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Courting the Court:
Petitions for Discretionary Review

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PDR Check List

Grounds

General Threshold

- ☐ Is there a viable argument that error was not preserved (even if not an issue in the COA)?
- ☐ If error was not objected to, is the type of error subject to procedural default or waiver or is it systemic? Should preservation be required?
- ☐ Is there a viable estoppel argument?
- ☐ Is there a viable laches argument?

Merits

If you have a Fourth Amendment claim,

- ☐ can a challenge to standing be made (even if it was not raised in the COA)?
- ☐ is a remand appropriate because additional factfindings (if made in the first instance) are needed
- ☐ are there any previously un-argued legal theories that support the trial court's ruling (only if you prevailed in the trial court)?
- ☐ was there actually a violation, or was there a mistake of law (*Heien v. N.C.*, 135 S. Ct. 530 (2014))?
- ☐ is the evidence subject to suppression under federal law and TEX. CODE CRIM. PROC. art. 38.23?

If you have a Fifth Amendment issue,

- ☐ is there a viable claim concerning "custody"?
- ☐ is the evidence subject to suppression under federal law and TEX. CODE CRIM. PROC. art. 38.22?

Do you have a trending issue? If so,

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

If you are challenging whether an act or failure to act was erroneous,

- ☐ did the COA conduct a harm analysis?
- ☐ if so, is the error subject to a harm analysis? Or is it structural?
- ☐ is there a viable challenge to the harm analysis to obtain a reversal?

Harm

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

- ☐ have you determined whether there is a viable issue pertaining to the error?
- ☐ have you determined whether the proper harm standard has been applied? (44.2(a) or (b); *Almanza*'s "some" or "egregious" harm?)
- ☐ have you fully fleshed-out the harm analysis?
- ☐ Is a request for a summary remand the best strategy to get your desired result and conserve resources?

Sufficiency

- ☐ Is reformation to a lesser, deletion of a finding, or a remand the proper remedy?
- ☐ Is a request for a summary remand the best strategy to get your desired result and conserve resources?

Substance

- ☐ Have you winnowed down the grounds (preferably 1 & 2 and no more than 4)?
- ☐ Does the ground for review and argument unquestionably challenge the COA decision (not the trial court's ruling) to avoid refusal under *Degrate*?
- ☐ Does the ground for review concisely reflect a single issue (not compound) without being over-broad?
- ☐ Do you want oral argument? If so, have you explained why it is needed?
- ☐ Have you acknowledged and addressed unfavorable facts or law?
- ☐ Have you requested the proper form of relief? Reformation to lesser? New punishment? Deletion? Remand?
- ☐ 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)?
- ☐ If the COA reversed the conviction, have you (defense counsel) requested bail?

Form

- ☐ If you have cut and pasted from other documents, have you changed all 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 case turns on the substance of a search or arrest warrant or affidavit in support, has it been included in the appendix?
- ☐ Have you had at least one person review and edit the PDR?

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 page 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 (do not send a "read only" document 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?
- ☐ Are 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?
- ☐ 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? Single-Sided Paper Copies
- ☐ 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?

I. 2016 STATISTICS AND INTERNAL REVIEW

PDRs Filed	1,411	
Granted PDRs	96	6.8%
Refused PDRs	1,282	91%
Non-Compliant	18	1.2%
Untimely	10	.7%

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

Practice Tip: **Monitor cases in which a judge is shown as having voted to grant when the PDR was refused. This is called a "show me." Knowing what the issue was may help you craft a PDR later (with the same or related issue) to get that judge's interest. In turn, that judge may be able to convince 3 others to vote to grant.**

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

not mean that the Court of Criminal Appeals agreed with the lower court's decision. *Dennis v. State*, 798 S.W.2d 573, 573 (Tex. Crim. App. 1990).

II. SCOPE OF REVIEW

***Practice Tip:* What you can't PDR;**
New issues
COA interlocutory orders

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

"The Court will not entertain a petition for discretionary review from an interlocutory order of abatement by the court of appeals because that order does not finally dispose of the case in that court." *Jack v. State*, 149 S.W.3d 119, 123 (Tex. Crim. App. 2004) (citing *Measeles v. State*, 661 S.W.2d 732, 733 (Tex. Crim. App. 1983)). Nor will the Court entertain a PDR seeking review of an order denying a motion to recuse an appellate court justice. *Leija v. State*, 456 S.W.3d 157 (Tex. Crim. App. 2015).

