

No. PD-0474-19

In The
COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

FILED IN
COURT OF CRIMINAL APPEALS

AUG 21 2019

Deana Williamson, Clerk

JAMES RAY PENDERGRAFT

PETITIONER

Vs.

THE STATE OF TEXAS

RESPONDENT

PETITIONER'S PETITION FOR DISCRETIONARY REVIEW

On Appeal From the Twelfth District Court of Appeals in Tyler,
Texas, Under Case No. 12-18-00091-CR, and Originating From the 7th
Judicial District Court in Smith County Under Case No. 007-1264-17

JAMES RAY PENDERGRAFT
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PRO SE LITIGANT

ORAL ARGUMENT REQUESTED IF PERMITTED

IDENTITY OF JUSTICES, JUDGE, PARTIES, AND COUNSEL

Justices:

Penal consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

Twelfth District Court of Appeals
1517 West Front Street
Suite 354
Tyler, Texas 75702

Judge of the 7th District Court of Smith County:

Kerry L. Russell^o
Courthouse, 100 N. Braodway, Ave., Rm 203,
Tyler, Texas 75702

Counsel for the State:

Matt Bingham (At Trial)^o
Criminal District Attorney
Courthouse, 100 N. Broadway, Ave.
Tyler, Texas 75702

Mr. Michael J. West (On Appeal)
Asst. District Attorney
4th floor, Courthouse
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Tyler, Texas 75702

Petitioner:

James Ray Pendergraft
Address Appears on Caption Page.

Counsel for the Petitioner:

James W. Huggler, Jr.^o
100 East Ferguson, Suite 805,
Tyler, Texas 75702

^o Petitioner does not have access to the Appellate Records. Petitioner does not have Counsel's Ander's Brief because it is believed to be lost between his transfer from Gurney Unit to Coffey field Unit. Therefore, Petitioner will assume the trial judge and the Parties are correct.

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STATEMENT REGARDING ORAL ARGUMENT

Because of the ever changing state of case law, Petitioner believes that oral argument will be beneficial and aid this Honorable Court in granting this Petition.

STATEMENT OF THE CASE

Petitioner was charged by indictment with the offense of Aggravated Assault with a Deadly Weapon, a second degree felony, Tex. Penal Code § 22.02(a)(2), (b)(West 2019),^o by intentionally, knowingly, and recklessly causing bodily injury to the victim by striking the victim with a bat, and that the Petitioner used or exhibited a deadly weapon, i.e., a bat. The indictment also included one felony enhancement paragraph. Petitioner plead "not guilty," and the case proceeded to a jury trial. At the conclusion of the trial, the jury found Petitioner guilty as charged in the indictment. At the sentencing phase, Petitioner plead "true" to the enhancement paragraph. Consequently, the trial court found the enhancement paragraph to be "true" and assessed Petitioner's punishment at thirty-five years of imprisonment. The trial court also made an affirmative finding that Petitioner used or exhibited a deadly weapon, i.e., a bat, during the commission of the offense. The Petitioner appealed to the Twelfth District Court of Appeals and affirmed the trial court's judgment.

^o Petitioner cannot provide this Honorable Court with Record Citations because he does not have access to the Appellate Records.

STATEMENT OF THE PROCEDURAL HISTORY

On April 17, 2019, a panel consisting of Worthen, C.J., Hoyle, J., and Neeley, J., the Twelfth District Court of Appeals affirmed the trial court's judgment. See Pendergraft v. State, No. 12-18-00091-CR (Tex. App. --Tyler, April 17, 2019)(unpublished opinion). No motion for rehearing was filed in the Twelfth District Court of Appeals. On May 06, 2019, Petitioner filed his first motion for an extension of time to file his Petition for Discretionary Review (PDR), and a motion to proceed by filing a single copy without penalty. On May 09, 2019, this Honorable Court granted the extension and extended the deadline to Tuesday, July 06, 2019. See Pendergraft v. State, No. PD-0474-19 (Tex.Crim.App. May 09, 2019) (postcard). This Honorable Court also granted Petitioner with the ability to file a single copy without being penalized. Id.

On July 15, 2019, Petitioner filed a second extension of time to file his PDR. On July 24, 2019, this Honorable Court granted an extension of time and extended the deadline to Thursday, August 15, 2019. See Pendergraft v. State, No. PD-0474-19 (Tex.Crim.App. July 24, 2019)(postcard). Petitioner files his PDR timely on or before August 15, 2019. Id.

STATEMENT OF JURISDICTION

While neither controlling nor fully measuring this Honorable Court's discretion, the following should be considered by this Honorable Court in deciding to grant this Petition as explained:

- a. The Twelfth District Court of Appeals has made a decision that conflicts with Ander v. California, 386 U.S. 738, 87 S.Ct. 1396 (1969), and Kelly v. State, 436 S.W.3d 313 (Tex. Crim.App. 2014). See Tex. R. App. Proc. 66.3(a).

