STRAATEGIES FOR PREPARING
PETITIONS FOR DISCRETIONARY REVIEW

North Carolina Appellate Boot Camp
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**Grounds for discretionary review:** Not every opinion warrants discretionary review. The following examples are grounds that might stand a better chance of getting reviewed.

1. **Split of authority:**
   a. If there is a split of authority on an issue that you raised in the Court of Appeals, be sure to identify the conflict in a PDR.
   b. This would fall under N.C. Gen. Stat. § 7A-31(c)(2), “The cause involves legal principles of major significance to the jurisprudence of the State.”
   c. When a decision by the Court of Appeals creates a split of authority, discretionary review is proper in order to settle diverging lines of cases. *See, e.g., In re R.T.W.*, 359 N.C. 539, 542, 614 S.E.2d 489, 491 (2005) (“We allowed DSS’s petition for discretionary review to resolve the conflict in our lower court’s case law.”) (emphasis added), *superseded by statute as stated in In re K.L.*, 196 N.C. App. 272, 674 S.E.2d 789 (2009); *Seders v. Powell*, 298 N.C. 453, 259 S.E.2d 544 (1979) (“We allowed the petition primarily because the opinion of the Court of Appeals is in apparent conflict with another decision of that court[.]”) (emphasis added). Remember that the Supreme Court itself recently said that “[i]t is the institutional role of this Court to provide guidance and clarification when the law is unclear or applied inconsistently.” *State v. Lawrence*, 365 N.C. 506, 511, 723 S.E. 2d 326, 330 (2012).

2. **Trends in the law that need correction:**
   a. If the issue that you raised in the Court of Appeals is part of a troubling pattern either in superior court or the Court of Appeals, be sure to identify that pattern in the PDR.
   b. This would fall under N.C. Gen. Stat. § 7A-31(c)(2), “The cause involves legal principles of major significance to the jurisprudence of the State.”
   c. In *State v. Moore*, 366 N.C. 100, 726 S.E.2d 168 (2012), Danny Pollitt successfully persuaded the North Carolina Supreme Court to grant discretionary review by showing that there was an “alarming and growing pattern in Court of Appeals case law” on the State’s use of defendants’ right to silence for impeachment purposes. Specifically, Danny showed that “in the past five years, the Court of Appeals has issued 9 published decisions holding the very error committed in this case was error but not prejudicial error or plain error and 0 decisions holding the error was prejudicial or plain error.” Danny also pointed out that Court of Appeals case law reflected “unbalanced results” and a statistical pattern that was “astonishing.”
3. Unjust results that warrant intervention:

   a. If the Court of Appeals issues an opinion that is patently unjust, consider filing a PDR that emphasizes how unfair the decision is.
   b. This would fall under N.C. Gen. Stat. § 7A-31(c)(1), “The subject matter of the appeal has significant public interest.”
   c. In *State v. Bean*, No. COA12-697, slip op. (N.C. Ct. App. Dec. 18, 2012), Danny Pollitt successfully convinced the North Carolina Supreme Court to order the Court of Appeals to grant plain error review in his case. Here is the second paragraph of his PDR: “Briefly, this case cries out for this Court to exercise its ‘institutional role…to provide guidance and clarification when the law is unclear or applied inconsistently’ in the Court of Appeals. *State v. Lawrence*, ___ N.C. ___, 723 S.E. 2d 326, 330 (2012). Here, the Court of Appeals has unlawfully refused to give any appellate review of any kind, including plain error review, to 3 appellate arguments properly brought before it for plain error appellate review by an appealing defendant sentenced to life imprisonment without parole. The Court of Appeals’ decision to deny any and all appellate review of defendant’s appellate arguments is completely inconsistent with this Court’s established law and even the Court of Appeals’ own usual practice.”

**Specific Issues that Warrant Discretionary Review:** The following issues are examples of arguments that arguably should be reviewed in the Supreme Court of North Carolina.

4. Whether an instructional error is preserved for appellate review when the trial court deviates from a pattern instruction that it identified during the charge conference:

   a. This would fall under N.C. Gen. Stat. § 7A-31(c)(3), “The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.”
   b. In at least two cases, the Court of Appeals has held that when the trial court gives an instruction that differs from the instruction that the court previously agreed to give, the defendant must still object in order to preserve the issue for appeal. *See State v. Wright*, ___ N.C. App. ___, ___, 709 S.E.2d 471, 475 (2011); *State v. Morton*, No. COA05-257, slip op. at 7 (N.C. Ct. App. Feb. 7, 2006) (unpublished). These decisions appear to be in conflict with *State v. Keel*, 333 N.C. 52, 423 S.E.2d 458 (1992), in which the North Carolina Supreme Court held that the defendant was not required to object when the trial court deviated from a pattern instruction that it had previously agreed to give.

5. The failure of the Court of Appeals to review evidentiary issues involving constitutional rights for plain error:

   a. This would fall under N.C. Gen. Stat. § 7A-31(c)(3), “The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.”
   b. For example, the Court of Appeals recently asserted in *State v. Bean*, No. COA12-697-2, slip op. at 4 (N.C. Ct. App. May 21, 2013), that it was barred from reviewing evidentiary issues in criminal cases that involve constitutional violations, even for
plain error. This clearly contradicts State v. Lawrence, 365 N.C. 506, 514, 723 S.E.2d 326, 332 (2012), which specifically held that plain error review is allowed in criminal cases in order “to alleviate the potential harshness of preservation rules.”

6. Whether a general motion to dismiss is sufficient to preserve specific arguments for appeal:

   a. This would fall under N.C. Gen. Stat. § 7A-31(c)(3), “The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.”
   b. There is some language in State v. Jones, ___ N.C. App. ___, ___ 734 S.E.2d 617, 623 (2012), that suggests that a general motion to dismiss is not sufficient to preserve arguments about specific elements on appeal. This would appear to conflict with State v. Smith, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980), and State v. Cox, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981), which hold that when the trial court is presented with a motion to dismiss, it has an independent duty to determine whether there is substantial evidence of every essential element of the crime charged and, thus, a general motion to dismiss put all of the elements in play for purposes of the appeal.