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# Criminal Procedure: Pretrial

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# CRIMINAL PROCEDURE: PRETRIAL

*by*

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THIS article details the major state and federal developments in the area of criminal pretrial procedure during the Survey period. Although nothing as dramatic occurred during the past Survey year as the demise of the Texas Speedy Trial Act,[1] the courts issued a number of important decisions. A discussion of the most significant decisions follows.

## I. CHARGING INSTRUMENTS

In November of 1985, the Texas voters approved a constitutional amendment authorizing the legislature to establish new rules governing the use of indictments and informations.[2] Pursuant to the constitutional amendment, the legislature amended several provisions of the Code of Criminal Procedure. The various courts of appeals are now interpreting those amendments.

One of the amendments enacted by the legislature requires a defendant to object, prior to trial, to defects of form or substance in a charging instrument.[3] A defendant who fails to object prior to trial forfeits the right to complain about any such defect.[4] During the Survey period, several courts of appeals interpreted this amendment to bar consideration of motions to quash filed on the day of trial.[5] The more interesting question raised by this statute, however, concerns whether the statute applies to charging instruments that are insufficient to charge an offense. The correct answer to this question appears to be that expressed by the Dallas court of appeals in *Studer v. State*.[6] The *Studer* court reasoned that if a charging instrument is

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1. Meshell v. State, 739 S.W.2d 246 (Tex. Crim. App. 1987) (held the Texas Speedy Trial Act to be unconstitutional because it violates the separation of powers doctrine in the Texas Constitution).

2. TEX. CONST. art. V, Sec. 12(b) (Vernon 1988) states:

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

3. TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon Supp. 1989).

4. *Id.*

5. Van Dusen v. State, 744 S.W.2d 279 (Tex. App.—Dallas 1987, no pet.); Hill v. State, 750 S.W.2d 2, 3 (Tex. App.—Fort Worth 1988, pet. ref'd, untimely filed); Smith v. State, 754 S.W.2d 414, 416 (Tex. App.—Corpus Christi 1988, no pet.).

6. No. 05-87-01108-CR (Tex. App.—Dallas August 24, 1988, no pet.).

so defective that it does not charge a crime, then it is not a charging instrument under the Constitution.[7] A defendant can challenge such a defective charging instrument on appeal even if the defendant did not object to it in the trial court.[8]

Another statutory amendment enacted by the legislature pursuant to the 1985 constitutional mandate allows the state to amend matters of form or substance in charging instruments.[9] The state may amend a charging instrument even after a trial on the merits commences if the defendant does not object.[10] The statute thus implies that charging instruments may not be amended after trial commences if the defendant objects. The Dallas court of appeals, however, affirmed a conviction by applying the harmless error rule to an amendment entered over the defendant's objection after the trial on the merits commenced.[11]

The court of criminal appeals may have created a new form of charging instrument in *Ex parte Patterson*.[12] The *Patterson* court considered the question of what notice must be given to the defendant when the state intends to seek a finding that the defendant used or exhibited a deadly weapon during the commission of an offense. The court recommended that such a plea appear in the indictment although the court stated that it need not be based on a specific grand jury finding.[13] The court, however, did not make this recommendation mandatory.[14] Apparently a prosecutor may prepare and serve on the defendant a separate pleading notifying the defendant that the state will seek a finding that the defendant used or exhibited a deadly weapon during the commission of an offense.

