

Modification, Reversal and Remand:

Opinions of the Second Court in  
Appeals of Criminal Cases

9/01/08-8/31/09

Taking a Bankruptcy Court Decision to the  
Fort Worth District Courts:

Is The Trip Really Worth It?

Is The Trip Really Worth It?

Probably Not.

Thank You.

Appeals of Convictions:

Not As Fruitless As Bankruptcy—  
But Obviously a Challenge.

# The Cases\*:

Reversal	Modification/Reform
<i>Gray v. State</i> , 2009 Tex. App. LEXIS 5168	<i>Pinkston v. State</i> , 2009 Tex. App. LEXIS 6155
<i>Braun v. State</i> , 2009 Tex. App. LEXIS 1510	<i>Brown v. State</i> , 2009 Tex. App. LEXIS 5555
<i>Shelton v. State</i> , 2009 Tex. App. LEXIS 1506	<i>Jackson v. State</i> , 2009 Tex. App. LEXIS 2689
<i>Aldrich v. State</i> , 296 S.W.3d 225	<i>Primus v. State</i> , 2009 Tex. App. LEXIS 1490
<i>Roof v. State</i> , 2009 Tex. App. LEXIS 1336	<i>Jones v. State</i> , 285 S.W.3d 501
<i>Martinez v. State</i> , 2008 Tex. App. LEXIS 9230	<i>Lee v. State</i> , 2009 Tex. App. LEXIS 1211
	<i>Maddox v. State</i> , 2009 Tex. App. LEXIS 595
	<i>Bollman v. State</i> , 2009 Tex. App. LEXIS 440
	<i>Sanders v. State</i> , 2008 Tex. App. LEXIS 7466

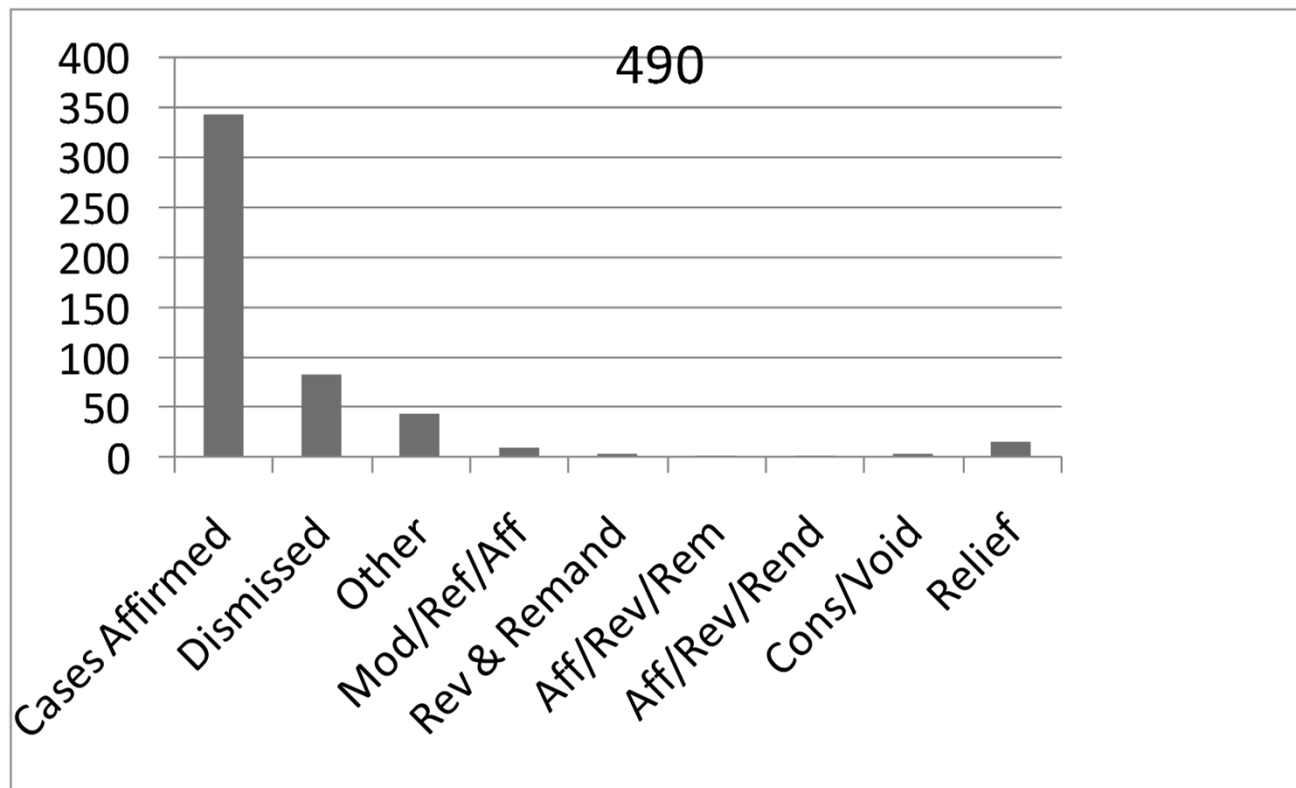
- All but two are Memorandum/Do Not Publish Opinions which do not establish a new rule, alter or modify an existing rule, apply a rule to a novel situation, involve an important jurisprudential issue, criticize existing law or resolves a conflict of authority. TRAP 47.4.
- I could not find the tenth case involving a Modification or Reform.

