

1987

Criminal Procedure: Pretrial

Robert Udashen

Follow this and additional works at: <https://scholar.smu.edu/smulr>

Recommended Citation

Robert Udashen, *Criminal Procedure: Pretrial*, 41 SW L.J. 517 (1987)
<https://scholar.smu.edu/smulr/vol41/iss1/19>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

CRIMINAL PROCEDURE: PRETRIAL

*Robert Udashen**

This Article details the significant state and federal developments in the area of criminal pretrial procedure during the Survey period.

I. CHARGING INSTRUMENTS

In November of 1985 the Texas voters approved a constitutional amendment authorizing the legislature to establish new rules governing the use of indictments and informations.¹ In anticipation of the passage of this amendment, the legislature amended various provisions of the Code of Criminal Procedure. For example, the legislature amended the Code of Criminal Procedure to require a defendant to object, prior to trial, to a defect of form or substance in a charging instrument.² A defendant who fails to object at the correct time forfeits the right to complain about any such defect.³ If a defendant objects to a defect in the charging instrument, the state can amend the charging instrument and proceed to trial.⁴ The Code of Criminal Procedure, however, upon the defendant's request, allows ten days for the defendant to respond to the amendment.⁵ Apparently, the state can amend even substantive defects unless the amendment charges the defendant with an additional or different offense or prejudices the defendant's substantial rights.⁶ Further, the state may amend a charging instrument even if the defendant has not objected to it.⁷

The purpose of these changes in the Code of Criminal Procedure was to eliminate the reversal of criminal convictions because of perceived technical defects in charging instruments. The legislature, however, may have succeeded only in substituting one form of litigation for another. Instead of appealing the denial of motions to quash because of notice defects in charging instruments or raising questions of fundamental error on appeal because

* B.A., J.D., The University of Texas. Attorney at Law, Udashen & Goldstucker, Dallas, Texas.

1. TEX. CONST. art. V, § 12(b) (Vernon 1987) now states:

An indictment is a written instrument presented to a court by a grand jury charging a person with the commission of an offense. An information is a written instrument presented to a court by an attorney for the State charging a person with the commission of an offense. The practice and procedures relating to the use of indictments and information, including their contents, amendment, sufficiency, and requisites, are as provided by law. The presentment of an indictment or information to a court invests the court with jurisdiction of the cause.

2. TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon Supp. 1987).

3. *Id.*

4. *Id.* art. 28.09 (Vernon Pam. Supp. 1987).

5. *Id.* art. 28.10(a).

6. *Id.* art. 28.10(c).

7. *Id.* art. 28.10(b).

of missing elements in charging instruments, defendants will now be arguing that amendments to charging instruments prejudiced their substantial rights.

The changes in the Code of Criminal Procedure create the possibility that prosecutors will bypass the grand jury system. A defendant, for instance, could be indicted for aggravated robbery by causing serious bodily injury to the complainant.⁸ The prosecutor could then amend the indictment to allege aggravated robbery by the use of a deadly weapon.⁹ The prosecutor would thus not have to present the deadly weapon allegation to the grand jury. This procedure raises numerous questions. Has the defendant been denied the right to have the grand jury consider the case? Does the amendment to the indictment charge the defendant with a new offense? Have the substantial rights of the defendant been prejudiced? These questions, and others, will certainly come before the court of criminal appeals in future years.

Currently, the court of criminal appeals seems ready to jump on the anti-crime bandwagon against technical reversals of criminal convictions. A good example of this trend is *Adams v. State*.¹⁰ In *Adams* the court overruled the 1983 opinion in *Jeffers v. State*.¹¹ The court in *Adams* found the defendant guilty of promoting an obscene film. The police had seized two films when they arrested the defendant. Prior to trial, the defendant filed a motion to quash the information since it did not give notice of which film was the basis of the prosecution. The court upheld the denial of the defendant's motion to quash by stating that the defect in the charging instrument did not prejudice the defendant's substantial rights.¹² The *Adams* court analyzed the motion to quash by looking first at the charging instrument to see if it failed to convey some requisite item of notice.¹³ The court next examined the record in order to determine if the lack of notice harmed the defendant's ability to prepare a defense.¹⁴ In *Adams* the court found no harm to the defense because both films depicted similar behavior and the defendant presented no evidence contesting either film's obscenity.¹⁵

