. Crim. App. 1988).
3. Based on Ms. Gilder’s testimony, trial counsel would not have prevailed if he had objected to her serving on jury based on cause. *See* Tex. Code Crim. Proc. Art. 35.16, Reasons for Challenge for Cause.
4. The applicant fails to prove by a preponderance of the evidence that trial counsel’s representation fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *See Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002); *see also Narvaiz v. State*, 840 S.W.2d 415, 434 (Tex. Crim. App. 1992) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).
5. The applicant fails to overcome the strong presumption that trial counsel’s actions were reasonable and based on sound trial strategy. *See Ex parte White*, 160 S.W.3d 46, 51 (Tex. Crim. App. 2004); *see also Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). It is not sufficient that the applicant show, with the benefit of hindsight, that his counsel’s actions or omissions during trial were merely of questionable competence. *Lopez v. State*, 343 S.W.3d 137, 142-143 (Tex. Crim. App. 2011).
6. The totality of the representation afforded the applicant was sufficient to protect his right to reasonably effective assistance of trial counsel. Counsel’s performance is judged by the totality of the representation, and judicial scrutiny

of counsel's performance must be highly deferential with every effort made to eliminate the distorting effects of hindsight. *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006). Isolated instances in the record reflecting errors of omission or commission do not render counsel's performance ineffective, nor can ineffective assistance of counsel be established by isolating one portion of trial counsel's performance for examination. *Id.*

7. The applicant fails to prove by a preponderance of the evidence that counsel's representation in the motion for new trial was objectively unreasonable, and there is a reasonable probability that, but for counsel's allegedly-deficient representation, he would have prevailed on the motion. *See Ex parte Flores*, 387 S.W.3d 626, 639 (Tex. Crim. App. 2012) (citing *Ex parte Miller*, 330 S.W.3d 610, 623 (Tex. Crim. App. 2009)); *McQuarrie v. State*, 380 S.W.3d 145, 154 (Tex. Crim. App. 2012); *Cruz-Garcia v. State*, No. AP-77,025, 2015 WL 6528727, at *29 (Tex. Crim. App. Oct. 28, 2015).

The applicant fails to show that his conviction and sentence were improperly obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that the requested habeas relief be denied.

ORDER

THE CLERK is ORDERED to prepare a **supplemental** habeas record of all papers in cause numbers 1374837-A and transmit the record to the Court of Criminal Appeals as provided by Tex. Code Crim. Proc. art. 11.07 § 3 and Tex. R. App. Proc. § 73.4. Unless previously sent, the record shall include certified copies of the following documents:

1. the application for writ of habeas corpus;
2. the applicant's legal memorandum;
3. the applicant's writ exhibits (labeled 1-5 and labeled A);
4. the Court's orders;
5. the indictment, the court's charge and the jury's verdict, the judgment and sentence, and the docket sheets in cause numbers 1374837 and 1374838;
6. the court reporter's trial record in cause numbers 1374837 and 1374838 (November 13-19, 2015);
7. the court reporter's records from pretrial (May 23, 2014; July 27, 2015) and abatement proceedings (April 4, 2016);
8. the Court's Findings of Fact and Conclusions of Law; and
9. the State's and the applicant's original and amended proposed findings of fact and conclusions of law.

THE CLERK is further ORDERED to send a copy of this Order to the applicant's habeas counsel, Stanley Schneider, 5300 Memorial Dr, Ste 750, Houston, Texas 77007, stans3112@aol.com; and to counsel for the State, Kristin Assaad, Assistant District Attorney, Harris County District Attorney's Office, 1201 Franklin, Suite 600, Houston, TX 77002, assaad_kristin@dao.hctx.net.

By the following signature, the Court adopts the State's Amended Proposed Findings of Fact, Conclusions of Law, and Order in cause number 1374837-A.

Signed:
7/3/2024
1:00 PM



JUDGE PRESIDING
HARRIS COUNTY, TEXAS

NO. 1374837-A

EX PARTE

§

IN THE 177TH

§

DISTRICT COURT OF

NATHAN RAY FOREMAN,
Applicant

§

HARRIS COUNTY, TEXAS

STATE'S CERTIFICATE OF SERVICE

I, Kristin Assaad, certify that, on March 28, 2024, I directed the electronic filing service provider efile.txcourts.gov to electronically serve a copy of the State's Amended Proposed Findings of Fact, Conclusions of Law, and Order on the applicant's habeas attorney, Stanley Schneider, 5300 Memorial Dr, Ste 750, Houston, Texas 77007, at stans3112@aol.com.

SIGNED March 28, 2024.

Respectfully submitted,

/s/ Kristin Assaad

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Kristin Assaad on behalf of Kristin Assaad

Bar No. 24078164

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Case Contacts

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APPENDIX D

Habeas court's unpublished findings of
fact and conclusions of law
(recommending habeas relief be denied)
No. 1374838-A
(July 3, 2024)

NO. 1374838-A

EX PARTE	§	IN THE 177TH
	§	DISTRICT COURT OF
NATHAN RAY FOREMAN,	§	HARRIS COUNTY, TEXAS
Applicant		

**STATE'S AMENDED PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER**

The Court has considered the application for writ of habeas corpus; the applicant's legal memorandum; the applicant's writ exhibits, including declarations of the applicant and his wife; the jury trial records, including all trial exhibits, pretrial hearings, and abatement proceedings; and official court records in the above-captioned and primary causes. The Court finds that there are no controverted, previously unresolved facts material to the legality of the applicant's confinement that require an evidentiary hearing and recommends that habeas relief be **denied** based upon the following:

FINDINGS OF FACT

Confinement

1. The Court finds that the applicant, NATHAN RAY FOREMAN, is confined pursuant to judgments and sentences out of the 177th District Court of Harris County, Texas, where a jury convicted the applicant of aggravated robbery (cause number 1374837) and aggravated kidnapping (cause number 1374838).
2. On November 19, 2015, the trial court sentenced the applicant to 50 years confinement in the Texas Department of Criminal Justice—Institutional Division.
3. After the Fourteenth Court of Appeals reversed the applicant's judgments and sentences (*Foreman v. State*, 561 S.W.3d 218, 245 (Tex. App.—Houston [14th Dist.] 2018)), the Court of Criminal Appeals reversed the lower court's decision and affirmed the applicant's convictions and sentences. *Foreman v. State*, 613

S.W.3d 160, 167 (Tex. Crim. App. 2020).

