PD-1102-20
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 12/21/2021 4:22 PM
Accepted 12/22/2021 9:48 AM
DEANA WILLIAMSON
CLERK

No. PD-1102-20

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
12/22/2021
DEANA WILLIAMSON, CLERK

EX PARTE
KEVIN DALE SHEFFIELD, Appellant

Appeal from Johnson County, Trial Cause DC-F201900865-1
No. 07-20-00216-CR

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STATE'S BRIEF ON THE MERITS

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's order denying the pretrial habeas relief are the State of Texas and Appellant, Kevin Dale Sheffield.

* The trial judge was Hon. William C. Bosworth, Jr., Presiding Judge, 413th District Court, Johnson County, Texas.

* Appellant represented himself at the June 4, 2020 hearing and was represented at the June 30, 2020 hearing by standby counsel Bryan Bufkin, Bufkin & Adams, 1632 W. Henderson, Suite B, Cleburne, Texas 76033.

* Appellant was represented on appeal in the Court of Appeals by himself and/or with standby counsel Bryan Bufkin, Bufkin & Adams, 1632 W. Henderson, Suite B, Cleburne, Texas 76033.

* Appellant is represented in this Court by Johnna Bonds McArthur, McArthur & Boedeker, 1632 W. Henderson St. Suite B, Cleburne, Texas 76033.

* Counsel for the State at the hearings in the trial court was Assistant District Attorney J. Ryan Eady, Johnson County District Attorney's Office, 204 S. Buffalo, Cleburne, Texas 76033.

* Counsel for the State before the Court of Appeals on original submission was Assistant District Attorney David Vernon, Johnson County District Attorney's Office, 204 S. Buffalo, Cleburne, Texas 76033, and on rehearing was Emily Johnson-Liu, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

* Counsel for the State before this Court is Emily Johnson-Liu, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

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* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

This Court has repeatedly refused to allow interlocutory review of speedy trial claims. Asking for a trial rather than dismissal changes nothing. In fact, instead of vindicating the right, the inherent slowness of a multi-tiered appellate process would undermine it. Further, that this process was forgotten while the State petitioned for discretionary review does not deprive this Court of the authority to say as much.

STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant argument.

STATEMENT OF THE CASE

Appellant was indicted on five counts for multiple drug possession, felon in possession, and evading arrest. 8/10/20-Supp. CR at 14-15.[1] Appellant filed a pretrial habeas application, asking for personal bond under TEX. CODE CRIM. PROC. art. 17.151 or a speedy trial. CR at 6-7. The trial court denied relief. 7 RR 8-9. Appellant appealed. The court of appeals upheld the art. 17.151 ruling but interpreted the trial court's actions as "indefinitely pretermit[ting] enjoyment of the right" to a speedy trial and reversed and remanded the case to the trial court, presumably for a speedy trial. *Ex parte Sheffield*, 611 S.W.3d 630, 635 (Tex. App.—Amarillo 2020). It denied the State Prosecuting Attorney's argument on rehearing. Before this Court ruled on the SPA's petition for discretionary review, the trial court conducted a trial and convicted Appellant.[2] Neither party filed a motion for stay.

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[1] The supplemental clerk's records are differentiated by file-stamp date, which precedes the "-Supp. CR."

[2] The appeal from that conviction is proceeding in the Tenth Court of Appeals in Cause Number 10-21-00109-CR. *See* https://search.txcourts.gov/Case.aspx?cn=10-21-00109-CR&coa=coa10.

ISSUES GRANTED

On the State's Petition:

1) Are speedy trial claims cognizable on pretrial habeas if the applicant asks for a speedy trial rather than dismissal?

2) Did the court of appeals improperly reverse the trial court's ruling for what the trial court said instead of what it did?

On the Court's Own Motion:

Did the trial court have jurisdiction to hold a trial while the State's petition for discretionary review was pending in this Court?

