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Criminal Procedure: Pretrial

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CRIMINAL PROCEDURE: PRETRIAL

by

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I. CHARGING INSTRUMENTS

THIS article details the major state and federal developments in the area of criminal pretrial procedure during the Survey period.

In November of 1985, the Texas voters approved a constitutional amendment authorizing the legislature to establish new rules governing the use of indictments and informations.[1] Pursuant to the new constitutional provision, the legislature amended several articles of the Code of Criminal Procedure. Those amendments created a number of problems for the courts during the Survey period.

One of the statutory amendments enacted by the legislature requires a defendant to object, prior to trial, to defects of form or of substance in a charging instrument.[2] A defendant who fails to object prior to trial forfeits the right to complain about any such defect.[3] The purpose of this amendment seems to be the elimination of technical reversals of convictions due to errors in charging instruments.

This statute raises the question of whether the statutory waiver rule applies to charging instruments that are insufficient to charge an offense. During the last Survey period the Dallas court of appeals held that a defect in a charging instrument relating to jurisdictional requirements cannot be waived.[4] One can therefore challenge such a defect at any time.[5] During this Survey period the Beaumont court of appeals reached the same result in *Oliver v. State*.[6] That court held that an instrument so defective that it does not charge a person with the commission of an offense is not a charging instrument, and does not vest a court with jurisdiction.[7] Such a defect cannot be waived.[8]

The court of criminal appeals, however, came to the opposite conclusion

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1. TEX. CONST. art. V, § 12(b) (1876, amended 1981, 1985).
2. TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon Supp. 1990).
3. *Id.*
4. Murk v. State, 775 S.W.2d 415, 416 (Tex. App.—Dallas 1989, pet. granted).
5. *Id.*
6. 787 S.W.2d 170 (Tex. App.—Beaumont 1990, pet. granted).
7. *Id.* at 172.
8. *Id.*

in *Studer v. State*.[9] The court in *Studer* held that an indictment or information is still a valid charging instrument, even if it contains substantive flaws, such as the absence of an element of the charged offense.[10] A defendant who fails to object to a substantive defect prior to trial waives the right to complain about the defect on appeal.[11] Defendants will therefore no longer be able to "lay behind the log" and raise defects in charging instruments for the first time on appeal. Defendants must now object to defects in charging instruments in the trial court in order to give the state the opportunity to correct the defects.

In *Luken v. State*[12] the court of criminal appeals limited the rule requiring pretrial objections to charging instruments. The Luken court held that an accused need not object prior to trial when the charging instrument fails to allege the use or exhibition of a deadly weapon.[13] The court of criminal appeals stated that it would be unconscionable to require a defendant to object to the failure of the state's pleadings to present an issue that may adversely impact the defendant's liberty interest.[14] A defendant can preserve error in the context of a deadly weapon finding by objecting when the trial court submits the special issue to the jury or when the trial court, acting as fact finder, enters an affirmative finding in the judgment.[15]

Another statute enacted pursuant to the constitutional mandate allows the state to amend matters of form or substance in charging instruments.[16] This statute arguably conflicts with article I, section 10 of the Texas Constitution[17] requiring grand jury screening of felony offenses. The El Paso court of appeals attempted to harmonize the statute with the constitutional provision in *Flowers v. State*.[18] The court in *Flowers* held that an amendment that substantively changes part of the indictment, such that it varies the underlying legal theories or evidentiary requirements, deprives a defendant of his right to grand jury review.[19] An amendment that cures a defect of notice in a charging instrument is, however, permissible.[20] The Corpus Christi court of appeals sidestepped the issue of the right to grand jury review in *Batiste v. State*.[21] That court held that an amendment to an enhancement allegation did not violate a defendant's right to grand jury screening, since a defendant is not entitled to a grand jury's probable cause determination regarding such

