CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

EDWARD LOUIS THOMAS, PETITIONER

V.

LORIE DAVIS, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE TEXAS COURT OF CRIMINAL APPEALS

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APPENDIX A

OPINION OF THE TEXAS COURT OF CRIMINAL APPEALS

# IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-86,364-01 AND WR-86,364-02

EX PARTE EDWARD LOUIS THOMAS, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS FROM HARRIS COUNTY

KEEL, J., delivered the opinion of the Court in which KELLER, P.J., and KEASLER, HERVEY, RICHARDSON, YEARY, NEWELL, and WALKER, JJ., joined. ALCALA, J., concurred.

## OPINION

A jury found Applicant guilty of two counts of aggravated assault against a public servant, and the trial judge sentenced him to concurrent terms of 40 and 35 years' imprisonment. His convictions were affirmed on appeal. *Thomas v. State*, Nos. 14-09-00592-CR & 14-09-00593-CR, 2010 Tex. App. LEXIS 6207 (Tex. App. Houston [14th Dist.] August 3, 2010, pet. ref'd) (mem. op., not designated for publication). The habeas judge, who did not preside over the trial, recommended that relief be denied. We agree

APPENIX A

and deny relief.

**Background**

According to the State's evidence, Houston Police Department detectives Tim Butler and Michael Hamby, who were dressed in plainclothes, took a lunch break at the Asian City restaurant in Humble. Returning to their unmarked car they found Applicant in their driver's seat with the door open and another car backed into the space next to theirs. The drivers' doors of the cars were next to one another, and the second car's engine was idling.

The officers drew their weapons, verbally identified themselves as police officers and ordered Applicant to get out of the car and on the ground. He instead slid into the car next to theirs, revved its engine and lurched forward, clipping Hamby's right leg; then he veered left toward Butler, throwing him onto the hood of his car. Butler fired at Applicant through the front windshield and fell off the car. Applicant then drove toward Hamby who fired at Applicant until the car drove over a curb and stopped in the bushes. Applicant got out of the car and dropped to a knee as the officers continued ordering him to the ground. He stood up, asked for an ambulance and reached under his shirt, prompting Butler to shoot at him several more times.

The defense theory was that Hamby and Butler shot Applicant out of anger for burglarizing their car, and they concocted the story that he tried to run over them in order to justify shooting him. Part of the trial strategy was to show a conspiracy between the

Houston and Humble police departments. The defense relied on, among other things, physical evidence, 911 call records, and the scene video to contradict the officers' version of events and support the defense theory.

**Ineffective Assistance of Counsel: Standard of Review**

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that his defense was prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Deficient performance means "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* A reviewing court must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance. *Id.* at 689. "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 131 S.Ct. 770, 788 (2011) (citing *Strickland*, 466 U.S. at 690). That evaluation "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Richter*, 131 S.Ct. at 790. It depends on the totality of counsel's representation and the facts of the particular case at the time of the trial, not hindsight. *Ex parte Martinez*, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011) (citing *Strickland*, 466 U.S. at 690).

To demonstrate prejudice from an attorney's deficient performance, the defendant

must show a reasonable probability that the jury's decision would have been different absent counsel's errors. *Strickland*, 466 U.S. at 694. In the context of guilt-phase errors, that means "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" and requires a review of the totality of the evidence. *Id.* at 694-95. "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 131 S.Ct. at 792.

Applicant argues that *Strickland*'s prejudice standard does not require a reasonable probability that, but for counsel's errors, the defendant would have been acquitted. He claims that "the issue is whether he received a fair trial that produced a verdict worthy of confidence." The "worthy of confidence" language, however, informs the "reasonable probability" aspect of the prejudice inquiry, not the "different result" question. *See, e.g.*, *Hinton v. Alabama*, 571 U.S. 263, ___, 134 S.Ct. 1081, 1089 (2014) (per curiam) (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).

As detailed below, although the attorney made some mistakes, his deficiencies did not prejudice the trial's outcome, and Applicant's ineffective assistance claim fails *Strickland*'s two-prong test. *Strickland*.

**Deficient Performance Allegations**

Applicant claims his attorney was deficient in the guilt phase by: failing to object to, opening the door to or eliciting certain testimony, and failing to object to closing argument that was outside the record.

