Petitions for Discretionary Review

LISA C. McMINN
P.O. Box 13046
Capitol Station
Austin, Texas 78711

State Bar of Texas
ADVANCED CRIMINAL LAW COURSE
July 22-25, 2013
Dallas, Texas

CHAPTER ___

Lisa C. McMinn has been the State Prosecuting Attorney since December 6, 2010. She first joined the office as an assistant in October of 2005. From 1992 to 2005, Lisa worked as a staff attorney for the Court of Criminal Appeals. She began her career at the Tarrant County District Attorney's office, where she served from 1988-1992, as an assistant district attorney in both the misdemeanor and appellate sections.

Lisa graduated from Baylor University in 1984, with a B.A. in Political Science. In 1987, she received her J.D. from Baylor Law School.

Lisa is Board Certified in Criminal Appellate Law and is a regular lecturer on criminal appellate law topics at CLE programs around the state. She is a member of the Texas District and County Attorneys Association.

Petitions for Discretionary Review

Drafting a good petition for discretionary review (PDR) involves more than just repackaging your brief in the court of appeals. A PDR has a different purpose, is addressed to a different audience, and is governed by different rules.[1] Understanding these differences will greatly increase the odds that your PDR will be considered on its merits and granted.

I. Process

Upon filing in the Court of Criminal Appeals, PDRs are screened for compliance with the rules of appellate procedure, reviewed by staff attorneys, and voted on by the judges. The Court's disposition of those petitions is published on Wednesdays throughout the year when the Court is in session.

The Court of Criminal Appeals disposed of 1,520 PDRs in fiscal year 2012. Of those, 104 were granted, 1,219 were refused, 142 were struck for non-compliance, and 46 were dismissed as untimely filed.[2]

Anecdotal evidence from the Court shows that for every 100 PDRs that are timely filed, 25 are "non-compliant." Of those 25, approximately 14 do not comply with the Rules of Appellate Procedure and are struck. Most of the stricken PDRs have an insufficient number of copies or fail to attach a copy or a complete copy of the court of appeals' opinion. The other 11 of the non-compliant PDRs are refused pursuant to *Degrate v. State*, 712 S.W.2d 755 (Tex. Crim. App. 1986), because they fail to address the court of appeals' opinion. Approximately 60 of the 100 PDRs filed are "frivved" on the merits, which means the issues raised are deemed so non-meritorious by central staff that they do not require a "workup" by a staff attorney. The judges can ask for a workup on a PDR that has been frivved, but if no workup is requested, the PDR is summarily refused. Out of the original 100 PDRs filed, only 15 survive the screening process and get a full workup by a staff attorney. Of those 15 PDRs worked up, 5-7 are typically granted.

A workup is generally 3-5 pages long. It consists of a summary the facts, court of appeals holding, and arguments in the petition; a discussion of the applicable law; and a recommended disposition of the PDR. The workup is attached to the PDR and circulated to the judges. Prior to Monday conference, the judges take a preliminary vote on the PDRs that are "called up" for that week. In addition to the vote to grant or refuse, the judges can request discussion of a particular case. Central staff attends conference to answer any questions about the cases that have been marked for discussion. After discussion of a case, a revote may be taken in conference. If a case is not discussed, it is disposed of based on the pre-conference vote tally. It takes at least four votes to grant a PDR.

II. Rules

The Rules of Appellate Procedure are sometimes changed with very little notice to practitioners. For the most up-to-date

[1] All references to the rules are the Texas Rules of Appellate Procedure.

[2] http://www.txcourts.gov/pubs/AR2012/cca/2-cca-activity.pdf

version of the Rules, consult the Supreme Court's website.[3]

The Rules of Appellate Procedure for briefs and PDRs are different, especially with regard to deadlines, word or page limits, contents, and motions for rehearing. The Rules listed below for the most part apply only to PDRs. However, some rules that apply to both PDRs and briefs are included.

When to File:

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.

*Even if you miss the deadline and your PDR is dismissed as untimely filed, you can file a motion for rehearing under Rule 79.1, requesting that the PDR be reinstated.

Rule 68.9

Reply. The opposing party has 15 days after the timely filing of the petition in the Court of Criminal Appeals to file a reply to the petition with the clerk of the Court of Criminal Appeals.