In *London v. State*[15] the court of criminal appeals examined the rule that each count of an indictment must contain all of the elements of an offense. An indictment that fails to allege elements of an offense is fundamentally defective. The court, however, can look to a dismissed count of the indictment to supply the missing element.[16]

## II. FORMER JEOPARDY

The defendant in *Moore v. State*[17] filed a motion for new trial alleging only that the evidence was insufficient to support the judgment of conviction. The defendant's attorney failed to serve a copy of this motion on the state. The trial judge, without benefit of a hearing on the motion, signed an order granting the motion. The trial judge then set that order aside after learning that the state had not been served with a copy of the motion. The court of

7. *Id.*, slip op. at 5-6.
8. *Id.*, slip op. at 6.
9. TEX. CODE CRIM. PROC. ANN. art. 28.10 (Vernon Pam. Supp. 1989).
10. *Id.* § (b).
11. Mills v. State, 747 S.W.2d 818, 821 (Tex. App.—Dallas 1987, no pet.).
12. 740 S.W.2d 766 (Tex. Crim. App. 1987).
13. *Id.* at 776.
14. *Id.*
15. 739 S.W.2d 842 (Tex. Crim. App. 1987).
16. *Id.* at 844.
17. 749 S.W.2d 54 (Tex. Crim. App. 1988).

criminal appeals held that allowing the trial court to change its ruling on the motion for new trial would violate the Double Jeopardy Clause.[18] After granting the motion, the trial court only had jurisdiction to enter a judgment of acquittal.[19]

Unlike most other jurisdictions, Texas requires the prosecution to introduce evidence in support of a guilty plea entered before a judge.[20] In *Ex parte Martin*[21] the court of criminal appeals wrestled with the question of whether the reversal of a guilty plea on appeal because of insufficient evidence to support the plea bars retrial of the defendant. A plurality of the court said such a reversal is trial error and therefore the defendant can be retried.[22] The court held that the United States Supreme Court opinions in *Burks v. United States*[23] and *Greene v. Massey*,[24] which preclude a second trial once a reviewing court has found the evidence insufficient to support a conviction, do not apply to the reversals of guilty pleas based on insufficient evidence. Judge Clinton, in dissent, opined that for the plurality to say that a trial judge's finding of guilt on insufficient evidence is trial error, gives new meaning to the concept of double jeopardy.[25]

The United States Supreme Court also recently considered the relationship of "trial error" to the double jeopardy clause. In *Lockhart v. Nelson*[26] the Supreme Court held that where the evidence offered by the state and admitted by the trial court was sufficient to sustain a guilty verdict, the double jeopardy clause does not preclude retrial if the conviction is reversed because certain evidence was erroneously admitted.[27] Retrial would be permitted even if the remaining evidence was legally insufficient to support a conviction.[28]

Each Survey period the courts face double jeopardy questions arising out of multiple prosecutions brought for offenses committed during one incident or transaction. In *Simmons v. State*[29] the defendant was charged with robbing two different victims in the course of one incident. The defendant was tried and convicted for the first robbery. The court of criminal appeals held that double jeopardy barred the second prosecution because the underlying theft alleged to support both robberies was the same theft in both cases.[30] The fact that the defendant assaulted more than one person in the course of that theft did not mean that more than one robbery took place.[31]

The San Antonio court of appeals reached a result similar to *Simmons* in

18. *Id.* at 58.
19. *Id.* at 59.
20. TEX. CODE CRIM. PROC. ANN. art. 1.15 (Vernon 1977).
21. 747 S.W.2d 789 (Tex. Crim. App. 1988).
22. *Id.* at 793.
23. 437 U.S. 1 (1978).
24. 437 U.S. 19 (1978).
25. 747 S.W.2d at 796 (Clinton, J., dissenting).
26. 102 L. Ed. 2d 265 (1988).
27. *Id.* at 269-70.
28. *Id.*
29. 745 S.W.2d 348 (Tex. Crim. App. 1987).
30. *Id.* at 351.
31. *Id.*

*Rios v. State*.[32] There the defendant was tried and convicted of the offense of driving while intoxicated. The court of appeals held that double jeopardy barred the defendant's subsequent prosecution for aggravated assault arising out of the same incident. Since the indictment alleged serious bodily injury as part of the driving while intoxicated prosecution, proof of the aggravated assault offense would necessarily require proof of all the elements of the driving while intoxicated offense.[33]

