

Petitions for Discretionary Review: Strategies and Pending Issues

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PDR Check List

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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 ex-ante 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 (*Helen v. N.C.*, ___ U.S. ___, (2014)?
- is the evidence subject to suppression under federal law and Tex. Code Crim. Proc. art. 38.23?
- If you have a Fifth Amendment issue:
 - is there a viable claim concerning "custody"?
 - is the evidence subject to suppression under federal law and Tex. Code Crim. Proc. art. 38.22?
- Do you have a trending issue? If so,
 - did you check for other PDR-worthy grounds, especially ones that could result in greater relief to your client?
 - have you investigated and researched whether there are any additional legal arguments to make that have not yet been presented in those other cases?
 - have you investigated whether there are any determinative factual differences in your case in comparison to the lead case? If so, have you clearly noted the distinctions and requested that the Court grant your PDR and not "hold" for the lead-case-decision?
- If you are challenging whether an act or failure to act was erroneous, did the COA conduct a harm analysis? If so,
 - is the error subject to a harm analysis? Or is it structural?
 - is there a viable challenge to the harm analysis to obtain a reversal?

Harm

- Do you have a ground for review involving harm? If so,
 - have you determined whether there is a viable issue pertaining to the error?

PDR Checklist (smg)

- have you determined whether the proper harm standard has been applied? (44.2(a) or (b), Almanzo's "some" or "egregious" harm?)
- have you fully fleshed-out the harm analysis?

Form

- If you have cut and pasted from other documents, have you changed all of the case-specific information like names and dates?
- Have you deleted immaterial facts?
- Have you used too many visible emphasis tactics like *italicizing*, *underlining*, and *bolding*?
- If you cited hard-to-find authority (e.g., old Legislative hearing recordings), has it been included in an appendix?
- If your cases turn on the substance of a search or arrest warrant, has it been included in the appendix?
- Have you had at least one person review and edit the PDR?

Substance

- Have you winnowed down the grounds (preferably 1 & 2 and no more than 4)?
- Does the ground for review and argument unquestionably challenge the COA decision (not the trial court's ruling) to avoid refusal under *Dege*?
- Does the ground for review concisely reflect a single issue (not compound) without being over-broad?
- Do you want oral argument? If so, have you explained why it is needed?
- Have you acknowledged and addressed unfavorable facts or law?
- Have you requested the proper form of relief? Reformation to lesser? New punishment? Deletion?
- Have you noted other claims unaddressed by the COA that may need to be resolved, depending on the Court's disposition of your ground(s)?

Filing & Rule Compliance

- Is your email address on the cover sheet?
- Is the PDR properly styled (does the case already have a COA cause number)?
- Is the identity of the trial judge and parties included?
 - If you omitted it and the PDR was rejected, make sure you timely refile.
- Is there a certificate of compliance?
- Is the document within the 4,500 word limit?
- Is the PDF in a searchable format?
- Is a non-double-sided COA opinion attached? Have you excluded Headnotes?
- Are all pages of the COA opinion present? Concurring and Dissenting opinions?
- Is the PDR and COA opinion combined into one PDF document?
- Is the State Prosecuting Attorney (information@spa.tx.gov) included on the Certificate?
- If requesting an emergency stay, have you alerted the Court you are planning on filing it and designated it as an emergency filing in your document description?
- **Single-Sided Paper Copies**
 - Has a reminder or prompt been set so you remember to send 10 single-sided paper copies 3 days after it is accepted for filing?
 - Do the single-sided paper copies include the Clerk's "accepted" electronic stamp?
 - Are the paper copies identical to the filed version?
 - Is the full COA opinion attached to the paper copies?

PDR Checklist (mg)

Golden Rule for Courts of Last Resort



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

“It’s the Jurisprudence, Stupid!”

J. Gary Hart

(with apologies to James Carville)

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



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

Scope of Review

Review decisions of the COA

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

Beyond Scope

- Abatement Orders
- Motion to Recuse

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