The University of Texas School of Law

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**Clash of Courts:**

**Avenging a Bad Court of Appeals Decision by**

**Petition for Discretionary Review (PDR)**

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**I. Statistics and Internal Review**

During the fiscal year of 2014, 1,589 PDRs were filed. The Court granted review in only 130 (8.2%) cases. It refused 1,305 (82%) petitions.[[1]](#footnote-1) 111 (6.9%) were struck for non-compliance, and 39 (2.4%) were dismissed for being untimely filed.

Review of PDRs begins in the Court’s Central Staff. They are screened by the head of the PDR section which, in total, consists of five attorneys. Those with probable PDR-worthy grounds are assigned to a staff attorney to prepare a “work-up.” A work-up is a memo that summarizes the case, discusses the applicable law, and includes a recommendation to grant, refuse, or to hold for another pending case that raises the same or a similar issue. The case is then assigned to a judge who will bring it before the full Court for a vote at an upcoming Monday conference. It takes four votes to grant a PDR. Tex. R. App. P. 67.1. Each judge submits a vote sheet that is circulated the week before conference. If any Judge has a question about a case or wants to advocate a particular position, then the Judge can mark the case for discussion. The staff attorney who worked on the case will be present during conference to answer any questions or address any concerns. The final vote is tallied during conference. A judge who disagrees with the majority vote can write a dissent or ask to be shown that he/she would have granted the petition.

The majority of PDRs are designated as “frivs,” i.e., frivolous PDRs by the head of the PDR section. Each judge is assigned a stack of frivs (about 10 PDRs-bi-weekly) to “call-up” for conference. All of the judges, however, are given copies of the friv PDRs, and any judge can “kick” a case of personal interest from a friv stack and send it back to central staff for a work-up, or the Judge can circulate a memo detailing why a case should be granted. Once it is worked up, the case is treated like the ones discussed above. If the case remains in the friv stack, it is never worked-up by a staff attorney and will most likely be summarily refused.

**II. Scope of Review**

**No new issues, and no COA interlocutory orders**

On PDR, the Court will address only issues upon which the court of appeals ruled. *State v. Moreno*, 294 S.W.3d 594, 601 (Tex. Crim. App. 2009). Alternative arguments not considered below are not ripe for review. *Stringer v. State*, 241 S.W.3d 52, 59 (Tex. Crim. App. 2007). A PDR that does not challenge error in the court of appeals’ opinion and addresses only trial court error will be summarily refused. *Degrate v. State*, 712 S.W.2d 755, 756-57 (Tex. Crim. App. 1986). A PDR that sets out the ground for review in terms of trial court error is a giveaway that the petition is not compliant. One Judge has indicated that, even though she will review a petition recommended for refusal under *Degrate*, her reading is colored by the “*Degrate*” label and the “*Degrate*” presumption is difficult to overcome. “A discussion of principles of law, without reference to the holding of the court of appeals, will usually be insufficient to persuade th[e] Court to exercise its discretionary jurisdiction.” *Id*. “[I]t is unlikely that a petition for discretionary review that is simply cut-and-pasted from the direct appeal brief will be granted[.]” *Gregory v. State*, 176 S.W.3d 826, 828 (Tex. Crim. App. 2005) (Holcomb, J., concurring in refusal to grant review); *see also King v. State*, 125 S.W.3d 517, 520 (Tex. Crim. App. 2003) (Cochran, J., concurring) (“Petitioners seeking review should not simply take their direct appeal briefs, make superficial changes, and file them. That methodology is virtually doomed because it fails to present the issue as it was actually decided by the court of appeals.”).

“The Court will not entertain a petition for discretionary review from an interlocutory order of abatement by the court of appeals because that order does not finally dispose of the case in that court.” *Jack v. State*, 149 S.W.3d 119, 123 (Tex. Crim. App. 2004) (citing *Measeles v. State*, 661 S.W.2d 732, 733 (Tex. Crim. App. 1983)). Nor will the Court entertain a PDR seeking review of an order denying a motion to recuse an appellate court justice. *Leija v. State*, \_\_ S.W.3d \_\_, PD-0241-15 (Tex. Crim. App. 2015).

The Court will not consider documents the truth of the matter asserted that are attached to unsworn motions filed directly in the Court for. *Pharris v. State*, 165 S.W.3d 681, 687 (Tex. Crim. App. 2005).

**III. Building a PDR**

*“A petition for discretionary review need not (and should not) attempt to resolve the merits of the question presented. It need only attract the interest of at least four judges concerning the legal issue.”* *Bradley v. State*, 235 S.W.3d 808, 810 (Tex. Crim. App. 2007) (Cochran, J. concurring).

The best starting point is to have a general template that provides a simple and clear outlined-writing formula. It has been recognized that the SPA’s Office and large DA and Public Defender offices submit some of the finest PDRs because they have developed good templates. If you are in private practice or have little experience filing PDRs, make an effort to get some examples to follow. The ability to obtain and review filed PDRs is now simple because they are now all easily accessible on the CCA’s website.

**1. Selecting an Issue**

***Novel, Law-Based Issues***

The Court of Criminal Appeals will not ordinarily grant review simply because the court of appeals erred. It is primarily interested in novel or unsettled legal issues, particularly those that will have broad impact on the law of the State. Based on a review of its docket, the Court appears to grant most cases to reverse a lower court decision . . . though that’s not always the case. So if the Court grants your case, don’t automatically conclude that you’ve already won.

Though not required to be included in a petition, always consider the reasons that the Court grants review (outlined in Texas Rule of Appellate Procedure 66.3) when deciding what issues to pursue.

(a) the court of appeals’ opinion conflicts with an opinion from another court of appeals; (b) the court of appeals has decided an important question of state or federal law that should be settled by the Court of Criminal Appeals, (c) the court of appeals has decided an important question of state or federal law in a way that conflicts with an opinion of the Court of Criminal Appeals or the Supreme Court; (d) the court of appeals has declared unconstitutional or has misinterpreted a statute, rule, or regulation; (e) the justices of the court of appeals have disagreed on a material issue; or (f) the court of appeals’ opinion has so far departed from the usual and accepted course of judicial proceedings or has sanctioned such a departure by a lower court as to call for an exercise of the Court of Criminal Appeals’ power of supervision.

One to two grounds is recommended. When choosing what issues to raise, it is best to winnow down the potential grounds to those that are law-centered. Fact-specific generally translates into a case-specific issue, and it is less likely that the Court will dedicate its resources to resolve an issue that will have little, if any, impact on Texas law. Too many grounds will dilute those that actually are PDR worthy. Avoid reiterating a single issue by rephrasing in multiple grounds for review. The possibility that your PDR will be granted will not increase the more you repeat the issue. Winnow and simplify.

