

January 1988

## Criminal Procedure: Pretrial

Robert Udashen

---

### Recommended Citation

Robert Udashen, *Criminal Procedure: Pretrial*, 42 Sw L.J. 581 (1988)  
<https://scholar.smu.edu/smulr/vol42/iss1/20>

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

by  
*Robert Udashen\**

**T**HIS Article details the major state and federal developments in the area of criminal pretrial procedure during the Survey period.

## I. SPEEDY TRIAL

The most notable development in pretrial criminal procedure this Survey period was the demise of the Texas Speedy Trial Act.<sup>1</sup> A sharply divided court of criminal appeals<sup>2</sup> held the Speedy Trial Act unconstitutional because it violates the separation of powers doctrine in the Texas Constitution.<sup>3</sup>

The Texas Constitution divides the powers of government into three departments.<sup>4</sup> A power that has been granted in the constitution to one branch of the government may not be exercised by another branch.<sup>5</sup> Article V of the Texas Constitution<sup>6</sup> creates the office of prosecuting attorney. The same article also establishes the judicial branch of government.<sup>7</sup> Thus, the court of criminal appeals reasoned, prosecuting attorneys are members of the judicial branch of government and entitled to the separation of powers protection as expressed in article II, section 1 of the Texas Constitution.<sup>8</sup>

County and district attorneys function primarily to represent the state in criminal cases.<sup>9</sup> In carrying out this function, a prosecutor must be free to exercise discretion in preparing cases for trial.<sup>10</sup> The separation of powers doctrine prevents the legislature from abridging this discretion unless authorized by an express constitutional provision.<sup>11</sup>

The legislature, however, may provide procedural guidelines regulating the method of asserting a defendant's substantive rights.<sup>12</sup> By enacting the Speedy Trial Act, the legislature attempted to regulate enforcement of a de-

---

\* B.A., J.D., The University of Texas. Attorney at Law, Dallas, Texas.  
1. TEX. CODE CRIM. PROC. ANN. art. 32A.02 (Vernon Pam. Supp. 1988).  
2. *Meshell v. State*, 739 S.W.2d 246 (Tex. Crim. App. 1987).  
3. TEX. CONST. art. II, § 1.  
4. *Id.*  
5. 739 S.W.2d at 252.  
6. TEX. CONST. art. V, § 21.  
7. *Id.* art. V, § 1 (1891, amended 1980).  
8. 739 S.W.2d at 253.  
9. *Id.* at 254.  
10. *Id.*  
11. *Id.* at 254-55.  
12. *Id.* at 255.

fendant's constitutional right to a speedy trial.<sup>13</sup> According to a majority of the court of criminal appeals, the Act's problem stems from its focus on speeding the prosecutor's preparation for trial and not on speeding the commencement of trial.<sup>14</sup> The Act gives no consideration to any of the traditional factors that courts examine to determine whether or not a defendant has been denied a constitutional right to a speedy trial.<sup>15</sup> According to the court the Speedy Trial Act deprives prosecutors of their exclusive discretion in preparing for trial without directly protecting a defendant's constitutional right to a speedy trial.<sup>16</sup> The court concluded that because the Texas Constitution has no provision expressly granting the legislature the power to control a prosecutor's preparation for trial, the Speedy Trial Act violates the separation of powers doctrine and is unconstitutional.<sup>17</sup>

The majority opinion of the court of criminal appeals fails to explain how the Speedy Trial Act interferes with the discretion of prosecuting attorneys to represent the state in court on criminal cases. As the dissenters point out, the Speedy Trial Act does not require prosecutors to do anything.<sup>18</sup> They are free to pursue criminals aggressively or to do nothing, as they see fit. The Act merely imposes certain sanctions on prosecutors if they fail to prepare for trial once the Speedy Trial Act has been triggered.<sup>19</sup>

Even if it could be said that the Speedy Trial Act interfered with prosecutors' discretion by directing them to prepare for trial when they would not have otherwise prepared, such a requirement is clearly related to defendants' constitutional right to a speedy trial. Obvious to all, except perhaps five members of the court of criminal appeals, is that if the Act forces prosecutors to be ready for trial in a timely fashion, then defendants will more likely be afforded their constitutional right to a speedy trial. In that sense the Speedy Trial Act does help protect a defendant's constitutional right to a speedy trial.

