

PRESENTED AT

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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 *Degrade*?
- Does the ground for review concisely reflect a single issue (not compound) without being over-broad?
- Do you want oral argument? If so, have you explained why it is needed?
- Have you acknowledged and addressed unfavorable facts or law?
- Have you requested the proper form of relief? Reformation to lesser? New punishment? Deletion? 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](mailto: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.

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***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.***

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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

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