Where to file:

Rule 68.3

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

Contents:

Rule 68.4

(a) *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.
(b) *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.
(c) *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.

*The statement about why argument would be helpful doesn't need to be too long or involved. One or two sentences are sufficient. **Example**: "Because this

[3] http://www.supreme.courts.state.tx.us/rules/TRAP/trap-all.htm#s1r9

case presents novel issues this Court has not previously addressed, oral argument would be helpful." More than likely, the judges will grant or deny argument based on their own views about whether argument would be helpful, not on the wording of your statement.

(d) *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.

*****The statement of the case provides the Court with the context in which your issue arose; very few facts are necessary at this point.
Example: Appellant was indicted for murder. At trial, the State sought a lesser- included-offense instruction for criminal conspiracy, which was granted over Appellant's objection. The jury convicted Appellant of conspiracy and assessed his punishment at 10 years. The court of appeals affirmed the conviction, holding that conspiracy to commit murder is a lesser-included offense of murder and was properly submitted. This petition challenges that holding.

(e) *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.

***Example**: On January 1, 2010, the court of appeals reversed the conviction. *Jones v. State*, __S.W.3d __ No. 02-10-0001-CR (Tex. App. –Fort Worth, delivered January 1, 2010). The State's motion for rehearing was filed on January 13, 2010, and overruled on January 28, 2010.

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

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

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

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

*Attach the entire opinion, including concurring or dissenting opinions. An incomplete copy of an opinion is not in compliance, even if it is only missing one page. Many courts of appeals print their opinions on both sides of the page.

If you put the opinion in the copier and forget to set it to "two-sided original" you will get a copy with only odd-numbered page and your petition will not be in compliance with the rules.

Form:

Rule 9.4

Except for the record, a document filed with an appellate court must -- unless the court accepts another form in the interest of justice -- be in the following form:
(a) Printing. A document may be produced by standard typographic printing or by any duplicating process that produces a distinct black image. Printing may be on both sides of the paper.
(b) Paper Type and Size. The paper on which the document is produced must be white or nearly white, and opaque. Paper must be 8 1/2 by 11 inches.
(c) Margins. Papers must have at least one inch margins on both sides and at the top and bottom.
(d) Spacing. Text must be double spaced, but footnotes, block quotations, short lists, and issues or points of error may be single spaced.
(e) Typeface. A document produced on a computer must be printed in a conventional typeface no smaller than 14-point except for footnotes, which must be no smaller than 12-point. A typewritten document must be printed in standard 10-character-per-inch (cpi) monospaced typeface.
(f)-(h) omitted
(i) Length.

(1) Contents Included and Excluded. In calculating the length of a document, every word and every part of the document, including headings, footnotes, and quotations, must be counted except the following: caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix.
(2) Maximum Length. The documents listed below must not exceed the following limits:
(A)-(C) omitted.
(D) A … petition for discretionary review and response in the Court of Criminal Appeals, and a motion for rehearing and response in an appellate court: 4,500 words if computer-generated, and 15 pages if not.
(E) A … reply to a response to a petition for discretionary review in the Court of Criminal Appeals: 2,400 words if computer-generated, and 8 pages if not.

(3) Certificate of Compliance. A computer-generated document must include a certificate by counsel or an unrepresented party stating the number of words in the document. The person certifying may rely on the word count of the computer program used to prepare the document.
(4) Extensions. A court may, on motion, permit a document that exceeds the prescribed limit.

Number of copies:

Rule 9.3

(a) omitted
(b)(1) Paper Copies of Document Filed in Paper Form. A party must file the original and 11 copies of any document addressed to . . . the Court of Criminal Appeals . . . and in the Court of Criminal Appeals, only the original must be filed of a motion for

extension of time or a response to the motion . . . .

Who to serve:

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.[4]

How to file

Rule 9.2

(a) omitted
(b) Filing by Mail.[5]
(1) Timely Filing. A document received within ten days after the filing deadline is considered timely filed if:
(A) it was sent to the proper clerk by United States Postal Service first class, express, registered, or certified mail;
(B) it was placed in an envelope or wrapper properly addressed and stamped; and
(C) it was deposited in the mail on or before the last day for filing.
(2) Proof of Mailing. Though it may consider other proof, the appellate court will accept the following as conclusive proof of the date of mailing:
(A) a legible postmark affixed by the United States Postal Service;
(B) a receipt for registered or certified mail if the receipt is endorsed by the United States Postal Service; or
(C) a certificate of mailing by the United States Postal Service.