- b. There has been a question raised in this Petition that should be, but has not been completely settled by this Honorable Court. Therefore, this Honorable Court should exercise its great power of supervision to settle the question at bar. See Tex. R. App. Proc. 66.3(b), (f).

QUESTIONS PRESENTED FOR RELIEF

Upon Counsel's motion to withdraw and Ander's Brief, Petitioner sought, by motion, for his appellate records to review in order to meaningfully respond to the Ander's Brief. Petitioner was bench warranted to Smith County to review the record. Once the trial court learned that Petitioner does not know how to read or write, Smith County sent Petitioner back to TDCJ. The Trial Court then provided two copies of the records on CD's even though CD's are not allowed in TDCJ. When Petitioner sought for a paper copy of his appellate record to be sent for review the Twelfth District Court of Appeals declared that the records will only be made available for the price of \$688.00. Therefore:

1. Based on these facts, does the Twelfth District Court of Appeals' decision conflict with Kelly v. State, for granting Counsel's motion to withdraw and declaring the appeal frivolous, without first satisfying Petitioner's express request to gain access to the appellate record in order to meaningfully respond to the Ander's Brief? Kelly, 436 S.W.3d 313 (Tex.Crim.App. 2014).°
2. Based on these facts, was Petitioner denied his due process and equal protection rights as declared by Anders v. California, for withholding the Appellate Record from Petitioner, unless he could provide the court with the monetary expense of \$688.00? Anders, 386 U.S. 738, 87 S.Ct. 1396.

° Petitoiner cannot provide this Honorable Court with Record Citations becuase he does not have access to the Appellate Record.

QUESTIONS PRESENTED FOR RELIEF

3. Once Counsel files a motion to withdraw and an Ander's Brief, should it be Counsel's responsibility to provide access of the appellate record to the Petitioner, in order to meaningfully respond to the Ander's Brief?

COMPENDIOUS ARGUMENT

I. INTRODUCTION:

The Petitioner presents his petition in three questions; therefore, this Honorable Court should grant this petition, as explained in detail herein, because: (1) the Twelfth District Court of Appeals' decision conflicts with the decisions of Ander's v. California [386 U.S. 738, 87 S.Ct. 1396 (1969)], and Kelly v. State [436 S.W.3d 313 (Tex.Crim.App. 2014)]. And (2), while this Honorable Court should exercise Its great power of supervision, the Petitioner presents a question of fact that has not been completely settled by, but should be settled by, this Honorable Court. See Tex. R. App. Proc. 66.3(a), (b), & (f).

II. ARGUMENT IN SUPPORT TO GRANT PETITIONER'S PDR.

a. Events That Occurred Before Petitioner's Current Legal Aid Assistance.

On September 10, 2018, James W. Huggler Jr., Petitioner's appellate Counsel, filed a motion to withdraw, accompanied with an Ander's Brief. See Penson v. Ohio, 488 U.S. 75, 75, 109 S.Ct. 346, 347 (1988)(Counsel must first conduct a "conscientious examination of the Case" and support a request to withdraw accompanied with a brief referring to anything in the record that might arguably support the appeal); Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

This Honorable Court has explained that Counsel must then inform the Petitioner that he has the right to file a brief on his own behalf. And, that Petitioner has the right to review the record to determine what points to raise in his pro se brief. See

COMPENDIOUS ARGUMENT

McMahon v. State, 529 S.W.2d 771, 772 (Tex.Crim.App. 1975). What Counsel told or advised the Petitioner is unknown. On October 12, 2018, the Twelfth District Court of Appeals received a pro se motion to obtain records and motion for an extension of time to file his brief in response to Counsel's Ander's Brief. See Kelly v. State, 436 S.W.3d 313, 318 (Tex.Crim.App. 2014) ("We believe that the Court of Appeals also ha[s] an on-going responsibility [] to officially guide the process and follow through to make sure that such access is granted before they rule on the validity of counsel's ander's brief.").

As a result, on October 26, 2018, Petitioner was bench warranted to the trial court in Smith County to review his appellate records. Counsel was present and advised the trial court that Petitioner does not know how to read or write. Consequently, Petitioner was sent back to TDCJ, and the trial court sent a CD to the Gurney unit on December 21, 2018. Because TDCJ does not allow inmates to have access to CD's, what happened to the CD is unknown. On December 28, 2019, the trial court sent a second CD to the Gurney unit. What happened to that CD is also unknown. Sometime in January or early February of 2019, Petitioner sent a motion to the Twelfth District Court of Appeals and explained that he is encountering problems obtaining the duplicate record from the trial court because inmates are not allow to have CD's. Kelly v. State, 436 S.W.3d at 321 (It is common that "if the [Petitioner] indicates he has encountered problems obtaining the duplicate record from the trial court clerk, the clerk of the court of appeals will make a

copy of the original appellate record and mail it directly to the [Petitioner]."). Instead of the Twelfth District Court of Appeals making a copy to send to the Petitioner, on February 20, 2019, the Twelfth District Court of Appeals overruled the Petitioner's pro se motion requesting paper records because it failed to comply with the Texas Rule of Appellate Procedure 9.5 (Requiring a proof of service, and for the filing party to serve a copy on all parties to the proceeding).

