

CRIMINAL APPELLATE CASE ANALYSIS 2018-2019

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State Bar of Texas
HANDLING YOUR FIRST (OR NEXT)
CRIMINAL APPEALS CASE
November 13, 2020

CHAPTER 3

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South Texas College of Law
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Jurisprudence Doctorate
Bachelor of Science

Licenses and Admissions

Board Certified in Criminal Law - 2005

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Chhoungly Keung, 6:11CR00012

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Admitted to the United States Court of Appeals for the Fifth Circuit

Admitted to the Supreme Court of the United States

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The College of the State Bar

National Conference of Bar Foundations Board of Trustees 2017-2020, President
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Smith County Bar Association (Past-President)

Smith County Bar Foundation (Past-President)

Smith County Criminal Defense Lawyer's Association (Past-President)

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Texas Criminal Defense Lawyer's Association

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I. INTRODUCTION

In early 2020, the third review of Texas Courts of Appeal opinions in civil cases was published. Kent Rutter and Natasha Breaux, *Reasons for Reversal in the Texas Courts of Appeals*, 57 *Hous. L. Rev.* 671 (2020). That paper, like two which preceded it looked at the opinions issued by the fourteen Texas Courts of Appeal over a one year period. The paper included an analysis to determine how often and why judgments were reversed; and whether or not the type of proceeding could be used to provide appellate practitioners any factual input based on data to properly advise their clients.

A similar survey has been published for the Texas Court of Criminal Appeals. Hon. Elsa Alcala, *Court of Criminal Appeals "Top Ten" State Bar of Texas Prof. Dev. Program, Advanced Criminal Law Course 39* (2013).

The author is not aware of a similar survey being accomplished for the criminal appellate opinions issued by the Courts of Appeal. When this idea was discussed with the planning committee, there was a strong desire for this type of analysis, which would provide similar, but qualitatively different data than the Office of Court Administration Annual Reports.

The author is indebted to the contributions, encouragement, and assistance provided by the Honorable Justice Diane DeVasto and Deborah Race. Both are experienced appellate attorneys who have practiced in Tyler my entire career.

Finally, I would like to thank Ms. Gabby Jones and Stephen Koehn for

their tireless efforts regarding this massive endeavor. I am extremely fortunate to have Ms. Jones as my legal assistant, especially with the statistical analysis for this project. Ms. Jones was responsible for selecting the statistical software, coordinating the research assignments, and the preparation of the statistical information in this paper. Mr. Koehn is a J.D. candidate at New England Law | Boston. Each of them read hundreds and hundreds of the cases.

II METHODOLOGY

This quantitative study will examine the criminal appellate opinions within the Texas Courts of Criminal Appeals, with a compare and contrast between the fourteen courts. This study will use a spreadsheet that will include different aspects of each case that was heard by one of the fourteen courts. The goal of this study is to understand the difference, if any, in judgements produced by the courts and to determine if any patterns exists within the data that could be used to provide appellate practitioners with factual input to properly advise clients.

A. Data Collection

For this study, the target population are the criminal appellate practitioners in the state of Texas. The data of the study was chosen in an effort to include a mass amount of cases among the fourteen courts. Because the case study examined cases over one judicial fiscal year, the cases were chosen from September 1, 2018 through August 31, 2019. Cases were sorted by the date the opinion was issued, a

criminal cause number, and was decided on by one of the fourteen courts. This study used both the Texas Judicial Branch website and Westlaw to gain the initial list of cases, and to view the opinion issued by the courts. This study also used both to additional information on the cases including, but not limited to, Petition for Discretionary Review and case history.

Once the initial list of cases for each court has been compiled, the study can then enter in all case information needed into the spreadsheet which will be used later to analyze the data across columns within a singular court, and across sheets between multiple courts. The process of this study will take an estimate of four to six months to gather and analyze the data. Gathering the data will take the majority of time with the sheer number of cases totaling an estimated four thousand (4,000).

B. Sampling

The unit of analysis for this study are the courts, because the study is focused on the compare and contrast between cases. Therefore, the findings of the research will apply to this specific type of case: criminal post-conviction. This study will use a probability sampling method approach, meaning cases were selected from a complete list and none were excluded. This type of sampling ensures that all cases within the parameters of the study were chosen to gain a higher generalizability. This type of sampling was chosen due to time constraints and convenience. The study uses a type of purposive sampling in which the sample is chosen because of a specific characteristic that is

relevant to the research. Due to the characteristic aspect of purposive sampling, some eligible subjects may not be chosen.

C. Limitations

There are limitations to this study, just as with every research study. The research is limited by the sampling methodology, and the threat to internal validity. The fact that this study uses purposive nonprobability sampling excludes the random sample selection Rennison, C. M., & Hart, T. C. Research methods in criminal justice and criminology. Los Angeles, CA: Sage. (2019). This study chooses a very specific type of case: criminal basis and reviewed by the Courts of Appeals. Purposive sampling involves the segregating of a part of the population and then confining the sample of the study to that part through control means (Snedecor, 1939). This confinement or segregation creates a sample bias in the study. Purposive sampling involves the segregating of a part of the population and then confining the sample of the study to that part through control means. Snedecor, G. W. Design of sampling experiments in the social sciences. *Journal of Farm Economics*, 21(4), 846-855. <https://doi.org/10.2307/1231789> (1939). This confinement or segregation creates a sample bias in the study. The internal validity limitation is recognized through the number of researchers working on the study and the lack of operationalization for the defining of some areas of data. For instance, how to organize or define the issues presented within each case of the

study.

D. Data Analysis

This study will use the analysis program SPSS to conduct the data analysis which will provide a statistical analysis between and within courts. The SPSS program will show if there is any statistical significance in the data among the courts, and allow the researchers to determine what such a significance means for the practitioners. This study will also use the charts and graphs provided through Microsoft Excel to create the visual aspects of the comparisons of the data within each court. Using pie charts, this study will show the overall aspects of each court including the percentage of cases found within each trial county and the percentages of the offenses found within the year decided on by the courts. Bar charts are used to compare the judgments produced by each court which will show any patterns found between the courts including, for example, if one court is more likely to affirm cases than another. Eventually, using the SPSS program, the data will reveal the comparison in judgment and if there is a statistical significance between the courts during specific months of the judicial fiscal year. Overall the data analysis of this study will reveal statistical values to provide appellate practitioners with factual input to better advise clients.

III. BASIC PARAMETERS

In general, interlocutory appeals are the exception in criminal post-conviction matters, while in the civil

world appear to be common and can include appeals of a summary judgment, default judgment, or temporary injunction are common. The survey attempts to capture data on each criminal appeal for a one year period. Appeals from juvenile matters and expunctions or non-disclosures were excluded.

A. Time Period

This survey began with a review and data gathering of 4,123 opinions in criminal matters from the fourteen courts of appeal from September 1, 2018 through August 31, 2019. This time period was selected to coincide with a judicial year as determined by the Texas Office of Court Administration, to have cases reviewed by the Court of Criminal Appeals completed, and to determine if there was any appreciable difference in outcome following the 2018 judicial election with new justices beginning their service on January 1, 2019.

B. Limited Interlocutory Matters

The closest analogue to a civil appeal from a default or summary judgment would be an appeal involving a motion to quash a charging document or a motion to suppress. However, that is only an analogy because in many cases involving a motion to suppress, there is a final judgment entered which can be appealed.

C. Pro se Litigation

There were a surprising large

number of matters involving pro se litigation. The cases can be broken down into: mandamus actions; out of time appeals; appeals of writs; and very few appeals when a court actually had jurisdiction. Many of the mandamus actions were filed in an appellate court which had no jurisdiction over the trial court involved. Almost invariably the cases were denied or dismissed.

D. Anders Briefs

A brief submitted by appointed counsel when there are no nonfrivolous issues to appeal is commonly known as an Anders brief. *Anders v. California*, 386 U.S. 738 (1967). Other topics in this course address when and how an Anders brief should be filed, however there is no denying the simple fact that cases resolved after the filing of an Anders brief account for a sizeable percentage of opinions. The survey did locate cases from several appellaate courts where an Anders brief had been reviewed and returned to the trial court for appointment of new counsel.

E. State Appeals

The State has a limited right to appeal. TEX. CODE CRIM. PROC. 44.01; Tex. R. App. P. 25.2. Again, this topic is covered extensively in a different topic for this course, but a series of cases appealed by the State to the Fourth Court of Appeals (San Antonio) caused that court's data to reflect significantly more cases than the other courts.

IV. DATA COLLECTED

The spreadsheets are not included in this paper due to the sheer volume of information. However, a discussion of the types of data is important to understand the methodology of this review.

A. Docket Information

Each case included the court of appeals assigned number, the style of the case, the date of the opinion, the trial court county and court, whether the underlying case was a felony or misdemeanor offense, whether or not the opinion was published, and the authoring justice.

B. Pro se Proceedings

Cases were included in this category if the appellant proceeded without an attorney. An Anders brief was not included in this category because an attorney reviewed the record and simply was unable to locate a nonfrivolous issue.

C. Offense Types

Generally, the offense being appealed was taken from the applicable Penal Code or other offense. For analysis, the cases were generally broken down into categories. The full list includes approximately 70 categories of offense from capital murder to speeding. Burglary offenses included buildings, homes and vehicles; drug offenses included possession, possession with intent to distribute and

distribution without regard to the underlying substance; sex offenses included indecency by contact or exposure, sexual assault and aggravated sexual assault. This was necessary to have a manageable number of offense types.

While the specific criminal offense was identified in most written opinions, there were many cases where this was not possible. Mandamus opinions generally made no reference to the underlying offense and dealt with the subject of the mandamus.

D. Type of Trial

The trial proceedings were broken into ten categories for analysis. Jury trials, bench trials, open plea, plea agreements, mandamus, motion to revoke probation, motion to adjudicate, motion to quash or suppress, motion to dismiss and writs of habeas corpus.

E. Result at Court of Appeals

Largely this category mirrors rule 43.2. The categories include: affirmed, modified, reversed and rendered, reversed and remanded, or dismissed. TEX. R. APP. P. 43.2. Rule 43.2(e) allows the appellate court to vacate the trial court's judgment and dismiss the case. This occurred fewer than a dozen times.

Cases which were affirmed were also divided into affirm with waiver, affirm with harmless error and simply affirm.

Modifications were divided into clerical errors and modifications which affected a monetary value in the judgment.

Reversals were divided into cases where there was a rendering of an acquittal, remand for proceedings, or remand for new punishment proceedings.

Mandamus proceedings were divided into denied, or conditionally granted. During this year no court of appeals actually had to issue a final mandamus following the conditional grant.

Dismissals were categorized into four categories. Dismissals for no jurisdiction or interlocutory appeals were noted. The largest categories of dismissals were either upon motion by the appellant or following the submission of an Anders brief.

F. Further Review

If a petition for discretionary review was filed, the outcome of the petition was noted. If the Court of Criminal Appeals issued an opinion, that also was noted. There were cases where review had been granted and no opinion has issued.

V. ISSUES RAISED

This was the most difficult area to quantify. Texas appellate lawyers can be extremely creative. To aid in a

meaningful analysis, the number of issues was limited to five for each case. The vast majority of cases had three or fewer issues raised. The ones which had more than three or five issues were combined into at most five issues.

As expected, the largest issue raised was sufficiency of the evidence. This category was used when the attack was on the verdict or the punishment assessed. For statistical purposes an issue based on sufficiency of evidence was categorized the same regardless of the stage of trial.

What was surprising was the number of times that ineffective assistance of counsel was raised on direct appeal. In general, courts are reluctant to grant relief when defense counsel does not have the opportunity to explain trial strategy and is still bound by attorney/client privilege. *Strickland v. Washington*, 466 U.S. 668 (1984).

The next largest category dealt with evidentiary matters, again this was simplified for analysis regardless of whether the issue was admission or exclusion of evidence. Because this is nonconstitutional error, reversal must be predicated upon the error affecting the substantial rights of the defendant. TEX. R. APP. P. 44.2(b).

In a similar vein, extraneous offense conduct was raised frequently under Rule 404, which did not see much success. When it was raised as a Constitutional issue related to due process or confrontation, it seemed to

have more thorough analysis by the courts.

Motions to suppress were raised, almost always in conjunction with an underlying charge of DWI or possession of a controlled substance.

Jury charge issues were raised in every appellate court and in most trial court jurisdictions. This has been an area where defendants have seen relief be granted.

Constitutional issues were raised frequently including Due Process, Equal Protection, 4th, 5th, 6th, and 8th Amendments, Brady and Batson.

Issues with the judgment involving either improperly assessed court costs, fines, restitution and clerical errors in the judgment were raised causing modification of judgments. These issues were raised in both a brief on the merits and as part of an Anders brief. Interestingly the Dallas County District Attorney's Office frequently would file a cross-appeal finding a clerical error in the judgment.

VI. RESULTS

As anticipated, the majority of the cases were affirmed by the Courts of Appeal. What was unexpected was the large percentage of cases which resulted in modification for clerical issues and monetary issues.

Half of the courts had between

55% and 85% of their cases arising from a single county within their area. The Texarkana Court of Appeals was the only court with a balance caseload from 20 counties. Some counties had a disproportionate number of cases. Smith County had 167 opinions from two courts of appeal, more than El Paso and Travis Counties.

By case category, sex offenses was either the first or second most frequent type of case in thirteen of the fourteen courts. Assaultive conduct was the second most frequent case type followed by narcotics offenses and homicide and robbery.

Not unexpectedly the single most frequently raised issue was sufficiency of the evidence. It was raised most frequently, and was the only error resulting in a reverse and render opinion.

A Denial of a Motion for New Trial or a Hearing on a Motion for New Trial was the second most frequent issue raised.

Ineffective Assistance of Counsel was raised far more than expected. It was not successful in any case, but was raised frequently.

