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CRIMINAL PROCEDURE: PRETRIAL

by
Ed Kinkeade*

THIS Article discusses the significant Texas criminal cases pertaining to criminal pretrial procedure decided during the survey period. Although no noteworthy cases concerning competency to stand trial were reported during this period, other developments occurred in the area of criminal pretrial procedure, particularly in the speedy trial area.

I. SPEEDY TRIAL

A. *Attacks on the Mechanics of the Speedy Trial Act*

The court of criminal appeals has been prolific in the area of speedy trial during the survey period. In *Turner v. State*¹ the court held that the statutory Speedy Trial Act² is invoked only if specifically mentioned in the record.³ The court held in *Santana v. State*⁴ that the state's written announcement of ready for trial is sufficient and need not be made in open court.⁵ Furthermore, the state is not obligated to make any type of assertion as to the state's preparedness until such time as the accused invokes the relevant provisions of the Act.⁶ Once the defendant invokes these provisions of the Act, the state has the burden of proving readiness within the statutory time limit and at all times thereafter.⁷ The court of criminal appeals held in *Smith v. State*⁸ that if the state makes a voluntary announcement of ready within the statutory time constraints and before the accused invokes the Act,

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1. 662 S.W.2d 357 (Tex. Crim. App. 1983).

2. TEX. CODE CRIM. PROC. ANN. art. 32A.02 (Vernon Pam. Supp. 1966-1983).

3. The docket sheet mentioned the Speedy Trial Act and it was obvious that all parties concerned knew what they were making reference to without specific mention of the Act in the record. The court held that the defendant waived his statutory right to a speedy trial by not filing a motion for discharge under the Speedy Trial Act. 662 S.W.2d at 359.

4. 658 S.W.2d 612 (Tex. Crim. App. 1983).

5. *Id.* at 614.

6. *Fraire v. State*, 588 S.W.2d 789, 791 (Tex. Crim. App. 1979). The Speedy Trial Act reads in part: "[t]he failure of a defendant to move for discharge under the provisions of this article prior to trial or the entry of a plea of guilty constitutes a waiver of the rights accorded by this article." TEX. CODE CRIM. PROC. ANN. art. 32A.02, § 3 (Vernon Pam. Supp. 1966-1983).

7. *Barfield v. State*, 586 S.W.2d 538, 542 (Tex. Crim. App. 1979).

8. 659 S.W.2d 828 (Tex. Crim. App. 1983).

the defendant bears the burden of rebutting that announcement.⁹

To be ready for trial, the state must be prepared to try the lawsuit. The court of criminal appeals interpreted preparedness in *Ward v. State*¹⁰ not to require the state to be ready with a perfect indictment or information.¹¹ The *Ward* court overruled *Kernahan v. State*,¹² in which the El Paso court of appeals had interpreted *Pate v. State*¹³ to require a valid charging instrument as an essential element of the state's preparedness.¹⁴ In *Ward* the affidavit forming the basis for the information inadvertently was left unsigned. Readiness further requires that the state have the accused present and indicted within 120 days of his arrest. In *Stokes v. State*¹⁵ the court dismissed the prosecution because the defendant proved that the state knew that the defendant was in jail in Arkansas and did not exercise due diligence to secure his presence within the statutory time limits of the Speedy Trial Act. In *Lloyd v. State*¹⁶ the state failed to indict the accused within 120 days from the date of his arrest. The state argued that the delay of the forensic laboratory in analyzing the seized materials was excludable as an exceptional circumstance.¹⁷ The court rejected this argument, noting that a chemist's analysis was not an essential prerequisite to presenting a case to a grand jury.¹⁸

The court of criminal appeals has grappled with the carryover of waivers and announcements of ready for some time. During the survey period the court shed some light on this area. In *Rosebury v. State*¹⁹ the defendant waived his right to speedy trial under indictments charging possession of tetrahydrocannabinol. Subsequent to the waiver the state discovered the substance to be marijuana and re-indicted the defendant. The second indictment was filed outside the time limits of the Speedy Trial Act,²⁰ but the court held that the defendant's previous waiver of his rights under the Act carried forward to the second indictment because both indictments dealt with a single criminal act.²¹ The *Rosebury* court distinguished *Richardson v. State*,²² in which the Dallas court of appeals held that the state's announcement of ready in one indictment did not carry forward to an indictment that

9. *Id.* at 830.