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| **Novel, But Two Grounds, Same Issue** |

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| 1. “Whether a warrantless search of involuntarily conveyed historical cell tower data is an illegal search, is a novel question of law that has not been, but should be decided by the Court of Criminal Appeals.” 2. “The Court of Appeal’s holding, that cell tower data information conveyed from a phone involuntarily, is public information under the third party record doctrine; is contrary to *Richardson v. State*, 865 S.W.2d 944 (Tex. Crim. App. 1993).” *Ford*, PD-1396-14. |

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| **OR, Novel and Single, Succinct Issue** |

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| Is a warrantless search of involuntarily conveyed cell tower data public information under the third-party record doctrine, as the court of appeals held, or contrary to *Richardson v. State*, 865 S.W.2d 944 (Tex. Crim. App. 1993), and therefore illegal? |

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| **Well-Framed Law-Centered Legal Issues** |
| 1. “Did the Second Court of Appeals err in implicitly holding that citizens can use the First Amendment to the United States Constitution as a shield to disobey lawful orders of law enforcement and forcibly cross a police skirmish line set up at a Gay Pride Parade in Fort Worth, Texas, when those measures by law enforcement are taken to preserve the peace and the safety of the public?”2. “Notwithstanding that police action may infringe on a citizen’s First Amendment rights, does a citizen have a right to disobey orders of a police officer, forcibly breach a skirmish line imposed, and interfere with the officer’s duties?”3. “Did the Second Court of Appeals err in failing to conduct a proper ‘as applied’ First Amendment analysis when it concluded that the Fort Worth Police Department’s action in constructing a skirmish line at a Gay Pride Parade violated the First Amendment to the United States Constitution?” 4. “Did the Second Court of Appeals err in concluding that the skirmish line set up by the police department during the Fort Worth Gay Pride Parade was not a reasonable action as to ‘time, place or manner’ under the First Amendment to the United States Constitution?” *Faust*, PD-0893-14; *Marroquin*, PD-0894-14.  |
| “Is the general rule of *Muniz v. State*, 573 S.W.2d 792 (Tex. Crim. App. 1978) – permitting trial courts to order juries to reconsider sentencing verdicts that do not comply with applicable statutes – partially superseded by the later and more specific Tex. Code Crim. Pro. art. 37.10(b), under which a sentencing verdict containing both authorized and unauthorized punishment is not to be rejected and sent for reconsideration, but simply reformed to reflect only the authorized portion?” *Nixon*, PD-0851/52-14.  |
| 1. “The Court of Appeals erred by reviving *Grady v. Corbin* (overruled by the Supreme Court), and applying a cognate evidence analysis (rejected by this court) in reviewing a double jeopardy claim.”2. “The Court of Appeals erred by finding that an aggravated assault on a victim not named in a capital murder indictment was a lesser included offense of the capital murder.” 3. “The Court of Appeals misapplied the law by finding that an offense was subsumed within the greater if the State ‘could have’ used that offense to prove the greater, rather than that it was required to do so.” *Castillo*, PD-0545-14.  |

***Statutory and Constitutional Construction***

Notably, the above examples involve the construction of constitutional and statutory provisions, which are the predominate reasons that the Court grants review. However, even if the issues present an interesting constitutional challenge, the Court may be less likely to grant review when all of the court of appeals are in agreement on the issue. *See e.g., Casey v. State*, 349 S.W.3d 825, 829 (Tex. App.El Paso 2011, pet. ref’d) (challenge to constitutionality of continuous sexual abuse of a child statute); *Martin v. State*, 335 S.W.3d 867, 872‑873 (Tex. App.Austin 2011, pet. ref’d) (same); *Reckert v. State*, 323 S.W.3d 588 (Tex. App.Corpus Christi 2010, pet. ref’d) (same); *Render v. State*, 316 S.W.3d 846 (Tex. App.Dallas 2010, pet. refd) (same). The Court may also be reluctant to jump on an issue immediately. The judges may want to give it time to percolate in the lower courts. One way to combat this viewpoint is to stress how likely it is that numerous wrong decisions will follow as a result of the COA’s decision; therefore, it’s best for the Court to fix the error now.

The Court’s docket consistently has issues that are derivative of recent Supreme Court cases. When the Supreme Court announces a new rule, or overrules precedent, the Court of Criminal Appeals will have to flesh out the infinite scenarios that arise under the novel controlling authority. Examples of such cases include *Crawford v. Washington*, 541 U.S. 36 (2004), *Florida v. Jardines*, 133 S. Ct. 1409 (2013), and *Missouri v. McNeely*, 133 S. Ct. 1552 (2014). When this is your basis for filing a PDR, be certain to point out any distinguishing elements (positive and negative) in your case.

***Recurring Issues***

Whether an issue will recur is always a consideration of the judges in voting on whether to grant review. The more often that courts of appeals will continue to be, or already have been, confronted with an issue, especially when there is a split among the lower courts, the more likely it is that the Court will grant review. A few years ago, the issue *de jure* was court costs. *Johnson v. State*, 423 S.W.3d 385 (Tex. Crim. App. 2014). In the past year, it’s been warrantless mandatory blood draws. *State v. Villarreal*, No. PD-0306-14, 2014 Tex. Crim. App. 1898 (Tex. Crim. App. 2014, reh’g granted).

***Unlikely to Recur***

***But Just so Intriguing***

There are always exceptions to the general rule. Every year there are those few cases that are so extraordinary, either because of the facts or the law, that the Court can’t resist them. So if you’ve got one of those remarkable cases, you can confidently pursue a PDR by persuasively crafting an issue that truly captures the unique aspects of the case.

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| “Does TEX. HEALTH & SAFETY CODE § 822.013(a)-(b), which authorizes an owner of a recently attacked dog to kill the attacker-dog without the owner’s effective consent and also bars liability for damages to the attacker-dog’s owner, provide a defense to criminal liability?” *Chase*, PD-1768-13.  |
| “The court of appeals erred in finding that SB 1416, which amended Penal Code Section 38.04(b), did not violate the ‘Single Subject’ provision of the Texas Constitution, Art. III, Section 35.” *Jones*, PD-1158-13.  |
| “Did the trial court abuse its discretion when it determined that Appellant’s absence from his trial due to his attempted suicide was voluntary?” *Brown*, PD-1723-12.  |
| “Whether the Court of Appeals erred by determining that the trial court abused its discretion in admitting official documents from the United Kingdom because the exhibits were not certified under Rule 902(4) and lacked a ‘final certification’ under evidence Rule 902(3) and the State did not establish good cause to dispense with the final certification requirement under Rule 902(3).” *Bruton*, PD-1265-13. |

***Fourth Amendment Issues***

Search and seizure issues are frequent flyers. When these issues do arise, the best practice is to frame the ground for review in the broadest terms possible. It is important to convey that the rule generated by the case will be useful to law enforcement and the bench and bar on a routine basis.

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| **Global Legal Issue Developed From Fact-Specific Case** |
| ***Rendon*, PD-0013/14-15: “The Court of Appeals’ finding that the area outside of Appellee’s apartment constituted the curtilage of that apartment incorrectly decided an important question of State and Federal law that has not been but should be settled by the Court of Criminal Appeals.”[[2]](#footnote-2)**Rendon lived in an upstairs apartment at a four-plex. The two upstairs apartments shared a staircase in the middle that led to a balcony and front door on each side. Police took a drug dog to Rendon’s front door, and he alerted to the presence of drugs. At a suppression hearing, the trial court ruled that because the area leading to the front door was part of the curtilage of Rendon’s apartment, the dog sniff was a search under *Florida v. Jardines*, 133 S. Ct. 1409 (2013). The court of appeals upheld the trial court’s suppression ruling, holding that the front door and area leading to it was not a common area of the four-plex but was part of the curtilage of Rendon’s apartment. It based this determination on the following factors: Rendon’s apartment was the only one upstairs on the left, he hung plants on the balcony railing in front of his apartment, and Rendon’s downstairs neighbor had chairs in the area in front of his apartment. The State points out that, according to *United States v. Dunn*, 480 U.S. 294 (1987), an area is part of the curtilage if it “harbors the intimate activity associated with the sanctity of a man’s home and the privacies of life.” It contends that to qualify as curtilage, the resident must have the authority to exclude others from the area. Here, renters at the four-plex did not have this authority, notwithstanding their placement of plants and chairs in the area in front of their apartments. The State distinguishes such an area from the front porch of a free-standing home, which is under the exclusive control of the resident. |

Also, remember that standing can be challenged for the first time on appeal. *State v. Klima*, 934 S.W.2d 109 (Tex. Crim. App. 1996). So the State, when reviewing a Fourth Amendment issue, should ask whether the challenger had standing.