Jury Charge error was the last most frequently raised issue and had far better success resulting in a number of cases remanded to the trial court. Typically the jury charge omitted a requested lesser-included offense, commented on the weight of the

evidence, or allowed a less than unanimous verdict.

Constitutional issues were raised in a variety of ways. Double Jeopardy was raised and had very good outcomes. Search and seizure issues were raised by the State and defense, and in many cases resulted in a suppression being granted being reversed. Brady and Batson issues were raised, though not as frequently as expected. A trial court limiting voir dire resulted in a reversal each of the times it was raised.

The length of the sentence was attacked through an 8th Amendment framework as well as a sentence proportionality analysis. Unless the punishment assessed fell outside the applicable range, these challenges were not successful. When they were there was also a sufficiency attack on a punishment issue.

Suppression issues were raised in DWI, PCS cases as well as other offenses. Motions to suppress either a defendant's own statement, or that of a co-defendant were frequently raised. The suppression for most of the DWI/PCS cases involved the reason for the initial contact with law enforcement, although this occurred in other types of cases as well, specifically felon in possession of a firearm.

Evidentiary issues were raised, but unless they were combined with a confrontation clause or other constitutional issue, they were unsuccessful.

Clerical issues are still significant. These varied from the assessment of court costs for multiple cases in the same trial proceeding, to incorrect fines being assessed in the written judgment, to the improper assessment of attorney's fees.

Pro se cases were almost uniformly unsuccessful. These include mandamus actions, writs of habeas corpus, and out-of-time appeals.

VII. SURPRISES

The sheer lack of published opinions was astounding. A majority of the justices participating in the opinion must decide whether it will be published or not. TEX. RULE APP. P. 47.2(b). Given the importance of some of the issues raised, and the fact that civil appeals after January 1, 2003 cannot be designated "do not publish" may lead to courts or the rules committee changing rule 47.2.

The Dallas Court of Appeals issued no per curium opinions. Every opinion had an identifiable author. This court was not unique, but was the largest court to operate in this fashion. The Corpus Christi Edinburg, El Paso, Texarkana, and Waco courts also issued no per curium opinions. The remaining courts used per curium opinions for predominantly dismissals, denials, and no jurisdiction cases.

The San Antonio Court of Appeals had a substantial number of

cases which were appealed following a plea agreement. At the time of this writing, we are still attempting to verify if this was from one or two courts in Bexar County, or primarily in Bexar County in general.

The San Antonio Court of Appeals also saw the largest number of appeals by the State of Texas. Far and away the majority of these cases came from Kinney County, and dealt with a judge imposing a "pay to plea" format which resulted in two mandamus cases and 25 other opinions.

The vast majority of the cases dealt with the issues raised, very few cases occurred where the appellate court found waiver by trial counsel, although one suspects that it is raised by the State in a substantial percentage of their briefs.

VIII. CONCLUSIONS

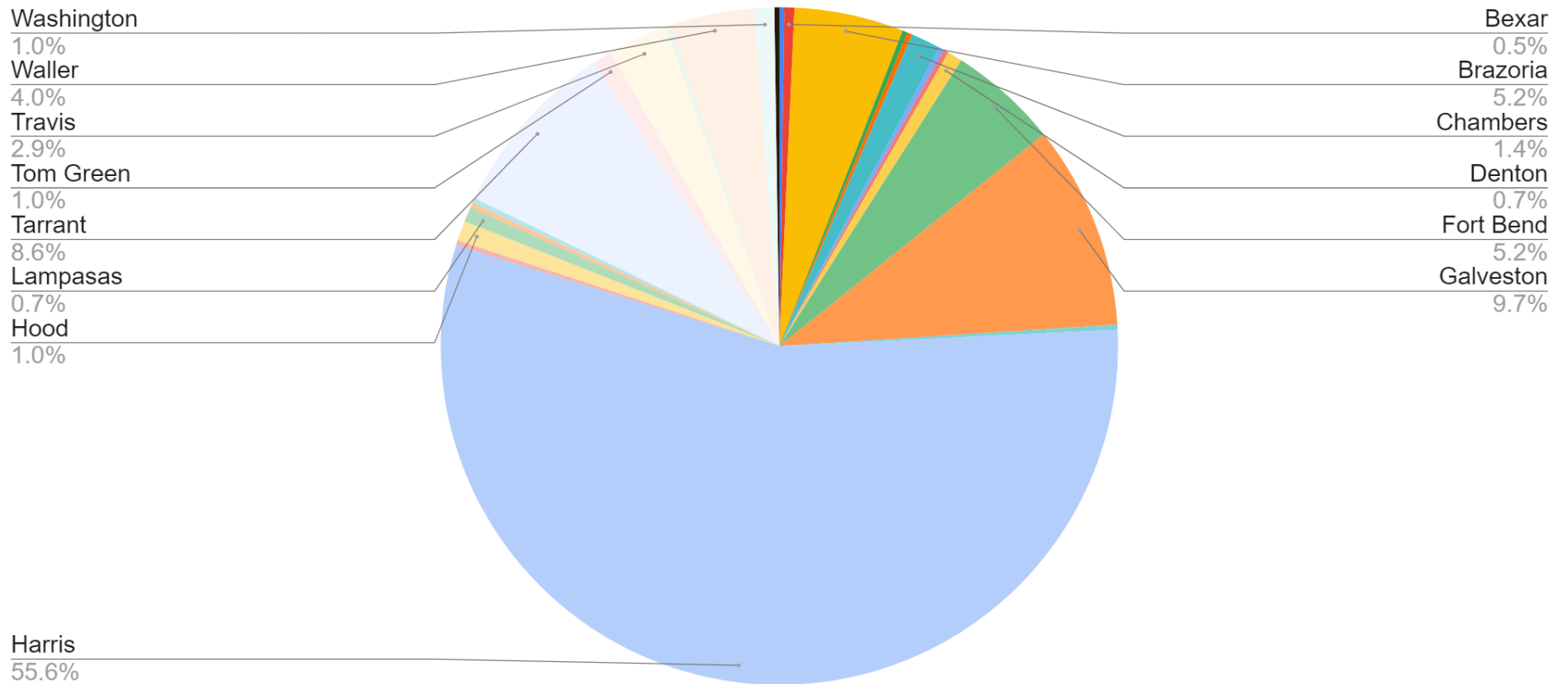
Most direct appeals of judgments in criminal cases are going to be affirmed. If a case does result in relief, it usually occurs in an unpublished opinion. Only 4% of the criminal opinions issued were published. Of those 48% came from the Houston and Texarkana Courts. If Fort Worth and San Antonio are added 67% of the published cases were written by five courts. While the appellate rules encourage, if not require, civil opinions to be published, a majority of the panel must decide to publish a criminal

opinion.

While statistically the State prevailed in the majority of the cases, that does not mean that the work accomplished by the defense bar is meaningless. Even in cases of a modification, that can mean a different parole calculation from the Texas Department of Criminal Justice, or the saving of funds in an inmate trust account. Those small victories make a difference to individuals serving time in TDCJ.

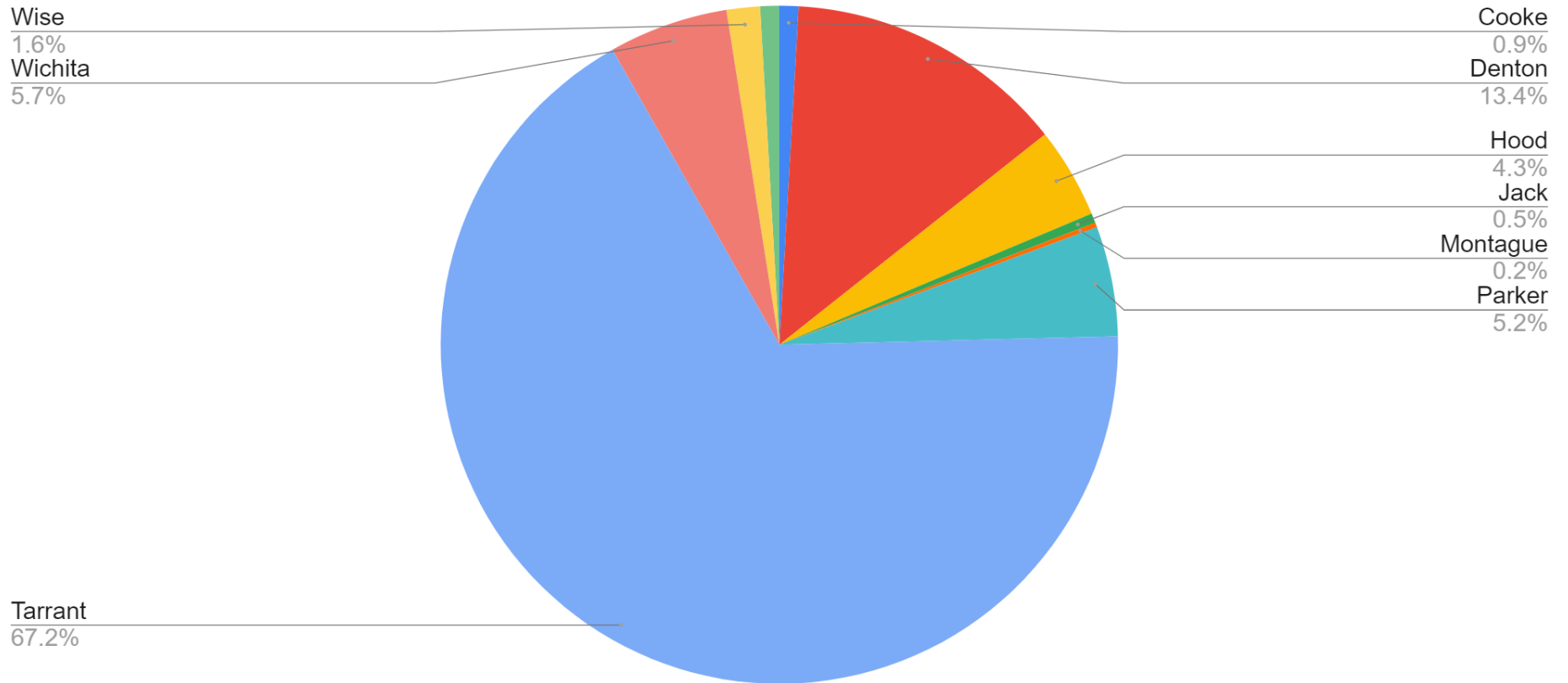
Appendix A - Court of Appeals by Trial Court County