The 1987 Texas Legislature amended the Speedy Trial Act without addressing the issues raised by the court of criminal appeals.<sup>20</sup>

The legislature increased the time allotted for trial to commence in felony cases from 120 days to 180 days.<sup>21</sup> The amendments also provided that delay caused by exceptional circumstances not under the control of the state's attorney, such as scientific analysis should be excluded in computing the time for trial to commence.<sup>22</sup> Those amendments are, presumptively,

---

13. *Id.*

14. *Id.*

15. *Id.* at 256. The court stated that the traditional factors used by courts in analyzing a constitutional violation of the right to a speedy trial include: the length of the delay before trial; the reason for the delay; the defendant's assertion of his right to a speedy trial; and any prejudice to the defendant resulting from the delay in the trial. *Id.* (citing *Barker v. Wingo*, 407 U.S. 514, 531 (1972)).

16. 739 S.W.2d at 256.

17. *Id.* at 257.

18. *Id.* at 267 (Teague, J., dissenting), 270 (Miller, J., dissenting).

19. TEX. CODE CRIM. PROC. ANN. art. 28.061 (Vernon Pam. Supp. 1988).

20. *Id.* art. 32A.02.

21. *Id.* art. 32A.02, § 1(1).

22. *Id.* art. 32A.02, § 4(11)(12).

unconstitutional.

The United States Court of Appeals for the Fifth Circuit addressed the similar issue of prosecutorial preparation and diligence under the federal Speedy Trial Act.<sup>23</sup> In *United States v. Bigeler*<sup>24</sup> the court clearly stated that the government has the duty to act promptly to secure the presence for trial of a prisoner incarcerated in another jurisdiction and to seek timely appointment of counsel for that prisoner.<sup>25</sup> Under the federal act counsel must be appointed in time to allow thirty days to prepare for trial within the seventy-day time period within which the federal Speedy Trial Act requires a trial to commence.<sup>26</sup> Failure to comply with the act's provisions, however, does not require the indictment against an accused to be dismissed with prejudice.<sup>27</sup> Unlike the Texas Speedy Trial Act, the federal Speedy Trial Act allows an indictment to be dismissed without prejudice.<sup>28</sup> The government can obtain a new indictment if it can show that the circumstances that led to the violation of the Speedy Trial Act's requirements and the impact of re-prosecution on the administration of the Speedy Trial Act and on the attainment of justice would not offend notions of fair play.<sup>29</sup> The dismissal of an indictment without prejudice under the federal Speedy Trial Act tolls the running of the act's time limits.<sup>30</sup> The time limits begin to run anew with the return of a new indictment.<sup>31</sup>

## II. FORMER JEOPARDY

The courts heard a number of important double jeopardy cases during the Survey period. The Dallas court of appeals decided the most alarming case, *Harrison v. State*.<sup>32</sup> The case concerned the state's prosecution of the defendant, Harrison, for hindering apprehension. During Harrison's first trial his defense attorney challenged the arresting officer's credibility by implying that the officer did not really suffer a black eye in arresting the defendant or the attorney would have noticed the black eye at the jail. Following the officer's testimony, the trial court declared a mistrial on motion of the state because the attorney had made himself a potential witness in the case. Prior to his second trial, Harrison's special plea in bar was overruled. The Dallas court of appeals affirmed the trial court's decision, holding that a manifest necessity for the mistrial existed and thus presented no double jeopardy bar to retrying the defendant.<sup>33</sup> The court of appeals stated that an attorney cannot serve as counsel and as an unsworn witness.<sup>34</sup> The court relied on

---

23. 18 U.S.C. §§ 3161-3174 (1982).

24. 810 F.2d 1317 (5th Cir. 1987).

25. *Id.* at 1323.

