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STANDARDS OF REVIEW: What Chance Does My Argument Have of Prevailing on Appeal?

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<u>Appellate Standards of Review in Criminal Cases</u>

The standard of review is often the determining factor for success in an appeal. Why? Because which standard applies to a given issue frequently determines the likelihood of success on appeal.

As the framework in which issues on appeal are reviewed and the merits of arguments assessed, standards of review also distribute power within the judiciary. The more deferential the standard, the more power is retained by the trial court and the less likely the appeal will be successful.

Serving as a lens through which each side focuses and frames their arguments for the reviewing court, the standard of review is each party's metric against which the factual and legal arguments presented in briefs should be considered. This allows for effective formulation of persuasive arguments and also avoids cluttering briefs with meritless assertions, which draw effectiveness from potentially worthy claims.

Frequently, attorneys argue the facts yet fail to discuss the governing standard. Similarly, attorneys – and even courts – state the applicable standard in boilerplate language but do not apply it to the facts of a case.

Including a statement of the standard of review assists in formulating arguments that are properly framed. Omitting a statement of the applicable standard of review can lead to an improper analysis of the issue presented. What follows is a collection of definitions of the standards of review in criminal cases and examples of each.

I.
Reviewing Trial Court Rulings

A.
Abuse of discretion; clearly erroneous; great deference[1]

1.
Defined

A trial court abuses its discretion when its ruling is "without reference to any guiding rules and principles" or, stated another way, the decision is "arbitrary or unreasonable."[2] Decisions falling "within the zone of reasonable disagreement" are not an abuse of discretion.[3]

Under the "clearly erroneous" standard, the trial court's ruling or finding is deferred to unless the record leaves the reviewing court with a "definite and firm conviction" that the trial court committed error.[4]
While the standard of "great deference" does not by definition preclude relief, decisions subject to review under this standard are almost unchallengeable.[5]

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1 Given that the applications of the "great deference" and "clearly erroneous" standards by our State's appellate courts are substantially similar both to each other and to that employed by those same courts when conducting a review of the record for abuse of discretion, these standards will be discussed together. *See Carter v. State*, 309 S.W.3d 31, 38 n.39 (Tex. Crim. App. 2010) (the clearly erroneous standard is "similar to our 'great deference' standard of review"); *Whitsey v. State*, 796 S.W.2d 707, 726 (Tex. Crim. App. 1989) (op. on reh'g) (the "analysis is essentially the same … and, in fact the clearly erroneous and great deference standards engage in the same level of review."); *see also, e.g.*, *Davis v. State*, 329 S.W.3d 798, 815 (Tex. Crim. App. 2010) ("The trial court's determination is accorded great deference and will not be overturned on appeal unless it is clearly erroneous."); *Watkins v. State*, 245 S.W.3d 444, 448 (Tex. Crim. App. 2008) (trial court's factual conclusion reviewed "with great deference, revers[ed] only when that conclusion is, in view of the record as a whole, clearly erroneous.").

2 *Montgomery v. State*, 810 S.W.2d 372, 380, 391-92 (Tex. Crim. App. 1990).

3 *Id.* at 391.

4 *Gibson v. State*, 144 S.W.3d 530, 534 (Tex. Crim. App. 2004).

5 *Watkins*, 245 S.W.3d at 448; *see also Miller-El v. Dretke*, 545 U.S. 231 (2005).

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