The University of Texas School of Law
2023 Robert O. Dawson Conference on Criminal Appeals
May 10-12, 2023

Austin, TX

Plot Ye Course

Petitions for Discretionary Review
&
Motions for Rehearing

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Introduction: You're Marooned on Loser Island.

About ninety-nine percent of the time, a PDR comes into play after you've been marooned on "Loser Island" based on an adverse decision from an intermediate appeals court. In rare cases, you're the prevailing party on harm but want the CCA to settle a merits issue.

In either case, it's best to strategically plan how to convince the Court to grant review. Remember: they don't have to grant anything!

Past papers have delved into strategy and writing tactics; this paper focuses on strategies for particular issues for prosecutors and defense attorneys and provides an update on rule changes.

I. Avoid the Gallows.

a. Calendar 30 days.

First things first. Calendar your PDR due date; the due date should be posted on the COA's docket. You have 30 days after (1) the COA's judgment, (2) a timely motion for rehearing was overruled, or (3) a timely motion for en banc consideration was overruled. TEX. R. APP. P. 68.2.

b. Change to parties and counsel identities.

There's been a substantive change to TEX. R. APP. P. 53.2(a). You are now required to provide more detailed information to the Court.

Rule 53. Petition for Review

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53.2. Contents of Petition

The petition for review must, under appropriate headings and in the order here indicated, contain the following items:

(a) *Identity of Parties and Counsel*. The petition must give a complete list of all parties to the trial court's final judgment~~, and the names and addresses of all trial and appellate counsel~~. The petition must also give a complete list of the names of all counsel appearing in the trial or appellate courts; their firm or office name at the time of the appearance; and, for counsel currently appearing, their mailing address, telephone number, and email address. If new counsel appears or if any counsel currently appearing changes firm or office affiliation during the pendency of the appeal, lead counsel for the party must notify the clerk by filing a supplemental disclosure.

c. What your PDR must do.

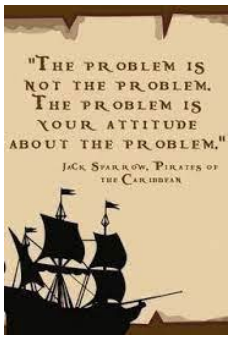
The PDR must challenge the COA's decision. Otherwise, the CCA cannot grant review, and your PDR will end up in the "frivolous" pile. *Degrate v. State*, 712 S.W.2d 755 (Tex. Crim. App. 1986); TEX. R. APP. P. 68.1. How a ground is presented is essential. Shift your perspective from framing what happened in the trial court to what happened in the COA.[1] Therefore, a point of error from direct appeal should not be restated as a ground for review in a PDR. *Bradley v. State*, 235 S.W.3d 808, 810 (Tex. Crim. App. 2007) (Cochran, J., concurring) (a PDR is a "highly polished small jewel that invites the reader to request a view of the entire necklace...not...a lump of coal that merely repeats the direct appeal brief.").

Practice Tip: Ask how the COA erred and address how its analysis of the law was flawed.

Practice Tip: You don't need to tack on "The COA erred by holding the trial court didn't err by . . . ." It's unnecessary text that doesn't enhance your issue.

[1] There are exceptions, however. For example, preservation can be raised at any time. *Moore v. State*, 295 S.W.3d 329, 333 (Tex. Crim. App. 2009) (error preservation is systemic and may be raised at any time).

d. Logic and emotion don't mix, Matey.



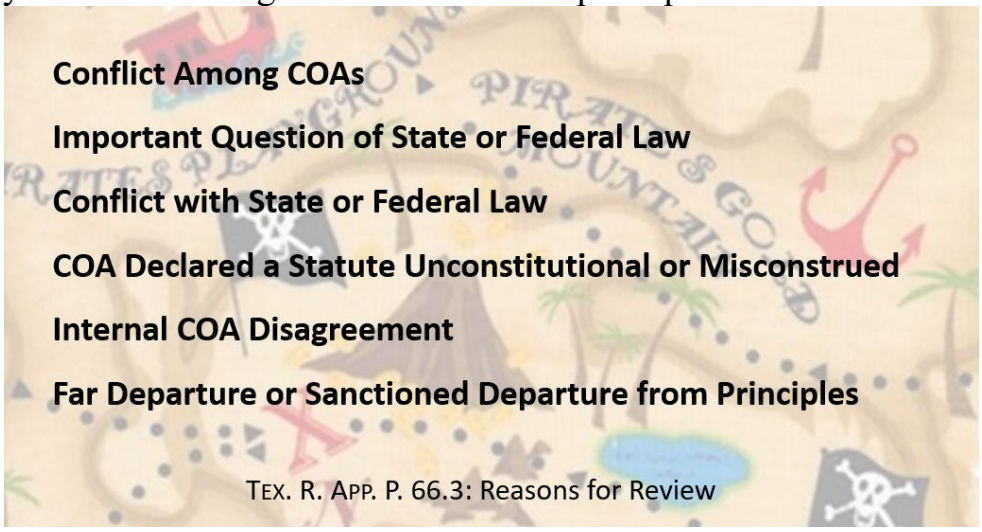
Being relegated to "Loser Island" can bring up emotions like frustration and even anger. Remember that logic and emotion don't mix. Because the appellate forum is, in a sense, sterile, your logical side must prevail when writing a PDR. The CCA judges have seen it all, and emotion-based arguments will not persuade them; instead, such arguments could undermine your legal argument. There are two critical pitfalls to avoid: attacking the COA justices and attacking opposing counsel. Assailing the integrity of either of these will only harm you. Though they may not provide a reason to refuse review or rule against you, they will damage your professional reputation among the Judges and court staff.