26. *Id.* at 1322 (interpreting 18 U.S.C. §§ 3161(b)-3161(c) (1982)).

27. *Id.* at 1323.

28. 18 U.S.C. § 3162(a)(2) (1982).

29. *Bigler*, 10 F.2d at 1324.

30. *United States v. Hutchins*, 818 F.2d 322, 326 (5th Cir. 1987).

31. *Id.*

32. 721 S.W.2d 904 (Tex. App.—Dallas, pet. granted).

33. *Id.* at 908.

34. *Id.*

the state bar disciplinary rules that require an attorney to withdraw from representing a client if he becomes a potential witness in a case.<sup>35</sup>

*Harrison* failed to reconcile the state bar disciplinary rules with an attorney's obligation to investigate the facts of a case and a defendant's right to effective assistance of counsel. If the court of criminal appeals upholds the decision in *Harrison*, an attorney who interviews a witness who later testifies differently at trial would become a potential witness and thus be disqualified from representing his client. The client would then be deprived of the effective counsel of his choice. Such a result, particularly on the motion of the prosecutor, is unconscionable without a showing that the defendant desired the attorney actually to take the stand and testify in the case.

The court of criminal appeals dealt with a wide variety of double jeopardy issues. Among them was *Fulmer v. State*,<sup>36</sup> in which the court held that an acquittal based on an indictment that alleged the wrong name for the complainant did not bar prosecution under another indictment that correctly set out the complainant's name.<sup>37</sup> The court also continued its trend of considering erroneously admitted evidence in weighing the sufficiency of the evidence to sustain a conviction.<sup>38</sup>

In *May v. State*<sup>39</sup> the court of criminal appeals clearly stated that the *Blockburger* test<sup>40</sup> is not the only test for determining if two offenses are the same for double jeopardy purposes.<sup>41</sup> In the defendant's first trial, the jury found the defendant guilty of involuntary manslaughter arising out of an automobile accident. Subsequently, the defendant brought a pretrial habeas proceeding seeking dismissal of a driving while intoxicated prosecution arising out of same incident.

The court of criminal appeals relied on *Illinois v. Vitale*,<sup>42</sup> in which the United States Supreme Court discussed the possibility that two separate offenses might still be the same offense for purposes of double jeopardy if the prosecution of the second offense required relitigation of factual issues previ-

35. *Id.* at 907-08; SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. XII, § 8 (Code of Professional Responsibility) DR 5-102(A) (1973). Disciplinary Rule 5-102(A) states:

If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR5-101(B)(1) through (4).

36. 731 S.W.2d 943 (Tex. Crim. App. 1987).

37. *Id.* at 946.

38. *Messer v. State*, 729 S.W.2d 694, 700 (Tex. Crim. App. 1986) (failure of trial court to approve defendant's waiver of rights and agreement to stipulate is trial error but does not render evidence insufficient to support guilty plea; no double jeopardy bar to retrial exists); *Faulder v. State*, No. 69,077 (Tex. Crim. App. Sept. 30, 1987) (sufficiency of evidence is judged by considering all evidence, including erroneously admitted confession).

39. 726 S.W.2d 573 (Tex. Crim. App. 1987).

40. *Blockburger v. United States*, 284 U.S. 299, 304 (1930) (two offenses are different for double jeopardy purposes if each requires proof of an element that the other does not).

41. 726 S.W.2d at 577.

42. 447 U.S. 410, 420-21 (1980).

ously determined by the first prosecution.<sup>43</sup> The Supreme Court found such a result possible even if one of the two offenses required proof of an element not contained in the other and thus the offenses were classified as different offenses under the *Blockburger* test.<sup>44</sup> In *May* the court of criminal appeals held that since the state would seek to prove in the driving while intoxicated case the same act of driving while intoxicated on a public roadway that it proved in the involuntary manslaughter prosecution, the two offenses were the same for double jeopardy purposes, thus barring the second prosecution.<sup>45</sup>