STATEMENT OF FACTS

Appellant's confinement in jail began in late summer 2019.[3] He was indicted within 90 days. By then he had filed a *pro se* motion for speedy trial. 8/10/20-Supp. CR 9. In Spring 2020, Texas entered a COVID-19 lockdown.[4] In a videoconference hearing in May 2020, the trial court let Appellant represent himself and told him, "your trial is likely to be awhile until the Governor lets us have a trial again." 5 RR 14. The trial court explained the difficulties of even accessing the courthouse in May 2020:

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[3] Appellant alleged he had been in custody since Aug. 5, 2019. CR 6; 7 RR 5. His *pro se* letters suggest he was there at least by September 2019. 8/10/20-Supp. CR 13.

[4] *See* https://www.dshs.state.tx.us/coronavirus/execorders.aspx for a timeline of the Governor's executive orders and public-health-disaster declarations.

> The Office of Court Administration says that after June 1st if we have an approved plan in place, we can start letting people come back in the building. Our county health official has to sign off on that. He's not comfortable until July 1st, but I'm working on a plan to try to convince him that after June 15th or sometime in earlier June that he would let limited people, you know, come back in here.

5 RR 18.

A few days later on May 12, Appellant filed a *pro se* motion for release due to delay under TEX. CODE CRIM. PROC. art. 17.151. 8/10/20-Supp. CR 21. He asked for a personal bond or bail reduction. *Id*. At the June 4 motion hearing, Appellant argued Article 17.151 required his release because he hadn't been taken to trial. 6 RR 5-6. The prosecutor responded that an indictment had been returned and that the State was ready for trial. 6 RR 6. The trial court denied relief. 6 RR 8. It also gave Appellant an extended explanation:

> The problem is that the State's ready but the Court is not allowed to conduct a jury trial because the Office of Court Administration has instructed me that I'm not allowed to conduct any jury trials until they let me know. They don't think that there will be any jury trials until after August 15th, and that even then, there may not be any jury trials until next year. On top of the Office of Court Administration, the Chief Justice [sic] of the Court of Criminal Appeals and the Chief Justice of the Texas Supreme Court have instructed the courts, including me, that we are not to have live, in-person hearings unless it's absolutely necessary and there's no other way to have the hearing, and that we are not to have jury trials. We're not even to convene a Grand Jury selection hearing, so they've extended the previous Grand Jury six months so we don't have to have 140 people in here to pick a new Grand Jury. So, I would like to have a jury trial. I would be more than willing to have a jury trial, but the Court

> is being prevented from having any trials under direct direction and instruction from higher authority.
>
> So I am going to deny your motion.
>
> If you wish to appeal the motion, you may do so to the Waco Court of Appeals and let them figure out how to handle it. But it's not me, it's not [the prosecutor] and his office that are not ready to go forward with the trial. It's the Office of Court Administration and the higher courts in Texas that have decided that until they can get a handle on this virus problem that we are not to go forward with trials, so that's where we are.

6 RR 7.

On June 29, 2020, Appellant filed an "Application for Writ of Habeas Corpus To Order Release Because of Delay." CR at 6-7. He asked for a personal bond and said "[i]f such request is denied, Movant is entitled under the law to a speedy trial, which he re-urges his request for." CR at 7.

At the June 30 writ hearing, Appellant's standby counsel re-urged all arguments made at the motions hearing. 7 RR 5. He said Appellant had a $100,000 bond he could not pay, wanted to go to trial (preferably before a jury), but that because of COVID-19 and the Texas Supreme Court's emergency orders, that trial could not occur and thus TEX. CODE CRIM. PROC. art. 17.151 required his release on personal bond. 7 RR 5-7. The prosecutor opposed both personal bond and a bond reduction. It said the State was ready to proceed to trial but pointed to the emergency orders by the Office of Court Administration, this Court, and the Texas Supreme Court that created a "roadblock …to getting this case resolved." 7 RR 7. The trial

court noted that Appellant's offenses were not ones it would consider a personal bond for. It denied the habeas petition, stating again that it was following the instructions of the Office of Court Administration and was "prohibited from calling a jury in for a jury trial[.]" 7 RR 9.