4. The mandate of affirmance issued on January 13, 2021.

Habeas Procedural History

5. Stanley Schneider represents the applicant on habeas.
6. On May 18, 2023, the applicant filed an application for writ of habeas corpus (“Writ App.”), legal memorandum (“Writ App. Memo”), and five exhibits (“App. Writ Ex. 1-5”).
7. On July 5, 2023, the applicant filed proposed findings of fact and conclusions of law.
8. On July 7, 2023, the habeas court designated the following issues: 1) whether the applicant was denied effective assistance of counsel; and 2) whether the applicant’s right to due process was violated.
9. On September 22, 2023, the applicant filed a request for an evidentiary hearing.
10. On November 21, 2023, pursuant to the statutory timeline, the Harris County District Clerk prepared and sent the habeas record, which was received by the Court of Criminal Appeals on December 1, 2023 and assigned case numbers WR-95,302-01 and WR-95,302-02.
11. On January 10, 2024, the Court of Criminal Appeals remanded this application to the habeas court to complete its evidentiary investigation and make findings of fact and conclusions of law.
12. On February 16, 2024, the applicant filed an amended request for evidentiary hearing, which the habeas court verbally denied the same day after hearing argument from both parties.
13. On March 25, 2024, the State filed proposed findings of fact and conclusions of law.

14. On March 26, 2024, the applicant filed an additional exhibit (“App. Writ Ex. A”) and amended proposed findings of fact and conclusions of law (“App. Amended Proposed Findings”).
15. On March 26, 2024, the State asked for leave to file amended proposed findings addressing the applicant’s additional exhibit.
16. The habeas court’s response to the Court of Criminal Appeals’ remand order is due April 9, 2024.

Summary of Trial Evidence

17. The Court of Criminal Appeals summarized the factual background as follows:

As far as con men go, [Complainants] Richard Merchant and Moses Glekiah are not what most people would call luminaries of their profession. They had concocted a plan to swindle [Applicant] Nathan Foreman into buying a batch of “black money,”¹ allegedly valued at \$200,000, for \$100,000 in cash. Of course, the “black money” was not money at all—it was construction paper. And at first, it seemed like the scam was working; Foreman appeared to be on board. Foreman agreed to conduct the transaction at Dreams Auto Customs, an auto-body shop owned by his wife. But somewhere along the way, the scam went awry.

Not long after Merchant and Glekiah arrived at the shop, they were ambushed. Foreman and some accomplices captured both men, tied them up, and tortured them.² Eventually, Merchant and Glekiah were forced into a van at gunpoint. Foreman ordered his accomplices to take the pair to “the spot” and said that he would “be there” when they arrived. Unfortunately for Foreman, Merchant and Glekiah managed to escape in transit.³ Glekiah eventually told the police what had happened to them and

¹ “In a ‘black money’ scam, a perpetrator defrauds an individual by persuading the individual that bundles of banknote-sized black paper are actually bundles of paper money that have been dyed black to avoid detection by authorities. Glekiah and Merchant represented to [the applicant] that they would exchange smuggled dyed money for cash at a two-for-one rate and provide chemicals to remove the dye.” *Foreman v. State*, 561 S.W.3d 218, 227 n. 3 (Tex. App.—Houston [14th Dist.] 2018), rev’d, 613 S.W.3d 160 (Tex. Crim. App. 2020).

² “When the two men arrived, several suspects grabbed them, tied them up, beat them, poured gasoline on them, and threatened to set them on fire.” *Foreman*, 561 S.W.3d at 224 (referring to the facts contained in the affidavit for search warrant).

³ “On December 24, 2012, witnesses driving on the service road of Highway 290 observed complainants Moses Glekiah and Richard Merchant tumble from the rear of a van onto the road.

where it had happened.⁴

Based on the information that Glekiah gave, the police applied for a warrant to search Dreams Auto Customs.... Pursuant to this warrant, the police seized three computer hard drives from Dreams Auto Customs. Upon analysis, one hard drive...was found to contain surveillance footage that depicted much of the incident at Dreams Auto Customs and Foreman's involvement in that incident. Foreman was charged with aggravated kidnapping and aggravated robbery....

Foreman was convicted of both offenses as charged and sentenced to fifty years' confinement.

Foreman v. State, 613 S.W.3d 160, 161-162 (Tex. Crim. App. 2020).

18. State's Trial Exhibit 28 is a disc containing surveillance video from Dreams Auto Customs on the date of the offense. *See also* 4 R.R. at 44-65, 92-94, 154-160, 187-188; 5 R.R. at 90-98, 120-122, 132-142, 158-160, 171-172 (testimony regarding various video files contained on St. Tr. Ex. 28).
19. State's Trial Exhibits 29-32, 34-35, 38, and 43 are still-shots from the surveillance videos.
20. The Court of Appeals summarized Homicide Investigator Hufstedler's trial testimony about the video surveillance as follows, referring to the applicant as "appellant":

When Hufstedler was on the stand, the State extensively played the video and elicited testimony about what it showed. The first person Hufstedler identified in the video was appellant. Hufstedler then repeatedly identified appellant in different parts of the video. In all, Hufstedler

Complainants were bound with zip ties and their mouths were taped shut with duct tape. Witnesses observed that complainants had been shot and were bleeding.... In addition to gunshot wounds and injuries from falling out of a moving vehicle, Merchant's abdomen had been burned with an iron." *Foreman*, 561 S.W.3d at 224 (summarizing the trial testimony). "At trial, the first five witnesses testified to the scene out on the highway where the two complainants tumbled out of the van while tied up." *Foreman*, 561 S.W.3d at 227 n. 2.

⁴ When presented with a photo array, "Glekiah positively identified Nathan Ray Foreman as" a suspect "who participated in punching Complainants, told other suspects what to do, poured the gasoline on Complainants and contacted two suspects to drive Complainant away from business." *Foreman*, 561 S.W.3d at 227 (quoting the search warrant affidavit). Two officers "testified that Glekiah identified appellant in a photo array." *Foreman*, 561 S.W.3d at 227 n. 4; *see also* St. Tr. Ex. 57 and 58 (Glekiah witness admonishment and photo array).

identified appellant in the video at least ten times. He testified that the video showed appellant walking in with duct tape in his hand. Hufstedler also testified that the video showed that one of the men at the body shop, Darren Franklin, had a gun, and later, was walking with an iron in his hand. Hufstedler explained that some of what occurred happened off camera. He testified that the video showed the van being parked inside the body shop. Hufstedler testified that the video showed appellant open the doors to the van and lay out a sheet or a blanket before pushing the two tied-up complainants into the back of the van and closing its doors....