The court of criminal appeals also considered the doctrine of collateral estoppel during the Survey period. In *Ex parte Traver*<sup>46</sup> the court held that a factual finding adverse to the state on a motion to revoke a defendant's probation could not be relitigated in a criminal prosecution for the same act (assault) that served as the basis of the motion to revoke probation.<sup>47</sup> The United States Court of Appeals for the Fifth Circuit, however, refused to follow the reasoning of *Traver* in *Showery v. Samaniego*.<sup>48</sup> In *Showery* the defendant was free on an appeal bond for a murder conviction when he was arrested for a new offense. The state sought revocation of the appeal bond based on the fact that the defendant had committed a new offense. The trial court revoked the bond, but the appellate court reversed the decision because the state had failed to prove by a preponderance of the evidence that the defendant had committed a new offense.<sup>49</sup> The Fifth Circuit refused to block the new prosecution on double jeopardy or collateral estoppel grounds because a bond revocation proceeding is not designed to obtain a conviction for a new offense and thus is not essentially criminal in nature.<sup>50</sup>

### III. CHARGING INSTRUMENTS

In *Labelle v. State*<sup>51</sup> the court of criminal appeals extended the holding of *Adams v. State*<sup>52</sup> to motions to revoke probation. The state in *Labelle* moved to revoke the defendant's probation, alleging that he had removed and destroyed a governmental record. The defendant filed a motion to quash the revocation motion, requesting that the state be required to specify what document the defendant removed and destroyed. The trial court overruled this motion.

---

43. *Id.*

44. *Id.*

45. 726 S.W.2d at 576-77.

46. 725 S.W.2d 195 (Tex. Crim. App. 1986).

47. *Id.* at 200. The state sought to prosecute the defendant for the same assault that the district court dismissed as incredible after a full hearing on the state's motion to revoke probation. The state was to present the same case in the assault trial as it presented in the probation hearing. *Id.* at 196.

48. 814 F.2d 200 (5th Cir. 1987).

49. *Id.* at 202.

50. *Id.* at 203.

51. 720 S.W.2d 101 (Tex. Crim. App. 1986).

52. 707 S.W.2d 900, 903 (Tex. Crim. App. 1986) (if trial court errs in overruling a motion to quash an indictment or information, the conviction will not be reversed unless the error prejudiced the defendant's ability to prepare a defense).

In analyzing the motion to quash in *Labelle*, the court of criminal appeals first determined that the trial court erred in overruling the motion because the reference to "a governmental record" in the motion to revoke probation was such an inadequate description as to be no description at all.<sup>53</sup> The court then applied the test of *Adams v. State*<sup>54</sup> to determine whether reversible error existed in *Labelle*.<sup>55</sup> Because the record showed that the state had informed the defendant of the identity of the governmental record prior to the hearing, and because the defendant failed to produce any witnesses or evidence in his behalf or argue that the alleged act had not occurred, the court found no impact on the defendant's ability to prepare his defense.<sup>56</sup> The court of criminal appeals affirmed the judgment of the trial court.<sup>57</sup>

In an important decision for cases brought prior to December 1, 1985, the court of criminal appeals held in *Janecka v. State*<sup>58</sup> that the state may amend an indictment to correct defects in form pointed out by a motion to quash.<sup>59</sup>

In *Gonzales v. State*<sup>60</sup> the state alleged in the indictment that the defendant started a fire in San Antonio, but failed to allege that San Antonio was an incorporated city or town.<sup>61</sup> The court of criminal appeals held that whether San Antonio is an incorporated city is a fact of which judicial notice is taken.<sup>62</sup> As such, the fact need not be alleged in an indictment.<sup>63</sup>

#### IV. JOINDER AND SEVERANCE

The 1987 Texas Legislature broadened the definition of "criminal episode" in the Penal Code.<sup>64</sup> Now a defendant may be prosecuted in a single criminal action for all offenses arising out of the same "criminal episode" regardless of whether those offenses are found in title 7 of the Penal Code.<sup>65</sup>

---

53. 720 S.W.2d at 106.

54. 707 S.W.2d at 903.

55. *Labelle*, 720 S.W.2d at 106.

56. *Id.* at 109.

