

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

24-5736

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.

OCT 09 2024

OFFICE OF THE CLERK

James Ray Pendergraft — PETITIONER  
(Your Name)

vs.

The State Of Texas — 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

James Ray Pendergraft

(Your Name)

2661 F.M. 2054- Coffield Unit  
(Address)

Tennessee Colony, Texas 75884  
(City, State, Zip Code)

(Phone Number)

**QUESTION(S) PRESENTED**

1. Whether the Texas Court of Criminal Appeals decision conflicts with ~~Smith~~ v. Robbins, 120 S.Ct. 1446 (2000), ~~Hopper~~ v. ~~Evans~~, 102 S.Ct. 2049(1982) and Burns v. ~~Mays~~, 143 S.Ct. 1077(2023) when it held that petitioner was not entitled to a lesser included offense instruction and that counsel was not ineffective for raising the issue on direct appeal.
2. Whether the Texas Court of Criminal Appeals erred in deciding the case on an incomplete trial court record.

## **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:

James Ray Pendergraft-Pro Se  
2661 F.M. 2054 - Coffield Unit  
Tennessee Colony, Texas 75884

Sarah Bales Mikkelsen  
Assistant District Attorney  
100 N. Broadway Ave, 4th Fl.  
Tyler, Texas 75702

## **RELATED CASES**

## TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	3
STATEMENT OF THE CASE .....	4
REASONS FOR GRANTING THE WRIT .....	5
CONCLUSION.....	8

## INDEX TO APPENDICES

### APPENDIX A

White card of Texas Court of Criminal Appeals

### APPENDIX B

Findings of Fact and Conclusions of Law of Habeas Court

### APPENDIX C

### APPENDIX D

### APPENDIX E

### APPENDIX F

## TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Beck v. Alabama, 100 S.Ct. 2382(1980).....	5
Burns v. Mays, 143 S.Ct. 1077(2023).....	ii
Hopper v. Evans, 102 S.Ct. 2049 (1982) ...	ii,5
Smith v. Robbins, 120 U.S. 746 (2000).....	ii,6
Wade v. State, 662 s.w.3d 175 (Tex. Cr. App. 2022) .....	5

## STATUTES AND RULES

Texas Rule of Appellate Proc. §3.4.....	7
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## 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.

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,  
 is unpublished.

The opinion of the state habeas court appears at Appendix B to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 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 8/7/2024. 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**

Sixth Amendment to the United States Constitution

Fourteenth Amendment to the United States Constitution

## STATEMENT OF THE CASE

Petitioner was charged by indictment with the offense of aggravated assault with a deadly weapon by intentionally, knowingly, and recklessly causing bodily injury to the victim by striking her with a bat, and that such was a deadly weapon. The indictment also included one felony enhancement paragraph. After a plea of not guilty, a jury found petitioner guilty as charged in the indictment on March 29, 2018. The trial court then sentenced petitioner to 35 years in prison on that same date.

Petitioner filed timely notice of appeal and his direct appeal was affirmed on October 6, 2012 by the 12th Court Of Appeals, Tyler Texas. His petition for discretionary review was refused by the Texas Court Of Criminal Appeals on January 26, 2022. *Hendergraft v. State*, 2012 Tex.App.LEXIS 8153, pet. ref,d.

On April 23, 2024, petitioner filed a state habeas application in the 7th Judicial District Court of Smith County, Texas. 007-1264-17. The trial court, after resolving the issues, recommended denial of relief. On August 7, 2024, the Texas Court Of Criminal Appeals denied relief without written order on the findings of the trial court and on its independent review of the record. *Ex parte James Ray Hendergraft*, WR-91,910-02. At the time the Texas Court Of Criminal Appeals made its decision, it did not have before it the full habeas record. Specifically, it was missing petitioner's memorandum of law in support of his petition.