II. FORMER JEOPARDY

During the Survey period both the United States Supreme Court and the Texas Court of Criminal Appeals faced double jeopardy issues arising out of sentencing proceedings in capital murder cases. In *Poland v. Arizona*¹⁶ the Supreme Court addressed the question of whether the double jeopardy

8. TEX. PENAL CODE ANN. § 29.03(a)(1) (Vernon 1974).

9. *Id.* § 29.03(a)(2).

10. 707 S.W.2d 900 (Tex. Crim. App. 1986) (en banc).

11. *Id.* at 903; see *Jeffers v. State*, 646 S.W.2d 185, 187, 189 (Tex. Crim. App. 1983) (the required notice must appear on the face of the charging instrument; it is not proper to examine the record to determine whether the charging instrument gave proper notice).

12. 707 S.W.2d at 904.

13. *Id.* at 903.

14. *Id.*

15. *Id.* at 904.

16. 106 S. Ct. 1749, 90 L. Ed. 2d 123 (1986).

clause of the fifth amendment of the United States Constitution¹⁷ bars a second capital sentencing hearing when, on appeal from a death sentence, the reviewing court finds the evidence insufficient to support the only aggravating factor on which the sentencing judge relied, but does not find the evidence insufficient to support the death penalty. The Court held that the double jeopardy clause does not require the reviewing court to ignore evidence in the record of aggravating circumstances that the sentencing judge rejected.¹⁸ The reviewing court had found sufficient evidence to support another aggravating factor not found by the sentencing judge and, therefore, the court had affirmed the death penalty.¹⁹ The Supreme Court found it proper to sentence the defendant to death once again based on a different aggravating factor.²⁰

In *Ex parte Padgett*²¹ the trial court convicted the defendant of capital murder and sentenced him to life in prison even though the jury could not answer the second special issue.²² The state then attempted to try the defendant for the capital murder of a second person that occurred during the same robbery to which the first conviction related.²³ The defendant filed a pretrial writ of habeas corpus arguing that the failure of the jury to answer the second special issue in the first trial collaterally estopped the state from seeking the death penalty in the second trial.²⁴ The court of criminal appeals held that the first jury's failure to answer the special issue affirmatively or negatively did not result in a resolved fact issue that supported invoking the doctrine of collateral estoppel in the second case.²⁵ The trial court had deemed the failure to answer a negative answer for purposes of the first sentencing hearing by virtue of article 37.071(e) of the Code of Criminal Procedure.²⁶ The court of criminal appeals, however, could find nothing in the legislative history of article 37.071(e) to indicate that the legislature intended to convert a nonanswer into a negative answer for purposes of collateral estoppel.²⁷

The United States Supreme Court and the Texas Court of Criminal Appeals also both faced the question of whether successive prosecutions arising out of one criminal incident were for the same offense for double jeopardy

17. U.S. CONST. amend. V states in part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb"

18. 106 S. Ct. at 1756, 90 L. Ed. 2d at 133.

19. *Id.* at 1756, 90 L. Ed. 2d at 133.

20. *Id.*

21. 717 S.W.2d 55 (Tex. Crim. App. 1986).

22. *Id.* at 56. The second special issue asked the jury to determine whether the defendant would commit violent criminal acts and would be a continuing threat to society. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(2) (Vernon Supp. 1987) (one issue in a capital case is whether the defendant would be a threat to society).

23. 717 S.W.2d at 56.

24. *Id.*

25. *Id.* at 57 n.6.

26. *Id.* at 58; *see* TEX. CODE CRIM. PROC. ANN. art. 37.071(e) (Vernon Supp. 1987) ("If the jury returns a negative finding on or is unable to answer any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.").

