

## **GETTING DISCRETIONARY REVIEW**

### **THE BIG PICTURE: TAKE THE PDR GROUNDS AT FACE VALUE**

Under N.C.G.S. § 7A-31(c), the Supreme Court of North Carolina may certify a case when, in the opinion of the Court:

- (1) The subject matter of the appeal has significant public interest.
- (2) The cause involves legal principles of major significance to the jurisprudence of the State.
- (3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

These PDR grounds reflect an understanding that the Supreme Court's chief purposes are to ensure uniformity in the law and provide guidance to lower courts and litigants. The Supreme Court does not view itself as an "error correcting" court, and it allows very few PDRs overall.

Granted, we have all had cases in which the State's PDR was allowed, seemingly without regard to whether the case fit the PDR criteria. It is easy to get cynical or discouraged. No doubt defendants face a steep climb in seeking discretionary review. But we should embrace the challenge. Start by taking the PDR criteria at face value.

### **STRATEGIES FOR GETTING YOUR CLIENT'S PDR ALLOWED**

The default at the Court is to deny PDRs. Unless a case appears to be a strong candidate for review — a sort of "know it when they see it" standard — the Court will usually be looking for a reason to deny. You must give them a reason not to reflexively deny your client review.

This means you *have* to argue more than just the COA got it wrong, For your PDR to get noticed and allowed, you also have to credibly argue that the case meets one of the PDR criteria and has effects that extend beyond just your client's interests. Here are some tips:

- Organizing Principles
  - Failing to make an argument about the three statutory criteria is reason enough to deny the petition. You must show why the case matters beyond your client's interest or some general notion of justice. That burden is on you as the petitioner.
  - "The COA got it right" is also a good reason to deny review. Why should the Supreme Court step in if the COA was correct?

- Therefore, almost all PDRs should include two arguments: (1) the case meets one or more of the three statutory criteria listed in N.C.G.S. § 7A-31(c); and (2) the Court of Appeals erred.
- As a rule of thumb, your PDR should *at least* give equal treatment to each of these broad justifications. Depending on the case, it might make sense to skew the balance so that the bulk of the PDR explains why the case is important, with the remainder addressing the merits. Some things are important enough to warrant the Supreme Court's time regardless of what the COA did. Play to the strength of your case. But always make sure you have told the Court why it's worth their time.
- Arguments you can make about the importance of a case:
  - There's a split of authority in the COA, and thus the case is of major significance to the jurisprudence of the state. This is probably the best reason you can offer for the Court to step in. Because of *In re Civil Penalty* and the Court of Appeals' apparent reticence to exercise its *en banc* authority, generally the Supreme Court must fix the split of authority. This argument is even stronger if you have sought and were denied *en banc* review, because at that point you've done all you can do to remedy the split.
  - There is a consistent pattern of wrongly decided cases from the Court of Appeals which conflicts with broader Supreme Court precedent. Argue that it's time for the Court to put a stop to it.
  - The case directly conflicts with North Carolina Supreme Court precedent (or SCOTUS precedent the North Carolina Supreme Court has acknowledged or reiterated).
    - However, don't argue that the COA misapplied its own precedent, or that its opinion conflicts with other COA precedent. The Supreme Court doesn't care about that (at least when the statutory "conflict" criterion is urged as the basis of review). If the COA botched the application of its own case law, rely on the "major significance" ground. Frame the problem as a split, preferably with multiple COA cases on each side if you can.
  - The case presents an issue of first impression and thus is of "major significance."
    - Be careful with this one. You also must argue that *this sort of issue is likely to come up again*. The existence of some weird one-off might be a reason to deny review.
  - The case has attracted media coverage or the subject-matter has entered popular consciousness. Argue this shows how the case is of "significant public interest." (Don't overstate this one or rely on it as your sole ground.)

