

Plot Ye Course
**Petitions for Discretionary
Review
&
Motions for Rehearing**

Stacey M. Soule, State Prosecuting Attorney

information@spa.texas.gov



@OSPATX



Marooned on Loser Island



Avoid the Gallows



**PDR
Calendar
Due Date**

30 Days

New Rule (8/1/22)

Rule 53. Petition for Review

53.2. Contents of Petition

The petition for review must, under appropriate headings and in the order here indicated, contain the following items:

- (a) *Identity of Parties and Counsel.* The petition must give a complete list of all parties to the trial court's final judgment, ~~and the names and addresses of all trial and appellate counsel.~~ The petition must also give a complete list of the names of all counsel appearing in the trial or appellate courts; their firm or office name at the time of the appearance; and, for counsel currently appearing, their mailing address, telephone number, and email address. If new counsel appears or if any counsel currently appearing changes firm or office affiliation during the pendency of the appeal, lead counsel for the party must notify the clerk by filing a supplemental disclosure.

Identity of Counsel & Parties

- Firm name
- Telephone
- Email

Degrate v. State,
712 S.W.2d 755 (Tex. Crim. App. 1986)

A PDR must:

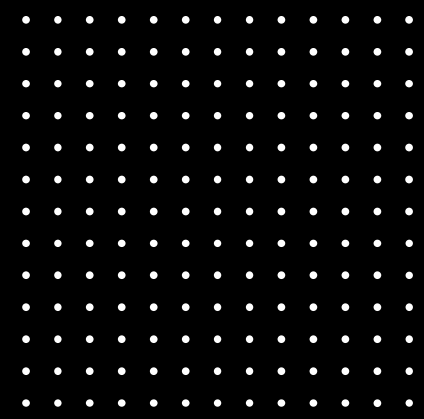
“specifically address the court of appeals opinion and its effect on our jurisprudence.”

Bradley v. State,
235 S.W.3d 808 (Tex. Crim. App. 2007)
(Cochran, J., concurring)

The PDR: “highly polished small jewel that invites the reader to request a view of the entire necklace...not...a lump of coal that merely repeats the direct appeal brief.”