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

III. CONSTRUCTING A PDR LIKE A MASTER

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

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

1. Selecting an Issue

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

Though none is expressly required to be included in a petition, the official "Reasons for Granting Review" set out in Texas Rule of Appellate Procedure 66.3 provide ready examples of the kind of issues that may catch the Court's attention:

(a) the court of appeals' opinion conflicts with an opinion from another court of appeals;

(b) the court of appeals has decided an important question of state or federal law that should be settled by the Court of Criminal Appeals;

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

(d) the court of appeals has declared unconstitutional or has misinterpreted a statute, rule, or regulation;

(e) the justices of the court of appeals have disagreed on a material issue; or

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

Look for Novel and Law-Based Issues
Avoid Fact-Specific Cases Unless Extraordinary

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

Construing Statutes and Constitutions

The Court will take an interest in any case presenting a novel question of statutory or constitutional construction. However, even if the case presents an interesting question of interpretation, the Court may be less likely to grant review when all the court of appeals are in agreement. *See e.g.*, *Casey v. State*, 349 S.W.3d 825, 829 (Tex. App.—El Paso 2011, pet. ref'd) (challenge to constitutionality of continuous sexual abuse of a child statute); *Martin v. State*, 335 S.W.3d 867, 872-873 (Tex. App.—Austin 2011, pet. ref'd) (same); *Reckert v. State*, 323 S.W.3d 588 (Tex. App.—Corpus Christi 2010, pet. ref'd) (same); *Render v. State*, 316 S.W.3d 846 (Tex. App.—Dallas 2010, pet. ref'd) (same). The Court may also be reluctant to jump on an issue immediately. The judges may want to give it time to percolate in the lower courts.

Practice Tip:
Try to counter the CCA's tendency to let an issue percolate in the COAs by stressing the domino effect, thus making it most expeditious to fix the error sooner rather than later.

The Court's docket consistently has issues that are derivative of recent Supreme Court cases. When the Supreme Court announces a new rule, or overrules precedent, the Court of Criminal Appeals will have to flesh out the infinite scenarios that arise under the novel controlling authority. Examples of such cases include *Crawford v. Washington*, 541 U.S. 36 (2004), *Florida v. Jardines*, 133 S. Ct. 1409 (2013), *Missouri v. McNeely*, 133 S. Ct. 1552 (2014), and *Heien v. North Carolina*, 135 S. Ct. 530 (2014). When this is your basis for filing a PDR, be certain to point out any distinguishing elements (positive and negative) in your case.

Trending Issues

Whether an issue will recur is always something the judges consider in voting on whether to grant review. The more often that courts of appeals will continue to be, or already have been, confronted with an issue, especially when there is a split among the lower courts, the more likely it is that the Court will grant review. The latest hot-topic issues have involved First Amendment free speech challenges to various Penal Code provisions. *Ex parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013) (On-Line Solicitation of a Minor), *Ex parte Thompson*, 442 s.W.3d 325 (Tex. Crim. App. 2014) (Improper Photography), and *State v. Johnson*, 475 S.W.3d 860 (Tex. Crim. App. 2015) (Flag Destruction). This term, the Court will be deciding a related issue: whether the online solicitation statute, Tex. Penal Code § 33.021, is a content-based restriction on speech. *Leax*, PD-0517-16; *Ingram*, PD-0578-16.

Other hot-topic issues have involved court costs that violate separation of powers and warrantless blood draws under the mandatory blood draw statute. *Salinas v. State*, PD-0170-16 (Mar. 8, 2017); *Johnson v. State*, 423 S.W.3d 385 (Tex. Crim. App. 2014); *State v. Villarreal*, 475 S.W.3d 784 (Tex. Crim. App. 2014).

Captivating Issues

There are always exceptions to the general rule. Every year there are those few cases that are so extraordinary, either because of the facts or the law, that the Court can't resist granting them. If you've got one of those remarkable cases, you can confidently pursue a PDR by persuasively crafting an issue that truly captures the unique aspects of the case. One example this term is *Bolles*, PD-0791-16, where the Court has granted review to decide whether Robert Mapplethorpe's "Rosie" photo, which shows a three-year-old girl's genitals, is lewd and therefore constitutes child pornography.