e. You will not be welcomed aboard the CCA ship.

The CCA does not give you a red-carpet welcoming when you file a PDR. All you'll get is a blue stamp and notice that your PDR was filed. Granting discretionary review is a choice, so you'll have to work hard to earn it.

i. What's your hook?

The reasons for granting review in TEX. R. APP. P. 66.3 is a good starting place to consider how to convince the Court that your case is worth taking up. Do your best to frame your issue and argument around these principles.



Additionally, practical considerations can convince the Court to grant review.

- Will the COA's decision affect many cases?
- Is this an issue that needs to be nipped in the bud now?
- Is the issue related to another trending issue?

- Does the subject involve something new from the U.S. Supreme Court?

ii. Give the CCA reasons not to refuse review.

More than persuading the Court to grant review is required. The CCA is the busiest Court in the country, so you must also strategize with the mindset that their initial inclination is to find a reason to avoid granting review. You must demonstrate why they shouldn't refuse your case.

For example, if you're the defense and the COA ruled against you on the merits, and you want to PDR that issue, you should also address why a ruling in your favor would not be harmless error on remand. Even though the CCA will not (and cannot) address harm, in that situation, if a decision in your favor will not make a difference to the ultimate outcome, that fact can sway them to refuse review.

Additionally, suppose you're the State, and you lost on a suppression issue on the merits in both courts below. In that case, consider whether a potentially meritorious threshold preservation issue would favor refusing review.

Practice Tip: Also address outcome determinative reasons the CCA should *not* refuse review.

f. Batten down the hatches: wise choices.

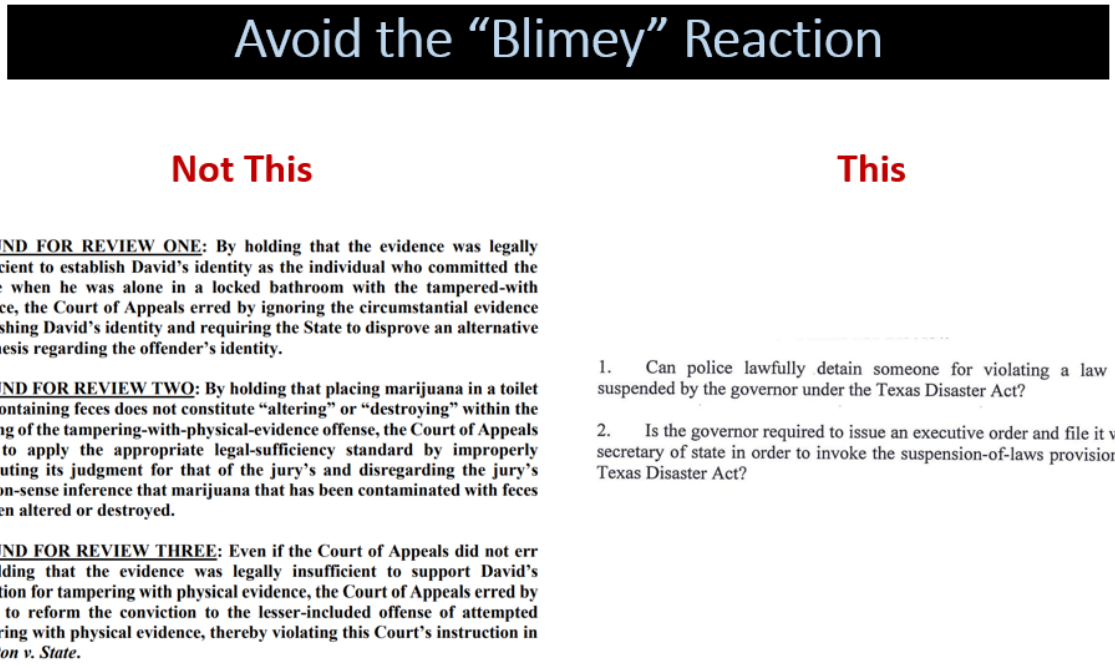
i. Substance of issues.

