

18-6762

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

ORIGINAL

Supreme Court, U.S.  
FILED

SEP 12 2018

OFFICE OF THE CLERK

Edward Louis Thomas — PETITIONER  
(Your Name)

VS.

Lorie Davis — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Texas Court Of Criminal Appeals  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Edward Louis Thomas

(Your Name)

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Rosharon, Texas 77583

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

- 1) DID THE TEXAS COURT OF CRIMINAL APPEALS APPLY THE WRONG STANDARD OF REVIEW IN ANALYZING THE CLAIM OF DEFICIENT PERFORMANCE BY TRIAL COUNSEL?
- 2) DID THE TEXAS COURT OF CRIMINAL APPEALS APPLY THE WRONG STANDARD OF REVIEW IN ANALYZING THE CLAIM OF PREJUDICE FROM COUNSEL'S DEFICIENT PERFORMANCE BY REQUIRING A SHOWING THAT ABSENT COUNSEL'S ERRORS THE TRIAL WOULD HAVE RESULTED IN AN ACQUITTAL?
- 3) DID THE TEXAS COURT OF CRIMINAL APPEALS MISINTERPRET THE SUPREME COURT'S HOLDINGS IN HARRINGTON V. RICHTER 131 S.C.T. 770(2011) AND HINTON V. ALABAMA 134 S.C.T. 1081(2014) TO MODIFY THE OUTCOME-DETERMINATIVE PREJUDICE INQUIRY OF STRICKLAND V. WASHINGTON 466 U.S. 668(1984) LIMITING THE "DIFFERENT RESULT" PART OF THE INQUIRY TO AN ACQUITTAL IF THE DEFICIENT PERFORMANCE APPLIES TO THE GUILT PHASE OF THE TRIAL?
- 4) DID THE TEXAS COURT OF CRIMINAL APPEALS APPLY THE WRONG STANDARD OF REVIEW TO THE CLAIM OF PREJUDICE FROM COUNSEL'S DEFICIENT PERFORMANCE IN FAILING TO ASSESS THE CUMULATIVE EFFECT OF COUNSEL'S ERRORS?

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## TABLE OF CONTENTS

OPINIONS BELOW .....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	3
STATEMENT OF THE CASE .....	4
REASONS FOR GRANTING THE WRIT .....	7
CONCLUSION.....	16

## INDEX TO APPENDICES

APPENDIX A	Texas Court of Criminal Appeals opinions WR-86,364-01 and WR-86,364-02 denying Habeas Corpus relief
APPENDIX B	Findings of Fact and Conclusions of Law by the 176th Dist. Court of Harris County, Texas in cause nos.1101865-A and 1101866, Harris County, Judge W. Scott Nease, CR-05-4
APPENDIX C	Record of Evidentiary Hearing on the Application for Writ of Habeas Corpus
APPENDIX D	Record of oral arguments from Evidentiary Hearing on Writ of Habeas Corpus
APPENDIX E	Memorandum Opinion by the 14th Dist Court of Appeals, Edward Louis Thomas v. State Nos.14-09-00592-CR and 14-09-00593-CR
APPENDIX F	

## TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
DARDEN V. WAINWRIGHT 106 S.CT. 2464(1986) .....	11
ELAM V. STATE 47 S.W. 2d 279(TEX.CRIM.APP. 1932).....	8
GOODMAN V. BERTRAND 467 F. 3d 1022(7th CIR. 2006).....	7,11
HARRINGTON V. RICHTER 131 S.CT. 770(2011).....	8,9,11,12,14
HINTON V. ALABAMA 134 S.CT. 1081(2014).....	8,9,11,12,14
LACY V. STATE 111 S.W. 2d 264(TEX.CRIM.APP. 1937).....	8
STRICKLAND V. WASHINGTON 466 U.S. 668(1984) ...	7,8,9,11,12,13,14,15
THOMPSON V. STATE 89 S.W.3d 184 3d (TEX.APP-HOU [1st DIST] 2002) .....	16,17
WASHINGTON V. STATE 16 S.W.3d 70 (TEX.APP.-HOU [1st DIST] . 2000) ...	10
STATUTES AND RULES	
U.S. CONSTITUTION AMEND. VI .....	11
U.S. CONSTITUTION AMEND. XIV .....	11
OTHER	

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[X] is unpublished.