On re-direct, Hufstedler testified that the video showed appellant and a co-defendant loading bags complainants had brought to the shop into the rental car driven by complainants before another co-defendant drove the car out of the auto shop. Hufstedler testified the rental car was later discovered “burned.” Hufstedler testified that the video and the zip ties and tape recovered at the shop corroborated what complainants told him. Hufstedler also testified that complainants’ injuries corroborated their stories.

Foreman, 561 S.W.3d at 228.

21. During closing argument, the State offered a timeline depicted on the video surveillance:

So I want to look at it in terms of the timeline. First of all, at 9:54 a.m. on the surveillance video, Nathan Foreman puts an object consistent with a firearm in the back of his belt. That right there is evidence that he was in possession of a firearm. At 9:54, also, you see Darren Franklin on the surveillance video putting a gun into his waistband. Folks, if they were just there for a friendly business deal, why are we putting weapons, why are we getting all weaponed up two hours before the incident actually occurs?

At 11:25, Moses Glekiah and Richard Merchant arrived at Dreams Auto Customs. At 11:30, Richard Merchant brings the money and the chemicals inside of the Dreams Auto Customs garage. At 11:37, mere minutes after Richard Merchant has peacefully entered the location with his suitcase and the backpack full of the items used to scam the defendant, Darren Franklin and Jason Cunningham enter the garage with objects in their hands -- you can see it on the video -- that are consistent with firearms.

At 11:45, Nathan Ray Foreman retrieves duct tape and then walks off camera with it to a location that is consistent to where the complainants are being held and tortured. At noon, Nathan Ray Foreman

is seen speaking on the phone, and then shortly thereafter Jason Washington, the Customs agent, enters in his uniform into the garage. And you heard testimony that the agent then helped by then looking at the GPS of the complainants and asking them where the money was....

At 1:00 p.m. Darren Franklin retrieves an iron, an iron that was identified by Moses and Richard as the iron that was used to torture a screaming Richard Merchant. You heard testimony from Moses about how terrified he was during that moment, how it hurt him to see his friend being hurt.

At 1:05, Charles Campbell wipes down the complainants' car. If these men, including Nathan Foreman, thought that they were in the right, if they weren't doing something that was terrible and wrong and illegal, there would be no need for them to try and wipe down and tamper with the evidence like what you see on the camera at 1:05 p.m....

And, finally, at 3:30 p.m., Nathan Ray Foreman places a blanket or tarp in the back of a van, a van where Moses Glekiah and Richard Merchant, without hope, believing that they were going to die that day, terrified, in pain, and alone, are loaded in. And if what you see Nathan Foreman doing on this video isn't aiding, assisting, encouraging and planning, I don't know what is. He is literally the person who was shutting the doors on the hope of our complaining witnesses. You heard their testimony. You heard what Moses said. Moses said that the words that Nathan Ray Foreman spoke that day were, "Take them to the spot. I'll meet you there." He told Moses and Richard, "You're going to die today." And you know that he meant it because he did everything he could to make sure that it happened and that there was nothing left of the evidence by burning the car.

6 R.R. at 48-52.

No Response from Counsel Needed to Evaluate Habeas Claims

22. According to the State Bar of Texas website, Alan Percely is deceased.
23. According to the State Bar of Texas website (accessed March 19, 2024), James Pons, bar number 24041707, was licensed in 2003 and is currently eligible to practice law in Texas.
24. According to the State Bar of Texas website (accessed March 19, 2024), Michael Strickland, bar number 24056389, was licensed in 2006 and is currently eligible to

practice law in Texas.

25. According to the State Bar of Texas website (accessed March 19, 2024), Robert Sirianni, bar number 24086378, was licensed in 2013 and is currently eligible to practice law in Texas.
26. The Court finds that responsive affidavits from the applicant's attorneys are not necessary because the record is sufficient to evaluate the merits of the applicant's claims.

Overview of Habeas Allegations

27. In his first ground for relief in his application for writ of habeas corpus, the applicant claims he “was denied effective assistance of counsel based on trial attorney’s failure to present and investigate the relationship between a juror and a co-defendant and object to the juror being on the jury.” Writ App. at 6-7 (referring to attorneys Mr. Percely, Mr. Pons, and Mr. Strickland).
28. In his second ground for relief, the applicant claims he “was denied effective assistance of counsel at a critical stage of the proceedings by his trial attorney’s failure to file and present a motion for new trial that alleges jury misconduct” and “evidence that a State’s witness had been paid for his testimony.” Writ App. at 8-9 (referring to attorney Mr. Sirianni).
29. In his third ground for relief, the applicant claims his “right to due process was violated by the failure of the State to proffer evidence concerning the results of any charges pending against the complainants, any deals in exchange for their testimony as well as payments made to them in exchange for their testimony.” Writ App. at 10.

The Applicant Fails to Prove Trial Counsel was Ineffective Regarding Juror #7

30. In Ground One, the applicant claims that trial counsel was ineffective for failing to present and investigate the relationship between Juror Number 7 (Zibora Rayshun Gilder) and “a co-defendant,” and for failing to object to Ms. Gilder being on the jury. Writ App. at 6-7.
31. The record reveals the following: On Friday, November 13, 2015, Juror Number 7, Zibora Rayshun Gilder, was empaneled on the jury and told to return on Monday at 10 o’clock (2 R.R. at 154-155, 159). On Monday, November 16, 2015, before the jury was sworn, the trial court spoke with Ms. Gilder, in the presence of lawyers from the State and defense (3 R.R. at 13-19). Ms. Gilder had called the bailiff over the weekend (3 R.R. at 14). Ms. Gilder explained that her mother had called her and told her “Wingate” was involved in the case (3 R.R. at 16). Ms. Gilder wanted the court to know that she knew Wingate (3 R.R. at 14). Ms. Gilder was under the impression that Wingate might be called as a trial witness (3 R.R. at 14). Ms. Gilder explained to the court that she had known Wingate since she was young; she worked with Wingate at his record label; her mother and Wingate’s mother are close friends; and her mother helped Wingate start one of his businesses (3 R.R. at 15, 17-18). Ms. Gilder “wanted to be forthcoming” (3 R.R. at 18). But, Ms. Gilder was “not to the place where I feel like it would alter my opinion about the case” (3 R.R. at 17). She averred, “I would treat him like any other witness” (3 R.R. at 17). She continued, “I want to just listen to the evidence and do what’s right” (3 R.R. at 17). When asked about the potential of family pressure, Ms. Gilder said “I’m grown, and I’m going to make my own decision...I wouldn’t let nobody influence my decision one way or the other” (3 R.R. at 17). When asked by the judge whether Ms. Gilder “felt like [it] might influence your verdict one way or the other,” Ms. Gilder responded “no” (3 R.R. at 18-19). When asked by the judge if she still believed she could be

