PETITIONS FOR DISCRETIONARY REVIEW: EASY CASES ARE EASY, PDRs ARE HARD

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BIOGRAPHICAL INFORMATION

John graduated from Baylor Law School after earning his B.S./M.S. in Marketing from the New Jersey Institute of Technology. He has been with the Office of the State Prosecuting Attorney since 2010. Before that, he was the Assistant District Attorney in McLennan County who handled direct appeals, Adult Protective Services matters, protective orders, and occasionally some Child Protective Services matters.

John has filed over 100 petitions for discretionary review and enjoyed the privilege of representing the State in almost 80 cases decided by the Court of Criminal Appeals. Notable cases include *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010) (ending factual sufficiency review of convictions), *Ex parte Perez*, 398 S.W.3d 206 (Tex. Crim. App. 2013) (expanding the application of laches in writ proceedings), and *Proenza v. State*, 541 S.W.3d 786 (Tex. Crim. App. 2017) (rejecting a fundamental error exception to the rules of error preservation). He has also argued almost 40 cases, including 21 before the Court of Criminal Appeals.

John serves on the State Bar's Pattern Jury Charges—Criminal Committee and summarizes the Court of Criminal Appeals's decisions for The Appellate Advocate. He has had the honor of speaking at the State Bar Advanced Criminal Law Course (2016, 2017, 2018, 2019, 2021), the Robert O. Dawson Conference on Criminal Appeals (2011, 2019, 2021), TDCLA's "Innocence for Lawyers" course (2018), the Collin County Bench Bar Conference (2015), and the DWI College for Trial Judges (2011). John has served on the planning committee of the Advanced Criminal Law Course and been a moderator of its Appellate Track multiple times. He has also traveled to rural counties promoting "The Fourth Amendment: Core Concepts and Vehicular Searches," a comprehensive paper and four-hour presentation he created for law enforcement officers.

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PETITIONS FOR DISCRETIONARY REVIEW: DOING THEM BETTER COULDN'T HURT.

I. INTRODUCTION

A litigant has no right to have a court of appeals's decision reviewed by the Court of Criminal Appeals. This is not merely a rule of appellate procedure; it is enshrined in our constitution.[1] Even if the Court had the desire to act as a check on every opinion, it lacks the resources to grant and issue an opinion on every petition. The Court thus exercises its discretion sparingly. The number of granted petitions from 2015 to 2020 were:

- FY 2015: 97 petitions.[2]
- FY 2016: 96 petitions.[3]
- FY 2017: 81 petitions.[4]
- FY 2018: 83 petitions.[5]
- FY 2019: 57 petitions.[6]
- FY 2020: 72 petitions.[7]

The grant rate was under 10% in each of these years. The report for 2021 does not plainly state how many petitions were granted, but it says the rate was 12%.[8] That number might be misleading, however. As of writing, there are only 56 granted cases pending. That is down from over 100 in the last year or two. The Court's sharply negative replacement rate can perhaps be explained by the dramatic increase in average time to disposition for granted PDRs over the same period. From 2014 to 2021, that time increased 50%, from 200 days to 300 days.[9] That is down from a peak in 2019, but it still creates pressure not to invite more work. The "D," after all, is for "discretionary." More than ever, practitioners will have to find ways to make their request for review attractive to at least four judges. Hopefully, this paper will help.

II. TO PETITION OR NOT TO PETITION?

A. A brief disclaimer.

I am a career prosecutor. I only make arguments I believe to be correct and fair.[10] I have never filed an appeal or petition I did not believe in. I have never been assigned an appeal that was iffy (at best) nor have I ever had to hustle to find clients so I can pay bills. In short, I have never faced most of the situations defense attorneys face regularly. If a wealthy client wants to pay you to file a petition that will almost certainly be denied (but is not frivolous[11]) to keep them out of prison for a while, you should tell them their odds and then take their money. In that order. This paper is designed for litigants who think they have an issue worth pursuing, but it might be of use in those circumstances, too.

B. Are you sure you want to do this?

Before you give any more thought to filing a petition, take a moment to consider the probable and unintended consequences. Prosecutors, for example, may want to consider whether winning back the conviction in this one case will have an adverse effect on the larger body of law. Or maybe filing a petition on a point of error you lost will lead to a defense "cross-petition" on an issue you'd rather went unaddressed. Defense attorneys, on the other hand, will want to consider whether their client has more to lose than gain from a successful petition. Would he face a greater punishment the second time around? Would winning undo an amazing plea deal? Explain these risks to your client before filing a petition.

C. Decisions, decisions

So, you want to file a petition for the right reasons. The first question to ask is whether your issue was actually considered by the lower court. "Actually" is

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[1] TEX. CONST. Art. V sec. 5(b) ("Discretionary review by the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion."); TEX. R. APP. P. 66.2 ("Not a Matter of Right – Discretionary review by the Court of Criminal Appeals is not a matter of right, but of the Court's discretion."). Any reference to a rule is to the Texas Rules of Appellate Procedure unless otherwise stated.

[2] Annual Statistical Report for the Texas Judiciary Fiscal Year 2015, Detail 5 (https://www.txcourts.gov/media/1308021/2015-ar-statistical-print.pdf).

[3] Annual Statistical Report for the Texas Judiciary Fiscal Year 2016, Detail 5 (http://www.txcourts.gov/media/1436989/annual-statistical-report-for-the-texas-judiciary-fy-2016.pdf). These numbers include petitions that were untimely or struck for other reasons.

[4] Annual Statistical Report for the Texas Judiciary Fiscal Year 2017, Detail 5 (https://www.txcourts.gov/media/1441397/ar-fy-17-final.pdf).

[5] Annual Statistical Report for the Texas Judiciary Fiscal Year 2018, Detail 5 (https://www.txcourts.gov/media/1443455/2018-ar-statistical-final.pdf).

[6] Annual Statistical Report for the Texas Judiciary Fiscal Year 2019, Detail 7 (https://www.txcourts.gov/media/1445760/fy-19-annual-statistical-report.pdf).

[7] Annual Statistical Report for the Texas Judiciary Fiscal Year 2020, Detail (p.99). (https://www.txcourts.gov/media/1451853/fy-20-annual-statistical-report_final_mar10_2021.pdf).

[8] Annual Statistical Report for the Texas Judiciary Fiscal Year 2021 p. 48.

[9] *Id*. at 49.

[10] TEX. CODE CRIM. PROC. art. 2.01 ("It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done.").

[11] TEX. DISCIPLINARY R. PROF'L CONDUCT 3.01 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.").

literally the most overly and improperly used word in our language, except for "literally," but it is appropriate here. The Court has said, "In our discretionary review capacity we review 'decisions' of the courts of appeals."[12] This means that your issue was the basis for the court of appeals's decision. As in the court of appeals, be careful to challenge every ground that supports the adverse holding. Otherwise, it will be clear that your petition presents, at most, an interesting academic exercise.

There are exceptions to the "decision" rule:

- **Was it raised in the court of appeals but the court failed to address it?** This is the "non-decision" ground. Rule 47.1 requires the court of appeals to "hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal." Ignoring this rule is a "depart[ure] from the accepted and usual course of judicial proceedings," one of the stated reasons for review discussed below.
- **If the issue was not raised in the court of appeals, did you win in the trial court?** The prevailing party at trial need not raise a particular argument in a reply brief on appeal as a predicate to later raising it on discretionary review.[13] "[T]his is especially true when . . . the issue . . . was essentially generated by the lower appellate court's particular manner of disposing of the claim on appeal."[14] By definition, complaints about an unexpected disposition or remedy could not have been raised earlier and so are timely made in a motion for rehearing or even in a petition for discretionary review.[15]
- **Is there a preservation issue?** Preservation is a systemic requirement that the Court says it "can and should" address when raised for the first time on discretionary review.[16] How it is addressed has changed over the years. Until recently, the Court assumed that the court of appeals implicitly decided it against the petitioning party because a court of appeals must review preservation regardless of whether it is raised.[17] The Court subsequently suggested that this "means only that a court of appeals may not *reverse* a judgment of conviction without first addressing any issue of error preservation."[18] More recently, the Court has stopped relying on this assumption but has been inconsistent in its treatment, refusing the State's request for remand in some cases and granting the issue on its own motion and remanding for consideration in others.[19] The better practice, regardless of whether preservation was raised and unaddressed or simply forgotten, is to raise it in a petition (or subsequent petition, if you won on appeal).