In *Ex parte Sewell*[34] the court of criminal appeals barred the state from reprosecuting the defendant as an habitual offender. In his original trial the defendant pled "untrue" to the enhancement allegations. The state subsequently abandoned one of those allegations and the defendant obtained a reversal of his conviction because of error regarding the other allegation.[35]

The appellant in *Johnson v. State*[36] argued that the principle of collateral estoppel barred his prosecution for driving while intoxicated after the driving while intoxicated offense had been used as the basis for revocation of an earlier probation. The court of appeals affirmed the defendant's conviction by holding that collateral estoppel applies only when a defendant is "acquitted" of an ultimate fact issue in a prior proceeding.[37]

## III. JOINDER

Joinder continues to be a confusing area of the law in state court. The court of criminal appeals dealt with that issue a number of times during the Survey period. In *Fortune v. State*[38] the court tried to clarify this area of the law. In *Fortune* the state accused the defendant, in a single indictment, of committing the offenses of burglary of a habitation and aggravated sexual assault. This single indictment violated the then-existing rules for joinder of prosecutions.[39] According to the court of criminal appeals, a single charging instrument may not allege the following combination of offenses: more than one non-property offense, statutorily different property offenses, or one property and one non-property offense.[40] An indictment, however, "may contain multiple allegations of the *same offense* in different paragraphs."[41]

The court of criminal appeals also clearly stated that a defendant need not

32. 751 S.W.2d 892 (Tex. App.—San Antonio 1988, no pet.); *see also* Cervantes v. State, 742 S.W.2d 768 (Tex. App.—San Antonio 1987, no pet.) (aggravated robbery prosecution barred by conviction for attempted capital murder); Herrera v. State, 756 S.W.2d 120 (Tex. App.—Fort Worth 1988, no pet.) (burglary of habitation prosecution barred by conviction for sexual assault).

33. 751 S.W.2d 892, 894 (Tex. App.—San Antonio 1988 no pet.).

34. 742 S.W.2d 393 (Tex. Crim. App. 1987).

35. *Id.* at 397.

36. 749 S.W.2d 513 (Tex. App.—Houston [1st Dist.] 1988, no pet.).

37. *Id.* at 515.

38. 745 S.W.2d 364 (Tex. Crim. App. 1988).

39. Under former TEX. PENAL CODE ANN. §§ 3.01-3.02 (Vernon 1974) joinder of offenses was restricted to offenses arising out of the same criminal episode. Criminal episode was defined as the repeated commission of any one offense found in Title 7 of the Penal Code.

40. 745 S.W.2d at 367; *accord* Holcomb v. State, 745 S.W.2d 903 (Tex. Crim. App. 1988).

41. 745 S.W.2d at 367 (emphasis in original).

object in the trial court in order to raise a misjoinder error on appeal.[42] Misjoinder is fundamental error and thus the defendant can raise it at any time. Misjoinder, however, is subject to the harmless error rule.[43] The new Penal Code definition of "criminal episode" that allows joinder of offenses committed pursuant to the same transaction will likely eliminate the confusion surrounding joinder of offenses.[44]

## IV. SEVERANCE

The general rule in the Fifth Circuit is that persons who are indicted together should be tried together. The trial court has discretion to grant or deny a motion for severance.[45] When a defendant requests a severance to obtain the testimony of a co-defendant, he must show a need for the testimony, the substance of such testimony, its exculpatory nature and effect and that the co-defendant will testify.[46] The defendant in *United States v. McDonald*[47] made no such showing and failed to demonstrate how the trial court's denial of the severance motion prejudiced him. The Fifth Circuit therefore affirmed the trial court's decision.[48]

A state court also has considerable discretion in deciding whether to grant a motion for severance. Unless a motion for severance comes within the "automatic" severance category of the Code of Criminal Procedure,[49] a defendant seeking reversal on appeal must affirmatively show that the denial of his motion for severance prejudiced him.[50] The mere facts that certain items of evidence are admissible as to one defendant and not as to another defendant, or that the defendants have slightly antagonistic defenses, are not enough to require separate trials.[51]