The court of appeals

Appellant appealed the denial of his pretrial habeas writ. He argued there were two options to protect his constitutional rights: give him a speedy, in-person jury trial or release him. Since he could not be given a speedy trial due to COVID-19, he should not be kept in custody "for an indeterminate amount of time" awaiting trial. Appellant's COA Brief at 9-10, 12-13, 19. He appended a docket sheet showing his jury trial was not scheduled until January 4, 2021, which was then five months away. Appellant's COA Brief, Exhibit A. Appellant also argued that Art. 17.151 required his release because, due to COVID-19, the State could not be ready for trial "in any practical sense." *Id*. at 16.

The court of appeals upheld the trial court on "the bail/bond issues." *Ex parte Sheffield*, 611 S.W.3d at 633. Appellant did not contest that issue on petition for discretionary review. Thus, that traditional pre-trial habeas avenue is not an issue in the case.

But the court of appeals did reverse the trial court's decision concerning a speedy trial. *Id*. at 635. It identified the underlying question as whether "Covid-19 and its impact displace[d] the rights afforded in our United States and Texas Constitutions?" *Id*. at 632. It specified that the federal and state constitutional right to a speedy trial was the constitutional right at issue. *Id*. It quoted the trial court's extended explanation about OCA and the high courts—which the court of appeals read as indefinitely forgoing proceedings—and corrected the trial court: the Supreme Court's emergency orders were not absolute bans on jury trials; they contained caveats for constitutional protections and authorized a limited number of jury trials. *Id*. at 635. The trial court's misunderstandings, the court of appeals held, were an "erroneous legal basis upon which to act." *Id*. It found Appellant was harmed by the error given his indigency and continued incarceration. *Id*. Although the court of appeals did not specify what the trial court was to do on remand, presumably it was to set the case for trial as quickly as possible, consistent with the Texas Supreme Court's Emergency Orders and the Constitution.

In a motion for rehearing, the SPA argued that interlocutory appeal was not available for review of speedy trial decisions, citing *Ex parte Delbert*, 582 S.W.2d 145, 146 (Tex. Crim. App. 1979), and *Ex parte Doster*, 303 S.W.3d 720, 724 (Tex. Crim. App. 2010). The court of appeals declined to alter its opinion and issued an

order in response. *See Ex parte Sheffield*, 611 S.W.3d at 636-37 (order on reh'g). It distinguished the State's cases because the defendants in those cases sought discharge, not a speedy trial setting. *Id*. at 636. By contrast, the court of appeals held, "seeking a trial when a court indefinitely refuses one furthers the values inherent in the Speedy Trial Clause, as does testing the refusal through an interlocutory appeal." *Id*. at 637. It invoked the exception under *Ex parte Perry*, 483 S.W.3d 884 (Tex. Crim. App. 2016), for pretrial habeas claims that would be effectively undermined if not vindicated before trial. *Id*.

SUMMARY OF THE ARGUMENT

Pretrial habeas is not the proper vehicle for speedy trial claims, even as imagined by the court of appeals. That vehicle is limited to claims that have a special need for appellate review before the judgment. But the appellate process only impedes speedy trials and thus undermines the claim. Transforming the claim into a request solely to get a trial (as opposed to discharge of the case) is contrary to the purpose of habeas, which is to challenge the confinement and secure immediate release. Because the claims the court of appeals imagines are not legitimate free-standing habeas claims but impermissible interlocutory review, the trial court did not have jurisdiction to hold a trial while appellate review was still ongoing.

