FRAMING THE ISSUES
IN A
PETITION FOR DISCRETIONARY REVIEW

Conference on Criminal Appeals
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I. SCOPE OF PAPER

The Office of Court Administration reports that the Texas Court of Criminal Appeals granted 110 of the 2,026 petitions for discretionary filed, or less than 6%, during the fiscal year 2001. To be sure, the court's decision to grant or deny many, if not most, of the petitions before it is driven primarily by the type of issues presented in the case. No lawyer, no matter how able, could convince the court to review some issues. Conversely, other issues are so ripe for review that (almost) no lawyer, no matter how inept, could fail to get the court's attention. It must be true, though, that some issues fall somewhere in between these two extremes. In such cases, the quality of advocacy is important, and good lawyering might well be the difference between a petition granted and one denied.

II. ACKNOWLEDGMENTS

If success is proof of expertise, I am far from the most qualified person to speak or write on this topic, since I have not had a petition granted in several years. To compensate, I spoke with a number of lawyers, or read their petitions to prepare for this paper. They include: Richard Anderson, Judge Charles Baird, Alan Battaglia, Jay Brandon, Carol Cameron, Michael R. Casillas, Joe Connors, C. James Gibson, Cynthia Hampton, Keith Hampton, John Jasuta, Joseph Leo Lanza, Forrest Lumpkin, Chuck Mallin, Jan Morrow, Matthew Paul, Scott Roberts, George Scharmen, Kathleen Schneider, Stanley Schneider, Mac Secrest, Stephanie Stevens, Daniel Thornberry, Enrico Valdez, Mary Beth Welsh, Brian Wice and Kevin Yeary. Their contributions have made this paper more useful than it would have otherwise been.

III. PRACTICAL TIPS

This section offers a few suggestions for lawyers seeking review in the court of criminal appeals:

- The first rule is to follow the rules.
- Your argument is with the court of appeals, not the trial court.
- Carefully select your grounds or questions for review.
- Reasons for review are the "heart of the PDR."
- Keep up with the law.
- Present your petition persuasively.
- It is better, but not essential, that the opinion below be published.

- Move for rehearing in the court of appeals.

A.
The First Rule Is To Follow The Rules

1. Non-conforming petitions may be summarily refused

Rule 68.6 of the Texas Rules of Appellate Procedure provides as follows:

> The Court may strike, order redrawn, *or summarily refuse* a petition for discretionary review that is unnecessarily lengthy or that does not conform to these rules.

TEX. R. APP. PROC. 68.6(emphasis supplied).

The importance of Rule 68.6 cannot be overstated. Under its plain terms, if you fail to comply with any of the rules, the court can summarily refuse your petition, *without regard to its merits*. As demonstrated in the next section, the court not only demands compliance, it demands *strict* compliance.

2. Strict conformity is demanded

In 1996, then Judge, now Presiding Judge, Keller wrote: "Complying with the Rules will not guarantee that your petition will be granted, but I know of no easier way to increase the likelihood." Judge Sharon Keller, *Petitions For Discretionary Review In The Texas Court Of Criminal Appeals*, 25 VOICE FOR THE DEFENSE 26, 27 (No. 10, 1996)(hereinafter, "Keller").

In 1993, Judge Chuck Campbell made the same point a little more forcefully, warning that petitions "not prepared in strict conformity with the Rules *will* be summarily refused by the Court of Criminal Appeals." Judge Charles F. (Chuck) Campbell & William P. Green, *Petitions For Discretionary Review*, 21 VOICE FOR THE DEFENSE 33, 33 (No. 8, 1993)(emphasis in original)(hereinafter, "Campbell & Green"). At the time approximately 20% of all petitions filed were summarily dismissed for non-compliance with one or more of the Rules of Appellate Procedure. "The Court *just will not tolerate* a failure to follow the clear requirements of the Rules." *Id* (emphasis supplied).

For proof of just how strict the court can be, read Judge Baird's dissent in *Garcia v. State*, 910 S.W. 2d 499, 499-500 (Tex. Crim. App. 1995)(Baird, J., dissenting). In *Garcia*, the petitioner no doubt meant to comply with Rule 68.4(i) by attaching to the petition a copy of the court of appeals's opinion as an appendix. Unfortunately, only the odd-numbered pages of the opinion were attached. All the other rules were complied with. The court summarily dismissed the petition, and Judge Baird dissented. "Refusing the petition for this obvious oversight is an extremely harsh result. In the instant case, rather than demanding such hyper-technical

compliance, we should order the petition redrawn." *Id*. at 500. *See also Salinas v. State*, 897 S.W. 2d 785, 786 (Tex. Crim. App. 1995)(Baird, J., concurring)("This petition is an example of the many petitions that we summarily refuse each week for noncompliance with the Rules").