## V. SPEEDY TRIAL

The federal Speedy Trial Act[52] sets forth certain standards to guide trial courts in determining whether to dismiss indictments with or without preju-

42. *Id.* at 370.
43. Ponder v. State, 745 S.W.2d 372, 374 (Tex. Crim. App. 1988).
44. TEX. PENAL CODE ANN. § 3.01 (Vernon Supp. 1989) now reads as follows:
In this chapter, "criminal episode" means the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, under the following circumstances:
(1) the offenses are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan; or
(2) the offenses are the repeated commission of the same or similar offenses.
45. United States v. McDonald, 837 F.2d 1287, 1289 (5th Cir. 1988).
46. *Id.* at 1290.
47. *Id.*
48. *Id.*
49. TEX. CODE CRIM. PROC. ANN. art. 36.09 (Vernon 1981) (requires a severance when one defendant has an admissible prior conviction and the moving defendant does not have an admissible prior conviction).
50. Simon v. State, 743 S.W.2d 318, 322 (Tex. App.—Houston [1st Dist.] 1987, pet. ref'd).
51. *Id.*
52. 18 U.S.C. §§ 3161-3174 (1985 and Supp. 1988).

dice when the government violates the Speedy Trial Act. The United States Supreme Court applied those standards in *United States v. Taylor*[53] in reversing the trial court's decision to dismiss an indictment with prejudice.

The defendant in *Taylor* was scheduled to begin trial one day prior to the expiration of the seventy day period set forth in the Speedy Trial Act for the commencement of trials. The defendant, however, failed to appear for his trial. The defendant was later arrested on other charges in another state. The trial court dismissed with prejudice the indictment against the defendant because of the government's "lackadaisical" attitude in bringing the defendant back from out of state to stand trial.[54] The Supreme Court reversed the trial court because the trial court made no finding of prejudice to the defendant arising out of the government's violation of the Speedy Trial Act.[55] The Supreme Court further stated that trial courts must carefully consider the statutory factors when they dismiss indictments and clearly articulate the effect of these factors in order to permit meaningful appellate review.[56]

Several Fifth Circuit decisions indicate the difficulty of even establishing a violation of the federal Speedy Trial Act, much less getting an indictment dismissed with prejudice because of a violation. In *United States v. Perez*[57] the court held that a void indictment tolls the thirty day arrest-to-indictment time period in the Speedy Trial Act.[58] In *United States v. Walker*[59] the court said that the thirty day arrest-to-indictment time period does not even begin to run if the defendant is arrested, processed at the jail, and then immediately released without being required to post a bond.[60] On the other hand, if a valid arrest triggers the thirty day time period, the period runs only as to those offenses for which the defendant was originally arrested.[61] The defendant may be indicted more than thirty days after his arrest for offenses arising out of the same transaction as the initial arrest as long as those offenses were not charged in the original complaint against the defendant.[62]

The court of criminal appeals found a violation of a defendant's constitutional right to a speedy trial in *Chapman v. Evans*.[63] The defendant in *Chapman* sought the issuance of a writ of mandamus directing the trial court to either set his case for trial or dismiss it. The defendant was incarcerated in the Texas Department of Corrections. A detainer was placed on him for the

53. 108 S. Ct. 2413 (1988).
54. *Id.* at 2416.
55. *Id.* at 2420.
56. *Id.* at 2419.
57. 845 F.2d 100 (5th Cir. 1988); *see also* United States v. Castellano, 848 F.2d 63 (5th Cir. 1988) (delays resulting from dismissal of original indictment excludable from 70-day period to bring defendant to trial).
58. 845 F.2d at 103.
59. 856 F.2d 26 (5th Cir. 1988).
60. *Id.* at 27.
61. United States v. Giwa, 831 F.2d 538, 543 (5th Cir. 1987).
62. *Id.*
63. 744 S.W.2d 133 (Tex. Crim. App. 1988).

