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**Findings of Fact:
Critical, Underused Advocacy Tool**

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Contents

I. Introduction	4
A. Words of Thanks	4
B. Paper’s Goals	4
II. STANDARDS OF REVIEW	4
A. The Standards of Review / Deference Continuum	5
B. Why Differing Standards Exist	5
C. De Novo Review	5
1. Examples – Purely Legal Questions	5
2. The “Mixed Question” Muddle	6
D. Reasonableness Review	8
E. Abuse of Discretion Review	8
III. STRUCTURAL AND HARMLESS ERROR ANALYSIS	9
A. Structural Error	9
B. TRAP 44.2: The Critical Framework	9
1. Constitutional Error Required for Reversal: Tex. R. App. Pro. 44.2 provides:	9
2. Harm Analysis	10
3. Non-Constitutional Error Under TRAP 44.2(b)	10
IV. FINDINGS OF FACT -- IN THE TRIAL COURT	11
A. Appellate Review in Absence of Findings of Fact	12
B. Contrast with Civil Trial and Appellate Litigation	12
C. When Required in Criminal Trial and Appellate Litigation	12
1. Confessions	12
2. Motions to Suppress	12
V. FINDINGS OF FACT – IN WRIT PRACTICE	13
A. Resolving Fact-Based Allegations: Some Foundational Considerations	13
B. Process Considerations: Introducing Facts on Collateral Review	13
a. Methods for Fact Gathering at the Trial Court	13
b. Article 11.07 Variations	14
c. Article 11.072 Variations	14
C. Strategic Considerations	15
a. Short Term, Mid-Range and Long Term Uses for Findings of Fact in Article 11.07 Litigation	15

b.	When Findings of Fact Are Mission Critical in Habeas Litigation	15
D.	When Findings of Fact May Not Be Necessary	16
E.	How to Create “Space” For Their Consideration	17
1.	Within 180-day window	17
2.	Beyond the 180-day window	18
VI.	CHAPTER 64 MOTIONS	18
VII.	TECHNIQUES FOR DRAFTING PROPOSED FINDINGS OF FACT	18
A.	When to Begin Drafting	19
1.	Trial and Direct Appeal	19
2.	Post-Conviction Habeas	20
a.	Relationship to ODI [Order Designating Issues]	20
B.	Objecting to Unfavorable Findings	20
1.	Possible Grounds	20
2.	Procedure in Habeas Litigation	20
a.	Article 11.07	20
b.	Article 11.072	21
C.	Writing Tips, Techniques, and Suggestions	21
1.	Create Checklist.....	21
2.	Use Headings	23
3.	Number Each Proposed Fact	23
4.	Follow the “One Fact per Number” Rule	23
5.	Support Each Fact with Cite	24
6.	Write Persuasively.....	24
VIII.	CONCLUSIONS OF LAW	25
A.	Pre-trial Motions to Suppress.....	25
B.	Article 11.07 Habeas.....	25
C.	Article 11.072 Habeas.....	25

I. Introduction

So much of what we do derives from the work of others and so this paper must begin with an acknowledgement of their work and our appreciation for those contributions to our understanding. This paper is not designed to be an academic treatise. It's goal is to serve as a guide -- a skills-focused paper addressing "why" and "how to" when approaching findings of fact as a criminal law practitioner. It is not lengthy. Findings of Fact occupy a niche in the larger topics of (1) pretrial motion practice and (2) appellate/habeas litigation and effective advocacy. However, its concepts are no less important due to that niche designation or this paper's brevity.

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 staff attorneys at the Texas Court of Criminal Appeals Michael Stauffacher and Michael Falkenberg, Baldwin Chin, Andrea Jacobs, David Keltner, Robert Dubose, 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

II. STANDARDS OF REVIEW

"How will the reviewing court consider and adjudicate our claim?" This is a foundational issue in pretrial motion practice and also for appellate review and post-conviction challenges. Despite its critical nature, careful consideration of the standard of review that appellate courts will use is often skipped over in the rush to reach case specific considerations.

The skillful advocate should take a hard pause and undertake a decision analysis that asks:

- 1) What is the viable legal issue for appeal or collateral attack
- 2) How does it need to be supported **factually**
- 3) Is there a need for specific fact findings to be made at the trial court level
- 4) If so, who should draft them and when

At its most basic level, the standard of review 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

Degree of Deference	No Deference	Deference	More Deference	Great Deference	Total Deference
Standard of Review	De Novo	Reasonableness [Substantial Evidence]	Abuse of Discretion	Clearly Erroneous	No Review
Application Example in Criminal Cases Generally	Questions of Law	Jury's Verdict	Credibility Determination; Many Evidentiary Rulings	Questions of Fact [Supported]	Decision 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. Even that description is an oversimplification, for the higher the court, the less emphasis is placed on individual case error correction. 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 and the relationship between the courts at each level.

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:*

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