27. 717 S.W.2d at 58.

purposes. In *Heath v. Alabama*²⁸ a Georgia trial court convicted the defendant of a murder committed in Georgia. A grand jury in Alabama then indicted the defendant for capital murder in Alabama based on the death of the same victim as in the Georgia case. The defendant had apparently hired two men who kidnaped the victim in Alabama, killed her, and then left her body in Georgia. The Supreme Court held that although a second prosecution in Georgia would be barred, the Alabama case was not barred because a different sovereign prosecuted the defendant.²⁹ Thus the dual sovereignty doctrine overrode the defendant's protection against double jeopardy.

In *Ex parte Rathmell*³⁰ the defendant was driving while intoxicated. While intoxicated he struck another automobile, killing two women. The state prosecuted the defendant for involuntary manslaughter for one of the deaths, and the court sentenced him to two years in prison.³¹ The state then proposed to try him for the second death.³² The defendant sought to block that prosecution with a pretrial writ of habeas corpus by arguing that he had engaged in one criminal act that resulted in two deaths.³³ The court of criminal appeals rejected the defendant's argument by holding that the defendant violated the same section of the Penal Code twice.³⁴ The defendant thus committed two distinct and separate offenses and therefore the state could try the defendant for both of them.³⁵

The United States Supreme Court decided one other case of note on the issue of double jeopardy during the Survey period. In *Morris v. Matthews*³⁶ the Court addressed the issue of a proper remedy for violation of the double jeopardy clause. The Ohio court convicted the defendant of aggravated robbery. Later, after the defendant had admitted to killing his accomplice, the state brought a subsequent charge of aggravated murder. Following the defendant's conviction on the aggravated murder charge, the Ohio Court of Appeals reduced the conviction to the lesser included offense of murder. The United States Supreme Court held that the reduction of the jeopardy-barred conviction to a lesser included offense that was not jeopardy-barred cured the double jeopardy error.³⁷

III. SPEEDY TRIAL

During the Survey period the state continued its assault on the constitu-

28. 106 S. Ct. 433, 88 L. Ed. 2d 387 (1985).

29. *Id.* at 437, 88 L. Ed. 2d at 393.

30. 717 S.W.2d 33 (Tex. Crim. App. 1986).

31. *Id.* at 34.

32. *Id.*

33. *Id.*

34. *Id.* at 36.

35. *Id.*

36. 106 S. Ct. 1032, 89 L. Ed. 2d 187 (1986).

37. *Id.* at 1038, 89 L. Ed. 2d at 197. The burden shifts to the defendant when a court reduces a jeopardy-barred conviction to a conviction for a lesser included offense that is not jeopardy-barred. The defendant must demonstrate a reasonable probability that the court would not have convicted him of the nonjeopardy-barred offense without the presence of the jeopardy-barred offense. *Id.*

tionality of the Speedy Trial Act³⁸ because of an alleged defect in the caption to the bill creating the Act. A number of courts of appeals addressed the issue.³⁹ Those courts, however, failed to agree on the matter. The court of criminal appeals will therefore have to decide the question. That court's decision should be made easier by the November 1985 amendment to the Texas Constitution that gives the legislature the sole responsibility for determining the sufficiency of a bill's caption.⁴⁰ This amendment is expressly retroactive and would thus seem to eliminate the problem found by those courts of appeals that declared the Speedy Trial Act unconstitutional.

The court of criminal appeals decided a number of other Speedy Trial Act issues this Survey term. In two cases the court held that a criminal action commences for Speedy Trial Act purposes when the police arrest a defendant or when the state files a charging instrument in a trial court with jurisdiction to try the offense of which the defendant stands accused, whichever comes first.⁴¹ The filing of a felony complaint pursuant to which a judge issues an arrest warrant is not sufficient to start counting the time under the Speedy Trial Act on a felony offense.⁴²

In several other cases the court of criminal appeals addressed the exclusion of time under the Speedy Trial Act because of agreed reset forms. In one case, the court held that the lower court properly excluded the time encompassed by agreed reset forms signed by the defendant, his attorney, the prosecuting attorney, and the trial judge, even though the state did not introduce the forms into evidence at the hearing on the defendant's motion to dismiss.⁴³ In another case, the court excluded the time encompassed by an agreed reset form signed by the defendant's attorney but not by the defendant.⁴⁴ In a third case, the court held that resets entered into on a misdemeanor driving while intoxicated (D.W.I.) case do not carry over to a felony D.W.I. arising out of the same incident.⁴⁵ In that case, the state chose first