ARGUMENT

Except for the trial court's conducting trial amid the appeal, this is a straight-forward case about when and how constitutional speedy trial claims should be addressed. It is not about pretrial bond during COVID-19 or whether emergency orders can alter deadlines and "procedures."[5] In the courts below, Appellant attempted to show how COVID-19 bolstered his request for release under TEX. CODE CRIM. PROC. Art. 17.151. He failed for the usual, non-pandemic reason such claims fail: the State had already indicted him and was, as the statute requires, "ready for trial." The court of appeals so ruled, and Appellant did not file a petition for discretionary review. But out of the ashes of this claim, the court of appeals took up Appellant's request for a speedy trial and created a mythic habeas claim that it saw as distinguishable from this Court's precedents precluding pretrial speedy-trial habeas claims. In reality, it is just as fantastical as the phoenix.

I. Pretrial habeas has long been the wrong vehicle for speedy trial claims because permitting immediate appellate review slows down the process and runs contrary to the right.

The court of appeals erred to hold that pretrial habeas was the appropriate vehicle for this claim. This Court has long since held that a pretrial habeas

[5] Some of those matters are before this Court in other cases. *See, e.g.*, *Lira v. State*, PD-0212-21 (Tex. Crim. App.) (submitted June 9, 2021). But Appellant never challenged the legitimacy of the emergency orders.

application may not be used to vindicate the constitutional speedy trial right. *Smith v. Gohmert*, 962 S.W.2d 590, 593 (Tex. Crim. App. 1998); *Ex parte Delbert*, 582 S.W.2d at 146. Part of the reason for this lies in what pretrial writs offer—"an immediate appeal from a denial of relief, before the trial proceedings in a criminal prosecution have been concluded." *Greenwell v. Court of Appeals for Thirteenth Judicial Dist.*, 159 S.W.3d 645, 650 (Tex. Crim. App. 2005). "The right of appeal occurs because the habeas proceeding is in fact considered a separate 'criminal action,' and the denial of relief marks the end of the trial stage of that criminal action and the commencement of the timetable for appeal." *Id*. (footnote omitted). But this benefit is closely guarded. "Because an interlocutory appeal is an extraordinary remedy, appellate courts have been careful 'to ensure that a pretrial writ is not misused to secure pretrial appellate review of matters that in actual fact should not be put before appellate courts at the pretrial stage.'" *Ex parte Doster*, 303 S.W.3d at 724.

There is good reason not to permit appellate review of a defendant's pretrial speedy-trial claims.[6] As the Supreme Court explained in *United States v. MacDonald*:

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[6] A State's appeal from the granting of a motion to dismiss on speedy trial grounds, while a pre-trial matter, is not interlocutory. Dismissal is a final judgment that, when erroneous, appeal exists to remedy. *See* TEX. CODE CRIM. PROC. art. 44.01(a)(1).

> There perhaps is some superficial attraction in the argument that the right to a speedy trial . . . must be vindicated before trial in order to insure that no nonspeedy trial is ever held. Both doctrinally and pragmatically, however, this argument fails. Unlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not, either on its face or according to the decisions of this Court, encompass a "right not to be tried" which must be upheld prior to trial if it is to be enjoyed at all. It is the delay before trial, not the trial itself, that offends against the constitutional guarantee of a speedy trial. If the factors outlined in *Barker v. Wingo, supra*, combine to deprive an accused of his right to a speedy trial, that loss, by definition, occurs before trial. Proceeding with the trial does not cause or compound the deprivation already suffered.

435 U.S. 850, 860-61 (1978). Interlocutory appeal thwarts the purpose of the speedy trial clause by delaying trial even further. *Id*. ("Allowing an exception to the rule against pretrial appeals in criminal cases for speedy trial claims would threaten precisely those values manifested in the Speedy Trial Clause."); *Ex parte Doster*, 303 S.W.3d at 724 (comparing speedy trial and IADA claims). "[A]ppellate delay can become especially long if the case is bounced back and forth between this Court and a court of appeals." *Id.* at 726. And post-trial development of the record also offers a better vantage point for determining prejudice. *See MacDonald*, 435 U.S. at 861; *Ex parte Doster*, 303 S.W.3d at 726.