**1. Failure to Object to Testimony**

Applicant cites four instances in which his attorney failed to object to testimony: (a) Butler's opinion that Applicant knew that he and Hamby were police officers; (b) crime scene officer Domingo Villarreal's opinion that Hamby's prints on the hood of Applicant's car showed he was "getting out of the way, as he said he did"; (c) testimony that a grand jury no-billed and internal affairs cleared Butler and Hamby; and (d) testimony that neither Butler nor Hamby had previously fired his weapon in the line of duty.

In order to prevail on these claims, Applicant must show that the trial judge would have erred in overruling objections to the evidence. *Ex parte White*, 160 S.W.3d 46, 53 (Tex. Crim. App. 2004); *Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996). A trial court's decision about admitting evidence is reviewed for an abuse of discretion and will constitute error only if the decision lies outside the zone of reasonable disagreement. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010).

a. Butler's opinion

Applicant claims that his attorney was deficient for failing to object to Butler's testimony that Applicant knew that he and Hamby were police officers based on the

things in their car, i.e., floor-mounted police radio, "Sam Brown" bearing asp baton and can of mace, and bag of police gear containing handcuffs, holsters, magazines and hand-held radio. The officers had left these items under a jacket on the floor of the backseat before lunch but afterward found them on the front passenger seat.

Applicant cites two cases to support his argument that Butler's opinion was inadmissible. They are *Witty v. State*, 203 S.W.2d 212, 220 (Tex. Crim. App. 1947) (commission op.) (witness's opinion generally inadmissible to interpret meaning of another's acts, conduct or language), and *Frank v. State*, 49 S.W2d 759, 760 (Tex. Crim. App. 1932) (police officer should have testified to what suspect said or did instead of concluding that he faked an injury). Notwithstanding these authorities, a fact witness's opinion testimony is admissible if it is (a) rationally based on his perception and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue. TEX. R. EVID. 701; *Osbourn v. State*, 92 S.W.3d 531, 535 (Tex. Crim. App. 2002).

Butler's opinion was rationally based on his perceptions about the car's contents, and it was helpful to a determination of Applicant's state of mind, a disputed issue in the case. The trial court would not have erred in overruling an objection to this testimony, and the defense attorney was not deficient for failing to object to it.

b. Villarreal's opinion

Domingo Villarreal, a crime scene officer for the Humble Police Department, testified about identifying Hamby's print on the hood of Applicant's car:

> Officer Hamby put his left hand on that front of that car, with movement, and at that point getting out of the way, as he said he did, to be able to leave me that impression on there and identify that it was his.

Applicant characterizes this testimony as an inadmissible opinion that Hamby was telling the truth. In support of his argument he cites *Schutz v. State*, a case of aggravated sexual assault of a child in which this Court held that expert testimony that "constitutes 'a direct opinion on the truthfulness' of a child complainant's allegations" does not assist the jury, and is inadmissible. 957 S.W.2d 52, 59 (Tex. Crim. App. 1997). Applicant also relies on *In re G.M.P.*, 909 S.W.2d 198, 205-06 (Tex. App. — Houston [14th Dist.] 1995, no writ), and *Black v. State*, 634 S.W.2d 356, 357-58 (Tex. App. — Dallas 1982, no pet.), which held that a witness's belief that the complainant was telling the truth about sexual assault allegations was inadmissible.

Unlike the witnesses in the cases that Applicant cites, Villarreal did not offer a direct opinion about Hamby's truthfulness; he testified about his observations of the physical evidence. His testimony that the prints showed that Hamby got out of the way "as he said he did" was a shorthand rendition of the significance of the physical evidence. The trial court would not have erred in overruling an objection to this testimony, and the attorney's failure to object was not deficient performance.

c. Grand jury and internal affairs actions

Hamby, Butler and Keith Webb, an investigator for the district attorney's office, testified that the two officers were no-billed by a grand jury. Hamby also testified that

they were cleared in an internal affairs investigation.

Applicant claims that the testimony about the no-bills was irrelevant because the same DA's office that presented the cases to the grand jury also prosecuted Applicant, a situation that he deems a conflict of interest. To the extent that there was a conflict of interest, it would not render the evidence irrelevant.

Applicant points out the attorney's habeas hearing testimony that, in hindsight, he thought the evidence was inadmissible. But an attorney's subjective opinion and hindsight evaluation of his trial performance are irrelevant to an appellate review of an IAC claim. *Richter*, 131 S.Ct. at 790. Applicant further argues that this evidence was prejudicial because it likely led the jury to believe that an acquittal depended on finding that the complainants acted unlawfully. But that risk was inherent to a defensive strategy centered on persuading the jury that the shooting was unjustified, and Applicant does not claim that strategy was unreasonable.