38. TEX. CODE CRIM. PROC. ANN. art. 32A.02 (Vernon Pam. Supp. 1987).

39. *Hernandez v. State*, 713 S.W.2d 697, 699 (Tex. App.—Corpus Christi 1986, no pet.) (act is constitutional); *Creel v. State*, 710 S.W.2d 120, 138 (Tex. App.—San Antonio 1986, no pet.) (act is unconstitutional); *Bedford v. State*, 703 S.W.2d 775, 780 (Tex. App.—Houston [14th Dist.] 1985, no pet.) (act is constitutional); *Stewart v. State*, 699 S.W.2d 695, 699 (Tex. App.—Waco 1985, no pet.) (act is unconstitutional); *Morgan v. State*, 696 S.W.2d 465, 467 (Tex. App.—Houston [1st Dist.] 1985, pet. granted) (act is constitutional); *Wright v. State*, 696 S.W.2d 288, 296 (Tex. App.—Fort Worth 1985, pet. granted) (act is constitutional).

40. TEX. CONST. art. III, § 35 (b)-(c) (Vernon 1987) now states:

(b) The rules of procedure of each house shall require that the subject of each bill be expressed in its title in a manner that gives the legislature and the public reasonable notice of that subject. The legislature is solely responsible for determining compliance with the rules.

(c) A law, including a law enacted before the effective date of this subsection, may not be held void on the basis of an insufficient title.

41. *Sykes v. State* 718 S.W.2d 733, 733-34 (Tex. Crim. App. 1986); *Rios v. State*, 718 S.W.2d 730, 731-32 (Tex. Crim. App. 1986) (en banc).

42. *Sykes v. State*, 718 S.W.2d at 733-34; *Rios v. State*, 718 S.W.2d at 731-32.

43. *Baumert v. State*, 709 S.W.2d 212, 213 (Tex. Crim. App. 1986) (en banc) (a trial court can take judicial notice of its own records).

44. *Orellana v. State*, 706 S.W.2d 660, 661 (Tex. Crim. App. 1986) (defendant cannot challenge on appeal his attorney's authority to sign a reset form).

45. *Luedke v. State*, 711 S.W.2d 657, 659-60 (Tex. Crim. App. 1986) (en banc).

to charge the defendant with a misdemeanor D.W.I. The state later indicted the defendant for a felony D.W.I. Because the two offenses are different, with different elements of proof, the waivers entered into on the misdemeanor did not carry over to the felony.⁴⁶

In *Whalon v. State*⁴⁷ the state filed a motion for continuance alleging that it was missing a material witness. The defendant argued that the state should be allowed to exclude from the Speedy Trial Act time period only the time from the granting of the motion until the date of the trial.⁴⁸ The court of criminal appeals held, however, that the state could exclude the time from the date the state filed the motion for continuance until the date of the trial.⁴⁹

The proper exclusion of time periods is also an issue under the federal Speedy Trial Act.⁵⁰ In *Henderson v. United States*⁵¹ the United States Supreme Court held that the lower court properly excluded the time from the filing of a motion to suppress through the conclusion of the hearing on that motion.⁵² The Court also sanctioned as properly excludable from the time period in which the United States must bring the defendant to trial an additional period of delay while the court awaits briefs from the parties.⁵³

IV. SEVERANCE

Three cases from the Survey period illustrate the difficulty a defendant often has in obtaining a severance. The United States Supreme Court, in *United States v. Lane*,⁵⁴ applied a harmless error analysis to misjoinder under rule 8 of the Federal Rules of Criminal Procedure.⁵⁵ The Court held that a case will be reversed for misjoinder only if the misjoinder results in actual prejudice to the defendant because it had a "substantial and injurious effect or influence in determining the jury's verdict."⁵⁶ The trial court's proper limiting instructions eliminated the prejudice in *Lane*.⁵⁷

*United States v. Fortna*⁵⁸ demonstrated the role of limiting instructions in curing any possible error in the denial of a severance motion. In *Fortna* two defendants moved for a severance because of evidence of prior drug involve-

46. *Id.* at 659.