The availability and preferability of post-trial review is precisely why the extraordinary writs are unavailable for this claim. *See Ordunez v. Bean*, 579 S.W.2d 911, 913-14 (Tex. Crim. App. 1979) (rejecting interlocutory review of speedy trial

claims by mandamus because there was an adequate remedy at law); *Ex parte Delbert*, 582 S.W.2d at 146 (interlocutory review was no more appropriate when the petitioner evoked writ of habeas corpus).

A. Seeking trial rather than dismissal makes the claim even less cognizable.

The court of appeals's decision creates a new rule that allows for interlocutory review when a defendant seeks a trial instead of a discharge or dismissal. *Ex parte Sheffield*, 611 S.W.3d at 636 (order on reh'g). It reasons that appealing after conviction is not a viable remedy because "the very act found objectionable precludes the necessary element for enjoying the legal remedy from arising. Without a trial, there can be no conviction …[or] post-conviction appeal." *Id*. at 637.

Looking to the remedy requested isn't a principled way to distinguish those who are entitled to pretrial appellate review from those who are not—both can claim they cannot vindicate their speedy trial right without interlocutory review. *See Smith v. Gohmert*, 962 S.W.2d at 595 (Baird, J., dissenting) (making same argument where petitioner had requested dismissal: "after being held for nine years awaiting trial, there is no reason to assume he ever will be [tried]. So long as there is no trial, relator has no remedy."). The lower court's test is too easy to manipulate; every speedy trial claim could be transformed into an interlocutory review claim simply by asking for the preferred remedy. Also, it is unclear how it will be applied. What if, like

Appellant, he requests discharge in the alternative in the trial court? 8/10/20-Supp. CR at 9. What if he, like Appellant, makes a passing request for dismissal in his appellate briefing? *See* App. Resp. to Motion for Reh'g at 9.[7] It makes no sense for an appellate court to focus on one requested remedy over another to authorize interlocutory appellate review when, as has been recognized, it does nothing to further speedy-trial interests.

Further, the remedy the court of appeals seems to be insisting upon—a prompt trial setting rather than discharge—transforms the claim into something even less cognizable because it does not challenge the legality of the petitioner's restraint. That is the entire point of habeas. *See* TEX. CODE CRIM. PROC. art. 11.01 (habeas is the remedy when a person is "restrained in his liberty" for the official with custody to "show why he is held"). Consequently, "pretrial habeas is not appropriate when the question presented, even if resolved in the defendant's favor, would not result in immediate release." *Ex parte Doster*, 303 S.W.3d at 724; *Ex parte Weise*, 55 S.W.3d 617, 619 (Tex. Crim. App. 2001). Granting a form of relief other than release highlights that the claim is not a challenge to confinement or restraint and thus not

[7] Appellant argued: "The opinion of this Court should arguably have required Appellant's immediate release, *either by the trial court dismissing the case, which Appellant urges*, or, at the very least, setting a bond that Appellant can make while the case pends." (emphasis added).

truly habeas corpus.

Habeas is inappropriate in the instant case for another reason. Unnecessary explanation underlies a lot of this case—both in the trial court's insisting his hands are tied (and encouraging Appellant to appeal to a higher authority) and the court of appeals's seizing on that explanation and insisting that COVID and the emergency orders have not trumped the constitution. To this extent, the court of appeals's opinion is essentially a declaratory judgment. *See* BLACK'S LAW DICTIONARY, "Judgment" (11th ed. 2019) (defining "declaratory judgment" as "[a] binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement."). This is not a proper use of habeas corpus. *See Ex parte Strother*, 395 S.W.2d 629, 630 (Tex. Crim. App. 1965), *abrogated on other grounds by Ex parte McCain*, 67 S.W.3d 204 (Tex. Crim. App. 2002) ("[t]his Court is not authorized to enter a declaratory judgment but only to inquire into the legality of the confinement or restraint of the prisoner."). In remanding for further proceedings rather than releasing Appellant or dismissing the case, the court of appeals implicitly acknowledges that his pretrial confinement and restraint is legal. This claim is thus not suited for habeas.