***Public Appeal***

The Court also tends to grant cases in which the factual and legal issue has wide public appeal because virtually anyone can relate to the issue.

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| **Driving Violations** |
| “Does driving in the left lane while not ‘in the process of passing’ after passing a ‘Left Lane for Passing Only’ sign provide reasonable suspicion of a traffic violation?” *Jaganathan*, PD-11898-14.  |
| **Privacy in Medical Records** |
| **1. “After *State v. Hardy*, does a citizen have standing to challenge the process by which his medical records are obtained?”****2. “Must the State comply with federal requirements under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to obtain a citizen’s medical records, and if it fails to do so, is there any remedy?”** Huse was involved in a single-car crash. He was taken to a hospital, where he admitted to police he consumed numerous alcoholic beverages that night. Huse was later charged with DWI. Medical records and blood draw results were obtained; once by an improper subpoena from the DA’s office and later, after Huse was charged, by a grand jury subpoena. The trial court granted Huse’s motion to suppress, which alleged a violation of his right to privacy under HIPAA by use of an improper “sham” subpoena. The court of appeals reversed. Relying on *State v. Hardy*, 963 S.W.2d 516 (Tex. Crim. App. 1997), the court held Huse had no standing because there is no reasonable expectation of privacy in blood test results obtained by subpoena when the tests were conducted by medical personnel solely for medical purposes. It also held that, because the trial court did not find the second subpoena defective or tainted by the first, there was no evidence the medical records were obtained in violation of the law. Huse argues that *Hardy* does not control because it was decided before HIPAA, which recognizes a right to privacy in medical records. He further argues that the State’s initial violation of HIPAA tainted the records obtained under the grand jury subpoena. |

***Error Correction: Severely Flawed or Outrageous***

***Sufficiency Analysis***

Challenges to a sufficiency of the evidence analysis are rarely granted on PDR. In those cases in which the Court does grant review, the court of appeals’ analysis is generally severely flawed or outrageous. Remember to think about the proper disposition if a conviction is reversed for sufficiency: Should the judgment be reformed to reflect a conviction for a lesser-included?

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| **Severely Flawed Sufficiency Analysis** |
| “Did the court of appeals err to hold that the evidence was insufficient to prove that Appellant failed to register his intent to change his sex-offender registration address seven days before the intended change when evidence of Appellant’s actual residence change necessarily establishes his underlying or subsumed intended change date?” *Thomas v. State*, 444 S.W.3d 4, 7 (Tex. Crim. App. 2014). |

The Court dealt with a severely flawed sufficiency analysis in *Rodriguez v. State*. The Court reversed the court of appeals’ decision holding that injury to a child by omission constitutes an act clearly dangerous to human life under the felony-murder statute. No. PD-1189-13, 2014 Tex. Crim. App. LEXIS 876, at \*1, 5 (Tex. Crim. App. 2014). Because the defendant starved her child to death, the defendant’s omissions caused the death. *Id*. at \*9-12.

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| **Outrageous Sufficiency Analysis** |
| “The court of appeals disregarded this Court’s rules for sufficiency review by not examining the entire record, viewing what it did in a light other than that most favorable to the verdict, dismissing inferences contrary to its own, viewing pieces of evidence in isolation rather than cumulatively, and elevating direct evidence over circumstantial evidence.” *Whatley*, PD-1340-13.The Court reversed the court of appeals’ conclusion that the evidence was insufficient to support Whatley’s aggravated sexual assault of a child conviction based on the fact that the State failed to dispute Whatley’s claim that he was asleep on the three occasions he sexually assaulted the victim and therefore did not act voluntarily. 445 S.W.3d 159 (Tex. Crim. App. 2014).  |
| “Whether the court of appeals was correct in holding that the evidence was legally sufficient to prove that Nowlin knew Degrate was charged with a felony offense.” *Nowlin*, PD-0840-14.Nowlin was convicted of hindering apprehension, enhanced from a misdemeanor to a felony because Degrate was being arrested for a felony. On appeal, Nowlin challenged the evidentiary sufficiency supporting the felony enhancement element, contending that the evidence fails to prove she knew Degrate was charged with a felony. The warrant was sealed and there was no evidence about the offense for which Degrate was on bond. The court of appeals disagreed and held that the trial court could have reasonably inferred that Nowlin had knowledge that Degrate’s arrest was for a felony.[[3]](#footnote-3)  |

One successful way of challenging sufficiency is to argue that the court of appeals applied a divide-and-conquer analysis.

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| “The first ground for review asks this Court to determine if the court of appeals erred in its sufficiency of the evidence review by utilizing a ‘divide‑and‑conquer’ approach rather than viewing all of the evidence collectively and allowing the jury to draw reasonable inferences from the evidence.” *Gross v. State*, 380 S.W.3d 181, 186 (Tex. Crim. App. 2012). |
| “The court failed to properly consider the combined and cumulative force of the evidence . . . .” *Merritt v. State*, 368 S.W.3d 516, 526 (Tex. Crim. App. 2012).  |

Another strategy is to challenge the applicable standard of review.

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| “We granted review to clarify that the common-law *corpus-delicti* rule exists, in the post *Jackson v. Virginia* era, only in confession cases.” *Carrizales v. State*, 414 S.W.3d 737, 739 (Tex. Crim. App. 2013). |

The Court may also be inclined to grant a sufficiency issue when the case is so close that it is on the edge in either direction.

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| In *Butcher v. State*, the Court had to resolve whether Butcher’s act of releasing the child kidnapping victim at the place she was abducted constituted voluntary release in a “safe place” when it was during the day and the victim had been permitted to walk there alone every day on her way to the school bus stop. PD-1662-13, 2015 Tex. Crim. App. LEXIS 39 (Tex. Crim. App. 2015). |

A review of cases over the past two years demonstrates that the best way to proceed in sufficiency cases is to challenge the proper interpretation of an element of the offense.

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| Is tampering with evidence by destruction proven when the defendant swallowed a baggie with pills and it is not known what happened to the baggie after it was swallowed? *Rabb v. State*, 434 S.W.3d 613 (Tex. Crim. App. 2014).  |
| When the defendant exhibited a firearm, refused to put the weapon down when ordered to do so, and expressed his intent to use the firearm to shoot himself, but never threatened to use the weapon against the officers, is the evidence sufficient to prove he used force “against” a peace officer? *Dobbs v. State*, 434 S.W3d 166 (Tex. Crim. App. 2014).  |
| Whether a seller who enters into a one-time contractual agreement to provide window treatments acts in a “fiduciary capacity” for purposes of proving of misapplication of fiduciary property. *Berry v. State*, 424 S.W.3d 579, 586 (Tex. Crim. App. 2014). |
| 1. “For purposes of a deadly weapon finding, does the fact of an intoxicated driver establish that the vehicle was driven in a manner capable of causing death or serious bodily injury when driving while intoxicated is dangerous per se and thus presents a real risk to the driver?”2. “In a DWI case, is evidence that Appellant unlawfully crossed over the center line into oncoming traffic, with an officer traveling ten car lengths behind him, sufficient to prove a real risk to others for purposes of a deadly weapon finding?” *Brister v. S*tate, 449 S.W.3d 490 (Tex. Crim. App. 2014). |
| 1. “Must multiple calls be made as part of a ‘single episode’ to constitute harassment by repeated telephone communications?2. “Does a facially legitimate reason for a call negate any reasonable inference of intent to harass or that it was made in a manner reasonably likely to harass, annoy, etc., or must the totality of the surrounding circumstances be examined?” *Wilson v. State*, 448 S.W.3d 418 (Tex. Crim. App. 2014).  |

***Error Correction: Severely Flawed or Outrageous***

***Harm Analysis***

Like sufficiency, the Court will be more inclined to grant review of a harm analysis if it’s severely flawed or outrageous.

