IMPROVING THE CHANCES THAT YOUR PDR WILL BE GRANTED

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I. SCOPE OF PAPER

In the fiscal year 2003, the Texas Court of Criminal Appeals granted 109 of the 1708 petitions for discretionary filed, or just over 6%. Undoubtedly, the issues themselves are the most important things that drive the court's decision to grant or deny review. No lawyer, however able, could convince the court to review some issues. Conversely, other issues are so ripe for review that (almost) no lawyer, however 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. The purpose of this paper is to suggest ways to improve the chances that your petitions will be granted.

II. PRACTICAL TIPS

This section offers a few suggestions for lawyers who have lost in the court of appeals and are seeking review in the court of criminal appeals:

- Move for rehearing in the court of appeals.
- Get published.
- Follow the rules.
- Carefully select your grounds and questions for review.
- Present your grounds and questions persuasively.
- Remember that the argument is the "heart of the PDR."
- Use the whole petition to persuade.
- Be brief.
- Keep up with the law.

A.
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, which means you never have to go to the court of criminal appeals, where your chances just of being heard are only about 6 out of 100.

b. The motion for rehearing is a good opportunity to begin thinking about the petition for discretionary review. As Catherine Burnett and Matthew 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 fact, 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.

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), 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); *accord Farrell v. State*, 864 S.W. 2d 501, 503 n. 2 (Tex. Crim. App. 1993).

B.
Get Published

1. Effective January 1, 2003, in addition to being designated as an "Opinion" or a "Memorandum Opinion," all opinions in criminal cases "must bear the notation 'publish' or 'do not publish' as determined – before the opinion is handed down – by a

majority of the justices who participate in considering the case." TEX. R. APP. PROC. 47.2(b).

2. "Opinions not designated for publication by the court of appeals under these or prior rules have no precedential value but may be cited with the notation, '(not designated for publication).'" TEX. R. APP. PROC. 47.7. *See Carrillo v. State*, 98 S.W. 3d 789, 794 (Tex. App.– Amarillo 2003, pet. ref'd)("effect of the rule is to afford parties more flexibility in pointing out such opinions and the reasoning employed in them rather than simply arguing, without reference, that same reasoning").

3. It is hard to understand how an unpublished opinion with 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." Forrest D. Lumpkin, *Petitions For Discretionary Review*, 25 VOICE FOR THE DEFENSE 10 (No. 8, 1996), at 21. Statistics seem to bear this out. More than 62% of the granted petitions pending on June 30, 2004 arose from published opinions. If you plan to seek review of an unpublished decision, consider moving to change the notation from "do not publish" to "publish," as provided by TEX. R. APP. PROC. 47.2(b).

C.
Follow The Rules

1. Non-conforming petitions may be summarily refused.

"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).

There are several things the court can do with petitions that do not comply with the rules:

> 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*. The court not only demands compliance, it demands *strict* compliance.

2. Strict conformity is demanded.

Judge Chuck Campbell forcefully warns 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). 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 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. A recent change in procedures.

Although Rule 68.6 plainly permits the court to "strike, order redrawn, or summarily refuse" a non-conforming petition, until recently, summary refusal was the only sanction the court of criminal appeals employed. Petitions were refused, almost always without comment, so that petitioners had no way of knowing whether the refusals were on the merits, or because of a formal defect. And if the petition was defective, there was no opportunity to fix the problem. Since September, 2002, the court has begun striking petitions showing certain defects, and inviting the petitioners to redraw and refile them within 30 days. *E.g., Bolinger v. State*, No. 195-03 (Tex. Crim. App. April 2, 2003)(not designated for publication) (petition violated Rule 68.4(i) because it did not contain a complete copy of the court of appeals's opinion); *Johnson v. State*, No. 1801-02

(Tex. Crim. App. February 12, 2003)(not designated for publication)(petition longer than 15 pages in violation of Rule 68.5); *Davalos v. State*, No. 1950-02 (Tex. Crim. App. January 29, 2003)(not designated for publication)(original petition not accompanied by 11 copies, in violation of Rule 9.3).

4. Some 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. Petitions and copies are filed *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. Although, *all* the procedural rules relating to petitions are important, three stated within Rule 68.4 are both unique and important, and therefore merit special emphasis.