B. Mandamus is the vehicle for true indefinite postponement claims.

If, as the court of appeals was suggesting, the trial court declared an indefinite postponement, such claims can be litigated in mandamus. Despite the statement in *Barker v. Wingo*, 407 U.S. 514, 522 (1972), that there is one remedy for a speedy trial violation—dismissal—there is authority that the constitutional speedy trial guarantee can, in some instances, compel the State to bring someone to trial. For example, in *Klopfer v. State of N.C.*, the speedy-trial right compelled proceedings when a state procedure permitted the prosecution to indefinitely suspend a case without explanation and without a way for the defendant to have his case placed on the court's docket. 386 U.S. 213, 226 (1967). Similarly, in *Smith v. Hooey*, the Supreme Court held that when a defendant was incarcerated in another jurisdiction, the State could not just throw up its hands in the face of repeated requests to be brought to trial and make no effort to obtain the prisoner. 393 U.S. 374, 383 (1969) ("Texas had a constitutional duty to make a diligent, good-faith effort to bring [Smith] before the Harris County court for trial.").

In these cases, the defendants were stuck in legal limbo. Klopfer's case had been lingering more than 18 months; Smith's more than six years. *Klopfer*, 386 U.S. at 218; *Smith v. Hooey*, 393 U.S. at 375. Worse, it was arbitrary; in neither case did

the State attempt to justify the delay and thus there was no reason to think the delay was conditioned on anything.

Appellant's situation is different. Although the trial judge could not tell him exactly when a trial could be conducted, it appeared ready and willing to do so when permissible—perhaps even before it was permissible, as is demonstrated by the trial it conducted while this case was pending on petition for discretionary review. Appellant did not face an unconstitutional indefinite postponement. The public health crisis that existed in the first six months of the pandemic when businesses and courthouses were only beginning to reopen was a perfectly understandable reason not to give Appellant his trial. Even Appellant understood this—as he acknowledged the reality that an immediate trial was not possible, which furthered his claim that a lowered bond or personal bond was warranted.

Regardless, if Appellant truly had a claim for indefinite postponement of trial, the vehicle for relief is mandamus, not pretrial habeas. In that context, this Court has distinguished between a party who sought trial from others who wanted dismissal and therefore had an adequate remedy at law. *See Smith v. Gohmert*, 962 S.W.2d at 593 n.7 (distinguishing *Chapman v. Evans,* 744 S.W.2d 133, 138 (Tex. Crim. App. 1988), from the usual discharge-seeking speedy-trial complainant). But in *Chapman*, longer delays than are present in this case and delay likely because he was already

serving a long prison sentence in another case helped substantiate the claim that the postponement was truly indefinite.[8] To obtain mandamus relief, there would have to be a clear articulation of the relief sought, proof that the usual remedy at law (dismissal following appeal) is not adequate under the circumstances, and a clear right to relief based on one rational ruling. To the extent mandamus is an appropriate remedy, Appellant should not be permitted to sidestep those requirements by raising the claim in habeas.

II. The court of appeals erred to overstep its role to review legal errors.

The court of appeals also erred in reversing the trial court for its "erroneous legal basis upon which to act"—namely, that OCA and the presiding judges of the Supreme Court and this Court required indefinite postponement. *Ex parte Sheffield*, 611 S.W.3d at 635. First, there was no indefinite postponement. What the trial court said was it was "prohibited from calling a jury in for a jury trial at this point by the Office of Court Administration." 7 RR 9. And Appellant did not meet his burden of showing this was inaccurate. *See Ex parte Peterson*, 117 S.W.3d 804, 818 (Tex. Crim. App. 2003), *overruled on other grounds by Ex parte Lewis*, 219 S.W.3d 335

[8] *Chapman* was brought as a writ of habeas corpus but treated as a mandamus writ. *Chapman*, 744 S.W.2d at 135 n.1. Appellant's Article 17.151 claim, by contrast, was properly habeas, not a mandamus claim. As for the speedy trial demand, the court of appeals could not have construed that claim as mandamus without all the procedural and substantive requirements that accompany such treatment. *See* TEX. R. APP. P. 52.