Count of Trial County



1st Court

Count of Trial County



2nd Court

Count of Trial County

Williamson
9.4%

Travis
36.7%

Tom Green
5.6%

Bastrop
0.6%

Bell
18.9%

Blanco
0.6%

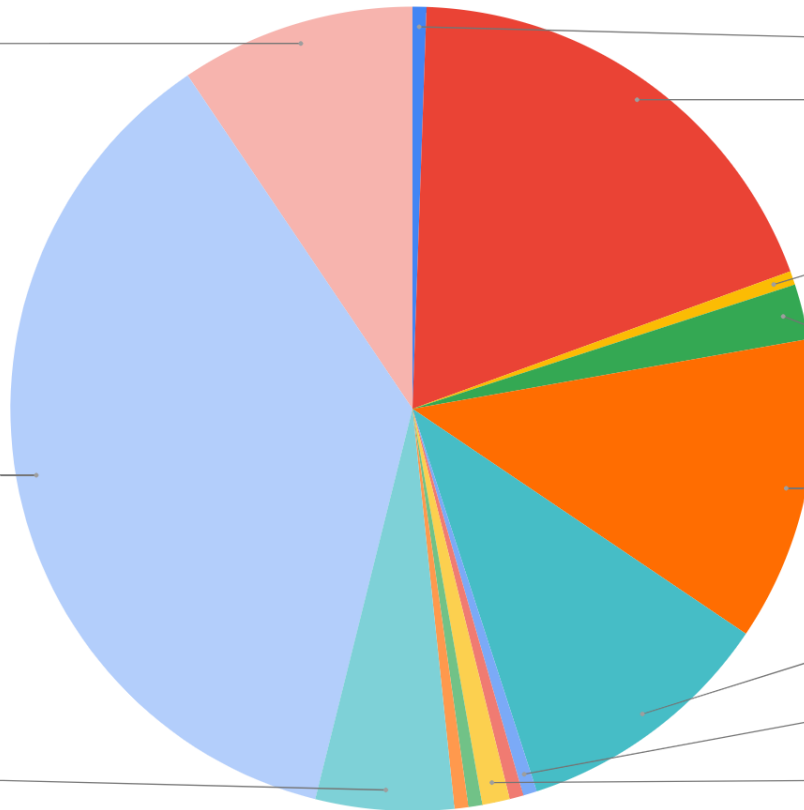
Burnet
2.2%

Comal
12.2%

Hays
10.6%

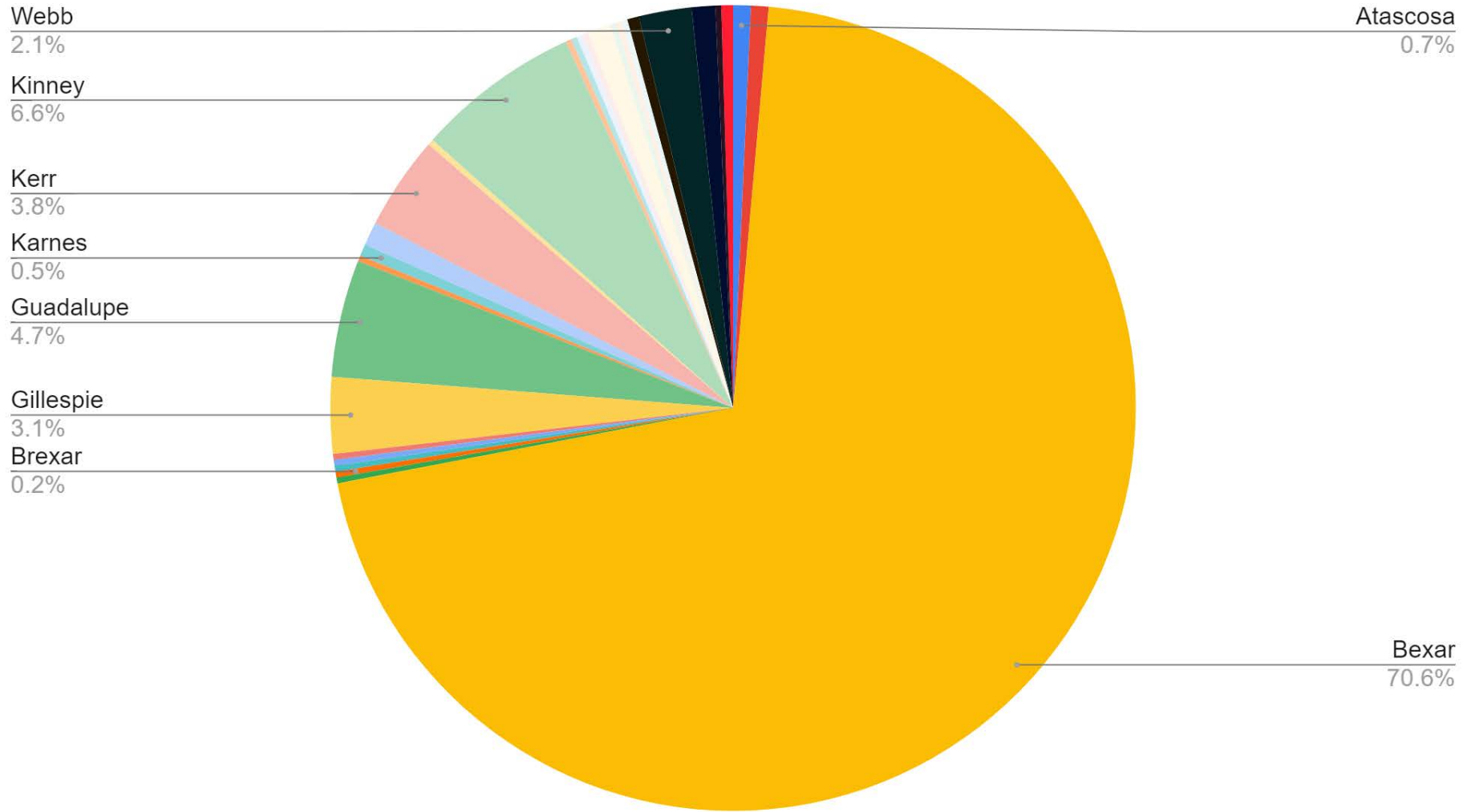
Lampasas
0.6%

Llano
1.1%



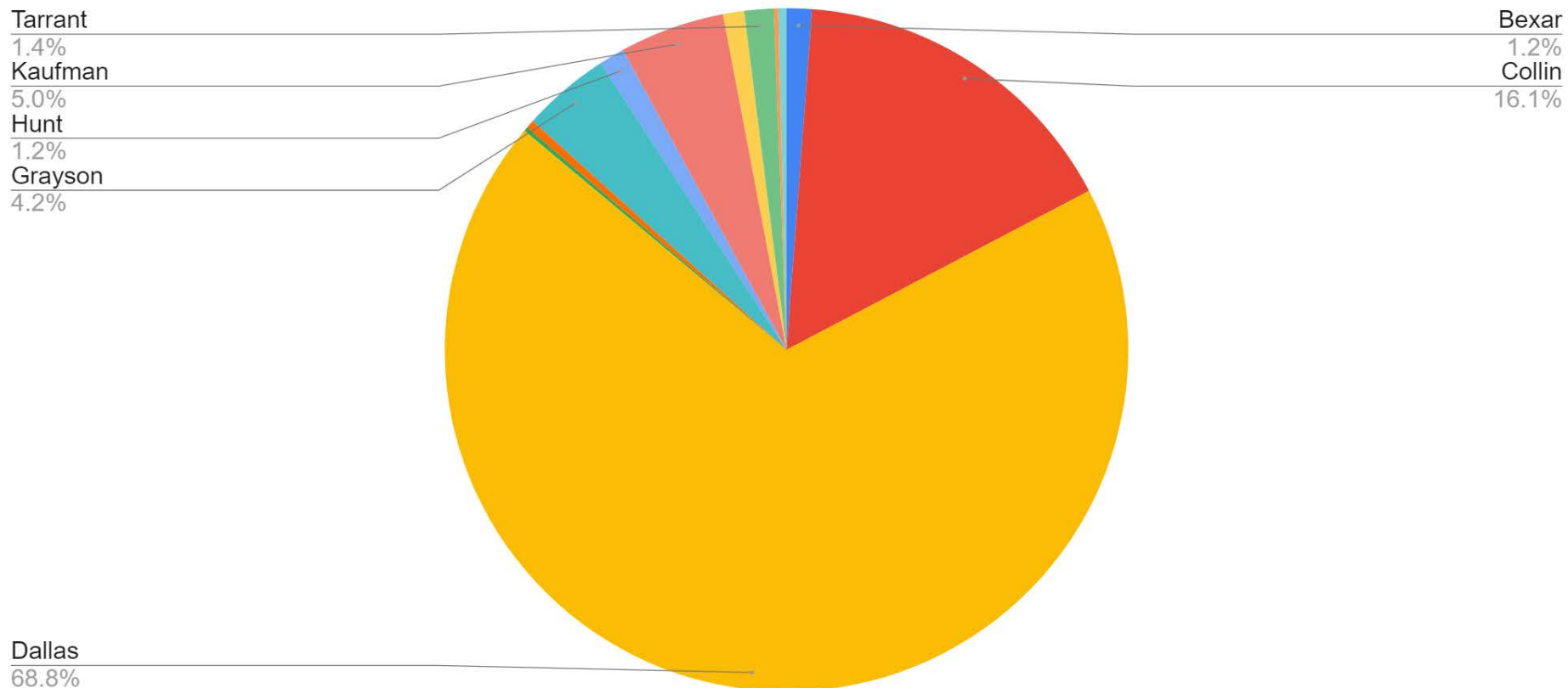