47. No. 67,324 (Tex. Crim. App. Oct. 8, 1986).

48. *Id.*, slip op. at 4.

49. *Id.* at 5.

50. 18 U.S.C. §§ 3161-3174 (1982).

51. 106 S. Ct. 1871, 90 L. Ed. 2d 299 (1986).

52. *Id.* at 1877, 90 L. Ed. 2d at 309.

53. *Id.*

54. 106 S. Ct. 725, 88 L. Ed. 2d 814 (1986).

55. *Id.* at 732, 88 L. Ed. 2d at 823-25. FED. R. CRIM. P. 8 (b) states:

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

56. 106 S. Ct. at 732, 88 L. Ed. 2d at 826.

57. *Id.*

58. 796 F.2d 724 (5th Cir. 1986).

ment offered against two other defendants. The Fifth Circuit stated that courts must balance any prejudice to the defendants against the public's interest in judicial efficiency.⁵⁹ The court in *Fortna* considered efficient judicial administration more important than the potential prejudicial effect.⁶⁰ In *Mulder v. State*⁶¹ one defendant moved for a severance because his co-defendant had prior convictions that could be used to impeach him if he testified. The moving defendant also had prior convictions. The severance was therefore at the court's discretion.⁶² During the trial the co-defendant testified, but the moving defendant did not testify. The court of criminal appeals held, however, that the trial court did not abuse its discretion in denying the severance because the moving defendant made no showing as to how his co-defendant's prior record prejudiced him.⁶³

V. GRAND JURY

The Federal Rules of Criminal Procedure state that the following persons may be present in the grand jury room:

Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.⁶⁴

The United States Supreme Court found a harmless violation of this rule in *United States v. Mechanik*.⁶⁵ In *Mechanik* two government witnesses testified together before the grand jury. The defendants did not learn of this violation of the rule until after the trial began. The Supreme Court held that the jury's verdict of guilty demonstrated probable cause to charge the defendants with the offenses for which the court had convicted them.⁶⁶ The Court stated that the harmless error standard should be applied to this type of error.⁶⁷

The Court in *Mechanik* did not express an opinion on an appropriate remedy if this type of error were discovered before trial. The Court, however, will not likely ever be faced with this issue. The difficulty of piercing the veil of secrecy surrounding grand jury proceedings prior to trial makes the discovery of an error of this type very remote. *Mechanik* itself demonstrates this problem in that the defendants in *Mechanik* apparently filed pretrial

59. *Id.* at 737.

60. *Id.*

61. 707 S.W.2d 908 (Tex. Crim. App. 1986) (en banc).

62. See TEX. CODE CRIM. PROC. ANN. art. 36.09 (Vernon 1981) (requires a severance when one defendant has an admissible prior conviction and the moving defendant does not have an admissible prior conviction).

63. 707 S.W.2d at 915.

64. FED. R. CRIM. P. 6(d).

65. 106 S. Ct. 938, 943, 89 L. Ed. 2d 50, 58 (1986).

66. *Id.* at 940, 89 L. Ed. 2d at 56.

67. *Id.* at 942, 89 L. Ed. 2d at 57. FED. R. CRIM. P. 52(a) states: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

discovery motions that could have revealed this error.⁶⁸ Unless the courts allow defendants more liberal discovery, *Mechanik*-type violations will always be cured by the return of a guilty verdict. Thus, prosecutors can freely disregard the rules surrounding grand jury procedures in order to maximize the odds of persuading a grand jury to indict a particular individual. In the end, this practice could cause the grand jury to cease being a buffer between the government and an accused citizen, and instead become a tool of law enforcement.

VI. VENUE

The Fifth Circuit in *Cook v. Morrill*⁶⁹ reconsidered its holding in *Martin v. Beto*.⁷⁰ In *Martin* the court had held that the sixth amendment right to a trial in the district where the defendant committed the crime does not apply to state prosecutions.⁷¹ The defendant in *Cook*, along with several others, was indicted in Bee County, Texas, for the offense of felony theft. The case received a considerable amount of attention and became known as "Lumbergate."⁷² The trial court thus ordered the defendant to appear in court and show cause why the court should not change venue in his case. Following a hearing, the court ordered a change of venue on its own motion.