D. Do you have an issue worth reviewing?

Just because you can doesn't mean you should. The second question is: why should the Court care?

1. <u>The Court is not hiding the ball.</u>

One does not have to guess at what the Court considers when deciding what petitions to grant:

> **Rule 66.3. Reasons for Granting Review**
> While neither controlling nor fully measuring the Court of Criminal Appeals' discretion, the following will be considered by the Court in deciding whether to grant discretionary review:
>
> (a) whether a court of appeals' decision conflicts with another court of appeals' decision on the same issue;
> (b) whether a court of appeals has decided an important question of state or federal law

[12] *Lee v. State*, 791 S.W.2d 141, 142 (Tex. Crim. App. 1990). More often, the Court frames this rule as "a general proposition" subject to exceptions. *Gilley v. State*, 418 S.W.3d 114, 119 (Tex. Crim. App. 2014) (citations omitted).

[13] *McClintock v. State*, 444 S.W.3d 15, 20 (Tex. Crim. App. 2014). In fact, the Rules do not even require the appellee to file a brief. *Volosen v. State*, 227 S.W.3d 77, 80 (Tex. Crim. App. 2007).

[14] *McClintock*, 444 S.W.3d at 20.

[15] *Sotelo v. State*, 913 S.W.2d 507, 510 (Tex. Crim. App. 1995).

[16] *Ford v. State*, 305 S.W.3d 530, 532-33 (Tex. Crim. App. 2009).

[17] *Mays v. State*, 285 S.W.3d 884, 889 (Tex. Crim. App. 2009); *Haley v. State*, 173 S.W.3d 510, 515 (Tex. Crim. App. 2005).

[18] *Meadoux v. State*, 325 S.W.3d 189, 193 (Tex. Crim. App. 2010) (emphasis in original).

[19] *Compare Reynolds v. State*, 423 S.W.3d 377, 383 (Tex. Crim. App. 2014) ("we will not remand for this omission, as the State requests, and instead we will address whether the retroactivity complaint was preserved."), *with Leal v. State*, 456 S.W.3d 567, 568 (Tex. Crim. App. 2015) ("We therefore . . . vacate the judgment of the court of appeals, and remand this case to that court [to] address whether appellant preserved his claim that the warrantless blood draw violated his Fourth Amendment rights."); *Mayes v. State*, 353 S.W.3d 790, 797 (Tex. Crim. App. 2011) ("We therefore reverse the judgment of the court of appeals and remand the case to that court to address the issue of error preservation, which is not before us" because it was acknowledged by the court of appeals, went undecided, and was not raised by the State in a subsequent petition).

that has not been, but should be, settled by the Court of Criminal Appeals;

(c) whether a court of appeals has decided an important question of state or federal law in a way that conflicts with the applicable decisions of the Court of Criminal Appeals or the Supreme Court of the United States;

(d) whether a court of appeals has declared a statute, rule, regulation, or ordinance unconstitutional, or appears to have misconstrued a statute, rule, regulation, or ordinance;

(e) whether the justices of a court of appeals have disagreed on a material question of law necessary to the court's decision; and

(f) whether a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Court of Criminal Appeals' power of supervision.

This list gives valuable insight. It can be broken down into three main categories:

- **Conflict**. The conflict could be with existing controlling precedent, amongst courts of appeals on a matter that needs to be resolved, or amongst the justices of a single court. Whatever the case, only the highest criminal court in Texas can settle it.
- **Novel legal questions**. These are often on the meaning and/or constitutionality of a statute, but could be any question of law.
- **The lower court has "so far departed" from proper procedure that its actions must be reviewed**. Nothing new here; just a blatant failure to follow accepted norms for handling a case, either in its analysis or disposition.

Please note that nowhere in this list is anything like "I should have won in the trial court." The Court focuses on cases that will enhance the jurisprudence of the State by offering guidance and consistency. It has rejected a role as another venue in which to complain about errors the trial court made.[20]

2. Why is your case worth the Court's time?

If there is one thing to take away from this paper, it is that the purpose of a petition is to convince the Court your case should be reviewed—not to convince them you should have won. The Court summarized a petition's purpose in *Degrate v. State*:

> Appellant presents twelve grounds for review, which are an exact duplication of the grounds of error presented to the court of appeals. However, appellant's petition fails to present any reasons why this Court should review the opinion of the court of appeals. . . . The purpose of the petition for discretionary review is to present cogent, concise reasons why this Court should exercise its discretionary jurisdiction. . . . The importance of the case to the jurisprudence of the State must, therefore, be made apparent in the petition for review. The assertion that the court of appeals was in error as to some point of law, standing alone, may be insufficient to require further review.[21]

Importantly, this task is not necessarily complete when the petition is granted. It takes only four judges to grant review,[22] so your case could get discretionary review despite a majority of judges thinking it is a waste of time. That belief may not go away; do not be surprised if a judge asks you at argument why your case should not be dismissed as improvidently granted. Have an answer, because five judges can do so at any time.[23]

3. Additional considerations

Although they are not exclusive, the considerations listed in Rule 66.3 are a good starting point. Here are some related considerations:

- **If your issue is one of statutory construction, is it a new law?** The Court might be reluctant to construe a statute before other courts of appeals have weighed in. This is especially true if the statute does not have obvious broad application. Explain why review must happen now.
- **If the statute is old, why is review suddenly imperative?** Has there been a change in the legal or societal landscape that makes the statute more relevant now? This is often the case with technology. For example, it has been against the law to intercept oral communications for years and there are relatively few cases involving the statute. However, with the advent of readily available recording technology in almost everyone's pocket,

[20] *See*, *e.g.*, *State v. Terrazas*, 4 S.W.3d 720, 725 n.4 (Tex. Crim. App. 1999) ("Appellee argues this case as if we were an intermediate appellate court reviewing the trial court's ruling rather than a discretionary court reviewing the decision of the Court of Appeals.").

[21] 712 S.W.2d 755, 756 (Tex. Crim. App. 1986).

[22] TEX. R. APP. P. 69.1.

[23] TEX. R. APP. P. 69.3.

the issues of surveillance and privacy are a hot topic.