3rd Court

Count of Trial County



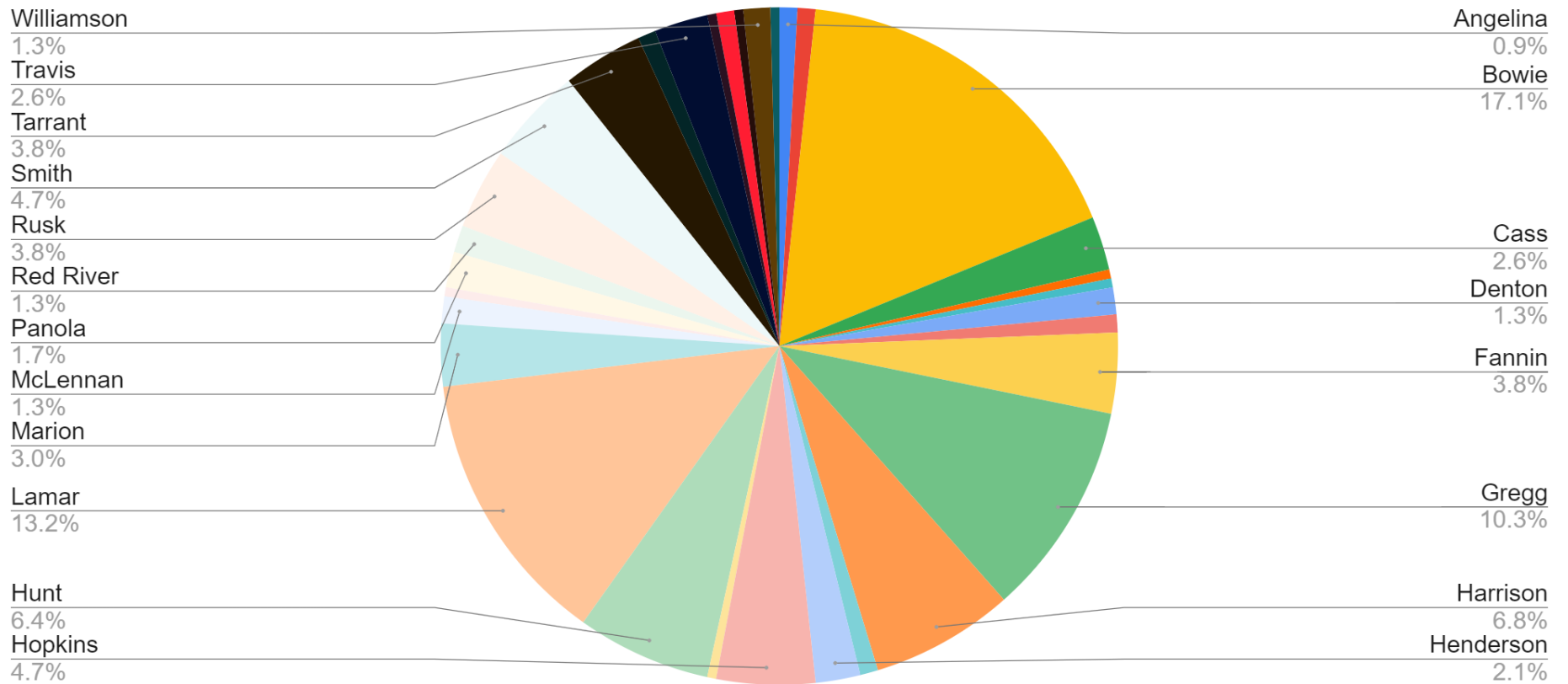
4th Court

Count of Trial County



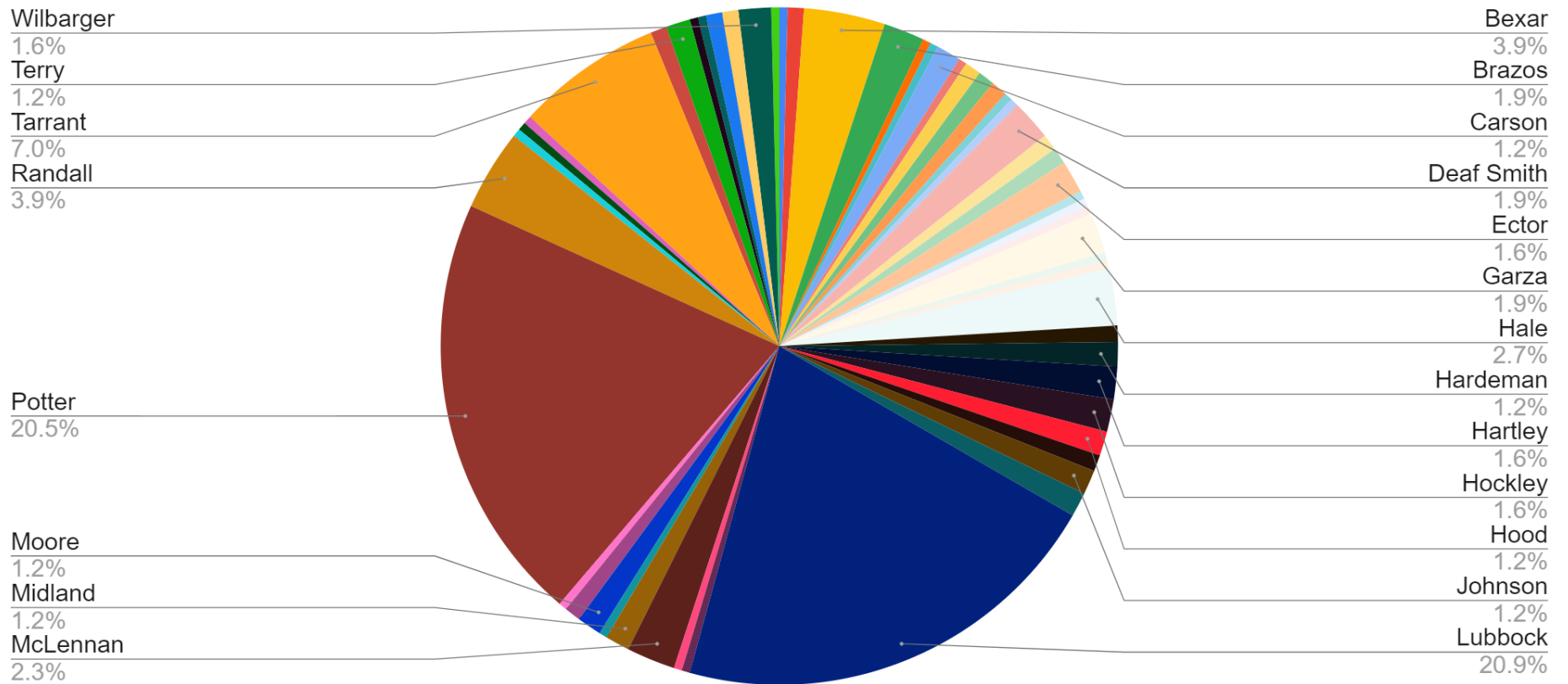
5th Court

Count of Trial County



6th Court

Count of Trial County

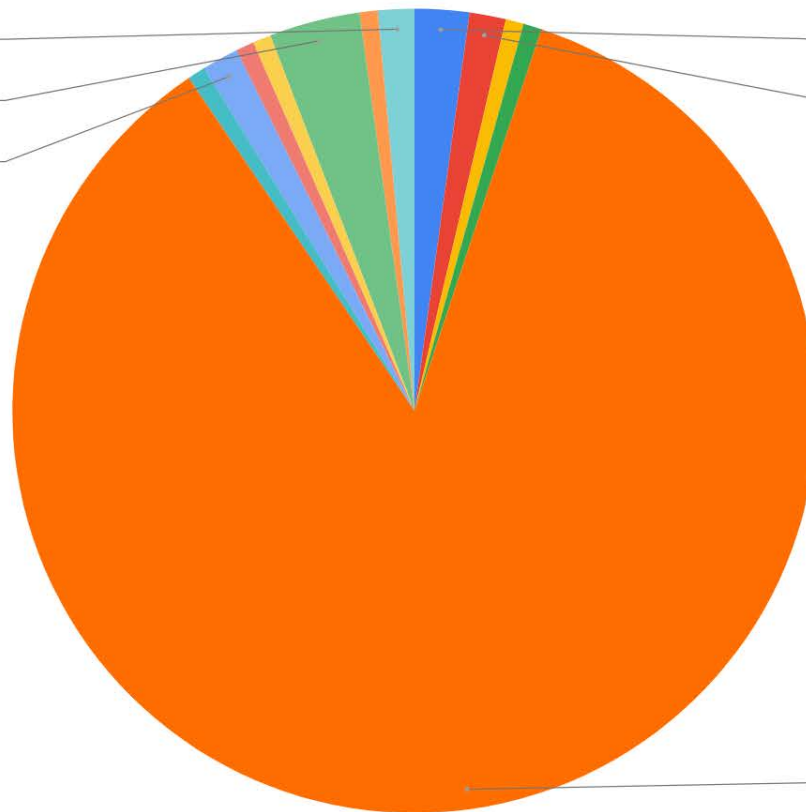


7th Court

Count of Trial County

Ward
1.5%
Tarrant
3.6%
Pecos
1.5%