Not every point of error overruled by the COA is PDR-worthy. Select one to two issues that have legal merit. For PDRs, the CCA is interested in the law and how the case will impact practice statewide. If your claim is fact-bound and, therefore, in a category that generally weighs against the CCA granting review, consider how certain facets of your case can be applied more globally to future issues.

Practice Tip: Ask how your case can be used to help define a legal principle that can be used in future cases.

ii. Drafting your grounds and providing an executive summary.

Be as succinct as possible when drafting your grounds for review.



While the former case was granted, the grounds did not materially benefit the statement of issues.

An executive summary at the beginning of your PDR is also helpful to give the Court a guidepost about what the PDR is about. Here's an excellent example from the State's PDR in *State v. Heath*, PD-0156-22 (granted Aug. 24, 2022):

> Criminal practitioners are accustomed to imputing what law enforcement knows and does to the State, ultimately the prosecutor. That is appropriate in a *Brady v. Maryland* situation, where law enforcement has failed to divulge result-altering evidence in a defendant's favor. Nothing about this case would change that. But criminal-case discovery of inculpatory evidence—which is all that is involved here—is controlled by statute. Even if items solely within law enforcement custody were once discoverable under Article 39.14(a), they aren't now. The courts below erred in holding to the contrary.
>
> Further, the point of one-way criminal discovery is to allow the defense access to evidence to better prepare and evaluate their case. Where, as here, the defense had the evidence in time to meet it at trial and voiced no concern other than his opponent should be kept from using it, the trial court had no discretion to employ the drastic measure of excluding the evidence.

II. Preparing for Battle.

Both parties need to consider threshold issues. Importantly, as discussed, some of these issues may be relevant for providing a reason for the CCA not to refuse review. Conversely, they may give a reason for the opposing party to file a response urging the CCA to refuse a PDR.

Always ask ye self about the following:

Preservation
Is the error subject to preservation? If so, was it properly preserved? *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993).

Estoppel
Is the claim subject to estoppel? *Rhodes v. State*, 240 S.W.3d 882 (Tex. Crim. App. 2007); *Arroyo v. State*, 117 S.W.3d 795 (Tex. Crim. App. 2003) (applying estoppel to the State).

Manifest Injustice to the State
Is the legal theory the COA relied upon to affirm a ruling to suppress one that the State was not called upon to deduce evidence?

- Scientific evidence to establish reliability. *State v. Esparza*, 413 S.W.3d 81 (Tex. Crim. App. 2013).
- Coercion theory. *State v. Castanedanieto*, 607 S.W.3d 315 (Tex. Crim. App. 2020).

For habeas cases, also ask ye self:

Laches
Has the State been prejudiced by the D's delay in seeking habeas relief? *Ex parte Perez*, 398 S.W.3d 206 (Tex. Crim. App. 2013).

Cognizability
Is the claim cognizable on a pretrial habeas application? *Ex parte Shefflied*, PD-1102-20 (request dismissal under pretrial hold under emergency order).

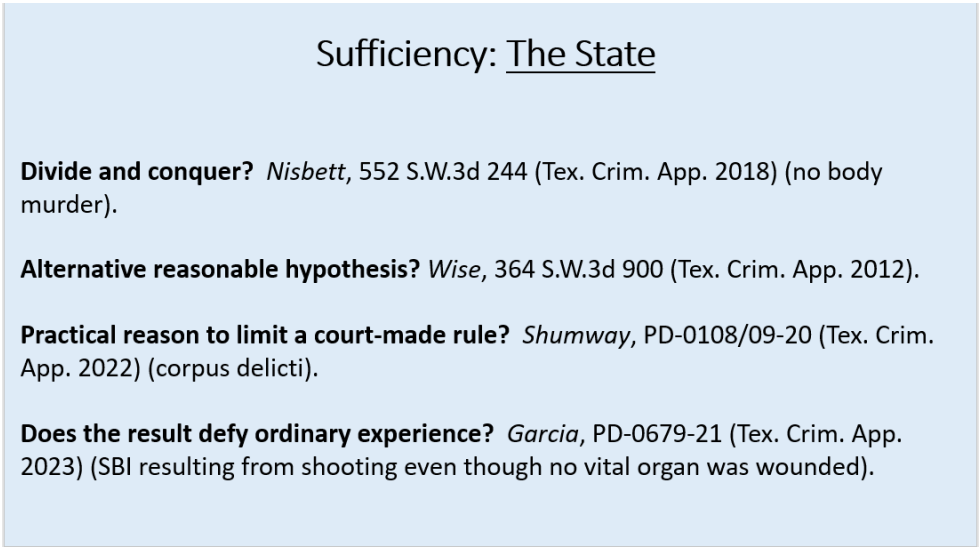
III. Plundering the Merits.