Accordingly, because the Petitioner could not obtain access to the appellate records, the Petitioner could not provide a response to Counsel's Ander's brief. Consequently, on April 17, 2019, the Twelfth District Court of Appeals affirmed the trial court's judgment, and granted counsel's motion to withdraw in four points as shown below:

1. Counsel's Motion to Withdraw and Ander's Brief Filed.

First, the Twelfth District Court of Appeals held, "Counsel's brief was in compliance with Ander's and Gainous, stating that he diligently reviewed the appellate record and is of the opinion that the record reflects no reversible error and that there is no error upon which an appeal can be predicated. see Pendergraft v. State, No. 12-18-00091-CR, *2 (Tex. App. --Tyler, April 17, 2019) (citing Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), and Gainous v. State, 436 S.W.2d 137 (Tex. Crim. App. 1969))(unpublished opinion). The Petitioner does not contest whether Counsel diligently reviewed the appellate record. See Anders, Supra, 386 U.S. 774, 87 S.Ct. at 1400. Petitioner believes that Counsel sent him the motion to withdraw and Ander's brief; but Petitioner

does not have Counsel's Ander's brief because it was lost between the transfer from Gurney unit to the Coffield unit: id.

2. Counsel Acquainted Himself with the Facts of the Case.

Second, the Twelfth District Court of Appeals held that "from our review of Counsel's brief, it is apparent that Counsel is well acquainted with the facts in this case. In Compliance with Anders, Gainous, and High v. State, 573 S.W.2d 807, 812 (Tex.Crim. App. 1978), Counsel's brief presents a chronological summation of the procedural history of this case, and further states that Counsel is unable to raise any arguable issues for appeal." See Pendergraft, Supra, pg. 2. Because Petitioner does not have the Ander's brief, Petitioner will not contest whether Counsel was acquainted with the facts of the case at this point.

3. Twelfth District Court's Error for Allowing Counsel to Not Take Concrete Measures for Petitioner to Gain Access to The Appellate Records.

Third, the Twelfth District Court of Appeals held that "Counsel was in compliance with Kelly v. State [436 S.W.3d 313 (Tex.Crim. App. 2014)] because Counsel provided [Petitioner] with a copy of the brief, notified [Petitioner] of his motion to withdraw as counsel, informed [Petitioner] of his right to file a pro se response, and took concrete measures to facilitate [Petitioner's] review of the appellate record. See Pendergraft, supra, pg 2, n.3.

The Petitioner argues that the Twelfth District Court of Appeals was in error for holding that counsel "took concrete measures to facilitate [Petitioner's] review of the appellate record." This Honorable Court held in Kelly that, "Counsel's duties of re-

presentation; therefore, do not cease simply because he has submitted a motion to withdraw, along with the supporting Ander's Brief, in the court of appeals. Until such time as the court of appeals relieves him of his professional obligation, appellate counsel must continue to "act with competence, commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf." Kelly, supra, 436 S.W.3d at 319. Counsel knew that Petitioner does not know how to read or write. At the very least, Counsel should have either requested for someone to read the record to Petitioner or read the record himself to Petitioner while Petitioner was in Smith County. nevertheless, if this was too much of a burden upon the trial court, or Counsel, then Counsel should have checked out the record and made a duplicate for the Petitioner to have someone in TDCJ read the record to him. Counsel failed to assure Petitioner full access to the appellate records. What good is it if Counsel provides a record of only blank pages to someone and tells him to review the records and make a response to his brief? In simple terms, no good can come out of Counsel's inaction/failure to provide an adequate access to the records for review. Likewise, because Petitioner does not know how to read or write, Counsel should have taken these concrete measures to assure Petitioner full access to the Appellate Records. Kelly, supra, 436 S.W.3d at 321.

Accordingly, as explained below, the Twelfth District Court of Appeals should have followed through to make sure that Petitioner was granted access to the Appellate record before ruling on the validity of Counsel's Ander's Brief. See Kelly, supra, 436 S.W.3d

at 318.

This Honorable Court should grant this Petition because of the current conflict between the Twelfth District Court of Appeals decision and this Honorable Court's precedent held in Kelly. See Tex. R. App. Proc. 66.3(a), (f).

4. Twelfth District Court of Appeals Failure to Comply With Kelly v. State.

Fourth, the Twelfth District Court of Appeals acknowledged that "[Petitioner] was given time to file his own brief." See Pendergraft, supra, pg. 2, n.3. But, Petitioner and his former/current legal aid never obtained a copy of Petitioner's appellate record to review in order to respond to Counsel's Ander's brief. Id. As a result, no brief was filed in the Twelfth District Court of Appeals. Therefore, the Twelfth District Court of Appeals granted Counsel's motion to withdraw because the court "reviewed the record for reversible error and found none." Id. pgs 2-3.