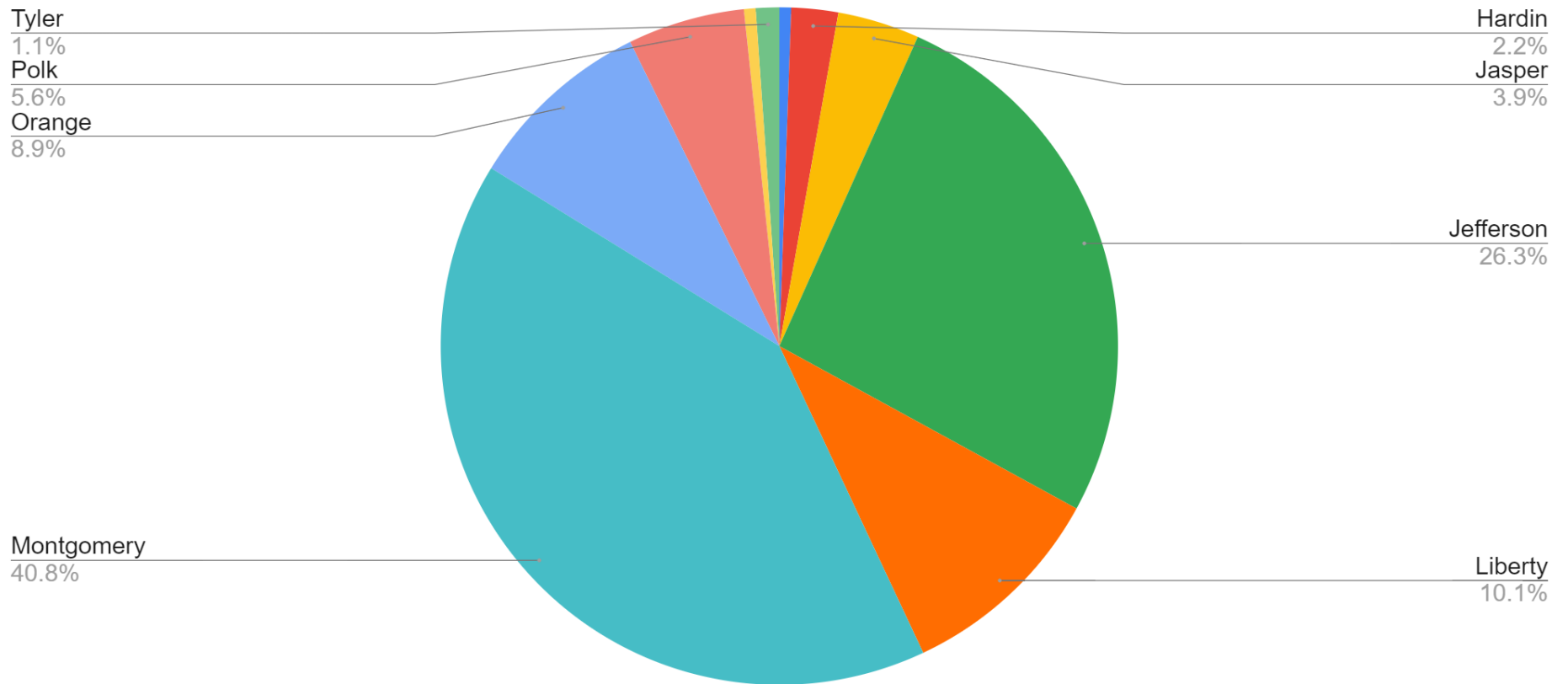
Andrews
2.2%
Brewster
1.5%



El Paso
85.4%

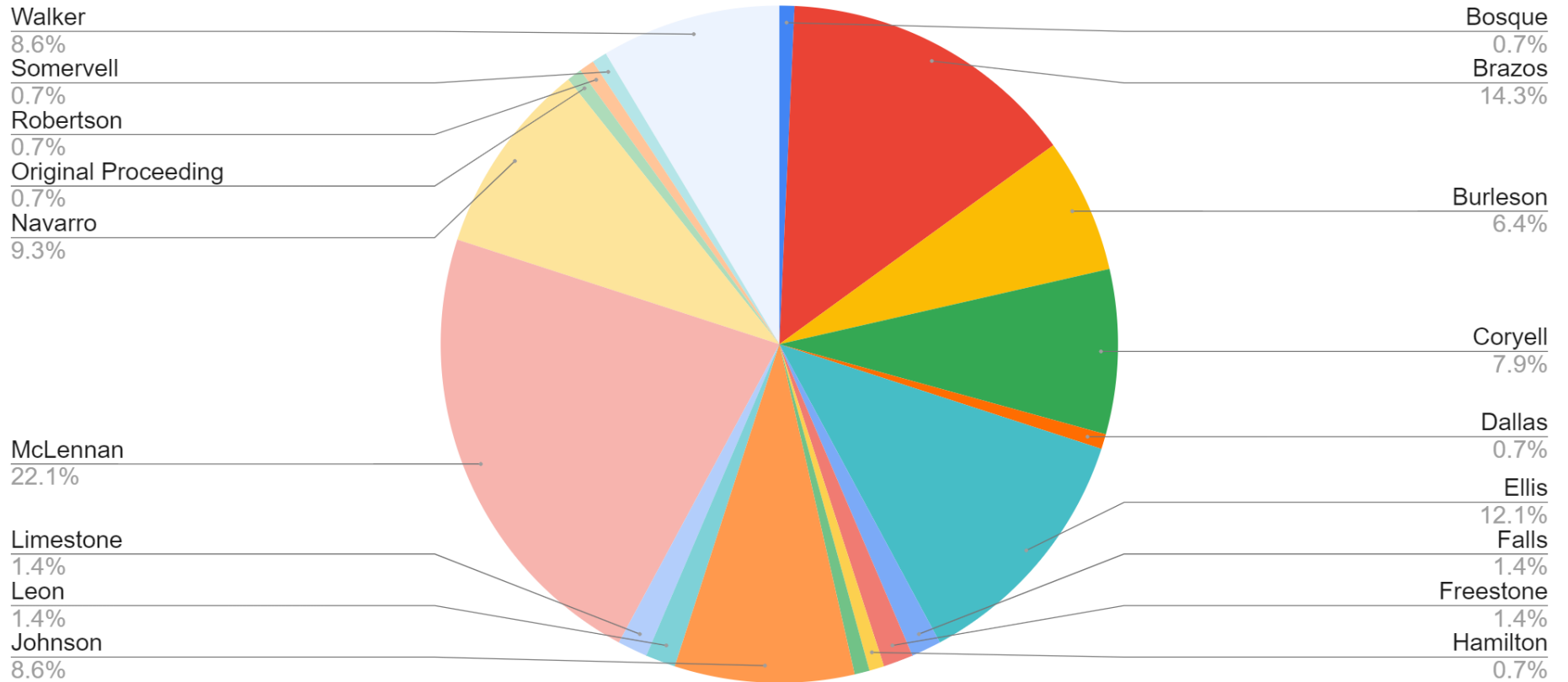
8th Court

Count of Trial County



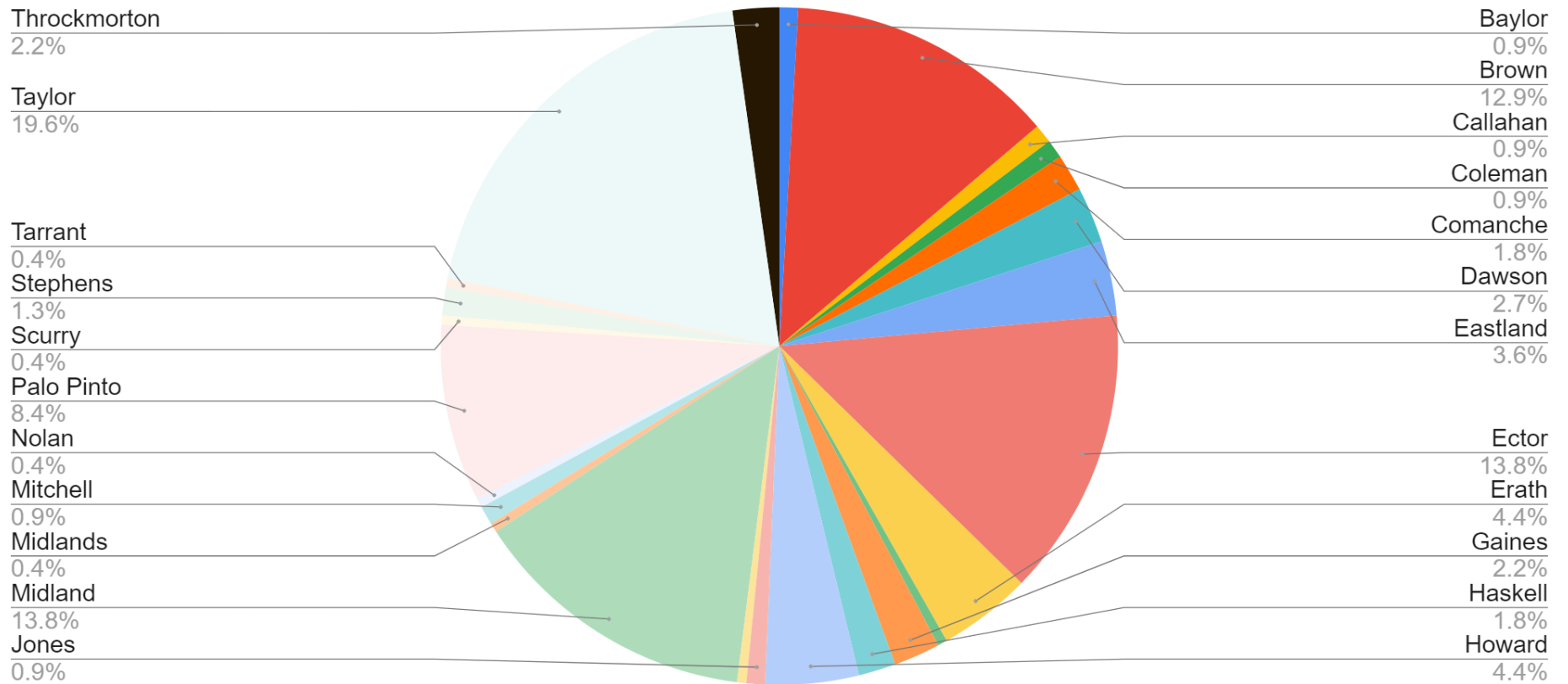
9th Court

Count of Trial County



10th Court

Count of Trial County

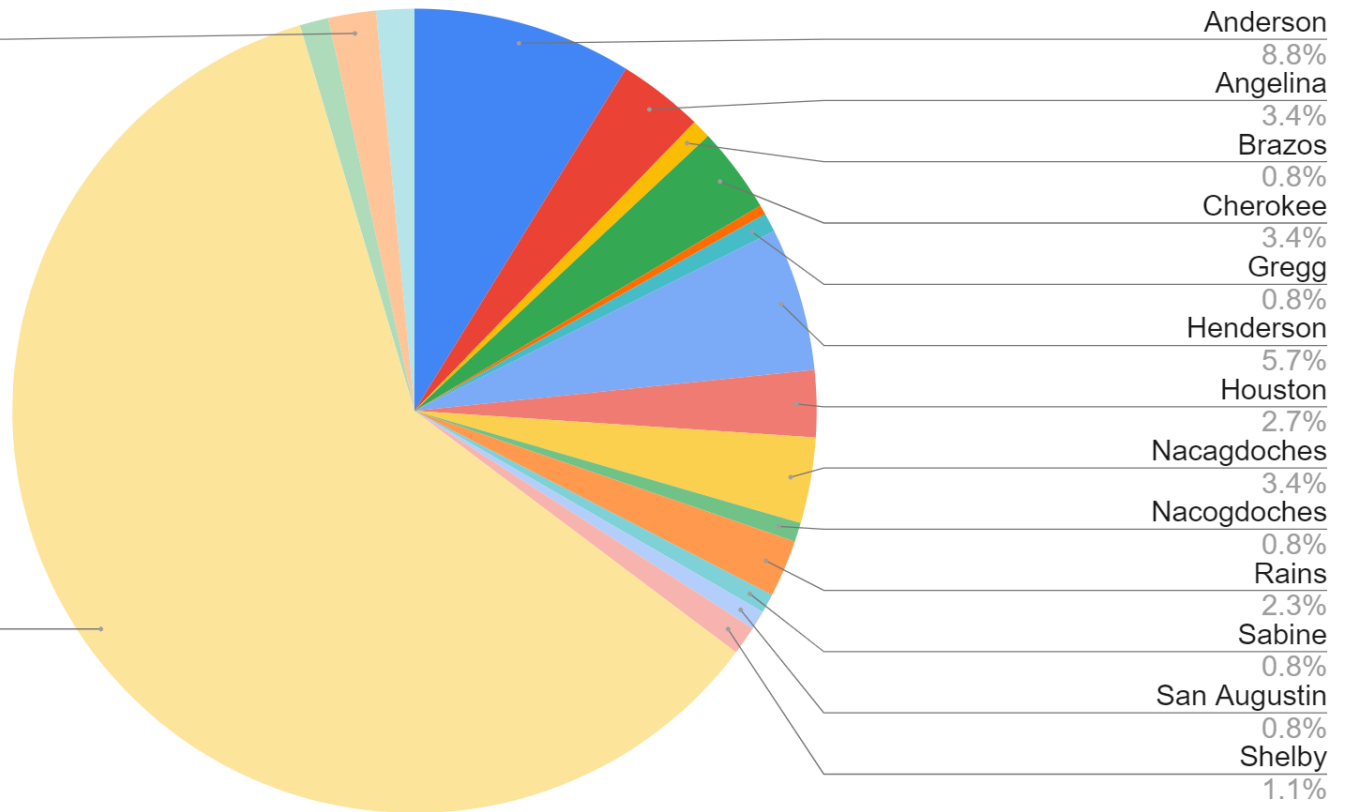


11th Court

Count of Trial County