*Under Rule 9.2(b), the mailbox rule applies only to documents delivered to the U.S. Postal Service. *Castillo v. State*, 369 S.W.3d 196, 197 (Tex. Crim. App. 2012).

III. Audience and Purpose

The PDR has a different audience and serves a different purpose than the brief in the court of appeals.

In the court of appeals

The court of appeals is required to write an opinion addressing every issue raised and necessary to the disposition of the appeal. Rule 47.1. It has no choice in the matter. Even if your brief is badly written, the court of appeals must still address it. Your purpose in writing the brief is to set out the facts, standard of review, and substantive law, and persuade the judges to rule in your favor.

Many court of appeals justices have backgrounds in civil law. Long-serving justices on the court of appeals will be better versed in criminal law than those more recently elected.

In the Court of Criminal Appeals

The members of the Court of Criminal Appeals are called judges, not justices. The judges on the Court of Criminal Appeals are all former criminal defense attorneys, prosecutors or district judges. They are well versed in criminal law. It is not necessary to set out the standard of review or applicable law at great length in a PDR. Judges and staff attorneys are likely to skip long boilerplate paragraphs setting out the standard of review.

[4] P.O. Box 13046, Capitol Station, Austin, Texas, 78711.
[5] The Court of Criminal Appeals does not currently accept electronic filing of PDRs.

The Court of Criminal Appeals is a discretionary review court that can cherry pick the cases and issues it will address. The judges can refuse your petition for any reason. The refusal of a PDR does not necessarily mean the Court agrees with the opinion below. Your purpose in filing the PDR is to convince the Court that your issue is interesting enough or important enough to examine more closely and perhaps reconsider the law.

Judge Cochran's concurring opinion in *Bradley v. State*, 235 S.W.3d 808 (Tex.Crim.App. 2007) explains, "Converting a direct appeal claim into a discretionary review ground entails considerably more time, effort, and analysis than a minor tinkering with the original direct appeal brief. 'Instead, it involves a change of character, a recognition that this Court wants to know why we should, as a matter of sound discretion, expend our scarce judicial resources to review the court of appeals' reasoning about a particular legal issue.'"

Rule 66.3, provides the reasons the Court of Criminal Appeals will consider in deciding whether to grant review: (a) the court of appeals' opinion conflicts with an opinion from another court of appeals; (b) the court of appeals has decided an important question of state or federal law that should be settled by the Court of Criminal Appeals, (c) the court of appeals has decided an important question of state or federal law in a way that conflicts with an opinion of the Court of Criminal Appeals or the Supreme Court; (d) the court of appeals has declared unconstitutional or has misinterpreted a statute, rule, or regulation; (e) the justices of the court of appeals have disagreed on a material issue; or (f) the court of appeals' opinion has so far departed from the usual and accepted course of judicial proceedings or has sanctioned such a departure by a lower court as to call for an exercise of the Court of Criminal Appeals' power of supervision.

This is not an exclusive list. For example, sometimes the Court grants review to reconsider its own precedent. These reasons illustrate the types of issues the Court is concerned with. In a nutshell, the Court is looking for issues that are important to the jurisprudence of the State. The Court's primary role is not to correct every mistake made by the courts of appeals. As the court of last resort, its role is to be the caretaker of Texas criminal law. As a result, it is more interested in legal issues than factual issues. The Court is less concerned that there may have been an injustice in a particular case than that the opinion could set bad precedent or create a conflict in the law. The Court is not likely to grant review just because a court of appeals "got it wrong" in one case. On the other hand, if more than one court of appeals has gotten it wrong, if a court of appeals keeps getting it wrong, or if a court of appeals got it really, really wrong, the Court of Criminal Appeals may decide to correct the problem.

Familiarize yourself with the issues currently pending before the Court of Criminal Appeals. The Court includes a listing of all the granted PDRs and grounds for review.[6] The issues are updated after each PDR hand down. They are listed chronologically and alphabetically. The State Prosecuting Attorney's website provides summaries of the issues raised in all granted, pending PDRs. They are listed in alphabetical order.[7]

[6] http://www.cca.courts.state.tx.us/issues/ISSUES.pdf
[7] http://www.spa.state.tx.us/

If your issue is similar to one that has been granted, point out the similarity to the Court. Even if your issue is not exactly the same, it may be analogous to one already granted. The Court likes to examine different facets of the same issue.