10. 659 S.W.2d 643 (Tex. Crim. App. 1983).

11. *Id.* at 647; *see also* *Pena v. State*, 662 S.W.2d 430 (Tex. App.—Corpus Christi 1983, no pet.) (court noted Act does not require perfect indictment from state).

12. 643 S.W.2d 210, 211 (Tex. App.—El Paso 1982), *aff'd*, 657 S.W.2d 433 (Tex. Crim. App. 1983).

13. 592 S.W.2d 620 (Tex. Crim. App. 1980).

14. 659 S.W.2d at 647.

15. 666 S.W.2d 493, 494 (Tex. Crim. App. 1983).

16. 665 S.W.2d 472, 474 (Tex. Crim. App. 1984).

17. *Id.* at 475; *see also* TEX. CODE CRIM. PROC. ANN. art. 32A.02, § 4(10) (Vernon Pam. Supp. 1966-1983) (providing exception to Speedy Trial Act's 120-day requirement).

18. 665 S.W.2d at 475.

19. 659 S.W.2d 655 (Tex. Crim. App. 1983).

20. Under TEX. CODE CRIM. PROC. ANN. art. 32A.02 (Vernon Pam. Supp. 1966-1983), indictments must be filed within 120 days of arrest.

21. 659 S.W.2d at 657.

22. 629 S.W.2d 164 (Tex. App.—Dallas 1982, pet. ref'd).

alleged a different offense.²³

In *Paris v. State*²⁴ the court held that the defendant's waiver of speedy trial transferred to the subsequent indictment for the same offense. *Carr v. State*²⁵ stands for the proposition that the state's timely announcement of ready on one offense does not transfer to the second, different offense arising out of the same transaction. The Dallas court of appeals in *Willcutt v. State*²⁶ reached an opposite conclusion, however. The court held that the state's announcement of ready in the first indictment for injury to a child transferred to the second incitement for serious bodily injury to a child arising out of the same transaction.²⁷

The court of criminal appeals' interpretation of article 28.061 of the Code of Criminal Procedure²⁸ in *Kalish v. State*²⁹ is particularly important to the criminal law practitioner. In *Kalish* the police stopped the defendant for failure to dim his headlights and subsequently arrested him for public intoxication, possession of quaaludes, and possession of cocaine. The defendant's public intoxication case was dismissed under the provisions of the Speedy Trial Act. The defendant moved to have the provisions of article 28.061 bar prosecution in his pending drug cases. The court of criminal appeals held that the legislature drafted article 28.061 cognizant of the fact that crimes of varying degrees may be committed in the same transaction and, as such, the decision to begin the criminal action and include all offenses arising out of the same transaction dictated that the state be prepared for trial on all cases within the shorter time period.³⁰ The court stated that "when a person is detained, placed under restraint or taken into custody by a peace officer, all such chargeable voluntary conduct in which the person was then and there engaged, constituting an offense continuing in nature, arises out of the same transaction."³¹ This definition of an offense arising out of the same transaction was followed in *Patterson v. State*.³²

B. Attacks on the Constitutionality of the Speedy Trial Act

Recently, the state executed a frontal attack on the constitutionality of the Speedy Trial Act. In March of 1984, in *Noel v. State*,³³ the state attacked

23. *Id.* at 165. The first indictment was for theft, and the reindictment was for burglary. The state failed to announce ready within 120 days after the criminal action for burglary commenced, as required by the Speedy Trial Act. The state argued that this indictment was a reindictment of a previous theft indictment for the same offense. *Id.* at 165.

24. 668 S.W.2d 411, 413 (Tex. Crim. App. 1984).

25. No. 337-38 (Tex. Crim. App. Sept. 19, 1984).

26. 669 S.W.2d 404 (Tex. App. — Dallas 1984, no pet.).

27. *Id.* at 405 (citing *Denson v. State*, No. 63,428 (Tex. Crim. App. July 7, 1982, reh'g granted)).