While the State argues that the decision not to object to this testimony supported the over-arching defensive theory of collusion and cover-up, Applicant asserts that no competent lawyer would try to persuade a jury that a grand jury was involved in covering up a bad police shooting. We are skeptical of this bare assertion.[1] We agree with the

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[1] *See, e.g., Missouri police prepare for riots as they await grand jury decision over whether to charge officer Darren Wilson in the shooting death of Michael Brown*, DAILY MAIL (24 Oct. 2014, 9:52 EDT), http://www.dailymail.co.uk/news/article-2806561; Twila Decker, *Violence Returns To St. Pete Streets: Gunfire Wounded Two Police Officers After A Grand Jury Cleared Another Officer In The Killing Of A Black Motorist*, ORLANDO SENTINEL (Nov. 14, 1996), http://articles.orlandosentinel.com/1996-11-14/news/9611140167_1_police-officer-grand-

State that this testimony supported the defensive strategy, and we will not second-guess the attorney's decision not to object to it. *See Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009).

d. Hamby and Butler had never before fired their guns in the line of duty

Applicant argues that this evidence was inadmissible for three reasons. First he claims it was irrelevant. But the trial court would not have erred in finding it relevant to show that the complainants were in fear of injury when the car came at them, a fact issue under the indictment. Applicant next asserts that this testimony was inadmissible bolstering. Since it had relevance apart from any tendency to suggest the complainants were credible, however, it was not bolstering. *Cohn v. State*, 849 S.W.2d 817, 819-20 (Tex. Crim. App. 1993). Lastly he points out that if the officers had previously fired their weapons on the job, such testimony would have been inadmissible under Rule of Evidence 608(b). That rule prohibits the introduction of "extrinsic evidence to prove specific instances of the witness's conduct in order to attack or support the witness's character for truthfulness." The fact that Hamby and Butler had never before fired their guns in the line of duty is not extrinsic evidence of specific instances of their conduct that

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jury-riot; J. David Goodman and Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html; Allie Gross, *California Becomes First State to Ban Grand Juries in Police Shooting Cases*, MOTHER JONES (Aug. 13, 2015, 10:00AM), https://www.motherjones.com/politics/2015/08/california-becomes-first-state-ban-grand-juries-police-shooting-cases/.

support or attack their character for truthfulness. Thus, Rule 608(b) is inapplicable.

Applicant has not shown that the trial court would have erred in overruling an objection to this testimony, so he has not demonstrated that his attorney acted deficiently in failing to object to it.

**2. Elicitation of Opinion Testimony**

Applicant complains about his attorney's elicitation of testimony from (a) Andrea Szabo that she thought this was a "rightful shooting," (b) detective Victor Gonzales that he "talked to Villarreal, and the evidence he obtained from the hood of the vehicle, it's pretty obvious" that Applicant tried to run over the complainants and (c) Hamby that he had no doubt that Applicant knew that he was a police officer though he was not in uniform.

a. Szabo

Szabo testified on direct that she and her mother, Billie Stubblefield, were pulling into the parking lot of Asian City when Szabo saw two officers facing a vehicle with their weapons drawn. The car went toward one officer. It seemed to her that the officers were in danger from the car. Szabo put some distance between her own car and "everything" that was going on in the Asian City parking lot, heard gunfire and saw the car go into the bushes. She saw one officer on a cell phone and the other pointing his gun at a man on the ground. The officer with the gun was telling the man not to move, but the man kept getting up, and there was more gunfire.

On cross-examination the defense attorney impeached her with prior inconsistent statements and established that she:

– did not immediately know that the two men with guns were police officers;

– told defense investigator Rudy Vargas that she heard a gunshot before she saw a gunshot;

– did not know the circumstances surrounding the first gunshot;

– did not remember while testifying whether she heard or saw gunfire first;

– did hear a gunshot before she saw a gunshot;

– is friendly with police officers; and

– never saw Applicant on his knees.

The attorney also asked her if she thought it was a rightful shooting, and she answered yes.