- a fair juror, Ms. Gilder nodded (3 R.R. at 19). Neither the State nor defense objected to Ms. Gilder serving on the jury (3 R.R. at 20). Ms. Gilder was sworn and seated on the jury (3 R.R. at 30). *See also* App. Writ Ex. 3 (3 R.R. at 8-20).
32. Outside Ms. Gilder's presence, the State told the trial court there is no Wingate on her witness list (3 R.R. at 19).
 33. Defense attorney Mr. Percely said, "I just asked something – apparently there is a co-defendant who's not going to testify at all in this case" (3 R.R. at 19).
 34. Mr. Percely said that Wingate knows the co-defendant's family (3 R.R. at 19).
 35. Both sides confirmed they were not going to call Wingate as a witness (3 R.R. at 20).
 36. No one named Wingate testified in the applicant's trial, and no trial witness mentioned someone named Wingate.
 37. Other than the seven pages of discussion with Ms. Gilder (3 R.R. at 14-20), "Wingate" does not appear in the trial record.
 38. The habeas prosecutor avers "Wingate" does not appear in the 82-page offense report (HPD 161435712).
 39. The applicant and the applicant's wife claim that Wingate is the applicant's co-defendant Ricky Bernard. App. Writ Ex. 1, Applicant's 2022 Unsworn Declaration at 4-5; App. Writ Ex. 2, Charese Foreman's 2022 Affidavit at 1; Excerpt from App. Writ Ex. 4, Charese Foreman's 2015 Affidavit at 1.
 40. When questioned on the record, Ms. Gilder never mentioned Ricky Bernard, and Ms. Gilder did not state that Wingate is also called Ricky Bernard.
 41. The habeas prosecutor avers "Wingate" does not appear in the 21-page amended pre-sentence investigation (PSI) report for co-defendant Ricky Bernard (cause numbers 1385788 and 1385789; original report dated March 1, 2018; amended

report dated March 9, 2018).⁵

42. Ricky Bernard did not testify in the applicant's trial.
43. Assuming *arguendo* the applicant told trial counsel that Wingate is co-defendant Ricky Bernard, the applicant fails to prove his trial counsel was deficient for failing to present and investigate the relationship between Ms. Gilder and Bernard.
44. Assuming *arguendo* Wingate is co-defendant Ricky Bernard, the applicant fails to prove his trial counsel was deficient for failing to present and investigate the relationship between Ms. Gilder and Bernard.
45. The applicant fails to prove trial counsel was deficient for deciding to not reveal to the trial court what his client allegedly told him and/or deciding to not question a juror who is potentially a "friend" of his client's co-defendant.
46. Assuming *arguendo* Wingate is co-defendant Ricky Bernard, the applicant fails to prove his trial counsel was deficient for failing to object to Ms. Gilder serving on the jury.
47. The applicant fails to prove trial counsel was deficient for failing to object to a juror who told the court she would be fair despite knowing a potential witness. *See* Tex. Code Crim. Proc. Art. 35.16, Reasons for Challenge for Cause.
48. Assuming *arguendo* Wingate is co-defendant Ricky Bernard, the applicant fails to prove he was harmed by Ms. Gilder previously working with Bernard or by Ms. Gilder's mother being friends with Bernard's mother.
49. According to the applicant's wife, Bernard and his mother believed Ms. Gilder "better do the right thing." Writ Ex. 2, Charese Foreman's 2022 Affidavit at 2;

⁵ Bernard's PSI was conducted under the authority of the applicant's current habeas judge, the Honorable Robert Johnson, Presiding Judge of the 177th District Court of Harris County, Texas.

Excerpt from App. Writ Ex. 4, Charese Foreman's 2015 Affidavit at 1.⁶

50. The applicant fails to prove that any witness or hearsay statement indicated Ms. Gilder was biased against the applicant.
51. Assuming *arguendo* that Ms. Gilder was biased for Bernard, the applicant fails to prove Ms. Gilder was biased against the applicant or that he was harmed by her serving on the jury. *See supra* at 3-6, "Summary of Trial Evidence" (findings #15-19), for evidence of the applicant's guilt, which is considered in the harm analysis.
52. The applicant fails to overcome Ms. Gilder's declaration on the record that she would not let anyone influence her decision one way or the other. *See* 3 R.R. at 17.
53. The applicant fails to overcome Ms. Gilder's declaration on the record that she would be a fair juror. *See* 3 R.R. at 19.
54. The applicant fails to prove that trial counsel would have prevailed had he objected to Ms. Gilder serving on the jury. *See* Tex. Code Crim. Proc. Art. 35.16.
55. The applicant fails to establish, by a preponderance of the evidence, that the harm resulting from trial counsel's alleged deficiency undermines the confidence in the trial's outcome. *See Ex parte Parra*, 420 S.W.3d 821, 826-828 (Tex. Crim. App. 2013) (finding no ineffective assistance of counsel when trial counsel allegedly failed to properly voir dire a juror who may have been a victim of both domestic abuse and sexual assault of a child in the applicant's trial for aggravated sexual assault of a child); *see also supra* at 3-6, "Summary of Trial Evidence" (findings #15-19), for evidence of the applicant's guilt, which is considered in the harm analysis.

⁶ In his memorandum and proposed findings, the applicant mentions an affidavit from Lillian Thorn, but no such affidavit appears in the habeas record. *See* Writ App. Memo at 3; App. Amended Proposed Findings at 3 (#13).

Applicant Fails to Prove Counsel was Ineffective Regarding Motion for New Trial

56. In his second ground for relief, the applicant claims he was denied effective assistance of counsel by Mr. Sirianni's alleged failure to file and present a motion for new trial based on juror misconduct and evidence that a State's witness was paid for his testimony. *See* Writ App. at 8-9.
57. The applicant claims that a private investigator spoke with Ms. Gilder on December 17, 2015 and, according to the investigator in an unsworn, unauthenticated document, Ms. Gilder told the investigator:
- a. In her opinion, the applicant had a fair trial.
 - b. She does not know the applicant.
 - c. She does not know the applicant's wife and has never spoken to the applicant's wife "Mrs. Foreman."
 - d. She did not know Ricky Bernard was involved in the case until she was actually on the jury.
 - e. She did not know any of the trial witnesses.
 - f. When Bernadette Wingate reached out to her, Ms. Gilder told her, "I was going to do the right thing and I was going to do my civic duty."
- App. Writ Ex. A.
58. To establish harm on habeas, the applicant must prove that, had Mr. Sirianni not been deficient in his representation of the applicant's motion for new trial, the applicant would have prevailed on the merits of the motion.
59. Without deciding whether Mr. Sirianni was deficient, the applicant fails to prove Mr. Sirianni was ineffective because he cannot prove he would have prevailed on his motion for new trial, had Mr. Sirianni acted in an objectively reasonable manner.
60. The applicant fails to prove both allegations in the motion for new trial—juror misconduct and witness misconduct.