28. TEX. CODE CRIM. PROC. ANN. art. 28.061 (Vernon Pam. Supp. 1966-1983). This statute requires a court to discharge a defendant when the court grants relief to the defendant under the Speedy Trial Act.

29. 662 S.W.2d 595 (Tex. Crim. App. 1983).

30. *Id.* at 599.

31. *Id.* at 600.

32. 662 S.W.2d 342, 343 (Tex. Crim. App. 1983).

33. No. 827-83 (Tex. Crim. App. Oct. 9, 1984).

the Speedy Trial Act, arguing that the caption was constitutionally insufficient based on the court of criminal appeals' ruling in *Ex parte Crisp*.³⁴ The court of criminal appeals held that the state could not be heard to complain because the state did not petition for discretionary review.³⁵ The court expressed an inability to consider the state's constitutional question as unassigned error because the constitution guarantees the state's citizens, but not the state, due course of law.³⁶ The court granted the state's motion for rehearing, and the case was submitted on May 30, 1984. No opinion has been issued to date.

The state launched a second attack on the constitutionality of the Act, and specifically the caption, in *State ex rel. Wade v. Mays*.³⁷ The state was seeking to prohibit State District Judge Richard Mays from dismissing the pending charges against Joe and Cathy Cody. The Codys were arrested on March 12, 1984, for murder. The murder allegedly took place during an aggravated robbery, making the Codys subject to indictment for capital murder. Both defendants were indicted for murder and the state announced ready within the 120-day statutory requirement for preparedness. Later, on July 17, 1984, the state indicted the Codys for aggravated robbery arising out of the same transaction. The two aggravated robbery indictments were dismissed under the Speedy Trial Act. Trial counsel for the Codys invoked the provisions of article 28.061,³⁸ and the judge expressed an intent to dismiss the pending murder indictments.³⁹ The state specifically attacked the statute as possessing a fatally deficient caption,⁴⁰ but the court denied the state relief.⁴¹ By this action the court refused to include pure issues of law in the parameter of a writ of prohibition. In light of this action, the constitutionality of the Speedy Trial Act will only be properly before the court for consideration when a defendant has received an adverse ruling on a motion to set aside the indictment under article 32A.02⁴² and not on any extraordinary writs.

34. 661 S.W.2d 944 (Tex. Crim. App. 1983). In *Crisp* the court held that the caption to the bill that created a new offense of aggravated possession of marijuana did not fulfill the state constitutional requirement that the caption give the reader fair notice of the subject matter of the bill. *Id.* at 946.

35. No. 827-83, slip op. at 2.

36. *Id.*

37. No. 69,329 (Tex. Crim. App. Feb. 6, 1985).

38. TEX. CODE CRIM. PROC. ANN. art. 28.061 (Vernon Pam. Supp. 1966-1983) states:

If a motion to set aside an indictment, information, or complaint for failure to provide a speedy trial as required by Article 32A.02 is sustained, the court shall discharge the defendant. *A discharge under this article is a bar to any further prosecution for the offense discharged or for any other offense arising out of the same transaction.*

Id. (emphasis added).

39. The state was ready for trial on the two murder indictments at all times required by the Speedy Trial Act. The defendants never contended otherwise.

40. See *Ex parte Crisp*, 661 S.W.2d 944 (Tex. Crim. App. 1983) (statute unconstitutional because caption not descriptive of scope of statute's contents).

41. *State ex rel. Wade v. Mays*, No. 69,329 (Tex. Crim. App. Feb. 6, 1985).