The State points out that the attorney asked for Szabo's opinion only after impeaching her and argues that this context suggests that the attorney was executing a trial strategy in asking her opinion about the shooting. But the State does not identify the strategy the attorney was supposedly carrying out at that point, and though the cross-examination damaged Szabo's credibility, her opinion still undermined the defensive theory that the shooting was unjustified. The attorney erred to elicit the opinion, but as detailed below, the ineffective assistance claim still fails for lack of prejudice.

b. Hamby

On direct examination, Hamby testified that Applicant tried to run over "two

police officers." The defense attorney cross-examined him about whether the jacket he was wearing covered his badge. Hamby insisted the badge was visible in spite of the jacket but conceded that a uniformed officer's badge "would stand out a little better[.]" The attorney then asked, "And there's no doubt in your mind that the defendant knew you were a police officer, even though you were wearing that jacket, which was a Marine Corps jacket?" Hamby answered, "No doubt in my mind."

Applicant argues that Hamby's opinion about his state of mind was inadmissible, and he points out that the attorney conceded as much at the habeas hearing. But Hamby's opinion was admissible for the same reasons that Butler's was: It was rationally based on his perception and helpful to determining a fact in issue. TEX. R. EVID. 701. The trial court would not have erred in overruling an objection to it, and the attorney's elicitation of it will not support a claim of ineffective assistance of counsel.

c. Gonzales

The defense called as a witness Victor Gonzales, a Humble Police Department detective, and asked him whether a video camera across the street captured "what happened at the Asian City." Gonzales answered non-responsively,

> The only thing the video contained was when myself and Detective Miller made the approach to the location, and it just captures an overall but it didn't capture any of the shooting or when your client attempted to run over the officers.

Instead of objecting, however, the attorney asked Gonzales how he knew that Applicant tried to run over the officers, and Gonzales answered, "I talked to Detective Villarreal,

and the evidence that he obtained from the hood of the vehicle, it's pretty obvious." Gonzales's answer was objectionable because he lacked personal knowledge. Assuming that counsel should have objected, we address prejudice later in this opinion.

**3. Opening the Door to Evidence of Guns in Applicant's Car and Failing to Object to Testimony that the Guns Were Stolen**

The attorney asked Hamby if Applicant had a weapon on him when he was arrested. Hamby answered, "Not on his person." The attorney then asked, "No weapons, right?" The prosecution argued that this question opened the door to testimony that there were guns in Applicant's car. The trial court agreed, reasoning that it left "a false impression with the jury that this man was completely unarmed[.]" Consequently, Officer Villarreal testified that he found a loaded Glock hidden behind the glove compartment, a loaded magazine under the armrest and a loaded nine-millimeter pistol hidden in the car. He added, without defense objection, that the guns were reported stolen from a car burglarized five days earlier.

Applicant claims that his attorney had no sound strategic reason to ask Hamby about Applicant's lack of a weapon on his person because in the absence of such testimony, "the jury would assume that he was unarmed[.]" But the lack of weapons on Applicant's person supported the defensive theory that the shooting was unjustified, and that question did not, in the trial court's judgment, open the door to the evidence about the guns in the car. The further question, however, "No guns, right?" did. Since the salient point had already been made about the lack of guns on Applicant's person, the additional

question was unnecessary.

The State argues that the testimony about guns in Applicant's car was admissible to show Applicant's motive: He was a convicted felon who would have been subject to prosecution for felon in possession of a firearm, and this explained his desperate effort to flee the scene of the burglary. We agree that the trial court would not have abused its discretion in admitting the evidence of the guns on that basis. As for the stolen nature of the guns, however, counsel could have objected to the non-responsive testimony. Assuming that his failure to do so was deficient performance, we address prejudice later in this opinion.

**4. Failure to Object to Argument Outside the Record**

The prosecutor argued in closing that Applicant's car could not have gotten over the curb while idling:

> It's just not going to happen. I also drive a four cylinder car and I'm telling you, not going to happen. Your common sense tells you that engine was revved and that's how it had enough momentum to end up in those bushes.

Trial counsel testified at the habeas hearing that he did not think it was necessary to object to this argument because he had presented the car's black box evidence which did not show any acceleration or impact. His failure to object to this innocuous outside-the-record remark was not deficient performance.

**Prejudice Evaluation**

The trial attorney arguably performed deficiently in three ways: eliciting Szabo's

opinion that this was a rightful shooting, eliciting Gonzales' testimony that it was obvious from what Villarreal said that Applicant had tried to run over the complainants, and failing to object to testimony that the guns in the car were stolen. Assessing these errors in light of the entire record, we cannot say that there is a reasonable probability that in their absence, the jury would have acquitted Applicant.