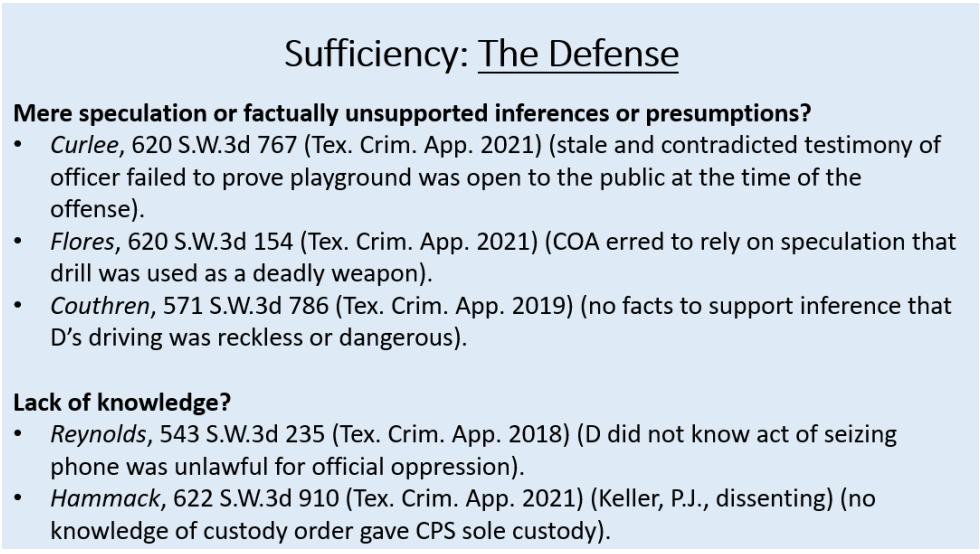
Some reasons for granting review under TEX. R. APP. P. 66.3 are easy to spot and argue. However, some can be more ambiguous—like an important question of state or federal law, a conflict with state or federal law, a COA's misconstruction

of the law, and a far departure or sanctioned departure from established principles. Considering common categories, this section offers some strategies for presenting a PDR-worthy issue.

For the State and the defense, specific principles will garner interest from the CCA. You can use these principles to help identify a ground for review and to guide your legal analysis.

a. Sufficiency of the evidence.





Sufficiency: Both Parties

On the edge? *Swenson*, PD-0589-22 (attempted capital murder of police).

Requires construing an element? *Mason*, PD-0881-20 (illegal voting); *Herron*, 625 S.W.3d 144 (Tex. Crim. App. 2021) (sex-offender registration).

Unjustifiably flawed? *Vital*, PD-0679-21 (SBI gunshot in breast).

Reformation as a remedy? *Lang*, PD-1124-19 (reformation when missing owner element of lesser theft).

What is the proper definition, and did the evidence match that definition? *Stahmann*, 602 S.W.3d 573 (Tex. Crim. App. 2020) (conceal not proven if sight of it was never lost).

b. Search and seizure.

Search and Seizure: The State

Is standing an issue? *Klima*, 934 S.W.2d 109 (Tex. Crim. App. 1996).

If the State prevailed at trial, are there additional legal theories that support the trial court's ruling that would not cause a "manifest injustice" to the D under *Esparza*? *Calloway*, 743 S.W.2d 645 (Tex. Crim. App. 1988).

Was there actually a violation or a reasonable mistake of law (assuming it's preserved)? *Heien*, 574 U.S. 54 (2014)?

Was it obtained in violation of the law under 38.23? *Wehrenberg*, 416 S.W.3d 458 (independent source).

Search and Seizure: The Defense

Not enough particularized facts for PC?

- *Baldwin*, PD-0027-21 (Tex. Crim. App. 2022) (cert. pending) (nexus between cell phone and person).
- *Patterson*, PD-0322-21 (Tex. Crim. App. 2022) (room within fraternity house).

Close call between consensual encounter & detention?

- *Monjaras*, PD-0582 (Tex. Crim. App. 2022).