42. TEX. CODE CRIM. PROC. ANN. art. 32A.02 (Vernon Pam. Supp. 1966-1983).

II. VENUE

No dramatic changes in the law on venue occurred during the survey period; however, the court of criminal appeals did decide one significant venue case. In *Cook v. State*⁴³ the court upheld the manner in which the trial court ordered a change of venue on its own motion. Appellant contended that article 31.01 of the Code of Criminal Procedure⁴⁴ required that at a hearing on the court's motion to change venue, if the defendant objects to the change of venue, evidence in support of said court's motion must be produced to support the court's order. The court rejected this argument and held that article 31.01 does not require the trial court to offer evidence in support of its own motion,⁴⁵ but only affords the parties a chance to be heard on the matter.⁴⁶ Appellant also contended in *Cook* that the trial court's consideration of matters learned outside of the hearing at which appellant was present constituted a denial of due process of law. Since the court already had ruled that the trial court was not required to offer evidence in support of its motion at the venue hearing, the trial court necessarily considered matters learned outside of the formal venue hearing in making its determination to change venue.⁴⁷ The holdings in *Cook*, that the trial court need not offer evidence in support of its own motion for a change of venue and that the trial court may consider matters learned outside the formal venue hearing, make one wonder what would constitute a reversible abuse of discretion.⁴⁸ The only circumstances that probably would merit an abuse of discretion reversal would be a failure to state the grounds for the change of venue in the trial court's order and an affirmative showing that any county in the court's own and adjoining district was not subject to the same conditions that required the transfer.

III. BAIL

One case of interest was decided in the bail area during the survey period. In *Kernahan v. State*⁴⁹ the defendant asserted his right under article 17.151 of the Code of Criminal Procedure⁵⁰ to be released on personal bond or have his bond reduced to an amount that he could post. Defendant had been incarcerated for ninety-four days without an indictment being returned. The state contended that it had been ready for trial at all times and the only delay in seeking and obtaining an indictment was the result of mutual negotiations to obtain restitution and save indictment and prosecution. The court held that without an indictment the state could not be ready for trial as required

43. 667 S.W.2d 520 (Tex. Crim. App. 1984).

44. TEX. CODE CRIM. PROC. ANN. art. 31.01 (Vernon 1966).

45. 667 S.W.2d at 523.

46. *Id.* n.2.

47. *Id.* at 523.

48. See *Allen v. State*, 488 S.W.2d 460 (Tex. Crim. App. 1972) (judge did not abuse his discretion by changing venue on his own motion).

49. 657 S.W.2d 433 (Tex. Crim. App. 1983).

50. TEX. CODE CRIM. PROC. ANN. art. 17.151 (Vernon Supp. 1984).

by article 17.151.⁵¹ Further, negotiations for disposal of the case will not serve to toll the mandatory provisions of the article.⁵² The court also held that article 17.151 contemplated a reduction of bond to an amount that the detainee could afford to pay.⁵³

IV. FORMER JEOPARDY

During the survey period the court of criminal appeals interpreted the meaning of chapter 3 of the Penal Code⁵⁴ in connection with article 27.05 of the Code of Criminal Procedure⁵⁵ for double jeopardy purposes. In *Stevens v. State*⁵⁶ the defendant was convicted of burglarizing a building. In a later trial in the same district court, he was convicted of another offense arising out of the same criminal episode. Stevens claimed that the state's failure to consolidate the trial barred prosecution of the second offense under article 27.05 of the Code of Criminal Procedure and Penal Code section 3.02.⁵⁷ The court pointed out that the language of article 27.05 seemed to indicate that the legislature envisioned a mandatory joinder under some circumstances.⁵⁸ The court, however, adhered to its prior interpretation of section 3.02 in *Haliburton v. State*⁵⁹ that the joinder provisions under section 3.02 are wholly permissive,⁶⁰ and held that Stevens was not subjected to former jeopardy by reason of failing to consolidate the two offenses into one trial.⁶¹

In two cases the court of criminal appeals held that former jeopardy barred the state from using a different prior conviction to enhance punishment when the conviction used to enhance punishment is discovered not to be a final conviction.⁶² In *Carter v. State*⁶³ the appellant was convicted of

51. 657 S.W.2d at 434. Article 17.151 mandates a prisoner's release either on personal bond or by reducing bail if the state is not ready for trial within 90 days from the commencement of the prisoner's detention if he is accused of a felony. TEX. CODE CRIM. PROC. ANN. art. 17.151, § 1(1) (Vernon Supp. 1984).

52. 657 S.W.2d at 434.