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| **Severely Flawed Harm Analysis** |
| In *Villarreal v. State*, the Court reversed the court of appeals’ determination that Villarreal was egregiously harmed by the omission of a jury instruction that would have required the jury to apply a presumption of reasonableness as to Villarreal’s belief that deadly force was necessary because the court of appeals conducted an incomplete review of the record and the arguments of counsel. PD-0332-12, 2015 Tex. Crim. App. LEXIS 136 (Tex. Crim. App. 2015).  |

And the leading bases upon which to challenge a harm analysis is to argue that the error is structural and not subject to a harm analysis or that the wrong standard under Rule of Appellate Procedure 44.2 or *Almanza* was applied.

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| “Whether the court of appeals erred by concluding that the State’s failure to prove venue in the instant case was subject to harmless-error review, in contravention of this Court’s holding in *Jones v. State*, 979 S.W.2d 652 (1998), which reiterated the longstanding rule in Texas that venue error, once established, results in reversal and acquittal. *Schmutz v. State*, 440 S.W.3d 29, 32 (Tex. Crim. App. 2014). |
| “The court of appeals erred in holding that an error based on the voluntariness of a plea under the Due Process Clause and *Boykin v. Alabama*, is evaluated for harmless error under the standard for nonconstitutional error set out in Rule of Appellate Procedure 44.2(b). *Davison*, PD-1236-12.  |
| “The court of appeals erred in finding that the appellant was harmed by unanimity error in the jury charge because his defense was not predicated on isolating one transaction from another.” *Kent*, PD-1340-14.  |

Keep in mind that when the court of appeals assumed error, you can’t challenge that assumption without also challenging the harm analysis. Ask whether the harm analysis is worthy of review. It is unlikely that the Court will decide whether something was erroneous if it won’t change the outcome of the case because of the lack of harm or prejudice.

***Preservation***

Issues involving preservation of error are also frequently granted by the Court. The Court’s review may concern whether an objection satisfied the specific or timely requirements. Other times, the Court will determine what rights and prohibitions are subject to preservation rules. It can be surprising to discover which rights and prohibitions have yet to be identified under the *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993), three-tiered framework.

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| “The court of appeals erred in finding that the public-trial issue was preserved for review when the appellant did not ask the trial court to do anything and did not alert the trial court to the specific grounds he would raise on appeal.” *Peyronel*, PD-1274-14.  |
| “The Court of Appeals determined Mr. Stairhime had waived all error during voir dire when, at the end of voir dire, he made no objection to the seated jury. Mr. Stairhime was denied the right to ask a proper question and made a timely and specific objection. Did the Court of Appeals err in holding that by affirmatively stating no objection to the seated jury, that all previously made objections were waived?” *Stairhime*, PD-1071-14. |
| “The Court of Appeals erred by holding that the State must ‘preserve’ in the trial court the issue of reformation of the judgment to a lesser-included offense on appeal.” *Thorton*, PD-0669-13. |

It’s easy to get blinders regarding threshold issues. The State should always consider preservation when contemplating a PDR, even when it was not raised in the court of appeals. It is systemic and can therefore be raised for the first time on PDR. *Wilson v. State*, 311 S.W.3d 452 (Tex. Crim. App. 2010).

***Pending Issue***

The easiest way to get a PDR granted is to raise an issue that is currently pending before the United States Supreme Court or Court of Criminal Appeals or to bootstrap an issue to a recent decision from either of those Courts to create an issue of first impression. It is important to keep up with the issues that the Courts have agreed to review. A list of the issues pending before the Court of Criminal Appeals can be found on the Court’s website, or you can go to the State Prosecuting Attorney’s website for summaries of the pending PDR cases: <http://www.spa.texas.gov/pending-pdr-cases.aspx>

One Judge noted that practitioners need to consider two factors before jumping on the pending-issue-bandwagon: (1) whether there are other claims that could result in greater relief and, (2) whether your case is distinguishable. As to the first factor, make certain that you are not overlooking other meritorious claims when spotting a pending issue. For instance, obtaining a reversal on court-cost grounds will be of little solace to a client who may actually be entitled to a new trial or punishment determination. And regarding the second factor, be aware that when there is a trending issue, the Court will usually pick one or a few cases to be the lead case, and your case may be entirely dependent on the outcome of the lead case. Ask whether the lead case exhausts all the applicable arguments. If not, present the previously unaddressed arguments and make sure to point out to the Court that you have marshaled new arguments. Also, consider whether your case has any distinguishing factors that may provide a reason for separating your case from the lead case. Point out any difference in explaining why a pending case is close but not directly on point. This may result in the Court reviewing your case on its own merits instead of possibly later summarily remanding in light of its lead-case decision.

Finally, when rasing a pending issue, there is a tendancy to cut and paste from other attorneys’ filings. One judge has cautioned against using this method. In her view, it disengages the brain and thus prevents independent, critical thinking. Experince also teaches that this may result in errors because it’s easy to forget to change case-specific facts like names.

***Overruling Precedent***

Overruling precedent may also provide a good basis upon which to seek review. In such cases, it’s best to have a new reason for the Court to reconsider a prior ruling.[[4]](#footnote-4) New law that is inconsistent with precedent is the most obvious and strongest reason. However, a new argument not previously considered is just as good. Don’t be afraid to reevaluate an issue by pointing out what the Court did not consider in rendering the prior decision. Ask: Was anything that could be determinative left out of the analysis?

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| “Is the subsumption theory of *Patterson v. State* still valid in light of this Court’s more recent double jeopardy and lesser-included offense case law?” *Aekins*, PD-1712-13. |
| “Should *Phillips v. State*, 362 S.W.3d 606 (Tex. Crim. App. 2011), which held that a facial limitations bar is a ‘true *ex post facto* violation’ and so may not be forfeited, be overruled? *Heilman*, PD-1591-13. |

***Disregarding Precedent***

The Court will grant review when a lower court ignores or improperly applies precedent. This strategy should be reserved for cases in which the prior decision is truly on point, not cases that are only an extension of precedent.

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| “Whether the Fourth Court, failing to follow clear precedent from this Court in *Cosio v. State*, based its harm finding on theoretical harm instead of actual harm.” *Arrington*, PD-1448-13.  |
| “The Court of Appeals erred by reviving *Grady v. Corbin* (overruled by the Supreme Court), and applying the cognate evidence analysis (rejected by this court) in reviewing a double jeopardy claim.” *Castillo*, PD-0545-14. |

***Published Decisions***

A published court of appeals decision increases the odds that the Court will grant a PDR. So, if a decision was not designated to be published, it may be helpful to ask the court of appeals to publish. In doing so, explain how the issue is of importance to the jurisprudence to the State . . . . However, you always run the risk of there being bad published precedent if the CCA declines to grant review. Also, if a motion for rehearing was filed, make sure you emphasize that point. The judges will be interested to know that you gave the COA the opportunity to correct its error.

***Dissent***

***Published Decisions***

In deciding whether to grant review, cases in which there is a dissenting opinion—that supports your argument—also increases the odds that the Court will take an interest in the case. Point that aspect out immediately and concisely in the ground for review.