Szabo suffered a harsh cross examination; her opinion about the rightfulness of the shooting likely carried little weight with the jury. Gonzales' testimony based on what Villarreal said added nothing new to the evidence; the jury heard from Villarreal directly. As for the testimony that the guns in Applicant's car were reported stolen, it did not introduce an unsavory aspect to the case that was not already apparent from other, unobjectionable evidence.[2]

The attorney made mistakes, but error-free counsel is not required. *Frangias v. State*, 450 S.W.3d 125, 136 (Tex. Crim. App. 2013). Furthermore, "it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Richter*, 131 S.Ct. at 791. The attorney's overall performance in this case demonstrated such advocacy in the presentation of evidence[3] and his closing

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[2] Before he burglarized the officers' car, Applicant burglarized another car in the same parking lot. The owner of that car found its window smashed open and her briefcase in the car that "was stopped in front of the restaurant halfway in some bushes, like it had ran up the curb[.]" Applicant's car also contained an assortment of tools, each of which had a broken or bent tip "which is consistent with it being used as a tool to pry an item[.]"

[3] The defense attorney developed the following evidence: eyewitness Yong Mavis' 911 call asking why they shot Applicant; Szabo's bias and inconsistencies; Stubblefield's failure to see Applicant's car move; the failure of Hamby's 911 call to capture the complainants' demands

argument.[4]

## CONCLUSION

Viewing the totality of the record, we cannot say that counsel's errors were so serious that he was not functioning as the counsel guaranteed by the Constitution or that there is a reasonable probability that Applicant would have been acquitted in their absence. *Strickland*, 466 U.S. at 687. Applicant fails to meet both prongs of *Strickland*.[5] Relief is denied.

Delivered: June 20, 2018

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that Applicant get on the ground; the DA investigator's opinions that the shooter was standing in front of the vehicle instead of lying on its hood when he fired; Butler's ability to walk on-scene in spite of his claim that he had just been hit by a car; the on-scene statement by an unidentified officer that "he" shot Applicant's "ass while he was laying on the ground."

[4] The attorney emphasized his theory of the case, "Corruption, conspiracy, cover-up, it's like an equation. That equals reasonable doubt." Based on the scene video he argued that the hand print on the hood of the car was placed there after the fact, Butler was not actually injured because he was "walking around with no limp," and the police were "out there trying to figure out what they going to say about this guy shooting this guy while he was laying face down on the concrete." He reminded the jury of the bullet trajectories and suggested "that Butler walked up to that car and started shooting. [Applicant] wasn't getting out of there alive."

[5] Applicant's brief offers editorial comment about the trial attorney and speculates about why the habeas judge signed the findings she did. This commentary and speculation shed no light on the validity of his IAC claims. Consequently, we do not consider them.

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APPENDIX B

FINDINGS OF FACT AND CONCLUSIONS OF LAW, 176TH Dist. Court

CAUSE NO. 1101865-A

| | | |
|---|---|---|
| EX PARTE | § | IN THE 176TH DISTRICT COURT |
| | § | OF |
| EDWARD LOUIS THOMAS,<br>Applicant | § | HARRIS COUNTY, T E X A S |

**FINDINGS OF FACT,**
**CONCLUSIONS OF LAW AND ORDER**

The Court has considered the application for writ of habeas corpus, the State's Original Answer, the affidavit of Kendric Ceaser, the evidentiary hearing testimony in the instant proceeding, the appellate and habeas records in the above-captioned cause. The Court finds that there are no controverted, previously unresolved facts material to the legality of the applicant's confinement, and recommends that the relief requested be denied for the following reasons:

**FINDINGS OF FACT**

**Procedural History**

1. The applicant, Edward Louis Thomas, was charged by indictment with the felony offense of aggravated assault of a public servant, enhanced with one prior conviction, in cause number 1101865 in the 176th District Court of Harris County, Texas (the primary case).

2. The applicant was also charged by indictment with the felony offense of aggravated assault of a public servant, enhanced with one prior conviction, in cause number 1101866 in the 176th District Court of Harris County, Texas (the companion case).

3. On June 29, 2009, the applicant was convicted by a jury in the primary case and the companion case and sentenced to forty (40) and thirty-five (35) years confinement in the Texas Department of Criminal Justice - Institutional Division, respectively.

4. On August 3, 2010, the applicant's conviction was affirmed by the Fourteenth Court of Appeals. *Thomas v. State*, 14-09-00592-CR, 2010 WL 2998780 (Tex. App. – Houston [14th Dist.] 2010, pet. ref'd).

