

# Saving the Day Through Post-Trial Error Preservation Ambushes

University of Texas School of Law  
29<sup>th</sup> Annual Conference on State and Federal Appeals

Austin, Texas  
June 20-21, 2019

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## Resources

- Bloch, *Preserving Error-Different Rules for Questions of Law?*, SBOT 32<sup>nd</sup> Annual Advanced Civil Appellate Practice Course (2018)
- Bloch/Buntz, *Unwaivable Error and Arguments That Still Work Even if You Think of Them —But Have to Raise—on Appeal*, SBOT 29th Annual Advanced Civil Appellate Practice Course (2015)
- Hayes, *Selling Your Case at Trial, Selecting Appellate Issues to Pursue, and Other Implications of Error Preservation Rulings*, p. 55 et seq, ([www.stevhayeslaw.com/ErrorPreservation14.pdf](http://www.stevhayeslaw.com/ErrorPreservation14.pdf), 2018)
- Ho, Simons, Frost, Busby, Oldham, Timms, *Splits Among the State Appellate Courts*, SBOT 32<sup>nd</sup> Annual Advanced Civil Appellate Practice (2018)
- Summary Judgment Practice (both cited 100+ times, in libraries of various courts of appeals):
  - Patton, *Summary Judgment Practice in Texas*, LexisNexis;
  - Hittner & Liberato, *Summary Judgments in Texas*, 60 Hous. L. Rev. 1 (2019)

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## Saving the Day Post-Trial: Sources

Here are the sources of some case-saving ambushes—some must be sprung in the trial court, others as late as appeal:

- Opinions (fundamental error, other stuff, incl. msj stuff).
  - *Watch for Conflicting Authority—Make sure your court of appeals is on your side.*
- Rules—for example:
  - legal/factual sufficiency in a *civil* bench trial (TRAP 33.1(d)).
  - Legal/factual sufficiency in post-verdict motion practice in jury trial (Rule 279)

HOW FAR CAN YOU PUSH THE ENVELOPE?

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## Saving the Day Post-Trial: Sources

If you are desperate enough, consider invoking an exception to the federal rule on error preservation:

Fed. courts may consider unpreserved issue which “involves a purely legal question, refusal to consider it would result in a miscarriage of justice, or its proper resolution is beyond doubt.” *Vitale v. Keim*, No. 01-95-00401-CV (Houston 1st 8/29/97)

Question: Do state courts already do this without saying so?

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# Complaints You Can First Raise on Appeal

Fundamental error: origin in *Jones v. Black*, 1 Tex. 527, 530 (1846); historical discussion *In the Interest of J.F.C.*, 96 S.W.3d 256, 291 (Tex. 2002) (Dissenting, Hankinson, J.).

Now: “[D]iscredited doctrine . . . ” *Tamez* (2006); *B.L.D.* (2013)

Only applies:

- Lack of subject matter jurisdiction (but not in mandamus. *Coppola*, 535 ///506, 510 (Tex. 2017); *Ron*, 14-18-00711-CV (14<sup>th</sup>, 2018) )
- Some juvenile delinquency cases, and some issues in parental right termination cases.
- When error directly, adversely affects public generally, as declared by statute or constitution. *Cox v. Johnson*, 638 S.W.2d 867, 868 (Tex. 1982)

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# Complaints You Can First Raise on Appeal

A constitutional argument does not necessarily equal fundamental error—check out virtually any sexually violent predator civil commitment case with error preservation issues.

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## Title search: Saving the Day Through Post-Trial Error Preservation Ambushes

Also available as part of the eCourse

[eSupplement to 2020 Conference on Criminal Appeals](#)

First appeared as part of the conference materials for the  
29<sup>th</sup> Annual Conference on State and Federal Appeals session  
"Error Preservation Ambushes: Infliction and Prevention"