

Petitions for Discretionary Review: Strategies and Pending Issues

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PDR Check List

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?
-
- 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?

PDR Checklist (smg)

- 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 *Degrade*?
- 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?

PDR Checklist (smg)

Golden Rule for Courts of Last Resort



“We rarely grant review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case.” *Salazar v. Houston*, 581 U.S. ___, No. 15-515 (2017) (Alito, J., concurring in denial of cert.).

“It’s the Jurisprudence, Stupid!”

J. Gary Hart

(with apologies to James Carville)

TEX. R. APP. P. 66.3: *Your Guide to Selecting an Issue*

1. Conflict Among COAs
2. Important Question of State or Federal Law
3. Conflict with State or Federal Law
4. COA Declared Unconstitutional or Misconstrued
5. Internal COA Disagreement
6. Far Departure or Sanctioned Departure from Principles



Scope of Review

Review decisions of the COA

- Challenge the COA opinion or *Degrate*, 241 S.W.2d 755 (Tex. Crim. App. 2006)
- Only Issues Ruled Upon

Beyond Scope

- Abatement Orders
- Motion to Recuse



Error Preservation & Categorizing Claims



Ask if the claim is preserved



Anticipate and preemptively refute



Ask whether it is the type of error
that requires preservation



1. "Is there a common-law 'fundamental error' exception to preservation that exists outside of the framework of *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993)?"
 2. "Is a complaint about a judge's comment on the evidence forfeited if not raised at trial?"
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PROENZA, PD-1100-15



1. "Is the 'right' not to be subjected to improper jury argument forfeitable?"
2. "Is there a word so inflammatory that its mere mention in closing arguments incurably taints the entire trial?"

Hernandez, PD-1389-16



Construing the Constitution

Leax, PD-0517-16

"Whether Section 33.021 of the Texas Penal Code is a content-based restriction."



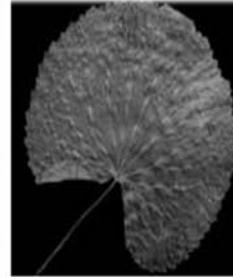


Estes, PD-0429-16



State's
&
Appellant's PDRs

1. "Did the Court of Appeals properly conclude that there was no rational basis for the appellant receiving disparate treatment?"
2. "Should Appellant's equal protection claim be reviewed under strict scrutiny?"
3. "Was it error for the Court of Appeals to affirm Appellant's sexual assault convictions as second-degree felonies and remand those charges to the trial court for a new trial on punishment, rather than order the prosecution of Appellant dismissed or remand the charges to the trial court to enter an order dismissing the prosecution?"



Construing a Statute Captivating with Public Appeal

Bolles, PD-0791-16

1. “The Thirteenth Court of Appeals erred in concluding that the image of a toddler with her genitals exposed, without any discernable reason for the exposure other than to arouse or offend the viewer, did not amount to a ‘lewd exhibition of the genitals’ for purposes of the offense of Possession of Child Pornography.”
2. “Does Rosie’s toddler status in 1976 when Robert Mapplethorpe photographed her revealing her genitals control the ‘child younger than 18... when the image was made’ element of possession of child pornography when, long after Rosie reached adulthood, Appellant took a ‘cropped’ photo of the original depicting only her genitalia?”



"A deadly weapon is anything that in the manner of its actual or intended use is capable of causing death or serious bodily injury." TEX. PENAL CODE § 1.07(a)(17)(B).

What constitutes a deadly weapon?



Prichard, No. PD-0712-16

"Is a 'deadly weapon' finding appropriate when the only thing injured or killed is a pit bull rather than a human being?"



1. "Did the Second Court of Appeals err in misapplying the *Jackson v. Virginia* legal sufficiency standard by holding evidence the Appellant was intoxicated, caused a wreck with a stationary occupied vehicle, and disregarded a red light was legally insufficient to support a finding the Appellant's vehicle was a deadly weapon?"
2. "Did the Second Court of Appeals err in holding that the infliction of minor injuries or 'bodily injury' by the Appellant's vehicle rendered any actual danger of causing death or serious bodily injury purely hypothetical and thus insufficient to support a deadly weapon finding?"
3. "Does a deadly weapon finding in a felony driving while intoxicated conviction require a *mens rea* of reckless conduct?"