3. Just a few of the more important rules

a. Rule 68.2: Timeliness

i. The first petition must be filed within 30 days after the decision of the court of appeals or the date the motion for rehearing was overruled. TEX. R. APP. PROC. 68.2(a).

ii. If your opponent timely files a petition, you have 10 days after that filing to file your petition. TEX. R. APP. PROC. 68.2(b).

iii. The court of criminal appeals can extend the time for filing the petition upon motion filed in compliance with Rule 10.5(b). TEX. R. APP. PROC. 68.2(c).

b. Rule 68.3: Where to file petition

i. Everyone but the State's Prosecuting Attorney must file their petition *with the clerk of the court of appeals*. TEX. R. APP. PROC. 68.3 (emphasis supplied).

c. Rule 68.4: Contents of the petition

i. The contents of the petition are detailed in TEX. R. APP. PROC. 68.4.

ii. As has been previously noted, *all* the procedural rules relating to petitions are important, but three stated within Rule 68.4 are both unique and important, and therefore merit special emphasis.

(a) The petition or the reply or cross-petition must contain a short statement of why oral argument would be helpful or that argument is waived. TEX. R. APP. PROC. 68.4(c). This paper contains a further discussion of this statement below, in § F(6).

(b) "The petition must contain a direct and concise argument, with supporting authorities, amplifying the reasons for granting review." TEX. R. APP. PROC. 68.4(g). Strict compliance with this rule is required. *See DeGrate v. State*, 712 S.W. 2d 755, 756 (Tex. Crim. App. 1986). This "reasons for review" portion of the petition is extraordinarily important and will be discussed in greater detail below, in § D of this paper.

(c) "The petition must contain a copy of any opinion of the court of appeals." As just noted, the failure to include the entire opinion in the appendix can result in the summary refusal. *E.g.,Garcia v. State*, 910 S.W. 2d at 499-500; *but see Thorpe v. State*, 863

S.W. 2d 739, 742 (Tex. Crim. App. 1993)(Campbell, J., dissenting)(failure to include opinion did not cause summary dismissal).

d. Rule 68.5: Length

The petition is limited to 15 pages, exclusive of pages containing certain portions, such as the table of contents, etc. The court can permit a longer petition, upon motion. TEX. R. APP. PROC. 68.5.

e. Rule 68.11: Service

In addition to serving your opponent as required by Rule 9.5, you must serve the State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711.

B.
Your Argument Is With The Court Of Appeals, Not The Trial Court

Except where the death penalty has been assessed, the first appeal in criminal cases in Texas is to the intermediate court of appeals. This is where you complain about the trial court.

In contrast, "[y]our argument in a petition for discretionary review is not with the trial court; it is with the Court of Appeals. Your petition should address your disagreement with the action and analysis of the Court of Appeals rather than your disagreement with the action of the trial court." Keller, at 27. "Thus a ground for review should seldom, if ever, be couched in such terms as 'The trial court erred in . . . .'" Catherine G. Burnett & Matthew Paul, *Post-Decision Appellate Practice: Motions For Rehearing In The Court Of Appeals And Petitions For Discretionary Review*, *in* STATE BAR OF TEXAS, TEXAS CRIMINAL APPELLATE MANUAL F-1, 26 (1996)(hereinafter, "Burnett & Paul"). *See Gardner v. State*, 777 S.W. 2d 717, 719 (Tex. Crim. App. 1989)(Clinton, J., dissenting)(strictly construed, a ground for review complaining that "the trial court erred" does not comply with the rules of appellate procedure).

C.
Carefully Select Your Grounds Or Questions For Review

1. Rule 68.4(f): Grounds for review

> *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 petitioner 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.

TEX. R. APP. PROC. 68.4(f).

2. An effective question for review

Enrico Valdez presented this question for review in the state's petition in *Boget v. State*, 40 S.W. 3d 624 (Tex. App.--San Antonio 2001, pet. granted):

> Did the court of appeals err to hold that a defendant was entitled to a self-defense instruction when he was not charged with an offense involving the use of force against another?"

3. A court of "sound judicial discretion"

An intermediate court of appeals *must* address "every issue raised and necessary to a final disposition of the appeal." TEX. R. APP. PROC. 47.1. In contrast, "[d]iscretionary review by the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion." TEX. CONST. Art. V, § 5; *see* TEX. R. APP. PROC. 66.2. That, of course, means that the court of criminal appeals does not even have to accept the case, much less address every issue raised. What can petitioners do to improve the way they raise their issues in the court of criminal appeals?

a. Understand that the court sees itself as "the caretaker of Texas law"

In *Arcila v. State*, 834 S.W. 2d 357 (Tex. Crim. App. 1992), the court of criminal appeals declared that its "principal role as a court of last resort is the caretaker of Texas law, not the arbiter of individual applications." *Id*. at 360. The "business of basic appellate review" is left largely to the courts of appeals. *Id*. That the court of appeals "somehow managed to get it wrong" is not cause for discretionary review.

> This Court should reserve its discretionary review prerogative, for the most part, to dispel any confusion generated in the past by our own case law, to reconcile settled differences between the various courts of appeals, and to promote the fair administration of justice by trial and appellate courts throughout Texas.