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| “The court of appeals, in a 2-1 decision, erred in holding that the terms and conditions of the Defendant’s community supervision began, not when the court of appeals’ mandate issued after a timely appeal was filed, but at the earlier date when the trial court entered its original judgment based upon the Defendant’s negotiated plea of guilty.” *Lundgren*, PD-1322-12. |

If there is not adequate time to develop an issue and argument, consider not filing a PDR or request an extension. Be mindful that it is never a good idea to file anything that may be construed as wasting the Court’s limited resources. The judges and Court staff will remember an attorney whose work-product is poor, and it will affect the attorney’s credibility with respect to any future PDRs.

**2. Framing the Issue**

The ground for review is the first opportunity to convince the Court to grant the PDR. Regarding style, it is not necessary to start each ground with, “The court of appeals erred . . . .” Avoid unnecessary wordiness like, “The Court of Appeals erred when it held that the trial court erred in . . . .” However, one judge and a few of the Court’s staff have stated that an introduction that includes “the court of appeals erred by” gives a clear indication that the Court’s jurisdiction is being invoked. A few words that almost always grab the Court’s attention when included in the ground for review are “case of first impression” and “inconsistent or conflicts with.”

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| “The Tenth Court of Appeals erroneously held that Appellant failed to preserve his complaint regarding the trial court’s refusal to submit a self-defense with deadly force instruction because the uncharged contemporaneous conduct could have given rise to a self-defense instruction. Its decision conflicts in principle with decisions of this Court and other courts of appeals. This Court should definitively settle this important question of law.” *Bedolla*, PD-0737-13. |

The key is to frame the issue concisely while, at the same time, including enough information to make the ground enticing. The ultimate purpose is to have the Court want to read more, otherwise you run the risk of having the staff and judges skim your PDR. A ground that consists of run-on sentences and includes the entire fact scenario will be viewed as overwhelming and overly fact-specific. If you have a compound question issue, split it up in either two issues or separate it into sub-parts.

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| **Overly Wordy, Incomprehensible**  | **Concise Alternative** |
| “The Court of Appeals committed error by incorrectly applying the law for admissibility of expert opinion testimony in concluding that the trial court did not abuse its discretion in allowing the testimony. The ruling conflicts with the opinion of the Court of Criminal Appeals on the issue in *Layton v. State*, 280 S.W.3d 235, 241 (Tex. Crim. App. 2009) which states that the party offering expert testimony must prove that the expert testimony being offered is reliable and relevant by clear and convincing evidence, and *Gobert v. State*, AP-76,345, 2011 WL 5881601 (Tex. Crim. App. Nov. 23, 2011) cert. denied, 133 S.Ct. 103, 184 L. Ed. 2d 47 (U.S. 2012); *Coble v. State*, 330 S.W.3d 253, 277 (Tex. Crim. App. 2010) holding that expert testimony is not admissible when the offering party provides no scientific research or studies to support her idiosyncratic methodology. The ruling also conflicts with the opinion of the Court of Criminal Appeals in *Leonard v. State*, 385 S.W.3d 570, 582 (Tex. Crim. App. 2012) which holds that Tex.R.Evid. 702 and 703 do not allow inadmissible evidence to support an expert opinion unless it is reasonably relied upon by experts in the particular field, and reasonable reliance does not exist if the evidence would not pass the reliability test of Tex.R.Evid. 702.” | Is a DPS’s expert testimony that Appellant’s blood contained a trace amount of cocaine reliable when the finding was omitted from the toxicology report because the levels were below DPS’s reportable cutoff point?  |

Conversely, a bland, nondescript issue will not capture the Court’s interest.

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| **Bland, Nondescript**  | **Concise and Enticing** |
| “The court of appeals erred in holding that the trial court erred in admitting into evidence the contents of State’s Exhibit Number 57 due to the failure of the State to properly authenticate the exhibit.” | Did the threatening text messages lack proper authentication, as the court of appeals held, when the victim testified they were from the defendant’s number, he made threatening phone calls between texts, and the substance was consistent with the contextual relationship between the parties?  |

One useful way to approach framing the issue is to decide what rule you want to have the Court make in rendering a decision in your favor. Take that rule and transform it into the ground for review.

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| “Is evidence ‘obtained in violation of the law’ when it is seized after a detention for an offense committed in the presence of police, who were lawfully situated, when they were aware of the defendant’s presence at that location as a result of an illegal tracking device?” *Jackson*, PD-0823-14. |

Consider framing the issue in a way that the answer you want necessarily and obviously follows.

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| 1. “Does a person have standing to contest an unlawful search where they are in possession of a vehicle with consent and permission of the vehicle’s owner?” 2. “Can the police detain a person to conduct a warrantless search based on an anonymous tip when the initial investigation provides zero evidence to show any law violation?” *Matthews*, PD-1341-13. |

The best time to frame the ground is after the facts and legal arguments have been fleshed out in the argument section. At this point, it should be easy to summarize the precise issue for resolution.

When writing the issue, DO NOT USE ALL CAPS. IT IS HARDER TO READ AND THEREFORE MAKES IT MORE LIKELY THAT THE READER WILL BE IMMEDITAELY TURNED OFF.

**3. Pitching the Argument**

Good writing is the most important factor in making the argument. The objective is to take a complex and technical issue and present it in a way that the average person can understand. Engage the Court by making certain that the logic and reasoning behind your argument are stated in the most clear and simple of terms. As a general rule, people don’t like to read what they can’t easily comprehend. The more difficult something is to read, the more likely that the reader will lose interest (this is particularly true because the Court’s docket contains thousands of cases). Be conversational, and omit legalese. If you wouldn’t say something in a conversation with a colleague in the manner in which you have written it, then revise it.

“*The best way to become a good legal writer is spend more time reading good prose, and legal prose ain’t that.*” Hon. Frank H. Easterbrook.[[5]](#footnote-5)

While the above sentiment is true a lot of the time, the judges have made a good effort to overcome this defect. Many of them have adopted a plain English style that can be understood by the average reader. You should do the same. And importantly, many of them strategically start their opinions with a pointed overview of the pivotal facts, legal issue, and resolution. Using a similar format in your opening is recommended not only because of the vital information conveyed but because familiarity breeds likability.

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| *Butcher v. State*, 2015 Tex. Crim. App. LEXIS 39 (Tex. Crim. App. Jan. 28, 2015) (Hervey, J.): “The punishment level for aggravated kidnapping is reduced from a first-degree felony to a second-degree felony if the kidnapper ‘voluntarily releases the victim in a safe place.’ *See* Tex. Penal Code § 20.04(d). The court of appeals concluded that the evidence was legally and factually sufficient to support the jury’s rejection of Appellant’s mitigating defense of release in a safe place. *See Butcher v. State*, No. 11-11-00288-CR, 2013 Tex. App. LEXIS 13483, 2013 WL 5891603, at \*9 (Tex. App.—Eastman Oct. 31, 2013) (mem. op.) (not designated for publication). We granted review to examine the holding of the court of appeals, and because we agree with the judgment of the court of appeals, we shall affirm.” |
| *Arrington v. State*, 2015 Tex. Crim. App. LEXIS 15, 1-2 (Tex. Crim. App. Jan. 14, 2015) (Alcala, J.): “This case addresses whether a defendant suffers egregious harm from erroneous jury instructions permitting a non-unanimous verdict when a jury confronted with two diametrical positions reaches multiple verdicts signifying, in the aggregate, its belief in the credibility of the State's evidence and its disbelief in the defendant's evidence. The State’s petition for discretionary review argues that the court of appeals erred by determining that erroneous jury instructions permitting non-unanimous jury verdicts caused egregious harm to Charles Lavoy Arrington, appellant. *Arrington v. State*, 413 S.W.3d 106, 118 (Tex. App.—San Antonio 2013). The State challenges the court of appeals’s judgment in favor of appellant that reversed his six convictions, including five convictions for aggravated sexual assault of a child and one conviction for indecency with a child by contact. We conclude that, by improperly failing to consider all of the evidence that was admitted at trial and by finding dispositive the jury’s inability to reach a verdict on a single count without considering other rational reasons for the lack of a verdict on that single count, the court of appeals erroneously determined that the faulty instructions egregiously harmed appellant. We reverse the judgment of the court of appeals and remand this case for consideration of appellant's other issues on appeal.”  |