Accordingly, Petitioner presents this question to this Honorable Court:

[QUESTION #1]: Based on These Facts, Does The Twelfth District Court of Appeals' Decision Conflict With Kelly v. State, for Granting Counsel's Motion to Withdraw and Declaring the Appeal Frivolous, Without First Satisfying Petitioner's Express Request to Gain Access to the Appellate Record in Order to Meaningfully Respond to the Ander's Brief?

This Honorable Court held that the Court of Appeals also has an on-going responsibility, once [a Petitioner] manifests his desire to pro se record access, to offically guide the process and follow through to make sure that such access is granted before they rule

on the validity of Counsel's Ander's brief and motion to withdraw. Kelly, 436 S.W.3d at 318. Zeroing in on this fact, many of the courts of appeals instruct the trial court to have its clerk to forward a physical copy to the appellate if he is incarcerated. others simple send a letter to appellate counsel ordering him to obtain the trial court clerk's duplicate of the record and make that available to the Petitioner. Several court of appeals have indicated that, if the record is relatively small, or if the Petitioner indicates (as Petitioner has in this case) he has encountered problems obtaining the duplicate record from the trial court clerk, the clerk of the court of appeals will make a copy of the original appellate record and mail it directly to the Petitioner. Kelly, supra, 436 S.W.3d at 321.

No physical copy was forwarded to the Petitioner, only a CD that he cannot have access to or obtain because TDCJ prohibits CD's. Truly, the Court of Criminal Appeals has indicated that the record must show the Petitioner was given access to the record before the attorney has fully complied with the requirements of Anders. See Heistell v. State, 522 S.W.2d 477, 477 (Tex.Crim.App. 1975); Hawkins v. State, 515 S.W.2d 275, 276 (Tex.Crim.App. 1974); Brown v. State, 485 S.W.2d 914, 915 (Tex.Crim.App. 1972). Instead, the Twelfth District Court of Appeals disregarded Petitioner's attempts to clarify his problem in obtaining the duplicate record from the trial court clerk. Accordingly, the United States Supreme Court has condemned the procedure that permits a court to withhold a transcript if the court found that a Petitioner has been accorded a fair and impartial trial, and in the court's opinion no grave

or prejudicial errors have occurred." Anders, 386 U.S. 738, 742, 87 S.Ct. 1396 (quoting Eskridge v. Washington State Board, 357 U.S. 214, 215, 78 S.Ct. 1061 (1958)). Therefore, this Honorable Court should grant this petition because the Twelfth District Court of Appeals fails to follow this Honorable Court's precedent in Kelly v. State, 436 S.W.3d at 321-22. Cf. Tex. R. App. Proc. 66.3(a), (f).

Further, this Honorable Court held that the court of appeals must continue to monitor the situation (as the court of appeals fails to do in Petitioner's case) and may not, in any event, rule on the validity of Counsel's motion to withdraw and Anders brief until it has to access the appellate record to prepare his response. Kelly, 436 S.W.3d at 321-22. In Petitioner's case, the Twelfth District Court of Appeals reversably erred in granting Counsel's motion to withdraw and declaring Petitioner's appeal as frivolous, without first satisfying the Petitioner's express request to gain access to the appellate record in order to meaningfully respond to the Ander's Brief. See Id. This Honorable Court should grant this Petition and request briefs on the merit because of the Twelfth District Court of Appeals' complete failure to follow this Honorable Court's precedent at bar. Tex. R. App. Proc. 66.3(a), (f).

b. Events that Occurred After Petitioner's Current Legal Aid Assistance.

On April 18, 2019, Counsel sent the Twelfth District Court of Appeals' memorandum opinion to the Petitioner, and advised him of his right to file a pro se Petition for Discretionary Review. On

the first week of May, 2019, Jonathan Sikes, TDCJ No. 01621814, Petitioner's current legal aid (a "Jailhouse Lawyer") became aware of Petitioner's situation. See Attachments A & B; Johnson v. Avery 393 U.S. 483, 89 S.Ct. 747 (1969)(The United States Supreme Court has protected Prisoners right to access to the courts by prohibiting state prison officials from actively interfering with jailhouse lawyer's attempts to prepare legal documents on behalf of other inmates). On May 06, 2019, Petitioner's legal aid prepared and filed two motions: (1) a motion for an extension of time to file a PDR and (2) a motion to file a single copy without being penalized. On May 09, 2019, this Honorable Court granted both motions and extended the deadline to July 16, 2019. Petitioner's legal aid also prepared a power of attorney because the Petitioner was under the impression that his daughter, Patsy Elisabeth Pendergraft, was going to obtain a copy of the CD and print out a paper copy for Petitioner to review. Unfortunately, to this day the Petitioner's daughter has not contacted the Petitioner back. Once Petitioner's legal aid determined that Petitioner's daughter was not going to respond back, on June 14, 2019, Petitioner wrote Mr. Huggler and the Twelfth District Court of Appeals, and requested for the appellate records and a copy of Counsel's Ander's brief and motion to withdraw.