Id. at 361.

b. Focus on impact, not mere error

It will usually not be enough to complain merely that the court of appeals was in error. Instead, you must demonstrate how that court's decision "will adversely impact the criminal law of this State." Burnett & Paul, at F-35. "The importance of the case to the jurisprudence of the State must, therefore, be made apparent in the petition for review. The assertion that the court of appeals was in error as to some point of law, standing alone, may be insufficient to require further review." *DeGrate v. State*, 712 S.W. 2d 755, 756 (Tex. Crim. App. 1986); *see also Gamez v. State*, 737 S.W. 2d 315, 324 (Tex. Crim. App. 1987)(Clinton, J., dissenting and concurring)("That a decision of a court of appeals is said to be "incorrect" is not among [the enumerated reasons for review] and we have committed the Court to the proposition that a petition for discretionary review which does no more than complain about a claimed error on the part of a court of appeals is not likely to be a fit candidate for review.").

c. Understand the petition's "unique character:" Clear, compelling, convincing, significant, global

Catherine Greene Burnett and Matthew Paul make these excellent points about the "unique character of the PDR:"

> Understanding the unique character of the PDR is best accomplished by contrasting it with the original appellate brief. Three significant differences are really apparent. First, no matter how uninspired the argument, counsel knows that the intermediate court must address and dispose of all points of error raised in the brief. In contrast, a PDR may simply be denied without explanation. Consequently, counsel must be clear, compelling and convincing in order to garner sufficient attention to distinguish this case from the hundreds of others competing for review. Second, the further removed the parties become from the trial court level, the less institutional concern is given to issues of individual justice between the litigants. Thus, even though an "incorrect" or "unjust" result may have been reached, there is no guarantee that the case will be considered significant enough to the overall jurisprudence of the State of Texas to warrant review. As a result, while a brief focuses on a particular case, a PDR is more likely to address a global legal issue against the backdrop of a specific case. Lastly, an appellate brief is drafted to suggest the appropriate ultimate legal disposition of the disputed issues. In contrast, the PDR only seeks to get a figurative foot in the door -- the advocate must persuade the Court that the issue is significant enough to consider before being in a position to suggest how it should be resolved.

Burnett & Paul, F-16.

d. Make sure that only the strong issues survive the final cut

Judge Campbell believes that, while the Justices of the courts of appeals sometimes err, only rarely do they get *everything* wrong. "Consequently, the judges of the Court of Criminal Appeals will look askance at any PDR that simply reurges, as grounds for review, all or most of the points of error the petitioning party urged in the court of appeals." Campbell & Green, at 33. "A PDR will be more effective if it asserts as grounds for review only those one or two or (at most) three grounds that have an objectively reasonable chance of being granted." *Id.*

Because the court will only review "truly significant questions," petitioners "should devote considerable time to deciding which matters presented to the court of appeals actually deserve consideration by the Court of Criminal Appeals." Burnett & Paul, at F-28. If you raise more than one ground or question for review, "present the strongest ground first." Forrest D. Lumpkin, *Petitions For Discretionary Review*, 25 VOICE FOR THE DEFENSE 10 (No. 8, 1996)(hereinafter, "Lumpkin").

e. Address all issues necessary to the decision below

Addressing the truly significant issues will sometimes require that you also raise issues that are more mundane, where the court of appeals gives alternative reasons for its decision. For example, the court might hold that the trial court's decision to limit the defense's cross-examination did not violate the Confrontation Clause, but, even if it did, the error was not preserved, and, finally, that any error was harmless. The denial of cross-examination might be the truly significant issue, but, because the decision was based on alternative grounds, the petitioner will also have to convince the court of criminal appeals that this error was preserved and not harmless. Otherwise, any opinion would be merely advisory. *See generally Gonzales v. State*, 864 S.W. 2d 522, 524 (Tex. Crim. App. 1993)(Baird, J., concurring)("In the instant case, even if we sustained both of the State's grounds for review, the judgment of the trial court would nevertheless be reversed because our opinion would not affect the Court of Appeals' disposition of appellant's fourth point of error."); *Sims v. State*, 792 S.W. 2d 81, 82 (Tex. Crim. App. 1990)(the court dismissed because the court of appeals had ruled alternatively, but the appellant only complained of one of its rulings in his petition for discretionary review).

4. Some examples of "truly significant" issues

The following are examples of questions and grounds for review, which, in my judgment, obey very well *DeGrate's* command that petitions make apparent the "importance of the case to the jurisprudence of the State."

- "Do the 1997 amendments to the sex offender registration law violate the 'ex post facto' clause of the U.S. and Texas Constitutions by requiring persons convicted prior to the amendments's effective date to register as a sex offender for life?" *Rodriguez v. State*, 45 S.W. 3d 685 (Tex. App.--Fort Worth 2001, pet. granted).

- "The court of appeals erred in holding that imposing an improper restriction on voir dire is constitutional error." *Rios v. State*, 4 S.W. 3d 400 (Tex. App.--Houston [1st Dist.] 1999, pet. granted).

- "The court of appeals decided an important question of law - whether the trial court erred by admitting into evidence testimony relating to the results of an intoxilyzer test without first requiring the state to satisfy the requirements of *Kelly v. State* - in conflict with this Court's decisions in *Kelly* and *Hartman*." *Beard v. State*, 5 S.W. 3d 883 (Tex. App.--Eastland 1999, pet. granted).