*Just the Facts*

Do not include unnecessary facts. Include only those that are relevant to the issue presented. If the issue is purely legal, do not include an in-depth review of the facts of the offense or the trial proceedings. No one wants to read pages of material only to later discover that it had absolutely no bearing on the case. Once the reader discovers this, it’s likely that this will have a lasting effect on the reader’s review the remainder of the PDR. Include names and dates only when necessary. Usually, the use of specific names and dates signal the need to make a mental note of it because it plays an important role in the case. Conversely, even when the issue is purely legal, the facts required to understand the context need to be included. Do not force the Judges to sift through the lower court opinion just to understand the context of the complaint.

When the issue is fact-intensive, unless absolutely necessary, do not recite the facts by using a witness-by-witness account. It’s tedious to read and usually results in redundancies in the narrative. Though it’s more time-consuming, present the facts as a seamless story and point out individual perspectives or inconsistencies within that framework. When revising the PDR after having at least one complete draft, delete any immaterial facts.

*Avoid Repetition*

Though threshold issues like preservation and estoppel (or even standing) usually precede any merits issue, it may make more sense to present them in reverse order. Sometimes the facts and circumstances concerning the merits claim are better explained within that context first, followed by a threshold issue. Reverse ordering may help avoid reiterating all of the information that fits better in the merits section. You can let the background information lay the foundation for the threshold issue.

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| 1. “Must a revocation be based on evidence of a violation that occurred or was discovered subsequent to the preceding continuation or modification?”2. “If the State is required to allege all known violations or risk forfeiting them, is that requirement subject to waiver or estoppel?” *Tapia*, PD-0729-14. |

*Editing and Proofreading*

Avoid unintentionally giving an immediate negative impression. One judge advises not waiting until the due date to file a PDR. Leave enough time to put it away for a day or so and return to it with fresh eyes for final editing. Sloppy writing, like mixing-up dates and names, according to some Judges, gives the impression that the thinking behind the analysis was sloppy as well.

Have both an attorney and a non-attorney read your draft. Having these two perspectives should provide valuable feedback with respect to form and substance. If the non-attorney gains an understanding of the concepts, then you have truly met the objective. Finally, find a third, new coworker to review your final draft. There is a tendency to get so familiar with a case when you’re working on it that you unintentionally omit things that a person not familiar with the case will notice. If that person asks you to fill in a blank, then you need to add it to the PDR. An in-depth knowledge of the legal issue in your case can also result in a dis-jointed argument. Reflect on all of the logical steps that you made to reach your ultimate determination about the lower court’s decision and make sure that your argument connects all of the logical steps to support that conclusion.

*The Heart of It*

Get to the crux of the issue as it pertains to the facts as quickly as possible. If the context of the issue is unclear until the end, chances are that the judges will get frustrated and never make it to that point of the PDR. Provide a concise opening statement that sets out what the court of appeals did wrong and why. This provides the Judges with an instant roadmap of the argument that will follow. Writing the introduction may be the second to last substantive undertaking, preceding the framing of the ground for review. Or you can begin with drafting the summary; remember, however, to consider whether it needs to be revised after you’ve completed your argument. The summary provides the general outline for the ground for review so that the ground for review represents the shortest possible version of the summary.

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| **Ground for Review** | Does Penal Code section 42.11, entitled ‘Destruction of Flag,’ ban a substantial amount of protected speech, not only in an absolute sense, but also relative to the statute’s plainly legitimate sweep? *Johnson*, PD-0228-14.  |
| **Opening Statement** | Appellee became angry at the owner of a store and yanked a flag off the store front and threw it in the street. The court of appeals rejected his argument that section 42.112 is unconstitutional as applied to him but concluded that it “criminalizes a substantial amount of constitutionally protected conduct when judged in relation to its legitimate sweep,” and struck it for overbreadth.3 This conclusion, arrived at without any analysis, pays lip service to but ultimately ignores the standard promulgated by the Supreme Court and most recently utilized by this Court in *Ex parte Lo.* In so doing, it needlessly found unconstitutional a statute with numerous legitimate applications. For these reasons, this Court should grant review. |

Supplement the roadmap with topic or sub-topic headings. This helps to transition between points and to break-up the subject matter into bite-sized portions so that the reader is not overwhelmed with the amount of material.

*Limit Background Law*

Unlike the courts of appeals, the CCA specializes in criminal law, so the judges are familiar with, and have an excellent working knowledge of, criminal issues. Therefore, a statement involving common, general legal principles should be brief. For instance, if the ground for review does not involve the applicable standard of reviewde novo, abuse of discretion, or bifurcated legal and factualthen any reference should be limited to a sentence or two. If the error involves a *Brady* violation, there is no need to delve into a tedious explanation of *Brady* precedent. The Judges know the standard off the top of their heads, so it’s best to limit the discussion to its application to the facts. Only obscure, novel legal issues need a thorough introduction.

*Limit Cites*

Avoid using an abundance of citations. If there is one case on point, cite to that case only. The use of a long string-cite not only breaks up the flow of the writing, it unnecessarily increases the word-count of the PDR. One judge has noted that the longer the string cite, the less likely it is any of the cases stands for the proposition they supposedly support.

*Be Succinct*

Keeping the word count to a minimum, while effectively presenting the argument, should be a priority. There is a maximum word limit for PDRs and the longer the PDR is the less likely it will keep the reader’s undivided attention.

*Embrace the Unfavorable*

Acknowledge and address any adverse authority and facts. Again, doing anything that may be regarded by the Court as a negative with respect to your argument and your credibility can only hurt your chances of getting a case granted or damage your reputation with the Court and its staff. Once your reputation has been damaged, it will become very difficult to regain their trust and respect.

*Neutral Tone*

The tone of the writing is also of fundamental importance. Avoid anything that could leave a negative impression on the judges and Court staff, as this may affect how the merits of your argument are perceived. Be tactful and respectful, and use a neutral tone. While it’s appropriate to challenge the court of appeals decision, never attack the justices on a personal level. So even though the petition is directed to the CCA, be careful of how you choose to challenge the COA decision. The judges on the CCA will take offense if they view other members of the bench as being unjustly attacked. One now-retired judge once pointed out the following: It’s permissible to say that the court of appeals erred, was mistaken, or misconstrued something, but it is never okay to say the court was disingenuous, unfair, or prejudiced (unless in the legal sense). Finally, never belittle the other party or opposing counsel.

*Emphasis*

Visible emphasis*italicizing*, underlining, and **bolding**should be used infrequently and reserved for extremely important points, if used at all. These tools may be interpreted as the equivalent of shouting, and too many could give the impression that the writer believes that the judges and Court staff are stupid. So it’s either offensive because it reeks of aggression, or it’s insulting to the intelligence of the judges and Court staff. They are perfectly capable of reading and understanding the argument without this type of emphasis. If any type of emphasis appears in the original, though not required, it may be better taken by the Court if there is a parenthetical noting that the emphasis appears in the original. If a point needs to be emphasized, then do it through the writing by using a calculated sentence structure or stronger or more precise language.