61. Alleged Witness Misconduct: The applicant has offered no admissible evidence of the State paying a witness for his testimony. To the motion for new trial, Mr. Sirianni attached an alleged transcript of a phone call that is not authenticated, was not under oath, is not accompanied by the actual audio recording (if it exists), and does not establish that the State paid the witness for his testimony. *See* App. Writ Ex. 4 and 5.⁷ The applicant has offered no additional evidence on habeas to support this claim.⁸
62. Alleged Juror Misconduct: Jury misconduct must be material and have caused harm. *Magdaleno v. State*, No. 14-18-00972-CR, 2020 WL 206185, at *4 (Tex. App.—Houston [14th Dist.] Jan. 14, 2020, no pet.) (not designated for publication) (citing *Ryser v. State*, 453 S.W.3d 17, 39 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd)).
63. “To be entitled to relief on the basis of juror misconduct, the defendant must establish that an outside influence was improperly brought to bear on any juror. 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) (citing Tex. R. Evid 606(b); *McQuarrie v. State*, 380 S.W.3d 145, 154 (Tex. Crim. App. 2012); *Colyer v. State*, 428 S.W.3d 117, 129-130 (Tex. Crim. App. 2014)).
64. An “outside influence” is “something originating from a source outside of the jury room and other than from the jurors themselves.” *McQuarrie*, 380 S.W.3d at 154.

⁷ The transcript implies the opposite—that the “guy who robbed [Glekiah],” who he has “known [] for years,” offered to pay Moses. *See* App. Writ Ex. 5 at 11.

⁸ The applicant has not proposed any findings of fact or conclusions of law that claim the applicant established on habeas that the State paid Glekiah for his testimony. *See* App. Amended Proposed Findings.

65. “[O]utside influence has been interpreted by Texas courts to include factual or legal information conveyed to the jurors by a bailiff or some other unauthorized person who intends to affect the deliberations. But the outside influence exception does not include influences such as coercion by a fellow juror or the discussion of a juror’s own personal knowledge.” *Colyer*, 428 S.W.3d at 117, 125.
66. “An outside influence is problematic only if it has the effect of improperly affecting a juror’s verdict in a particular manner—for or against a particular party.... [E]ven if [a juror] had testified to an improper outside influence under Rule 606(b) he would still be prohibited from testifying about the effect of that information on him. Courts use the objective reasonable person test to decide what effect the particular outside influence in a case would have on the hypothetical average juror. We do not allow testimony about the effect had upon this particular juror.” *Colyer*, 428 S.W.3d at 129-130.
67. “[C]ourts conduct an objective analysis to determine whether there is a reasonable possibility that the outside influence had a prejudicial effect on the hypothetical average juror in order to determine whether a juror affidavit regarding the outside influence is admissible under Rule 606(b).” *Becerra v. State*, No. PD-0280-22, 2024 WL 461928, at *16 (Tex. Crim. App. Feb. 7, 2024).
68. “A motion for new trial based on jury misconduct must be supported by a juror’s affidavit alleging that ‘outside influence’ affected the jury’s decision.” *Tate v. State*, 414 S.W.3d 260, 264 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (noting that, even if an appellant established the existence of an outside influence, he is not entitled to an inquiry under *McQuarrie* when he has not shown that the jurors who sat on his case were actually biased by the outside influence, and determining that the record did not contain any evidence or allegation that the foreman’s knowledge affected the jury’s decision).

69. If the trial court in the applicant's case had held a hearing or considered a juror affidavit before ruling on the applicant's motion for new trial, the Rules would have permitted only limited testimony from Ms. Gilder:

During an Inquiry into the Validity of a Verdict or Indictment.

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify:

(A) about whether an outside influence was improperly brought to bear on any juror; or

(B) to rebut a claim that the juror was not qualified to serve.

Tex. R. Evid. 606.

70. "A Rule 606(b) inquiry is limited to that which occurs outside of the jury room and outside of the juror's personal knowledge and experience." *McQuarrie*, 380 S.W.3d at 153.
71. "Whether an affidavit is admissible pursuant to Rule 606(b) is reviewed under an abuse of discretion standard like other evidentiary rulings." *Becerra*, 2024 WL 461928, at *20.
72. "[T]he trial court is the sole fact-finder and judge of the credibility of the testifying jurors." *Scales v. State*, 380 S.W.3d 780, 784 (Tex. Crim. App. 2012).
73. A trial court's denial of a motion for new trial is reviewed under an abuse of discretion standard. *McQuarrie*, 380 S.W.3d at 150.
74. It is within the trial court's discretion to rule on a motion for new trial on affidavits without oral testimony. *Cruz-Garcia v. State*, No. AP-77,025, 2015 WL 6528727, at *29 (Tex. Crim. App. Oct. 28, 2015) (not designated for publication) (determining that the trial court did not abuse its discretion when it denied the appellant's request for an evidentiary hearing on his motion for new trial when

the admissible evidence would not have met the burden of proof).

