

**PRESENTED AT**

2022 Robert O. Dawson  
Conference on Criminal Appeals

May 25-27, 2022  
Austin, Texas

**Findings of Fact:  
Critical, Yet Underdeveloped, Tools**

**Catherine Greene Burnett**

Catherine Greene Burnett  
South Texas College of Law Houston  
Houston, Texas

cburnett@stcl.edu  
713 .646.1831

## Contents

|   |    |
|---|----|
| <b>I. INTRODUCTION</b>  | 2  |
| A. Words of Thanks  | 2  |
| B. Paper’s Goals  | 2  |
| <b>II. STANDARDS OF REVIEW</b>  | 2  |
| A. The Standards of Review / Deference Continuum                      | 2  |
| B. Why Differing Standards Exist                                      | 3  |
| C. De Novo Review   | 3  |
| 1. Examples – Purely Legal Questions                                  | 3  |
| 2. The “Mixed Question” Muddle  | 3  |
| D. Reasonableness Review  | 4  |
| E. Abuse of Discretion Review   | 4  |
| <b>III. STRUCTURAL AND HARMLESS ERROR ANALYSIS</b>                    | 5  |
| A. Structural Error: A Game Changer                                   | 5  |
| B. TRAP 44.2: The Critical Framework                                  | 5  |
| 1. Constitutional Error Required for Reversal                         | 5  |
| 2. Harm Analysis  | 6  |
| 3. Non-Constitutional Error Under TRAP 44.2(b)                        | 6  |
| <b>IV. FINDINGS OF FACT -- IN THE TRIAL COURT</b>                     | 7  |
| A. Appellate Review in Absence of Findings of Fact                    | 7  |
| B. Contrast with Civil Trial and Appellate Litigation                 | 8  |
| C. When Required in Criminal Trial and Appellate Litigation           | 8  |
| 1. Confessions  | 8  |
| 2. Motions to Suppress  | 8  |
| <b>V. FINDINGS OF FACT – IN WRIT PRACTICE</b>                         | 8  |
| A. Resolving Fact-Based Allegations: Some Foundational Considerations | 9  |
| B. Process Considerations: Introducing Facts on Collateral Review     | 9  |
| a. Methods for Fact Gathering at the Trial Court                      | 9  |
| b. Article 11.07 Variations   | 9  |
| c. Article 11.072 Variations  | 10 |
| C. Strategic Considerations   | 10 |

|              |   |           |
|--------------|---|-----------|
| a.           | Short Term, Mid-Range and Long Term Uses .....                        | 10        |
| b.           | When Findings of Fact are Mission Critical in Habeas Litigation ..... | 11        |
| D.           | When Findings of Fact May Not Be Necessary .....                      | 12        |
| E.           | How to Create “Space” For Their Consideration .....                   | 12        |
| 1.           | Within 180-day window .....   | 13        |
| 2.           | Beyond the 180-day window .....                                       | 13        |
| <b>VI.</b>   | <b>TECHNIQUES FOR DRAFTING PROPOSED FINDINGS OF FACT .....</b>        | <b>13</b> |
| A.           | When to Begin Drafting .....  | 13        |
| 1.           | Trial and Direct Appeal.....  | 13        |
| 2.           | Post Conviction Habeas.....   | 14        |
| B.           | Objecting to Unfavorable Findings .....                               | 14        |
| 1.           | Possible Grounds.....   | 14        |
| 2.           | Procedure in Habeas Litigation .....                                  | 14        |
| a.           | Article 11.07 .....   | 15        |
| b.           | Article 11.072 .....  | 15        |
| C.           | Writing Tips, Techniques, and Suggestions.....                        | 15        |
| 1.           | Create Checklist .....  | 15        |
| 2.           | Use Headings.....   | 16        |
| 3.           | Number Each Proposed Fact.....  | 17        |
| 4.           | Follow the “One Fact per Number” Rule .....                           | 17        |
| 5.           | Support Each Fact with Cite .....                                     | 17        |
| 6.           | Write Persuasively .....  | 17        |
| <b>VIII.</b> | <b>CONCLUSIONS OF LAW .....</b>                                       | <b>18</b> |
| A.           | Pre-trial Motions to Suppress .....                                   | 18        |
| B.           | Article 11.07 Habeas .....  | 18        |
| C.           | Article 11.072 Habeas .....   | 18        |

## I. Introduction

### A. Words of Thanks

In the practice of law, we stand on the shoulders of those coming before us. We attempt to build on their work. We labor to expand on the concepts and theories with which they inspired and intrigued us. This is no less true in the CLE world. So this short paper must start with thanks to Georgetown University Law Center's Writing Center, the Office of the State Prosecuting Attorney, past and present staff attorneys at the Texas Court of Criminal Appeals who are ever ready to assist the habeas bar – Michael Stauffacher and Michael Falkenberg, Baldwin Chin, Andrea Jacobs, David Keltner, and Laurie Ratliff (for tips from the civil side).