On June 19, 2019, Mr. Huggler, Jr. advised Petitioner that he "checked out the appellate records like a library book and returned it back to the clerk's office. On June 27, 2019, Petitioner wrote Mr. Huggler back and enclosed the "motion for stay and obtain records to be provided," signed and returned to counsel for

e-filing. Did this Honorable Court receive this motion prepared by counsel that was to be filed electronically? also, on June 27, 2019, the Twelfth District Court of Appeals advised Petitioner that the reporter's and clerk's record will only be furnished to Petitioner for the price of \$688.00. On June 27, 2019, Petitioner wrote the Twelfth District Court of Appeals again, not having received the letter on June 27th yet, and requested for his appellate records and the Ander's brief and motion to withdraw. On July 2, 2019, the Twelfth District Court of Appeals advised Petitioner that the requested documents will only be available to Petitioner for the price of \$714.00. When Petitioner received this letter from the court of appeals, Petitioner sought for a second motion for extension of time in order to prepare this PDR, and this Honorable Court granted the motion and extended the deadline to Thursday, August 15, 2019.

Accordingly, the Petitioner presents his second question to this Honorable Court:

[QUESTION #2]: Based on These Facts, Was Petitioner Denied His Due Process and Equal Protection Rights as Declared by Anders v. California, for Withholding the Appellate Record From Petitioner, unless He Could Provide the Court with The Monetary Expense of \$688.00?

The United States Supreme Court has explained that even in an Anders proceeding, this Procedure should assure penniless Petitioners with the same rights and opportunities on appeal, as those who are in the same situation who can afford to pay for the record and retain counsel to assist him on appeal. Anders, 386 U.S. 738, 745, 87 S.Ct. 1396 (1967).

Because the Petitioner does not know how to read or write, the Twelfth district Court of Appeals decided to withhold his appellate records, unless Petitioner sent \$688.00 to the Twelfth District Court of Appeals. Therefore, Petitioner argues his due process and equal protection rights were violated when the court of appeals would only provide access to the appellate record for the price of \$688.00. Cf. Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585 (1956)(Equal Justice was not afforded an indigent [Petitioner] where the nature of the review "depends on the amount of money he has."). Further, the United States Supreme Court has condemned the procedure that permits "a trial judge to withhold a transcript if the court found that a petitioner has been accorded a fair and impartial trial, and in the court's opinion no grave or prejudicial errors occurred therein." See Anders, 386 U.S. 738, 742, 87 S.Ct. 1396 91967)(quoting Eskridge v. Washington State Board, 357 U.S. 214, 215, 78 S.Ct. 1061 (1958)).

Taken together, this Honorable Court should grant this Petition because the Twelfth district Court of Appeals decision to withhold Petitioner his appellate records, unless he provides \$688.00 to the Court, conflicts with the Supreme Court's precedent recognized in Anders v. California. See Tex. R. App. Proc. 66.3(a), (f).

c. Question #3: Once Counsel Files a Motion to Withdraw and an Ander's Brief, Should it be Counsel's Responsibility to Provide Access of the Appellate Record to the Petitioner, in Order to Meaningfully Respond to the Anders Brief?

In 2003, the Amarillo Court of Appeals "have found no decision addressing on whom the responsibility falls of ensuring that an indigent [Petitioner] obtains access to the record for review for

possible preparation of a pro se response in an Ander's appeal. See Escobar v. State, 134 S.W.3d 338, 339 (Tex.App.--Amarillo 2003). The Texas Rules of Appellate procedure, the the Amarillo Court explains, provides that in criminal cases the trial court clerk and the court reporter must prepare the clerk's record and reporter's record in duplicate. Id. (citing Tex.R.App.P. 34.5(g) & 34.6(h)). Based on the rules requiring a duplicate copy, the Amarillo Court of Appeals held that it is Counsel's responsibility to procure a copy of the record for Petitioner to review in preparation of his response. Therefore, this Honorable Court should grant this petition, and require Counsel, in an Ander's proceeding, to provide a copy or access to the reporter's and clerk's records at hand. Tex. R. App. Proc. 66:3 (a), (b), & (f).

In 2014, this Honorable Court has acknowledged that there is a need for uniform procedures for the cases in which an Ander's Brief is filed. Kelly, 436 S.W.3d at 317. This Honorable Court has also agreed with the Sixth Court that Counsel has a continuing responsibility to his client, extending beyond the filing of a motion to withdraw and Anders brief, to facilitate the Petitioner's access to the appellate record. Kelly, 436 S.W.3d at 318. Therefore, this Honorable Court should require Counsel, in an Ander's proceeding to provide a copy or access to the Reporter's and Clerk's records. Tex. R. App. Proc. 66.3(a), (b), & (f).