75. A trial court abuses its discretion in denying a motion for new trial only if no reasonable view of the record could support the trial court's ruling. *McQuarrie*, 380 S.W.3d at 150; *see also Campbell v. State*, No. 01-21-00332-CR, 2022 WL 3648891, at *7-8 (Tex. App.—Houston [1st Dist.] Aug. 25, 2022, pet. ref'd) (not designated for publication) (holding that the trial court did not err in denying the appellant's motion for new trial when a juror, outside of court, accessed a news story and reviewed a video containing a gunshot and subsequent interview of a witness; the video was not admitted in trial and directly contradicted the appellant's claim of self-defense; the juror reported back to the other jurors that the video existed but "did not show anything"; and the juror testified he only considered the trial testimony).
76. The applicant fails to prove Ms. Gilder's alleged familiarity with the applicant's co-defendant constitutes an outside influence. *Parra*, 420 S.W.3d at 827 (noting that a juror's personal experience, including being a victim of the same type of crime for which the applicant is on trial, is not an outside influence for the purposes of a Rule 606(b) inquiry).
77. The applicant fails to show that the trial court erred by discrediting the affidavit submitted by the applicant's wife containing a hearsay statement from a co-defendant who claimed to have spoken with Ms. Gilder, particularly in light of Ms. Gilder's statements on the record, which the trial court acknowledged it reviewed prior to its decision.⁹ *See Davis v. State*, No. 14-14-00778-CR, 2015 WL

⁹ In the order denying the motion for new trial, the trial court wrote, "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 Part 1c, 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 question and these issues during the voir dire portion of the trial." 1 C.R. at 303, Court's Ruling on Defendant's Motion for New Trial, January 29, 2016 (showing that the trial court correctly did not find mention of Ms. Gilder's concern during voir dire in Volume 2, and reviewed Ms. Gilder's statements to the court, after voir dire, in Volume 3). In the abatement proceeding, the trial court

8730935, at *4-5 (Tex. App.—Houston [14th Dist.] Dec. 10, 2015, no pet.) (not designated for publication) (noting that a trial court could properly deny a motion for new trial after hearing no live testimony and instead discrediting a lawyer’s affidavit that a juror conducted an out-of-court experiment related to the believability of a witness’ identification of the appellant as the suspect, which the juror then reported back to the rest of the jury).

78. Assuming *arguendo* that Ms. Gilder’s “friend” Bernard told Ms. Gilder to “do the right thing” (as the applicant’s wife claims she was told), the applicant cannot prove that the trial court would have abused its discretion denying the applicant’s motion for new trial without any showing of harm. *Jordan v. State*, No. 01-14-00721-CR, 2015 WL 6768497, at *4 (Tex. App.—Houston [1st Dist.] Nov. 5, 2015, no pet.) (not designated for publication) (determining that the appellant could not prove harm when the outside influence would have improperly affected the juror in favor of the appellant).
79. Assuming *arguendo* that Ms. Gilder told Bernadette Wingate that Ms. Gilder “was going to do the right thing and [she] was going to do [her] civic duty” (*see* App. Writ Ex. A at 4), the applicant fails to prove Mrs. Wingate’s alleged outside influence was legally “problematic” and fails to prove Ms. Gilder serving on the jury harmed the applicant. *See Colyer*, 428 S.W.3d at 129-130 (“[a]n outside influence is problematic only if it has the effect of improperly affecting a juror’s verdict in a particular manner” and “[c]ourts use the objective reasonable person test to decide what effect the particular outside influence in a case would have on the hypothetical average juror”).

stated “I recall ruling on the motion [for new trial]. Partly my rulings were based on some allegations made in the Motion For New Trial. Once I reviewed the record of what was appropriate, that the record simply did not reflect at all -- now, I was not present for the trial; but going back and reviewing the transcript of the few pages that were appropriate, the Motion For New Trial just did not -- it -- it made no sense with -- with what the -- the record reflected.” Reporter’s Record of Abatement Hearing (April 4, 2016) at 16; *compare* App. Writ Ex. 4 (allegations in the motion for new trial regarding Ms. Gilder) *with* 3 R.R. at 14-20 (Ms. Gilder’s statements in the trial record).

The Applicant Fails to Prove a Complainant was Paid for His Testimony

80. In his third ground for relief, the applicant claims his “right to due process was violated by the failure of the State to proffer evidence concerning the results of any charges pending against the complainants, any deals in exchange for their testimony as well as payments made to them in exchange for their testimony.” Writ App. at 10.
81. As established above, the applicant has offered no admissible evidence of the State paying a complainant for his testimony. *See supra* at 13, finding #61.
82. The applicant fails to prove that the State violated the applicant’s right to due process of law.

CONCLUSIONS OF LAW

1. “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.” *Ex parte Richardson*, 70 S.W.3d 865, 870 (Tex. Crim. App. 2002).
2. The applicant’s conclusory allegations, even if sworn to, do not overcome the State’s denial and are insufficient to warrant habeas relief. *Ex parte Empey*, 757 S.W.2d 771, 775 (Tex. Crim. App. 1988).
3. Based on Ms. Gilder’s testimony, trial counsel would not have prevailed if he had objected to her serving on jury based on cause. *See* Tex. Code Crim. Proc. Art. 35.16, Reasons for Challenge for Cause.
4. The applicant fails to prove by a preponderance of the evidence that trial counsel’s representation fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *See Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002); *see also Narvaiz v. State*, 840 S.W.2d 415, 434 (Tex. Crim. App. 1992) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).
5. The applicant fails to overcome the strong presumption that trial counsel’s actions were reasonable and based on sound trial strategy. *See Ex parte White*, 160 S.W.3d 46, 51 (Tex. Crim. App. 2004); *see also Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). It is not sufficient that the applicant show, with the benefit of hindsight, that his counsel’s actions or omissions during trial were merely of questionable competence. *Lopez v. State*, 343 S.W.3d 137, 142-143 (Tex. Crim. App. 2011).
6. The totality of the representation afforded the applicant was sufficient to protect his right to reasonably effective assistance of trial counsel. Counsel’s performance is judged by the totality of the representation, and judicial scrutiny

of counsel's performance must be highly deferential with every effort made to eliminate the distorting effects of hindsight. *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006). Isolated instances in the record reflecting errors of omission or commission do not render counsel's performance ineffective, nor can ineffective assistance of counsel be established by isolating one portion of trial counsel's performance for examination. *Id.*

7. The applicant fails to prove by a preponderance of the evidence that counsel's representation in the motion for new trial was objectively unreasonable, and there is a reasonable probability that, but for counsel's allegedly-deficient representation, he would have prevailed on the motion. *See Ex parte Flores*, 387 S.W.3d 626, 639 (Tex. Crim. App. 2012) (citing *Ex parte Miller*, 330 S.W.3d 610, 623 (Tex. Crim. App. 2009)); *McQuarrie v. State*, 380 S.W.3d 145, 154 (Tex. Crim. App. 2012); *Cruz-Garcia v. State*, No. AP-77,025, 2015 WL 6528727, at *29 (Tex. Crim. App. Oct. 28, 2015).

The applicant fails to show that his conviction and sentence were improperly obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that the requested habeas relief be denied.