case at issue in *Chapman*. Despite the defendant's demand for a speedy trial, the trial court let more than two and one-half years pass without setting the defendant's case for trial. The court of criminal appeals determined that the factors enunciated in *Barker v. Wingo*[64] balanced in the defendant's favor.[65] The court therefore ordered that the defendant's case be set for trial within thirty days.[66]

In the wake of *Meshell v. State*[67] that declared the Texas Speedy Trial Act to be unconstitutional, the state has now launched an attack on the constitutionality of the Interstate Agreement on Detainers Act.[68] The Dallas court of appeals avoided the constitutional question in *Schin v. State*[69] by holding that the state did not violate the Interstate Agreement.[70] One justice, however, did write a concurring opinion in which he expressed his belief that the Interstate Agreement on Detainers is unconstitutional for the same reasons that the Speedy Trial Act was declared unconstitutional.[71]

*Schin* is also noteworthy because the court, in a case of first impression, held that an innocent receiving state under the Interstate Agreement on Detainers should not be forced to dismiss criminal charges because of violations of the agreement by the sending state.[72]

A number of decisions this Survey period made it clear that the state Speedy Trial Act was void from the inception.[73] As such, the act confers no rights or benefits.[74] Therefore, courts will reverse indictments dismissed because of violations of the Speedy Trial Act.

## VI. VENUE

The defendant in *Cockrum v. State*[75] was convicted of capital murder and sentenced to death. Prior to his trial, the defendant filed a motion for change of venue. The state controverted that motion with affidavits attacking the credibility of the defendant's affiants. The state's affiants, however, testified at the hearing on the motion for change of venue that they did not know the defendant's character witnesses; they did not know the witnesses' basis of knowledge; and they did not know if the witnesses were biased. The defendant objected to this testimony, asked that the state's affidavits be

64. 407 U.S. 514, 531 (1972) (In order to determine if a defendant's constitutional right to a speedy trial has been violated, court must balance length of delay, reason for delay, defendant's assertion of right, and prejudice to defendant).

65. 744 S.W.2d at 138.

66. *Id.*

67. 739 S.W.2d 246 (Tex. Crim. App. 1987).

68. TEX. CODE CRIM. PROC. ANN. art. 51.14 (Vernon 1979).

69. 744 S.W.2d 370 (Tex. App.—Dallas 1988, no pet.).

70. *Id.* at 375.

71. *Id.* at 377 (Whitham, J., dissenting).

72. *Id.* at 374.

73. *See, e.g.*, Reyes v. State, 753 S.W.2d 382 (Tex. Crim. App. 1988) (dismissal of indictment reversed due to unconstitutionality of Speedy Trial Act); Chacon v. State, 745 S.W.2d 377 (Tex. Crim. App. 1988) (defendant's claim mooted because Speedy Trial Act deemed unconstitutional).

74. 753 S.W.2d at 384; 745 S.W.2d at 378.

75. No. 69,766 (Tex. Crim. App. Sept. 14, 1988).

struck, and requested a change of venue as a matter of law. The trial court denied the defendant's request for change of venue.

The court of criminal appeals in *Cockrum* sidestepped the obvious perjury committed by the state's affiants. The court stated that it is not reasonable to expect the state to find compurgators who know the defendant's compurgators.[76] Since the state can join issue with a defendant on a motion for change of venue by presenting affidavits stating that the defendant can receive a fair trial and since the evidence in *Cockrum* indicates that the defendant can receive a fair trial, the trial court did not abuse its discretion in refusing to grant a change of venue.[77]

"Venue" generally refers to the place in which prosecutions are to commence.[78] Venue, however, applies to trial courts only.[79] It has no application to the question of the proper appellate court to which a defendant might appeal even if the appeal is de novo.[80] The Dallas County criminal court of appeals can therefore hear appeals from all municipal courts and justice of the peace courts that sit in Dallas County even if the offense occurred outside of Dallas County.[81]