The Court generally prefers to address legal issues such as the proper standard of review, statutory construction, search and seizure, lesser-included offense issues, jeopardy issues, jury unanimity issues, and jury charge issues.

IV. Drafting

Because of their different purpose, PDRs are written differently than briefs filed in the court of appeals. When filing a PDR, focus on the following:

Narrowing the issues

A defendant who is convicted and appeals the denial of a challenge for cause, the admissibility of the confession, sufficiency of the evidence, hearsay, jury charge error, and the constitutionality of the statute should not raise all of those issues in a PDR. The kitchen sink method is not effective. Judge Cochran illustrates this point, stating, "I look upon one or two well-crafted grounds for review more favorably as it is most unusual that a court of appeals might be seriously wrong on numerous different issues of statewide importance." *King v. State*, 125 S.W.3d 517, 518 n4 (Tex.Crim.App. 2003)(Cochran, J., concurring).

"Scattershot argument is ineffective. It gives the impression of weakness and desperation, and it insults the intelligence of the court." --Scalia and Garner, Making Your Case

Sometimes a single issue includes sub-issues, especially when the court of appeals has alternative holdings. Because the Court's first impression of multi-ground PDR may be unfavorable, it might be wise to present a broad ground for review with subheadings within the body of the argument.

Legal issues

A petition arguing that the court of appeals erred under the facts of a particular case in an unpublished opinion is not likely to be granted. The PDR should demonstrate that the issue is not limited to the facts of that case alone but has potential to affect other cases. Sufficiency of the evidence and search and seizure are often fact intensive issues. If you have a sufficiency issue, emphasize the statutory construction aspect of the case. If you have a search and seizure issue, argue that the court of appeals applied the wrong standard of review or that this holding will have broad application.

Degrate

A PDR should address error in the court of appeals' opinion, not error in the trial court. *Degrate v. State*, 712 S.W.2d 755 (Tex. Crim. App. 1986). Don't argue that the trial court erred by granting the defendant's motion to suppress. Point out the error in the court of appeals' opinion affirming the trial court's granting of the motion to suppress. A PDR arguing that the court of appeals erred by holding that the trial court did not err is in danger of being "*Degrated*." The petition must address the court of appeals' analysis by arguing that it misapplied precedent, misconstrued a statute, applied the wrong standard of review, conflicts with an opinion from another court of appeals, etc.

About 10-12 % of all the non-compliant PDRs are refused because of *Degrate*. Those petitions are refused–not dismissed or struck–so the attorney doesn't know the reason the petition was refused and has no opportunity to correct the error. Some attorneys are routinely "*Degrated*," because they keep making the same mistake over and over again. Some actually cut and paste their entire argument from the brief and re-label it a PDR.

In *King v. State*, 125 S.W.3d 517 (Tex. Crim. App. 2003), Judge Cochran's concurring opinion discusses a PDR that was presumably "*Degrated*." The Court of Appeals affirmed the trial court's ruling for a reason not explicitly relied on by the trial judge. Judge Cochran points out how the ground for review and the accompanying argument provided no clue about the court of appeals analysis. All of the argument was focused on the trial judge's ruling. Judge Cochran proposed a viable argument the appellant could have made about the court of appeals' analysis that involved statutory construction. There was a good issue in the case, but the appellant didn't recognize or know how to present it.

Evolving issues

Judge Cochran's concurring opinion in *King* illustrates why parties should not be too wed to the exact formulation of the issue raised in the court of appeals. As pointed out above, you must discuss the court of appeals' holding, not the trial court's ruling. Sometimes the sole issue in the PDR is the standard of review the court of appeals applied to the trial court's ruling. Sometimes the issue the court of appeals found dispositive may not have received much attention in the trial court. For example, if the trial court denies a motion to suppress a confession resulting from the defendant's arrest after a traffic stop, the main issue in the trial court may have centered on whether the defendant was required to use a turn signal at a particular intersection. But the court of appeals may hold that even if the stop was improper, the taint from the illegal stop was attenuated, rendering the confession admissible. The issue on PDR will be the attenuation doctrine, not the turn signal issue.