(Tex. Crim. App. 2007) ("the burden of proof is on the habeas applicant, as it is in any habeas corpus proceeding."). The Supreme Court's controlling Emergency Order provided that "[a] court must not hold a jury proceeding, including jury selection or a jury trial, prior to September 1, except as authorized by this Order." Supreme Court of Texas, 18th Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 20-9080 (June 29, 2020) at 2, ¶6. It indicated that only a limited number of monitored jury trials would be permitted, and each had to be pre-approved by the OCA. *Id*. The record is silent on whether the trial court submitted an operating plan to hold one of the limited trials or what the OCA may have said in response. Thus, the court of appeals erred by assuming the trial court had not done all it could.

Even if the trial court had not sought pre-approval for trial, at most, the trial court's explanation was an oversimplification: it neglected to say that an avenue existed for trial in a small percentage of test cases. *See* Office of Court Administration, "Jury Trials During the COVID-19 Pandemic: Observations and Recommendations," Aug. 28, 2020, available online at https://www.txcourts.gov/media/1449660/jury-report-to-scotx-final.pdf.

But this oversimplification did not render the trial court's ruling erroneous.

To be reversible error, it must affect the trial court's judgment. TEX. R. APP. P. 44.2.[9] Here, the trial court's order—to the extent it denied him a trial before September 1st—was proper. Appellant has not met his burden of showing that his speedy trial claim had ripened. From what little the habeas record shows, about 10 months had passed between his arrest and the writ hearing. Cases that haven't yet "approache[d]" a year of delay do not trigger consideration of the other *Barker v. Wingo* factors. *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992); *Balderas v. State*, 517 S.W.3d 756, 768 (Tex. Crim. App. 2016); *Cantu v. State*, 253 S.W.3d 273, 281 (Tex. Crim. App. 2008) ("There is no set time element that triggers the analysis, but we have held that a delay of four months is not sufficient while a seventeen-month delay is."). A 10-month delay in prosecuting Appellant's drug, weapon, and evading felonies does not cross the threshold from ordinary to presumptively prejudicial delay under ordinary circumstances. *See Zamorano v. State*, 84 S.W.3d 643, 649 (Tex. Crim. App. 2002) (defendant must show that interval between accusation and hearing on a speedy trial claim crossed the threshold dividing "ordinary" from "presumptively prejudicial" delay).

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[9] *See also Black v. Cutter Labs.*, 351 U.S. 292, 298 (1956) ("This Court, however, reviews judgments, not statements in opinions.…it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests.").

The circumstances of COVID-19 fully justify the delay at the time the trial court was determining this issue, as the court of appeals seems to acknowledge: "Nevertheless, the actual trial need not occur on the accused's timetable. Circumstances related to the state of disaster may reasonably affect the date of trial, especially since the essential ingredient of the right is orderly expedition and not simply speed." *Sheffield*, 611 S.W.3d at 365.

Although Appellant repeatedly asserted his right and was in custody, these factors were overshadowed by the remaining ones: an ordinary-length delay and an extra-ordinary pandemic. Notably, Appellant never challenged the emergency orders suspending in-person jury trials.

The court of appeals's fundamental objection seems to be that the emergency orders don't trump the constitutional right to a speedy trial or even purport to do so. That may be true enough. But until there is an actual speedy-trial violation in Appellant's case for not holding a jury trial during the early months of COVID-19, that is an academic point. Neither trial nor appellate courts may entertain hypothetical claims. *See State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 912 (Tex. Crim. App. 2011) (death-penalty-sentencing scheme challenge is hypothetical at the pretrial stage). And it is not a basis for reversing the trial court's ruling.

III. Because this was mere interlocutory appeal, not legitimate habeas, the trial court lacked jurisdiction to conduct a trial.