Search and Seizure

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

Search and seizure issues are frequent flyers. When these issues do arise, the best practice is to frame the ground for review in the broadest terms possible. It is important to

convey that the rule generated by the case will be useful to law enforcement and the bench and bar on a routine basis.

Public Appeal

The Court also tends to grant cases in which the factual and legal issue has wide public appeal because virtually anyone can relate to the issue. Such issues include traffic offenses and what constitutes use of a deadly weapon. *Prichard*, PD-0712-16, will address whether a deadly weapon can be used against an animal or whether such use is limited to persons. The Court recently found that a table/butter knife used in a robbery and fire used to commit arson can be deadly weapons. *Pruett*, PD-0251-16; *Johnson*, 0669-15.

Unjustifiably Flawed

Challenges to a sufficiency of the evidence analysis are rarely granted on PDR. In cases in which the Court does grant review, the court of appeals' analysis is generally severely flawed or outrageous. Remember to think about the proper disposition if a conviction is reversed for sufficiency: Should the judgment be reformed to reflect a conviction for a lesser-included? One successful way of challenging sufficiency for the State is to argue that the court of appeals applied a divide-and-conquer analysis. Another strategy is to challenge the applicable standard of review. *See e.g., Matlock v. State*, 392 S.W.3d 662, 667-68 (Tex. Crim. App. 2013) (adopting standard from Texas Supreme Court when reviewing evidence of an adverse finding in cases in which the defendant bears a preponderance of the evidence burden of proof). The Court may also be inclined to grant a sufficiency issue when the case is so close that it is on the edge in either direction. For instance, in *Bush*, PD-1012-16, a capital murder case, the Court granted review to consider proof of kidnaping as it relates to "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." A review of cases over the past two years demonstrates that the best way to proceed in sufficiency cases is to challenge whether the court of appeals properly construed a statutory element of the offense.

> *Practice Tip*:
> Remember to think about the proper disposition if a conviction is reversed for sufficiency: Should the judgment be reformed to reflect a conviction for a lesser-included?

As with sufficiency, the Court will be more inclined to grant review of a harm analysis if it's severely flawed or outrageous. But the most promising basis upon which to challenge a harm analysis is to argue that the error is structural and not subject to a harm analysis or that the wrong standard under Rule of Appellate Procedure 44.2 or *Almanza* was applied.

Ask whether the harm analysis is worthy of review. It is unlikely that the Court will review whether a court of appeals resolved the merits of a claim erroneously if it won't change the outcome of the case because of the lack of harm or prejudice.

Practice Tip:
Keep in mind that if the COA assumed error, you won't have a worthwhile challenge to that assumption unless you can also challenge its harm analysis.

In exercising its discretionary jurisdiction, the CCA struggles between dedicating its resources to only important legal questions only and the desire to see that justice is done. The conflict arises most in sufficiency and harm/prejudice cases. To accommodate both concerns, it may useful to succinctly detail the lower court's flaws and request a summary remand for reconsideration. This approach will present its own challenges. Demonstrating a lower court's error in these cases usually requires an exhaustive review of the facts, which is exactly what the CCA wants to avoid when exercising its discretionary authority. Do your best to provide the CCA with a clear basis for remanding that will instruct the lower court in re-analyzing the issue. But always ask the CCA to address the issue on its own as an alternative.

Practice Tip:
Is a summary remand for reconsideration of sufficiency or harm/prejudice a strategy that can achieve your goal of getting your PDR granted and while preserving the CCA's limited resources?

Preservation

Issues involving preservation of error are also frequently granted by the Court. The Court's may want to review whether an objection satisfied the specific or timely requirements. Other times, the Court will determine what rights and prohibitions are subject to preservation rules. It may be surprising to discover which rights and prohibitions have yet to be identified under the *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993), three-tiered framework. Additionally, a lower court's decision excusing preservation based on "fundamental error" presents a good opportunity to petition the Court on whether such error still exists following *Marin*. The Court is currently resolving such an issue in a case in which a judge improperly commented on the evidence. *Proenza*, PD-1100-15.

