Substantive Criminal Law

Shirley Baccus-Lobel

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by

Shirley Baccus-Lobel *

IMPORTANT developments in substantive criminal law at the state level occurred during the Survey period. Several of the more significant decisions are discussed below.

I. CAPITAL CASES: MITIGATING EVIDENCE

Since Texas courts must impose the death penalty when the jury affirmatively answers the special issues required at the punishment phase, such as issues relating to the probability of future dangerousness and the deliberateness of the conduct causing death,[1] the treatment of mitigating evidence has become a serious constitutional issue in capital cases. For over a decade, the United States Supreme Court decision in *Jurek v. Texas*[2] upheld the constitutionality of the Texas capital punishment scheme. In *Franklin v. Lynaugh*,[3] however, only four justices joined the opinion reaffirming *Jurek*. Justices O'Connor and Blackmun, while concurring in the result, expressed reservations regarding a scheme whereby juror consideration of relevant mitigating evidence might well be foreclosed because the evidence was beyond the scope of the special issues.[4] These justices were able to concur because the evidence at issue, the petitioner's disciplinary record while in custody, could be given mitigating effect by the jury in its consideration of the special issue regarding future dangerousness.[5]

The Fifth Circuit in *Kelly v. Lynaugh*[6] concluded that evidence of the appellant's voluntary drug intoxication, if mitigating, could be given full effect on the special issue of deliberateness.[7] Similarly, the Texas Court of Criminal Appeals in *James v. State*,[8] held that a capital murder defendant has a right to have evidence considered in mitigation of punishment.[9] No corollary right exists, however, to instructions specifically informing the jury that the evidence may be considered and how it should be applied.[10]

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* B.A., J.D., The University of Texas. Attorney at Law, Dallas, Texas.

1. TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1990).
2. 428 U.S. 262 (1976).
3. 108 S. Ct. 2320, 2323, 101 L. Ed. 2d 155, 161 (1988).
4. *Id.* at 2332-35, 101 L. Ed. 2d at 171-75.
5. *Id.* at 2334, 101 L. Ed. 2d at 174.
6. 862 F.2d 1126 (5th Cir. 1988).
7. *Id.* at 1132-33.
8. 772 S.W.2d 84 (Tex. Crim. App. 1989).
9. *Id.* at 102-03.
10. *Id.* The court in *James* also grappled with the distinction drawn between intentional

In *Bell v. Lynaugh*[11] the Fifth Circuit, consistent with precedent, held that a defendant is not entitled to jury instructions that mental retardation must be considered as a specific circumstance mitigating against the death penalty.[12] Further, the court held that the imposition of the death penalty upon mentally retarded persons does not violate the eighth amendment's ban against cruel and unusual punishment.[13] The court also found the evidence of mental retardation relevant to both special issues.[14]

In *Penry v. Lynaugh*[15] the United States Supreme Court answered the question foreshadowed by Justice O'Conner's concurring opinion in *Franklin*.[16] The Court held that the Texas capital punishment scheme is unconstitutional when the jury is not instructed that it can give effect to the defendant's mitigating evidence.[17] Jurors may consider, for instance, mental retardation and childhood abuse, even if the evidence is not relevant to the special issues or is relevant beyond those issues.[18]

II. JUROR QUALIFICATIONS

The qualification of jurors to serve in capital cases remained a troublesome issue during the Survey period. This issue arises most often in regard to voir dire examination of prospective jurors. Sentiments regarding the death penalty, although relevant, may warrant excusal for cause only if they substantially prevent or impair the venireman's ability to perform the requisite duties of a juror.[19]

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conduct, which is an essential element of guilt, and deliberate and reasonably foreseeable conduct causing death, which is a special issue in the capital punishment phase of trial. The court concluded that an instruction distinguishing the two issues was not required. *Id.* at 112-13. *See also* Motley v. State, 773 S.W.2d 283, 290 (Tex. Crim. App. 1989) (prosecution's characterization of intentional and deliberate as being similar not error); Martinez v. State, 763 S.W.2d 413, 419 (Tex. Crim. App. 1988) (a venireman's inability to distinguish the two issues requires his excusal for cause, unless he has been rehabilitated on the issue).

11. 858 F.2d 978 (5th Cir. 1988).

12. *Id.* at 984.

13. *Id.*

14. *Id.* at 985. The *Bell* opinion is of interest on another ground, particularly in view of the State Bar's clarion call seeking counsel for death penalty representation of indigents on appeal and on collateral attack. The court in *Bell* lambasted counsel for having filed this petition less than one week prior to the scheduled execution date. Also, this was Bell's second federal petition for a writ of habeas corpus, and he had filed three state petitions. He had consistently, albeit without success, raised his mental retardation as an issue in various contexts. While the court reached Bell's claims on the merits, and rejected them, it likewise concluded that a serious issue of abuse of the writ was presented. *Id.* at 983. Judge Jones, specially concurring in the opinion she authored, stated that, due to the inexcusable conduct of Bell's counsel, he should, at the least, be stricken from the rolls of the Fifth Circuit and barred from appearing before that court for several years. *Id.* at 986.

15. 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989).

16. *See supra* notes 3-4 and accompanying text.