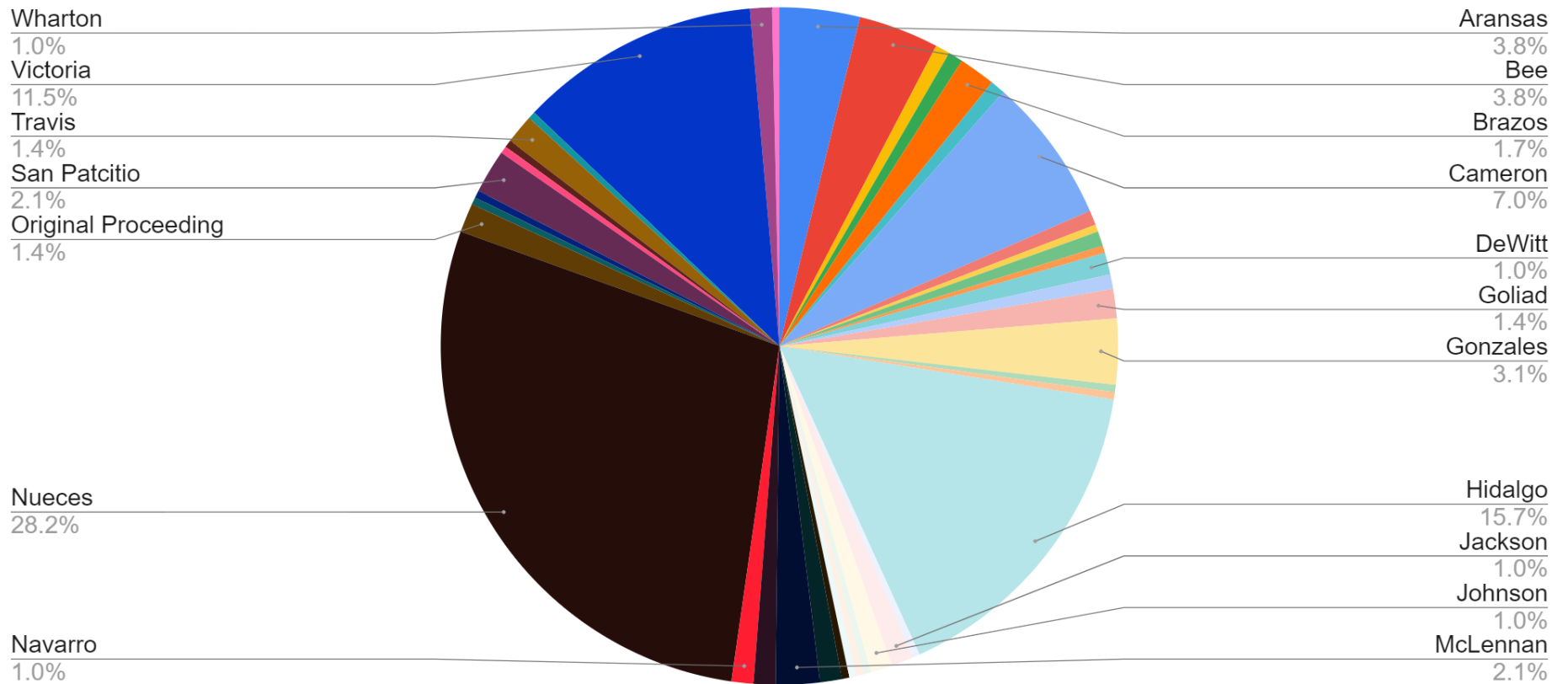
Van Zandt
1.9%

Smith
60.2%



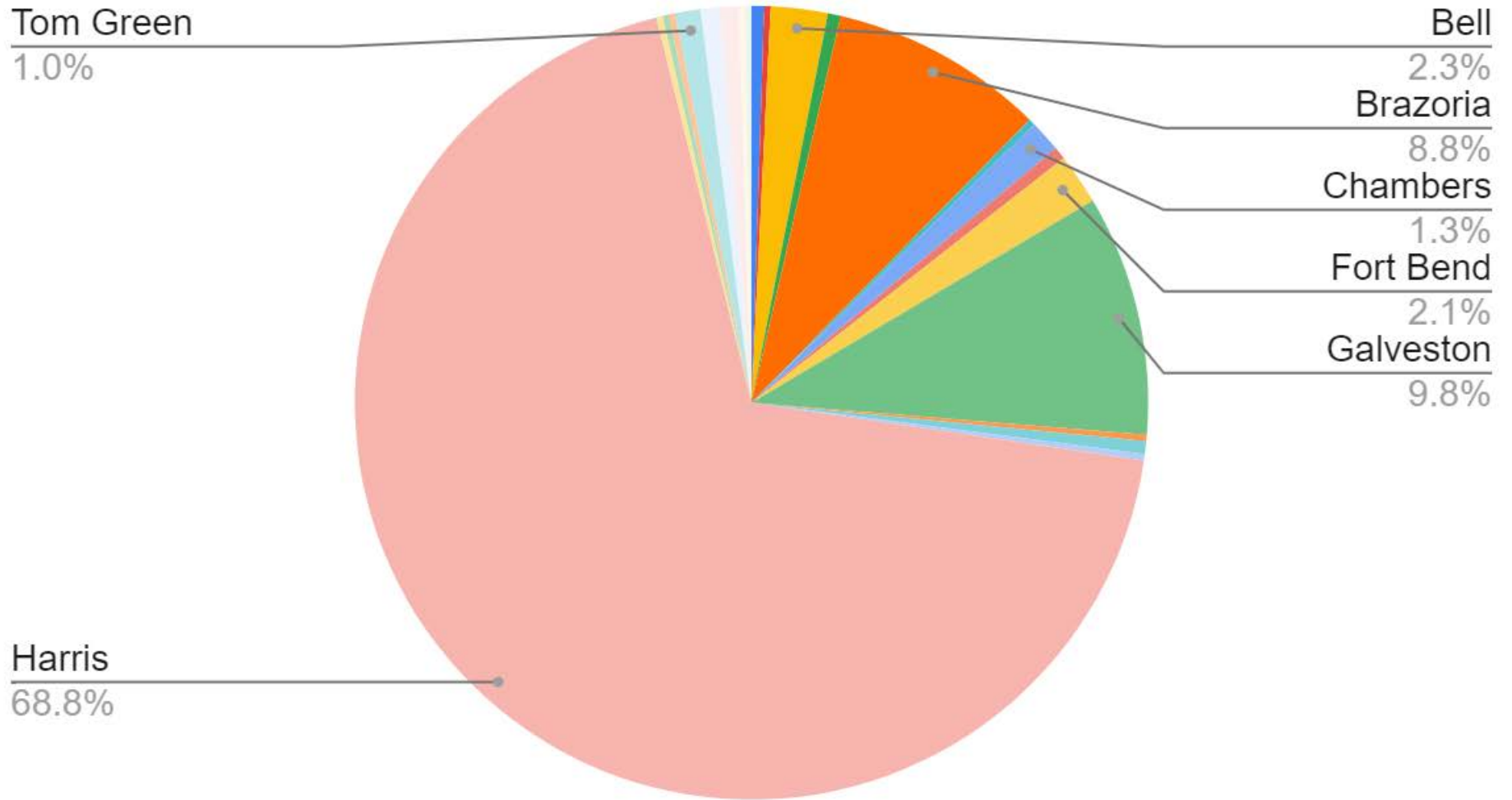
12th Court

Count of Trial County



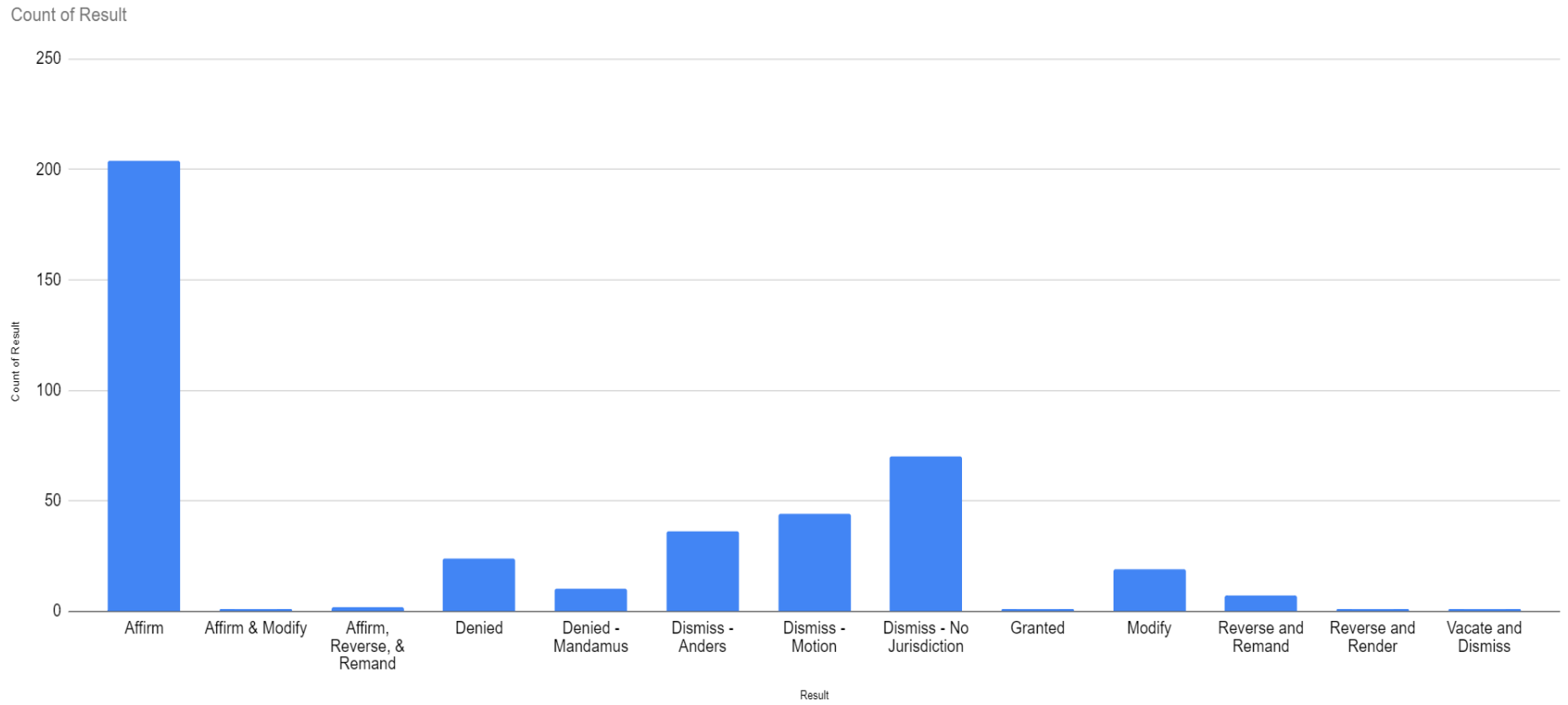
13th Court

Count of Trial County

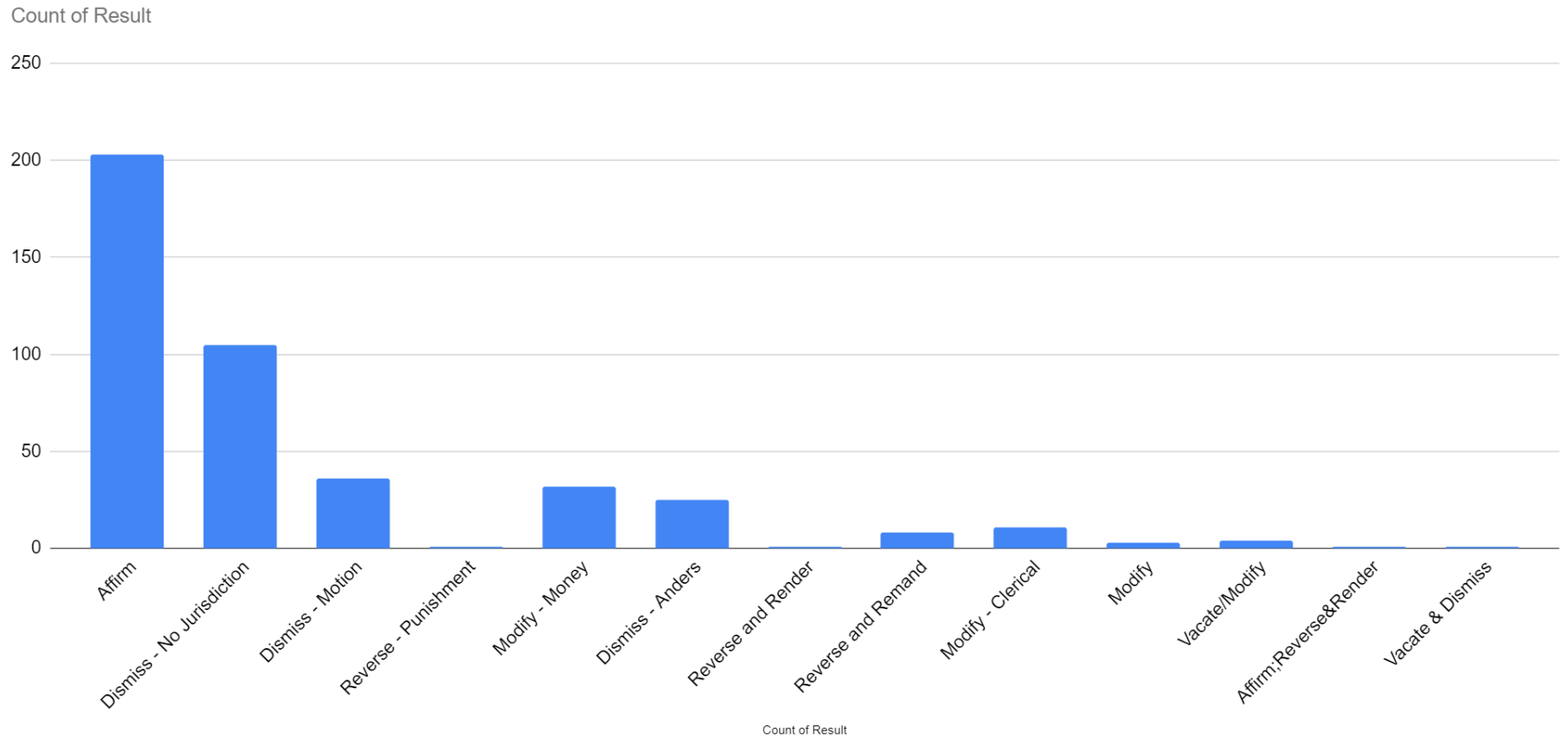


14th Court

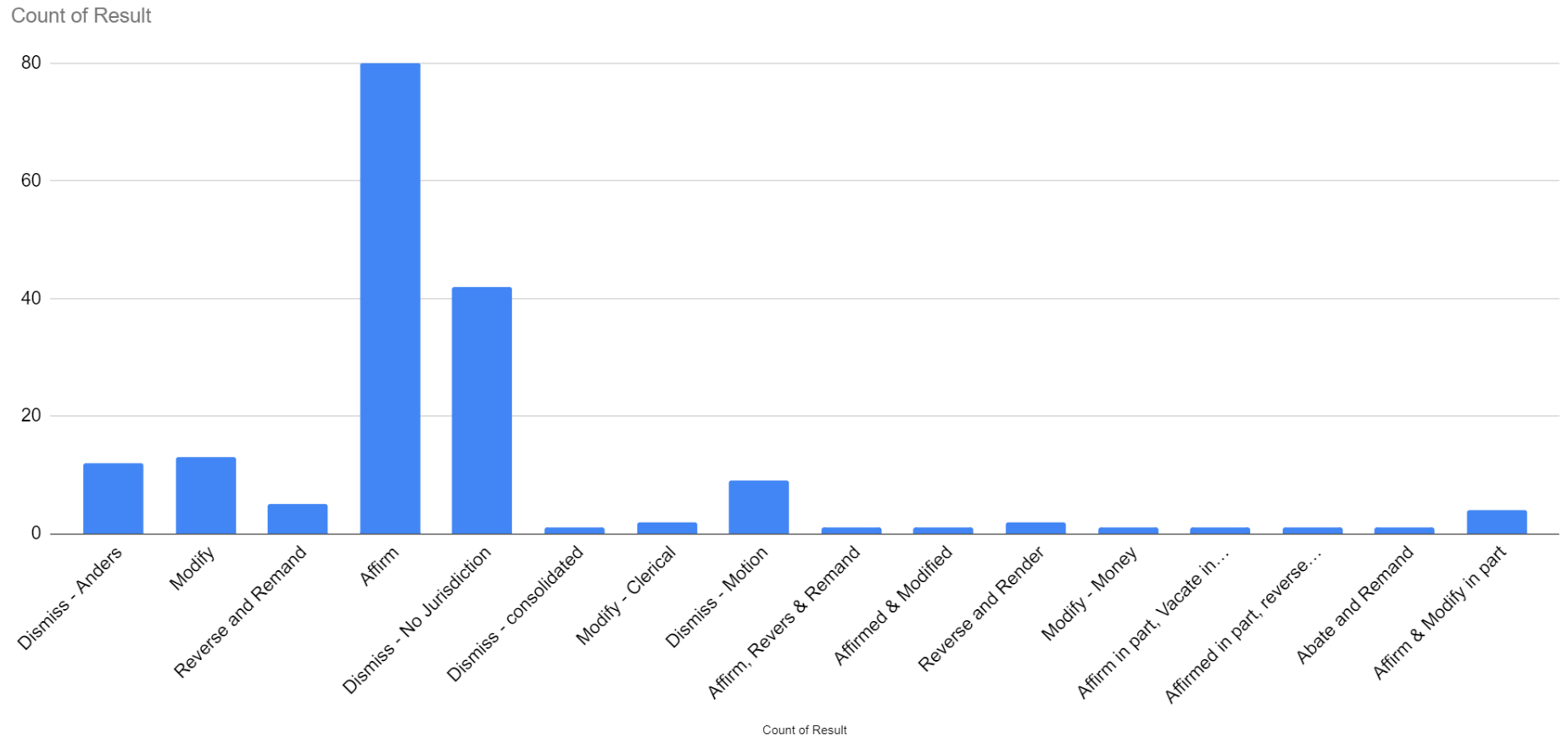
Appendix B - Results by Court of Appeals