53. The court noted that a \$2,500 bond was just as unattainable to a penniless detainee as a \$5,000 bond and ordered the trial court to release the appellant on personal bond. *Id.*

54. TEX. PENAL CODE ANN. § 3.02 (Vernon 1974).

55. TEX. CODE CRIM. PROC. ANN. art. 27.05 (Vernon Pam. Supp. 1966-1983).

56. No. 67,582 (Tex. Crim. App. Apr. 17, 1984).

57. Article 27.05 provides in part that "[a] defendant's only special plea is that he has already been prosecuted for the same or a different offense arising out of the same criminal episode that was or should have been consolidated into one trial" TEX. CODE CRIM. PROC. ANN. art. 27.05 (Vernon Pam. Supp. 1966-1983). Section 3.02(a) provides that "[a] defendant may be prosecuted in a single criminal action for all offenses arising out of the same criminal episode." TEX. PENAL CODE ANN. § 3.02(a) (Vernon 1974).

58. No. 67,582, slip op. at 5.

59. 578 S.W.2d 726 (Tex. Crim. App. 1979).

60. *Id.* at 729.

61. No. 67,582, slip op. at 6.

62. See TEX. PENAL CODE ANN. § 12.42(d) (Vernon Supp. 1984), which provides:

If it be shown on the trial of any felony offense that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by confinement in the Texas Department of Corrections for life, or for any term of not more than 99 years or less than 25 years.

63. 676 S.W.2d 353 (Tex. Crim. App. 1984).

aggravated robbery. The court assessed the automatic punishment under section 12.42(d)⁶⁴ of life imprisonment upon the jury finding that the enhancement allegations of two prior felony convictions were true. Carter was granted a new trial because one of the prior convictions resulted in a probated sentence and not a final conviction. The state then attempted to prove Carter's habitual offender status a second time with a different prior conviction. The court held that such an attempt to retry the issue of enhancement was barred by former jeopardy, stating that when the trial court granted appellant a new trial because the evidence was insufficient as to an essential element necessary to prove habitual offender status, it essentially granted an acquittal to that disputed question of fact.⁶⁵ The same result was reached in *Ex parte Bullard*,⁶⁶ in which the state likewise failed to prove properly one of the two prior felony convictions alleged in the indictment for enhancement of punishment. A second punishment hearing was conducted before the trial court, after which the trial court again found that Bullard was an habitual criminal and assessed his punishment at life imprisonment. Bullard filed for a post-conviction writ of habeas corpus. The court held that the second enhancement punishment proceeding violated the double jeopardy clause of the United States Constitution.⁶⁷ In Texas, therefore, to establish the defendant's status as an habitual criminal, the prosecution is entitled to have but one bite of the same apple.⁶⁸

In *Miller v. State*⁶⁹ the appellant argued that the state was prohibited from prosecuting him for murder after the offense had been alleged in an adjudication petition filed in juvenile court. The court applied former article 30(c) of the Texas Penal Code⁷⁰ and concluded that the state was precluded from prosecuting appellant for an offense previously alleged against him in the

64. TEX. PENAL CODE ANN. § 12.42(d) (Vernon Supp. 1984).

65. 676 S.W.2d at 355.

66. 679 S.W.2d 12 (Tex. Crim. App. 1984).

67. *Id.* at 14; U.S. CONST. amend. V; see *Burks v. United States*, 437 U.S. 1 (1978) (double jeopardy clause of fifth amendment precludes a second trial once the reviewing court has found the evidence insufficient to sustain the jury's verdict of guilty, and the court must enter a judgment of acquittal); *Green v. Massey*, 438 U.S. 19 (1978) (a defendant may not be retried after his conviction was reversed by an appellate court for insufficiency of evidence).

68. See *Ex parte Augusta*, 639 S.W.2d 481, 485 (Tex. Crim. App. 1982) (state precluded from enhancing defendant's punishment at a second trial when a trial court once held that evidence adduced after the first enhancement proceeding was legally insufficient to establish the sequence of prior felony convictions); *Cooper v. State*, 631 S.W.2d 508, 512 (Tex. Crim. App. 1982) (if state fails to prove sufficiently all facts necessary to find an enhancement true in a sentencing hearing, state may not have a second opportunity or a new hearing in that cause to prove original allegations).