## REASONS FOR GRANTING THE PETITION

In Hopper v. Evans, 102 S.Ct. 2049 (1982), the court relying on Beck v. Alabama, 100 S.Ct. 2382 (1980) held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But the due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction. The jury's discretion is channelled so that it may convict a defendant of any crime fairly supported by the evidence. Under Texas law, the rule in non capital cases is that a lesser included offense instruction should be given if "more than a scintilla of evidence from any source, raises the issue that the defendant was guilty only of the lesser included offense, then the defendant is entitled to an instruction on the lesser included offense, regardless of the strength or weakness. Hade v. State, 663 s.w.3d 175 (Tex. Cr.App. 2022).

In the case sub judice, the victim testified petitioner hit her on her legs with a ornamental (toy) bat and that he did not hit her in the head. (RR VOL.12,pp. 14-32). The attending physician testified the victim would have fully recovered without medical intervention, (RR VOL. 11,p.107) the victim was admitted and discharged within a few hours (RR VOL.11,pp.108-109) and there was no injury that would have resulted in serious bodily injury or death in this case. (RR VOL.11,pp.115-116).

The trial court denied petitioner's request for a lesser included offense instruction positing that the state proved the toy bat was used in a deadly manner, thus taking the disputed issue away from the jury. (RR VOL.11,p.136, RR VOL.12,p.49).

Petitioner was harmed when the trial court refused to give an instruction on the lesser included offense because the jury was not given the opportunity to find the petitioner guilty of the lesser included offense and there is a distinct possibility that the jury, believing petitioner to have committed some crime, but given only the option to convict of a greater offense, may have chosen to find him guilty of that greater offense. In fact, the trial court refused to grant petitioner's request positing that the state wins or loses on the issue of the deadly weapon use.(RR.VOL.14,p.48).

## II.

The state court erred in denying petitioner's claim that his counsel was ineffective for failure to raise the preserved error of the denial of his request for a lesser included offense instruction of assault with bodily injury.

In Smith v. Robbins, 120 S.Ct. 746 (2000), the court stated to prove counsel was ineffective on appeal, petitioner must show counsel's decision not to raise a particular point of error was objectively unreasonable and that there is a reasonable probability that, but for counsel's failure to raise that particular issue, he would have prevailed on appeal.

In the case sub judice, the victim clearly and unequivocally testified that petitioner hit her on the legs and the only evidence submitted by the state in the admitted photos support her testimony. The doctor likewise testified no serious injury occurred in this case. Moreover, the error was duly preserved.

In fact, it was the only preserved error in the record. Counsel's failure to advance this clearly meritorious complaint deprived petitioner of a meaningful direct appeal.

## III.

Finally, petitioner would show the state court made its decision on an incomplete record through no fault of petitioner which deprived him of meaningful review. At the time petitioner filed his application for habeas relief, he attached to it a memorandum of law. When the appeals court received the habeas record, said memorandum was not included. On July 17, 2024, the appeals court ordered the trial court to forward the memorandum to the court. On July 31, 2024, the trial court claimed to not have the said memorandum. Petitioner immediately sent another copy to the trial court and asked the clerk to forward such to the appeals court in compliance with Tex.R.App.P. 34.4. The trial court failed to forward the memorandum and the appeals court denied relief on the incomplete record before it.

The appeals court made an indisputable mistake of fact that directly affects its decision and petitioner's fair consideration of his claims. Specifically, the court overlooked the fact that it made a decision without a complete record of the habeas court proceedings in that petitioner's memorandum of law was not made part of the record. Said memorandum provided in-depth factual support and relevant case law that entitled him to relief, but such was not received by the court prior to its decision on the merits. In other words, the court's decision was premature

for lack fo a complete record.

Further, the appeals court adopted the state's position on petitioner's ineffective assistance of counsel on appeal without affidavits from both appellate counsel, which means the record was not sufficiently developed to assess the claims.

## **CONCLUSION**

Petitioner requests summary reversal and further consideration.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

  
James Ray Pendergraft

Date: SEPTEMBER 23, 2024