The opinion of the COURT OF APPEALS, TEXAS (14th Dist) court appears at Appendix E to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[X] is unpublished.

## JURISDICTION

For cases from federal courts:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_ A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was June 20, 2018. A copy of that decision appears at Appendix A.

A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_ A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### U.S. CONST. AMEND. VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

### U.S. CONST. AMEND. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Petitioner was found guilty in cause nos. 1101865 and 1101866 of aggravated assault on a public servant and was sentenced to 40 years and 35 years respectively on June 29, 2009. Kendric Ceasar represented him at trial. The 14th Court of Appeals, Texas affirmed the convictions on direct appeal in an unpublished opinion issued on August 3, 2010. The Texas Court of Criminal Appeals refused discretionary review on January 12, 2010, Thomas v. State Nos. 14-09-00592-CR and 14-09-00593-CR, 2010 WL 2998780 (Tex. App.--Houston [14th Dist.] 2010, pet. ref'd.).

Petitioner filed an application for writ of habeas corpus March 24, 2015. Judge Stacy Bond conducted an evidentiary hearing. She signed the State's findings of fact and conclusions of law and recommended that relief be denied on December 28, 2016. The Texas Court of Criminal Appeals denied relief in an unpublished opinion nos. WR-86,364-01 and WR-86,364-02 on June 20, 2018. All of the claims addressed herein were first raised in that application for writ of habeas corpus.

Testimony at trial showed that Detectives Michael Hamby and Tim Butler of the Houston Police Department left the Asian City restaurant in Humble, Texas returning to their vehicle, an unmarked Ford Taurus. They saw a man in the front seat of their car and another car backed in next to theirs so that the drivers' sides were adjacent. They testified that Petitioner ignored their commands to

get out, put his hands on his head and get on the ground and instead slid into the front seat of the adjacent car; that he revved the engine, drove forward and struck Hamby's right leg and Butler's left leg and that Butler was thrown onto the hood of the car. Butler fired three shots at Petitioner through the windshield. The car veered toward Hamby and Butler was thrown off then fired six more shots. Hamby fired four more shots at Petitioner until the car hit a curb and came to a stop against a bush. Butler ordered Petitioner out of the car. Petitioner exited and dropped to one knee. Hamby called 911 on his cell phone. They told Petitioner to put his hands on his head and to stay on the ground. Instead, Petitioner -- who was bleeding from his head and torso -- stood and asked for an ambulance and refused to lay down then reached under his sweatshirt. Butler fired 13 more shots, emptying his gun.

This testimony was contradicted by Yong Mavis who said she didn't understand why they shot someone who was on the ground, by Hamby's 911 call recording him saying Petitioner was laid out and not recording any commands for him to get down, by the D.A. investigator's opinion that the shooter was standing in front of the car rather than laying on the hood, by a witness testimony that he didn't see the car move, by Butler's ability to walk around unimpaired despite his claim of being hit and injured by the car, by the lack of any documentation of the officers' injuries, by the statement of an officer at the scene that another officer had said "he" shot Petitioner's "ass while he was on the ground" and by testimony that

the data from the car's black box had not recorded any event--meaning that there had not been a measurable change in velocity.