9. 799 S.W.2d 263 (Tex. Crim. App. 1990, no pet.).
10. *Id.*, slip op. at 11.
11. *Id.*; *accord Ex parte* Gibson, 800 S.W.2d 548 (Tex. Crim. App. 1990, no pet.); Rodriguez v. State, 799 S.W.2d 301 (Tex. Crim. App. 1990, no pet.).
12. 780 S.W.2d 264 (Tex. Crim. App. 1989, no pet.).
13. *Id.* at 268.
14. *Id.*
15. *Id.*
16. TEX. CODE CRIM. PROC. ANN. art. 28.10 (Vernon 1989).
17. The Texas Constitution article I, § 10 states in pertinent part: "[N]o person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary . . . ." TEX. CONST. art. 1, § 10.
18. 785 S.W.2d 890 (Tex. App.—El Paso 1990, pet. granted).
19. *Id.* at 894.
20. *Id.*
21. 785 S.W.2d 432 (Tex. App.—Corpus Christi 1990, no pet.).

an allegation.[22] The court did imply, however, that an amendment of the essential allegations found by the grand jury on the primary offense would be improper.[23]

If the purpose of the statute allowing substantive amendments to charging instruments is to do away with the grand jury, then the legislature should let the voters decide whether to eliminate article I, section 10 of the Texas Constitution. Otherwise, the legislature cannot constitutionally authorize prosecutors to present one set of facts to the grand jury, obtain an indictment, and then amend the indictment to charge a completely different set of facts without ever returning to the grand jury.

In one other case during the Survey period, the court of criminal appeals reiterated the right of an accused to notice.[24] An accused is entitled to some form of notice that the use of a deadly weapon will be a fact issue at trial, if the state intends to seek an affirmative finding of a deadly weapon.[25] That notice, however, can come from a count of the indictment dismissed by the state.[26]

II. FORMER JEOPARDY

In *Grady v. Corbin*[27] the U.S. Supreme Court faced the question of whether the double jeopardy clause bars a subsequent prosecution where, to establish an essential element of an offense, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted. That question arose in the context of successive prosecutions arising out of an automobile accident involving Thomas Corbin. The State initially charged Corbin with driving while intoxicated and failure to keep to the right of the median. He entered guilty pleas to those charges and received a minimum sentence. Neither the Judge who accepted those pleas nor the prosecutor representing the state at the sentencing hearing was aware that the accident caused by Corbin killed one person and seriously injured another. Subsequently, Corbin was indicted on more serious charges including reckless manslaughter, second-degree vehicular manslaughter, and criminally negligent homicide. The prosecution identified the reckless or negligent acts that it intended to prove: 1) operation of a motor vehicle on a public highway in an intoxicated condition; 2) failure to keep right of the median; and 3) excessive speed under the weather and road conditions then pending.

The Supreme Court in *Corbin* held that the first step in determining whether the double jeopardy clause bars a subsequent prosecution is to apply the traditional *Blockburger* test.[28] If, after applying that test, the court finds

22. *Id.* at 436.
23. *Id.* at 435-36.
24. Grettenberg v. State, 790 S.W.2d 613, 614 (Tex. Crim. App. 1990, no pet.).
25. *Id.*
26. *Id.* at 615.
27. 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990).
28. *Id.* at 2090, 109 L. Ed. 2d at 561. Blockburger v. United States, 284 U.S. 299 (1932), held that if a single act violates two statutes, an acquittal or conviction under one statute does

that the offenses have the same statutory components, or that one is a lesser included offense of the other, then the subsequent prosecution is barred.[29] The *Blockburger* test, however, is not the exclusive test for determining whether the double jeopardy clause bars a successive prosecution.[30] The double jeopardy clause also prohibits any subsequent prosecution where the state, in order to show an element of a charged offense, will prove conduct for which the defendant has already been prosecuted.[31] The Court therefore held that the double jeopardy clause barred the subsequent prosecution of Corbin, because the state intended to prove the entirety of the conduct for which Corbin had already been convicted.[32]

The court of criminal appeals had one occasion during the Survey period to consider a double jeopardy issue similar to *Corbin*. The court of criminal appeals, however, did not have the benefit of *Corbin* in reaching a decision. In *Phillips v. State*[33] the defendant was tried in a single trial for aggravated assault on two individuals. Those individuals were the driver and the passenger of a car that the defendant struck while driving while intoxicated. The court sentenced the defendant to two consecutive nine year prison terms. The question on appeal was whether the double jeopardy clause barred the assessment of cumulative punishments for the alleged same offense. The court of criminal appeals applied the *Blockburger* test, and determined that the defendant committed two offenses even though the underlying unlawful act was the same in each case.[34] The court held that an actor commits a distinct and separately-prosecutable offense against any person he injures.[35]