# The Long Odds Against Relief

<b>Disposition</b>	<b>Number</b>	<b>Percent</b>
Cases Affirmed	343	70.0%
Cases Dismissed	84	17.2%
Cases Otherwise Disposed	44	9.0%
Case Consolidations or Voids	3	0.6%
Cases Modified and/or Reformed and Affirmed	10 (9?)	2.0%
Cases Reversed and Remanded	3	0.6%
Cases Affirmed in Part and Reversed and Remanded in Part	2	0.4%
Cases Affirmed in Part and Reversed and Rendered in Part	1	0.2%
<b>Total</b>	<b>490</b>	<b>100.0%</b>

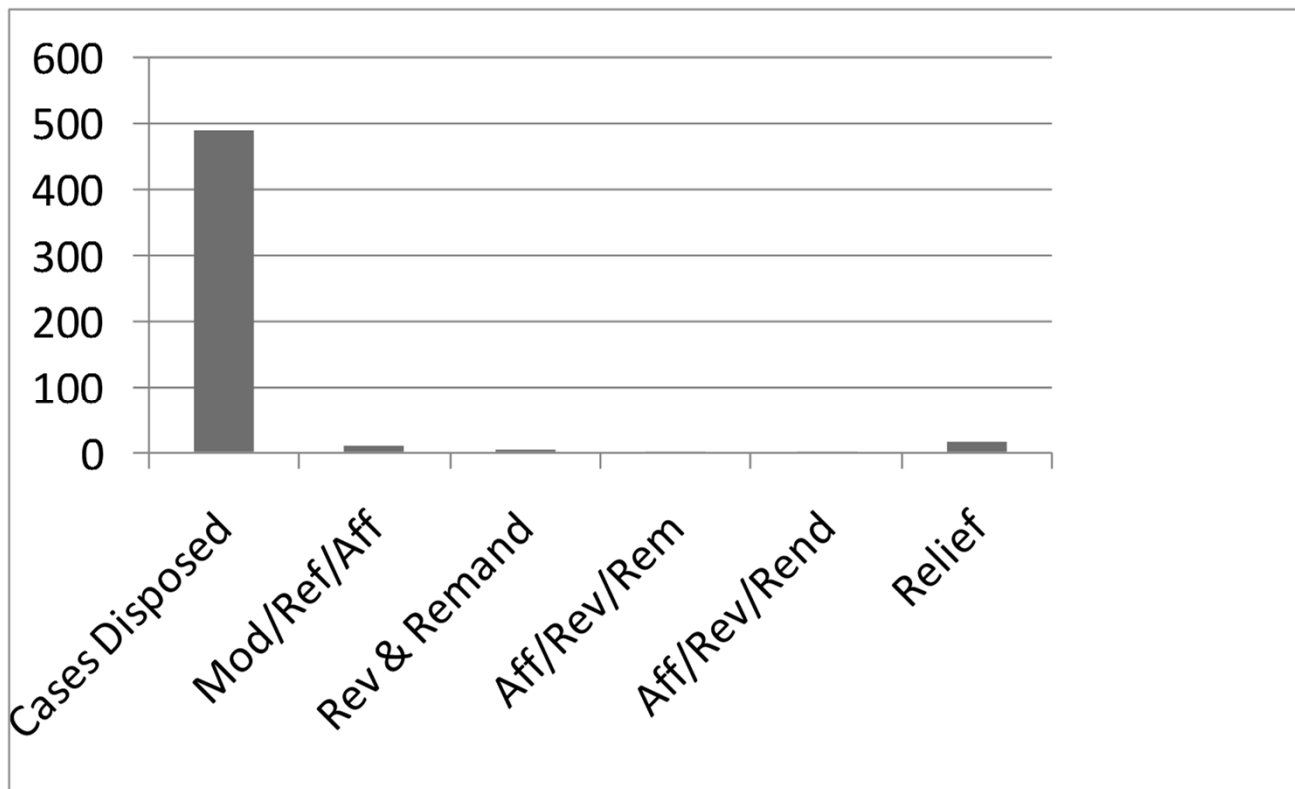
Source: Office of Court Administration, *Activity for Fiscal Year Ended August 31, 2009*

# The Long Odds Against Relief





# The Long Odds Against Relief



# The Long Odds Against Relief: A Perspective

Reversal (some type) civil case: 11.6% \*

Mandamus: 13.7% \*\*

Relief in a criminal case: 3.2% \*

\* Office of Court Administration, *supra*

\*\* Mandamus Study, 2003-2005

# The Cases\*:

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## In Post-Conviction/Post-Submission Evaluations and Negotiations:

Does the trial court matter?

Does the Court of Appeals panel matter?