(1) The petition, the reply, and the 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 § G(1).

(2) "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). As of January 1, 2003, this portion of the petition is called "argument." The commentary to this rule explains the change: "The original catch line of subdivision 68.4(g) was 'Reasons for Review,' which caused confusion because of its similarity to the catch line in subdivision 66.3 ('Reasons for Granting Review'). It is changed to 'Argument.'"

(3) "The petition must contain a copy of any opinion of the court of appeals." As 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

i. The petition is limited to 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." TEX. R. APP. PROC. 68.5. Note that the *statement of facts* and the *prayer*, among other things, are *not* excluded from the page limitation.

ii. The court can permit a longer petition, upon motion. TEX. R. APP. PROC. 68.5.

iii. The reply may not exceed 8 pages. 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.

D.
Carefully Select Your Grounds And Questions For Review

1. Rule 68.4(f): Grounds and questions presented 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. A court of "sound judicial discretion."

An intermediate court of appeals *must* address "every issue raised and necessary to 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.

3. "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.

4. Make sure that only the strongest 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*. In *King v. State*, 125 S.W. 3d 517 (Tex. Crim. App. 2003), Judge Cochran, joined by Judges Price, Johnson, and Holcomb, described appellant's six grounds for review as "rather a lot. I look upon one or two well-crafted grounds for review more favorably as it is most unusual that a court of appeals might be seriously wrong on numerous different issues of statewide importance." *Id*. at 518 n. 4.

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. And if you raise more than one ground or question for review, "present the strongest ground first." Lumpkin, at 10.

Section E(5) of this paper has examples of questions and grounds for review that, in my judgment, obey very well *DeGrate's* command that petitions make apparent the "importance of the case to the jurisprudence of the State."

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. Farrell v. State*, 864 S.W. 2d 501, 503 (Tex. Crim. App. 1993)(suggesting that the court can reach an issue raised for the first time in a petition if it challenges the jurisdiction of the court of appeals); *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 that challenged the court of appeals's authority to abate the appeal to obtain a complete record); *see also Jack v. State*, 2004 WL 574533 *2 (Tex.

Crim. App. 2004)(state may not obtain review of "double abatement" procedure, after the out-of-time motion for new trial was denied, but before the court of appeals ruled on any of appellant's points of error); *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).

E.
Present Your Grounds And Questions 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." 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. Understand the petition's "unique character."

Catherine Burnett and Matthew Paul point out the "unique character of the PDR," and assert that it is significantly different from the original appellate brief in three ways. First, since the court of criminal appeals may deny review without explanation, "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, because this court is more concerned with overall jurisprudence than with whether the correct or just result was reached below, the PDR should "address a global legal issue against the backdrop of a specific case." Finally, where an appellate brief urges the "appropriate ultimate legal disposition of the disputed issues . . . 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.

4. Focus on impact, not mere error.

Rarely will it be enough simply to complain 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.").

5. It's simple: Write issues that are clear, compelling, global, and truly significant.

Here are some grounds and questions for review that I think are clear, compelling, global, and significant:

- "Whether the doctrine of diminished capacity exists in the jurisprudence of the State of Texas." *Jackson v. State*, 115 S.W. 3d 326 (Tex. App.– Dallas 2003, pet. granted).

- Where an officer, following a valid traffic stop, resolves the original detention issue, is the continued detention of the driver, while waiting on the return of a routine computer driver's license check, reasonable? *State v. Kothe*, 123 S.W. 3d 444 (Tex. App.– San Antonio 2003, pet. granted).

- "Where a trial ends in mistrial, is a stipulation of evidence agreed to by appellant at his first trial binding upon him at a subsequent new trial, over objection?" *Carrasco v. State*, 122 S.W. 3d 366 (Tex. App.–El Paso 2003, pet. granted).

- "Did the court of appeals err when it affirmed the trial court's order granting early termination of deferred adjudication community supervision and dismissing the indictment, prior to appellee completing at least two years of community supervision, by not following the definition of community supervision found in article 42.12, §2(2) (Vernon Supp. 2002)?" *State v. Juvrud,* 2002 WL 31478697 (Tex. App.-El Paso 2002, pet. granted)(not designated for publication).