The court of criminal appeals in *Phillips* did not go beyond the *Blockburger* analysis to determine whether the state must prove the same conduct to establish an essential element of each offense. The Supreme Court decision in *Corbin* requires a same conduct analysis in successive prosecutions.[36] While it is not clear that the *Corbin* analysis applies when the two offenses are tried in one proceeding rather than in successive proceedings, such an analysis lends itself well to a case like *Phillips*. In *Phillips* the defendant committed one unlawful act that happened to injure two people. The court of criminal appeals allowed the defendant to receive two sentences for that one unlawful act. This is exactly the type of thing that the double jeopardy clause is intended to prevent.[37]

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not bar prosecution under the other statute if each statute requires proof of an additional fact which the other does not.

29. *Corbin*, 110 S. Ct. at 2084, 109 L. Ed. 2d at 561.

30. *Id.* at 2092, 109 L. Ed. 2d at 563.

31. *Id.* at 2093, 109 L. Ed. 2d at 564.

32. *Id.* at 2094, 109 L. Ed. 2d at 565-66.

33. 787 S.W.2d 391 (Tex. Crim. App. 1990, no pet.).

34. *Id.* at 394.

35. *Id.* at 395.

36. *Corbin*, 110 S. Ct. at 2094, 109 L. Ed. 2d at 565-66.

37. The court of criminal appeals did apply a same conduct type of analysis in May v. State, 726 S.W.2d 573 (Tex. Crim. App. 1987, no pet.). That case involved successive prosecutions and was decided before *Corbin*.

In *Ladner v. State*[38] the defendants were indicted for violating the civil rights of a prisoner. While that indictment was pending, the defendants were indicted for murder of the same prisoner. The defendants were tried first on the civil rights violation, and acquitted. The defendants then sought to bar the murder prosecution on double jeopardy grounds. The court of criminal appeals decided first that the two offenses were not the same under the *Blockburger* test.[39] The court then turned to the question of whether the doctrine of collateral estoppel[40] barred prosecution of the murder case.[41] To answer that question the court must examine the pleadings, evidence, jury charge and other pertinent material in the record to determine if a rational jury based its verdict on an issue that the defendants propose to bar from litigation.[42] The defendants did not present evidence on these matters. Thus, the defendants failed to prove that their prior acquittals foreclosed from jury consideration the elements essential to their possible conviction for murder.[43]

In *Dowling v. United States*[44] the Supreme Court considered whether the double jeopardy clause bars admission of testimony pursuant to Rule 404(b) of the Federal Rules of Evidence[45] concerning an extraneous offense for which the defendant had been previously acquitted. The Court stated that a court may allow similar act evidence only when a jury can reasonably determine that the act took place and that the defendant was the one who acted.[46] Even if a previous jury did not believe beyond a reasonable doubt that the defendant committed the act, another jury could still reasonably conclude that the act occurred.[47] The Supreme Court held that the double jeopardy clause does not bar the admissibility of extraneous offense evidence under this standard, even if the extraneous offense was the subject of a prior acquittal.[48]

III. JOINDER

The Penal Code now allows a single charging instrument to join multiple offenses so long as they relate to the same transaction, constitute a common scheme, or are the repeated commission of the same or similar offenses.[49]

38. 780 S.W.2d 247 (Tex. Crim. App. 1989, no pet.).
39. *Id.* at 249.
40. In Ashe v. Swenson, 397 U.S. 436 (1970), the Supreme Court held that collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443.
41. 780 S.W.2d at 250.
42. *Id.* at 254.
43. *Id.* at 257.
44. 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990).
45. Federal Rule of Evidence 404(b) authorizes admission of evidence concerning "other crimes, wrongs, or acts" to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FED. R. EVID. 404(b).
46. *Dowling*, 110 S. Ct. at 672, 107 L. Ed. 2d at 718.
47. *Id.*
48. *Id.* at 673, 107 L. Ed. 2d at 719.
49. TEX. PENAL CODE ANN. § 3.01 (Vernon Supp. 1990).