- "Where the state has a number of motivations for striking a prospective juror, one of which is gender based while others are proper, can the appellant prevail on a *Batson* challenge by simply showing that one of the motivations is improper even if the state shows that the prospective juror would have been struck absent the improper motivation?" *Guzman v. State*, 20 S.W. 3d 237 (Tex. App.--Dallas 2000, pet. granted).

- "Does the principle of collateral estoppel bar a D.A. from litigating a suppression issue in District Court when the D.A. was not the party who litigated the issue in County Court?" *Guajardo v. State*, 24 S.W. 3d 423 (Tex. App.--Corpus Christi 2000, pet. granted).

- "Should the juvenile law of a sister state or Texas juvenile law govern the admissibility of a written statement taken by law enforcement authorities of a sister state?" *Garcia-Vega v. State*, 32 S.W. 3d 897 (Tex. App.--Corpus Christi 2000, pet. granted).

- "Whether the court of appeals erred in holding that a third person's consent to search a vehicle is valid where the owner has refused to consent to the search." *Welch v. State*, 2001 WL 417180 (Tex. App.--Amarillo 2001, pet. granted).

- "Must a party seeking to introduce evidence of a scientific principle always present evidence sufficient to satisfy the test of *Kelly v. State*, 824 S.W. 2d 568 (1992), regardless of the particular scientific principle?" *Hernandez v. State*, 55 S.W. 3d 701 (Tex. App.--Corpus Christi 2001, pet. granted).

- "Given the identification of substantial defects in the court's decision, should the court re-examine and abandon *Bauder v. State*, 921 S.W. 2d 696 (Tex. Crim. App. 1996), and its progeny?" *Ex parte Peterson*, 2001 WL 1671157 (Tex. App.--Dallas 2001, pet. granted).

5. Some bad issues, generally speaking

a. Do not expect review to be granted on an issue raised for the first time in the court of criminal appeals. That court is not authorized to review claims "which have not been presented in an orderly fashion and determined by the appropriate court of appeals." *Lambrecht*

v. State, 681 S.W. 2d 614, 616 (Tex. Crim. App. 1984); *accord Bynum v. State*, 767 S.W. 2d 769, 776 (Tex. Crim. App. 1989). This rule also applies to claims raised by the state. *Tallant v. State*, 742 S.W. 2d 292, 294 (Tex. Crim. App. 1992). *But cf. Fielder v. State*, 811 S.W. 2d 131, 134 (Tex. Crim. App. 1991)(the state did not waive its right to have the court consider an issue which was implicitly included in its argument in the court of appeals below); *Lopez v. State*, 708 S.W. 2d 446, 449 (Tex. Crim. App. 1986)(perhaps certain fundamental errors may be raised for the first time in a petition for discretionary review).

b. "Ordinarily, this Court will not entertain a petition for discretionary review from an interlocutory order of the Court of Appeals since it does not finally dispose of the case in that court." *Measles v. State*, 661 S.W. 2d 732, 733 (Tex. Crim. App. 1983)(refusing state's petition which challenged the court of appeals's authority to abate the appeal to obtain a complete record); *see also Miles v. State*, 842 S.W. 2d 278, 279 (Tex. Crim. App. 1989)(petition refused where state attempted to challenge ruling by court of appeals extending time to file notice of appeal); *Jacolos v. State*, 692 S.W. 2d 724, 725 (Tex. Crim. App. 1985)(court of criminal appeals lacks "jurisdiction, power and authority to review on petition for discretionary review a decision rendered by a court of appeals in the exercise of its own original jurisdiction to grant or deny extraordinary writs of mandamus and prohibition").

c. "Avoid asking the Court to overrule precedent." Campbell & Green, at 33. "[A] petitioning party asking the Court to abandon a precedent must explain why the need to do so outweighs the very weighty considerations underlying *stare decisis*. If the petitioning party is unable to make a convincing case in this regard, then she should focus her attention instead on distinguishing her case from the opposing precedent." *Id*. at, 35.

d. Fact-bound issues, such as sufficiency of the evidence and whether error was harmless, are less likely to be reviewed. "Although such claims are encompassed within the Court's subject matter jurisdiction, typically they will not be deemed to have sufficiently compelling future application to warrant discretionary review." Burnett & Paul, at 19. *See also* Lumpkin, at 18 (suggesting that the following issues are less likely to be reviewed: "sufficiency of the evidence, ineffective assistance of counsel, search and seizure, and admission of evidence if the question turns on probative value versus prejudicial effect").

e. The court of criminal appeals lacks jurisdiction to consider the factual sufficiency of the evidence on a petition for discretionary review. The court can however, consider whether the court of appeals "applied the correct standard of review and considered all of the relevant evidence." *Johnson v. State*, 23 S.W.3d 1, 3-4 (Tex. Crim. App. 2000).

f. Where the court of appeals has "conscientiously and impartially discharged its duty to conduct a harm analysis," the court of criminal appeals will not exercise its discretionary review power just because it disagrees with that court's results. *Riley v. State*, 830 S.W. 2d 584, 587 (Tex. Crim. App. 1992).

g. Judge Clinton believed that "simple" issues are not worth the time and effort of the court of criminal appeals, "since, presumably, the various courts of appeals can be trusted to resolve them without our interference." *Gabriel v. State*, 900 S.W.2d 721, 722 (Tex. Crim. App. 1995).

