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**Clash of Courts:
Avenging a Bad Court of Appeals Decision by
Petition for Discretionary Review (PDR)**

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I. Statistics and Internal Review

During the fiscal year of 2014, 1,589 PDRs were filed. The Court granted review in only 130 (8.2%) cases. It refused 1,305 (82%) petitions.¹ 111 (6.9%) were struck for non-compliance, and 39 (2.4%) were dismissed for being untimely filed.

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 to 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 particular position, then the 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.

The majority of 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 of the judges, however, are given copies of the friv PDRs, and any judge can "kick" a case of personal 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 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 most likely be summarily refused.

¹ 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

No new issues, and no COA interlocutory orders
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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 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. *Degrade 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 giveaway that the petition is not compliant. One Judge has indicated that, even though she will review a petition recommended for refusal under *Degrade*, her reading is colored by the "*Degrade*" label and the "*Degrade*" 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*, __ S.W.3d __, PD-0241-15 (Tex. Crim. App. 2015).

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

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