Nonetheless, the court of criminal appeals continues to deal with joinder issues arising under the former definition of criminal episode.[50] In *Johnson v. State*[51] a single indictment charged the defendant with two counts of attempted capital murder. The defendant was convicted on both counts and sentenced to ninety-nine years in prison on each conviction. The court ordered that the sentences be served consecutively. The court of criminal appeals held that the trial court misjoined the two offenses.[52] The jury was entitled to convict the defendant on only one of the offenses, even though the defendant did not object to the misjoinder.[53] The court of criminal appeals vacated the second attempted capital murder conviction.[54]

In *Leal v. State*[55] the defendant was charged in a single indictment with capital murder and conspiracy to commit capital murder. Unlike the defendant in *Johnson*, the defendant in *Leal* objected to the misjoinder and asked that the court require the state to elect the count on which it would proceed at trial. The trial court denied this request. On appeal, the defendant argued that because he had requested an election, both of his convictions should be reversed.[56] The court of criminal appeals rejected this argument and followed its established practice of reversing and dismissing only the second conviction.[57] The new definition of criminal episode should eliminate most of the errors that arise in connection with the joinder of offenses.[58]

IV. SEVERANCE

The Code of Criminal Procedure allows co-defendants who have received a severance to agree upon the order in which the court will hear their cases.[59] In *Roberts v. State*[60] the trial court granted a severance and ordered three co-defendants tried separately. The co-defendants then filed an agreed order of trial stating that the court would try Roberts last. The trial court refused to follow the agreement because Roberts was in jail and the other two co-defendants were on bond.[61] The court tried Roberts first over his

50. Texas Code of Criminal Procedure article 21.24(a) allows two or more offenses to be joined in a single charging instrument "if the offenses arise out of the same criminal episode" as defined in the Penal Code. TEX. CODE CRIM. PROC. ANN. art. 21.24(a) (Vernon 1989). Former § 3.01 of the Texas Penal Code defined criminal episode as the repeated commission of any one offense found in title 7 of the code. TEX. PENAL CODE ANN. § 3.01 (Vernon 1974), *amended by* Acts 1987, 70th Leg. 387, 1, 1987 (Vernon Supp. 1990).

51. 784 S.W.2d 47 (Tex. Crim. App. 1990, no pet.).

52. *Id.* at 49.

53. *Id.*

54. *Id.* at 49-50.

55. 782 S.W.2d 844 (Tex. Crim. App. 1989, no pet.).

56. *Id.* at 846.

57. *Id.* at 846-47.

58. *See, e.g.* Kela v. State, 786 S.W.2d 81 (Tex. App.—San Antonio 1990, pet. ref'd)(joinder of sexual assault and aggravated robbery committed in same criminal transaction was proper); Howell v. State, 795 S.W.2d 27 (Tex. App.—El Paso 1990, pet. ref'd) (sexual assault of child and indecency with child involved repeated commission of similar offenses, thus joinder was proper).

59. TEX. CODE CRIM. PROC. ANN. art. 36.10 (Vernon 1981).

60. 784 S.W.2d 430 (Tex. Crim. App. 1990, no pet.).

61. *Id.* at 431.

objection. The court of criminal appeals reviewed the history of the severance and the agreed order of trial statute. The court held that although an agreed order of trial following a severance has been termed a matter of right, in certain situations the deprivation of that right will not merit the reversal of a conviction.[62] A violation of the agreed order of trial statute is subject to a harmless error analysis.[63] Applying this analysis, the court of criminal appeals upheld Roberts conviction primarily because one of Roberts' co-defendants testified for him without asserting his right against self-incrimination.[64] The court of criminal appeals warned, however, that where a co-defendant does not testify at the trial of an accused, an appellate court can rarely say with the required degree of confidence that the violation of an agreed order of trial was harmless.[65]