57. *Id.*

58. No. 68,881 (Tex. Crim. App. Oct. 7, 1987).

59. *Id.*, slip op. at 7 (overruling *Brusfield v. State*, 600 S.W.2d 288 (Tex. Crim. App. 1980)); cf. TEX. CODE CRIM. PROC. ANN. art. 28.10 (Vernon Pam. Supp. 1988).

60. 723 S.W.2d 746 (Tex. Crim. App. 1987).

61. It is an offense to start a fire in an incorporated city or town. TEX. PENAL CODE ANN. § 28.02(a)(1) (Vernon Supp. 1988).

62. 723 S.W.2d at 751.

63. *Id.* at 752. TEX. CODE CRIM. PROC. ANN. art. 21.18 (Vernon 1966) states that matters of which judicial notice is taken need not be stated in an indictment.

64. TEX. PENAL CODE ANN. § 3.01 (Vernon Supp. 1988) reads as follows:

In this chapter, "criminal episode" means the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, under the following circumstances:

(1) the offenses are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan; or

(2) the offenses are the repeated commission of the same or similar offenses.

65. *Id.* § 3.02 (Vernon 1974); see also former TEX. PENAL CODE ANN. § 3.01 (Vernon 1974) (criminal episode is restricted to the repeated commission of any one offense found in title 7 of the Penal Code).

This new definition of "criminal episode" allows the joinder of all offenses arising out of the same transaction and also allows the joinder of the repeated commission of similar offenses.<sup>66</sup> A defendant prosecuted under these new joinder provisions can be convicted and sentenced for more than one offense arising out of the same transaction.<sup>67</sup>

During the Survey period the Fifth Circuit reiterated its general rule that persons who are indicted together should be tried together.<sup>68</sup> Few exceptions to this rule exist. Even a situation such as *United States v. Carrion*,<sup>69</sup> in which one defendant in a joint prosecution intended to raise an entrapment defense and the other defendant planned to argue insufficiency of the evidence, did not justify a severance.<sup>70</sup> In order to obtain a severance because of incompatible defenses, a defendant must show that the defenses are irreconcilable and that the jury would draw adverse inferences from the conflict itself.<sup>71</sup> In the Fifth Circuit this requirement places an almost impossible burden on the defendant.

## V. GRAND JURY

The First District Court of Appeals in Houston in *Alejandro v. State*<sup>72</sup> considered the question of whether previously suppressed evidence can be the basis for a reindictment. The grand jury indicted the appellant for the offense of possession of heroin with intent to deliver. Following that indictment the trial court heard and granted the appellant's motion to suppress evidence. The state then submitted evidence of the same offense to another grand jury, which again indicted the appellant. The court of appeals, in this case of first impression in Texas, held that the grand jury could consider the suppressed evidence.<sup>73</sup> Presumably, however, the collateral estoppel doctrine will prevent the state from using the suppressed evidence in the new prosecution.

During the survey period the court of criminal appeals reexamined the procedure for holding a person in contempt for refusing to answer questions before a grand jury when the person has been granted immunity.<sup>74</sup> In such a case, the prosecutor must file a motion for contempt with the district court

---

66. See *supra* note 64.

67. TEX. PENAL CODE ANN. § 3.03 (Vernon 1974); cf. *Billings v. State*, 725 S.W.2d 757, 760 (Tex. App.—Houston [14th] 1987, no pet.) (securing multiple convictions on offenses joined for prosecution that arise out of one transaction is improper).

68. *United States v. Williams*, 809 F.2d 1072, 1084 (5th Cir. 1987).

69. 809 F.2d 1120 (5th Cir. 1987).

70. *Id.* at 1125-26.

71. *United States v. Wheeler*, 802 F.2d 778, 782 (5th Cir. 1986) (severance not prejudicial where ringleader's testimony negatively impacted accomplice's credibility); *United States v. Stotts*, 792 F.2d 1318, 1321-22 (5th Cir. 1986) (defenses not incompatible where all defendants argued unawareness of conspiracy); *United States v. Nichols*, 695 F.2d 86, 92-93 (5th Cir. 1981) (defenses not irreconcilable when one defendant argued that he was innocent of conspiracy and other defendant argued legitimacy of scheme).