After the State filed its petition for discretionary review and before this Court decided whether to accept review, Appellant was tried. That doesn't render the State's granted issues moot because a claim that isn't really habeas is just interlocutory review—where the court of appeals retains jurisdiction until the mandate issues.

True ancillary habeas proceedings, like bail, proceed on a different litigation track than the criminal case, often with a separate cause number. And so when the criminal case continues to trial, a pretrial bond issue can become moot when the trial occurs during the pendency of the defendant's appeal. *See Ex parte Tucker*, 3 S.W.3d 576 (Tex. Crim. App. 1999). This was true of Appellant's Art. 17.151 claim, which, if that were the issue now being litigated, would be mooted out by the trial.

But, as argued above, Appellant's speedy-trial claim was never properly a habeas matter. Instead, although it was titled pretrial habeas, this part of the appeal was in actuality only an interlocutory appeal of a pretrial motion in the criminal case. When considering Appellant's habeas petition and the court of appeals's opinion and order, this Court should, as with other motions and orders, "consider the substance of the filing and not just the label attached to it." *Skinner v. State*, 484 S.W.3d 434, 437 (Tex. Crim. App. 2016). In reaching out to decide an issue that was not a legitimate

habeas matter, the court of appeals was conducting an impermissible interlocutory appeal over that part of the case. To the extent Appellant was urging a speedy trial claim on pretrial habeas, he was seeking impermissible interlocutory appeal.

The distinction between habeas and interlocutory appeal has legal significance because interlocutory appeal deprives the trial court of jurisdiction over the criminal case. As this Court observed in *Ex parte Macias*,

> under Rule of Appellate Procedure 25.2(g), once the appellate record is filed in the appellate court, "all further proceedings in the trial court—except as provided otherwise by law or by these rules—will be suspended until the trial court receives the appellate court mandate."

541 S.W.3d 782, 786 (Tex. Crim. App. 2017); TEX. R. APP. P. 25.2(g). Citing this rule and the statutory stay provision for State's appeals in TEX. CODE CRIM. PROC. art. 44.01(e), this Court held that the trial court had no jurisdiction to conduct a trial before the appellate court mandate; because the pre-mandate trial was a nullity, a post-mandate trial did not violate double jeopardy. *Id*.

The absence of a stay (statutory or otherwise) here should not matter. The plain language of Rule 25.2(g) makes it unnecessary: the filing of the appellate record suspends the proceedings until mandate. Because the court of appeals's mandate still has not issued in the instant case, the trial court was without jurisdiction to conduct the trial.

That is why all of these issues should be addressed. Of course, there is no statutory or other authorization for such an interlocutory appeal. *Ex parte Jones*, 449 S.W.3d 59, 60 (Tex. Crim. App. 1970). But that is precisely what the State is attempting to establish through its petition for discretionary review. Appellant began this appeal, and he should not be allowed to complain of the State exercising its right to see it through to the end.

Moreover, the trial participants ought not be permitted to hijack this Court's jurisdiction to consider an issue of statewide importance before the court of appeals's mandate issues. Even if a petition for discretionary review is not filed, this Court "may, on its own motion, review a decision of a Court of Appeals in a criminal case as provided by law." TEX. CONST. art. V, § 5(b). And it is to this Court, not the court of appeals or trial court, that the Texas Constitution grants final appellate jurisdiction, along with the power to issue such other writs as may be necessary to protect this grant. *Id*. § 5(a), (c).

It could be argued that Appellant's receiving his trial moots the issue the court of appeals insists is proper on habeas and thus makes the petition for discretionary review moot. But that begs the question. Whether trial was a nullity depends on the characterization of the claim—proper habeas or interlocutory appeal. Appellant can't initiate a novel appellate claim and then foreclose review, especially when this

Court has the power to grant review on its own motion.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals reverse the court of appeals and affirm the trial court's order denying pretrial habeas relief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 5, 538 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this 21st day of December 2021, the State's Brief on the Merits was electronically served on the parties below:

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