The Fifth Circuit held that the right of vicinage found in the sixth amendment does not apply to the states.⁷³ The court based its determination on the Supreme Court's application to the states of only those sixth amendment provisions that the Court finds fundamental and necessary to an equitable trial.⁷⁴ The right to a trial in the district where the defendant committed the crime is not, according to the court, one of those rights.⁷⁵ Thus a state is free to try a defendant anywhere in the state it chooses unless the change of venue results in a denial of due process.⁷⁶

In *Lundstrom v. State*⁷⁷ the court of criminal appeals emphasized that the state must strictly comply with the requirements of the Code of Criminal Procedure in contesting a defendant's motion for change of venue. In that case the defendant filed a motion for change of venue in conformity with the Code of Criminal Procedure.⁷⁸ The state filed a motion in opposition to the defendant's request for a change of venue that did not strictly comply with the statute.⁷⁹

The court of criminal appeals decided not to follow the recent trend to

68. 106 S. Ct. at 940, 89 L. Ed. 2d at 56.

69. 783 F.2d 593 (5th Cir. 1986).

70. 397 F.2d 741 (5th Cir. 1968).

71. *Id.* at 748.

72. 783 F.2d at 594.

73. *Id.* at 595.

74. *Id.*

75. *Id.*

76. *Id.*

77. No. 898-84 (Tex. Crim. App. Apr. 23, 1986).

78. *Id.*, slip op. at 1-2.

79. *Id.* at 5.

assess the harm suffered by the defendant before reversing a case.⁸⁰ The court held that when a defendant files a motion for change of venue that is proper as to form and the state does not file proper controverting affidavits, the defendant is entitled to a change of venue as a matter of law.⁸¹ That the parties selected an unbiased jury does not matter.⁸² Nor can the state argue that its affidavits implicitly attacked the defendant's affidavits by stating that the defendant could receive a fair trial.⁸³ Strict compliance by the state, at least in the change of venue area, is apparently mandatory.

*Phillips v. State*⁸⁴ illustrates the continuing difficulty that a defendant has in reversing a trial court's decision denying a request for a change of venue if the state files proper controverting affidavits. *Phillips* was a capital murder case wherein a Harris County jury sentenced the defendant to death. The court of criminal appeals examined the publicity surrounding the case to determine whether it was inherently suspect.⁸⁵ The court stated that publicity alone does not establish prejudice or require a change of venue.⁸⁶ The court held instead that the publicity concerning the case "must be pervasive, prejudicial and inflammatory."⁸⁷ Thus, after examining the newspaper articles concerning the case and finding them factually correct and designed to inform the public of current events, the court of criminal appeals held that the defendant failed to meet his burden of showing that there existed in the mind of the community so great a prejudice against the defendant that it deprived him of a fair and unbiased trial.⁸⁸

VII. BAIL

The Texas Code of Criminal Procedure authorizes a trial court to release a defendant on bail pending the appeal of a felony conviction if the punishment does not exceed fifteen years confinement.⁸⁹ The trial court may impose reasonable conditions on such bail.⁹⁰ In *Ex parte Valenciano*⁹¹ the court of criminal appeals interpreted the reasonableness of a condition imposed upon the defendant's appeal bond.

The defendant in *Valenciano* was convicted of indecency with a child. The court sentenced him to two years confinement in the Texas Department of Corrections. The trial court set the defendant's appeal bond at \$10,000

80. *E.g.*, *Mustard v. State*, 711 S.W.2d 71, 76 (Tex. App.—Dallas 1986, no pet.) (error in indictment); *Adams v. State*, 707 S.W.2d 900, 904 (Tex. Crim. App. 1986) (error in indictments); *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985) (error in court charge).

81. No. 898-84, slip op. at 4.

82. *Id.* at 9.

83. *Id.* at 7.