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

Practice Tip:
Because preservation can be raised at any time, the State should always consider the issue, and the defense should anticipate the State's ability to advance it in response to a defense PDR.

Pending Issues

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

Practice Tip:
When raising a pending issue, always consider two factors: (1) whether there are other claims that would result in greater relief, and (2) whether there are distinguishing factors that may affect the disposition.

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

on point. This may result in the Court reviewing your case on its own merits instead of possibly later summarily remanding to the lower court for reconsideration in light of its lead-case decision.

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

Overruling Precedent

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

Practice Tip:
A challenge to precedent does not have to be raised in the COA because the COA has no authority to overrule the CCA.

Dissent

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

PDRing as the Prevailing Party

Though it is rare to seek review in a case that you've won, there may be instances that justify filing a PDR. First, the lower court erred in its analysis of an important issue along the way and that determination will have a negative impact on future cases. Second, you won but for the wrong reason.

Avoid Derailment

After a petition is granted and the case submitted, the Court may discover that it fails to properly present the issue the Court wanted to decide or there are sticky threshold

issues that were overlooked by the parties. For example, cases in which a sufficiency claim has been disguised as a standard of review issue may only be discovered post-submission. Further, in a sufficiency case, a challenge to one element could possibly forfeit a challenge to a different element that was not advanced by the defendant. *See, e.g.*, *Burks v. State*, PD-0992-15 (reh'g granted) (5/4 split on remanding for consideration of whether Burks had the intent to impair the availability of the body as evidence when that specific element was not challenged before the lower court).

And regarding threshold issues, the Court may discover that a crucial analytical step was not addressed by the court of appeals or a party. In *State v. Zuniga*, the Court considered whether the identity of an item alleged to have been tampered with is an essential element and thus needs to be specified in the charging instrument. PD-1317-15. The Court held that the identity was not an element; therefore, "thing" and "unknown substance" were appropriate terms. However, the Court recognized that the court of appeals failed to address whether the statute itself is sufficiently descriptive to provide adequate notice and remanded the case.

Make certain that all avenues in your case are covered. If you are the losing party in the trial court, remember that the opposing party can advance any justification for upholding a trial court's ruling because there is no procedural default. *Volosen v. State*, 227 S.W.2d S.W.3d 77, 80 (Tex. Crim. App. 2007). So challenging an error under one legal theory may not yield the result you expect if there are other viable arguments.

2. Crafting the Ground for Review

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

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

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

A bland, nondescript issue will not capture the Court's interest. Compare:

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

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

1. "Should a court of appeals consider all of 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, with an atmosphere conducive to the educational process, 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 or apparent authority to consent to law enforcement's entry into a dormitory room." *Rodriguez*, PD-1391-15.

Also, consider framing the issue in a way that the answer you want seems self-evident.

"Is fire a deadly weapon when Good-Samaritan neighbors and firefighters were in the "zone of danger" and had to take 'evasive action' to contain and extinguish nearby flaming vegetation and a burning house emitting 'extremely toxic' fumes?" *Pruett*, PD-0151-16.

Practice Tip:
The best time to draft your ground for review is after the facts and legal arguments have been fully fleshed out; your initial strategy may change as you develop the argument section.

Finally, when writing the issue, DO NOT USE ALL CAPS. The reader will be turned off.

3. Formulating Your Argument Strategy

Good writing is the most important factor in making the argument. Engage the Court by making certain that the logic and reasoning behind your argument are stated in the clearest and simplest of terms. Generally, people don't like to read what they can't easily comprehend. The more difficult something is to read, the more likely that the reader will lose interest (this is particularly true because the Court's docket contains thousands of cases). Be conversational, and omit legalese. If you wouldn't say something in a conversation with a colleague in the way you have written it, then revise it.

Practice Tip:
The objective is to take a complex and technical issue and present it in a way that the average person can understand.