- **Has a judge on the Court written on your point of view or foreseen the problem presented?** Sometimes the Court makes it clear that it wants to decide an issue. In *State v. Bennett*, 415 S.W.3d 867 (Tex. Crim. App. 2013), the issue was whether trial counsel was ineffective for failing to assert a limitations defense for aggravated assault. It came down to whether the statute of limitations for that offense is 1) two years, or 2) three years. There were six opinions issued: a majority opinion concluding that the law was unsettled (and therefore counsel was not deficient) and five others that said it should be two years, it should be three, it was clear enough to be raised, or it should be settled by the Court or clarified by the legislature. Combined with how common aggravated assault is, the above summary of *Bennett* in a properly formatted petition probably would have been enough to get the issue granted without further argument. *See State v. Schunior*, 506 S.W.3d 29 (Tex. Crim. App. 2016). This played out in *Kuykendall v. State*, PD-0003-20. The State's (granted) PDR was 479 words, largely because a previous CCA opinion from five years prior produced a concurrence and two dissents on the topic. Little else had to be done.
- **Are there any policy considerations that make your issue more important than it appears?** If your issue appears small, find a way to make it large. For example, Transportation Code violations are disproportionately important compared to other Class C misdemeanors because they often lead to convictions for more serious offenses. Or, if it is a matter of statutory interpretation, is your relatively obscure statute worded similarly to a more widely used statute?
- **Was the opinion published?** Unpublished opinions have no precedential value.[24] By rule, the court of appeals cannot designate an opinion as a memorandum opinion if that designation is opposed by the author of a concurrence or dissent. But it must designate it as a memorandum opinion unless it 1) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur; 2) involves issues of constitutional law or other legal issues important to the jurisprudence of Texas; 3) criticizes existing law; or 4) resolves an apparent conflict of authority.[25] These track Rule 66.3. Thus, publication is some indication that the case is worthy of review. If your case was not published, ask the court of appeals to do so under Rule 47.2(b). Sometimes they do. Moreover, the lack of publication can sometimes be leveraged against the court. Argue that it shows the court failed to grasp the significance of what it did, and that its reasoning will affect (or infect) other decisions in that judicial district.
- **Is your case interesting or fun?** (Appellate fun, not real fun.) Think back to moot court competitions in law school. Those fake cases had interesting fact patterns and areas of law that generate conversation. Judges are people, too; they can only consider so many court cost cases before something gives. Offering them something that might entertain them could put your petition over the top.

4. Winning!

Having said all that, there are times when demonstrating that the lower court likely got it wrong is necessary:

- **The court of appeals has construed a statute for the first time**. If there is not a split to settle, the Court will be far less likely to review it if it appears the court of appeals got it right.
- **You are asking the Court to overrule precedent**. Whether your argument is based on changes in the assumptions underlying the precedent, proof of unintended consequences, or simply better reasoning, you will have to show there's a good chance you are right before the Court will open up the *stare decisis* can of worms.
- **You are making a "standard" or "application" argument, as in a standard of review, framework for analysis, etc**. The lower court's deviation from the accepted standard is rarely so gross as to warrant correction if the outcome was never in serious doubt. You should demonstrate that its error made a difference.

5. You don't have more than two good issues for review.

Truth be told, you probably don't have one. And unless you were extremely judicious in your appeal, you certainly don't have as many viable issues as the court of appeals rejected. Pick the one or two that, in your best professional judgment, are worth even some consideration by the Court.

To be clear, "issue" in this context means a single trial event that may give rise to multiple questions or grounds.[26] A single error could give rise to separate questions of preservation, standard of review,

[24] TEX. R. APP. P. 47.7(a).

[25] *See* TEX. R. APP. P. 47.4.

[26] "Grounds" and "questions" are used interchangeably.

application, and harm, depending on how broadly you write them. The average number of "events" complained of in the 25 PDRs I filed since 2019 is 1.04. The average number of questions presented was 1.6. Fifteen of those petitions had only one question presented. For what it's worth, 15 of the 23 that have been ruled upon were granted. I cannot know for sure, but I bet focus works.

III. NUTS AND BOLTS

A. What are you talking about?

If you think you have an issue worthy of review, you still must package it in such a way as to convince the Court. One mistake practitioners make is writing as though the judges are as familiar with the case as they are. The judges did not work on the appeal, or anxiously await and then note all the alleged errors in the opinion. And even though some of them read the opinion before reading the petition, or flip back and forth, don't make it so they have to. Instead, assume the reader's ability to understand your argument depends entirely on what you tell them.

In short, you can craft a petition that neatly describes what you are asking the Court to address. Or, as many practitioners do, you can force the Court to guess wildly until halfway through the argument section because you have buried the lede at every step of the way. I have read many petitions like that and it makes me physically tense. I doubt it impresses judges.

B. Follow the Rules.

Thankfully, the Court has given us a map in the Rules of Appellate Procedure. Stripped of the "technical" requirements, Rule 68.4, entitled "Contents of Petition," says:

A petition for discretionary review must be as brief as possible. . . . The petition must contain the following items:

> . . .
>
> (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. . . .
>
> (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.
>
> . . .
>
> (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. . . . 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 66.3. 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.

These are the "moving parts" of a petition. It is no mistake that words like "concise," "brief," and "short" repeatedly appear. While concision is always commendable, it is especially important with PDRs because of the volume of documents the Court reviews each year. Any assistance in making your petition easier to read and comprehend can only benefit your client. Moreover, being "unnecessarily lengthy" is one of the grounds upon which the Court "may strike, order redrawn, or summarily refuse a petition for discretionary review."[27]

To that end, consider what contents are not mentioned in Rule 68.4. First, there is no section called "Reasons for Granting Review," where the applicable items listed in Rule 66.3 are stated in the abstract. There never was. Fun fact: the "Argument" section used to be called "Reasons for Review" but was materially the same as it is now. The change in name was likely made to emphasize it is not enough to list items from Rule 66.3—real argument is required. At best, a "Rule 66.3" section would be redundant.

Second, there is no "Statement of Facts." Briefs require them, petitions don't. This is not to say the necessary facts should not be succinctly stated to frame the questions presented. Rather, they should be worked into the "Argument" section to give the ground(s) for review context. And isn't that better? We've all reluctantly read a detailed factual recitation without knowing whether any of it matters. That doesn't happen when the facts are integrated. Besides, a separate statement-of-facts section will count against your total word allotment.

[27] TEX. R. APP. P. 68.6 ("Nonconforming Petition").

C. Don't overlook the request for oral argument.

It is easy to "check the box" by making a boilerplate request for argument and move on to the main event of the petition. Don't. Remember that the purpose of the petition is not to win outright but to convince the Court that your case is worth its time. Your explanation for why argument is necessary can also serve to explain why the case is important. Don't just avoid saying something dumb.[28] Say something helpful. Here are some examples:[29]

> *Ex parte Jones*, PD-0552-18
> The State requests oral argument. As with most First Amendment facial challenges, there are any number of factual scenarios that could affect the Court's analysis. The litigants cannot think of all of them. They should have the opportunity to respond to whatever aspects of this case most interest the Court.

> *Jacobs v. State*, PD-1411-16
> The State requests oral argument. Despite this Court's best efforts, the standard for assessing the harm of voir dire error continues to cause confusion. The impetus for the proposed questioning in this case, TEX. CODE CRIM. PROC. art. 38.37, can be especially problematic because it makes character conformity relevant in cases involving sexual offenses against children. Conversation will assist the Court in giving guidance to both the bench and bar.

> *Ramirez-Memije v. State*, PD-0378-13
> The State requests oral argument. This case deals with the two fundamental concepts of criminal culpability—voluntary conduct and an accompanying mental state—in possession cases. What it means for possession to be voluntary has not been squarely addressed by this Court. Given both the direct and sweeping, unintended consequences that the lower court's opinion has on possession cases specifically and mens rea generally, oral argument would be helpful to the Court's determination of the issue presented.

> *Cyr v. State*, PD-0257-21
> The State requests oral argument. There are few cases that discuss concurrent causation, and none that explore its application to offenses that make the defendant responsible for the actions of others. Given the careful distinction this Court has attempted to draw between criminal harm to children and civil negligence or mere tragedy, conversation would be helpful.

Full disclosure: only the third and fourth received argument. Given current practice, however, that's pretty good.

You can also take the opportunity to reinforce why you should win (and hence why review should be granted):

> *Niles v. State*, PD-0235-17
> The State does not request oral argument. The applicable law is clear such that discussion is unnecessary and summary remand is appropriate.

Either way, take the time to advocate.

D. The Statement of the Case should set up the Grounds for Review.

That the rules regarding the statement of the case and grounds for review are themselves short says a lot. Using them together effectively will say a lot about your case.