69. No. 961-82 (Tex. Crim. App. Jan. 11, 1984).

70. Act of June 15, 1973, ch. 544, § 2, 1973 Tex. Gen. Laws 1460, 1485, *repealed by Act of June 19, 1975, ch. 342, § 16, 1975 Tex. Gen. Laws 912, 918 & Act of Sept. 1, 1975, ch. 693, § 26, 1975 Tex. Gen. Laws 2152, 2159.* The former section provided that:

A person who has been alleged in a petition for an adjudication hearing to have engaged in delinquent conduct or conduct indicating a need for supervision may not be prosecuted for or convicted of any offense alleged in the juvenile court petition or any offense within the knowledge of the juvenile court judge as evidenced by anything in the record of the juvenile court proceedings.

Id.

petition for adjudication in the juvenile court.⁷¹ In *Ex parte Jefferson*⁷² the applicant for writ of habeas corpus was convicted of unauthorized use of a motor vehicle and later for theft of the same vehicle.⁷³ Jefferson asserted that double jeopardy barred prosecution for the crime of theft of a pickup truck following a conviction for the offense of unauthorized use of the truck. Applying the *Blockburger* test⁷⁴ to the facts, the court held that the second prosecution was barred because unauthorized use of a motor vehicle is a lesser-included offense of theft⁷⁵ and, therefore, the same offense for double jeopardy purposes.⁷⁶

*Palm v. State*⁷⁷ involved the question of whether a conviction based on an invalid charging instrument barred the state from re-indicting the appellant. The court held that such re-indictment was not barred by double jeopardy.⁷⁸ The court reasoned that by virtue of the invalid charging instrument the trial court lacked jurisdiction in the first trial and thus the resulting conviction was void.⁷⁹ Jeopardy does not attach if the trial court lacks jurisdiction to hear the case.⁸⁰ Since appellant had never been in jeopardy, he had no claim of former jeopardy.

V. SEVERANCE

In *United States v. Romanello*⁸¹ the Fifth Circuit extended the rule of *United States v. Berkowitz*⁸² that antagonistic defenses among defendants require severance only if the defenses are antagonistic to the point of being mutually exclusive or irreconcilable.⁸³ A defense reaches such a level of an-

71. No. 961-82, slip op. at 3. The dissent argued that the statute in question did not apply because it had been repealed prior to the occurrence of the operative facts in the instant case.

72. 681 S.W.2d 33 (Tex. Crim. App. 1984).

73. See TEX. PENAL CODE ANN. § 31.07 (Vernon 1974).

74. "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

75. See *Neely v. State*, 571 S.W.2d 926, 928 (Tex. Crim. App. 1978) (facts that sustain conviction for offense of theft also sustain conviction for lesser offense of unauthorized use of a vehicle).

76. 681 S.W.2d at 34.

77. 656 S.W.2d 429 (Tex. Crim. App. 1981).

78. *Id.* at 431.

79. *Id.*; see *American Plant Food v. State*, 508 S.W.2d 598, 603-04 (Tex. Crim. App. 1974) (exception to substance of state's pleading may be raised for first time on appeal).

80. 656 S.W.2d at 431; see *Ward v. State*, 520 S.W.2d 395, 398 (Tex. Crim. App. 1975) (jeopardy does not attach in event of conviction based on defective instrument); see also *United States v. Ball*, 163 U.S. 662, 671-74 (1896) (verdict of acquittal is conclusive).

81. 726 F.2d 173, 177 (5th Cir. 1984).

82. 662 F.2d 1127, 1133 (5th Cir. 1981); see also *United States v. Sheikh*, 654 F.2d 1057 (5th Cir. 1981) (existence of antagonistic defenses among codefendants is cause for severance when the defendants conflict to the point of being irreconcilable and mutually exclusive; *United States v. Crawford*, 581 F.2d 489 (5th Cir. 1978) (severance is not mandated every time codefendants with inconsistent defenses are tried together); *United States v. Johnson*, 478 F.2d 1129 (5th Cir. 1973) (trial judge has a continuing duty at all stages of joint trial to grant a severance if prejudice does appear).