Bottom Line

One Judge has requested that the statement of the case to be "punchy" and "pithy." Get to the crux of the issue as it pertains to the facts as quickly as possible and include an explanation of how the case has made its way to the Court. Provide a concise opening statement that sets out what the court of appeals did wrong and why. This provides the judges with an instant roadmap of the argument that will follow. If the context of the issue is unclear until the end, chances are that the judges will get frustrated and never make it to that point of the PDR. You may want to write the opening statement second to last, just before framing the ground for review. If you choose to begin by drafting the opening statement, remember to go back and consider whether it needs to be revised after you've completed your argument. The opening statement provides the general outline for the ground for review so that the ground for review represents the shortest possible version of the summary.

Practice Tip:
Your opening statement provides the general outline for the ground for review, and the ground for review should represent the shortest possible version of the summary.

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

Only Pertinent Facts

Do not include unnecessary facts. If the issue is purely legal, do not include an in-depth review of the facts of the offense or trial proceedings. No one wants to read pages of material only to later discover that it had absolutely no bearing on the case. Once the reader discovers this, it's likely that this will have a lasting effect on the reader's review of the remainder of the PDR. Include names and dates only when necessary to a proper understanding of the issue you are pursuing.[1] Usually, the use of specific names and dates signals the need to make a mental note of it because it plays an important role in the case. Conversely, even when the issue is purely legal, the facts required to understand the context need to be included. Do not force the judges to sift through the lower court opinion just to understand the context of the complaint.

Practice Tip:
Do not include facts and procedural history which are irrelevant to the issue(s) presented. The CCA is the busiest court in the United States.

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

Limit Legal Background

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

[1] Texas Rule of Appellate Procedure 9.10 provides that the use of a person's name who was a minor at the time the offense was committed must be redacted.

Special Appendix Materials

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

Practice Tip:
Attach legal research materials that are difficult to find, and attach record documents when your case hinges on a small portion (*e.g.*, motion to suppress, indictment, jury charge).

Know Your Audience

Avoid emotion-based pleas as they tend to undermine an advocate's credibility and legal argument. If you represent the State, referring to the "egregious" and "horrible" facts of your case is not recommended. First, the CCA encounters the worst cases on a routine basis, so there is little reason to believe that they will be impressed by your characterization of the facts. Second, it detracts from the legal argument, which is what the Court is there to address. If the facts are highlighted in this manner, then it may signal that the legal argument is weak or that the case is too fact-bound for the Court to want to intervene.

As a representative of the defendant, don't focus on how your client has been unjustly or unfairly treated by the judicial system. On discretionary review, the Court is less interested in your client's rights as an individual than with how the court of appeals' decision will impact the jurisprudence of the State and defendants as a class.

Avoid Repetition

Though threshold issues like preservation and estoppel (or even standing) usually precede any merits issue, it may make more sense to reverse the order of presentation. Sometimes the facts and circumstances concerning the merits claim are better explained within that context first, followed by a threshold issue. Reversing the order may help avoid

reiterating all the information that fits better in the merits section. You can let the background information lay the foundation for the threshold issue.

Keeping the word count to a minimum, while effectively presenting the argument, should be a priority. There is a maximum word limit for PDRs (4,500) and the longer the PDR is, the less likely it will keep the reader's undivided attention.

Limit Citations

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

Address the Unfavorable

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

Style and Tone

Visible emphasis—*italicizing*, <u>underlining</u>, and **bolding**—should be used infrequently and reserved for extremely important points, if used at all. These tools may be interpreted as the equivalent of shouting, and too many could give the impression that the writer believes that the judges and Court staff are inattentive or stupid. So it's either offensive because it reeks of aggression, or it's insulting to the intelligence of the judges and Court staff. They are perfectly capable of reading and understanding the argument without this type of emphasis. If any type of emphasis appears in the original, though not required, it may be better taken by the Court if there is a parenthetical noting that the emphasis appears in the original.

Practice Tip:
If a point needs to be emphasized, do it through the writing by using a calculated sentence structure or stronger, more precise language.

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

Practice Tip:
Don't use language that can be viewed as attacking the COA, a judge, or opposing counsel.

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

Fully Argue Harm and Prejudice Issues

When challenging a court of appeals' harm or prejudice analysis, you should present the facts to prove your argument in such a way as to show the impact on the outcome. Don't present a conclusory argument; the Court and staff will not do the work for you.

Edit and Proofread

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

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

Practice Tip:
The logic of your argument should be presented in a way that an average non-legal reader can understand.

