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**FINDINGS OF FACT:
Overlooked and Unused**

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**FINDINGS OF FACT:
AN UNDERUSED TOOL FOR THE HABEAS LITIGATOR**

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I. INTRODUCTION

Effective writ advocacy requires the habeas litigator to deploy trial and appellate skills in new combinations.

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 my colleague Baldwin Chin for prior work on this topic that we undertook together, and to the 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

B. Paper's Goals

The underlying premise of this paper: attorney-drafted findings of fact are an undervalued and underused tool in 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 habeas litigation
 - How to create "space" for their consideration
- **What are the best techniques for drafting them**
 - When to begin drafting
 - Relationship to ODI [Order Designating Issues] / Adapting and amending
 - 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 habeas litigation and effective advocacy; but, its concepts are no less important due to that brevity.

C. Paper's Scope

This paper considers the use of attorney-drafted Findings of Fact in habeas applications under both Article 11.07 and 11.072 of the Texas Code of Criminal Procedure although its primary emphasis is on felony post-conviction writ challenges under Article 11.07. There are significant differences between the two statutes in terms of:

- identity of the ultimate fact finder, and
- process for designating factual issues to be resolved.

However, the reasons that counsel should draft findings of fact and the skills and techniques for effectively doing so remain consistent across both provisions.

II. Resolving Fact-Based Allegations: Some Foundational Framing

A. Advocacy Orientation

Habeas litigation demands a blend of the skills of an appellate lawyer with the skills of a trial litigator. Knowledge of the applicable statutes, the case law, the burdens of proof, the timelines, and the potential grounds for relief is critical, of course. But equally significant is developing a case theory, finding the relevant supporting facts, and presenting those facts persuasively -- whether by affidavit, live testimony, or reliance on the trial court's personal recollection.

By their nature, writs are intensely fact specific. Facts are the make or break component of a writ in any individual case. The Findings of Fact in that case are the vehicle for ensuring that those facts receive proper consideration at every stage of the process.

B. Process Considerations

There are a few key differences in litigating felony and misdemeanor post-conviction challenges. How evidence is gathered and methods for presenting it are the same in each process. However, determining what facts are contested and the identity of the ultimate fact finder differs.

1. Methods for Fact Gathering at the Trial Court

Both statutes [Article 11.07 and 11.072] offer multiple options for resolving contested or disputed issues. Each authorize the trial court to order the use of an array of fact gathering tools:

- affidavits,
- depositions,
- interrogatories,
- additional forensic testing, and
- hearings.

Additionally, the trial court has discretion to use personal recollection. TEX. CODE CRIM. PROC. ANN. art. 11.07, §3(d) and art. 11.072, § 6(b). In selecting the method of resolving contested fact issues, the trial court has almost complete discretion under either statute.

2. Article 11.07 Variations

Under Article 11.07, the relevant process flow for Findings of Fact is that the trial court:

- timely designates factual issues to be resolved, then
- "resolves" these issues, typically by entering Findings of Fact,
- which are then ultimately determined by the Texas Court of Criminal Appeals

There is an intellectual tension when drawing the line between the roles of trial court and the Court of Criminal Appeals in answering the question: "Who is the fact finder"? The Court of Criminal Appeals has identified the trial court judge as the "original fact-finder". The Court of Criminal Appeals describes the trial judge's writ functions as being "the collector of the evidence, the organizer of the materials, the decision maker as to what live testimony may be necessary, [and] the factfinder who resolves disputed factual issues...." *Ex parte Navarajo*, 433 S.W.3d 558,

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