5. The applicant was represented at trial in the primary case by counsel Kendric Ceaser.

6. The Court finds that Kendric Ceaser provided an affidavit in the instant habeas proceeding, that the affidavit is credible and that the facts asserted therein are true. *See State's Writ*

APPENDIX B

7. On August 14, 2015, trial counsel testified in the writ evidentiary hearing regarding the primary and companion cases.[1]

**The Primary Offense**

8. The State presented evidence in the guilt/innocence phase of trial that on January 26, 2007, the complainants, Houston police officers Tim Butler and Michael Hamby, observed the applicant inside of the complainants' parked vehicle; that the complainants identified themselves as police officers and ordered the applicant out of the vehicle; that the applicant then got in his vehicle and proceeded to drive the vehicle toward the complainants; that the applicant struck both complainants with his vehicle; that the complainants fired their weapons at the applicant; that after exiting his vehicle, the applicant refused to comply with the complainants' instructions to stay on the ground with his hands visible; and that the offense was investigated by the Humble police department. (IV R.R. at 73, 75, 77, 125-126, 154-165; V R.R. at 122; VI R.R. at 102, 105-6, 110, 112).

**Grounds for Relief**

9. On March 24, 2015, the applicant, represented by habeas counsel Randy Schaffer, filed the instant petition alleging that trial counsel was ineffective at trial in the following areas: 1) eliciting and failing to object to inadmissible, prejudicial testimony that bolstered the officer's credibility while denigrating the applicant including: (a) the applicant knew the complainants were police officers; (b) the investigating officers believed the complainants were being truthful; (c) the grand jury that reviewed the officers' shooting of the applicant did not indict the officers; (d) the officers' shooting was cleared in an internal affairs investigation; (e) the officers had not previously discharged their weapons in the line of duty; (f) stolen guns were hidden in the applicant's vehicle; 2) failing to object to the State's improper argument outside the record; and 3) failing to determine the applicant's desire to elect court punishment prior to jury selection.

**Trial Strategy**

10. According to the credible testimony of trial counsel, he believed there was a "massive cover up" in the primary case, and he did not believe the applicant tried to run over the complainants. II W.H. at 28.

11. Trial counsel testified at the writ evidentiary hearing that he adopted a strategy that suggested the police investigating the offense conspired with the complainants to cover up

[1] "W.H." denotes the court reporter's record from the post-conviction writ hearing.

any wrongdoing by the complainants in shooting the applicant. II W.H. at 28, 45.

12. Trial counsel testified that in support of this strategy, he sought to raise questions as to the motives of the complainants. II W.H. at 58.

13. Trial counsel testified that in support of this strategy, he sought to highlight inconsistent witness testimony, such as State's witness Andrea Szabo statements regarding whether she saw the applicant's vehicle in motion. II W.H. at 59.

14. Trial counsel testified that in support of this strategy, he sought to portray his client as a victim of police overreach. II W.H. at 59.

15. At trial, State's witness Yong Sim Mavis testified during cross examination by trial counsel that she served the two complainants at the restaurant where the offense occurred "all the time." IV R.R. at 25.

16. Mavis testified during cross examination by trial counsel that the applicant was on the ground prior to being shot. IV R.R. at 29-30.

17. Mavis testified during cross examination by trial counsel that she did not write her own statement because of her lack of familiarity with English. IV R.R. at 39.

18. During his cross examination of Mavis, trial counsel brought out Mavis' question to the 911 operator: "Why they shoot him?" IV R.R. at 32.

19. At trial, State's witness Andrea Szabo testified during cross examination by trial counsel that she was friends with the Humble chief of police and that the chief offered to drive her to the courthouse to testify at trial. IV R.R. at 90.

20. Szabo testified during cross examination by trial counsel that she did not report seeing the applicant's vehicle moving in her first statement to police. IV R.R. at 96.

21. In closing argument, trial counsel suggested the crime scene video in evidence showed that Officer Tim Butler did not appear to be injured following the incident. VII R.R. at 229.

22. In closing argument, trial counsel noted that the Officer Butler testified that photos of his injuries "didn't come out." VII R.R. at 251.

23. In closing argument, trial counsel noted that the crime scene video shows Officer Butler appeared angry and was walking around holding his sidearm following the incident. VII R.R. at 231-2.

24. In closing argument, trial counsel questioned the lack of data on the black box data recorder in the applicant's vehicle, which he argued should have recorded any impact to the vehicle. VII R.R. at 236.