Half a page with double spacing and 14 pt. font[30] is not a lot of words for a statement, but this limitation is not an oversight. It jibes with the directive to "briefly" state the nature of the case, reserving details for later. So what happened in the court below? It is as simple as naming the offense and trial court outcome, and giving a succinct statement about the court of appeals's allegedly errant holding. That way, your grounds have context.

As with the rule on statements, there are a number of things to take away from the rule on grounds for review. The first, again, is brevity and concision. One of the reasons that overlapping or repetitious grounds are unnecessary (and therefore disfavored) is that the Court will consider all subsidiary issues that are "fairly raised" by the grounds for review.[31] That is, in part, why "unnecessary detail" is explicitly discouraged.

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[28] My favorite was an offer to explain the confusing lower court opinion to the Court.

[29] All the cited examples in this paper—good or bad—are from petitions I filed.

[30] *See* TEX. R. APP. P. 9.4(d), (e).

[31] *Ex parte Ellis*, 309 S.W.3d 71, 78 n.39 (Tex. Crim. App. 2010). *See also Bland v. State*, 417 S.W.3d 465, 471 n.12 (Tex. Crim. App. 2013) ("This argument does not fairly fall within the ground and arguments contained in his petition for discretionary review, and we do not consider it."); *State v. Munoz*, 991 S.W.2d 818, 830 (Tex. Crim. App. 1999) ("Having decided all issues fairly presented in the petitions for discretionary review . . . .").

It is also related to the second point: argument belongs in the argument section. While one should take every opportunity to persuade the reader, that should not get in the way of concisely and helpfully framing the issue for the Court. Writing the grounds last will ensure they do what they're supposed to.

1. Helpful Examples

Here are some examples of statements of the case followed by the related question(s) from granted petitions. Please note that the question or issue presented flows directly from the court of appeals's holding as it was framed. Also note that each is a fairly "straight" question; while the desired answer may be apparent, they (usually) pose a legal question the answer to which is both determinative of the case and valuable to the rest of Texas.

State v. Cortez, PD-1652-15

Appellee was stopped for driving on an improved shoulder and arrested for possession with intent to deliver. The trial court granted appellee's motion to suppress. The court of appeals agreed, holding that driving on the white "fog line" is not driving on the shoulder.

1. Where does the improved shoulder of a highway begin: on the inside edge of the "fog line," the outside edge, or somewhere in between?
2. Given the lack of controlling precedent, was it objectively reasonable under *Heien v. North Carolina*, 135 S. Ct. 530 (2014), for a law enforcement officer to believe that the improved shoulder begins where the roadway appears to end?

Jacobs v. State, PD-1411-16

Appellant was convicted of aggravated sexual assault of a child. The court of appeals reversed, holding that he suffered constitutional harm because the trial court limited his voir dire on the jury's duty to hold the State to its burden of proof notwithstanding a prior conviction for a similar offense.

Is it constitutional error to prevent defense counsel from asking a question during voir dire that could give rise to a valid challenge for cause?

Murray v. State, PD-1230-14

Appellant was convicted of driving while intoxicated and sentenced to one year in jail, probated for two years. The court of appeals found the evidence insufficient to prove that appellant was "operating" the vehicle while intoxicated.

Is a driver who is passed out behind the wheel of a running vehicle "operating" it for the purposes of DWI?

Queeman v. State, PD-0215-16

Appellant was convicted of criminally negligent homicide. The court of appeals acquitted him because, in its view, the evidence showed only that appellant "inexplicably failed" to avoid striking an SUV.

1. Is failing to maintain a safe speed and keep a proper distance the sort of "unexplained failure" that this Court suggested in *Tello v. State*, 180 S.W.3d 150 (Tex. Crim. App. 2005), would be unworthy of criminal sanction?
2. Did the court of appeals ignore basic rules of sufficiency review when it disregarded evidence that supported the verdict and drew inferences contrary to those presumably drawn by the jury?

Ramirez-Tamayo v. State, PD-1300-16

Appellant pleaded guilty to possession of a controlled substance after an extended traffic stop revealed almost 20 pounds of marijuana hidden in the doors of his rental vehicle. The court of appeals reversed. It held that the circumstances, while potentially indicative of criminal activity, were not proven reliable and accurate enough to provide reasonable suspicion.

1. The court of appeals ignored the law governing the review of suppression rulings by, *inter alia*, considering the circumstances in isolation, focusing on their innocent nature, and generally failing to defer to the fact-finder.
2. Under what circumstances is a reviewing court permitted to ignore a credible officer's inferences and deductions based on his training and experience?

Cyr v. State, PD-0257-21

Appellant was convicted of recklessly causing serious bodily injury to her child, a four-month-old girl, by failing to protect her from her husband's physical abuse and/or failing to obtain medical treatment. The court of appeals reversed after deciding that appellant was erroneously denied an instruction on

concurrent causation for her husband's conduct.

1. Does the concept of concurrent causation, Tex. Penal Code § 6.04(a), apply to the results caused by third parties for which the defendant is criminally responsible?
2. Is ambivalence over the amount of serious bodily injury directly attributable to the defendant evidence that her conduct was clearly insufficient to cause any serious bodily injury?

In each example, reading the statement of the case gives you context sufficient to understand the question(s) presented. As the rule requires, there will be details lacking so it may be that, with a more complex case, the specific problem may not be immediately apparent. That's okay; that's what the rest of the petition is for. But at least you will have sufficiently narrowed the field of potential issues so that the grounds for review do not strike from out of nowhere.

2. Mistakes to avoid.

The following are statements and grounds from three cases, all granted, that should have been more refined:

Merritt v. State, PD-0916-11
Appellant was charged with arson of an insured and mortgaged vehicle. He was convicted and sentenced to ten years and one day. The Court of Appeals reversed, holding that the evidence that appellant was responsible for the fire was legally insufficient.

1. To establish identity in an arson case, must motive be combined with some other circumstance(s) or should the reviewing court simply consider the logical force of the evidence on a case by case basis?
2. Did the First Court ignore evidence that supported the jury's verdict?
3. Did the First Court's analysis disregard the jury's prerogative to draw reasonable inferences and resolve conflicting theories of the case, in turn resurrecting the alternative reasonable hypothesis construct?

There is no reason why the second and third points could not be combined. Both suggest the court of appeals ignored basic rules of sufficiency review, and would undoubtedly be discussed together should the petition be granted.

Okonkwo v. State, PD-0207-12
Appellant was convicted of forgery. The court of appeals reversed, holding that trial counsel's failure to request an instruction on mistake of fact with regard to appellant's knowledge of the authenticity of the currency constituted ineffective assistance of counsel.

1. Must a reviewing court look beyond the testimony of trial counsel to determine whether not requesting a mistake-of-fact instruction was objectively unreasonable?
2. Can it ever be deficient performance not to request a mistake-of-fact instruction when the offense requires the State to prove knowledge of that fact beyond a reasonable doubt?
3. Does the failure to request an instruction on mistake of fact necessarily result in prejudice, or must the reviewing court perform a complete review of the record to determine whether there is a reasonable probability that, but for counsel's deficient performance, the result would have been different?

The first question could have been omitted. The point of that question is to reinforce that counsel's performance is to be viewed objectively. There is no reason why it could not have been discussed as part of the argument under the second question, which suggests that it is never objectively unreasonable to forgo a mistake-of-fact instruction when the offense requires knowledge of that fact.

Tate v. Texas, PD-0730-15
Appellant was convicted of possession of a controlled substance and sentenced to two years in state jail. The court of appeals held that the evidence was legally insufficient to connect appellant to the methamphetamine found in his vehicle.

1. Did the court of appeals ignore multiple rules of sufficiency review and substitute its judgment for the jury's when it held there was insufficient evidence connecting appellant to the contraband found in plain view in the center console of a car that he owned and was driving?