Andrea Szabo gave inconsistent testimony including her opinion that it was a "rightful shooting." Detective Villareal's testimony stated Hamby's prints on the hood showed he was "getting out of the way, as he said he did." Officer Gonzales testified he knew Petitioner had tried to run over the complainants because he had talked to Detective Villareal "and the evidence he obtained from the hood of the car, it's pretty obvious." The trial Court granted a defense motion in limine excluding testimony concerning guns that were found in the car and that had been reported stolen. The trial Court then ruled that Counsel had opened the door to that testimony during his cross of Officer Hamby. During direct by the State, Detective Villareal added an unresponsive comment that the guns had been reported stolen.

In summary, the defense was that two plainclothes officers shot Petitioner several times in an overreaction to him breaking into their unmarked car. To justify the shooting they claimed he tried to run over them. Where Petitioner was charged with aggravated assault on a public servant, the question of whether or not he had intentionally tried to run over two men he knew to be policemen was the central issue contested in the case.

Petitioner claims Counsel was ineffective in failing to object to inadmissible testimony, eliciting inadmissible testimony, opening the door to excluded evidence and failing to object to outside the record closing argument.

## REASONS FOR GRANTING THE PETITION

### I. THE TEXAS COURT OF CRIMINAL APPEALS APPLIED THE WRONG STANDARD OF REVIEW

The Court of Criminal Appeals cited Strickland v. Washington 466 U.S. 668(1984) and set forth the standard of review established by that decision. But that is not the standard they applied in their analysis of Petitioner's claims. What the Court of Criminal Appeals said and what they actually did are not the same, Goodman v. Bertrand 467 F.3d 1022(7th cir.2006).

#### A. TESTIMONY ABOUT THE GRAND JURY NO-BILL

Analyzing Counsel's failure to object to testimony that a grand jury no-billed and IAD had exonerated the complainants for shooting Petitioner, the State Court found that the testimony supported the defensive strategy. They contrasted the State's argument that the decision not to object to the testimony supported the defensive theory of collusion and cover up with their own averment that Petitioner had asserted that no competent attorney would try to persuade a jury that a grand jury was complicit in a cover up of a bad police shooting. Apparently this refers to Habeas Counsel's oral argument that "[even the best of attorneys] couldn't sell that to a jury." (Vol.III W.H.R.R. pgg 14-15) The argument, in context, is obviously that Trial Counsel did not make a strategic decision to allow this evidence to come in without objection. It was a mistake

was harmful and Counsel admitted it made the State's case stronger. (Vol II, W.H.R.R. pgg 43-44) The Court of Criminal Appeals also cited Petitioner's argument that the evidence probably led the jury to believe that they had to find that the police had acted unlawfully to acquit him when that was not the case. That Court addressed this argument as if it was the only basis for finding the evidence was prejudicial and held that such an improper conclusion by the jury was a risk inherent to the defensive theory.

The Court cited Harrington v. Richter 131 S.CT. 770(2011) and Hinton v. Alabama 134 S.CT.1081 (2014) as guiding their application of the Strickland standards. In Richter this Court held that courts may not indulge in post hoc rationalization for counsel's decisionmaking that contradicts the available evidence of counsel's actions and that the inquiry must be to an objective standard of reasonableness--not counsel's subjective state of mind. In Hinton this Court held that the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Having paid lip service, as it were, to the Strickland standard the Court of Criminal Appeals did not review Counsel's performance applying the standard enunciated by this Court in those cases.

As to the finding that the risk of the jury being led to an improper conclusion was inherent to the defensive theory of collusion and cover up, where that risk was inherent hypothetically, the prejudice was inherent in fact, Elam v. State 47 S.W.2d 279(Tex.Crim.App.1932); Lacy v. State 111 S.W.2d 264(Tex.Crim.App. 1937). Just because some possibility exists that the jury could be led to an improper, prejudicial conclusion anyway does not make it reasonable for Counsel to allow the

State to affirmatively lead them, unopposed, to that improper conclusion. Even making the questionable assumption that it was part of a trial strategy, just because it was done in furtherance of a trial strategy, even a good strategy, does not make it competent by the prevailing professional norms at the time of trial. As in Hinton where counsel's actions were unquestionably in furtherance of sound trial strategy, they still fell below the threshold of competent representation. Here, it was not competent representation for trial counsel to allow the State to present inadmissible, prejudicial evidence bearing on the central issue at trial and both strengthening the State's case and undermining the defense without objection and without making any effort to cast the evidence in a light favorable to or supporting the defensive theory (as would seem to be pro forma if it was actually part of Counsel's strategy at the time of trial).