1st Court

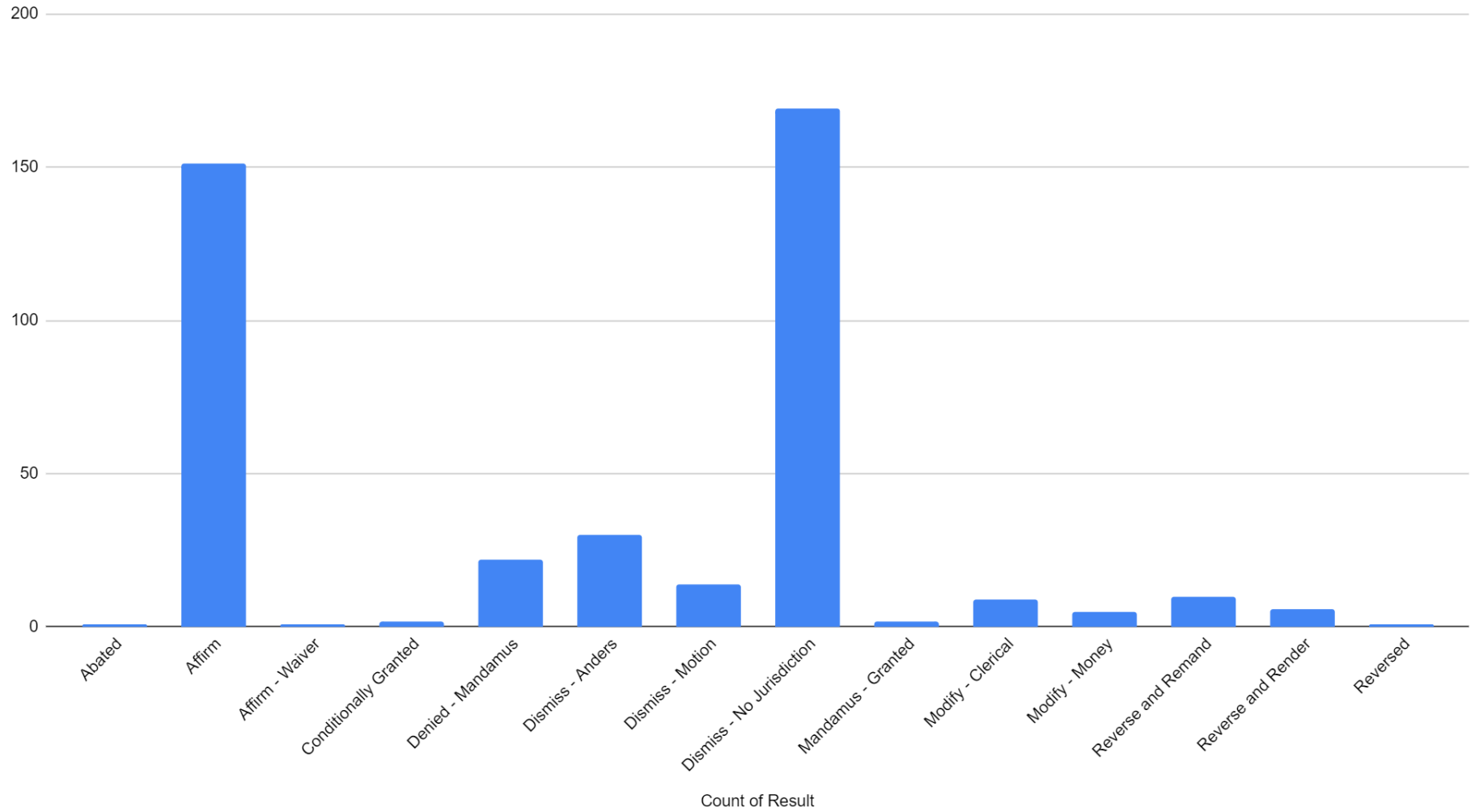


2nd Court

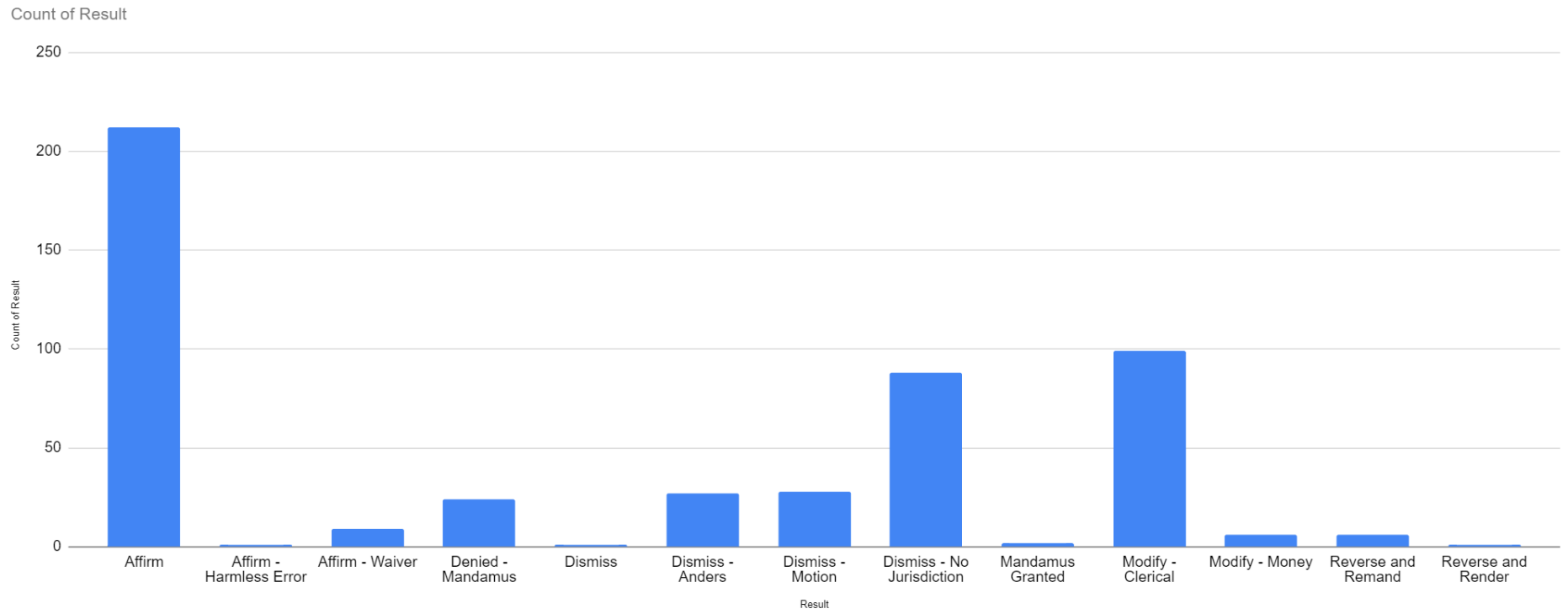


3rd Court

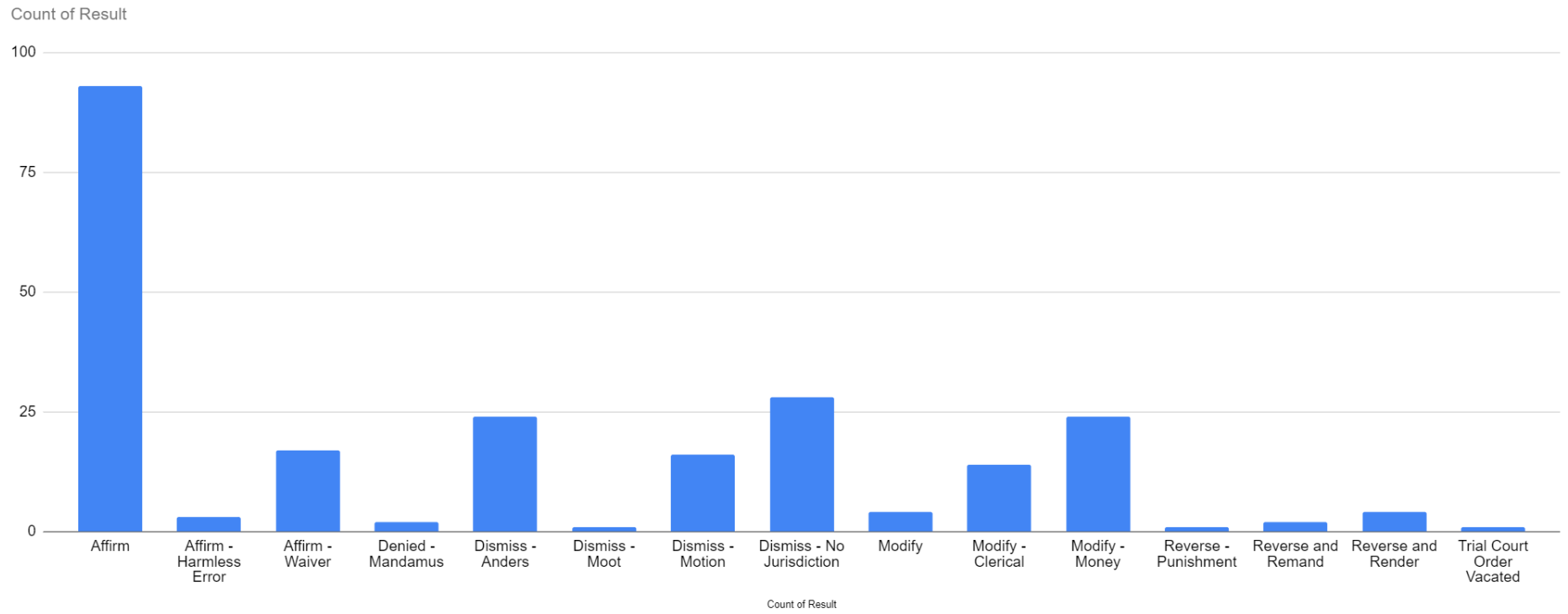
Count of Result



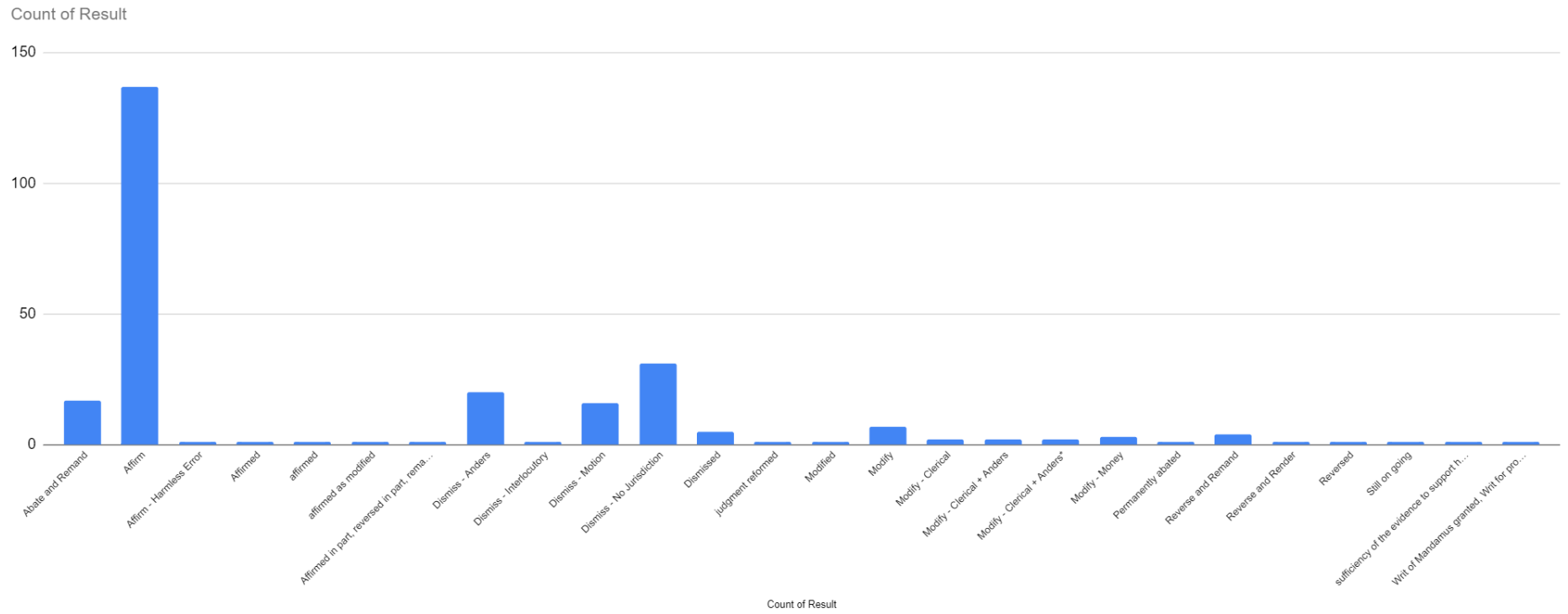
4th Court



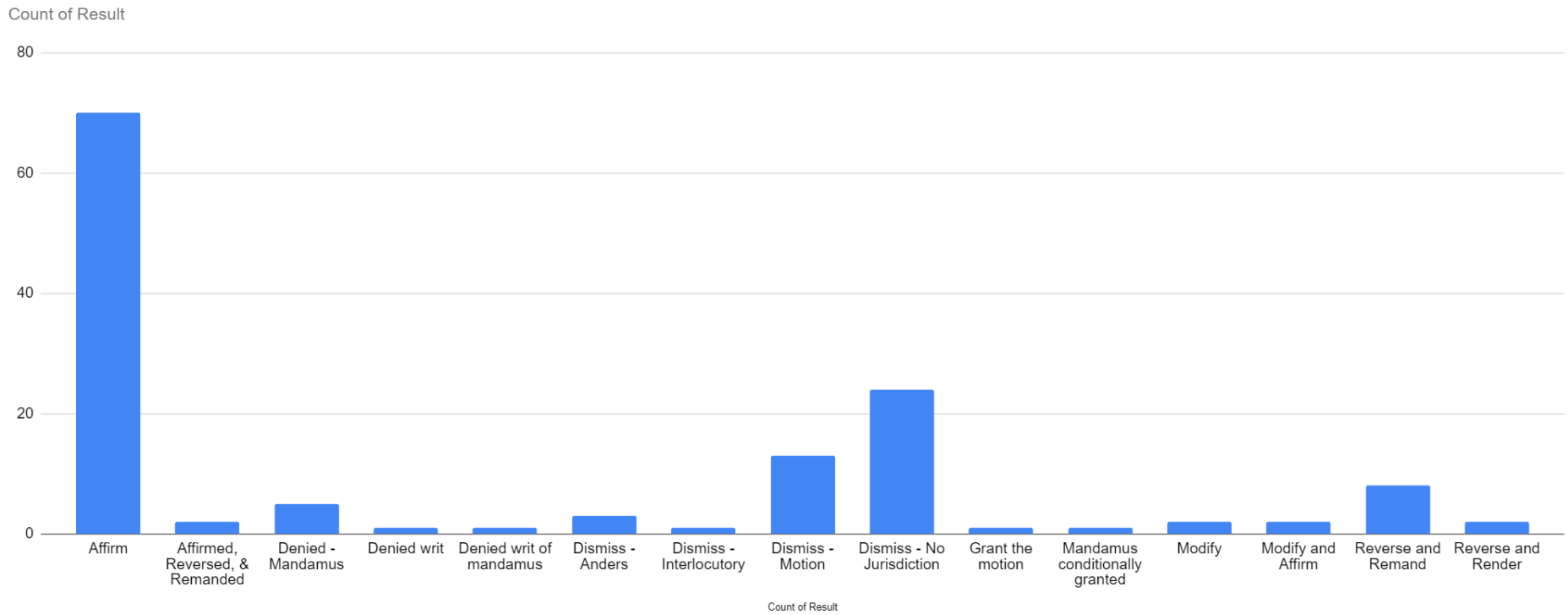
5th Court



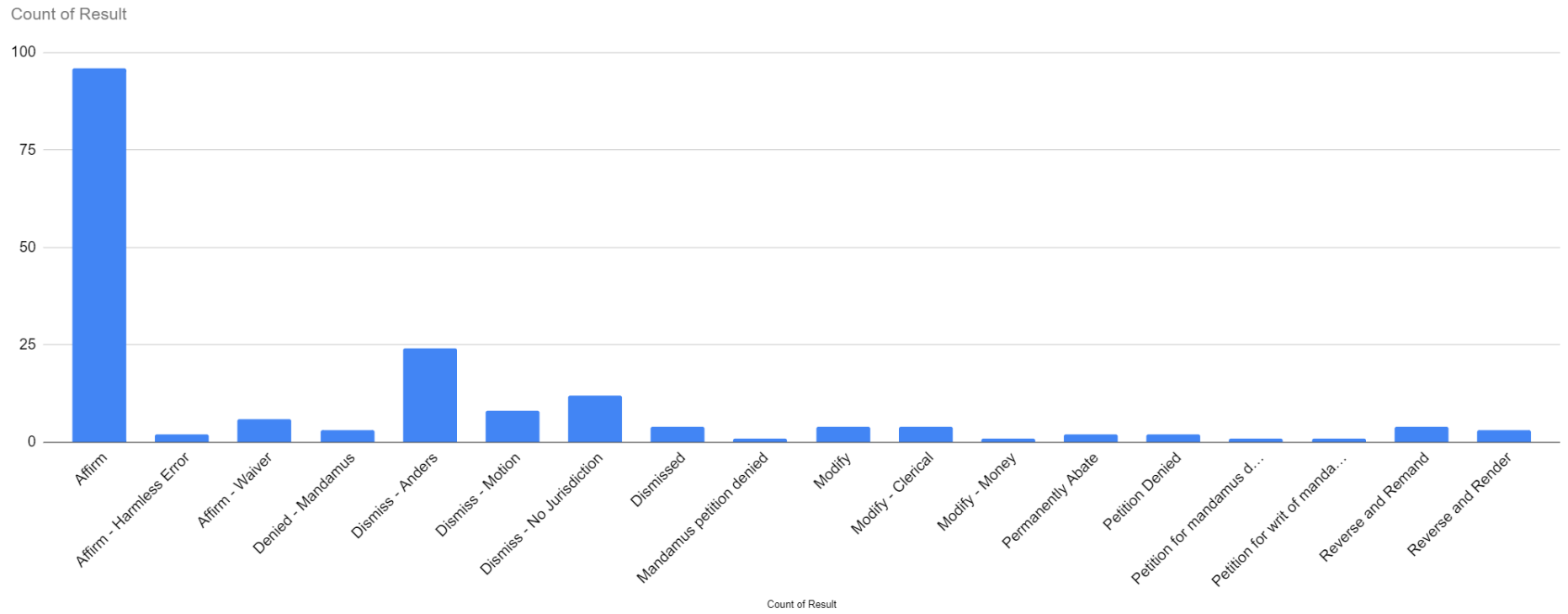