- "Did the Court of Appeals err in holding that the synergistic-effect instruction to the jury was properly given as law applicable to the case where appellant was not charged with intoxication by a combination of alcohol and drugs?" *Gray v. State*, 2003 WL 21357335 (Tex. App.– Houston [1st Dist.] 2003, pet. granted)(not designated for publication).

- "Did the Court of Appeals err in finding that it was not an abuse of discretion in a capital murder prosecution for the trial court to limit defense counsel's closing argument to twenty minutes?" *Dang v. State*, 99 S.W. 3d 172 (Tex. App.– Houston [14th Dist.] 2002, pet. granted).

- "Whether the Court of Appeals erred in holding that a hearsay statement made five days after an event constituted "excited utterance." *Apolinar v. State*, 106 S.W. 3d 407 (Tex. App.– Houston [1st Dist.] 2003, pet. granted).

- "The Court of Appeals erred in holding that the trial court abused its discretion in granting appellee's motion to suppress the results of his breath test based on Tex. R. Evid. 403." *State v. Mechler*, 123 S.W. 3d 449 (Tex. App.– Houston [14th Dist.] 2003, pet. granted).

- "Did the Court of Appeals correctly interpret the 2001 amendment to Penal Code 49.09(e) such that the relevant ten-year period for an intervening conviction is now the period between the two prior DWIs, rather than the ten-year period before the date of the primary offense?" *Getts v. State*, 2003 WL 22456104 (Tex. App.– Tyler 2003, pet. granted)(not designated for publication).

6. Your ground or question should get the reader's attention.

"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.

Certain issues are so intrinsically provocative that they require no linguistic embellishment:

- "Whether the court of appeals was correct in holding there is no reversible error *when the state calls defense counsel as a witness* to testify on behalf of the state during the guilt/innocence phase of appellant's jury trial." *Flores v. State,* 90 S.W. 3d 875 (Tex. App.–San Antonio 2002, pet. granted)(emphasis supplied).

- "Did the Court of Appeals err by not finding harm when the sole prosecutor called herself as a material witness to testify in front of the jury, objected to being cross-examined, resumed her advocate role and then argued her credibility to the jury." *Ramon v. State*, 2003 WL 22082410 (Tex. App.– San Antonio 2003, pet. granted).

7. There is hope for the rest of us.

a. Bland sometimes works

Although the clear, compelling, global, and provocative model is recommended, it is apparently not absolutely essential. A petition with this ground for review was recently granted and is now pending in the court:

- "The Court of Appeals erred by failing to perform a proper harm analysis regarding voir dire error."

It is difficult to imagine a blander presentation. That this petition was granted proves that someone on the court reads more than the questions and grounds presented.

b. Awkward may also work

- "The Court of Appeals erred in ruling that the trial court's failure to accept appellant's proposed stipulation, thus excluding evidence of appellant's prior conviction, was not erroneous."

8. *Your fight is with the court of appeals, not the trial court.*

Except where the death penalty has been assessed, our first appeal 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 . . . .'" Burnett & Paul, at 26. *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).

In *King v. State*, 125 S.W. 3d 517 (Tex. Crim. App. 2003), Judge Cochran, joined

by Judges Price, Johnson, and Holcomb, pointed out that appellant's petition complained about the trial court's failure to give a particular jury instruction. "On its face, this is a direct appeal complaint about what went wrong in the trial court rather than a discretionary review complaint about what went wrong in the court of appeals." *Id*. at 518.

Although not recommended, occasionally a petition is granted even though it seems to complain of something the trial court did. Presently pending review is a petition with this ground for review: "The trial court erred when it allowed over objection the admission of an incriminating statement made by appellant during a competency examination."

9. Styles not recommended.

Advocates have learned the hard way that certain styles are not favored. 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 first ground for review was quoted verbatim, and is also quoted here, so that you can get a clear example of what not to do.