83. The *Berkowitz* rule is based in FED. R. CRIM. P. 14, which provides: "[i]f it appears that a defendant . . . is prejudiced by a joinder of . . . defendants . . . for trial together, the

tagonism "if the jury, in order to believe the core of testimony offered on behalf of that defendant, must necessarily disbelieve the testimony offered on behalf of his co-defendant."⁸⁴ In *Romanello* the court was faced with a question of first impression: whether a defendant deserves a new trial if the core of his defense is his co-defendant's guilt, but defendant's guilt is not the core of his co-defendant's defense.⁸⁵ Defendant Vertucci and co-defendants Romanello and Mendez were convicted in the United States District Court for the Southern District of Texas of stealing gold jewelry, importing jewelry into the United States, transporting stolen goods in interstate commerce, and conspiracy. At trial Romanello and Mendez chose to attack the credibility of Vertucci's statement that he was robbed by painting him as an abettor of gold smugglers who fabricated a robbery story in order to shift suspicion to his co-defendants. Romanello and Mendez claimed to be innocent couriers. From this story the jury could have believed Vertucci's defense, that he was robbed by two unidentified men, and that of Romanello and Mendez, that they had innocently accepted a job to drive the gold contraband to New York. Thus, the defenses were not by nature irreconcilable or mutually exclusive under *Berkowitz*. The court, however, pointed out that although the core of the Romanello and Mendez defense was not Vertucci's guilt, they still had to disprove Vertucci's defense.⁸⁶ In attacking the truth of Vertucci's defense, the attorneys for Romanello and Mendez aided the prosecution. The court concluded that the conflict between the two defense camps created "a substantial possibility the jury would infer that neither defense was true."⁸⁷ By virtue of such a conflict, the court stated, Vertucci suffered "the very prejudice that the severance rules are designed to rectify."⁸⁸ The court proceeded to hold that a defendant deserves a severed trial when: (1) the core of his defense is the guilt of his co-defendant; (2) to disprove his defense would establish his guilt; (3) his defense and the defense of his co-defendant are irreconcilable and mutually exclusive; (4) the co-defendant actively attacks his defense at trial; and (5) he suffers compelling prejudice as a result.⁸⁹

VI. GRAND JURY

During the survey period the court of criminal appeals decided an interesting case dealing with contempt of grand jury. In *Ex parte Port*⁹⁰ the court of criminal appeals held that when a witness refuses to answer questions propounded by the grand jury and remains steadfast in his refusal to answer after being taken before the district court and compelled to testify as pro-

court may . . . grant a severance of defendants or provide whatever other relief justice requires."

84. *Berkowitz*, 662 F.2d at 1134.

85. 726 F.2d at 180.

86. *Id.*

87. *Id.* at 181.

88. *Id.*

89. *Id.*

90. 674 S.W.2d 772 (Tex. Crim. App. 1984).

vided for in article 20.15⁹¹ of the Code of Criminal Procedure, the recalcitrant witness is then in contempt of the grand jury, rather than in contempt of the district court.⁹² The district court has no jurisdiction to hold such person in contempt of court, because the power given the court under article 20.15 is only that of assistance to the grand jury in the execution of the finding of contempt of the grand jury.⁹³

VII. DISCOVERY

*Brady v. Maryland*⁹⁴ remains alive and well in the Fifth Circuit. In *Austin v. McKaskle*⁹⁵ the Fifth Circuit found a serious allegation of a violation of *Brady* and remanded to the district court for an evidentiary hearing on appellant's writ of habeas corpus. Appellant and a co-defendant were indicted for aggravated robbery. At the punishment phase the prosecution offered evidence of several threatening, violent acts that allegedly were committed by appellant. One police officer testified that the robber in the front passenger seat of the getaway vehicle pointed a rifle at him and threatened to kill him unless he turned off a spotlight illuminating the robber's automobile. A second officer told how the gunman in the passenger seat raised and aimed his rifle at the officer as he blocked the getaway car to prevent the robber's escape. This second officer further testified that he avoided being shot by ramming the vehicle. Two witnesses identified the appellant as the gunman in the front passenger seat, but the appellant testified that he was the driver.