Moore, PD-1056-16



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Derivatives

Lerma, No. PD-1229-16

"When the cocaine was seized after Appellant attempted to flee a reasonably timed traffic-stop-detention, does an alleged unlawful pre-arrest frisk and prolonged detention render the cocaine inadmissible?"





Oral Argument: to request or not request?

First Amendment Separation of Powers



What's Trendy?

FIRST AMENDMENT

Ex parte Ingram, PD-0578-16

- Online Solicitation Statute, Subsections (c), (d).

Ex parte Beck, PD-1618-16

- Improper Student-Teacher Relationship

Wagner, PD-0659-15

- Meaning of “harassing manner” in the protective order statute; scrutiny standard

SEPARATION OF POWERS

Vandyke, PD-0283-16

- Failure to Complete Sex Offender Treatment as a Basis for Prosecution Eliminated

Salinas, PD-0170-16 (reh'g)

- Court Costs - Comprehensive Rehab

Search and Seizure



Is standing an issue?



Is a remand for additional findings needed?



If you are the prevailing party, are there additional legal theories not argued that would support the trial court's ruling?



Was there actually a violation, or a mistake of law (*Heien v. N.C.*, 135 S. Ct. 530 (2014))?



Is the evidence subject to suppression under federal law and TEX. CODE CRIM. PROC. art. 38.23?



Rodriguez, PD-1391-15



1. "Should a court . . . consider . . . the totality of the circumstances, including (a) who initially searched a dorm room, (b) whether law enforcement had to conduct any additional search beyond a search conducted by university officials, and (c) whether a student consented to university officials searching her room, when determining whether the Fourth Amendment was implicated by law enforcement's actions in entering a dorm room?"
2. "Should a university's duty to provide a safe environment . . . and the minimal intrusion by law enforcement be balanced against a college student's Fourth Amendment rights when determining the reasonableness of a dorm room search?"
3. "The Court of Appeals erred in categorically ruling that the plain view doctrine did not apply because university administrators cannot have actual control or apparent authority to consent . . ."

"The Thirteenth Court of Appeals erred in its application of *Arizona v. Gant*, in that it did not apply the totality of the circumstances when determining the validity of the search incident to arrest."

Sanchez, PD-1037-16



Velasquez, No. PD-0028-16



"Did the State of Texas properly preserve error for lack of notice of a pre-trial hearing pursuant to TEX. CODE CRIM. PROC. Art 28.01 when in truth they objected merely to the evidentiary character of a pre-trial hearing on a Motion to Suppress?"

"Did the court of appeals err in concluding that TEX. CODE CRIM. PROC. Art 28.01 requires the Trial Court to provide additional notice to the State of the potential for a pre-trial hearing on a properly filed and served Motion to Suppress beyond an order to appear ready for trial on a certain date?"



Ramirez-Tamayo, PD-1300-16



"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."

"Under what circumstances is a reviewing court permitted to ignore a credible officer's inferences and deductions based on his training and experience?"

Sufficiency

1. Divide and conquer
2. On the edge
3. Requires construing an element
4. Unjustifiably flawed
5. Involves reformation as a remedy

1. "In reviewing sufficiency of the evidence, did the court of appeals err by:
- failing to consider any reasonable inferences that could be drawn from the evidence,
 - separating evidence about the crime scene from evidence about the relationship between Appellant and the victim as a whole,
 - speculating on evidence that was not offered by the State, and
 - speculating on a hypothesis that was inconsistent with the defendant's guilt, during its review of the sufficiency of the evidence to support a capital allegation that Appellant committed murder while in the course of kidnapping or attempting to kidnap the victim?"
2. "In considering the 'grey area' of criminal attempt law between acts that are simply mere preparation to commit an offense and acts that tend to effect the commission of an offense, may a reviewing court reject a jury's verdict . . . simply because the reviewing court would have drawn the 'imaginary line' in a different location than the jury?"