72. *Alejandro v. State*, 725 S.W.2d 510 (Tex. App.—Houston [1st Dist.] 1987, no pet.).

73. *Id.* at 513. The court also found no evidence of prosecutorial misconduct.

74. *Ex parte Port*, 674 S.W.2d 772 (Tex. Crim. App. 1987) (overruling *Ex parte Port*, 674 S.W.2d 772 (Tex. Crim. App. 1984), holding that refusal to answer grand jury questions constituted contempt of grand jury).

that impanelled the grand jury and ask that the witness be ordered to answer the grand jury's questions.<sup>75</sup> If the court orders the witness to answer the questions and the witness still refuses to answer, he may be found in contempt of the district court's order.<sup>76</sup> The mere refusal by a witness to answer questions before the grand jury is not contempt.<sup>77</sup> The grand jury must seek help from the court in dealing with a recalcitrant witness because a grand jury has no inherent power to punish a witness for contempt.<sup>78</sup>

## VI. VENUE

The court of criminal appeals decided only two cases of note concerning the issue of change of venue this Survey period. In *Aranda v. State*<sup>79</sup> the court upheld a change of venue on the trial court's own motion and over the appellant's objection.<sup>80</sup> The court rejected the appellant's argument that he should have the prerogative to be tried in the county where the offense occurred unless the evidence is overwhelming that both the state and the defendant will not receive a fair trial in that county.<sup>81</sup>

In *Faulder v. State*<sup>82</sup> the court of criminal appeals reviewed the denial of a change of venue motion even though the motion was not sworn to or accompanied by two affidavits as required by the Code of Criminal Procedure.<sup>83</sup> The court held that because a motion for change of venue is of constitutional dimensions, strict compliance with the requirements of the Code of Criminal Procedure is not necessary.<sup>84</sup> The court then affirmed the trial court's denial of the motion, stating that the fact that a case has been publicized, without more, does not establish prejudice or require a change of venue.<sup>85</sup>

## VII. BAIL

The Supreme Court, in *United States v. Salerno*,<sup>86</sup> considered the provisions of the Bail Reform Act<sup>87</sup> that allow a federal court to detain an arrestee without bail pending trial. Salerno was an alleged "boss" of the Genovese Crime Family. He was arrested and charged with numerous violations of federal law. The trial court detained Salerno in custody, without bail, because no release conditions would reasonably assure the safety of the community.

---

75. *Id.* at 447.

76. *Id.* at 449.

77. *Id.* at 448.

78. *Id.* at 448-49.

79. 736 S.W.2d 702 (Tex. Crim. App. 1987).

80. *Id.* at 706 (TEX. CODE CRIM. PROC. ANN. art. 31.01 (Vernon 1966) allows trial court to change venue on its own motion after giving notice to accused and state and hearing evidence thereon).

81. *Id.* at 705.

82. No. 69,077 (Tex. Crim. App. Sept. 30, 1987) (not yet reported).

83. TEX. CODE CRIM. PROC. ANN. art. 31.03 (Vernon Supp. 1988) (requires a defendant's motion for change of venue to be sworn and supported by two affidavits).

84. No. 69,077, slip op. at 20.

85. *Id.* at 21.

86. 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

87. 18 U.S.C. §§ 3141-3156 (1982 & Supp. III 1986).