ORDER

THE CLERK is ORDERED to prepare a **supplemental** habeas record of all papers in cause numbers 1374838-A and transmit the record to the Court of Criminal Appeals as provided by Tex. Code Crim. Proc. art. 11.07 § 3 and Tex. R. App. Proc. § 73.4. Unless previously sent, the record shall include certified copies of the following documents:

1. the application for writ of habeas corpus;
2. the applicant's legal memorandum;
3. the applicant's writ exhibits (labeled 1-5 and labeled A);
4. the Court's orders;
5. the indictment, the court's charge and the jury's verdict, the judgment and sentence, and the docket sheets in cause numbers 1374837 and 1374838;
6. the court reporter's trial record in cause numbers 1374837 and 1374838 (November 13-19, 2015);
7. the court reporter's records from pretrial (May 23, 2014; July 27, 2015) and abatement proceedings (April 4, 2016);
8. the Court's Findings of Fact and Conclusions of Law; and
9. the State's and the applicant's original and amended proposed findings of fact and conclusions of law.

THE CLERK is further ORDERED to send a copy of this Order to the applicant's habeas counsel, Stanley Schneider, 5300 Memorial Dr, Ste 750, Houston, Texas 77007, stans3112@aol.com; and to counsel for the State, Kristin Assaad, Assistant District Attorney, Harris County District Attorney's Office, 1201 Franklin, Suite 600, Houston, TX 77002, assaad_kristin@dao.hctx.net.

By the following signature, the Court adopts the State's Amended Proposed Findings of Fact, Conclusions of Law, and Order in cause number 1374838-A.

Signed:
7/3/2024
12:57 PM



JUDGE PRESIDING
HARRIS COUNTY, TEXAS

NO. 1374838-A

EX PARTE

§

IN THE 177TH

§

DISTRICT COURT OF

NATHAN RAY FOREMAN,
Applicant

§

HARRIS COUNTY, TEXAS

STATE'S CERTIFICATE OF SERVICE

I, Kristin Assaad, certify that, on March 28, 2024, I directed the electronic filing service provider efile.txcourts.gov to electronically serve a copy of the State's Amended Proposed Findings of Fact, Conclusions of Law, and Order on the applicant's habeas attorney, Stanley Schneider, 5300 Memorial Dr, Ste 750, Houston, Texas 77007, at stans3112@aol.com.

SIGNED March 28, 2024.

Respectfully submitted,

/s/ Kristin Assaad

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Kristin Assaad on behalf of Kristin Assaad

Bar No. 24078164

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Case Contacts

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APPENDIX E
Applicant's Proposed
Objections to Findings of Facts and Conclusions of Law
No. 1374837-A
(August 21, 2024)

CAUSE NO. 1374837-A

EX PARTE	§	IN THE DISTRICT COURT
	§	
	§	177TH JUDICIAL DISTRICT
	§	
NATHAN RAY FOREMAN	§	HARRIS COUNTY, TEXAS

**APPLICANT'S OBJECTION TO FINDINGS OF FACT
AND CONCLUSIONS OF LAW ENTERED BY THE TRIAL COURT**

NOW COMES, NATHAN RAY FOREMAN, by and through his attorney, **STANLEY G. SCHNEIDER**, and files these objections to the Findings of Fact and Conclusions of Law heretofore entered and would show this Court the following:

1. Applicant was charged by indictment with the first degree felony offenses of aggravated robbery (cause number 1374837) and aggravated kidnapping (cause number 1374838). Applicant entered a plea of not guilty pleas and a jury found him guilty on both cases. The trial court assessed concurrent 50-year sentences. Applicant filed timely written notice of appeal. Applicant's appeal was affirmed by the Fourteenth Court of Appeals. Applicant's motion for en banc rehearing was granted and the Court of Appeals reversed Applicant's convictions. The State filed a petition for discretionary review which was granted. The Court of Criminal Appeals reversed the Court of Appeals and affirmed Applicant's convictions. Applicant appealed to the

Supreme Court of the United States and his petition for writ of certiorari was denied.

2. On May 18, 2023, Applicant filed his application for a writ of habeas corpus that alleges facts that, if true, will entitle him to relief. Applicant is asking that this Court set aside his convictions for the offenses of aggravated robbery (cause number 1374837) and aggravated kidnapping (cause number 1374838).

3. Applicant requested twice to the trial court to set this case for an evidentiary hearing to resolve the issues pursuant to Art. 11.07, Sec. 3(d). Applicant believes that an evidentiary hearing was the only reasonable means available to resolve the contested issues in this case. Applicant further believes that for the trial court to fairly and fully determine the factual issues, it must hear live testimony and for the witnesses to be subject to appropriate cross-examination.

The record reflects that a motion for new trial was filed on behalf of Applicant. (1 CR 251). In the motion for new trial, Applicant 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, Applicant's mother, and Charese Foreman,

Applicant's wife indicated that Juror No 7 had communicated with Bernard and his mother during the trial. The motion for new trial lists an affidavit from Applicant as an Exhibit A but none was ever filed.

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 for new trial, one of the complainant's supposedly stated that he was being paid to testify against Applicant.

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

Robert L. Sirianni Jr. filed a notice of appearance as counsel for Applicant.¹ The motion for new trial filed in cause number 1374837 was not presented to the trial court.

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 question and these issues during the voir dire

¹ Robert L. Sirianni Jr. is licensed to practice law in Texas. According to the State Bar of Texas in Texas Bar Number is 24086378. On his notice of appearance, he lists his Texas Bar Number 216214.

portion of the trial.

Defendant's Motion for a New Trial is DENIED.

(1 CR 303).

The trial court's order is not supported by the record which reflects that on November 12, 2015, a jury was selected in the above styled and numbered causes.² Prior to the commencement of proceedings on November 16, 2015, juror number 7, Zibora Rayshun Gilder asked to speak to the court prior to the commencement of evidence. 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 Applicant'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.

² 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.

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?

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 Applicant’s co-defendant, a man named Bernard while the trial was pending about the proceedings.

Applicant filed an affidavit that states that he told his attorney what he knew about the juror and her relationship to a co-defendant. But that was not presented to the trial court.

Applicant would call Rudy Vargas, a private investigator to testify concerning his interview of a juror. Mr. Vargas would testify that he was a private investigator contacted by an attorney named Sirianni to locate a juror, Zibora Gilder, who served on Nathan Foreman’s jury. He conducted a

comprehensive investigation that located a number of civil judgments and one prior theft by check charge. He attempted to locate her at numerous residences and work. He was unable to find her to speak to her in person.