D.
Reasons For Review Are "The Heart Of The PDR"

1. Rule 68.4(g)

> *Reasons for Review*. The petition must contain a direct and concise argument, with supporting authorities, amplifying the reasons for granting review. See Rule 66.3. 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.

TEX. R. APP. PROC. 68.4(g).

2. DeGrate v. State

In *DeGrate v. State*, 712 S.W. 2d 755 (Tex. Crim. App. 1986), the court explained the function of the "reasons for review" portion of the petition. There, the grounds for review in appellant's petition exactly duplicated the points of error in his brief to the court of appeals. The petition was refused because it failed to provide any reasons why the court of appeals should review the opinion below. *Id*. at 756.

> [T]he portion of the petition designated "Reasons for Review" should specifically address the court of appeals opinion and its effect on our jurisprudence. This presentation should not go into a detailed analysis, but should briefly set out relevant cases and statutes, and note any alleged misstatements or omission of relevant facts. A discussion of principles of law, without reference to the holding of the court of appeals, will usually be insufficient to persuade this Court to exercise its discretionary jurisdiction.

Id. at 756-57.

3. Burnett & Paul

According to Burnett and Paul, the "reasons for review" section:

> is the heart of the PDR, the place where you attempt to convince

> the court that this case is important enough to warrant review. Your focus should be on amplifying the reasons relied on for the granting of review. Remember that except in the most egregious cases, the Court of Criminal Appeals does not care that the intermediate court was "wrong." Instead, much like the United States Supreme Court when deciding to grant certiorari, the Court is considering the bigger picture: What is the potential impact of this case on the development of Texas criminal law jurisprudence? That global view finds expression in [Rule 66.3] which is an illustrative list of characteristics factored by the Court when deciding to exercise its discretionary power.

Burnett & Paul, F-32-33.

4. Rule 66.3

1. Rule 66.3 of the Texas Rules of Appellate Procedure enumerates six reasons which, "while neither controlling nor fully measuring the Court of Criminal Appeals' discretion, . . . will be considered by the Court in deciding whether to grant discretionary review."

a. Conflict with another court of appeals

i. In determining if review is called for, the court of criminal appeals will consider "whether a court of appeals' decision conflicts with another court of appeals' decision on the same issue." TEX. R. APP. PROC. 66.3(a).

ii. *England v. State*, 887 S.W. 2d 902, 905 (Tex. Crim. App. 1994)(review granted where courts of appeals "have split on this issue" of whether extraneous offenses are admissible to rebut the defense of entrapment).

iii. *State v. Eaves*, 800 S.W. 2d 220, 221 (Tex. Crim. App. 1990)(review granted to determine whether there was "tension" between different courts of appeals "and, if so, to resolve the conflict").

b. To settle important questions of law

i. In determining if review is called for, the court of criminal appeals will consider "whether a court of appeals has decided an important question of state or federal law that has not been, but should be, settled by the Court of Criminal Appeals." TEX. R. APP. PROC. 66.3(b).

ii. *Richardson v. State*, 865 S.W. 2d 944, 946 (Tex. Crim. App. 1993)(review granted "to determine the novel question of whether the installation and use of a pen register by law enforcement personnel requires probable cause under the Texas Constitution").

iii. *Rodarte v. State*, 860 S.W. 2d 108, 109 (Tex. Crim. App. 1993)(review granted "to address this question of first impression" concerning the computation of time to file notice of appeal).

iv. *Cohn v. State*, 849 S.W. 2d 817, 817 (Tex. Crim. App. 1993)(review granted "to resolve an apparent ambiguity in our *Duckett* opinion").

v. *Castillo v. State*, 913 S.W. 2d 529, 530 (Tex. Crim. App. 1995)(review granted to determine whether case relied on by court of appeals had been overruled by another decision from the court of criminal appeals).

c. Conflict with the higher courts

i. In determining if review is called for, the court of criminal appeals will consider "whether a court of appeals has decided an important question of state or federal law in a way that conflicts with the applicable decisions of the Court of Criminal Appeals or the Supreme Court of the United States." TEX. R. APP. PROC. 66.3(c).

ii. *Del Rio v. State*, 840 S.W. 2d 443, 444 (Tex. Crim. App. 1992)(state's petition contended holding of court of appeals was inconsistent with *Strickland v. Washington*").

iii. *Fee v. State*, 841 S.W. 2d 392, 395 (Tex. Crim. App. 1992)(petition granted to consider appellant's "unremarkable, if often controversial contention," that sufficiency of the evidence should be measured in terms of jury charge).

iv. *Griffin v. State*, 787 S.W. 2d 63, 64 (petition granted "to determine whether the opinion of the court of appeals can be squared with prior opinions of this Court").

v. *Blankenship v. State*, 780 S.W. 2d 198, 199 (Tex. Crim. App. 1988)("We granted appellant's petition for discretionary review because we believe the opinion below is arguably in conflict with" two opinions from court of criminal appeals).

vi. Judge Duncan would have refused to consider a petition whose reason for review merely cited the rule, but did not cite the cases the petitioner felt were in conflict with the opinion below. *Beardsley v. State*, 738 S.W. 2d 681, 686 (Tex. Crim. App.