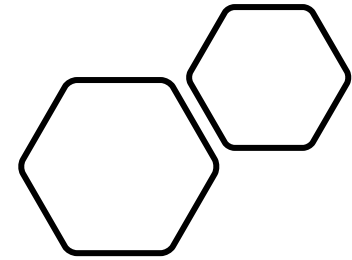


Discretionary  means you must earn your bounty

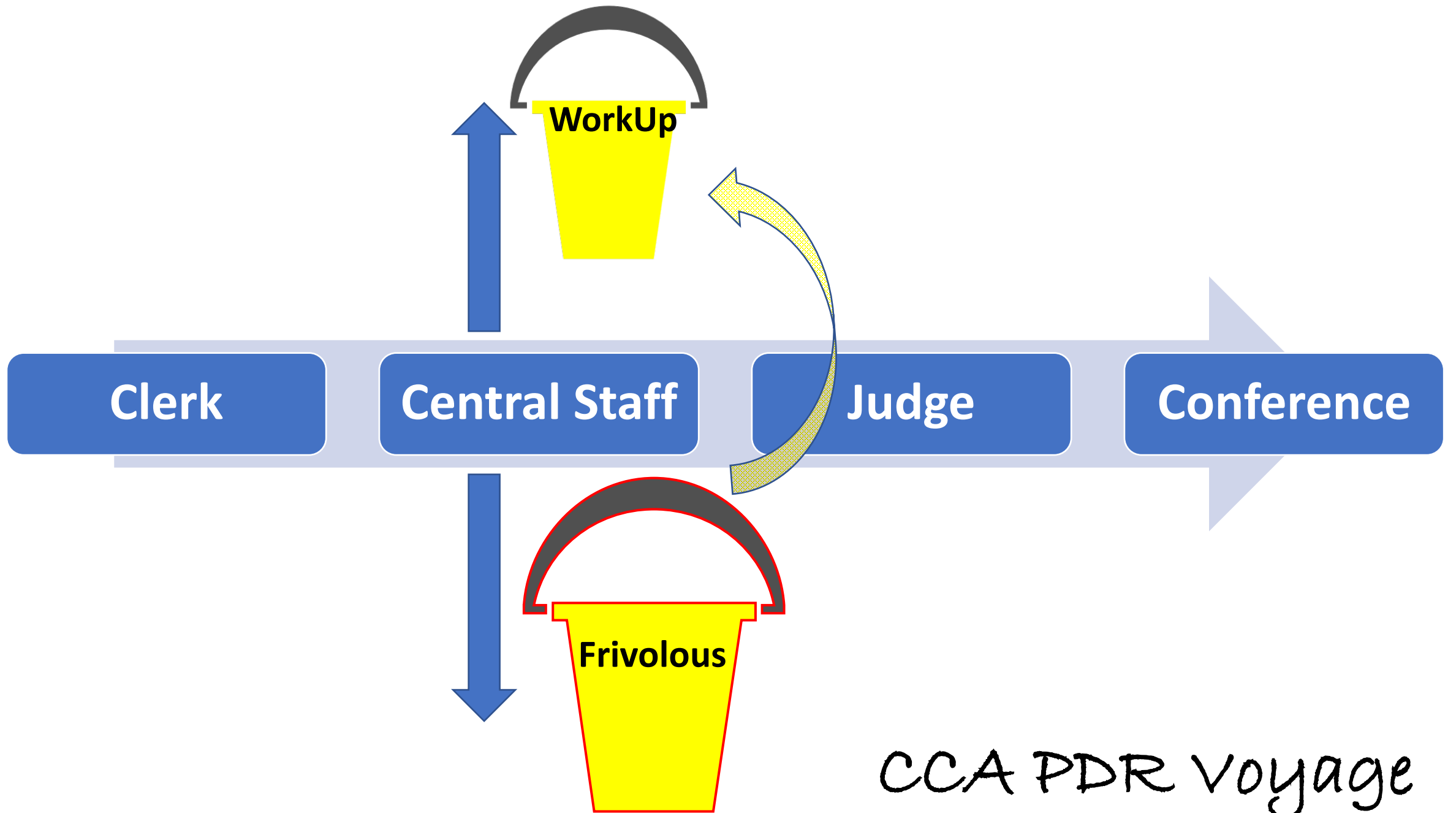


"THE PROBLEM IS
NOT THE PROBLEM.
THE PROBLEM IS
YOUR ATTITUDE
ABOUT THE PROBLEM."

JACK SPARROW, PIRATES OF
THE CARIBBEAN







Clerk

Central Staff

Judge

Conference

WorkUp

Frivolous

CCA PDR Voyage

What's
your
hook?





Conflict Among COAs

Important Question of State or Federal Law

Conflict with State or Federal Law

COA Declared a Statute Unconstitutional or Misconstrued

Internal COA Disagreement

Far Departure from Accepted and Usual Course

TEX. R. APP. P. 66.3: Reasons for Review

Batten Down the Hatches

Choose Wisely:
one to two
issues to PDR

Avoid the “Blimey” Reaction

Not This

GROUND FOR REVIEW ONE: By holding that the evidence was legally insufficient to establish David’s identity as the individual who committed the offense when he was alone in a locked bathroom with the tampered-with evidence, the Court of Appeals erred by ignoring the circumstantial evidence establishing David’s identity and requiring the State to disprove an alternative hypothesis regarding the offender’s identity.

GROUND FOR REVIEW TWO: By holding that placing marijuana in a toilet bowl containing feces does not constitute “altering” or “destroying” within the meaning of the tampering-with-physical-evidence offense, the Court of Appeals failed to apply the appropriate legal-sufficiency standard by improperly substituting its judgment for that of the jury’s and disregarding the jury’s common-sense inference that marijuana that has been contaminated with feces has been altered or destroyed.

GROUND FOR REVIEW THREE: Even if the Court of Appeals did not err by holding that the evidence was legally insufficient to support David’s conviction for tampering with physical evidence, the Court of Appeals erred by failing to reform the conviction to the lesser-included offense of attempted tampering with physical evidence, thereby violating this Court’s instruction in *Thornton v. State*.

This

1. Can police lawfully detain someone for violating a law that is suspended by the governor under the Texas Disaster Act?
2. Is the governor required to issue an executive order and file it with the secretary of state in order to invoke the suspension-of-laws provision of the Texas Disaster Act?