## VII. DISCOVERY

In *Taylor v. Illinois*[82] the United States Supreme Court upheld the trial court's decision refusing to allow an undisclosed defense witness to testify as a sanction for the failure to identify the witness in response to the state's pretrial discovery request. This case involved a willful omission motivated by a desire to obtain a tactical advantage.[83] The Supreme Court held that the Compulsory Process Clause of the Sixth Amendment[84] does not absolutely prohibit such a sanction.[85]

Pursuant to Illinois rules of criminal procedure,[86] the prosecutor requested a list of the defendant's witnesses prior to trial. The defendant filed one list and then amended that list on the first day of trial. On the second day of trial the defendant made an oral motion to amend to add two more witnesses to the list. The defendant's attorney represented to the trial court that he had been unable to find one of the witnesses until after the trial had begun. The witness, however, testified outside the presence of the jury that he had met with the defense attorney prior to the beginning of the trial. The trial judge excluded the testimony of that witness because of the wilful misconduct of the defense attorney and because the defense attorney was apparently seeking a tactical advantage by concealing the identity of the witness.

76. *Id.*, slip op. at 9.
77. *Id.*
78. Abouk v. Fuller, 738 S.W.2d 297, 298 (Tex. App.—Dallas 1987, no pet.).
79. *Id.*
80. *Id.*
81. *Id.* at 299.
82. 108 S. Ct. 646 (1988).
83. *Id.* at 650.
84. *Id.* at 653.
85. *Id.* at 649.
86. ILL. ANN. STAT. ch. 114, para. 14 (Smith-Hurd 1977).

Justice Brennan, in his dissent, argued that fairness requires a direct sanction of the attorney for a discovery violation rather than the sanction of a defendant who was not personally responsible for the violation.[87]

*Taylor* will cause defendants little concern in Texas state courts due to the fact that state prosecutors have no right to a list of defense witnesses. Hopefully, however, *Taylor* will cause the state courts to more closely scrutinize the failure of prosecutors to list their witnesses in response to proper motions from defendants. Defense attorneys practicing in federal courts in Texas should be aware of *Taylor* because in federal prosecutions the government does have the right to a list of defense witnesses.[88]

The state's failure to preserve potentially exculpatory evidence was at issue in *Garrett v. Lynaugh*.[89] Garrett, a convicted rapist and murderer, argued in a petition for a writ of habeas corpus that the state should have preserved semen samples taken from the rape victim and that the state should have tested those samples for the rapist's blood type. According to Garrett, if the semen sample had revealed the rapist's blood type to be different from his own blood type, Garrett would have been excluded as the rapist. The Fifth Circuit, however, held that since the state used the entire semen sample in conducting tests, no semen sample existed for the state to preserve.[90] The failure of the state to test the sample for blood type was not error because the state is not required to conduct its investigation in any particular way or perform tests in any particular order.[91]

The Amarillo court of appeals in *Marsh v. State*[92] recognized that the Texas Rules of Criminal Evidence expanded defendants' trial discovery rights. On cross-examination of a witness a defendant can now discover statements previously authored by the witness, statements used before the jury by the witness, and statements, regardless of authorship, used by the witness to refresh his memory before testifying.[93]

## VIII. BAIL

The federal Bail Reform Act[94] presumes that pretrial detention of a defendant is required to assure both the appearance of the defendant at trial and the safety of the community if probable cause exists to believe that the defendant violated the Controlled Substances Act and the maximum possible punishment for that offense exceeds ten years imprisonment.[95] A defendant can rebut this presumption if he proves by a preponderance of

87. 108 S. Ct. at 665 (Brennan, J., dissenting).