Contrary to this Court's decision in Richter, the Court of Criminal Appeals indulged in post hoc rationalization of Counsel's decision-making that was contrary to the available evidence of his actions. And contrary to this Court's decision in Hinton, the Court of Criminal Appeals did not weigh Counsel's performance against prevailing professional norms at the time of trial where its analysis halted at making the factually unsupported and unreasonable decision that his actions furthered the defensive strategy. Thus, the Strickland standard was not applied to this claim.

#### B. FAILING TO OBJECT TO ARGUMENT

The Prosecutor argued without objection that she drove a four cyl-

inder car and that there is no way a four cylinder car could have ended up in the bushes unless the engine had been revved. Trial Counsel testified at the Writ Hearing that he didn't think it was necessary to object to the argument (that he knew to be improper [Vol II, W.H.R.R. pg.55]) because he had presented the black box evidence from the car that didn't show any acceleration or impact (Vol II W.H.R.R. pg.7). The Court of Criminal Appeals did not articulate any analysis but, while acknowledging the argument was outside the record, described it as "innocuous" and dispensed with the claim at that.

The Prosecutor's unsworn testimony injected facts outside the record and prejudicial to the accused. Under Texas law that is reversible error, Thompson v. State 89 S.W.3d 843(Tex.App.--Houston[1st Dist.] 2002); Washington v. State 16 S.W.3d 70(Tex.App.--Houston [1st Dist.] 2000). Counsel's stated reason for not objecting is patently unreasonable when examined in the context of the trial. That the Prosecutor felt the need to rebut the black box testimony and go to such lengths to do so is indicative of the effectiveness of that testimony. It was compelling evidence that seriously undermined the State's assertion that Petitioner tried to run over the officers. Far from being "innocuous" the Prosecutor's unsworn testimony undercut the defense on the primary question of the prosecution. The black box testimony was the very reason the unsworn testimony was so objectionable and prejudicial. That issue was the crux of the prosecution and was hotly contested. Counsel's failure to object allowed the Prosecutor (whose opinions and knowledge the courts have long recognized as being subject to undue deference by juries) to offer

unsworn testimony of facts in her particular knowledge in rebuttal to a key piece of evidence for the defense. And to do so in a manner that circumvented Petitioner's Constitutional rights to due process and confrontation under the 14th and 6th Amendments, see Thompson citing Darden v. Wainwright 106 S.C.T. 2464(1986). To hold that Counsel's failure to safeguard these substantial rights was not deficient was to obviate the requirement for counsel altogether. What is counsel for if not to protect defendants from just such encroachments by the State?

It is apparent that whatever standard of analysis the Court of Criminal Appeals applied to this claim, it was not the objective standard of reasonableness considering all the circumstances required by this Court's decisions in Strickland, Richter and Hinton.

#### C. OPENING THE DOOR TO THE GUN TESTIMONY

The Court of Criminal Appeals found that Counsel's performance was "arguably deficient" on three points, one of which was failing to object to testimony that the guns found in the car Petitioner was driving had been reported stolen.

Petitioner claimed that Trial Counsel opened the door to excluded testimony concerning the guns found in the car. The Court of Criminal Appeals agreed with the State's argument that the testimony was admissible to show Petitioner's motive and held the trial Court would not have abused its discretion in admitting the evidence on that basis. That holding does not address itself to the issue Petitioner raised and does not apply the Strickland standard of review to Coun-

sel's performance. The Court went on to hold, however, that Counsel could have objected to the unresponsive testimony that the guns were stolen, which also was not the issue raised by Petitioner.