On this ship, our tactics are strategic. *Arrr* we clear?



Review for Threshold
Matters First

Ask Ye Self

- **Preservation**

- Is the error subject to preservation? If so, was it properly preserved? *Marin*, 851 S.W.2d 275 (Tex. Crim. App. 1993).

- **Estoppel**

- Is the claim subject to estoppel? *Rhodes*, 240 S.W.3d 882 (Tex. Crim. App. 2007); *Arroyo*, 117 S.W.3d 795 (Tex. Crim. App. 2003) (applying estoppel to the State).

- **Manifest Injustice to the State**

- Is the legal theory the COA relied upon to affirm a ruling to suppress one that the State was not called upon to deduce evidence?
 - Scientific evidence to establish reliability. *Esparza*, 413 S.W.3d 81 (Tex. Crim. App. 2013).
 - Coercion theory. *Castanedanieto*, 607 S.W.3d 315 (Tex. Crim. App. 2020).

Habeas: Ask Ye Self

- **Laches**
 - Has the State been prejudiced by the D's delay in seeking habeas relief? *Ex parte Perez*, 398 S.W.3d 206 (Tex. Crim. App. 2013).
- **Cognizability**
 - Is the claim cognizable on a pretrial habeas application? *Sheffield*, PD-1102-20 (request dismissal under pretrial hold under emergency order).



Never Surrender!

When these issues are raised,
consider filing a response.



Plundering the Merits

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Far Departure from Accepted and Usual Course

TEX. R. APP. P. 66.3: Reasons for Review



Sufficiency

Sufficiency: The State

Divide and conquer? *Nisbett*, 552 S.W.3d 244 (Tex. Crim. App. 2018) (no body murder).

Alternative reasonable hypothesis? *Wise*, 364 S.W.3d 900 (Tex. Crim. App. 2012).

Does the result defy ordinary experience? *Garcia*, PD-0679-21 (Tex. Crim. App. 2023) (SBI resulting from shooting even though no vital organ was wounded).

Practical reason to limit a court-made rule? *Shumway*, PD-0108/09-20 (Tex. Crim. App. 2022) (corpus delicti).


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Sufficiency: The Defense

Mere speculation or factually unsupported inferences or presumptions?

- *Curlee*, 620 S.W.3d 767 (Tex. Crim. App. 2021) (stale and contradicted testimony of officer failed to prove playground was open to the public at the time of the offense; mismatch of evidence for offense).
- *Flores*, 620 S.W.3d 154 (Tex. Crim. App. 2021) (COA erred to rely on speculation that drill was used as a deadly weapon).
- *Couthren*, 571 S.W.3d 786 (Tex. Crim. App. 2019) (no facts to support inference that D's driving was reckless or dangerous).

Lack of knowledge?

- *Reynolds*, 543 S.W.3d 235 (Tex. Crim. App. 2018) (D did not know act of seizing phone was unlawful for official oppression).
- *Hammack*, 622 S.W.3d 910 (Tex. Crim. App. 2021) (Keller, P.J., dissenting) (no knowledge of custody order gave CPS sole custody).



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Sufficiency: Both Parties

On the edge? *Swenson*, PD-0589-22 (attempted capital murder of police).

Requires construing an element? *Mason*, PD-0881-20 (illegal voting); *Herron*, 625 S.W.3d 144 (Tex. Crim. App. 2021) (sex-offender registration).

Unjustifiably flawed? *Vital*, PD-0679-21 (SBI gunshot in breast).

Reformation as a remedy? *Lang*, PD-1124-19 (reformation when missing owner element of lesser theft).

What is the proper definition, and did the evidence match that definition?
Stahmann, 602 S.W.3d 573 (Tex. Crim. App. 2020) (conceal not proven if sight of it was never lost).

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Search and Seizure



Search and Seizure: The State

Is standing an issue? *Klima*, 934 S.W.2d 109 (Tex. Crim. App. 1996).

If the State prevailed at trial, are there additional legal theories that support the trial court's ruling that would not cause a "manifest injustice" to the D under *Esparza*? *Calloway*, 743 S.W.2d 645 (Tex. Crim. App. 1988).