On the surface, there is nothing wrong with this question. If anything, it makes the issue seem too clear; there must have been some other facts the court of appeals deemed important because otherwise this is an easy case. That's the problem. The interesting thing

about *Tate* was that two people remained in the car after Tate was removed; because the drugs were not found until after those two were also removed, the court of appeals determined that there was no evidence that the drugs were ever in the console at the same time Tate was in the vehicle.[32] The argument was that it does not matter and, besides, the court of appeals ignored 1) the concept of joint possession, and 2) that the officer testified that he could see inside the car and never saw either passenger reach towards the console. But this information should have been included in the question presented because that was the real issue before the Court: does the "affirmative links" analysis change under these facts?

3. The "deep issue" alternative.

Noted legal writing expert Bryan Garner calls poor issue-framing "the most serious defect in modern legal writing."[33] In response, he has crafted what he calls the "deep-issue technique." "A deep issue is simply a multisentence issue-statement culminating in a question mark by the 75th word, critical facts having been included in chronological order."[34] He claims this statement-statement-question format has several advantages. First, it incorporates enough detail to convey a sense of story; besides being conducive to understanding and advocacy, it allows the reader to understand the issue without having to piece it together from other parts of your writing. Second, it is short enough that you do not lose the reader's interest. Third, creating it forces you to closely examine what your argument is. Finally, it is structured in a way as to make the answer obvious and favorable to you. Garner recommends stating it at the beginning of a brief or memo, before even a statement of facts.

Although some lawyers have embraced multi-sentenced issues in their petitions, our office has not. Part of the problem is that many issues are not decided on a key fact or minor premise that is easily stated. But the main problem is that the purpose of a petition is to persuade the reader of the importance of an issue, not the answer to it. However, when the question presented is about the application of law rather than its interpretation, this technique can be useful. Here are three "traditional" questions presented from *Totten v. State*, PD-0483-15, 2016 WL 5118331 (Tex. Crim. App. Sept. 21, 2016):

> Statement of the Case
>
> Appellant was convicted of possession of a controlled substance and sentenced to 25 years in prison. The court of appeals held that the trial court reversibly erred by refusing to submit an article 38.23 instruction on the lawfulness of the traffic stop that led to the discovery of the cocaine.
>
> Grounds for Review
>
> **1. Is the possibility that an officer detained the wrong vehicle, without more, determinative of the lawfulness of a detention such that an article 38.23 instruction is required?**
> **2. Is an appellant who identifies no disputed fact issue at trial but raises multiple issues on appeal entitled to the "some harm" standard for preserved charge error?**
> **3. Should the harm analysis for the failure to give an article 38.23 instruction assume the jury would have found in the defendant's favor, or is that the point of the analysis?**

Admittedly, the grounds for review require some background knowledge of Texas Code of Criminal Procedure article 38.23 and the statement of the case does not add any information that could not be gleaned from the grounds. In this petition, the first paragraph of the "argument" section clarified the issues. However, if one were to draft a "deep-issue" for each question presented so that the issues were immediately clear, they might have looked like this:

> **1. The jury is entitled to settle a disputed, dispositive fact issue on the lawfulness of a detention, and an officer is entitled to be reasonably mistaken when detaining a vehicle. In this case, there is evidence that the detained vehicle "wasn't the same" as the green Ford Ranger described over police radio, but no evidence as to its appearance. Were there sufficient facts for the jury to determine whether the detaining officer was reasonably mistaken?**
> **2. An appellant is entitled to the more favorable "some harm" standard if he requested a properly worded instruction at trial or the substance was clear to the judge. In this case, appellant filed a boiler-plate suppression motion, twice requested a "38.23 instruction" without elaboration, and argued two distinct fact questions on appeal. Was he entitled to the more favorable harm standard?**

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[32] *Tate v. State*, 463 S.W.3d 272, 276 (Tex. App.–Fort Worth 2015), *rev'd*, 500 S.W.3d 410.

[33] Bryan A. Garner, Advanced Legal Writing & Editing, Abridged Ed., LawProse, Inc. 2014, p. 48.

[34] *Id*. at 49.

> **3. An appellant is entitled to reversal on charge error calculated to injure his rights, but the harm must be "actual, rather than theoretical." In a single sentence, the court of appeals held appellant was harmed by the absence of an art. 38.23 instruction because it would have determined the admissibility of drugs in a drug-possession case. Did the court of appeals presume harm instead of determining whether the appellant suffered some actual harm?**

One of the benefits of framing the issues this way is that they suggest the answer to the question without arguing. On the first question, a jury would have to guess whether the detained vehicle looked anything like the green Ranger. On the second, it appears clear the defendant did nothing to clarify what factual issue he wanted the jury to consider. On the third, a court of appeals should never just assume harm. Whether the Court will agree is another matter, but the grounds are fairly presented in a concise way and the reader knows what to expect. If this type of ground/question seems awkward to you, the framework will still be useful when writing the opening paragraph of the argument section (discussed below).

4. <u>The evolution of a ground for review.</u>

As illustrated above, there are a number of ways to craft a question that effectively frame the issue for the reader. There are also a number of common mistakes that have the opposite effect. Consider the following hypothetical ground for review:

> **THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, OR SO FAR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.**

This is awful. You might recognize it as an affirmative restatement of one of the non-exclusive reasons for granting review in Rule 66.3. It is a lazy (but common) ground for review. Don't do it.

> **THE COURT OF APPEALS ERRED BY HOLDING THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED INADMISSIBLE EVIDENCE.**

This at least identifies a type of appellate issue, but there is a more basic problem: it is difficult to read. DO NOT USE ALL CAPITAL LETTERS. Almost every document we read (and every other part of the petition) uses normal rules of capitalization for a reason—we naturally look for signals that tell us whether a word is more important than others in a sentence. It helps us read, much in the way that changes in volume and tone help us understand speech. "All caps" is the written equivalent not only of monotone but of yelling, which you don't want to do at a court.

> **The court of appeals erred by holding the trial court did not abuse its discretion when it admitted inadmissible evidence.**

This ground for review is immediately easier to read but still virtually useless. Yes, we know that two courts have allegedly made mistakes and that the case has something to do with an evidentiary claim, but that does not help much. And it is pointless to state that the court of appeals erred; if it had not erred (in your view), you would not be filing a petition.

> **The trial court abused its discretion when it admitted evidence in violation of *Crawford*.**

This is better, as "*Crawford*" is arguably sufficient for the reader to understand that this case involves the Confrontation Clause.[35] But that covers a lot of possible claims. What kind of evidence was admitted? Why should it not have been?

> **The trial court abused its discretion when it admitted a 911 recording in violation of *Crawford* because there was no longer any ongoing emergency.**

This statement gives the reader a good base from which to consider your argument, but it still falls short in two ways. First, it addresses the problem as it was addressed to the court of appeals. Remember, discretionary review is not granted as a second check on the trial court's ruling; it is a review of a court of appeals's decision of law. Second, it does not offer any insight into the basis for the lower court's ruling. It is doubtful that the court of appeals agreed there was no ongoing emergency but found no error. So why did it find no ongoing emergency?

> **Is a 911 caller's identification of her alleged attacker testimonial if he fled the scene but was possibly nearby?**

[35] The full citation should be used but, for purposes of this paper, the short cite is fine.

This is the question the court of appeals answered in the negative. It contains all the operative facts and succinctly summarizes the issue. Whether the Court will determine that the answer to this question is pressing enough to grant review is a separate matter, but you have done everything to enable it to understand your petition from the outset.