Oral Argument

The Court has historically leaned toward not granting argument, and that remains true today. However, there are some judges who are open to hearing it in every case. And one judge urges practitioners, especially defense counsel, to ask for it in every case. The rationale is two-fold. First, the judge will dedicate more time to thinking about your issue. Second, if it's important enough to seek review, then it's important enough for you to want to show up in person to state your position and answer questions. But again, that is the opinion of a few.

There are a variety of factors to consider when deciding whether to request argument. It is more likely that the Court will be willing to grant a request when the issue involves a novel application of binding precedent or the application of a statute that the Court has never interpreted. Make sure that you provide a reason that the Court should grant argument. The reason is usually evident because, in most cases, it's the reason you're filing the petition.

3. Responses, Subsequent/Cross-PDRs, and

Responses are infrequently filed, but there are a few situations that necessitate a response. A response should be filed when the opposing party believes that there is a good reason for the Court to refuse review or to subsequently dismiss the PDR as improvidently granted after the Court has voted to grant review.

Practice Tip:

When to File a Response:

1. Preservation is an issue
2. The argument in the CCA is different than that in the COA
3. The PDR misrepresents the law or record
4. The outcome would be the same even if the CCA decided the PDR favorably to the petitioning party

A subsequent (cross) PDR should be filed by the State when there is a question about whether the Appellant's ground for review was properly preserved or when it is debatable about whether the error constitutes error and the defendant challenged harm/prejudice.

A subsequent PDR may be filed by the appellant when the court of appeals errs by overruling one point of error while sustaining another and the State PDRs on the sustained issue.

4. Rehearing

Seeking rehearing should be reserved for specific scenarios: (1) the CCA got the facts wrong; (2) the CCA failed to address all your legal arguments and you are the losing party; or, (3) there has been a new development in the law that is applicable. Generally, you don't want to ask for rehearing when all the arguments were fleshed out among the judges. The Court will easily dispose of your motion if you rehash what they just considered. However, when there is a 5/4 split, your chances of success are greater. *See, e.g.*, *Burks*, PD-0992-15 (reh'g granted) (5/4 split on remanding for consideration of whether Burks had the intent to impair the availability of the body as evidence when that specific element was not challenged before the lower court). A judge who was on the edge the first time around may be convinced to change his or her vote. Do your best to furnish something that will be the tipping point. Perhaps the majority's analysis or holding will have unforeseen consequences in the future.

5. Rules

The Rules of Appellate Procedure are sometimes changed with very little notice to practitioners. For the most up-to-date version of the rules and miscellaneous orders from the Court of Criminal Appeals, consult the Court's website. http://www.cca.courts.state.tx.us.

The following rules apply specifically to PDRs.

1. When: Rule 68.2

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

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

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

Practice Tips:
If you miss the deadline and your PDR is dismissed as untimely, you can file a motion for rehearing under 79.1, requesting reinstatement.

The Clerk's Office will usually grant a 30-day extension without question. The Court will not review an extension until a second one is filed. On second extensions, provide a sufficient basis for your request. Some judges do not like to see a list of your cases because it indicates that you should probably reduce your caseload.

2. <u>Where</u>: Rule 68.3

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

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

3. <u>Contents</u>: Rule 68.4

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

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

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

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

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

Practice Tip:
If your statement of the case is too long and includes too many facts, the Court may count it towards the word limit.

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

(g) Grounds for review. The petition must state briefly, without argument, the grounds on which the petition is based. The grounds must be separately numbered. If the party has access to the record, the petitioner must (after each ground) refer to the page of the record where the matter complained of is found. Instead of listing grounds for review, the petition may contain the questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions presented 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' opinion will be considered with the petition, and statements in the opinion need not be repeated if counsel accepts them as correct.

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

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

Practice Tip:
If you file an **emergency motion** to stay any proceedings along with a PDR, designate it as an "emergency request for . . ." so that it will capture the Clerk and the General Counsel's attention. Also, call and give the Clerk and General Counsel advance notice of the filing.

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4. <u>Word Count</u>: Rule 9.4

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

Effective February 1, 2017

(i)(D) . . . a **petition for discretionary review** in the Court of Criminal Appeals, and a **motion for rehearing** and **response** in an appellate court: **4,500 words** if computer-generated, and 15 pages if not.