Does the type of offense matter?

Do we get any hints from question of law or fact?

Do we get any hints from the results?

Do the briefs tell us anything?

Do we get any hints from the Court's analysis?

# Does the trial court matter?

Trial Court	County	Rev./% from TC*	Modif./% from TC*
355	Hood	2/ 8%	1/ 4%
367	Denton	1/ 14%	1/ 14%
16	Denton		1/ 1%
158	Denton	1/ 16%	
297	Tarrant		1/ 1%
371	Tarrant		1/ 3%
372	Tarrant	1/ 1%	
396	Tarrant		1/ 3%
CDC1	Tarrant		1/ 5%
CDC2	Tarrant		1/ 4%
CDC3	Tarrant		1/ 4%
CDC4	Tarrant	1/ 5%	
Total	All	6	9

\* % of cases from said trial court with opinions issued by 2<sup>nd</sup> Court during FY.

# Does the Court of Appeals panel matter?

Justice*	Reverse (Panel/Author)	Modify (Panel/Author)
McCoy	5/1+1PC	3/3PC
Gardner	4/1PC	1/1PC
Dauphinot	4/ 1	4/1+1PC
Walker	3/2	0/0
Livingston	3/1	5/4PC
Cayce	3/1PC (1 Dissent)	4/3PC (1 Dissent)
Meier	1	1/1PC
Other	1	1

\* All justices were on panels which issued between approx. 151-185 opinions, save Justice Meiers, whose service on the Court did not begin until 1/1/09. He was on panels issuing approx. 80 opinions.