Even if the issue is roughly the same in the trial court, court of appeals, and Court of Criminal Appeals, nuances in issues emerge as the case moves up the appellate ladder. Issues become more focused and complex in the Court of Criminal Appeals.

For the most part, issues cannot be presented in the PDR that were not raised in the court of appeals because the Court of Criminal Appeals only addresses "decisions" of the courts of appeals. But there are exceptions to the rule. The first is preservation of error. Preservation of error is a systemic requirement that the court of appeals should address on appeal, even if the issue was not raised by the State. *Ford v. State*, 305 S.W.3d 530, 532-33 (Tex. Crim. App. 2009). If the court of appeals did not address preservation, the Court of Criminal Appeals can do so if the State's PDR raises the issue. *Ibid.* "The State's failure to raise preservation to the court of appeals is no longer a bar to it raising it for the first time in this court in a petition for discretionary review." *Wilson v. State*, 311 S.W.3d 452, 474 (Tex. Crim. App. 2010).

The second exception is that the winning party in the trial court need not argue issues in the court of appeals that would uphold the trial court's ruling. "A trial court's ruling should be affirmed if it is right for any reason. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009). The

State's failure to raise an issue in the court of appeals does not prevent the Court of the trial court. *Volosen v. State*, 227 S.W.3d 77, 80 (Tex. Crim. App. 2007). "Regardless of whether an appellee files a brief, a first-level appellate court has the obligation to conduct a thorough review of an appellant's claims, including any subsidiary issues that might result in upholding the trial court's judgment." *Ibid*. This doesn't mean the Court of Criminal Appeals will grant such issues, but it has the authority to do so.

Both the preservation rule and the "prevailing party" rule will usually benefit the State because the State is usually the appellee. But defendants can rely on *Ford* and *Volosen* in State's appeals where the defendant is the prevailing party.

It is not always necessary to say, "The court of appeals erred by holding...." Those are wasted words that do not focus on the issue. Although the argument portion of your PDR must discuss what the court of appeals did wrong in its analysis, your ground for review can merely state the issue involved without running afoul of *Degrate*. The following are examples of well-worded grounds for review that were recently granted:

"In order to preserve error relative to a limitation on voir dire examination of a prospective juror, must a defendant object after the trial court sustains the State's objection to a proposed question?"

"May a non-aggravated state jail felony conviction, previously punished under the range for a second degree felony, be used for purpose of enhancing punishment to that of a habitual criminal under TEX. PEN. CODE § 12.42(d)?"

Criminal Appeals from addressing it on discretionary review if the State prevailed in

Grounds (or questions) for review

In the court of appeals, it doesn't matter how you word your point of error because the court of appeals is required to address it. But in the Court of Criminal Appeals, the wording of the ground for review is your first opportunity to make a good (or bad) impression. Sometimes it's helpful to write the ground for review after you have completed the argument portion of the PDR.

Don't make the ground for review too long, too argumentative, or too full of facts, but make it specific enough so the reader has an idea of what the issue is.

"Should the trial court's failure to execute a certification of right to appeal after entry of an appealable judgment result in Petitioner being denied his right of appeal where he was convicted by a jury upon a plea of not guilty."

"Did the Legislature intend to allow separate punishments for indecency with a child by both exposure and contact committed against the same victim when the exposure precedes the contact?"

Brevity

"Tediousness is the most fatal of all faults." –Samuel Johnson.

The Court of Criminal Appeals disposes of thousands of cases every year. Judges and staff attorneys read all day long. Their attention span is short. Grab their attention quickly and don't make them pay attention for too long.

Unless your PDR has multiple grounds and/ or complex issues, it should not get close to the word count limit. If you have a single issue with 4500 words of argument, you are likely repeating yourself, over-complicating the issue, or including too many unnecessary facts or too much law.

Outlining before you begin writing helps to narrow the issue and organize your argument. An outline prevents you from skipping around or writing in a disjointed, "stream of consciousness" style, and it prevents repetition.

A brief in the court of appeals usually has a lengthy statement of facts, setting out all the pertinent facts in the case. The PDR rules don't even require a statement of facts and suggest that the "details of the case" be included in the argument. Rule 68.4 (d). Set out the facts that relate to the issue you're raising, but don't include unnecessary or irrelevant facts. If your petition is limited to whether the State's notice of appeal was adequate, you don't need to recite the facts of the offense itself. A petition with several pages of facts gives the impression that that issue is limited to its facts and is less likely to be granted.