(i)(E) A reply to a response to a petition for review in the Supreme Court, a reply to a response to a petition in an original proceeding in the Supreme Court and the Court of Criminal Appeals, except a reply to a response in an original proceeding in a case in which the death penalty has been assessed, and **a reply to a petition for discretionary review in the Court of Criminal Appeals: 2,400 words** if computer-generated, and 8 pages if not.

5. <u>Paper copies</u>: Rule 9.3

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

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

Practice Tips:
The 10 paper copies must show the electronic "accepted" stamp.

File the copies within 3 days of acceptance. If you forget, the PDR may be refused, and the Clerk is not obligated to tell you why.

6. <u>Sensitive Data</u>: Rule 9.10 *(Misc. Docket N0. 13-003, effective January 1, 2014)*

(a) *Sensitive Data Defined.* --Sensitive data consists of:

(1) a driver's license number, passport number, social security number, tax identification number or similar government-issued personal identification number;

(2) bank account number, credit card number, and other financial account number;

(3) a birth date, a home address, and the **name of any person who was a minor at the time the offense was committed**.

(b) *Redacted Filings.* --Unless a court orders otherwise, an electronic or paper filing with the court, including the contents of any appendices, must not contain sensitive data.

(c) *Exemptions from the Redaction Requirement.* --The redaction requirement does not apply to the following:

(1) A court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case;

(2) An arrest or search warrant

(3) A charging document and an affidavit filed in support of any charging document;
(4) A defendant's date of birth;
(5) A defendant's address; and
(6) Any government issued number intended to identify the defendant associated with a criminal filing, except for the defendant's social security number or driver's license number.

(d) *Redaction procedures.*—Sensitive data must be **redacted by using the letter "X"** in place of each omitted digit or character or **by removing the sensitive data in a manner indicating that the data has been redacted**. The filer must retain an unredacted version of the filed document during the pendency of the appeal and any related proceedings filed within three years of the date the judgment is signed. If a district court clerk or appellate court clerk discovers unredacted sensitive data in the record, the clerk shall notify the parties and seek a ruling from the court.

7. Service on the State Prosecuting Attorney: Rule 68.11

In addition to the service required by Rule 9.5, service of the petition, the reply, and any amendment or supplementation of a petition or reply must be made on the State Prosecuting Attorney. The SPA's service email address is: information@spa.texas.gov.

Common Reasons Why PDRs are Rejected for E-filing
1. The PDR and COA opinion are not combined into a single document. Rule 9.4(j)(4)
2. The COA opinion is not attached and is not single-sided (i.e., copied in duplex form). Rule 9.4(a)
3. The PDR text is not a text-searchable PDF document. Rule 9.4(i)(1).
4. It does not include the proper CCA case number (if already assigned).
5. It does not include the proper COA case number or style.
6. The party's or attorney's email address is not listed on the cover. Rule 9.4(g)
7. It does not contain a certificate of compliance. Rule 9.4(i)(3)
8. It exceeds the word limit. Rule 9.4(i)(D)
9. The PDR does not contain the identity of the parties. Rule 68.4(a)

5. Bail

In the event the COA reversed the conviction, defense counsel can request bail while a case is pending on PDR. TEX. CODE CRIM. PROC. art. 44.04(h) states:

> If a conviction is reversed by a decision of a Court of Appeals, the defendant, if in custody, is entitled to release on reasonable bail, regardless of the length of term of imprisonment, pending final determination of an appeal by the state or the defendant on a motion for discretionary review. If the defendant requests bail before a petition for discretionary review has been filed, the Court of Appeals shall determine the amount of bail. If the defendant requests bail after a petition for discretionary review has been filed, the Court of

> Criminal Appeals shall determine the amount of bail. The sureties on the bail must be approved by the court where the trial was had. The defendant's right to release under this subsection attaches immediately on the issuance of the Court of Appeals' final ruling as defined by Tex.Cr.App.R. 209(c).

To avoid having to redraw a bail motion, counsel must address: (1) the nature of the offense; (2) prior criminal record; (3) conformity with past bond conditions; (4) employment history; and, (5) family and communal ties. *Montalvo v. State,* 786 S.W.2d 710, 711 (Tex. Crim. App. 1989).