Nevertheless, this Honorable Court also held, in Kelly, that "the courts of appeals also have an on-going responsibility, once [a Petitioner] manifests his desire to pro se record access, to Officially guide the process and follow through to make sure that

such access is granted before they rule on the validity of the appointed Counsel's Ander's brief and motion to withdraw." And, the court of appeals then must continue to monitor the situation and will abuse its discretion if the court rules on the validity before the appellant has been able to access the appellate record to prepare his response. Kelly, 436 S.W.3d at 318, 321-22.

Taken together, the Petitioner implores this Honorable Court to provide the appellate courts, the state, counsel, trial courts, and criminal defendants with a uniform procedure for ensuring that a pro se appellant, especially if they cannot read or write, to gain access to the appellate record under the circumstance that counsel files for an Anders proceeding. A uniform procedure has not been, but should be settled and declared, by this Honorable Court. Tex. R. App. Proc. 66.3(b). Finally, the Petitioner respectfully requests this Honorable Court to set a procedure that requires Counsel to send an incarcerated individual the appellate record with the Ander's brief, and inform the court of appeals that he provided access to the appellate records to his/her client. Id.

III. CONCLUSION AND PRAYER FOR RELIEF:

Because the Petitioner was denied access to his appellate records, the Twelfth District Court of Appeals abused its discretion for ruling on the validity of Counsel's Ander's brief. The Court of Appeals also denied Petitioner his due process and equal protection rights by requiring a monetary expense before providing access to the appellate records. And, this Honorable Court should set a uniform procedure that requires Counsel to send an incarcer-

ated individual the appellate record with the Ander's brief, and inform the court of appeals that he provided access to the appellate records to his/her client.

Therefore, the Petitioner prays this Honorable Court will GRANT this petition and request for briefs on the merits.

Respectfully Submitted,

James Pendergraft
James Ray Pendergraft
#02193119 - Coffield
2661 FM 2054
Tenn. Colony, Tx. 75884
Pro se

IV. INMATE DECLARATION:

I, James Pendergraft, being incarcerated in the TDCJ-CID Coffield unit in Anderson County, Texas, declares that the foregoing is true and correct under the penalty of perjury. Executed on this day of August 14, 2019.

James Pendergraft
James Ray Pendergraft
#02193119 - Coffield
2661 FM 2054
Tenn. Colony, Tx. 75884
Pro se

No. PD-0474-19

In The
COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

JAMES RAY PENDERGRAFT

PETITIONER

Vs.

THE STATE OF TEXAS

RESPONDENT

ATTACHMENT VOLUME TO THE
PETITIONER'S PETITION FOR DISCRETIONARY REVIEW

On Appeal From the Twelfth District Court of Appeals in Tyler,
Texas, Under Case No. 12-18-00091-CR, and Originating From the 7th
Judicial District Court in Smith County Under Case No. 007-1264-17

Attachment A: Affidavit of Jonathan Sikes, Certified Paralegal.

Attachment B: Certificate from Ohio University

Attachment C: Twelfth District Court of Appeals Opinion from
April 17, 2019.