What if the confrontation issue had been different? Modifying the fifth iteration above:

> **The trial court abused its discretion when it admitted the Intoxilyzer results in violation of *Crawford* because the technical supervisor who testified was not the supervisor on the day of the test.**

This gives the reader some idea of what the real issue is, but it is essentially a recitation of the factual set-up. Again, it also complains about the wrong court. What is the real problem with having a "substitute" technical supervisor at trial?

> **The Intoxilyzer results were admitted in violation of *Crawford* because the technical supervisor who testified was not the supervisor on the day of the test and therefore the defense could not use cross-examination to determine whether the results were reliable.**

This is the crux of the problem. Although not stated, the admissibility of Intoxilyzer results depends, in part, on the proper application of the methods approved by DPS. (This would be fleshed out in the "Argument" section.) Whether the machine was properly maintained is relevant to admissibility, and the petitioner is arguing that cross-examining the "correct" supervisor is essential to that ruling. Still, this ground is somewhat unwieldy.

> **Can the trial court perform its gate-keeping function, and is a defendant's right to confrontation violated, when the technical supervisor in charge of the Intoxilyzer on the day of the defendant's test is not the one who testifies at trial?**

This is the question the court of appeals answered, and it is the question the Court of Criminal Appeals will have to answer. This one question subsumes two related issues: 1) is the supervisor who maintained the Intoxilyzer at the time of the test necessary for admissibility generally, and 2) if not, does the Confrontation Clause require that a defendant have the opportunity to cross-examine that supervisor?

Compare the original two iterations of the ground for review with the two final questions presented. Note that any argument could have flowed from the first iteration and that both specific, pointed questions were embraced by the second, generic iteration. That alone should show how useless the first two iterations are. Even if your ground for review is not as awful as the original ground, it probably falls somewhere on the spectrum and so could be refined.

The following is a checklist of things to consider when evaluating your ground or question presented:

- Is your question easy to follow, both visually and grammatically?
- Does it succinctly state the dispositive issue in your case?
- Does it fairly present a "straight" issue for the Court's consideration? Or does it seek merely to relitigate the trial court's ruling?
- If the lower court's holding turned on a key fact, have you included it? In other words, are you being forthcoming with the Court?

5. <u>But don't make the focus too narrow.</u>

Although you want to draft a question presented that frames the issue, you have to consider that the Court may not see the case like you do. Even if enough judges agree that something went wrong, they might think the real issue is something else, or that there is a more direct way of getting at it.[36] One of a few things might happen. Preferably, the Court spots this discrepancy early and grants its own question presented to replace or supplement yours. If the Court does not spot the problem until after briefing (and maybe argument), however, that could lead to either a dismissal for an improvident grant or ugly split opinions on the propriety of addressing an issue not raised or briefed by the parties.

An example of the first option occurred in *Niles v. State*,[37] in which the State charged two counts of terroristic threat against a public servant but did not include the "public servant" enhancement in the jury charge. There was overwhelming evidence to support

[36] *See*, *e.g.*, *State v. Cortez*, 543 S.W.3d 198, 212 (Tex. Crim. App. 2018), reh'g denied (Keller, P.J., dissenting) ("The State's ground for review asks where the improved shoulder begins in relation to the fog line: 'Does the improved shoulder of a highway begin at the inside edge of the 'fog line,' the outside edge, or somewhere in between?' We have some leeway to address the State's grounds without being restricted to its characterization of what is at issue. We can ask whether the fog line is part of the roadway, part of the shoulder, or a no-man's land in between. We can also ask whether touching the fog line constitutes 'driving' on it. Both of these issues were addressed by the court of appeals.").

[37] 555 S.W.3d 562 (Tex. Crim. App. 2018), reh'g denied (Sept. 12, 2018).

the allegation and no indication the State intended to abandon it. The judgments and sentences reflected convictions for the enhanced offense, which Niles claimed on appeal were illegal under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The court of appeals agreed and remanded for a new punishment hearing on a lesser-included offense. The State filed a petition that asked the Court the following:

> **When a jury charge omits a question on an offense level enhancement, is that charge error subject to review for harm under *Olivas v. State*, 202 S.W.3d 137 (Tex. Crim. App. 2006), or does it automatically render the enhanced conviction and sentence "void and illegal"?**

The Court denied the State's petition but granted the following on its own motion:

> **Whether the Court of Appeals erred in reforming Appellant's judgment to reflect conviction for a Class B misdemeanor.**

Both questions got at the same problem: the court of appeals should not have reformed the conviction to a lesser offense. And the Court's decision ultimately followed the argument articulated by the State. But the Court's restatement gave it room to reverse on another basis if needed. It also gave it room to avoid dealing with the sub-issue of whether the enhancement was an element or a sentencing issue, which was a topic of discussion at the time.[38] Although the Court's question did little to inform the reader, it did provide the flexibility needed to decide the case on any ground. Sometimes less is more.

E. Argument

I mentioned above that the "Argument" section of the petition used to be called "Reasons for Review." The name has changed but not its contents. Nor has what is expected:

> [T]he portion of the petition designated ['Argument'] should specifically address the court of appeals opinion and its effect on our jurisprudence. This presentation should not go into a detailed analysis, but should briefly set out relevant cases and statutes, and note any alleged misstatements or omission of relevant facts.[39]

This should tell you that the Court does not want to read 4,500 words about how you were right. In fact, the Court could do without 4,500 words at all. It is a limit, not a requirement. And it should rarely be necessary to come anywhere close to 4,500 words in what is essentially the argument section.[40] For reference, since 2019 my average length is 1,687 words. Only four were over 2,000. You can imagine how unhappy a judge would get if everything he read was over twice as long as it needed to be. Again, sometimes less is more.

1. <u>The first paragraph is first for a reason.</u>

It is entirely possible that, given the space and content restrictions placed on the statement of the case and the questions presented, your issue is not as clear at this point as you want it to be.[41] If your petition has not yet set the table, do not jump into the facts or law before it is clear why they are important. Make sure the reader understands the gist of your specific argument by the end of the first paragraph.

a. The Good.

These introductory paragraphs, taken from granted petitions discussed above, frame the issues succinctly:

> <u>*Murray*</u>
> Appellant was found passed out behind the wheel of a running vehicle by the side of the highway. The court of appeals held that this was not "operating" and concluded that, "while one can infer that someone had to have driven the truck there, we have no evidence as to when or whether the person was inebriated at the time." If a jury may reasonably conclude that attempting to start a vehicle is "operating," *Kirsch v. State*, 357 S.W.3d 645, 652 (Tex. Crim. App. 2012), it should also be able to conclude that succeeding and then passing out is, too. If driving is required, the jury could have rationally inferred that the "someone" who drove the vehicle was the person passed out in the driver's seat, and that he pulled over due to impairment.

In four sentences, the reader finds out that this case deals with both the application of a significant DWI case and the proper deference to be shown juries. As an aside,

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[38] *See Oliva v. State*, 548 S.W.3d 518 (Tex. Crim. App. 2018) (creating multi-factor test for determining whether something is an element or a punishment issue).

[39] *Degrate v. State*, 712 S.W.2d 755, 756-57 (Tex. Crim. App. 1986).

[40] By rule, the word limit applies to the argument section and the prayer. TEX. R. APP. P. 9.4(i)(1). Again, a separate statement of facts (not provided for by the rules) or introductory statement, discussed below, will count towards the word limit.

[41] Again, as discussed below, an introductory statement can help. Can you stand the suspense?

the last two sentences easily (and more properly) could have been written as questions. A small thing, but worth doing to adhere to the purpose of a petition.

> *Queeman*
> In *Tello v. State*, this Court distinguished criminal negligence based on serious blameworthiness from "unexplained failures" that, while tragic, are not worthy of criminal condemnation. The court of appeals relied on *Tello* to acquit appellant because, in its view, the evidence established only that appellant "inexplicably failed" to see the vehicle he struck. Does the inability to explain an actor's conduct mean that he did not act with criminal negligence?