The evidence of guns was highly prejudicial to the defense. Counsel recognized this and filed a motion in limine to keep this evidence out. The trial Court recognized this, granted the motion and admonished the witness (Hamby) not to mention anything about the guns. The evidence of guns was not coming in, whether it was arguably admissible or not -- until Counsel opened the door. Even after he had opened the door he argued that he hadn't, trying to keep the evidence out. He knew it was not a good thing for the defense.

The Court of Criminal Appeals ignored this context and failed to apply the standard of review established in Strickland and reaffirmed by Richter and Hinton. They again indulged in post hoc rationalization for Counsel's performance that was contrary to the available evidence of his actions and failed to weigh his performance against an objective standard of reasonableness considering all of the circumstances.

If the evidence was admissible, then Counsel had procured a boon to the defense in having it excluded. His testimony at the Writ Hearing that he felt it bolstered the defense theory was a self serving hindsight assessment and, as the Court of Criminal Appeals has said, is irrelevant. And if he actually believed that, it is further evidence of his incompetence. His argument to the jury that it was only presented to portray the defendant as a bad guy was, at best, a feeble attempt to mitigate a colossal blunder. And was more likely

to have underscored that very assertion -- that the defendant was a bad guy -- in the jury's estimation.

Counsel on cross asked Hamby if he was aware whether or not a weapon was found on Petitioner at the time of arrest. The Prosecutor requested a bench conference at which point Counsel was put on notice of the State's concern about the questioning. The Trial Court warned Counsel he was in dangerous territory. To continue that line of questioning was tactically foolish and risky with little to be gained. The evidence was excluded and any reasonable inference from its absence was favorable to the defense. And once he had elicited an admission that no weapon was found on Petitioner's person, to continue was blatantly inviting disaster, which was prompt in arriving. There was nothing more he could have achieved with that line of questioning other than just what he did. Opening the door to the excluded evidence. If he had not opened it, none of that evidence -- that the guns were found in the car, much less that they were stolen -- would have been admitted.

Applying the Strickland standard requires weighing Counsel's actions against the prevailing professional norms at the time of trial. The highly prejudicial evidence of stolen guns had been excluded and one of the complainants who had shot Petitioner had just admitted that no weapons were found on his person. It is difficult, if not impossible, to imagine a scenario in which competent counsel rendering even minimally competent assistance would tiptoe along the edge of such a precipice in pursuit of such a minor gain only to leap into the abyss upon achieving it. The Court of Criminal Appeals contorted the issue and avoided applying the Strickland standard of review to the claim

that Petitioner actually presented.

## II. THE TEXAS COURT OF CRIMINAL APPEALS APPLIED THE WRONG STANDARD OF REVIEW TO THE PREJUDICE ANALYSIS

### A. DID THE SUPREME COURT'S DECISIONS MODIFY THE OUTCOME-DETERMINATIVE INQUIRY OF STRICKLAND

After enunciating the Strickland standard for review of prejudice the Court of Criminal Appeals cited Hinton in disputing Petitioner's assertion that he was not required to show the trial would have resulted in an acquittal absent Counsel's errors. They cited Hinton as holding that the prejudice question in the context of guilt-phase attorney error "is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt", (quoting Strickland 466 U.S. at 695). They apparently read "reasonable doubt respecting guilt" as limiting their inquiry to whether the defendant would have been acquitted absent the errors. That is not the standard of review required by Strickland. Thus, it appears that the Court of Criminal Appeals holds that Richter and Hinton have modified the Strickland standard of review.

At the outset, the Court's prejudice standard was compromised by the failure to apply the correct standard to the deficient performance inquiry, foreclosing the claims of failure to object to the grand jury testimony, failure to object to improper closing argument and opening the door to excluded evidence from the prejudice analysis.