*Nix Clichés*

Do not use trite language or clichés, and refrain from editorializing. One basic rule to follow is that if what is written will evoke an eye-roll or cringe from the reader, leave it out.

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| “This case is not about redistricting, high-end golf outings, inside-the Beltway cocktail parties, or the critical role that fund-raising plays in the political process. This is a case about the criminalization of politics.” |

*Consider the Audience*

Avoid emotion-based pleas as they tend to undermine an advocate’s credibility and legal argument. If you represent the State, referring to the egregious and horrible facts of your case is not recommended. First, the CCA encounters the worst cases on a routine basis, so there is little reason to believe that they will agree with your impression on the facts. Second, it detracts from the legal argument, which is what the Court is there to address. If the facts are highlighted in this manner, then it may signal that the legal argument is weak or that the case is too fact-bound for the Court to want to intervene. As a representative of the defendant, don’t focus on how your client has been unjustly or unfairly treated by the judicial system. On discretionary review, the Court is less interested in your client’s rights as an individual than with how the court of appeals’ decision will impact defendants as a class.

*Flesh-Out Harm*

When a harm analysis is challenged, the facts to prove your argument should be presented in such a way to show the impact on the outcome. Don’t present a conclusory argument; the Court and staff will not do the work for you.

*Special Research*

Attaching authority and reference material in an appendix is extremely helpful when there is reason to believe that the judges will have difficulty finding that material on their own. Though the majority of legal research is conducted online, there are instances in which an authority can be found only in a book at the law library. The judges will appreciate having these types of sources available at their fingertips. Cases that require such in-depth, historical research are rare but do occur. If your research capabilities are limited, contact the State Law Library in Austin. <http://www.sll.texas.gov/>. The staff there can assist you with any difficult or unusual project. Also, if your case has any documents that directly pertain to your argumentfindings of fact and conclusions of law, photos, or a jury chargeinclude them in the appendix so the staff and judges don’t have to search through the record.

*Argument*

The Court has historically leaned toward not granting argument. However, there are some judges that are opening to hearing it in every case. There are a variety of factors to consider when deciding to request argument. It is more likely that the Court will be willing to grant a request when the issue involves a novel application of binding precedent or the application of a statute that the Court has never interpreted. Make sure that you provide a reason that the Court should grant argument. The reason is usually clear because, in most cases, it’s the reason you’re filing the petition.

**IV. Responses and Subsequent (Cross) PDRs**

Responses are infrequently filed, but there are a few situations that necessitate a response. A response should be filed when the opposing party believes that there is a good reason for the Court to refuse review or to subsequently dismiss as improvidently granted the PDR after it has voted to grant review. This may be the case when there is: (1) a preservation problem, *Wilson v. State*, 311 S.W.3d 452, 473 (Tex. Crim. App. 2010) (“Preservation of error is a systemic requirement on appeal. If an issue has not been preserved for appeal, neither the court of appeals nor this Court should address the merits of that issue.”); (2) the argument made before the CCA is not the same as that addressed in the COA; (3) the PDR misrepresents the law or something in the record; or (4) the outcome of the case would be the same regardless of the Court’s decision to grant review (e.g., the COA reached the right ruling even though its reasoning was incorrect).

A subsequent (cross) PDR should be filed by the State when there is a question about whether the Appellant’s ground for review was properly preserved or when it is debatable about whether the error actually constitutes error.

A subsequent PDR should be filed by the appellant when the court of appeals errs by overruling a point of error but sustains and the State PDRs on the sustained issue.

**V. Rules**

The Rules of Appellate Procedure are sometimes changed with very little notice to practitioners. Several new rules became effective on January 1, 2014. For the most up-to-date version of the rules and miscellaneous orders from the Court of Criminal Appeals, consult the Court’s website. <http://www.cca.courts.state.tx.us>. The following rules apply specifically to PDRs.

**1. When:**

**Rule 68.2**

(a) First petition. The petition must be filed within **30 days** after either the day the court of appeals’ judgment was rendered or the day the last timely motion for rehearing or timely motion for en banc reconsideration was overruled by the court of appeals.

(b) Subsequent petition. Even if the time specified in (a) has expired, a party who otherwise may file a petition may do so within **10 days** after the timely filing of another party’s petition.

(c) Extension of time. The Court of Criminal Appeals may extend the time to file a petition for discretionary review if a party files a motion complying with Rule 10.5 (b) no later than **15 days** after the last day for filing the petition.

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| Even if you miss the deadline and your PDR is dismissed as untimely filed, you can file a motion for rehearing under Rule 79.1, requesting that the PDR be reinstated. Typically, the Clerk’s Office will grant a 30-day extension as a matter of course. A second request will go before the Court. In those circumstances, be mindful of the reasons you provide in your motion. Some of the judges believe that a list of other cases you have been working indicates that you can’t properly maintain your caseload and may need to cut back.  |

**2. Where:**

**Rule 68.3**

(a) The petition and all copies of the petition must be filed with the clerk of the Court of Criminal Appeals.

(b) Petition Filed in Court of Appeals. If a petition is mistakenly filed in the court of appeals, the petition is deemed to have been filed the same day with the clerk of the Court of Criminal Appeals, and the court of appeals clerk must immediately send the petition to the clerk of the Court of Criminal Appeals.

**3. Contents:**

**Rule 68.4**

(a) Identity of Judge, Parties, and Counsel. The petition must list the trial court judge, all parties to the judgment or order appealed from, and the names and addresses of all trial and appellate counsel.

(b) Table of contents. The petition must include a table of contents with references to the pages of the petition. The table of contents must indicate the subject matter of each ground or question presented for review.

(c) Index of Authorities. The petition must include an index of authorities arranged alphabetically and indicating the pages of the petition where the authorities are cited.

(d) Statement regarding oral argument. The petition must include a short statement of why oral argument would be helpful, or a statement that oral argument is waived. If a reply or cross-petition is filed, it likewise must include a statement of why oral argument should or should not be heard.

(e) Statement of the case. The petition must state briefly the nature of the case. This statement should seldom exceed half a page. The details of the case should be reserved and stated with the pertinent grounds or questions.

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| If your statement of the case is too long and includes too many facts, the Court may count it against your word limit. |

(f) Statement of procedural history. The petition must state: (1) the date any opinion of the court of appeals was handed down, or the date of any order of the court of appeals disposing of the case without an opinion; (2) the date any motion for rehearing was filed (or a statement that none was filed); and (3) the date the motion for rehearing was overruled or otherwise disposed of.

(g) Grounds for review. The petition must state briefly, without argument, the grounds on which the petition is based. The grounds must be separately numbered. If the party has access to the record, the petitioner must (after each ground) refer to the page of the record where the matter complained of is found. Instead of listing grounds for review, the petition may contain the questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of questions should be short and concise, not argumentative or repetitious.

(h) Argument. The petition must contain a direct and concise argument, with supporting authorities, amplifying the reasons for granting review. *See* Rule 66. The court of appeals’ opinions will be considered with the petition, and statements in those opinions need not be repeated if counsel accepts them as correct.

(i) Prayer for relief. The petition must state clearly the nature of the relief sought.

(j) Appendix. The petition must contain a copy of any opinion of the court of appeals.

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| Though exceedingly rare, if you are filing an emergency motion to stay any proceedings (along with the PDR), make sure that you note in the filing description that the matter is an “emergency request . . . .” If it is not designated accordingly, it may not come to the attention of the Clerk and General Counsel in the requisite time. So designate properly and give the Court a call in advance so they can look out for the motion.  |

**4. Word Count:**

**Rule 9.4**

(a) . . . . Printing must be on one side of the paper.