ATTACHMENT A

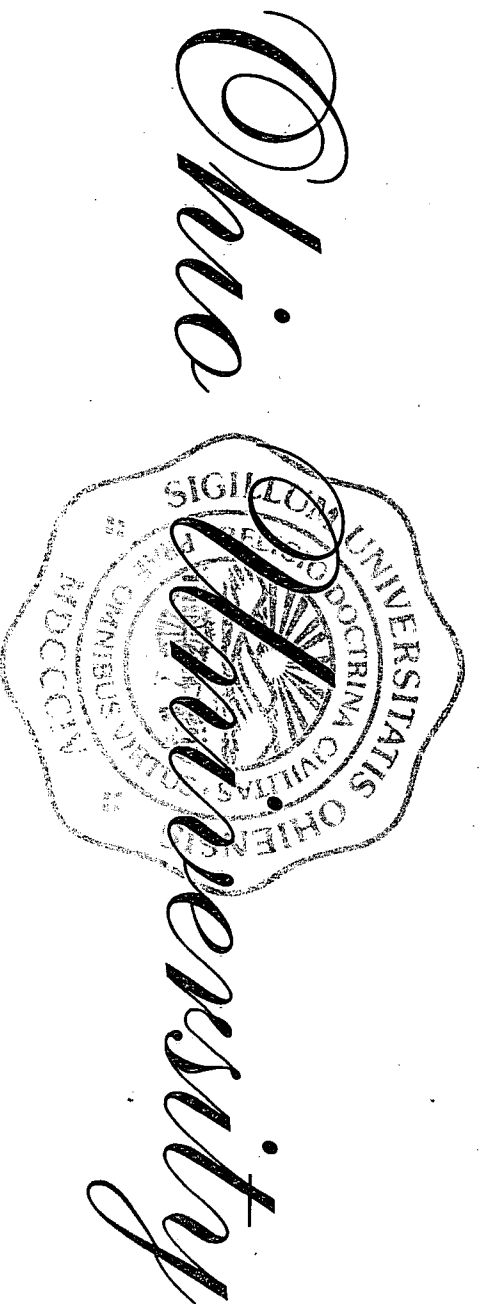
AFFIDAVIT OF JONATHAN SIKES, CERTIFIED PARALEGAL

ATTACHMENT A

ATTACHMENT B

JONATHAN SIKES' CERTIFICATE FROM OHIO UNIVERSITY

ATTACHMENT B



Certificate awarded to

Jonathan Sikes

in recognition of completion of all requirements for the:

Paralegal Certificate Course

conducted in conjunction with

Ohio University Southern

Continuing Education Units Awarded: 9.0

(One CEU equals 10 hours of Instruction)

Mary Lou Malone
Mary Lou Malone, Director, Continuing and Community Ed.

January 2, 2019
Date

ATTACHMENT C

TWELFTH DISTRICT COURT OF APPEALS OPINION
AFFIRMING TRIAL COURT'S JUDGMENT ON APRIL 17, 2019

ATTACHMENT C

NO. 12-18-00091-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

JAMES RAY PENDERGRAFT,
APPELLANT

§ *APPEAL FROM THE 7TH*

V.

§ *JUDICIAL DISTRICT COURT*

THE STATE OF TEXAS,
APPELLEE

§ *SMITH COUNTY, TEXAS*

MEMORANDUM OPINION
PER CURIAM

James Ray Pendergraft appeals his conviction for aggravated assault with a deadly weapon. Appellant's counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and *Gainous v. State*, 436 S.W.2d 137 (Tex. Crim. App. 1969). We affirm.

BACKGROUND

Appellant was charged by indictment with the offense of aggravated assault with a deadly weapon, a second degree felony,¹ by intentionally, knowingly, and recklessly causing bodily injury to the victim by striking the victim with a bat, and that the Appellant used or exhibited a deadly weapon, i.e., a bat. The indictment also included one felony enhancement paragraph. Appellant pleaded "not guilty," and the case proceeded to a jury trial. At the conclusion of the trial, the jury found Appellant guilty of aggravated assault with a deadly weapon as charged in the indictment. At the sentencing hearing, Appellant pleaded "true" to the enhancement paragraph. Consequently, the trial court found the enhancement paragraph to be "true" and assessed Appellant's punishment

¹ See TEX. PENAL CODE ANN. § 22.02(a)(2), (b) (West 2019).

at thirty-five years of imprisonment.² The trial court also made an affirmative finding that Appellant used or exhibited a deadly weapon, i.e., a bat, during the commission of the offense. This appeal followed.

ANALYSIS PURSUANT TO *ANDERS V. CALIFORNIA*

Appellant's counsel filed a brief in compliance with *Anders* and *Gainous*, stating that he diligently reviewed the appellate record and is of the opinion that the record reflects no reversible error and that there is no error upon which an appeal can be predicated. From our review of counsel's brief, it is apparent that counsel is well acquainted with the facts in this case. In compliance with *Anders*, *Gainous*, and *High v. State*, 573 S.W.2d 807, 812 (Tex. Crim. App. 1978), counsel's brief presents a chronological summation of the procedural history of the case, and further states that counsel is unable to raise any arguable issues for appeal.³ We reviewed the record for reversible error and found none. See *Bledsoe v. State*, 178 S.W.3d 824, 826-27 (Tex. Crim. App. 2005).

CONCLUSION

As required by *Stafford v. State*, 813 S.W.2d 503, 511 (Tex. Crim. App. 1991), Appellant's counsel moved for leave to withdraw. See also *In re Schulman*, 252 S.W.3d 403, 407 (Tex. Crim. App. 2008) (orig. proceeding). We carried the motion for consideration with the merits. Having done so and finding no reversible error, Appellant's counsel's motion for leave to withdraw is hereby *granted*, and the trial court's judgment is *affirmed*. See TEX. R. APP. P. 43.2.

Appellant's counsel has a duty to, within five days of the date of this opinion, send a copy of the opinion and judgment to Appellant and advise him of his right to file a petition for discretionary review. See TEX. R. APP. P. 48.4; *In re Schulman*, 22 S.W.3d at 411 n.35. Should

²If it is shown on the trial of a second degree felony that the defendant has previously been finally convicted of a felony other than a state jail felony, on conviction the defendant shall be punished for a first degree felony. See TEX. PENAL CODE ANN. § 12.42(b) (West 2019). An individual adjudged guilty of a first degree felony shall be punished by imprisonment for life or for any term of not more than ninety-nine years or less than five years, and in addition, a fine not to exceed \$10,000.00. See *id.* § 12.32 (West 2019).