Don't include details that are unnecessary, such as the date of arraignment, what district court the case was tried in, and the judge who presided. Also, don't name all the parties and witnesses unless necessary. When the reader sees a name or date, he assumes there's a need to remember it. The purpose of a PDR is to get the judges interested. If they use up all their available attention on your overly long and detailed recitation of the facts, they won't have any left for your actual issue.

Quotes

Long block quotes should be avoided. A big single-spaced, double-indented quote is a lot of concentrated ink in one area. The temptation is to skim it or skip over it. Paraphrase or cut the quote down to size by eliminating the parts that aren't important to your case. If you need to put the quote in context, paraphrase that part and include only the best part of the quote. Or break up long quotes into smaller chunks.

Getting to the point

"If you start with a bang, you won't end with a whimper." –T.S. Eliot

"Don't bury the lede."

Journalism professor, Tony Rogers, asks the students in his classes to write a newspaper account of a doctor giving a speech to a business group about fad diets and physical fitness. Midway through the speech, the doctor collapses from a heart attack and dies on the way to the hospital. Invariably, Rogers says, some of his students will begin the story with "Dr. Wiley Perkins gave a speech to a group of business people yesterday about the problems with fad diets." The story of course, is not about the speech, but about the doctor's death.

It is easier to write the opening to a news story than a PDR because a news story is only reporting facts. A PDR, however, has facts, law, the court of appeals' holding, and a central issue. It is sometimes difficult to start with your issue without providing some background. Nevertheless, it is important to tell the Court what your issue is and why it is important early on. The reader's attention span drops with each page, sometimes exponentially beyond a certain number of

pages. If the reader can't find the heart of your argument, he may start skimming in an effort to find it, in which case, he might skim over something important. Or, worse yet, he may simply lose interest.

Footnotes

Some writers include case cites or the text of statutes in footnotes. Footnotes are also used to make the reader aware of something that is interesting but not essential to the argument. A footnote is also a good place to dispel any qualms the Court might have about granting review in your case. Footnotes are often used extensively in briefs and opinions, where an exhaustive approach to an issue is appropriate. But they should be used sparingly in a PDR and be no longer than a few sentences unless they contain the text of a statute.

Authority

One case is generally enough for each proposition of law. String cites are unnecessary unless you are tracing the history of a particular principle, showing how other jurisdictions treat an issue, or showing how many courts of appeals are on one side of an issue or the other.

State the primary holding of the opinions you cite and explain how they apply to your case. If your issue depends on a particular statute, quote the pertinent part of it. Don't just cite a case or statute and expect the judge or staff attorney to pick up a book or go to Lexis or Westlaw to read it. Always use jump cites to pinpoint the page where the holding appears and always use parentheticals setting out the holding when you use a "see" cite. The key is to make it easy for the reader to follow your argument and understand how the authority you've cited supports it.

Tone

Credibility is important at any phase of a proceeding, but it is especially so when the Court's decision to grant review is discretionary. Do not be overly critical of the court of appeals, even if you believe their opinion was nonsensical. Avoid any suggestion that the court intentionally erred. If the court omitted facts from its analysis, it is much more tactful to say it overlooked rather than ignored them. Sometimes the court of appeals may not adequately explain its rationale, but resist the urge to belittle the opinion. The judges on the Court of Criminal Appeals are more likely to empathize with the court of appeals justices than with snarky appellate lawyers.

V. Odds and Ends

A. When to file a Motion for Rehearing before filing a PDR:

Some judges prefer that the parties give the courts of appeals an opportunity to correct their mistakes by filing a motion for rehearing. Most of the time, a motion for rehearing will be denied, but pointing out to the Court of Criminal Appeals that you gave the lower court that opportunity could be beneficial.

Motions for rehearing are always a good idea if the court of appeals incorrectly stated crucial facts, misstated the law, or missed recent, binding opinion from the Court of Criminal Appeals or the U.S. Supreme Court.

B. When your opponent files a PDR:

You have three options: file a reply, do nothing, or file a cross-petition.