He located her cell phone number and left her a message. She called him back. He told her why he was calling. She told him that she thought that Applicant had a fair trial. Ms. Gilder denied ever talking to Mrs. Foreman even though she did not know who she was. She did not comment about her relationship with Ricky Bernard. But she did state that she knew about the case prior to serving on the jury but she stated that she did not know that Bernard had anything to do with it until she was actually on the jury. She also admitted that she talked to Bernandette Wingate during the trial and that Wingate was a close family friend. She also confirmed that at one time she worked for Ricky Bernard. She also did not confirm or deny that Bernandette Wingate told her to do the right thing when they talked.

4. The trial court entered finding of fact and conclusion of law on July 3, 2024. However, Applicant was not notified of these findings until August 12, 2024.

The trial court's findings pertaining to the record regarding the denial of the motion for new trial are unsupported. The appellate record is inconsistent with the allegations contained in the motion for new trial.

A juror worked for a co-defendant. Her mother and the co-defendant's mother were best friends and the juror grew up around the co-defendant. The juror lied about her relationship with a co-defendant and did not tell the trial court that she had contact with the co-defendant during the trial.

The trial court ignored the record and the facts that would support Applicant's claims for relief.

Prayer

Applicant prays that this Court remand this cause to the trial court for an evidentiary hearing. Alternatively, Applicant prays that this Court grant Applicant his requested relief and order a new trial.

Respectfully submitted,

SCHNEIDER & McKINNEY, P.C.

/s/ Stanley G. Schneider
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5300 Memorial Drive, Suite 750
Houston, Texas 77007
Office: 713-951-9994
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Attorney for Applicant
Nathan Ray Foreman

CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that a true and correct copy of the above and foregoing *Applicant's Objection to Findings of Fact and Conclusions of Law Entered by the Trial Court* has been e-served to the office of the Kristin Assaad, Assistant District Attorney, Harris County District Attorney's Office, 1201 Franklin, Suite 600; Houston, Texas 77002, at assaad_kristin@dao.hctx.net on this the 21st day of August, 2024.

/s/ Stanley G. Schneider
Stanley G. Schneider

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Belen Argueta on behalf of Stanley Schneider

Bar No. 17790500

stanschneider.legalassistant@gmail.com

Envelope ID: 91150048

Filing Code Description: Motion

Filing Description: Applicants Objection to Findings of Fact and

Conclusions of Law Entered by the Trial Court

Status as of 8/21/2024 11:04 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Stanley Schneider		stans3112@aol.com	8/21/2024 10:48:02 AM	SENT
Belen Argueta		stanschneider.legalassistant@gmail.com	8/21/2024 10:48:02 AM	SENT
Kristin Assaad	24078164	assaad_kristin@dao.hctx.net	8/21/2024 10:48:02 AM	SENT

APPENDIX F
Applicant's Proposed
Objections to Findings of Facts and Conclusions of Law
No. 1374838-A
(August 21, 2024)

CAUSE NO. 1374838-A

EX PARTE	§	IN THE DISTRICT COURT
	§	
	§	177TH JUDICIAL DISTRICT
	§	
NATHAN RAY FOREMAN	§	HARRIS COUNTY, TEXAS

**APPLICANT'S OBJECTION TO FINDINGS OF FACT
AND CONCLUSIONS OF LAW ENTERED BY THE TRIAL COURT**

NOW COMES, NATHAN RAY FOREMAN, by and through his attorney, **STANLEY G. SCHNEIDER**, and files these objections to the Findings of Fact and Conclusions of Law heretofore entered and would show this Court the following:

1. Applicant was charged by indictment with the first degree felony offenses of aggravated robbery (cause number 1374837) and aggravated kidnapping (cause number 1374838). Applicant entered a plea of not guilty pleas and a jury found him guilty on both cases. The trial court assessed concurrent 50-year sentences. Applicant filed timely written notice of appeal. Applicant's appeal was affirmed by the Fourteenth Court of Appeals. Applicant's motion for en banc rehearing was granted and the Court of Appeals reversed Applicant's convictions. The State filed a petition for discretionary review which was granted. The Court of Criminal Appeals reversed the Court of Appeals and affirmed Applicant's convictions. Applicant appealed to the

Supreme Court of the United States and his petition for writ of certiorari was denied.

2. On May 18, 2023, Applicant filed his application for a writ of habeas corpus that alleges facts that, if true, will entitle him to relief. Applicant is asking that this Court set aside his convictions for the offenses of aggravated robbery (cause number 1374837) and aggravated kidnapping (cause number 1374838).

3. Applicant requested twice to the trial court to set this case for an evidentiary hearing to resolve the issues pursuant to Art. 11.07, Sec. 3(d). Applicant believes that an evidentiary hearing was the only reasonable means available to resolve the contested issues in this case. Applicant further believes that for the trial court to fairly and fully determine the factual issues, it must hear live testimony and for the witnesses to be subject to appropriate cross-examination.

The record reflects that a motion for new trial was filed on behalf of Applicant. (1 CR 251). In the motion for new trial, Applicant 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, Applicant's mother, and Charese Foreman,

Applicant's wife indicated that Juror No 7 had communicated with Bernard and his mother during the trial. The motion for new trial lists an affidavit from Applicant as an Exhibit A but none was ever filed.

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 for new trial, one of the complainant's supposedly stated that he was being paid to testify against Applicant.

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Respectfully submitted,

SCHNEIDER & McKINNEY, P.C.

/s/ Stanley G. Schneider
Stanley G. Schneider
TBN: 17790500
5300 Memorial Drive, Suite 750
Houston, Texas 77007
Office: 713-951-9994
Fax: 713-224-6008
Email: stans3112@aol.com

Attorney for Applicant
Nathan Ray Foreman

CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that a true and correct copy of the above and foregoing *Applicant's Objection to Findings of Fact and Conclusions of Law Entered by the Trial Court* has been e-served to the office of the Kristin Assaad, Assistant District Attorney, Harris County District Attorney's Office, 1201 Franklin, Suite 600; Houston, Texas 77002, at assaad_kristin@dao.hctx.net on this the 21st day of August, 2024.

/s/ Stanley G. Schneider
Stanley G. Schneider

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stanschneider.legalassistant@gmail.com

Envelope ID: 91150401

Filing Code Description: Motion

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Status as of 8/21/2024 11:04 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Stanley Schneider		stans3112@aol.com	8/21/2024 10:50:32 AM	SENT
Belen Argueta		stanschneider.legalassistant@gmail.com	8/21/2024 10:50:32 AM	SENT
Kristin Assaad	24078164	assaad_kristin@dao.hctx.net	8/21/2024 10:50:32 AM	SENT