6th Court



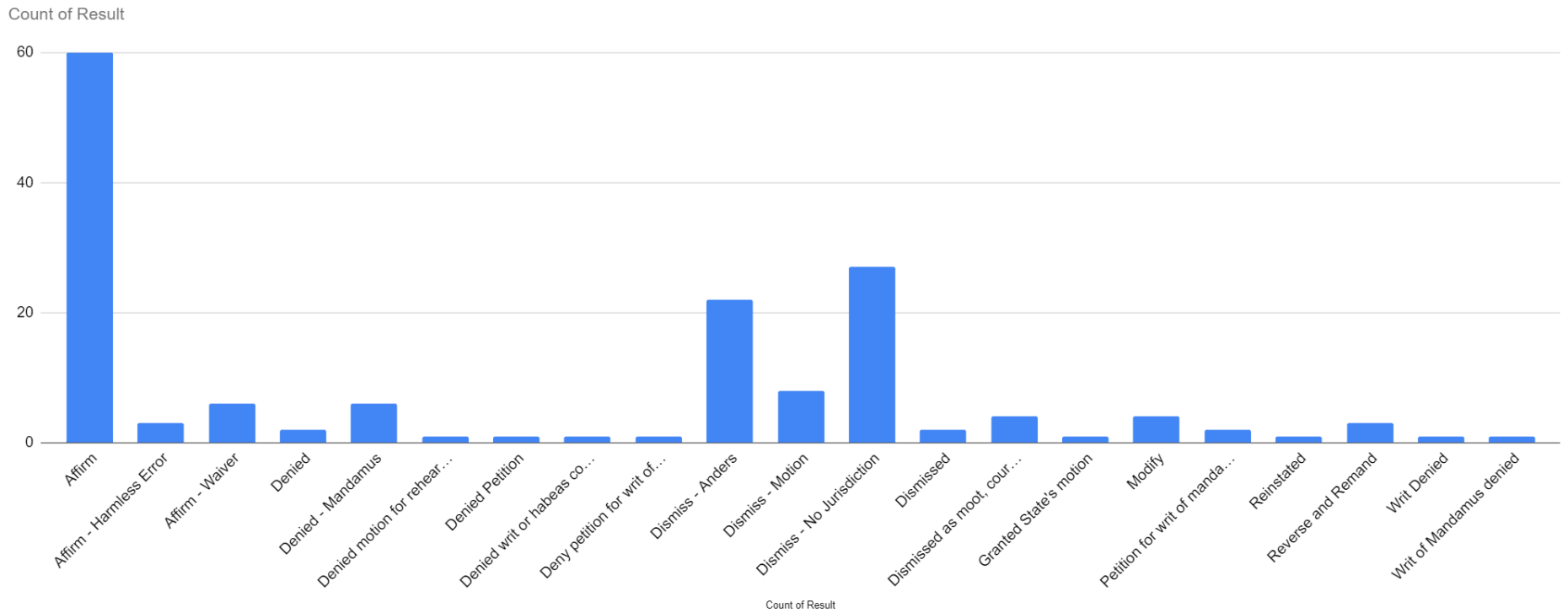
7th Court



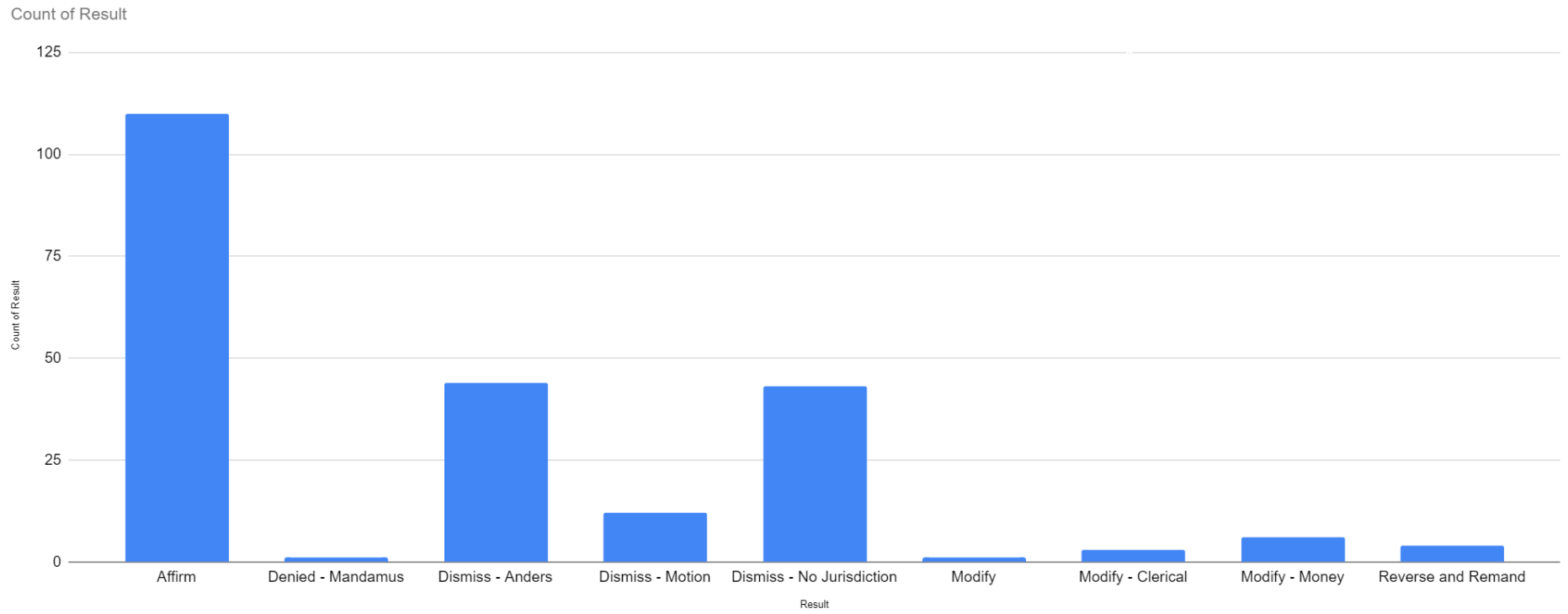
8th Court



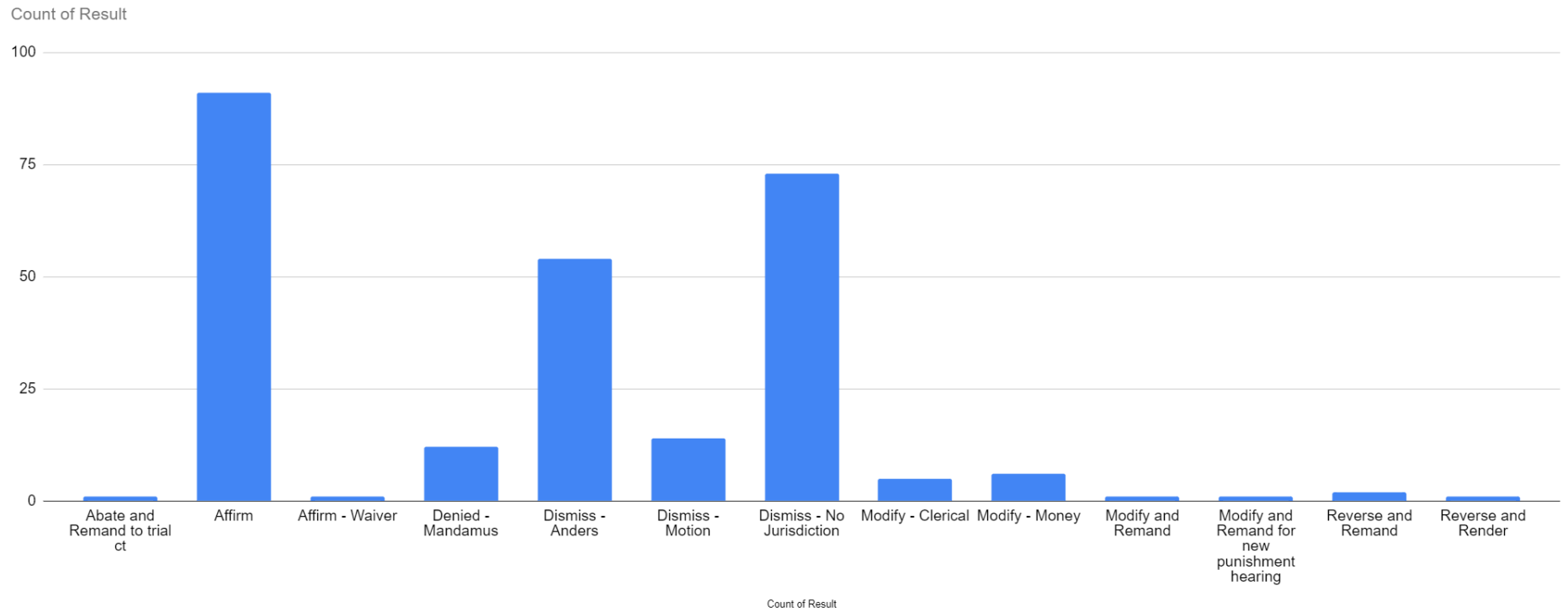
9th Court



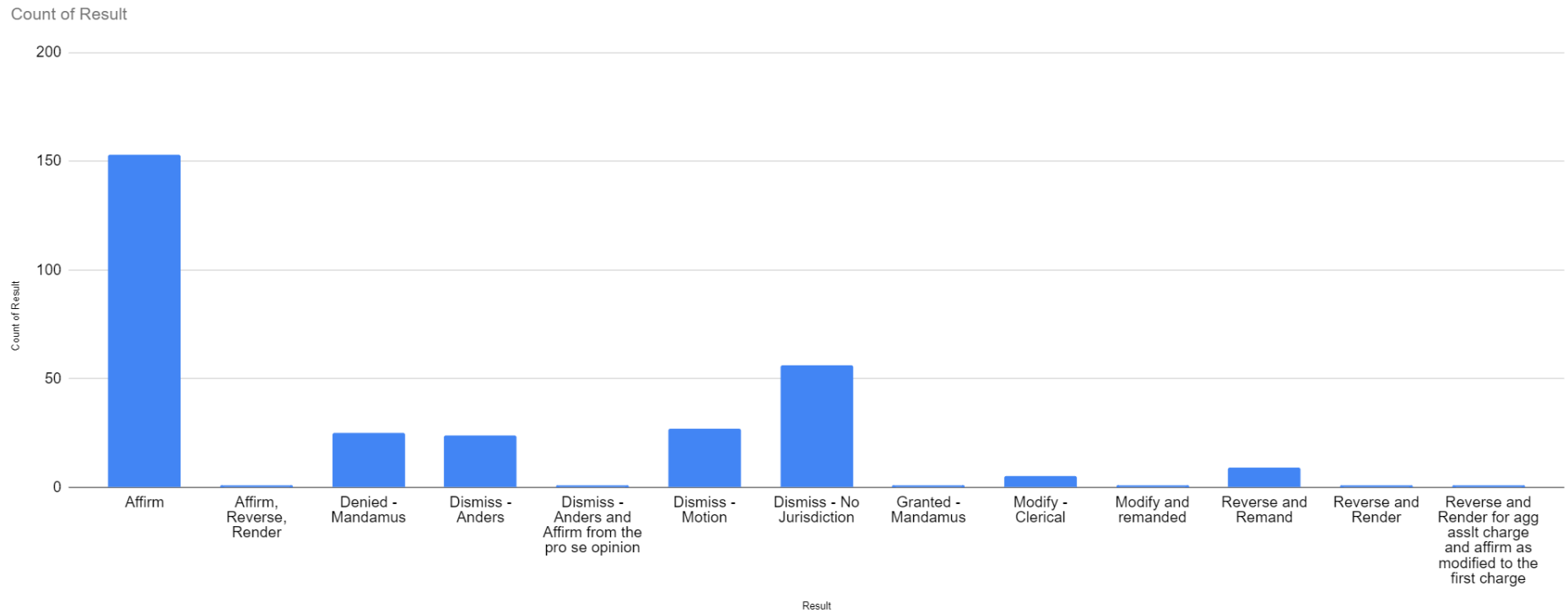
10th Court



11th Court

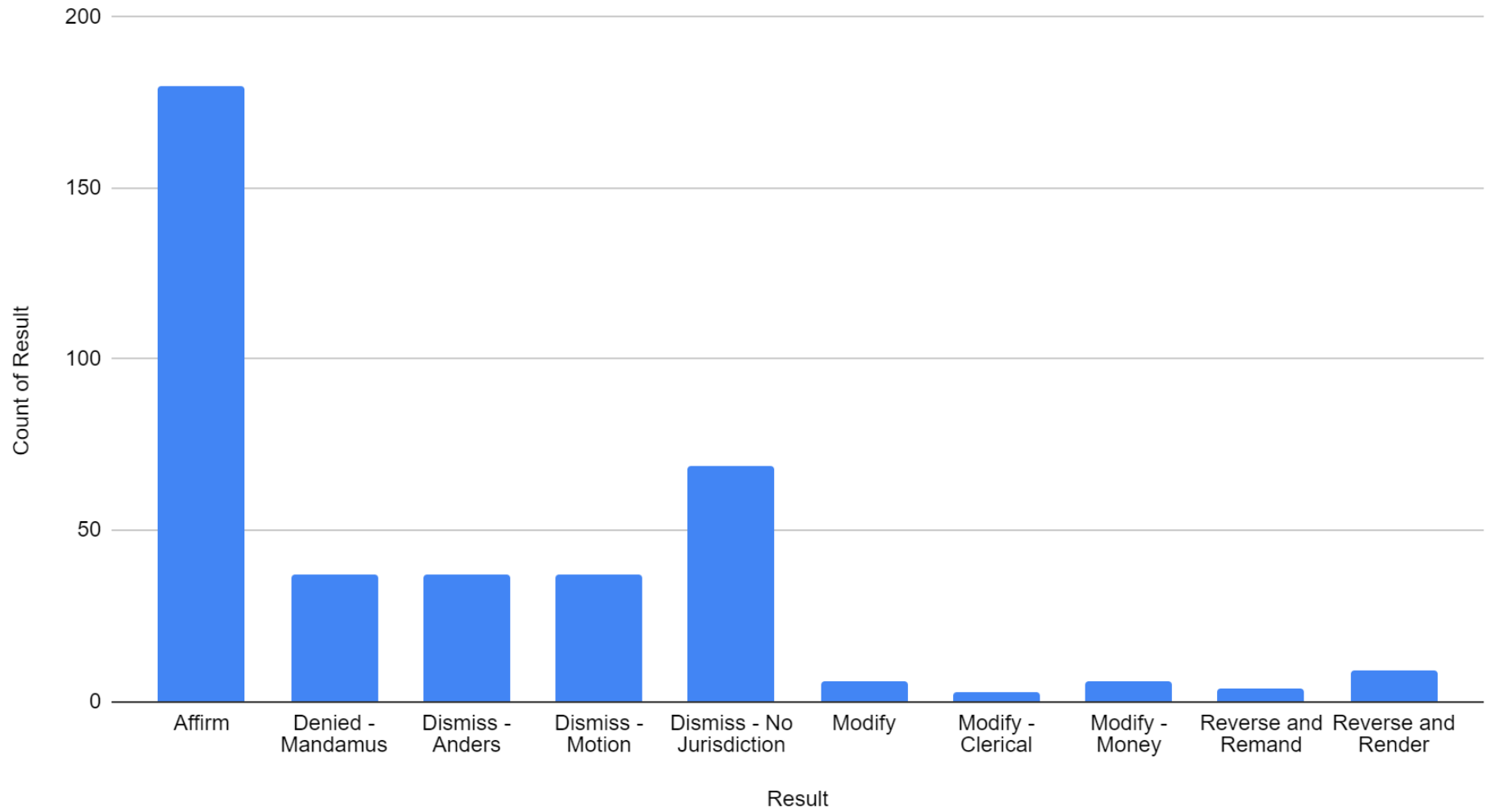


12th Court



13th Court

Count of Result



14th Court