Was there actually a violation or a reasonable mistake of law (assuming it's preserved)? *Heien*, 574 U.S. 54 (2014)?

Was it obtained in violation of the law under 38.23? *Wehrenberg*, 416 S.W.3d 458 (independent source).

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Search and Seizure: The Defense

Not enough particularized facts for PC?

- *Baldwin*, PD-0027-21 (Tex. Crim. App. 2022) (cert. pending) (nexus between cell phone and person).
- *Patterson*, PD-0322-21 (Tex. Crim. App. 2022) (room within fraternity house).

Close call between consensual encounter & detention?

- *Monjaras*, PD-0582 (Tex. Crim. App. 2022).

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Search and Seizure: Both Parties

Was a remand for additional findings needed on an essential fact? *Elias*, 339 S.W.3d 667 (Tex. Crim. App. 2011).

Requires construing an element? *Hardin*, PD-0799-19 (Tex. Crim. App. 2022) (failure to maintain a single lane).

Novel question? *Tilgham*, 623 S.W.3d 801 (Tex. Crim. App. 2021) (privacy expectation of hotel guest who was evicted for hotel-policy violation); *Parker*, PD-0388-21 (Tex. Crim. App. 2022) (art. 18.01(b) allows for anticipatory search warrants).

Standard of review? *Hyland*, 574 S.W.3d 904 (Tex. Crim. App. 2019) (standard for PC after excised false statements)

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Harm



Harm: Both Parties

- **Subject to harm?** *Williams*, PD-0504-20 (witness exclusion from courtroom/closed courtroom).
- **Standard of review?** *Cook*, PD-0850-21 (remedial cumulative evidence); *Holder*, 639 S.W.3d 704 (Tex. Crim. App. 2022) (statutory harm for 38.23).
- **On the edge?** *Huddleston*, PD-0213-21 (absence of physical presence at plea).
- **Unjustifiably flawed?** *Castillo-Ramirez*, PD-1279-19 (fail to specify means of penetration when only one means was presented).

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Negative Precedent







When should ye ask
to have a lively
discourse with the
CCA?

- Statutory issue construing element
- Weighty constitutional issue
- Consequential to a body of CCA jurisprudence
- Impacts all prosecutions or defense strategies
- Jurisdiction issues

New Rule (2/1/23)

Tex. R. App. P. 39.7

Old Rule: Even if the party waived argument, the court may direct a party to appear and argue.

New Rule: “The court may direct a party that has not requested argument to appear and argue.”

Ex parte Lowry
First Amendment
constitutionality lewd
visual material
depicting a child

Hughes v. State
Inman v. State
Confrontation Clause's
applicability to
revocations

State v. Curipoma
Pretrial habeas
jurisdiction of Travis
County over Kinney
County prosecution

King v. State
Expectation of privacy
in work truck

Shirley v. State
Governor suspension
of vehicle registration

Baltimore v. State
Sufficiency review
standard

Ex parte Hammons
Ex parte Couch
pretrial habeas and
facial challenge to one
offense when multiples



Response to a PDR

When should ye respond to a PDR?

- Preservation is an issue.
- The argument on PDR differs from that raised in the COA; alternative arguments are included.
- The PDR misinterprets the law or record.
- The outcome would be the same even if PDR was granted and decided favorably.



**Response
Calendar
Due Date**

15 Days



Subsequent PDR:

“It’s the PDR After
the First PDR is
Filed”

- Is there a question of preservation?
- Is debatable whether the error is error?
- Is there a defensive legal basis you would lose if the PDR was granted?

When should ye file a Subsequent Petition?



**Subsequent
PDR
Calendar
Due Date**

10 Days

Rehearing



When should ye file a motion for rehearing?

- The facts are wrong (for opinions).
- Failure to address all legal arguments and you are the losing party.
- New development in the law.
- Disagree with the remedy, which was not an “issue” before.



**Rehearing
Calendar
Due Date**

15 Days



***Ye Last
Bit of Booty***

- Request a summary reversal/remand in CCA when COA decision was plainly wrong.
- Consider rehearing in COA.
- Amicus: it's for anyone.
 - Reach out to counsel
 - Crowdsource

Thank you, me hearties.

May your quarrels be
settled without bitter
hardship and punishment.