84. 701 S.W.2d 875 (Tex. Crim. App. 1985) (en banc), *cert. denied*, 106 S. Ct. 3285, 91 L. Ed. 2d 574 (1986).

85. *Id.* at 879.

86. *Id.*

87. *Id.*

88. *Id.* at 880 (quoting *Bell v. State*, 582 S.W.2d 800, 810 (Tex. Crim. App. 1979) (en banc)).

89. TEX. CODE CRIM. PROC. ANN. art. 44.04 (Vernon Supp. 1987).

90. *Id.* art. 44.04(c).

91. 720 S.W.2d 523 (Tex. Crim. App. 1986) (en banc).

and made it a condition of that bond that the defendant stay away from the family residence.⁹² The court of criminal appeals found that the condition restricted the defendant's freedom unreasonably without promoting society's interest in assuring his presence in court when required.⁹³ The court stated that courts must determine the reasonableness of a particular bail condition in light of the purpose of bail to guarantee the presence of the defendant.⁹⁴

VIII. COMPETENCY TO STAND TRIAL

During the Survey period the court of criminal appeals interpreted article 46.02 of the Code of Criminal Procedure, the statute governing competency hearings.⁹⁵ In *Crawford v. State*⁹⁶ the appellant argued that the court should not have allowed the court-appointed expert who examined the appellant to testify on the appellant's competency because the order appointing the expert did not give a complete definition of the meaning of incompetency to stand trial and did not state the facts and circumstances of the offense.⁹⁷ The court of criminal appeals held that although the courts must advise an appointed expert in some manner of those items, the order appointing the expert did not have to contain those items.⁹⁸ Further, even if the order was erroneous, an expert may still testify as to competency if he possesses the expert qualifications that legally entitle him to give opinion evidence.⁹⁹ In that instance, according to the court, an incorrect order would be harmless error.¹⁰⁰

The San Antonio and Corpus Christi courts of appeals reached conflicting conclusions during the Survey period on the requisite burden of proof at a second competency hearing. In *Villareal v. State*¹⁰¹ and *Martin v. State*¹⁰² the courts found the defendants incompetent to stand trial and committed the defendants to Rusk State Hospital. After brief stays in the hospital each defendant returned to court certified by Rusk State Hospital as competent to stand trial. The courts afforded both defendants second competency hearings before juries. In *Villareal* the San Antonio court held that the state has the burden of proving competence by a preponderance of the evidence at a second competency hearing unless the defendant does not object to the report from Rusk State Hospital.¹⁰³ In *Martin*, however, the Corpus Christi court held that the defendant has the burden of proving incompetence by a

92. *Id.*, at 524.

93. *Id.* at 525.

94. *Id.*

95. TEX. CODE CRIM. PROC. ANN. art. 46.02 (1979 & Supp. 1987).

96. 703 S.W.2d 655 (Tex. Crim. App. 1986) (en banc).

97. *Id.* at 658; see TEX. CODE CRIM. PROC. ANN. art. 46.02 (3)(c) (Vernon 1979) (requires the court to advise the appointed expert of the facts and circumstances of the offense and the meaning of incompetency to stand trial).

98. 703 S.W.2d at 658.

99. *Id.*

100. *Id.*

101. 699 S.W.2d 364 (Tex. App.—San Antonio 1985, no pet.).

102. 714 S.W.2d 356 (Tex. App.—Corpus Christi 1986, no pet.).

103. 699 S.W.2d at 366.

preponderance of the evidence because the defendant's discharge from the hospital terminates any presumption of legal incompetency that attached when the court committed him.¹⁰⁴ Although the court of criminal appeals has not directly addressed this question certain language in some of that court's opinions appears to support the conclusion reached by the Corpus Christi court.¹⁰⁵

IX. CONTINUANCE

The United States Supreme Court in *United States v. Rojas Contreras*¹⁰⁶ held that the federal Speedy Trial Act¹⁰⁷ does not require that the thirty-day preparation time allowed to a defendant's attorney be restarted upon the filing of a superseding indictment.¹⁰⁸ The Supreme Court approved of the trial court's denial of a continuance by stating that Congress intended that the thirty-day preparation time run from the date of the first appearance through counsel and not from the date of indictment.¹⁰⁹ The Court, however, also stated that a district court retains the discretion to grant a continuance if necessary to avoid prejudice to the defendant.¹¹⁰ Two other recent cases demonstrate the difficulty of showing such prejudice that an appellate court will find an abuse of discretion in the trial court's denial of a motion for continuance.