- All of these arguments are much stronger if the case was published. Nevertheless, you can still argue that unpublished cases are certification worthy.
  - Unpublished cases often work their way into the law. “[T]he law which is developed in the unpublished, non-precedential opinions has a tendency to bleed over into other cases and eventually to end up in precedential opinions, even though it may not be cited as such.” *State v. Hensley*, 802 S.E.2d 744, 752 (N.C. Ct. App. 2017) (Stroud, J., concurring).
  - Your unpublished case may be the only case on the subject and will therefore be relied on by trial courts and practitioners regardless of it being unpublished. Argue that the COA should have therefore published the case under the criteria of Rule 30(e). Consider moving the COA to publish the opinion as provided in Rule 30(e)(4).
- What if the COA stated the legal standard correctly but then misapplied it?
  - You’re probably out of luck: The Supreme Court doesn’t do “mere error correction.” At least not when it’s the defendant’s ox being gored. One way to get around this issue is to argue that given the way the COA applied the law, it was really using a different, incorrect legal standard, and that this misapplication could have effects on other cases.
- The Court likes options, so give it some if you can. The Court jealously guards its merits docket, but it’s less concerned about creating work for the COA. If you can ask for something less than full review, for instance a remand to the COA to resolve a question it dodged, or to apply the correct standard of review, or to reconsider in light of an opinion it failed to address, consider asking for such relief in the alternative.

#### **STRATEGIES FOR GETTING THE STATE’S PDR DENIED**

- These will mostly be the flip side of what you would argue in a PDR:
  - Emphasize that the Court of Appeals got it right, and there’s no reason to step in.
  - If the COA got it wrong, argue that it articulated the correct legal standard, but at most erred in the application. Accuse the State of asking for “mere error correction.”
  - If the COA opinion was unpublished, emphasize that.
  - If the opinion was published, argue that the COA ruled narrowly and that the opinion is unlikely to have any serious effect on other cases.

- If the issue is well-settled, say that. Argue that the Court of Appeals didn't do anything novel or strange.
- If this is an issue of first impression, argue that the issue needs time to develop in the lower courts and that review is not yet required. If you can, present this "first impression" issue as a weird outlier that is unlikely to recur.
- If you can, argue vehicle problems (e.g., mootness, messy facts, other reasons the result would stand).
- If the State argues that news coverage shows significant public interest, accuse the State of conflating "public interest" with "public curiosity."
- If your case is at the trail end of a series of cases addressing the same issue, and is unpublished, argue that your case is duplicative of other cases already on the merits docket. Argue that the jurisprudential justification for certifying your case will be served by what the Court will do in the other cases, and therefore, the only reason to grant the State's PDR in your case is to allow the State to argue for error correction.
- Argue that the State's interest in the case is small. If possible, contrast that with your client's interest. For example: You vacate a conviction in the COA. The win shaves a year off your client's sentence. State PDRs. Argue that the State's interest (incarcerating your client for another year) is outweighed by your client's liberty interest, particularly given that he will likely serve the sentence if the Court hears the case, regardless of the merits.

## OTHER TIPS

- Never file just a notice of appeal based on a substantial constitutional question. Always file a dual NOA/PDR. If the case is "important" enough, the Court will usually dismiss the NOA, but allow the PDR. The Court likes options. If it keeps the appeal, it has to decide the case. But with a PDR, if there is later some problem (the justices can't figure out what to do with the case; there are serious procedural defects; upon reflection, it turns out the COA got it right but the Court doesn't want to bless the rule yet, etc.) the Court can DRIA.
  - Former Justice Orr has written about this phenomenon. *See* Robert Orr, *What Exactly is a "Substantial Constitutional Question" for Purposes of Appeal to the North Carolina Supreme Court?*, 33 CAMPBELL L. REV. 211 (2010).
- Good writing and argument matters. Even if an issue might warrant review, the prospect of bad lawyering can itself be a reason to deny review. The Court doesn't want to take up something important only to find itself unable to reach the issues it wants because of bad advocacy.