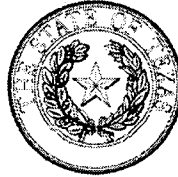
³In compliance with *Kelly v. State*, Appellant's counsel provided Appellant with a copy of the brief, notified Appellant of his motion to withdraw as counsel, informed Appellant of his right to file a pro se response, and took concrete measures to facilitate Appellant's review of the appellate record. See *Kelly v. State*, 436 S.W.3d 313, 319 (Tex. Crim. App. 2014). Appellant was given time to file his own brief. The time for filing such brief has expired and no pro se brief has been filed.

Appellant wish to seek further review of this case by the Texas Court of Criminal Appeals, he must either retain an attorney to file a petition for discretionary review or he must file a pro se petition for discretionary review. See *In re Schulman*, 252 S.W.3d at 408 n.22. Any petition for discretionary review must be filed within thirty days from the date of either this opinion or the date the last timely motion for rehearing was overruled by this Court. See TEX. R. APP. P. 68.2. Any petition for discretionary review must be filed with the Texas Court of Criminal Appeals. See TEX. R. APP. P. 68.3. Any petition for discretionary review should comply with the requirements of Rule 68.4 of the Texas Rules of Appellate Procedure. See TEX. R. APP. P. 68.4; *In re Schulman*, 252 S.W.3d at 408 n.22.

Opinion delivered April 17, 2019.

Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)



COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

APRIL 17, 2019

NO. 12-18-00091-CR

JAMES RAY PENDERGRAFT,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 7th District Court
of Smith County, Texas (Tr.Ct.No. 007-1264-17)

THIS CAUSE came to be heard on the appellate record and brief filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

By *per curiam* opinion.
Panel consisted of Worthen, C.J., Hoyle, J. and Neeley, J.

END OF ATTACHMENT VOLUME

END OF ATTACHMENT VOLUME

END OF ATTACHMENT VOLUME

JAMES PENDERGRAFT,
Petitioner,

V.

THE STATE OF TEXAS,
Respondent.

§ IN THE COURT OF CRIMINAL
§
§
§
§
§
§ APPEALS AT AUSTIN, TEXAS

DECLARATION OF INMATE FILING

I am an inmate confined in an institution. Today, August 14, 2019, I am depositing Petitioner's Petition for Discretionary Review, in this case in the institution's internal mail system. First Class postage is being prepaid either by me or by the institution on my behalf. See Richards v. Thaler, 710 F.3d 573, 579 (5th Cir. 2013).

I declare under penalty of perjury that the foregoing is true and correct. 28 U.S.C. § 1746; 18 U.S.C. § 1621. Executed on this day of August 14, 2019.

James Pendergraft
James Pendergraft
#02193119 - Coffield
2661 Fm 2054
Tenn. Colony, Tx. 75884
Pro se.

James Pendergraft
#02193119 - Coffield Unit
2661 FM 2054
Tenn. Colony, Tx. 75884

RECEIVED IN
COURT OF CRIMINAL APPEALS

AUG 19 2019

Deana Williamson, Clerk

August 14, 2019
Office of the Clerk
The Court of Criminal Appeals
P.O. Box 12308, Capitol Station,
Austin, Texas 78711

RE: No. PD-0474-19 (Court of Appeals No. 12-18-00091-CR)
STYLED: Pendergraft v. State.

Dear Clerk of the Court:

Enclosed is my copy of the Petition for Discretionary Review to be filed within this Honorable Court. This Court has granted me the ability to file a single copy; therefore, please make and provide all parties with the necessary copies. Also, I have attached the only copy of the Twelfth District Court of Appeals' Memorandum Opinion, as required by law. Please make a copy of the Opinion and provide me with a copy of the opinion. Thank you for all your time and help in granting my respectful requests.

Respectfully,

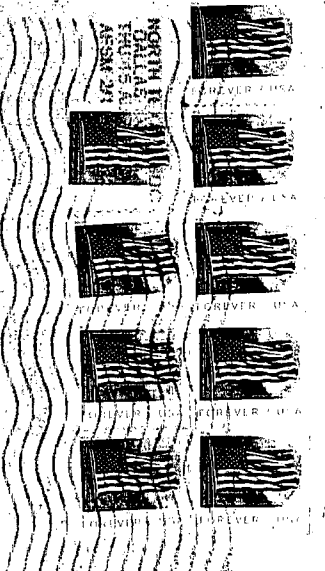
James Pendergraft
James Pendergraft
Pro se.

CC: File.

JP: JS

James Ray Penberg, Jr.
#0219 3118 - Caldwell
2661 fm 2054
Tenn. Celery, Tx. 75884

Legal Mail!!!



Office of the Clerk
The Court of Criminal Appeals
P.O. Box 12308, Capitol Station,
Austin, TX. 78711