The court of criminal appeals in *Duhamel v. State*¹¹¹ followed a line of reasoning similar to the Supreme Court's in *Rojas-Contreras*. The court in *Duhamel* found that the trial court did not abuse its discretion in denying a motion for continuance filed by the defendant's appointed attorney alleging that the attorney was not prepared for trial.¹¹² The court recognized that appointed counsel must have ten days actual preparation time.¹¹³ The date of counsel's formal appointment, however, does not control.¹¹⁴ Thus, since counsel had been involved in the case for more than ten days and since the defendant did not demonstrate any prejudice to him if his motion for continuance were denied, the trial court did not err in denying the motion.¹¹⁵

The Fifth Circuit took the "no abuse of discretion" standard one step further in *United States v. Mitchell*.¹¹⁶ The district court had denied the de-

104. 714 S.W.2d at 358.

105. See *Thompson v. State*, 612 S.W.2d 925, 929 (Tex. Crim. App. 1981) (discharge from hospital following civil commitment terminated any presumption of incompetency); *Paul v. State*, 544 S.W.2d 668, 671 (Tex. Crim. App. 1976) (discharge from hospital following civil commitment had effect of terminating any presumption of incompetency).

106. 106 S. Ct. 555, 88 L. Ed. 2d 537 (1985).

107. 18 U.S.C. §§ 3161-3174 (1982).

108. 106 S. Ct. at 558, 88 L. Ed. 2d at 544.

109. *Id.* at 557, 88 L. Ed. 2d at 543.

110. *Id.* at 558, 88 L. Ed. 2d at 544.

111. 717 S.W.2d 80 (Tex. Crim. App. 1986) (en banc).

112. *Id.* at 83.

113. *Id.*; see TEX. CODE CRIM. PROC. ANN. art. 26.04(b)(1966) (requires that an appointed attorney be given ten days to prepare for trial).

114. 717 S.W.2d at 83.

115. *Id.* at 83-84.

116. 777 F.2d 248 (5th Cir. 1985).

fendant's motion for continuance although the defendant's counsel had a scheduling conflict with the date set for trial. The Fifth Circuit upheld the denial of the defendant's motion for continuance even though it resulted in the defendant's being unrepresented throughout his entire trial.¹¹⁷

X. DISCOVERY

The Texas Rules of Criminal Evidence create some new opportunities for discovery by criminal defendants. For example, rule 404(b) requires the state to give the defendant, upon timely request, reasonable notice in advance of trial of extraneous offenses the state intends to introduce in its case.¹¹⁸ This rule thus effectively overrules cases such as *Milton v. State*¹¹⁹ and *Sharp v. State*.¹²⁰

The rules also impose some reciprocal discovery burdens on defendants. Rule 609(f) allows a defendant to give the state a list of his witnesses and request notice of any prior convictions the state intends to use to impeach those witnesses.¹²¹ The state, however, may request the same information from the defendant concerning the state's witnesses.¹²² Likewise, rule 614 requires the state to produce a witness's statement after the witness has testified on direct examination so that the defendant may use it for purposes of cross-examination.¹²³ The defendant, however, must also produce statements prepared by his witnesses so that the state may use those statements for cross examination.¹²⁴

117. *Id.* at 257.

118. TEX. R. CRIM. EVID. 404(b).

119. 599 S.W.2d 824, 827 (Tex. Crim. App. 1980) (en banc) (nothing requires notice to defendant before extraneous offenses can be introduced).

120. 707 S.W.2d 611, 618 (Tex. Crim. App. 1986) (en banc) (notice to defendant is not required before evidence of extraneous offenses are introduced).

121. TEX. R. CRIM. EVID. 609(f).

122. *Id.*

123. *Id.* 614.

124. *Id.*