88. *See, e.g.*, FED. R. CRIM. P. 12.01 (defendant must disclose names and addresses of potential alibi witnesses in response to demand from government); Local Rule 8.1(b) of the United States District Court for the Northern District of Texas (defendant must file list of witnesses three days before trial).

89. 842 F.2d 113 (5th Cir. 1988).

90. *Id.* at 116.

91. *Id.*

92. 749 S.W.2d 646 (Tex. App.—Amarillo 1988, no pet.).

93. *Id.* at 648-649.

94. 18 U.S.C. §§ 3141-3156 (1982 and Supp. III 1986).

95. *Id.* § 3142(e).

evidence that he will appear at trial and by clear and convincing evidence that he will not endanger the safety of the community.[96] The Bail Reform Act sets out the factors that must be considered by the court in deciding whether the defendant has rebutted the presumption that he should be detained pending trial.[97] These factors include the nature and circumstances of the charged offense, the weight of evidence against the person, and the history and characteristics of the person.

In *United States v. Jackson*[98] the defendant was detained pending trial despite the fact that he introduced evidence of substantial ties to the community including a job, home, and family. The government supported its request for pretrial detention by introducing evidence that the defendant was associated with the Bandidos motorcycle club. The government also relied on the presumption in favor of pretrial detention in the Bail Reform Act. The Fifth Circuit held that where the defendant presents evidence of longstanding ties to the locality in which he faces trial, the presumption in the Bail Reform Act has been rebutted.[99] The government must then introduce evidence on each of the factors enumerated in the Bail Reform Act to support a pretrial detention order.[100] Since the government failed to do so in *Jackson*, the court remanded the case to the trial court for reconsideration.[101]

Among the factors required by the Bail Reform Act, a judicial officer in determining whether to detain a criminal defendant must consider the nature and circumstances of the offense charged and the weight of the evidence against the accused.[102] In *United States v. Parker*[103] the defendant claimed that this portion of the Bail Reform Act is unconstitutional because it compels a defendant to testify in violation of his fifth amendment privilege against self-incrimination[104] in order to rebut the government's proof on those factors. The Fifth Circuit rejected this contention. According to the court, the defendant need not personally testify in order to secure his release because he may present evidence through hearsay or by proffer.[105]

Article 1, section 11a of the Texas Constitution allows a defendant to be held in custody, without bail, if he is accused of a felony committed while on bail for a prior felony for which he has been indicted. A court must issue an order denying bail on the second felony within seven days of the defendant's arrest on the second felony.[106] Arrest is not the same as indictment, so if a court does not issue the order denying bail until after the defendant has been

96. United States v. Jackson, 845 F.2d 1262, 1264 n. 3 (5th Cir. 1988) (quoting United States v. Fortna, 769 F.2d 243, 250-251 n. 7 (5th Cir. 1985)).
97. *Id.* at 1265.
98. *Id.*
99. *Id.* at 1266.
100. *Id.*
101. *Id.*
102. 18 U.S.C. § 3142(g) (Supp. 1988).
103. 848 F.2d 61 (5th Cir. 1988).
104. U.S. CONST. amend. V.
105. 848 F.2d at 63.
106. TEX. CONST. art. 1, § 11a.

indicted, then the order is void.[107]

## IX. COMPETENCY

In *Ex parte Jordan*[108] the court of criminal appeals dealt with a post-trial but pre-execution competency issue. In that case, the appellate court approved procedures fashioned by the trial court to determine a defendant's competency to be executed. In the absence of any statutory guidelines, the trial court appointed a doctor to examine the potentially incompetent defendant once defendant's counsel brought the issue of competency to the trial court's attention. The trial court then held a full adversarial hearing on the defendant's competency. The trial court determined that the defendant was not capable of comprehending the nature, pendency, and purpose of his execution. The trial court therefore stayed the execution and ordered the defendant to be reevaluated every ninety days. The appeals court found these procedures constitutionally adequate in the absence of statutory guidelines.