1. Reply: A reply to a party's PDR is due 15 days after the opposing party's petition is timely filed in the court of appeals. Rule 68.7 (b).

2. Do nothing: As a general rule, a reply to a PDR is needed only if your opponent's PDR misrepresents the law or the facts or there is a procedural problem with the case that would make it difficult for the Court of Criminal Appeals to address the issue or grant the relief sought. Very little is gained by filing a reply that merely says the court of appeals was correct.

3. "Cross-petition": Rule 68.2(b) provides for a "subsequent petition," stating, "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."

A cross-petition is often filed when the court of appeals affirms the conviction, but reverses on punishment; reverses one conviction, but affirms another; or affirms the conviction, but deletes a deadly weapon finding or restitution order. In these cases, both parties won in part and lost in part. One party may not care enough about the loss to file a PDR unless the other party files one.

A cross-petition might also be called for even if you won the case outright in the court of appeals. File a cross-petition when the court of appeals' ultimate holding is in your favor, but it disagreed with you on an issue and your opponent files a PDR, which, if decided in his favor, would change the outcome of the case.

Another example is if the trial court grants a new trial on two bases, the State appeals, and the court of appeals holds that reason A for granting a new trial was valid, and reason B was not. If the State files a PDR challenging the court of appeals' holding as to reason A, Appellee should file a cross-petition challenging the holding as to reason B.[3]

The importance of the cross-petition was recently illustrated in *Payne v. State*, PD-1214-11, (Tex.Crim.App. 2013) (not for publication) 2013 Tex. Crim. App. Unpub. LEXIS 237. The victim's hearsay statements were admitted at trial. The State argued error was not preserved, the statements were not hearsay, and their admission was harmless. The Court of Appeals held that Appellant's objections were sufficient and the statements were inadmissible, but error was harmless. Appellant's petition for discretionary review addressed the harm analysis. The State did not file a cross-petition on preservation and error, but after the Court granted Appellant's PDR on the harm analysis, the State raised those issues in its brief. The Court however, declined to consider the State's arguments on those topics because it did not file a cross petition. The Court assumed error was preserved that that the statements were hearsay, and it reversed due to a faulty harm

[3] On PDR, the parties keep the same designation they had in the court of appeals. If the State appealed to the court of appeals and wins, the style in the Court of Criminal Appeals is still *State v. Doe* and the defendant remains the Appellee, even if he is the one filing the PDR. If the defendant appealed, he remains the Appellant throughout the process, even if the State loses in the court of appeals and files a PDR.

analysis. The State's motion for rehearing arguing that the Court's should reconsider its policy of requiring a cross-petition to raise such issues was denied.

B. If your PDR is granted:
You must file a brief within 30 days after review is granted. Rule 70.1. **This is mandatory.** You cannot simply rely on your PDR. Rule 38.1 applies to your brief on the merits.

C. If your opponent's PDR is granted:
You must file a brief within 30 days after the petitioner's brief is filed. Rule 70.2. **This is mandatory.** Rule 38.2 applies to your brief. Also, there is no motion for rehearing from the granting of a PDR. Rule 79.2 (b). But if you think the PDR should not have been granted, you can argue that in your brief and suggest that the Court dismiss the PDR as improvidently granted.

D. If your PDR is refused:
You have 15 days to file a motion for rehearing from the refusal of a PDR under Rule 79.1. You must certify that your motion is based on "substantial intervening circumstances" or "other significant circumstances." Rule 79.2(c).

VI. Current Trends in PDR issues

Court costs and fees

"The Court of Appeals erred by creating an exception to *Mayer v. State*, and holding that withholding money from an indigent inmate's trust account to pay court-appointed attorney's fees does not violate the statute." (Cates, PD-0861-12)