1987)(Duncan, J., concurring and dissenting).

d. Rule 66.3(d): Statutory misconstruction

i. In those infrequent cases where the courts of appeals declare a statute unconstitutional, it is almost certain that the court of criminal appeals will grant review. *E.g., Rushing v. State,* 50 S.W. 3d 715 (Tex. App.--Waco 2001, *pet. granted)*.

ii. *Hines v. State*, 906 S.W. 2d 518, 519 (Tex. Crim. App. 1995)(petition granted where state contended court of appeals's decision was contrary to the plain language of the statute).

iii. *Bellamy v. State*, 742 S.W. 2d 677, 679 (Tex. Crim. App. 1987)(petition granted to determine whether penal code section "unconstitutional under the Fourteenth Amendment").

e. Disagreement among Justices in the court below

i. In determining if review is called for, the court of criminal appeals will consider "whether the justices of a court of appeals have disagreed on a material question of law necessary to the court's decision." TEX. R. APP. PROC. 66.3(e).

ii. To invoke this provision, the petitioner must show a disagreement among the Justices as to a material question of law, and not just a factual disagreement. *Roldan v. State*, 739 S.W. 2d 868, 869 (Tex. Crim. App. 1987).

ii. *Angel v. State*, 740 S.W. 2d 727, 728 n. 2 (Tex. Crim. App. 1987)(review granted to resolve the conflict between different panels of the same court of appeals).

f. Departure from the accepted and usual course of proceedings

i. In determining if review is called for, the court of criminal appeals will consider "whether a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Court of Criminal Appeals' power of supervision.." TEX. R. APP. PROC. 66.3(f).

ii. "This is perhaps the most unclear of . . . [the] 'reasons,' given its cryptic reference to the court's "power of supervision.'" Dix and Dawson, § 46.48.

iii. *Ludwig v. State*, 812 S.W. 2d 323, 324 (Tex. Crim. App. 1991)(petition granted to determine whether court of appeals erred in considering threat made by

appellant against mother of victim in reviewing amount of bail).

g. Other reasons, not specifically enumerated

Although unquestionably important, the rule specifies that the enumerated reasons neither control nor fully measure the court's discretion. Your petition might still be granted, even though your reasons for review do not neatly fit into one of the enumerated categories.

i. Rule 47.1 of the Texas Rules of Appellate Procedure requires that the court of appeals address "every issue raised and necessary to final disposition of the appeal." A petitioner is entitled to remand when the court below fails to address an issue raised. *E.g., McFarland v. State*, 930 S.W. 2d 99, 100 (Tex. Crim. App. 1996)("appellate court must examine and decide a sufficiency challenge even if the conviction must be reversed on other grounds"); *see also Weatherford v. State*, 828 S.W. 2d 12, 12-13 (Tex. Crim. App.1992)(state's petition summarily granted where court of appeals failed to consider arguments concerning preservation of error and harm).

ii. Sometimes dissenting judges on the court of criminal appeals signal particular antipathy for one of its decision, suggesting that the court might revisit the case in the future. In *Lee v. State*, 15 S.W. 3d 921, 927 (Tex. Crim. App. 2001)(Keasler, J., dissenting), three dissenting judges criticized the majority for "clinging to an ill-conceived, historically unsound, imprecise precedent," namely *Bauder v. State*, 921 S.W. 2d 696 (Tex. Crim. App. 1996). Perhaps this not-too-subtle hint inspired the state's petition, granted on April 10, 2002, where one of the grounds for review requests that the court re-examine and abandon *Bauder*. *Peterson v. State*, 2001 WL 1671157 (Tex. App.--Dallas 2001, pet. granted).

iii. Sometimes the hint comes from the court of appeals, which grudgingly follows precedent, but invites a re-examination. *E.g., Paulson v. State*, 991 S.W. 2d 907, 917 (Tex. App.--Houston [14th Dist.] 1999), *rev'd*, 28 S.W. 3d 570 (Tex. Crim. App. 2000).

iv. Where the court of appeals fails to consider all the relevant evidence. *Esteves v. State,* 849 S.W. 2d 822, 825 (Tex. Crim. App. 1993)("*Arcila* is not applicable when the Court of Appeals reviews a case without considering all the relevant evidence").

E.
Keep up with the law

The court of criminal appeals weekly publishes its opinions and reports its actions on pending petitions, restating the grounds or questions for review in the granted petitions.This information can be retrieved from the court's web site. Access it at: WWW.CCA.COURTS.STATE.TX.US. As noted, if you expect to have your petitions granted,

you must convince the court of the global significance of your cases. There is certainly no better way to discover what issues the court believes to be significant than by regularly reading its opinions -- majority, concurring and dissenting. There is no surer way of having a petition granted than by convincing the court that you have an issue identical to that in a petition previously granted in another case.