What constitutes criminal negligence had been a hot topic in the previous years in different contexts, and a vehicle collision is relatable. Moreover, the court of appeals invoked the lead case in this area and extrapolated a rule that the Court might not have intended. Of note here, the question presented mentioned *Tello* by name. Case names like *Crawford* and *Strickland* are easy to drop without having to explain it explicitly or by context. If your root case is less common and its significance is not made plain by the question itself, immediately address it. Do not make the reader pause to search for the case or risk turning pages until its importance becomes clear. This is made worse when the reader has to sift through three or more pages of facts that may or may not be relevant because he doesn't know what the question is about.

> *Ramirez-Tamayo*
> Reasonable suspicion can be based on otherwise ordinary and innocent circumstances that have special significance to officers. In this case, the officer explained why the "innocent" facts in this case, like avoiding using power windows, made him suspect drug trafficking. The court of appeals did not hold that these circumstances could never provide reasonable suspicion. Instead, it discounted them because "[t]he breadth of [the officer's] 'knowledge, training, and experience' was explained by no one." When, if ever, is the reliability of an officer's opinion given at a pretrial suppression hearing not a credibility determination for the trial court?

This is a good example of taking a fairly pedestrian occurrence—an officer explaining why something made him suspicious—and making it into something worth discussing. In fairness, some credit is due the court of appeals, as it prompted a good question: What is happening when an officer gives an opinion at a pretrial hearing? Litigants are so accustomed to regular practice that they sometimes do not pause to consider what legal doctrines are at play. The rules of evidence regarding experts do not apply, yet certain facts have no relevance without explanation from someone with expert knowledge. Identifying an interesting, dispositive legal question in a proceeding that comes up all the time is a good way to get your petition granted.

b. The not-so-good.

The next two first paragraphs are examples of missed opportunities to get the Court on board immediately.

> *Tate*
> The so-called "affirmative links" rule protects an innocent bystander from conviction for possession merely because of his fortuitous proximity to someone else's contraband. However, presence or proximity, when combined with other evidence, may well satisfy the State's burden of proof. Shortly after appellant was removed from his vehicle, an officer discovered a syringe of methamphetamine in plain view under the air conditioning controls within reach of the driver's seat. Was appellant's proximity to where the syringe was found merely fortuitous?

Like the question presented from the same petition, this opening paragraph made a compelling case but failed to tell the whole story. What was yet to be explained is that the court of appeals's opinion hinged on the continued presence of two passengers in Tate's car after he was removed. Again, the State's position was that it ultimately did not matter whether other people were in the vehicle due to the record and the concept of joint possession. But it was crucial to the court of appeals's decision and, because this is omitted from the statement of the case and the question presented, the reader should have been made aware of this by the end of the first paragraph.

The more accurate question was, "Was appellant's proximity to where the syringe was found merely fortuitous *simply because his passengers remained in the car for some time after he was removed*?" It was addressed later in the argument, but it should have been clear from the beginning. This was not an attempt to be deceptive, but is a good example of what happens if you "skip to the end" without bringing the reader along with you. At the least, it is a case of "burying the lede." And, at some point, such omissions breed annoyance or even lack of trust.

> *Jacobs*
> In *Easley v. State*, this Court held that erroneous limitations on voir dire are not constitutional [error] *per se* but said there may be instances when the limitation is "so substantial as to warrant labeling the error as constitutional error." In this case, the court of appeals held that "having an unqualified veniremember on the jury is a violation of the defendant's right to an impartial jury" and is therefore constitutional error. Is being prevented from asking a question that could lead to a strike for cause always constitutional error?

Jacobs is a classic example of following up on a then-recent case from the Court. While this passage alleges that the court of appeals created a *per se* rule in violation of *Easley*, it should have been more clear about its rationale. Identifying why the lower court did what it did is important for multiple reasons.

First, it shows the lower court respect. Even when a court of appeals does something you believe is unfathomably stupid, it presumably believed its result was fair, or at least legally correct. Taking the time to understand your "opponent's" motivation (and showing that you are interested in understanding it) is always a good first step if you are trying to solve a problem. And that is the name of the game at this stage: presenting a problem of statewide importance to be settled by the high court.

Second, understanding the opposing viewpoint makes you a better advocate. Not all cases are clear cut, and many (if not most) losing arguments have some facial appeal. It is not always enough to explain why you are right; sometimes it is more important to explain why they are wrong. And you cannot do that unless you take the time to figure out why the court did what it did.

Jacobs is a good example. *Easley*, the case at the heart of the opinion, held that being denied a proper question does not always violate the "right to be heard by counsel." The courts of appeals that sidestepped *Easley* did so because *Easley* dealt with limitations on peremptory strike questions and the "right to be heard," whereas their cases dealt with questions geared towards strikes for cause. Because strikes for cause are intended to prevent a biased juror from sitting, the argument went, it was the right to an impartial jury—not the "right to be heard"—that was at issue. This second part was the real distinction; the type of strike served by the intended question was just a prelude. So, although the question presented was accurate and the above passage true as far as it went, it did not go far enough to highlight the real issue or why it was worth taking up.

Although failing to pinpoint the crux of the issue could result in refusal because the issue was missed by the Court, there is also the danger that the petition will be granted for the wrong reason. It is not uncommon for the Court to grant a petition only to discover that the factual or procedural posture of the case is not as it was represented. It is also possible that the briefing reveals—or the Court decides—that the issue presented is different from the issue that needs to be resolved. In either event, the result could be dismissal as improvidently granted. Again, this could come after briefing and argument. You can reduce that risk by helping the Court make an informed decision on your petition. Spell out the core issue(s) up front.

2. The rest of the argument

As the rule says, the rest of the argument should be devoted to expanding upon the reasons for granting review. If there is a split among the courts of appeals, detail it. If the court is the first to interpret a new statute, explain why it needs to be reviewed now. If the court of appeals did not follow established precedent, how would the outcome be different if they had? If the law is unsettled, show that the statute at issue is important and you have a plausible argument.

Again, concision helps the reader understand your argument. This is rarely achieved by cutting and pasting the content of your brief to the court of appeals. Moreover, what you have already written will rarely be as good as a properly drawn argument for review because they serve different purposes. Take the time to understand what the court of appeals did and explain why it requires review. That's the point of a petition.

There will also be technical errors if you don't change your point of view or, worse, cut and paste your argument to the court of appeals. For example, it is unnecessary to engage in a complete review of the relevant area of law; the Court does not need three pages on the importance of the right to counsel or warrants. And, although you need to offer enough facts to give context and show that the outcome would be different, you do not need a full witness-by-witness recitation of the facts. (In fact, do not ever do a witness-by-witness recitation of the facts unless the issue depends on who saw what.) Finally, if you do a simple cut-and-paste, you will invariably forget to change "the Court of Criminal Appeals" to "this Court," and "this Court" to "the court below" or "court of appeals." In other words, it will be obvious that you put no additional thought into your petition. Don't do it.

F. Going the extra mile.

This is an advanced course, so here is an advanced option for those who feel comfortable with the basic requirements (or just want to set the tone for the reader at the outset): the introductory statement. For over two years, the first thing a reader sees in our office's petitions and briefs after the list of authorities has been

a short statement—usually three or four sentences—that sets out the crux of the case. It is more (and less) than a summary because it captures the essence of the central argument but does not get tangled in alternative grounds or subsidiary issues (like form of relief). Call it an executive-executive summary. Here are some examples:

> *Freeman v. State*, PD-0594-17
> The burden of proof in a criminal trial is a vital procedural safeguard against the erroneous deprivation of liberty. But it is no more important than the myriad procedural and substantive safeguards that defendants routinely forfeit through inaction. If trial counsel hears the trial court mention the wrong burden of proof, he should speak up.
>
> *Brown v. State*, PD-1404-18
> One can commit theft without stealing anything. This legal truth might blur the line between attempted and completed theft, but it also enables an actor to be guilty of thieving the same property multiple times without acquiring it. Or at least it should. The Tenth Court of Appeals disagrees.
>
> *Lyon v. State*, PD-0099-19
> Aggregate theft is a combination of thefts committed "pursuant to one scheme or continuing course of conduct." Courts sometimes find the evidence of aggregation insufficient but none have said what that phrase means. Given the peculiarities of aggregate offenses—loose pleading requirements, inability to sever, lack of unanimity, etc.—the odds are good that improper aggregation harms defendants. The State needs guidance in order to avoid causing this harm.