> In overruling appellant's point of error no. 3 in his brief, the 13th Court of Appeals reversibly erred by focusing on the "shooting" and ignoring the "gun pointing" and in not following the stare decisis of *Mullins v. State*, 767 S.W.2d 166, 169-170 (Tex.App.--Houston [1st Dist.] 1988, no pet.), for the trial court should have charged the jury as to the lesser offense under V.T.C.A. Penal Code § 22.05(a) of reckless conduct in cause no. 13-93-059-CR since appellant was aware of the risk of placing Firmato Rodriguez in imminent danger of serious bodily injury and purposefully disregarded that risk (recklessly) by pointing a firearm at or in the direction of another before shooting and firing a warning shot at the club wall in the direction of Rodriguez, from which "pointing" conduct recklessness and danger are presumed under V.T.C.A. Penal Code § 22.05(b), and which "pointing" conduct placed Rodriguez from his own perspective in imminent danger of serious bodily injury, while Rodriguez ducked and stayed under a van adjacent to the club's entrance where in a wall block an investigator found a chip, which could have been caused by a bullet.

Id. at 786. Yes, that was just one sentence. *See also Martinez v. State*, 874 S.W. 2d 684, 684-85 (Tex. Crim. App. 1994)(Baird, J., concurring).

F.
Remember That The Argument Is "The Heart Of The PDR"

1. Rule 68.4(g): The Argument.

> *Argument*. 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. Do not get "degrated."

a. Formerly, the portion of the petition now denominated "Argument" was called "Reasons for Review." In *DeGrate v. State*, 712 S.W. 2d 755 (Tex. Crim. App. 1986), the court explained the function of this 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.

b. In *King v. State*, 125 S.W. 3d 517 (Tex. Crim. App. 2003), Judge Cochran filed a statement concurring in the refusal of appellant's petition for discretionary review

that was joined Judges Price, Johnson, Holcomb. In this statement, the Judges noted that they did not mean to "pick on" the lawyer, but nonetheless pointed out in some painful detail the deficiencies of his petition.

> 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. Rarely will it garner the four votes necessary to grant review. Converting direct appeal grounds into discretionary review grounds involves much more than minor tinkering with the original brief. Instead, it involves a change of character, a recognition that this Court wants to know why we should, as a matter of sound discretion, expend our scarce judicial resources to review the court of appeals' reasoning about a particular legal issue.
>
> The rationale for the argument (formerly the "reasons for review") section of a petition is to explain how and why the court of appeals' decision adversely impacts the criminal jurisprudence of Texas. Perhaps the opinion conflicts with other courts of appeals' reasoning on this very topic and thus confuses bench and bar concerning the content of a substantive law or procedural rule. Perhaps it decides a novel and important issue of state or federal law which this court has not yet addressed, but it is an issue that this court should address because it has far-reaching or long-lasting impact or repercussions on other cases. Perhaps the court of appeals applied the wrong legal standard, and thus reached the wrong result in this case and would be likely to do so again.
>
> Discretionary review to this court is not simply another new appeal if a party did not like the result in the first one. We do not "redo" what the courts of appeals have already done. In all cases, there is but one direct appeal, and in all but capital cases in which the defendant is sentenced to death, that direct appeal is to the courts of appeals. There is no second bite at the direct appeal apple.

Id. at 520.

c. Presiding Judge Keller agreed that following the rules is advisable, but specifically noted that "noncompliance does not automatically preclude the Court or a judge from reviewing the merits of a petition. When the merits of a petition are presented sufficiently, I do not vote to refuse for noncompliance. In this case my decision to refuse review is based upon the merits of the petition." *Id*. at 521.

3. The argument is where you must convince the court that your case is important.

According to Burnett and Paul, this 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: The enumerated reasons for review.

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").

iv. Here are two ways a Rule 68.3(a) reason for review was stated in cases recently pending in the court. Which do you think is more effective?

(1) "In affirming the conviction, the Court of Appeals has decided an important question of law which conflicts with the applicable decisions of another Court of Appeals, specifically, *Cook v. State*, 1 S.W. 3d 722, 724 (Tex. App.–El Paso 1999) which deals with investigative detentions based on furtive gestures."

(2) "The Court of Appeals' decision conflicts with another court of appeals' decision on the same issue. See TEX. R. APP. P. 66.3(a)."

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).

vi. Compare the ways two different lawyers presented their Rule 68.3(b) reason for review:

(1) "Review is proper pursuant to Tex.R.App.Pro. 66.3(b) because the Court of Appeals has decided an important issue of state law that has not been, but should be settled by this Court, namely, whether a person in a two-party conspiracy can be convicted under a conspirator/party theory of liability when the other party has been acquitted of the same offense."