Bush, PD-1012-16

Divide and Conquer & On the Edge

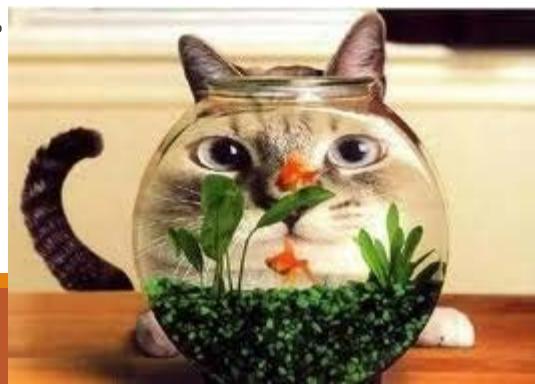
Crafting the Ground For Review

**"WRITING
IS THE
PAINTING
OF THE
VOICE!"**

VOLTAIRE

Drafting Principles

1. Know your audience.
2. Avoid repetition.
3. Include only the pertinent facts and limit the legal background.
4. Limit string citations; one is enough.
5. Address the unfavorable.
6. Use a neutral style and tone; avoid over emphasis and be respectful.
7. Edit and proofread; your purpose may be unclear, get a fresh set of eyes.



1. In reviewing legal sufficiency of the evidence to establish capital murder, where the underlying felony rendering the murder a capital offense was kidnapping, did the court of appeals engage in an improper divide-and-conquer analysis to conclude that there was no evidence of kidnapping or attempted kidnapping?
2. In reviewing legal sufficiency of the evidence to establish murder in the course of kidnapping or attempted kidnapping, did the court of appeals improperly focus upon what was *not* in evidence rather than focusing on reasonable inferences that a jury could draw from the totality of what *was* in evidence?
3. Did the court of appeals err to hold that the evidence showed that Appellant's conduct constituted no more than mere preparation to commit kidnapping and was therefore insufficient to support a reasonable jury inference that he at least attempted to kidnap his victim?

- In reviewing legal sufficiency of the evidence to establish for capital murder, where the underlying felony rendering the murder a capital offense was kidnapping, did the lower court of appeals engage in use an improper divide-and-conquer analysis to conclude that in concluding there was no evidence of supporting the underlying kidnapping or attempted kidnapping offenses?
- In reviewing legal sufficiency of the evidence to establish murder in the course underlying offenses of kidnapping or attempted kidnapping for capital murder, did the lower court of appeals improperly focus upon what was *not* in evidence rather than focusing on deferring to the reasonable inferences that a drawn by the jury could draw from the totality of based on what was in evidence?
- Did the court of appeals err to hold that the evidence showed lower court's finding that Appellant's conduct constituted no more than only mere preparation to commit kidnapping and was therefore insufficient to support a reasonable jury inference usurp the jury's rational finding that he at least attempted to kidnap his the victim?

1. In reviewing sufficiency for capital murder, did the lower court use an improper divide-and-conquer analysis in concluding there was no evidence supporting the underlying kidnapping or attempted kidnapping offenses?
2. In reviewing sufficiency of the underlying offenses of kidnapping or attempted kidnapping for capital murder, did the lower court improperly focus upon what was *not* in evidence rather deferring to the reasonable inferences drawn by the jury based on what *was* in evidence?
3. Did the lower court's finding that Appellant's conduct constituted only mere preparation usurp the jury's rational finding that he at least attempted to kidnap the victim?



TYPES OF HUMAN TRAFFICKING



Unjustifiably Flawed

Ritz, PD-1661-15

1. "The court of appeals erred in finding that the evidence was sufficient to prove that petitioner 'trafficked' the alleged victim as intended by the statute."
2. "The court of appeals erred in finding that the application of the plain language of V.T.C.A. Penal Code, Sec. 20A.01(4) did not lead to an absurd consequence that the legislature could not have intended."

Construing an Element

1. "Does Penal Code section 16.02 prohibit intercepting and disclosing the contents of an oral communication even when the speaker has no expectation that his words will not be repeated by those present?"
2. "Does a basketball coach have a justifiable expectation that his pep talk in a girls' locker room will not be secretly recorded by a former player?"

Harm

1. Subject to harm?
2. Standard of review
3. On the edge
4. Unjustifiably flawed



Lake, PD-0196-16

1. "The court of appeals erred in treating the trial court's refusal to allow final argument before revoking Appellant's community supervision as structural error immune from a harmless-error analysis."

2. "The court of appeals' treatment of the trial court's refusal to allow final argument before revoking Appellant's community supervision as structural error immune from a harmless-error analysis is contrary to decisions of the United States Supreme Court and this Court defining what constitutes structural error."



“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?”

Jacobs, PD- 1411-16



Burnett, PD-0576-16



"Did the court of appeals misapply this Court's decision in *Ouellette v. State* in determining that the inclusion of the full statutory definition of intoxication in a jury charge constitutes harmful error?"