The Texas Penal Code allows the state to proceed in a single trial on two or more charging instruments that allege offenses arising out of the same criminal episode.[66] The defendant, however, is entitled to a severance of the charging instruments so joined.[67] Failure to grant a severance is reversible error.[68]

V. GRAND JURY

The Texas Code of Criminal Procedure requires a witness who testifies before a grand jury to keep his testimony secret.[69] A recent decision of the U.S. Supreme Court calls the validity of this statute into question. In *Butterworth v. Smith*[70] the Supreme Court considered a Florida statue that prohibited a grand jury witness from ever disclosing the testimony he gave before the grand jury. The grand jury witness in that case, a reporter, had uncovered information about alleged wrongdoing by government officials. The reporter testified before the grand jury about the information in his possession. The reporter then sought a declaration that the Florida statute was an unconstitutional abridgment of speech so that he could publish his information without fear of criminal prosecution. In reviewing the case the Supreme Court balanced the reporter's First Amendment rights against Florida's interest in maintaining the confidentiality of its grand jury proceedings.[71] The Court found that the Florida statute could easily be misused to

62. *Id.* at 436.

63. *Id.* at 437. Texas Rule of Appellate Procedure 81(b)(2) provides that "[i]f the appellate record in a criminal case reveals error in the proceedings below, the appellate court shall reverse the judgment under review, unless the appellate court determines beyond a reasonable doubt that the error made no contribution to the conviction or to the punishment." TEX. R. APP. PROC. 81(b)(2).

64. 784 S.W.2d at 437.

65. *Id.* at 437-38.

66. TEX. PENAL CODE ANN. § 3.02(b) (Vernon 1974) (the state must file written notice at least 30 days prior to trial that it intends to join more than one charging instrument in a single trial).

67. TEX. PENAL CODE ANN. § 3.04(a) (Vernon 1974).

68. Ford v. State, 782 S.W.2d 911, 912 (Tex. App.—Houston [14th Dist.] 1989, no pet.).

69. TEX. CODE CRIM. PROC. ANN. art. 20.16 (Vernon 1977).

70. 110 S. Ct. 1376, 108 L. Ed. 2d 572 (1990).

71. *Id.* at 1380, 108 L. Ed. 2d at 580.

silence those aware of illegal government conduct.[72] The Court therefore held that the Florida statute violated the First Amendment.[73] The Texas statute suffers from the same constitutional defect.

In *State ex rel. Holmes v. Salinas*[74] the court of criminal appeals faced the question of whether a magistrate can prohibit a district attorney from presenting a case to a grand jury prior to completion of an examining trial. The magistrate's order was intended to protect the defendant's right to an examining trial because the return of an indictment terminates the right to an examining trial.[75] The court of criminal appeals found, however, that no statute mandates or even permits a magistrate to control the consideration of cases by a grand jury.[76] On the other hand, the Code of Criminal Procedure gives the prosecutor the right to inform the grand jury of indictable offenses at any time other than during grand jury deliberations or voting.[77] A magistrate therefore does not have the authority to restrain a prosecutor from presenting a case to the grand jury.[78]

VI. SPEEDY TRIAL

Ever since *Meshell v. State*[79] declared the Texas Speedy Trial Act unconstitutional,[80] the lower courts have been uncertain whether a charging instrument dismissed pursuant to the Speedy Trial Act prior to *Meshell* could be refiled. The court of criminal appeals cleared up that uncertainty in *Lapasnik v. State*.[81] The court recognized that, in general, an unconstitutional statute is void from its inception and creates no basis for any right or relief.[82] An exception to this rule arises where a court entered a final judgment prior to the declaration of the statute's unconstitutionality, and a party to the judgment relied on the benefits of the statute.[83] That exception applies to charging instruments dismissed with prejudice under the former Speedy Trial Act. The state therefore cannot refile a charging instrument dismissed pursuant to the Speedy Trial Act before the *Meshell* court declared that Act unconstitutional.[84]

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72. *Id.* at 1383, 108 L. Ed. 2d at 584.

73. *Id.*

74. 784 S.W.2d 421 (Tex. Crim. App. 1990, no pet.).