(2) "The Court of Appeals has decided an important question of state law that has not been, but should be, settled by the Court of Criminal Appeals. See TEX. R. APP. P. 66.3(b)."

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).

vii. Here are two ways a Rule 68.3(c) reason for review was stated:

(1) "By holding that the trial court erred in denying Shaw's speedy trial motion to dismiss where the record strongly indicates that Shaw did not want a speedy trial, and in fact benefitted from the delay, the Court of Appeals has delivered an opinion in conflict with the applicable decisions of this Court and the United States Supreme Court. See, e.g., *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); *Knox v. State*, 934 S.W. 2d 678 (Tex. Crim. App. 1996)."

(2) The Court of Appeals has decided an important question of state law in a way that conflicts with applicable decisions of the Court of Criminal Appeals. See TEX. R. APP. P. 66.3(C).

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").

iv. Consider these two presentations:

(1) "Review is proper pursuant to Tex.R.App.Pro. 66.3(d) because the Court of Appeals appears to have misconstrued the following statutes, namely Tex. Penal Code § 7.02(a) and § 7.02(b)."

(2) "The court of appeals appears to have misconstrued a statute. *See* TEX. R. APP. P. 66.3(d); TEX. PENAL CODE ANN. § 49.09(e) (West 1999). The court interpreted § 49.09(e) to require that the jury make a finding that a defendant has an

intervening DWI conviction. Moreover, the court of appeals appears to have held that § 49.09(e) mandates that the intervening DWI conviction is a necessary element of the felony offense. However, the structure of § 49.09 indicates that the existence of an intervening DWI conviction is a predicate rule requiring exclusion of a remote conviction if the predicate is not satisfied."

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).

iii. *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).

iv. Compare the following presentations:

(1) "This holding should be reviewed pursuant to TEX. R. APP. P.

66.3(f) because the Seventh Court of Appeals so far departed from the accepted and usual course of judicial proceedings by *reforming* a judgment after finding the evidence *factually* insufficient —a remedy in direct conflict with this Court's opinion in *Clewis v. State,* 922 S.W.2d 126 (Tex. Crim. App. 1996)."

(2) "Review is also appropriate under Tex. R. App. P. 66.3(f) because the court of appeals has departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power."

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 an earlier 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*. *Ex parte Peterson*, 2001 WL 1671157 (Tex. App.--Dallas 2001), *vacated*, 117 S.W. 3d 804, 807 (Tex. Crim. App. 2003)("we need not today address the broader question of whether *Bauder* and its progeny should be overruled").

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. Review has been granted where the court of appeals failed 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").

G.
Use The Whole Petition To Persuade

Of course your petition must be persuasive in the obvious places — the grounds and questions for review and the argument. Resourceful lawyers use other portions of their petition to make their points as well.

1. Using the Statement Regarding Oral Argument.

It has always seemed to me both premature and presumptuous to state 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. Good approaches

i. 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. Alan Curry wrote this in his petition in *Jack v. State*, 64 S.W. 3d 694 (Tex. App.–Houston [1st Dist.] 2002), *pet. dism'd*, 2004 WL 574533 (Tex. Crim. App. 2004):

> This case presents the constantly recurring issue—which must be settled by this Court—as to whether, and under what circumstances, a court of appeals may ever abate a case to the trial court so that the defendant can be permitted the opportunity to file an out-of-time motion for new trial.

ii. 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),

rev'd, 106 S.W. 3d 81 (Tex. Crim. App. 2003):

> 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.

iii. The very best use of the Statement Regarding Oral Argument I have seen is by Matthew Paul and Betty Marshall in their petition in *Shaw v. State*:

> The Court of Appeals' failure to follow established speedy trial case law does not, in our view, require further elucidation by means of oral argument. The State Prosecuting Attorney does not, therefore, request oral argument in this cause.