# Does the type of offense matter?

Offense	Reversal	Modification/Ref.
Possession/Delivery Marijuana	1	
Possession Controlled Substance	1	
Possession/Intent to Deliver Cocaine		1
Felony DWI	1	
False Statement to Obtain Credit	1	1
Intoxicated Manslaughter	1	
Organized Criminal Activity	1	
Felony Theft		1
Arson		1
Aggravated Sexual Assault		1
Aggravated Robbery		2
Agg. Assault with Deadly Weapon	1	1
Robbery with Injury		1
Felony Murder	1	1

# Do We Get Any Hints from Questions of Law or Fact?

Question	Reversal	Modification/Ref.
Law		1
Procedure	4	7
Evidence insufficient	2	2

Law: The two convictions constitute double jeopardy because the two offenses constitute the same offense.

Procedure: REV: ineffective assistance of counsel; double jeopardy; denial of accomplice instruction; premature intro. of enhancement allegations. MOD: failure to pronounce restitution as part of sentence; clerical error, i.e., difference of offenses between admonishments and judgment; indictment allows for conviction of only one offense (double jeopardy); judgment reflected revocation on version of petition parties litigated; can't cumulate sentences on offenses D might receive in the future; cumulation order is unclear; improper cumulation of sentences;

Evidence: REV: Only evidence shows limited nature of consent; . MOD; evidence shows recovery of merchandise undamaged; no evidence D intended to commit act clearly dangerous to human life (but evidence supports robbery conviction, as he knew they were going to beat someone up);

Red font indicates the State conceded the point or did not contest it.



# Do We Get Any Hints From the Results?

Result	Reversal	Modification/Ref.
New Trial	2	
Remand, w/evidence excluded	1	
Remand: Punishment	2	
Acquit as to one offense/affirm as to other	1	
Modify to reflect correct offense		3
Modify to delete double jeopardy convictions		2
Modify to delete improper cumulation of sentences		2
Modify to correct cumulation		1
Modify to delete restitution		2

Red font suggests cases possibly involving prosecutorial overreaching.

# Do the Briefs Give Us Any Hints?

Cases	Result	Issues Raised	Relief Issue
<i>Aldrich</i>	Rev./Rem.	7	1, 2
<i>Gray</i>	Mod., Rev./Rem.	7	4, 6
<i>Braun</i>	Rev./Rem.	5	2,3
<i>Maddox</i>	Mod.	4	1
<i>Roof, Jones</i>	Rev./Rem.; Mod.	3	2
<i>Sanders</i>	Mod.	3	3
<i>Martinez, Bollman</i>	Rev.; Reform	2	1
<i>Pinkston, Lee</i>	Mod.	2	2
<i>Shelton, Brown</i>	Rev./Rem; Mod.	1	1
<i>Jackson, Primus</i>	Modified	Anders*	Anders*

\* 43 *Anders* briefs filed in FY; 2/43=4.65%, v. 3.2% overall.

# Do the Briefs Give Us Any Hints?

The *Anders* Feint.

Cases with relief with on *Anders* Briefs-- 2

Cases with *Anders* Briefs-- 43

Likelihood of relief with *Anders* Brief: 4.65%

# Do the Briefs Give Us Any Hints?

The *Anders* Feint.

Likelihood of relief:

with <i>Anders</i> Brief:	4.65%
with regular Brief:	3.2%

# Do the Briefs Give Us Any Hints?

The *Anders* Feint.

Improved Chances of Relief with *Anders* Brief:

45%\*

\*4.65% rate of success with *Anders* Brief divided by 3.2% chance of relief overall

# Do the Briefs Give Us Any Hints?

- 1) In nine of the fifteen cases, the Defendant raised 3 or fewer issues.
- 2) In six of the fifteen cases, the winning issue was among the first two issues raised.  
Some Justices confirmed they typically see fewer issues in criminal cases than in civil cases.