75. *Id.* at 424.

76. *Id.* at 426.

77. *Id.* Texas Code of Criminal Procedure article 20.03 states in part as follows: "The attorney representing the State, is entitled to go before the grand jury and inform them of offenses liable to indictment at any time except when they are discussing the propriety of finding an indictment or voting upon the same." TEX. CODE CRIM. PROC. ANN. art 20.03 (Vernon 1977).

78. *Id.* at 427.

79. 739 S.W.2d 246 (Tex. Crim. App. 1987, no pet.).

80. *Id.* at 257.

81. 784 S.W.2d 366 (Tex. Crim. App. 1990, no pet.).

82. *Id.* at 368.

83. *Id.*

84. *Id.* at 369.

VII. VENUE

A motion for a change of venue raises constitutional issues.[85] A defendant, therefore, does not need to comply with the time limitations found in the Code of Criminal Procedure for filing pretrial motions when seeking a change of venue.[86] The trial court must hold a hearing on the issue of venue whenever a defendant files a proper motion for change of venue and the state joins issue on that motion by filing controverting affidavits.[87] The trial court may even hold a change of venue hearing after it has empaneled the jury but before the defendant pleads to the indictment.[88]

Unfortunately for defendants, however, obtaining a hearing on a motion for a change of venue is much easier than actually obtaining a change of venue. A defendant seeking a change of venue bears the burden of proving prejudice in the community, such that the likelihood of obtaining a fair and impartial jury is doubtful.[89] In order to sustain this burden the defendant must demonstrate an actual, identifiable prejudice resulting from pretrial publicity within the community from which the jury will be selected.[90] An appellate court will uphold the trial court's decision on a change of venue motion unless the trial court abused its discretion.[91] Rarely do the appellate courts find such an abuse of discretion.[92]

A question sometimes arises as to whether venue, in terms of the location of an offense, is an element of the offense that must be proved beyond a reasonable doubt. It is not. In both the state and federal systems, venue need only be proved by a preponderance of the evidence.[93]

VIII. BAIL

The Texas Constitution allows the state to hold a defendant in custody, without bail, if the defendant is accused of committing a felony while on bail for a prior felony indictment.[94] The order denying bail must be issued within seven days of the defendant's arrest on the second felony.[95] That order must be based on evidence substantially showing the guilt of the ac-

85. Foster v. State, 779 S.W.2d 845, 852 (Tex. Crim. App. 1989), *cert. denied*, 110 S. Ct. 1505, 108 L. Ed. 2d 639 (1990).

86. *Id.*; accord Powell v. State, 777 S.W.2d 466, 468 (Tex. App.—El Paso 1989, no writ). Texas Code of Criminal Procedure article 28.01 § 2 requires motions to be filed at least seven days before the pretrial hearing. TEX. CODE CRIM. PROC. ANN. art. 28.01 § 2 (Vernon 1989).

87. Foster, 779 S.W.2d at 852 (a defendant seeking change of venue must file written motion supported own affidavit and affidavit of at least two credible residents of county); TEX. CODE CRIM. PROC. ANN. art. 31.03 (Vernon 1989).

88. *Id.* at 853.

89. Ransom v. State, 789 S.W.2d 572, 578 (Tex. Crim. App. 1989, no pet.).

90. *Id.* at 578-79.

91. *Id.* at 579.

92. See, e.g., *id.* at 580; DeBlanc v. State, 799 S.W.2d 701, 706 (Tex. Crim. App. 1990, no pet.).

93. Glenn v. State, 779 S.W.2d 466, 469 (Tex. App.—Tyler 1989, pet. ref'd); United States v. Bryan, 896 F.2d 68, 72 (5th Cir. 1990), *cert. denied*, Malcomson v. U.S., 111 S. Ct. 133, 112 L. Ed. 2d 101 (1990).