Search and Seizure: Both Parties

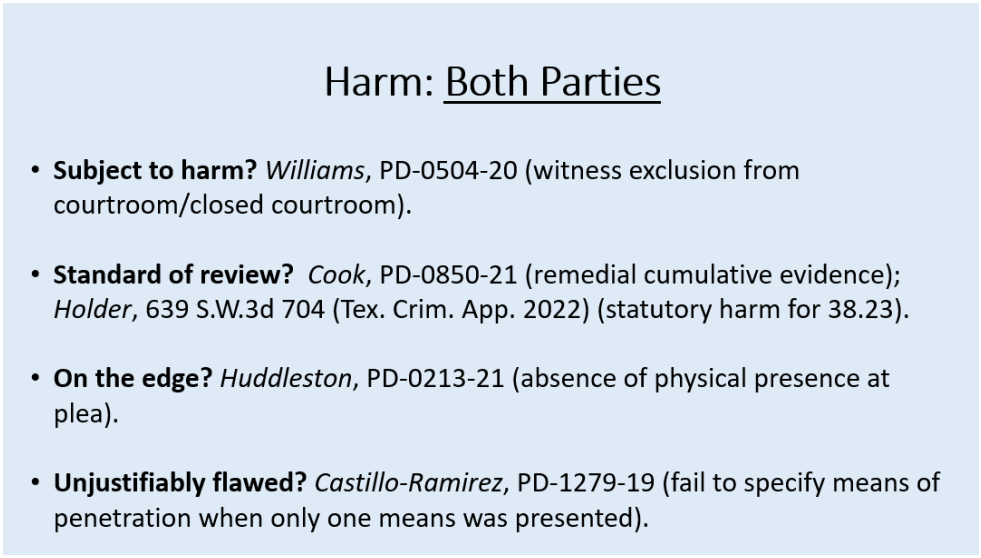
Was a remand for additional findings needed on an essential fact? *Elias*, 339 S.W.3d 667 (Tex. Crim. App. 2011).

Requires construing an element? *Hardin*, PD-0799-19 (Tex. Crim. App. 2022) (failure to maintain a single lane).

Novel question? *Tilgham*, 623 S.W.3d 801 (Tex. Crim. App. 2021) (privacy expectation of hotel guest who was evicted for hotel-policy violation); *Parker*, PD-0388-21 (Tex. Crim. App. 2022) (art. 18.01(b) allows for anticipatory search warrants).

Standard of review? *Hyland*, 574 S.W.3d 904 (Tex. Crim. App. 2019) (standard for PC after excised false statements)

c. Harm.



d. Overcoming negative precedent.

Frequently when raising a ground, you must overcome negative precedent. While your preferred goal may be to sink the negative precedent ship in *toto*, you should be realistic too.

i. Distinguish.

The most common approach to overcoming bad precedent is to distinguish it. As we all learned early in law school, the goal is to explain why your case differs from X.

ii. Limit.

Another tactic can be to argue for the limitation of an existing principle. For example, the State has sought to eliminate the court-made corpus delicti rule for years. Those efforts have failed and continue to fail. *Miller v. State*, 457 S.W.3d 919 (Tex. Crim. App. 2015). However, efforts to curtail it have been successful. *Id*. (closely related crimes exception); *Shumway v. State*, Nos. PD-0108-20 & PD-0109-20 (Tex. Crim. App. 2022) (preverbal child exception).

iii. Reframe it.

In rare cases, trying to recast an adverse decision from the Court is possible. Suppose there's a rule that doesn't jive with you because it can be too broadly applied; you can try reframing the issue in a prior case for the CCA. Successfully reframing a prior decision may offer a palatable compromise to the Court because it allows it to preserve a prior decision with a more current and informative explanation. This can be a valuable strategy, particularly when the adverse

decision is recent.

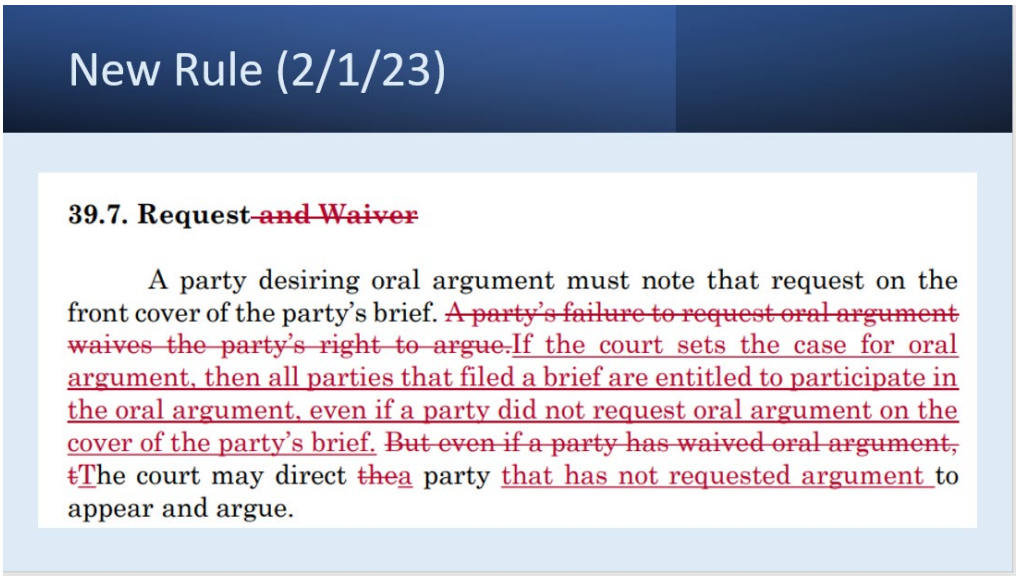
For instance, in sufficiency cases, there has been controversy about crediting particular testimony because it is deemed speculative or conclusory. *Curlee v. State*, 620 S.W.3d 767 (Tex. Crim. App. 2021). In some cases, that could be true, but perhaps there's something more to it. It may be that the testimony used to prove an element shouldn't be credited not because it's speculative or conclusory but because it failed to address the element as the Court now defines it. In such a case, a party could reframe the prior decision as a mismatch between the testimony and the element because the witness (and the parties at trial) were operating under a different understanding (now on appeal) about what something means.