Such as it was, the Court of Criminal Appeals applied a prejudice

analysis to Counsel's eliciting opinion testimony that it was a rightful shooting, eliciting testimony that it was obvious from what another witness said that the defendant had tried to run over the complainants and failing to object to testimony that the guns found in the car were stolen.

In the first instance, the Court of Criminal Appeals found that Andrea Szabo was harshly cross examined thus, her inadmissible testimony about the rightfulness of the shooting likely carried little weight with the jury. She was an eyewitness to the shooting. Whether her testimony carried great weight or little weight, if it carried any weight at all it contributed to the jury's verdict.

The Court held that the inadmissible hearsay testimony of Victor Gonzales that it was obvious from what Villareal had said that the defendant had tried to run over the complainants added nothing to the evidence since the jury had heard directly from Villareal. But it did add to the evidence. Without the jury being informed that it was nothing but inadmissible hearsay, it added Officer Gozales' (a veteran police investigator) opinion that Villareal's testimony was true and accurate and thus, that the complainant Hamby was telling the truth about what happened.

Addressing the testimony that the guns found in the car were stolen the Court of Criminal Appeals held that this did not introduce an unsavory aspect to the case that was not already apparent from other evidence. The Court's miscasting of the claim and failure to apply the Strickland standard in its analysis of deficient performance completely skewed the prejudice analysis which, in any case, also applied the wrong standard.

That the evidence of the guns came before the jury at all after it had been excluded was the issue. And that certainly added a new and unsavory aspect to the case. It hardly warrants argument that placing a loaded Glock and a nine-millimeter loaded with hollow point bullets in the possession of the defendant, a convicted felon, in the context of this trial introduced a whole new level of unsavory to the case. And that unsavory aspect could only have been compounded by the added testimony that the guns were reported stolen. The State's own arguments speak to the harm and prejudice to the defense from this testimony. Where the defensive theory was that Petitioner was an petty thief who police unjustifiably opened fire on then falsely claimed had tried to run over them to justify the shooting, placing those guns in his possession presents him to the jury as something altogether different-- (as Counsel argued) a bad guy, a highly dangerous criminal with a powerful motive to run down anyone who got in the way of his escape. Failing to apply the Strickland standard completely mutated this issue.

#### B. NO CUMULATIVE EFFECT ANALYSIS

Strickland requires a cumulative effect analysis. 466 U.S. at 693-696. Without application of Strickland's standard to Counsel's performance it is impossible to arrive at an accurate assessment of prejudice. Without weighing Counsel's actions against a proper standard, individual errors can escape detection or identification and thus consideration in a prejudice analysis. In the analysis of the errors it did review it applied the wrong standard requiring Peti-

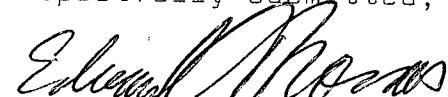
tioner to show that absent the errors the jury would have acquitted him. And there is no articulation or even mention of a cumulative effect inquiry. The nearest approach the Court made to such an assessment was to identify individual instances deemed to be competent representation and find this demonstrated "active and capable advocacy." That does not constitute a cumulative error analysis. Again, without subjecting Counsel's actions to an analysis applying the Strickland standards, a pattern of ineffective assistance escapes review, see Goodman.

It is incumbent on the United States Supreme Court to enforce the compliance with its decisions on the inferior courts. Where the court of last resort for the State, The Texas Court of Criminal Appeals so clearly departed from the dictates of the Supreme Court and, in part, cited the Supreme Court's own decisions as the basis for that departure it is the responsibility of the Supreme Court to say what the law is.

#### CONCLUSION

For the reasons stated, a Writ of Certiorari should issue to review the judgement and opinion of the Texas Court of Criminal Appeals.

Respectfully Submitted,



Edward Louis Thomas  
Petitioner, Pro Se