F.
Present Your Petition Persuasively

1. Presentation is important

I believe that substance is more important than style. Good issues are more likely to be granted, no matter how attractively, or unattractively, they are presented. Surely, though, presentation is not irrelevant. "The better a PDR practitioner understands the Court's role as a discretionary review court, the greater the chance that the practitioner's grounds for review and reasons for review will be framed in ways that lead to the granting of review." Lumpkin, at 16.

2. Grounds or questions?

Rule 68.4(f) permits the petitioner to state his issues in either "grounds for review" or "questions presented for review." An examination of the petitions pending on April 10, 2002 reveals that more than twice as many favor the question style. It has been suggested that petitioners experiment with both formats before coming to a decision. "Sometimes one format will lend itself to a smoothly worded and persuasive statement of the issue while the other format would result in an awkward, uncompelling presentation." Burnett & Paul, at 27.

3. Provocative is good

"Frame your ground for review and present reasons for review in ways that make your PDR stand out, favorably, from the other PDRs the Court is considering." Lumpkin, at 20.

"Your freedom to frame the ground or question for review in an imaginatively phrased, attention-getting fashion is virtually unlimited. A well-crafted ground or question may immediately catch the eye of the Court of Criminal Appeals, whereas a more mundanely worded statement of the problem may be given only cursory attention." Burnett & Paul, at 27.

In *Dyar v. State*, 59 S.W. 3d 713, 717 (Tex. App.--Austin 2001, pet. granted), the court of appeals held that the police were entitled to arrest appellant without a warrant because the place of the arrest -- a hospital -- was "suspicious" pursuant to article 14.03 of the Texas Code of Criminal Procedure. Cynthia and Keith Hampton's petition challenged this holding with this simple, yet provocative question for review: "Is a hospital really a suspicious place?"

While recommended, the eye-catching approach is not absolutely essential. In one case now pending before the court, the single question presented to the court is this: "Whether court

of appeals properly performed the factual sufficiency review of the evidence?" It is difficult to imagine a blander presentation. That this petition was granted proves that someone on the court reads more than the question presented.

4. Styles not recommended

Advocates have learned the hard way that certain styles are not favored with the court. Judge Baird concurred to the refusal to grant review in *Salinas v. State*, 897 S.W. 2d 785, 786 (Tex. Crim. App. 1995)(Baird, J., concurring), and wrote that the petition was defective, both because it failed to state its grounds for review in "short form without argument," and because each ground for review contained in it reasons for review. "This is also improper because reasons for review are separate and distinct from grounds for review." The ground for review was quoted verbatim. *See also Martinez v. State*, 874 S.W. 2d 684, 684-85 (Tex. Crim. App. 1994)(Baird, J., concurring).

5. Be brief

Common sense teaches that brevity is a good quality. Common sense aside, Texas law requires that petitions "be as brief as possible." TEX. R. APP. PROC. 68.4. While this vague rule is completely unhelpful, Rule 68.5 is very specific:

> The petition must be no longer than 15 pages, exclusive of pages containing the table of contents, the index of authorities, the statement regarding oral argument, the statement of the case, the statement of procedural history, and the appendix. A reply may be no longer than 8 pages, exclusive of the items stated above. The Court may, on motion, permit a longer petition or reply.

TEX. R. APP. PROC. 68.5. Fifteen pages is very brief, indeed. Appellate practitioners used to 50 page limits may find it hard to shorten their product so drastically. A few tips may help.

First, remember that a petition is not just a re-packaged appellate brief. If you are not otherwise convinced by those who urge you to severely limit the number of issues you raise in your PDR, the stingy page allotment will give you added incentive.

Second, the very nature of the process of discretionary review will usually permit you to reduce your factual presentation. Remember that the court views itself as "the caretaker of Texas law, not the arbiter of individual applications." Include only those facts necessary to consideration of the significant legal issues you present in your petition. The court of appeals's opinion is included in your index. Refer to that opinion whenever possible to reduce the need to repeat facts to the court of criminal appeals.

Third, avoid string cites. This device is probably never helpful, but it is clearly counter-

productive to the page-limited petitioner. In most cases it should be sufficient to rely on only the most significant cases in your petition, the purpose of which, of course, is to "get a figurative foot in the door. . . ." Burnett & Paul, F-16.

Fourth, remember that, if you get your foot in the door and the petition is granted, you have to file a brief which can be as long as 50 pages. *See* TEX. R. APP. PROC. 70.1 & TEX. R. APP. PROC. 38.4.