Practice Tip: If you are taking an all-or-nothing line, consider alternatives that will still make some favorable headway in a body of jurisprudence.

IV. Oral argument.

a. You may have it, like it or not.

A new rule related to oral argument appears to remove some of the decision-making from the parties. A court can now direct a party to appear and argue, even if the party did not request it.



Because of this change, you should consider treating the oral argument section differently. Typically, that section has been used to convince the CCA to grant argument. Now you may want to consider using it to explain why argument is

unnecessary or will not be helpful. If there's a reason not to argue the case, this may be your one opportunity to address it.

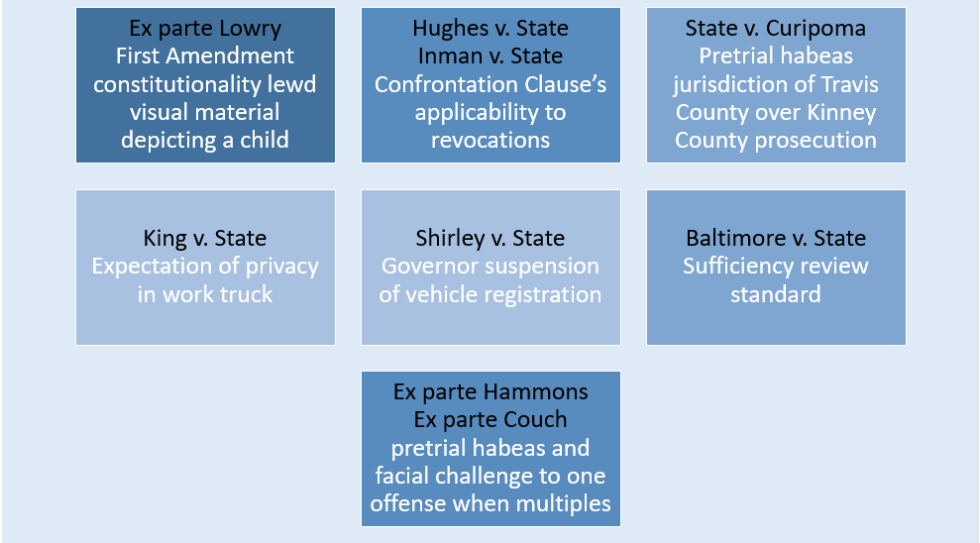
Practice Tip: If there's a good reason not to argue, tell the CCA why.

b. When should ye ask to have a lively discourse with the CCA?

It's impossible to set hard and fast rules for this, but there are categories of cases that do merit argument. Therefore, a request should be made when the following issues are involved:

- Statutory issue construing element
- Weighty constitutional issue
- Consequential to a body of CCA jurisprudence
- Impacts all prosecutions or defense strategies
- Jurisdiction issues
- An unanticipated issue could foreseeably crop up

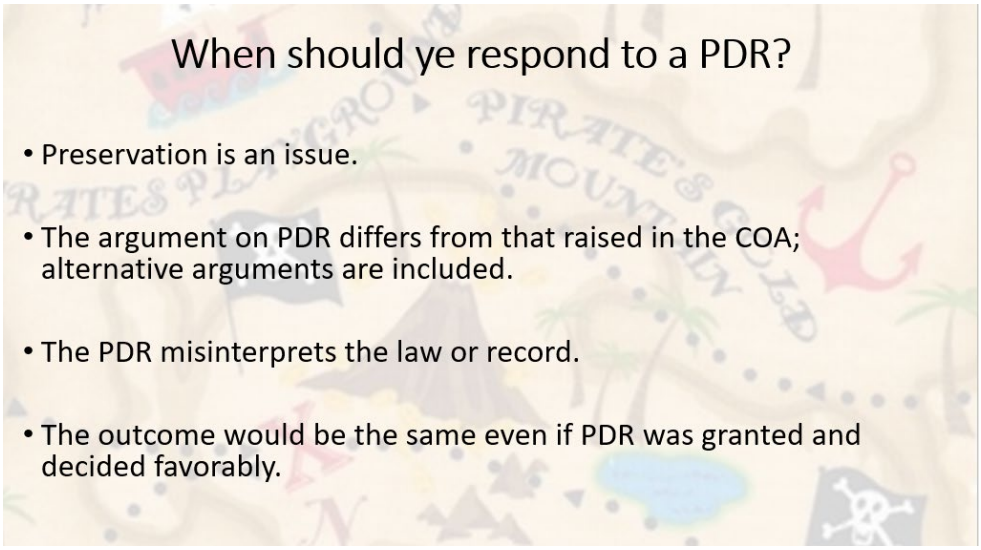
You can also glean some insight into what the Court wants to hear about in cases that it has granted argument in this term:



V. When Ye Should Respond to a PDR.

A PDR response is due 15 days after the PDR was filed. TEX. R. APP. P. 68.9.

The default posture to adopt when served with a PDR is to lie in wait. Because the CCA grants such a small percentage (usually 5-7%), it's often best to dedicate your resources elsewhere. There are exceptions, however. These are the circumstances in which you should file a response:



If you don't stick to this list, complaining too loudly that there's nothing to see here might bite you.

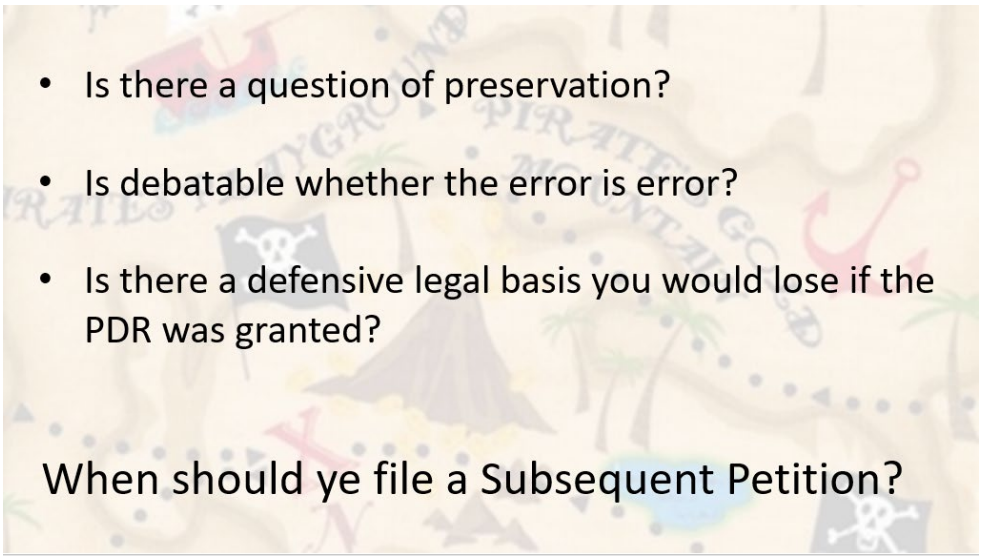
Also, your response does not need to be a full-blown pleading. When appropriate, a response can be succinctly set out in letter form.

> Practice Tip: Unless you are trying to expediate the CCA's internal review process, you don't need to file something that says you will not be filing a response.

VI. Subsequent PDR (previously called a cross-PDR).

A subsequent PDR is due 10 days after the initial PDR is filed. TEX. R. APP. P. 68.2(b).

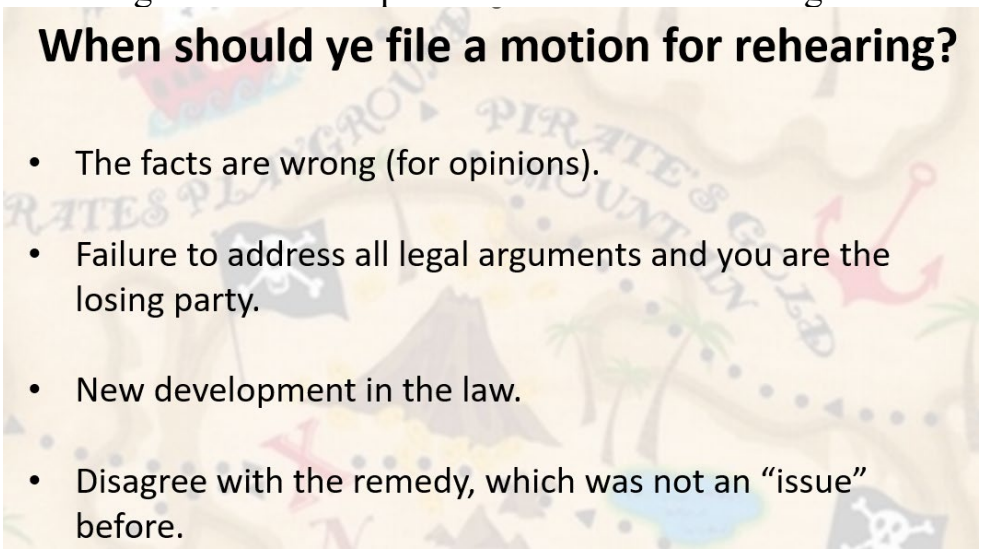
You should file a subsequent PDR in the following instances:



VII. Ye Motion for Rehearing.

A motion for rehearing is due 15 days after the opinion is issued. TEX. R. APP. P. 74.4.