On original submission the court of criminal appeals abated *Barber v. State*[109] and remanded to the trial court for the purpose of holding a retrospective competency hearing.[110] The defendant argued at the later hearing that because of the seven year delay in holding the competency hearing the burden should shift to the state to prove competency beyond a reasonable doubt. The court of criminal appeals held, however, that in the absence of a prior unvacated finding of incompetency the burden of proving incompetency is on the defendant by a preponderance of the evidence.[111] The court also held that the mere mention at the competency hearing that the defendant had been convicted of capital murder did not call for a mistrial when the court instructed the jury to disregard that comment.[112]

The Texas court of criminal appeals in *Abdnor v. State*[113] held that the trial court erred in allowing a psychiatrist to testify about a defendant's sanity on the basis of a previously conducted competency examination.[114] The court, however, also found the error to be harmless and affirmed the conviction.[115]

## X. CONTINUANCE

The Code of Criminal Procedure now allows the state to amend a charging instrument as to substance or form.[116] Upon request, the court must give the defendant ten days to respond to the amended charging instrument.

107. Garza v. State, 736 S.W.2d 710, 711-712 (Tex. Crim. App. 1987).
108. 758 S.W.2d 250 (Tex. Crim. App. 1988).
109. 757 S.W.2d 359 (Tex. Crim. App. 1988).
110. *Id.* at 361.
111. *Id.* at 363 n.1.
112. *Id.* at 362.
113. 756 S.W.2d 815 (Tex. App.—Dallas 1988, pet. granted).
114. *Id.* at 820.
115. *Id.*
116. TEX. CODE CRIM. PROC. ANN. art. 28.10 (Vernon Pam. Supp. 1989).

If the trial court denies the defendant's request for a ten-day continuance, reversible error is committed without any showing of harm.[117]

## XI. GRAND JURY

The United States Supreme Court held in *Bank of Nova Scotia v. United States*[118] that a district court may not invoke its supervisory power to dismiss an indictment for errors in grand jury proceedings unless such errors prejudice the defendant.[119] The district court must apply the harmless error standard of rule 52(a) of the Federal Rules of Criminal Procedure[120] to errors in the grand jury process.[121] An indictment may be dismissed only if it is shown that the violation substantially influenced the grand jury's decision to indict, or if grave doubt exists that the indictment decision was free from the substantial influence of such violations.[122] In *Bank of Nova Scotia* the improper disclosure of grand jury material by the government and other questionable conduct by the prosecutor did not affect the charging decision. According to the Supreme Court, the indictment should not have been dismissed.[123]

Several Texas courts of appeals decisions during the Survey period illustrate the difficulty of going behind a facially valid indictment to challenge the grand jury proceedings. First, unless a defendant raises an objection to the grand jury proceedings either while the grand jury is still impaneled or prior to trial, he waives the objection.[124] Even when the objection is timely, if the indictment is valid on its face, the courts will not go behind that indictment to see if evidence exists to support it or to ascertain whether the state prepared it according to the statute.[125] Further, no requirement exists that grand jury testimony be recorded and transcribed so that it can be made available to the defendant.[126]

117. Beebe v. State, 756 S.W.2d 759, 761 (Tex. App.—Corpus Christi 1988, no pet.).
118. 108 S. Ct. 2369 (1988).
119. *Id.* at 2373.
120. FED. R. CRIM. P. 52(a).
121. 108 S. Ct. at 2373.
122. *Id.* at 2374 (quoting United States v. Mechanik, 106 S. Ct. 938, 946-47 (1986)).
123. *Id.* at 2378.
124. Raetzsch v. State, 745 S.W.2d 520, 525 (Tex. App.—Corpus Christi 1988, no pet.).
125. Douglas v. State, 739 S.W.2d 660, 662 (Tex. App.—Houston [1st Dist.] 1987, no pet.).
126. Wiltz v. State, 749 S.W.2d 519, 521 (Tex. App.—Houston [14th Dist.] 1988, no pet.).