## Other suggestions:

- 1) Make use of headings and subheadings, and incorporate the same in your Table of Contents.
- 2) Don't use the Bryan Garner introduction.
- 3) State the Issues as statements, not as questions.
- 4) Write in the active voice.
- 5) Make use of graphs, charts and pictures.
- 6) Consider the results of the survey of appellate justices conducted by the SBOT Appellate Section this last year (<http://www.tex-app.org/judicialsurvey.pdf> ).
- 7) Rely on authority from the Second Court.

# Do We Get Any Hints from the Court's Opinions?

- 1) Preserve Error
- 2) Put the Court in Charge on the Evidence
- 3) As Mentioned Above, Most of the Relief Comes on Cases Which Don't Decide Anything New.

# Hints from the Court's Opinions: Preserve Error

In opinions in 52 cases, the Court noted that error had been forfeited or was not preserved (they appreciate the pressure placed on you in the trial courts).

Present the objection or complaint to the trial court, and have the court rule or refuse to rule. TRAP 33.1.

The complaint raised on appeal has to comport with the objection or complaint made to the trial court.



## Complaints Which Can Be Forfeited by Failure to Object:

“Except for complaints involving systemic (or absolute) requirements, or rights that are waivable only, all other complaints, whether constitutional, statutory, or otherwise, are forfeited by failure to comply with rule 33.1(a). Mendez, 138 S.W.3d at 342. Systemic requirements include jurisdiction of the person and subject matter, a penal [\*16] statute's being in compliance with the separation of powers section of the state constitution, a constitutional requirement that a district court conduct its proceedings at the county seat, the constitutional prohibition against ex post facto laws, and certain constitutional restraints on a judge's comments. Saldano v. State, 70 S.W.3d 873, 888-89 (Tex. Crim. App. 2002). Constitutional error that is "structural" and therefore not subject to a harm analysis also seems to fall into this category. See Mendez, 138 S.W.3d at 339-40. The very limited class of structural, constitutional errors includes the total deprivation of counsel at trial, lack of an impartial trial judge, the unlawful exclusion of members of the defendant's race from a grand jury, the denial of the right to self-representation at trial, the denial of the right to a public trial, and an instruction that erroneously lowers the burden of proof for conviction below the "beyond a reasonable doubt" standard. Johnson v. State, 169 S.W.3d 223, 235 (Tex. Crim. App. 2005) (citing Johnson v. U.S., 520 U.S. 461, 468-69, 117 S. Ct. 1544, 1549-50, 137 L. Ed. 2d 718 (1997)).” Perez v. State, 2009 Tex. App. LEXIS 450, \*15-16 (Tex. App.—Fort Worth January 22, 2009, no pet.).

## Examples of Complaints Which Can be Raised for the First Time on Appeal:

**Double Jeopardy.** “Because of the fundamental nature of double jeopardy protections, however, a double jeopardy claim may be raised for the first time on appeal or for the first time on collateral attack when the double jeopardy violation is clearly apparent on the face of the record and when the enforcement of the usual rules of procedural default serves no legitimate state interests. [cases cited]. A multiple-punishment double jeopardy violation is clearly apparent on the face of the record when the record shows multiple punishments resulting from the commission of a single act that violated two separate penal statutes, one of which is subsumed in the other. [cases cited].” *Lee v. State*, 2009 Tex. App. LEXIS 1211, \*11 (Tex. App.—Fort Worth February 16, 2009, no pet.);

**Art. 26.13 Warnings on a Guilty Plea.** “Article 26.13 requires a trial court, prior to accepting a guilty plea, to notify a defendant of various facts and conditions related to the plea. *See id.*; *Bessey v. State*, 239 S.W.3d 809, 812 (Tex. Crim. App. 2007). The trial court's failure to comply with such requirements may be raised for the first time on appeal. *See Bessey*, 239 S.W.3d at 812-13 (characterizing admonishments under article 26.13 as a "waivable-only right," meaning that it "cannot be forfeited and may be raised for the first time on appeal unless it is expressly waived").” *Garcia v. State*, 2009 Tex. App. LEXIS 5501, \*3 (Tex. App.—Fort Worth July 16, 2009, no pet.)