Freeman, *Brown*, and *Lyon* each had two grounds for review but the introductory statements are restricted to a gut-level focus on the primary ground for review. For example, I pushed preservation in *Freeman* but there was a back-up "merits" argument, and *Lyon* had a reformation issue that is not mentioned in this introduction. In both cases, I wanted to begin persuading the Court on "the big ask" early knowing the other issues would be clearer (and perhaps appear more reasonable) after discussion of the primary issue.

Freeman, *Brown*, and *Lyon* were all refused. Since then, I've focused on shorter introductory statements. Here are a few from granted petitions:

> *Ex parte Charles Barton*, PD-1123-19
> Words that are intended to harass, annoy, alarm, abuse, torment, or embarrass another person are not protected by the First Amendment. A statute that prohibits them is not unconstitutional simply because some people who have the requisite ill intent might also have some intent to communicate an idea.
>
> *Bell v. State*, PD-1225-19
> An error in the part of the charge that authorizes a greater punishment is still a charge error. This Court has a standard of review for that.
>
> *Kuykendall v. State*, PD-0003-20
> Appellant was on deferred probation on each of two counts charged in a single indictment. The State's motion to adjudicate and revoke both probations was set for a single hearing. Appellant failed to appear. Did he commit one offense or two?
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> *Cyr v. State*, PD-0257-21
> This case exposes a fundamental misunderstanding about how causation works, particularly with injury to a child by omission. When a defendant fails to protect her child from another person, she causes the harm to her child. There is no concurrent cause.

As with any experiment, however, the results are not always what was envisioned:

> *Carson v. State*, PD-0205/0206/0207/0208-17
> A defendant's waiver of his right to appeal is invalid unless sentencing was certain or he received consideration. Recent cases have changed both the certainty required to voluntarily waive a right and the form consideration must take. Is consideration required to uphold a waiver in the face of unanticipated punishment error? If so, does the State's waiver of its right to a jury trial—present in every plea agreement—suffice? Finally, can an otherwise valid waiver of appeal be invalidated by an unpreserved claim of judicial bias?
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> *State v. Arellano*, PD-0287-19
> Motions to suppress that raise a simple issue should have simple resolutions. In this case, deciding whether the good-faith exception applies when there is a technical defect with the warrant is easy. Deciding who has the burden to show the absence of probable cause or a neutral magistrate, and what to do next,

less so.

Carson and *Arellano* each had four grounds for review and illustrate what happens when I strayed from the formula set out above. The main argument in *Carson* was for a reconsideration of the law on waiver of appeal from open pleas. I could have stopped there, as at least the second question is merely an alternative (and the route the Court ultimately took). *Arellano* alluded to the other issues after touching on the central good-faith argument but, looking back, I don't know if it was mysterious and enticing or just vague and confusing.[42] Do better! And remember: this statement is (hopefully) persuasive so include it in your word count.

IV. MOTIONS FOR REHEARING, "CROSS-PDRS," AND REPLIES

A. Motions for rehearing

Your petition must state whether either party filed a motion for rehearing,[43] but it is unclear what effect an attempt to fix things in the lower court has on getting a petition granted. The decision to do so before filing a petition is grounded in a number of considerations:

- **Something obvious was missed that would change the ruling.** Preservation, a recent case, etc. This is done out of courtesy to the court of appeals to allow them the first opportunity to decide the issue.
- **The court's holding is based on an argument not raised by the parties.** Out of fairness, the losing party should have the opportunity to address it (and the prevailing party should have the opportunity to respond). With complete briefing, the court could change its mind. That potentially saves the CCA time having to correct it.
- **The court failed to address something that was raised and is necessary to disposition.** The omission could have been an oversight; bringing it to the court of appeals's attention could save everyone time on what is otherwise an easy Rule 47.1 "grant and remand."

Does any of this work? It's hard to say. The State Prosecuting Attorney's office filed fewer than 30 motions for rehearing since 2011. It should be noted that, because we did not brief the issues prior to the opinion, we are often in a better position to make arguments that were not already raised by the State. Our grant rate for cases in which we worked up a motion for rehearing is about the same as when we did not, and it is impossible to know whether a petition would have been granted regardless. But they were not filed for delay, helped us crystalize the issues, and afforded the lower court an opportunity to address the argument in the first instance. Moreover, it shows the Court you did everything you could to prevent the case from becoming its problem. Unless time is of the essence, there is not much downside.

B. Subsequent petitions

A party may file a petition within ten days after the timely filing of another party's petition.[44] This is commonly called a "cross-petition." This becomes relevant in a number of situations. As discussed above, a subsequent petition is a good way to raise preservation if it was not addressed in the court of appeals. It is also useful when the court of appeals decides the point of error in your favor but rules against you on a subsidiary issue along the way. For example, when it decides that the trial court erred but that it was harmless, a subsequent petition on whether it was error in the first place would be appropriate; the State should not expect to have the question of error considered without one. Finally, a party will sometimes seek review of an issue it otherwise would not have but for the opponent filing its petition on an unrelated matter.

C. Replies to petitions

An opposing party has 15 days after the timely filing of a petition to file a reply.[45] There are few reasons to file a reply, and most mirror the purpose of the petition. That is, a reply should briefly show why the opponent's petition should not be granted, not why you properly won on the merits. A reply would be appropriate when the issue petitioned was not the issue raised in the court of appeals, or when the petitioner has failed to show how the outcome would be different even if he prevailed in the Court of Criminal Appeals. A reply would also be in order if the petitioner misrepresented the record in a manner material to his issue. Again, preservation problems can be raised at any time. Basically, if there is a clear reason for not taking the case, it can (and arguably should) be raised early in a reply. As tempting as it may be to stay quiet and possibly get a chance to have your case decided by the high court, you can save everyone some time and yourself a lot of effort by informing the Court before the briefing is done and they dismiss it as improvidently granted months later.

As with filing motions for rehearing, there is no way to know whether a response to a petition has any

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[42] The granted both issues but decided only the "easy" issue. *State v. Arellano*, __ S.W.3d __, 2020 WL 2182258 (Tex. Crim. App. May 6, 2020).

[43] TEX. R. APP. P. 68.4(f).

[44] TEX. R. APP. P. 68.2(b).

[45] TEX. R. APP. P. 68.9.

real impact. The staff who work up the petitions usually find the problems that a well-written response letter raises. And if a response strays from factual or procedural problems with the opponent's issues presented, there is a risk that it augments the reasons for granting the petition. For example, a response that looks more like a brief on the merits, *i.e.*, a fight over whether the petitioner is correct on the law, only serves to underscore the fact that there are competing views that need to be resolved. If you believe the court of appeals was clearly right, it might best serve your client to quietly let the process play out.

V. CONCLUSION

A lot can be learned by looking at the rules. The appellate rules for petitions for discretionary review are not just a checklist to help litigants avoid summary refusal. Viewed positively, they provide valuable insight into the purpose of a petition and the Court's consideration thereof. Taking the time to read and understand them not only shows respect for the Court, it increases the odds that your petition will be one of the few granted each year.