"The Fourteenth Court of Appeals erred in deleting the specific amount of court costs on the judgment of conviction based upon the lack of a certified bill of costs in the record when a specific amount of court costs does not have to be included on the judgment."
"The Fourteenth Court of Appeals erred in deleting court costs on the written judgment based upon the lack of a certified bill of costs in the record when appellant failed to preserve his claim for appellate review and the issue is not ripe for review."
"The Fourteenth Court of Appeals erred in deleting the court costs on the written judgment based upon the lack of a certified bill of costs in the record when there is no requirement that the record include a certified bill of costs."
"The Fourteenth Court of Appeals erred in deleting the court costs on the written judgment based upon the lack of a certified bill of costs in the record when the evidence was otherwise sufficient to sustain the assessed court costs."
"The Fourteenth Court of Appeals erred in deleting the court costs on the written judgment based upon the lack of a certified bill of costs in the record when the district clerk's office has no authority to create a new document for the appellate record after the notice of appeal has been filed."
"The Fourteenth Court of Appeals erred in deleting the court costs on the written judgment based upon the lack of a certified bill of costs in the record when the district clerk's office did supplement the appellate record with a certified bill of costs." (Johnson, PD-0193-13)

"Is an objection concerning repayment of special prosecutor fees required to preserve error?" (Landers, PD-1673-12).

"May a final judgment revoking community supervision assess an attorney fee incurred at the imposition of community supervision, if neither evidence nor a court finding

indicates the defendant has ever been able to pay such a fee?" (Wiley, PD-1728-12)

Lesser included offenses

"Did the Legislature intend to allow separate punishments for indecency with a child by both exposure and contact committed against the same victim when the exposure precedes the contact?"
"Was the exposure in this case subsumed by the sexual contact?" (*Loving*, PD-1334-12)

"Whether the Court of Appeals erred in holding that criminal trespass should have been submitted as a lesser included offense to burglary of a habitation, when the defendant's entire body did not enter the habitation, such he could not have been guilty of a criminal trespass?" (*Meru*, PD-1635-12)

"The Ninth Court of Appeals erred when it upheld the trial court's denial of Appellant's request for an instruction on a lesser included offense where evidence had been presented at trial which supported the submission of the lesser included in the jury charge." (*Wortham*, PD-0765-12

"Should the court of appeals have reformed the verdict to the lesser-included offense of criminally negligent homicide rather than rendering a verdict of acquittal?" (*Britain*, PD-0175-13)

"In the alternative, the Court of Appeals reversibly erred by failing to reform the judgment to reflect a conviction for the lesser included offense of attempted manufacture." (*Canida*, PD-0003-13)

"The Court of Appeals reversibly erred by failing to reform the judgment to reflect a conviction for the lesser included offense of attempted tampering with or fabricating physical evidence." (*Rabb*, PD-1643-12)

Defenses

"Is a defendant who, at trial, both flatly denies the elements of aggravated sexual assault of a child and recants his pre-trial admission entitled to an instruction on the medical-care defense based upon that pre-trial admission?" (*Villa*, PD-0792-12)

"Whether Section 22.021 of the Texas Penal Code is unconstitutional, under the Due Process Clause of the Fourteenth Amendment, due to its failure to require the State to prove that Defendant had a culpable mental state ("mens rea") relating to the alleged victim's age when engaging in the conduct alleged?
Whether Section 22.021 of the Texas Penal Code is unconstitutional, under the Due Process Clause of the Fourteenth Amendment, due to its failure to recognize an affirmative defense based on Defendant's reasonable belief that the alleged victim at the time was 17 years of age or older?
Whether Section 22.021 of the Texas Penal Code is unconstitutional, under the Due Course of Law provision of the Texas Constitution, Article I, Section 19, due to its failure to require the State to prove that Defendant had a culpable mental state ("mens rea") relating to the victim's age when engaging in the conduct alleged?
Whether Section 22.021 of the Texas Penal Code is unconstitutional, under the Due Course of Law provision of the Texas Constitution, Article I, Section 19, due to its failure to recognize an affirmative defense based on Defendant's reasonable belief that the alleged victim at the time was 17 years of age or older?" (*Fleming*, PD-1250-12)

“The Court of Appeals erred by affirming the trial court when it, over objection, failed to include in the court's charge to the jury on guilt/innocence the affirmative defense that the actor was not more than three years older than the victim at the time of the offense.” (*Sanchez*, PD-1289-12)

“When the evidence established only that appellant "felt threatened" before he raised his gun and began firing, must the trial court instruct on sudden passion?
Had the trial court erroneously failed to instruct on sudden passion, did a sentence above 20 years automatically demonstrate harm, even after the jury rejected appellant's claim that he "felt threatened" by finding against self-defense?” (*Wooten*, PD-1437-12)

“Was appellant entitled to a jury instruction on “voluntary act?” (*Farmer*, PD-2620-12)