6. Statement Regarding Oral Argument

It has always seemed to me both premature and presumptuous to be stating reasons for oral argument before the petition has been granted. Nonetheless, Rule 68.4(c) plainly requires such a statement in the petition. There are several ways to approach this requirement.

a. The rule at least suggests that the statement regarding oral argument should be placed near the beginning of the petition, before the grounds and reasons for review. A well worded statement can serve as an effective summary of your presentation to the court. George Scharmen wrote this in *Mata v. State*, 13 S.W. 3d 1 (Tex. App.--San Antonio 1999), *rev'd* 46 S.W. 3d 902 (Tex. Crim. App. 2001):

> Because these questions present important issues which have not been finally or completely decided by the courts of this state, it is necessary for the court to hear arguments in the case. DWI is an offense which accounts for the vast majority of the docket of cases in the county courts and county courts at law of this State. The issues discussed in this petition arise daily throughout this State, and the courts of appeal are either providing no guidance or incorrect guidance regarding the law which is applicable. Additionally, the Supreme Court of Texas is addressing a similar issue in *Mireles v. Texas Department of Public Safety*, 993 S.W. 2d 426 (Tex. App.-San Antonio, 199, pet. granted). Undersigned counsel is counsel for *Mireles* in the Supreme Court. It is important that the two highest courts of this State will issue opinions which hold consistently on this topic.

b. In contrast to the vigorous advocacy found in Mr. Scharmen's statement, is the following: "Pursuant to Rule 68.4(c) of the Texas Rules of Appellate Procedure, counsel for the State would submit that in the event petition is granted, oral argument would aid the Court in passing on the merits of the State's contention." If that is as much enthusiasm the lawyer can muster, it may just be that this is a case that does not need to be argued. If so, what would be wrong with candidly telling the court that, while you would welcome the opportunity to argue, the issues in your case are such that they can be adequately presented in the petition and in a brief, should the petition be granted?

c. Jan Morrow both summarized her case well, *and* was candid with the court in *Sturgeon v. State*, 2001 WL 837956 (Tex. App.--Houston [14th Dist.] 2001, pet. granted):

> This petition presents an important policy question about the extent to which trial counsel will be treated as an officer of the court, whose "hearsay" representations to the trial court setting out the substance of anticipated testimony have been accorded respect in the past. The Court of Appeals has decided that this Court's decisions call for a sterner rule to be applied when defense counsel asks the trial court to issue a writ of attachment for a subpoenaed witness who fails to appear. Counsel for Appellant would like to present argument on this issue, but the question is one that is easily settled by reference to the cited cases in the petition and the briefs.

F.
It Is Better, But Not Essential, That The Opinion Below Be Published

Unpublished decisions "have no precedential value and must not be cited as authority by counsel or by a court." TEX. R. APP. PROC. 47.7. It is hard to understand how an unpublished opinion from a court of appeals which has no precedential value could be significant at all to anyone but the parties immediately involved, much less important to the jurisprudence of the state. Although publication is not a prerequisite for review "common sense dictates that one factor the Court could consider in its decision to grant or refuse review would be whether a court of appeals' opinion is published or unpublished." Lumpkin, at 21. Statistics bear this out. More than 60% of the granted petitions pending on April 10, 2002, arose from published opinions. If you plan to seek review of an unpublished decision, consider filing a motion to publish pursuant to Rule 47.3(c) of the Texas Rules of Appellate Procedure.

G.
Move For Rehearing In The Court Of Appeals

1. "A motion for rehearing is not a prerequisite to filing . . . a petition for discretionary review in the Court of Criminal Appeals nor is it required to preserve error." TEX. R. APP. PROC. 49.9.

2. Even though the motion for rehearing is not required, there are several good reasons for filing it.

a. You might win in the court of appeals, thereby avoiding the need to petition the court of criminal appeals.

b. The motion for rehearing is a good opportunity to begin thinking about the petition for discretionary review. As Burnett and Paul observe:

> The document that you submit as your motion for rehearing can easily be edited to be the nucleus of your petition for discretionary review. In face, the petition for discretionary review more closely resembles a motion for rehearing than any other document in the appellate process. Although the persuasive perspective differs, each document focuses on claimed errors made by the appellate court. In contrast, the focus of the original intermediate appellate court brief is on errors occurring at the trial-court level.

Burnett & Paul, at 4.

c. " While a motion for rehearing in the court of appeals is not a prerequisite for our granting discretionary review. . . there will be instances where it is a helpful tool for focusing attention on an adverse determination of an issue . . . and if it draws a responsive opinion from the court so much the better. . . ." *Tallant v. State*, 742 S.W. 2d 292, 295 (Tex. Crim. App. 1987).

IV. RESOURCES

A. Catherine G. Burnett & Matthew Paul, *Post-Decision Appellate Practice: Motions For Rehearing In The Court Of Appeals And Petitions For Discretionary Review*, *in* STATE BAR OF TEXAS, TEXAS CRIMINAL APPELLATE MANUAL F-1 (1996).

B. Forrest D. Lumpkin, *Petitions For Discretionary Review*, 25 VOICE FOR THE DEFENSE 10 (No. 8, 1996).

C. Judge Charles F. (Chuck) Campbell & William P. Green, *Petitions For Discretionary Review*, 21 VOICE FOR THE DEFENSE 33 (No. 8, 1993).

D. 43 GEORGE E. DIX & ROBERT O. DAWSON, CRIMINAL PRACTICE AND PROCEDURE (Texas Practice 1995).

E. Judge Sharon Keller, *Petitions For Discretionary Review In The Texas Court Of Criminal Appeals*, 25 VOICE FOR THE DEFENSE 26 (No. 10, 1996).