### B. Paper's Goals

*The underlying premise of this paper: attorney-drafted findings of fact are an undervalued and underused tool in appellate and habeas advocacy.*

This paper is designed as a persuasive piece set against a backdrop of applicable statutes and relevant case law. It is intended for use equally by defenders and state's attorneys. By its end, the user should be able to answer two foundational questions:

- **Why should the advocate bother with drafting findings of fact**
  - Short term, mid-range and long term uses for findings of fact
  - When findings of fact are mission critical in direct appeals and in habeas litigation
  - How to create “space” for their consideration
- **What are the best techniques for drafting findings of fact**
  - When to begin the drafting process
  - Relationship to underlying pretrial motions on direct appeal and ODI [Order Designating Issues] on collateral attack
    - Adapting and amending fact findings
    - Objecting to Unfavorable Findings
  - Writing tips

The paper is intended as a skills paper addressing “why” and “how to” rather than an academic thesis. It is not a lengthy paper since this is a niche in the larger topic of appellate and habeas litigation and effective advocacy; but, its concepts are no less important due to that brevity.

## II. STANDARDS OF REVIEW

This is a foundational issue for the advocate to consider in determining if there is a viable issue for appeal or collateral attack, and if so, how it needs to be supported. At its most basic level, it defines how much deference will be given to the proceedings below. Standards of review exist on a continuum. While often left unstated by appellate players, identifying the correct standard of review can be *the* determinate for success.

### A. The Standards of Review / Deference Continuum

|                            |                  |                                       |  |                               |                            |
|----------------------------|------------------|---------------------------------------|--|-------------------------------|----------------------------|
| <b>Degree of Deference</b> | No Deference     | Some Deference                        | More Deference                                 | Great Deference               | Total Deference            |
| <b>Standard of Review</b>  | De Novo          | Reasonableness [Substantial Evidence] | Abuse of Discretion                            | Clearly Erroneous             | No Review                  |
| <b>Application Example</b> | Questions of Law | Jury Verdict                          | Credibility Determination; Evidentiary Rulings | Questions of Fact [Supported] | Decisions not to Prosecute |

### B. Why Differing Standards Exist

In a multi-tiered judicial system, appellate courts have a somewhat limited function; they primarily serve to correct legal errors and develop the jurisprudence of an area of law. In contrast, trial court judges resolve contested factual disputes and make credibility determinations regarding the witnesses appearing before them. Consider the standards of review as a general summary of these discrete institutional roles.

### C. De Novo Review

Questions of law are reviewed de novo; the trial court’s assessment of purely legal questions is given no deference by the appellate court.

#### 1. Examples – Purely Legal Questions

- Question of constitutional interpretation – e.g., whether third party may consent to a search, *Hubert v. State*, 312 S.W.3d 554 (Tex. Crim. App. 2010); whether probable cause existed for search, *Guzman v. State*, 955 S.W.2d 85 (Tex. Crim. App. 1997); whether assessment of court costs and DNA record fee violates separation of powers, *Peraza v. State*, 467 S.W.3d 508 (2015)
- Meaning of statutory language – e.g., whether statute limited trial court’s authority to stack sentences. *Williams v. State*, 253 S.W.3d 673 (Tex. Crim. App. 2008)

#### 2. The “Mixed Question” Muddle

The challenge for advocates and reviewing courts is that many appellate issues involve mixed questions of law and fact. And, it is not always easy to distinguish between them. *Robinson v. State*, 377 S.W.3d 712 (Tex. Crim. App. 2012) (was the car’s movement a “turn”, or was it a “merge”).

The United States Supreme Court treats “mixed questions” as cases in which the issue to be resolved is whether the rule of law as applied to the established facts is or is not violated. *Ornelas v. United States*, 517 U.S. 690 (1996). In such cases the historical facts are admitted or established and the rule of law is undisputed. The issue then becomes whether the facts satisfy the relevant constitutional standard.

#### a. Examples – Mixed Law and Fact Questions:

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Drafting Findings of Fact and Conclusions of Law

Also available as part of the eCourse

[2022 Robert O. Dawson eConference on Criminal Appeals](#)

First appeared as part of the conference materials for the  
2022 Robert O. Dawson Conference on Criminal Appeals session  
"Drafting Findings of Fact and Conclusions of Law"