The Texas Court of Criminal Appeals affirmed the conviction on direct appeal.⁹⁶ Four years after the trial appellant learned of the existence of police records relating to the night of his arrest. The records identified the driver of the getaway car as Robert James Mathews, an alias used by appellant, and thus corroborated appellant's testimony that he was the driver rather than the passenger of the getaway car. Appellant Austin contended before the Fifth Circuit that he neither knew of nor had access to these records at the time of trial, notwithstanding the fact that his attorney had filed a pretrial *Brady* motion. Appellant twice sought habeas relief in state court. Both times the Texas Court of Criminal Appeals denied relief. Appellant then filed a federal habeas petition that was referred to a magistrate, who recommended that the petition be denied; the district court accepted the recommendation.⁹⁷ Appellant had not had an evidentiary hearing on his federal constitutional claims before either the state or federal habeas court.⁹⁸ If the records were in fact suppressed, then all elements of the *Brady* test

91. TEX CODE CRIM. PROC. ANN. art. 20.15 (Vernon 1977).

92. 674 S.W.2d at 780.

93. *Id.* at 779.

94. 373 U.S. 83 (1963) (a new trial only on the question of punishment does not violate due process when suppressed evidence was admissible only on the issue of punishment).

95. 724 F.2d 1153 (5th Cir. 1984).

96. *Austin v. State*, 565 S.W.2d 72, 74 (Tex. Crim. App. 1978).

97. 724 F.2d at 1155-56.

98. Such a hearing was needed to determine whether the records were suppressed or withheld by the prosecution despite the pending of appellant Austin's *Brady* request, whether the prosecution failed to correct what it knew or should have known to be false or incorrect testi-

were satisfied. The Fifth Circuit reversed the judgment of the district court and remanded the matter for an evidentiary hearing.⁹⁹

In *Pinkerton v. State*¹⁰⁰ the court of criminal appeals continued to approve of the prosecution's practice of calling witnesses to testify who do not appear on the witness list tendered to the defense.¹⁰¹ The prosecutor in *Pinkerton* acknowledged at trial that he did not furnish written notice of the state's witness, John Alley, who had been appellant's fellow inmate. The prosecutor, however, asserted that he orally notified the defense that Alley would testify approximately two weeks before he did so. Appellant's counsel, while agreeing that the state furnished him with some names of prisoners, disputed this point. At trial the court overruled appellant's motion to exclude Alley's testimony, but afforded counsel "whatever time you think you need to talk to Alley."¹⁰² In light of the trial court's strenuous efforts to ensure that appellant was not unfairly harmed by Alley's testimony, the court of criminal appeals could not find that the trial court abused its discretion in allowing Alley to testify.¹⁰³

mony of the witness who identified Austin as the passenger of the getaway car, and the actual time that the records came into Austin's possession. 724 F.2d at 1156.

99. The court echoed the teachings of *Brady v. Maryland* that "society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Id.* (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

100. 660 S.W.2d 58 (Tex. Crim. App. 1983).

101. See *Hightower v. State*, 629 S.W.2d 920 (Tex. Crim. App. 1982) (trial court must use discretion in allowing witness who is not on the witness list to testify); *Haynes v. State*, 627 S.W.2d 710 (Tex. Crim. App. 1982) (testimony of witness who is not on the state's list is admissible when testimony is inconsistent with defendant's admissions); *Young v. State*, 547 S.W.2d 23 (Tex. Crim. App. 1977) (failure of state to divulge names of witnesses not reversible error when state did not know what witnesses it would call at time of motion requesting such information); *Smith v. State*, 540 S.W.2d 693 (Tex. Crim. App. 1976) (no error when witness was called in rebuttal although name was not on the witness list); *Lincoln v. State*, 508 S.W.2d 635 (Tex. Crim. App. 1974) (no abuse of discretion when arresting officer who was not on the witness list was allowed to testify); *Clay v. State*, 505 S.W.2d 882 (Tex. Crim. App. 1974) (no error when witnesses not on the witness list were allowed to testify, in absence of bad faith by prosecutor and when testimony was not to any contested fact issue).

102. 660 S.W.2d at 64.

103. *Id.* at 64-65.