25. According to his testimony, the decisions trial counsel made regarding evidence, direct examination, cross examination and objections were calculated to support his theory of the case. II W.H. at 69.

26. The Court finds based on a review of the appellate and habeas records, that trial counsel's decisions regarding evidence, direct examination, cross examination and objections were based on the reasonable trial strategy suggesting police conspiracy and cover-up.

**Testimony Regarding Applicant's Knowledge that the Complainants were Police**

27. Several civilian witnesses testified at trial that the complainants were identifiable as police officers at the time of the offense. IV R.R. at 75,125, 156.

28. State's witness Andrea Szabo testified on direct examination that the complainants were identifiable as police officers through a visible badge and police jacket. IV R.R. at 75.

29. State's witness Billie Stubblefield testified on direct examination that one of the complainants had a badge around his neck that was "rather large, you couldn't miss it." IV R.R. at 125.

30. State's witness Billie Stubblefield testified on direct examination that one of the complainants "had a jacket that said 'police' on it." IV R.R. at 125.

31. Complainant Michael Hamby testified that the officers verbally identified themselves as police to the applicant. IV R.R. at 156.

32. The Court finds that, because the applicant's knowledge that the complainants were police officers was a reasonable inference from the credible testimony of the other witnesses at trial, the applicant cannot show that had the objection been sustained and the evidence excluded that the result of the trail would have been different.

**Testimony Regarding Investigators Finding the Complainants Credible**

33. Testimony from witnesses Andrea Szabo and Billie Stubblefield corroborated the complainants' account of the offense. IV R.R. at 73, 77, 126.

34. State's witness Andrea Szabo testified that the applicant was ordered to lie down and not move, and that the applicant continued to move, and appeared to attempt to get up off the ground. IV R.R. at 73, 77.

35. State's witness Billie Stubblefield testified that the complainants continually instructed the applicant to get down and stay down. IV R.R. at 126.

36. The Court finds that the jury could have found the complainants' testimony credible given the consistent witness accounts.

37. The Court finds that, because trial counsel pursued a strategy that the Humble police were covering for the Houston police officers, trial counsel's failure to object to the testimony suggesting that the investigators found the complainants credible was consistent with that strategy.

**Testimony Regarding the Grand Jury and Internal Affairs Investigation**

38. In jury argument, trial counsel suggested that the case against the applicant was characterized by "corruption, conspiracy and cover up." VII R.R. at 224.

39. According to his testimony at the evidentiary hearing, trial counsel did not believe that testimony regarding the internal affairs investigation would harm his client because of his theory of a police cover up. II W.H. at 42.

40. According to his testimony, trial counsel believed that the lack of indictment and the results of the internal affairs investigation were consistent with and could even "bolster" the defensive theory of a police cover up. II W.H. at 45.

41. According to his testimony, trial counsel believed that evidence that the complainants were not indicted "would be inconsequential to the jury because they would see other inconsistencies" in the State's case. II W.H. at 64.

42. The Court finds that the applicant fails to demonstrate that he was prejudiced by trial counsel's lack of objection to testimony regarding the lack of grand jury indictment and internal affairs investigation, because the evidence was consistent with his reasonable trial strategy..

**Testimony Regarding the Complainants having not Previously Fired Weapons**

43. Both complainants testified that they had not previously discharged their weapons in the line of duty. V R.R. at 16; VII R.R. at 21.

44. According to his testimony, trial counsel suggested the use of objections can be strategic, noting that continually objecting may disrupt the flow of trial and be perceived negatively by a jury. II W.H. at 66.

45. The Court finds that the applicant fails to demonstrate that he was prejudiced by trial counsel's lack of objection to testimony regarding the complainants' history of discharging their weapons in the line of duty.

**Testimony Regarding the Recovery of Stolen Firearms in the Applicant's Vehicle**

46. Officer Michael Hamby testified during direct examination that he saw the applicant reaching under his shirt. V R.R. at 15.

47. During cross-examination, trial counsel asked complainant Michael Hamby if the applicant had a gun on his person, and the State and trial counsel approached the trial court and discussed whether trial counsel's line of questioning opened the door to testimony regarding stolen firearms recovered in the applicant's vehicle. V R.R. at 110.

48. The trial court instructed the State to advise Officer Hamby that he was not to discuss the subsequent recovery of the firearms from the vehicle. V R.R. at 110.