94. TEX. CONST. art. I, § 11(a) (1956, amended 1977).

95. *Id.*

cused of the offense committed while on bail.[96]

The state has the burden to prove strict compliance with article I, section 11(a) of the Constitution.[97] If the state fails to establish the date of the defendant's arrest for a felony while on bail for a prior felony, the state has not met its burden of showing that the hearing was held and the order denying bail was signed within seven days of such arrest.[98] In that circumstance the defendant cannot be denied bail.[99]

The federal Bail Reform Act[100] requires a defendant to be detained pending trial if no condition of release can give reasonable assurance of the defendant's appearance at trial, and the safety of other persons and of the community.[101] The court must hold a hearing to determine if any conditions are present under which the defendant can be released. Such a hearing must be held immediately upon the defendant's first appearance before a judicial officer, unless the court grants a continuance. A continuance can be of no more than five days upon request of the defendant or three days upon request of the government.[102] In *United States v. Montalvo-Murillo*[103] the U.S. Supreme Court faced the question of whether the government must release a defendant from custody when no detention hearing is held within the time limits specified by the Bail Reform Act. The Court held that the Act neither requires nor even suggests that a timing error mandates the release of a person who should otherwise be detained.[104] Failure to comply with the statute, therefore, does not prevent the government from seeking the person's detention.[105]

IX. CONTINUANCE

The Code of Criminal Procedure mandates that the court, upon request, give the defendant ten days to respond to an amended charging instrument.[106] In *Sodipo v. State*[107] the court of criminal appeals made it clear that the statute is mandatory and not discretionary.[108] The court also held that a violation of the statute is not subject to a harmless error analysis.[109] Thus, even a minor or "trivial" amendment to the charging instrument enti-

96. *Id.*
97. Neunschwander v. State, 784 S.W.2d 418, 420 (Tex. Crim. App. 1990, no pet.).
98. *Id.*
99. *Id.*; *see also* Kelley v. State, 782 S.W.2d 537, 539 (Tex. App.—Houston [14th Dist.] 1989), *vacated*, 785 S.W.2d 157 (Tex. Crim. App. 1990) (state must produce evidence that defendant has been formally charged with committing felony while on bail for prior felony).
100. 18 U.S.C. §§ 3141-3156 (1982 & Supp. III 1986).
101. *Id.* § 3142(e).
102. *Id.* § 3142(f).
103. 110 S. Ct. § 2072, 109 L. Ed. 2d 720 (1990).
104. *Id.* at 2077, 109 L. Ed. 2d at 729.
105. *Id.*
106. Texas Code of Criminal Procedure article 28.10(a) reads in pertinent part as follows: "On the request of the defendant, the court shall allow the defendant not less than 10 days, or a shorter period if requested by the defendant, to respond to the amended indictment or information." TEX. CODE CRIM. PROC. ANN. art. 28.10(a) (Vernon 1989).
107. No. 1390-88 (Tex. Crim. App. September 12, 1990).
108. *Id.*, slip op. at 4.
109. *Id.*, slip op. at 5.

tles the defendant to ten days to respond to the change if the defendant so requests.[110]

On the other hand, the decision to grant or deny a motion for continuance requesting time to secure the testimony of a missing witness is a matter left to the discretion of the trial court.[111] The denial of such a motion will be reviewed only for an abuse of discretion.[112] In order to preserve the error in this situation the defendant must file a sworn motion for new trial, setting forth the testimony he expects witness to present.[113]

X. DISCOVERY

This Survey period demonstrated once again the very limited rights that a criminal defendant has to pretrial discovery. For example, in *Kinnamon v. State*[114] the court of criminal appeals reiterated that a defendant does not have a general right to discovery of evidence in possession of the state.[115] Except for exculpatory, mitigating, or privileged evidence, decisions involving pretrial discovery are within the discretion of the trial court.[116] A defendant faces difficulty in attempting to reverse on appeal a trial court's decisions regarding discovery matters. In fact, reversing a case on appeal even when the state fails to comply with the trial court's discovery order proves to be a difficult task.