Salerno challenged his detention on the grounds that it violated the fifth<sup>88</sup> and eighth<sup>89</sup> amendments to the United States Constitution in that his detention constituted punishment before trial and a denial of his right to bail. The Supreme Court held, however, that the Bail Reform Act is regulatory and not penal.<sup>90</sup> The Court stated that the government's interest in community safety can outweigh an individual's liberty interest.<sup>91</sup> Thus, when an accused presents an identifiable and articulable threat to an individual or society, he may, consistent with due process, be detained without bail.<sup>92</sup> The court further held that when some interest other than the prevention of flight mandates detention, the eighth amendment does not require release on bail.<sup>93</sup>

The dissent argued that the Bail Reform Act turns an untried indictment into evidence favoring pretrial detention and thus contradicts the presumption of innocence.<sup>94</sup> According to the dissent, crime prevention should not be considered as a factor in setting bail.<sup>95</sup> The focus of the Bail Reform Act, according to the dissent, should be on imposing conditions of release to insure the defendant's appearance at the trial on the charges relating to the defendant's arrest.<sup>96</sup> The dissent raised the question of whether the government can continue to hold a defendant after acquittal if the defendant is still dangerous to the community.<sup>97</sup> A majority of the Supreme Court seems on the brink of sanctioning such preventive detention.

#### VIII. COMPETENCY TO STAND TRIAL

In *Arnold v. State*<sup>98</sup> the court of criminal appeals established the standard for reviewing the sufficiency of the evidence to support a jury's verdict finding the defendant competent.<sup>99</sup> An examination of the evidence supporting such a verdict begins with a presumption of competency.<sup>100</sup> The defendant must thus prove his incompetence by a preponderance of the evidence.<sup>101</sup> In *Arnold* the court held that a jury finding of competency must be examined in the light most favorable to that verdict.<sup>102</sup> The standard of review is whether any rational trier of fact could have found that the defendant failed to prove his incompetency by a preponderance of the evidence.<sup>103</sup> Under

---

88. U.S. CONST. amend. V (due process).

89. *Id.* amend. VII (excessive bail clause).

90. 107 S. Ct. at 2102, 95 L. Ed. 2d at 708-09.

91. *Id.*

92. *Id.* at 2103, 95 L. Ed. 2d at 711.

93. *Id.* at 2105, 95 L. Ed. 2d at 713-14.

94. *Id.* at 2110-11, 95 L. Ed. 2d at 719 (Marshall, J., dissenting).

95. *Id.* at 2111, 95 L. Ed. 2d at 720.

96. *Id.*

97. *Id.* at 2110, 95 L. Ed. 2d at 719.

98. 719 S.W.2d 590 (Tex. Crim. App. 1986).

99. *Id.* at 592.

100. TEX. CODE CRIM. PROC. ANN. art. 46.02, § 1(b) (Vernon 1979).

101. *Id.*

102. 719 S.W.2d at 593.

103. *Id. Contra Hill v. State*, 721 S.W.2d 953, 954-56 (Tex. App.—Tyler 1986, no pet.) (criticizing *Arnold*, and supporting a "great weight and preponderance of the evidence" standard).

*Arnold* the appellate courts may not reweigh or reclassify the evidence in competency trials.<sup>104</sup>

During the Survey period the court of criminal appeals again addressed the issue of incompetency in *Manning v. State*.<sup>105</sup> The court held that if a defendant introduces evidence of a prior, unvacated adjudication of incompetency, the state must then prove the defendant's competency beyond a reasonable doubt.<sup>106</sup> The presumption that a defendant is competent to stand trial does not apply in such a situation.<sup>107</sup>

*Barber v. State*<sup>108</sup> established the rule that a trial court must impanel a jury to decide the issue of competency when some evidence of incompetency, amounting to more than a scintilla, is brought to the attention of the judge even during trial on the merits.<sup>109</sup> The trial judge does not weigh the evidence on competency. Instead, the judge must view the evidence in the light most favorable to the party with the burden of supporting the finding, disregarding contrary evidence and inferences.<sup>110</sup>

### IX. CONTINUANCE

Legislative continuances<sup>111</sup> came under the scrutiny of the court of criminal appeals in *Collier v. Poe*.<sup>112</sup> In that case the grand jury indicted the defendant, Collier, for the offenses of attempted murder and aggravated assault. Collier hired an attorney to represent him and his cases were subsequently set for trial. Later, more than ten days in advance of the trial setting, Collier retained State Representative Debra Danburg to assist in his defense. Representative Danburg promptly filed a motion for a legislative continuance. The trial court overruled the motion for continuance, even though the state did not file a controverting motion demonstrating that the state would suffer irreparable harm or that substantial existing rights of the state would be defeated by delaying the trial. The court of criminal appeals held that when the statute governing legislative continuances is complied with and the statutory exception<sup>113</sup> does not apply, then the trial court has no discretion except to grant the motion.<sup>114</sup>