49. Trial counsel asked Officer Hamby whether any weapons had been recovered on the applicant's person, and Officer Hamby responded, "No sir, not on his person." V R.R. at 110.

50. According to his testimony, trial counsel believed the testimony regarding the lack of gun on the applicant's person was important to undermine the allegation that the applicant was reaching for a gun. II W.H. at 51.

51. The trial court ruled that trial counsel opened the door to the recovery of the stolen guns during his questioning of Officer Hamby. V R.R. at 111.

52. Trial counsel questioned State's witness Domingo Villarreal about not recovering a gun from the vehicle for several days after it had been towed from the scene. VI R.R. at 74.

53. According to his testimony, trial counsel believed that the delay in recovering the guns from the applicant's vehicle underscored the theory of a police cover up and possibility that guns were planted. II W.H. at 50.

54. According to his testimony, trial counsel perceived that the jury was receptive to the police corruption argument and that the delay in discovering the guns in the applicant's vehicle bolstered the cover up theory. II W.H. at 52.

55. The Court finds that the testimony regarding the recovery of stolen firearms in the applicant's vehicle was supportive of trial counsel's theory that evidence was planted by the investigators; therefore, the applicant fails to demonstrate that he was prejudiced by this testimony.

**Alleged Improper Argument**

56. During jury argument the prosecutor suggested that the final position of the applicant's car indicated that the vehicle had been revved and mentioned that she too drove a four cylinder car, and stated without objection, "Your common sense tells you that the engine was revved and that's how it had enough momentum to end up in those bushes." VII R.R. at 259.

57. State's witness Andrea Szabo had testified on direct that she had seen the applicant's vehicle "go in motion towards the officer" and "the car was in motion to run over the officer." IV R.R. at 73 and 75.

58. The Court finds that because the prosecutor's complained of argument was not extreme or manifestly improper, the applicant fails to demonstrate that trial counsel's lack of objection to the complained of jury argument was objectively deficient conduct.

**Punishment Election**

59. The Court finds that based on the credible affidavit of Kendric Ceaser, trial counsel discussed trial strategy on numerous occasions with the applicant in person and by phone.

60. According to his credible testimony at the evidentiary hearing, trial counsel discussed every aspect of the case with the applicant, including who the judge was prior to trial. II W.H. at 34.

61. The Court finds that based on trial counsel's testimony and his credible affidavit, the change from jury to court punishment was a strategic move based on the trajectory of the trial, and only after consultation with the applicant. II W.H. at 19.

62. The Court finds the applicant fails to demonstrate that trial counsel's conduct was objectively deficient with respect to changing the punishment election mid-trial, because this decision was made by the applicant based on the events at trial, including the applicant's concern that he did not like the way the jury was looking at him. II W.H. at 31.

63. The Court finds that the applicant fails to demonstrate that trial counsel's representation fell below an objective standard of reasonableness or that with a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002); *Narvaiz v. State*, 840 S.W.2d 415, 434 (Tex. Crim. App. 1992) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

64. The Court finds that the totality of the representation afforded the applicant was sufficient to protect his right to reasonably effective assistance of trial counsel. *Harrington v. Richter*,

131 S. Ct. 770 (2011) (citing *Strickland v. Washington*, 466 U.S. at 690).

65. The Court finds that in all things, the applicant fails to show that his conviction and sentence were improperly obtained.

## CONCLUSIONS OF LAW

1. The applicant fails to show that had trial counsel objected to irrelevant and/or inadmissible evidence, and had the objection been sustained, and the evidence excluded, that the result of the trial would have probably been different. *White v. State*, 160 S.W.3d 46, 54 (Tex.Crim.App.2004).

2. The applicant fails to show he was prejudiced by counsel's failure to object to the State's jury argument; or that the argument was extreme, manifestly improper. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000).

3. The applicant fails to show that when the State's entire jury argument is considered in light of the evidence adduced at trial, that there is a reasonable possibility that the complained of statement regarding the applicant's vehicle contributed to the conviction. *Drew v. State*, 743 S.W. 2d 207, 222 (Tex. Crim. App. 1987).

4. The applicant fails to demonstrate that trial counsel failed to determine the applicant's preference in punishment election.

5. The applicant fails to demonstrate that counsel provided representation that "amounted to incompetence under 'prevailing professional norms.'" *Harrington v. Richter*, 131 S. Ct. 770 (2011) (citing *Strickland v. Washington*, 466 U.S. at 690).

6. In all things, 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.

Additional material from this filing is available in the Clerk's Office.