In these two sentences, the prosecutors not only waived oral argument, they also advised that the court of appeals had failed "to follow established speedy trial law" and that this failure was so clear that it needs no "further elucidation."

b. Bad approaches

1. Frequently, lawyers say something like this: "Pursuant to Rule 68.4(c) of the Texas Rules of Appellate Procedure, counsel for the State would submit that in the event the 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 that can be mustered, 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? Or simply, "The State does not request oral argument."

2. If you can't advocate, and you can't be candid, at the very least, don't be sloppy. Some people obviously have this portion of the petition set up on their

word processors, prepared to waive or request oral argument as the need arises. So, this is the result: "Appellant *requests waives* oral argument believing that it would not assist the Court in resolving the questions for review presented herein." And: "Oral argument *is requested* in these cases *is waived* because the arguments are adequately presented in the following brief." Since this part of the petition is one of the first things the court sees, it seems like a good idea to avoid these kind of clerical errors, which can only tend to diminish your credibility.

2. Using the Statement of the Case.

Rule 68.4(d) tells us only that this portion of the petition "must state briefly the nature of the case," that it "should seldom exceed half a page," and that details should be saved for the grounds or questions. In most petitions, the statement of the case is an uninteresting presentation of historical facts. Although this is doubtless what the rule contemplates, why not add a little — and just a little — advocacy to the dry facts. Here is the way Paul and Marshall did that in *Shaw*:

> After his first trial ended in a hung jury in March of 1998, James William Shaw was convicted of aggravated sexual assault of a child in February 2001. According to the Texarkana Court of Appeals, Shaw's August 2000 motion to dismiss should have been granted *even though he never requested a speedy trial, never proved any prejudice, the State was no more responsible for the delay than Shaw, and he benefitted from the delay*. [emphasis supplied]

3. Using the Statement of Facts.

The statement of facts portion of a petition for discretionary review will almost always be less detailed than in a brief to the court of appeals. Even so, some sort of factual statement is essential, and good advocates know how to address the facts concisely and honestly, but also in a light most favorable to their position.

H.
Be Brief

1. Brevity is good.

Common sense teaches that brevity is a good quality. And 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.

Finally, if you just can't say what you have to in 15 pages, the rules do provide that the court can permit a longer petition, on motion. TEX. R. APP. PROC. 68.5. Don't count on this being granted, though.

2. But address all issues necessary to the decision below.

a. When multiple issues must be addressed

Judge Campbell says that a petition should address only the one, two, or perhaps three strongest issues in the case. Campbell & Green, at 33. 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).

McGee v. State, 23 S.W. 3d 156 (Tex. App.–Houston [14th Dist.] 2000), *rev'd* 105 S.W. 3d 609 (Tex. Crim. App. 2003), is illustrative. There, the court of appeals found that appellant's arrest violated articles 14.01, 14.03, 14.04, *and* the constitution. Accordingly, the state raised four grounds for review in its petition:

> "1. The court of appeals erred in concluding appellant's escape was not imminent, and thereby finding that appellant's warrantless arrest was not justified by article 14.04.
>
> 2. The court of appeals erred in concluding that the tip leading them to appellant was not corroborated, and thereby finding that appellant's warrantless arrest was not justified by article 14.01.
>
> 3. The court of appeals erred in concluding that appellant was not found in a suspicious place, and thereby finding that appellant's warrantless arrest was not justified by article 14.03.
>
> 4. The court of appeals erred in concluding that the search of appellant

was unreasonable (strip search incident to arrest)."

b. When it is prudent to address multiple issues

Judge Campbell also advises against asking the court to overrule precedent. Campbell & Green, at 33. When you must, though, it is smart to have a back-up plan. For example, in *Ex parte Peterson,* 2001 WL 1671157 (Tex. App.–Dallas 2001), *vacated*, 117 S.W. 3d 804 (Tex. Crim. App. 2003), the state asked the court to "re-examine and abandon" the *Bauder* decision in its first question for review. Its second question, though, asked whether the court of appeals had properly analyzed the case under *Bauder*. This turned out to be a smart decision, where a majority of the court decided that its decision to grant review on the first question had been improvident. *Ex parte Peterson*, 117 S.W. 3d at 807.

I.
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.

III. 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).

F. BRYAN A. GARNER, THE WINNING BRIEF (Oxford 1999).

IV. APPENDICES

A. Statistics from the Office of Court Administration