In *Smith v. State*[117] the trial court ordered the prosecutor to disclose any consideration afforded to any witness in exchange for testimony. At the hearing on the discovery motion, the prosecutor denied that any witness had been offered inducements in exchange for testimony. The defendant then learned, during the testimony of a witness at trial, that the District Attorney had agreed to send a letter to the Board of Pardons and Paroles on behalf of the witness. The defendant objected to the witness testifying. The trial court overruled the objection. The court of criminal appeals held that the trial court's ruling did not deny the defendant a fair trial, because he was able to impeach the witness before the jury with the District Attorney's offer to write a letter to the Board of Pardons and Paroles.[118] The court therefore saw no justification for the exclusion of the witness' testimony.[119]

In *Crane v. State*[120] the trial court ordered the state to produce any photographs used by the state as a means of identification of the defendant. The state failed to comply with the trial court's order. When the state called a

110. *Id.*, slip op. at 4; accord Rent v. State, No. 1090-89 (Tex. Crim. App. September 12, 1990). By way of illustration, the amendment in Sodipo changed only the cause number for a prior conviction alleged in an enhancement paragraph.
111. Flores v. State, 789 S.W.2d 694, 698 (Tex. App. - Houston [lst Dist.] 1990, no pet.).
112. *Id.*
113. *Id.* at 698-99.
114. 791 S.W.2d 84 (Tex. Crim. App. 1990, no pet.).
115. *Id.* at 91.
116. *Id.*
117. 779 S.W.2d 417 (Tex. Crim. App. 1989, no pet.).
118. *Id.* at 431.
119. *Id.*
120. 786 S.W.2d 338 (Tex. Crim. App. 1990, no pet.).

witness who had identified the defendant from a photo lineup to testify at the defendant's trial, the defendant asked the trial court to either strike the testimony or declare a mistrial. The trial court denied both requests. In examining this issue, the court of criminal appeals held that once the court grants a motion for discovery, the state has a continuing burden of disclosure.[121] The appellate court will not reverse a case on the basis of nondisclosure of evidence by the state, unless the evidence may have had an effect on the outcome of the trial.[122] In order to obtain a reversal based on nondisclosure of evidence by the state, the defendant must show 1) that the state suppressed evidence after a request by the defense; 2) that the evidence is favorable to the defense; and 3) that the evidence is material.[123] Crane did not show that disclosure of the photo lineup would have been favorable to him or that the information was material in the constitutional sense.[124]

The obvious problem with *Crane* is that prosecutors are not punished in any manner for violating the trial court's discovery order. It hardly seems fair to allow prosecutors to ignore such orders with impunity.

XI. COMPETENCY

The Texas Constitution provides that the decision of the courts of appeals shall be conclusive on all questions of fact brought before them on appeal or error.[125] The court of criminal appeals ignored this provision of the Constitution until this Survey period. In *Meraz v. State*[126] the court of criminal appeals authorized the courts of appeals to review the sufficiency of the evidence on issues as to which the defendant has the burden of proof by the great weight and preponderance standard.[127] Thus, a court reviewing the sufficiency of the evidence to support a competency finding must determine whether, after considering all evidence bearing on competency, the great weight and preponderance of the evidence supports the trial court's finding.[128] Prior to *Meraz* the courts of appeals reviewed the sufficiency of the evidence on an issue such as competency by considering all of the evidence concerning the issue and determining if any factfinder could have rationally concluded that the defendant failed to meet his burden on the issue by a preponderance of the evidence.[129] *Meraz* overruled the cases that applied that standard of review to affirmative defenses.[130] *Meraz* also gave the courts of appeals exclusive jurisdiction in regards to questions of fact concerning proof of an issue on which the defendant has the burdens of proof

121. *Id.* at 348.
122. *Id.*
123. *Id.*
124. *Id.*
125. TEX. CONST. art. V, § 6.
126. 785 S.W.2d 146 (Tex. Crim. App. 1990, no pet.).
127. *Id.* at 155.
128. *Id.*
129. Van Guilder v. State, 709 S.W.2d 178, 181 (Tex. Crim. App. 1985), *cert. denied*, Texas v. Van Guilder, 476 U.S. 1169 (1986), *overr.*, Meraz v. State, 785 S.W.2d 146, 155 (Tex. Crim. App. 1990).
130. 785 S.W.2d at 154.

and persuasion.[131] The court of criminal appeals will no longer hear such questions.

131. *Id.*