(i)(2)(d) A … petition for discretionary review and response in the Court of Criminal Appeals, and a motion for rehearing and response in an appellate court: **4,500** words . . . .

**5. Paper copies:**

**Rule 9.3**

(b)(2) Electronically Filed Document. Paper copies of each document that is electronically filed with the ... Court of Criminal Appeals must be mailed or hand-delivered to the Supreme Court or the Court of Criminal Appeals, as appropriate, within **three business days** after the document is electronically filed. The number of paper copies required shall be determined, respectively, by order of . . . the Court of Criminal Appeals.

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| “[T]he Court of Criminal Appeals requires **ten paper copies** of Petitions for Discretionary Review, Briefs, Replies, and Motions for Rehearing that are filed electronically . . . . When a document is filed electronically, the Court will notify the party of the case number. **A party must include this Court’s case number on all copies**.” Miscellaneous Docket No. 13-004, “Order Requiring Copies Pursuant to Texas Rules of Appellate Procedure 9.3(b)(2). |

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| Paper Copies must show the “accepted” electronic stamp from the Clerk.  |

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| Make sure you timely submit the paper copies. A PDR will be refused if the paper copies are not delivered to the Clerk, and the Clerk will not notify you that this is the reason for the refusal.  |

**6. Service on the State Prosecuting Attorney:**

**Rule 68.11**

In addition to the service required by Rule 9.5, service of the petition, the reply, and any amendment or supplementation of a petition or reply must be made on the State Prosecuting Attorney.

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| SPA’s service email is: information@spa.texas.gov |

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| **Prevailing Reasons PDRs are Rejected for E-Filing**  |
| * The PDR and Appendix (COA Opinion) are not combined as one document (Do not efile a PDR and COA opinion as separate documents.) [Rule 9.4(j)(4)].
* The COA opinion is not attached and is not single-sided (i.e., copied in duplex form) [Rule 9.4(a)].
* The PDR text is not a text-searchable PDF document [Rule 9.4(i)(1)].
* It does not include the proper CCA case number (if already assigned).
* It does not include the proper COA case number or style.
* The party’s or attorney’s email address is not listed on the cover [Rule 9.4(g)].
* It does not contain a certificate of compliance [Rule 9.4(i)(3)].
* It is over the word limit [Rule 9.4(i)(D)].
* The PDR does not contain the identity of the parties [Rule 68.4(a)].
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**PDR Check List**

**Grounds**

 **General Threshold**

 Is there a viable argument that error was not preserved (even if not an issue in the COA)?

 If error was not objected to, is the type of error subject to procedural default or waiver or is it systemic? Should preservation be required?

 Is there a viable estoppel argument?

 Is there a viable laches argument?

 **Merits**

 If you have a Fourth Amendment claim,

* can a challenge to standing be made (even if it was not raised in the COA)?
* is a remand appropriate because additional factfindings (if made in the first instance) are needed?
* are there any previously un-argued legal theories that support the trial court’s ruling (only if you prevailed in the trial court)?
* was there actually a violation, or was there a mistake of law (*Heien v. N.C*., \_\_ U.S.\_\_ (2014)?
* is the evidence subject to suppression under federal law and Tex. Code Crim. Proc. art. 38.23?

 If you have a Fifth Amendment issue,

* is there a viable claim concerning “custody”?
* is the evidence subject to suppression under federal law and Tex. Code Crim. Proc. art. 38.22?

 Do you have a trending issue? If so,

* did you check for other PDR-worthy grounds, especially ones that could result in greater relief to your client?
* have you investigated and researched whether there are any additional legal arguments to make that have not yet been presented in those other cases?
* have you investigated whether there are any determinative factual differences in your case in comparison to the lead case? If so, have you clearly noted the distinctions and requested that the Court grant your PDR and not “hold” for the lead-case-decision?

 If you are challenging whether an act or failure to act was erroneous, did the COA conduct a harm analysis? If so,

* is the error subject to a harm analysis?Or is it structural?
* is there a viable challenge to the harm analysis to obtain a reversal?

 **Harm**

 Do you have a ground for review involving harm? If so,

* have you determined whether there is a viable issue pertaining to the error?
* have you determined whether the proper harm standard has been applied? (44.2(a) or (b); *Almanza*’s “some” or “egregious” harm?)
* have you fully fleshed-out the harm analysis?

**Form**

 If you have cut and pasted from other documents, have you changed all of the case-specific information like names and dates?

Have you deleted immaterial facts?

Have you used too many visible emphasis tactics like *italicizing*, underlining, and **bolding**?

If you cited hard-to-find authority (e.g., old Legislative hearing recordings), has it been included in an appendix?

 If your cases turns on the substance of a search or arrest warrant, has it been included in the appendix?

Have you had at least one person review and edit the PDR?

**Substance**

 Have you winnowed down the grounds (preferably 1 & 2 and no more than 4)?

 Does the ground for review and argument unquestionably challenge the COA decision (not the trial court’s ruling) to avoid refusal under *Degrate*?

 Does the ground for review concisely reflect a single issue (not compound) without being over-broad?

 Do you want oral argument? If so, have you explained why it is needed?

 Have you acknowledged and addressed unfavorable facts or law?

 Have you requested the proper form of relief? Reformation to lesser? New punishment? Deletion?

 Have you noted other claims unaddressed by the COA that may need to be resolved, depending on the Court’s disposition of your ground(s)?

**Filing & Rule Compliance**

 Is your email address on the cover sheet?

 Is the PDR properly styled (does the case already have a CCA cause number)?

 Is the identity of the trial judge and parties included?

* If you omitted it and the PDR was rejected, make sure you timely refile.

 Is there a certificate of compliance?

 Is the document within the 4,500 word limit?

 Is the PDF in a searchable format?

 Is a non-double-sided COA opinion attached? Have you excluded Headnotes?

 Are all pages of the COA opinion present? Concurring and Dissenting opinions?

 Is the PDR and COA opinion combined into one PDF document?

 Is the State Prosecuting Attorney (information@spa.tx.gov) included on the Certificate?

 If requesting an emergency stay, have you alerted the Court you are planning on filing it and designated it as an emergency filing in your document description?

• Single-Sided Paper Copies

 Has a reminder or prompt been set so you remember to send 10 single-sided paper copies 3 days after it is accepted for filing?

 Do the single-sided paper copies include the Clerk’s “accepted” electronic stamp?

 Are the paper copies identical to the filed version?

 Is the full COA opinion attached to the paper copies?

1. A refusal does not mean that the Court of Criminal Appeals agreed with the lower court’s decision. *Dennis v. State*, 798 S.W.2d 573, 573 (Tex. Crim. App. 1990). [↑](#footnote-ref-1)
2. This summary was taken from the State Prosecuting Attorney’s website. [↑](#footnote-ref-2)
3. This summary was taken from the State Prosecuting Attorney’s website. [↑](#footnote-ref-3)
4. Note that a challenge to precedent does not have to be raised before the court of appeals because the court of appeals has no authority to overrule Court of Criminal Appeals’ precedent. [↑](#footnote-ref-4)
5. This quote is taken from an interview conducted by Bryan Garner. http://www.lawprose.org/interviews/judges-lawyers-writers-on-writing.php?vid=easterbrook\_reading\_journalism&vidtitle=Hon.\_Frank\_H.\_Easterbrook\_On\_Reading\_Journalism. [↑](#footnote-ref-5)