# Hints from the Court's Opinions:

Put the Court in Charge on  
the Evidence

# Who Do They Believe: The State or Their Lying Eyes? (Hint: The Court's Eyes Win)

“In [\*9] this case, we have reviewed the videotape of the stop multiple times.

...The State was required to prove by clear and convincing evidence that Shelton's consent to a search of the interior of the vehicle was both positive and unequivocal; in other words, that Shelton left no doubt that he had consented to the search and that his words expressing his consent were, viewing the totality of the circumstances, capable of only one reasonable interpretation. [cases cited]. But a reasonable person standing at the rear of Shelton's vehicle near the trunk could have interpreted Shelton's statements that he would open up the trunk and that he was going to open up the trunk as a limitation to his consent to search, authorizing a search only of the trunk. ...We apply a deferential standard of review to the trial court's determination of historical facts, even when that determination is based on a videotape.[case cited] But this standard does not require that we disregard the videotape entirely when it does not support the trial court's ruling; the trial court could not find facts that the record would not support.” *Shelton v. State*, 2009 Tex. App. LEXIS 1506, \*8-9 (Tex. App.—Fort Worth March 5, 2009).

## They Do Require Some Evidence (But They Won't Ignore Reality)

“Gray asserts that the evidence is legally and factually insufficient because there was no evidence that he intended to commit an act clearly dangerous to human life, nor was there evidence that he had knowledge of Ashford's taking a gun to commit the offense. We agree. ....[We hold] that the evidence is legally insufficient to convict Gray of two counts of felony murder but sufficient to convict him of two counts of robbery [the defendant knew the person he transported was going to beat and take dope from the persons the defendant was taking the other person to see].” *Gray v. State*, 2009 Tex. App. LEXIS 5168, \*18-19 (Tex. App.—Fort Worth July 2, 2009).

# Did I Say They Won't Ignore Reality?

“the record also shows that the complainant, Wal-Mart, recovered the merchandise before Appellant's arrest. There is no evidence that the property was damaged. Accordingly, the trial court abused its discretion by awarding restitution.”

*Primus v. State*, 2009 Tex. App. LEXIS 1490, \*2 (Tex. App.—Fort Worth March 5, 2009).

## And That They Do Require Some Evidence?

“Here, there is no evidence of any former conviction to support the cumulation language in the judgment adjudicating guilt or the granting of the State's motion to cumulate. The State concedes that the trial court abused its discretion by cumulating appellant's sentence in this case with sentences he may receive in the future.” *Bollman v. State*, 2009 Tex. App. LEXIS 440, \*14 (Tex. App.—Fort Worth January 22, 2008).

# What Do We Learn?

- 1) You have a high hill to climb. Look for every edge you can get.
- 2) You will have to play shortstop, especially on non-esoteric, frustrating stuff (procedure). Don't get frustrated, preserve the error.
- 3) Take advantage of prosecutorial overreaching (too much restitution, charging too serious an offense, seeking double jeopardy, and pursuing improper cumulation of sentences).
- 4) Preserve error (the State will always argue waiver. The Court regularly agrees).
- 5) Limit issues to 1-3, put your best issue first.
- 6) Structure the evidentiary issues to put the Court of Appeals in the driver's seat:
  - a) Force the focus of the case so that the only evidence is evidence the Court can evaluate for itself (videotape, documents, other things that witness credibility does not matter on);
  - b) Focus on when there is no evidence to support an essential element of the crime (no evidence the defendant knew the accomplice had a gun; the only evidence showed the goods were returned unharmed)
  - c) Focus on the lack of prior convictions.



Thank You.