A rehearing motion is best presented when the following are at issue:



VIII. Ye Last Bit of Booty.

There are some other tactical decisions that many practitioners don't consider.

a. In due course: request a summary reversal.

Again, the CCA is the busiest court in the country. Lower courts, at times, err in an obvious way. Such cases don't require a complete investment of the Court's resources. Nevertheless, you want the decision overturned. When it's clear that the lower court misapplied well-established law incorrectly, you can request a summary reversal. Begin by pointing out how simple it is to reverse based on precedent and suggest language the Court could use in an opinion.

An example is *Harbin v. State*, PD-0059-20:

> Is a summary reversal warranted when the lower court violated an absolute requirement by applying law not applicable to the case, *i.e.,* the punishment phase sudden passion issue, not in effect until 1994, to a first-degree murder committed in 1991?

Though the Court may not always adopt this suggestion, *Harbin v. State*, 619 S.W.3d 293 (Tex. Crim. App. 2021), it's helpful to give the Court a way to reduce its caseload and get the remedy you want.

Successful use of this strategy appears in *Salinas v. State*. No. PD-0332-17 (Tex. Crim. App. 2017). There, the CCA followed the State's suggestion to summarily remand the case because the lower court did not consider two determinative cases in its analysis.

b. Rattle the bones: rehearing in the court of appeals.

I advise against using a motion for rehearing in the lower court to extend the time for filing a PDR. Because it may unfavorably reflect upon your credibility when you regularly practice before the court, it should be used for legitimate purposes. The same justifications for filing for rehearing in the CCA apply here, too.

Additionally, if the lower court's decision was not published, you can request that it be published in a motion for rehearing. You'll need to explain why the decision is vital to the jurisprudence of the State. Perhaps it's a novel issue that is anticipated to gain much traction in a negative way, and you want to nip it in the bud. Or maybe it misapplies a recent Supreme Court decision, and it's crucial for the CCA to have the final say. A published opinion does give the CCA more incentive to review it since it has precedential value. An

unpublished memorandum opinion does not carry the same weight.

There's also an element of fairness at play when you allow the lower court to correct something. While it won't get you across the finish line to a PDR grant on its own, it does help persuade the Court to grant a case. You've exhausted your options by putting in the time and effort, and the CCA is the last resort to fix an error.

c. Heave ho: amicus.

It's helpful to stay current with the issues pending before the CCA. The pending issues are summarized here: http://www.spa.texas.gov/pending-pdr-cases/. Taking an interest in pending cases forces you to look into the future of the State's jurisprudence. Will this issue impact my county or the court of appeals district? Will the issue negatively affect defendants in general or have detrimental consequences for prosecutors or law enforcement throughout the State? If any of these considerations are important to you, consider filing an amicus brief in the CCA. Being a friend of the CCA is for anyone who has an interest.

If you decide to go down this road, there are two things to contemplate:

- Remember that other attorneys own the case. They've devoted much effort and know the case's ins and outs. Contact the defense attorney or prosecutor about your plan to file a brief. Give them a chance to explain why pursuing your line of thinking may not be a good idea. They may be grateful for your help and unique point of view, but there may be an excellent reason why a particular strategy was not pursued. Importantly, it would be best to recognize that no attorney wants a surprise entry into their case. So, unless there's a critical justification for not reaching out, you should do so out of respect.

- Think about crowdsourcing. In most situations, you won't be the only person who identifies how much effect a particular outcome will have. Reach out to other prosecutors or defense attorneys. While the TDCAA does not file amicus briefs, a group of their membership will be interested in rare occasions. And TCDLA has filed amicus briefs in the past.

  Think broadly too. For example, the NRA has been interested in cases where a firearm was used in self-defense. *See, e.g.,* *Braughton v. State*, PD-0907-17. Or your case may deal with cruelty to non-livestock

animals, and an animal rights group may be willing to support your position.

IX. Looking elsewhere to get your bearings.

This paper is more focused on strategy than procedure. Hopefully, some of the ideas presented can help you shore up your PDR.

Past papers that cover some topics in more detail can be found at http://www.spa.texas.gov/publications/.