### X. DISCOVERY

Aggravated sexual assault cases raised some interesting discovery issues during the Survey period. In *State ex rel. Wade v. Stephens*<sup>115</sup> the trial court

---

104. 719 S.W.2d at 593; see also *Hill*, 721 S.W.2d at 954-55.

105. 730 S.W.2d 744, 745-46 (Tex. Crim. App. 1987).

106. *Id.* at 748.

107. *Id.* at 748 n.3.

108. 737 S.W.2d 824 (Tex. Crim. App. 1987).

109. *Id.* at 828.

110. *Id.*

111. TEX. CIV. PRAC. & REM. CODE § 30.00 (Vernon 1986).

112. 732 S.W.2d 332 (Tex. Crim. App.); cert. denied, 108 S. Ct. 51, 98 L. Ed. 2d 15 (1987).

113. TEX. CIV. PRAC. & REM. CODE § 30.003(c) (Vernon 1986) does not permit a legislative continuance if counsel is retained within ten days of the scheduled trial date.

114. *Id.* at 346.

115. 724 S.W.2d 141 (Tex. App.—Dallas 1987, no pet.).

ordered the complainant in an aggravated sexual assault prosecution to submit to a physical examination. The state sought a writ of mandamus in the Dallas court of appeals to nullify that order. The appellate court held that the trial court had no authority to order the complainant to submit to a physical examination and ordered the trial court to set aside its order.<sup>116</sup> The court reasoned that no general right to discovery exists under the United States or Texas Constitutions.<sup>117</sup> The court also stated that rule 167a of the Texas Rules of Civil Procedure,<sup>118</sup> which allows civil litigants to be ordered to submit to physical examinations, does not apply to criminal cases.<sup>119</sup> Further, the court held that article 39.14 of the Code of Criminal Procedure<sup>120</sup> does not authorize trial courts to order witnesses to submit to physical examinations.<sup>121</sup> Moreover, trial courts have no inherent authority to order this type of discovery.<sup>122</sup>

In another aggravated sexual assault case, *Dickens v. Court of Appeals*,<sup>123</sup> the trial judge sought a writ of mandamus from the court of criminal appeals contesting the issuance by the court of appeals of a writ of mandamus directing the trial judge to allow discovery of a complainant's videotaped statement. In reviewing the situation the court of criminal appeals stated that a defendant has a limited right to discovery of exculpatory or mitigating evidence.<sup>124</sup> A defendant does not have a general right to discovery.<sup>125</sup> The trial judge was within his discretion to deny the defendant's request for a copy of the videotape.<sup>126</sup>

In *Pennsylvania v. Ritchie*<sup>127</sup> the United States Supreme Court held that a defendant's rights of confrontation and compulsory process do not carry with them the power to compel pretrial disclosure of the names of the state's witnesses or information that would be useful in cross-examining the state's witnesses.<sup>128</sup> The Court adopted a due process analysis under the fourteenth amendment for the review of pretrial discovery rather than an examination under the less settled confines of the sixth amendment.<sup>129</sup>

---

116. *Id.* at 144-45.

117. *Id.* at 143.

118. TEX. R. CIV. P. 167(a) states:

When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

119. *Stephens*, 724 S.W.2d at 143-44.

120. TEX. CODE CRIM. PROC. ANN. art. 39.14 (Vernon 1979).

121. 724 S.W.2d at 144.

122. *Id.*

123. 727 S.W.2d 542 (Tex. Crim. App. 1987).

124. *Id.* at 551.

125. *Id.*

126. *Id.* at 552.

127. 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

128. *Id.* at 999, 1001, 94 L. Ed. 2d at 54, 57.

129. *Id.* at 1001, 94 L. Ed. 2d at 57.