Ash, PD-0244-16

"The Waco Court of Appeals erred in holding, without formal charges, an accomplice witness can only be classified as a matter of fact and cannot be an accomplice as a matter of law."



Jury Charge Error

Improper/Proper Inclusion

Improper/Proper Exclusion

Unanimity



*When she became exasperated,
the situation became exacerbated.*

"Does the submission of an instruction on transferred intent entitle a defendant to an instruction on mistake of fact even if the greater offense does not have any additional culpable mental state and there is no evidence that the defendant harbored a mistaken belief?"

Rodriguez, PD-0439-16

Proper Exclusion





O'Brien, PD-0061-16

"Whether the court of appeals erred in holding that **unanimity** is not required with respect to the enumerated offenses of theft and money laundering in an engaging in organized criminal activity by commission jury charge."

Jeopardy

Bien, PD-0366-16

State's

2. "Assuming a double jeopardy violation, who should determine what the most serious offense is? If this Court answers that question by deciding that a court of appeals should make that determination, what role should the parole consequences of Article 42.12 § 3g have in that analysis when the sentences, fine and restitution are all identical?"

Appellant's

1. "The Court of Appeals erred when it held that parole eligibility may determine the "most serious" offense for purposes of double jeopardy."
2. "What is the proper remedy for multiple punishment when the 'most serious' offense cannot be determined?"



Derailing Your Case

Ex parte Pete, PD-0771-72-16

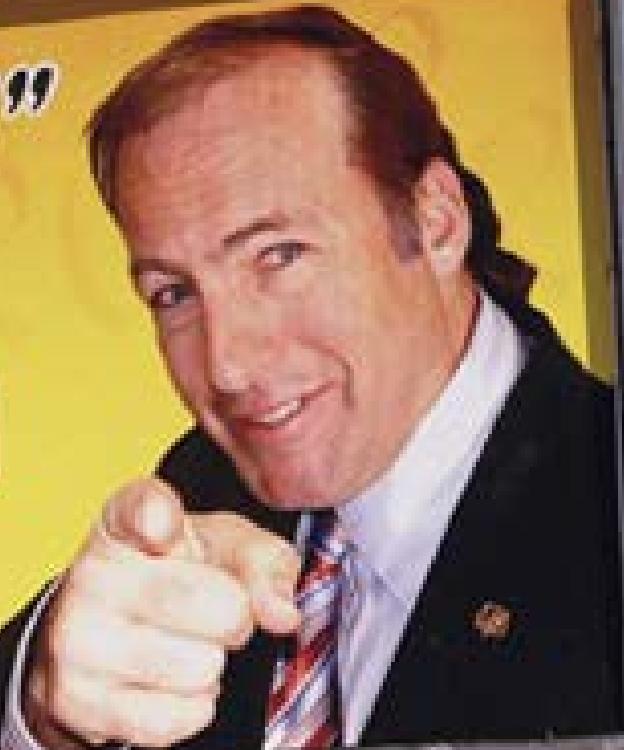
- Cognizability
- Authority
- *Marin Category*
- Pertinent Factors

"Better Call Saul!"

SAUL GOODMAN

ATTORNEY AT LAW

(505) 503-4455



Ineffective Assistance of Counsel

Knelsen, PD-1566-15

"By ruling that Anna Knelsen's sworn writ allegations did not constitute a sufficient basis for vacating her conviction, even though the record conclusively establishes that her guilty plea was not knowingly and voluntarily made and that it resulted from ineffective assistance of counsel, the court of appeals has rendered a decision which conflicts with applicable decisions of the Court of Criminal Appeals and U.S. Supreme Court."



"When the record is silent as to defense counsel's reasons for calling witnesses in support of jury-ordered probation, has the presumption of reasonable strategy been rebutted?"

Prine, PD-1180-16



When to Respond to PDR



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



When to File Subsequent (Cross) PDRs



When there is a question of preservation or it is debatable whether the error is error and the defendant challenged harm/prejudice.



When the COA errs by overruling a point while sustaining another and the State PDRs on the sustained issue.

Rehearing

1. The facts are wrong
2. Failure to address all legal arguments and you are the losing party
3. New development in the law
4. Disagree with the remedy, which was not an “issue” before

“It’s the Jurisprudence, Stupid!”