17. 109 S. Ct. at 2948-50, 106 L. Ed. 2d at 285-86.

18. *Id.* The Court's declaration in *Penry* that it was not announcing a new rule, 109 S. Ct. at 2952, 106 L. Ed. 2d 285-86, effectively foreclosed relief in Fierro v. Lynaugh, 879 F.2d 1276, 1281-82 (5th Cir. 1989) (consideration of federal claim barred by state procedural default, e.g. failure to object or seek an instruction at trial where there existed no good cause for the default since error should have been anticipated).

19. Adams v. Texas, 448 U.S. 38, 45 (1980).

In *Hernandez v. State*[20] the Texas Court of Criminal Appeals appeared to reject abuse of discretion as the standard of review for juror disqualification due to attitudes concerning the death penalty.[21] The court also sought to circumscribe the pertinent voir dire inquiry. Observing that neither judge nor jury is vested with the discretion to actually impose the death penalty, the court emphatically warned that courts must not allow veniremen to be misled to believe that, as jurors, they will impose the death penalty.[22]

Hernandez notwithstanding, abuse of discretion persists as the standard of review.[23] Moreover, the issue continues to arise in the context of whether the prospective juror can impose or vote for the death penalty. In *Granviel v. Lynaugh*[24] the Fifth Circuit concluded that a venireman's strong aversion to capital punishment could preclude his jury service.[25] The challenged veniremen in the case were adamant that they would automatically vote against the death penalty. Under the reasoning of *Hernandez,* such inquiries concerning a juror's feelings about capital punishment are inappropriately framed because they invite responses that are not properly disqualifying.[26]

Another troubling issue in *Granviel* is the fact that each prospective juror was equally emphatic that he would honestly answer the questions posed by the special issues. The court did not perceive the resulting paradox to result from the initial, and, under *Hernandez,* faulty, questioning.[27] Rather, the Fifth Circuit simply attributed this conflict in answers to the workings of the Texas capital punishment scheme.[28]

Texas courts also continued to struggle with jury selection issues in light of *Batson v. Kentucky,*[29] which prohibited racial discrimination in the exercise of the state's peremptory challenges.[30] In *Whitsey v. State*[31] the defendant was convicted of burglary with intent to commit sexual assault and raised the *Batson* issue on appeal. The court of criminal appeals reversed, holding that neutral explanations are insufficient to overcome a defendant's prima facie case of discrimination; instead, the attorney accused of the discrimination must give a clear and reasonably specific explanation to justify the peremptory strike.[32] Timing of a *Batson* challenge is critical; in *Williams*

20. 757 S.W.2d 744 (Tex. Crim. App. 1988).
21. *Id.* at 753.
22. *Id.* at 749 n.9, 751-52, 754.
23. Johnson v. State, 773 S.W.2d 322, 327-29 (Tex. Crim. App. 1989). *Compare* Cockrum v. State, 758 S.W.2d 577, 592 (Tex. Crim. App. 1988) (trial court did not abuse discretion by ruling that rehabilitated prospective juror was qualified despite initial statements that he would always answer special issues affirmatively) *with* Green v. State, 764 S.W.2d 242, 246 (Tex. Crim. App. 1989) (trial judge lacks authority to sua sponte excuse prospective juror who was rehabilitated on issue of her ability to follow the law where special issues were proved).
24. 881 F.2d 185 (5th Cir. 1989).
25. *Id.* at 189.
26. *Id.*
27. *Id.*
28. *Id.*
29. 476 U.S. 79 (1986).
30. *Id.* at 88-89.
31. No. 1121-87 (Tex. Crim. App. May 10, 1989, pet. ref'd).
32. *Id.*, slip op. at 6.

v. State[33] the court of criminal appeals held that *Batson* errors cannot be raised for the first time on appeal since the decision simply changed the law and did not establish a new constitutional right.[34] Still, if the issue is raised at trial, *Batson* remains a powerful weapon for the defendant. In an *en banc* decision, the Dallas court of appeals held that a defendant is entitled to cross-examine the prosecutor concerning explanations for exercising peremptory strikes to remove minority veniremen.[35]

III. EXPERT TESTIMONY

Problems with expert testimony often arise in the context of the insanity defense. In *Purtell v. State*[36] the Texas Court of Criminal Appeals rejected the defendant's contentions that the psychiatrist appointed to determine his competency to stand trial for capital murder should have warned him of his right to counsel and that the results of the examination could be used against him. The court concluded that the trial court properly permitted the psychiatrist to testify at the penalty phase regarding his diagnosis that the defendant represented a continuing threat to society.[37]

Raising the insanity defense may operate as a waiver of a defendant's constitutional rights. For example, a defendant who raises insanity as a defense waives his fifth amendment[38] privilege against self-incrimination with respect to psychiatric testimony.[39] The waiver, however, is not complete. The United States Supreme Court, in *Powell v. Texas*,[40] held that no automatic waiver of the sixth amendment[41] right to effective assistance of counsel flows from use of the insanity defense.[42]

As important as expert testimony is to the insanity defense, lay testimony may suffice. The Texas Court of Criminal Appeals rejected the claim that expert testimony is necessary to raise the defense of insanity in *Pacheco v. State*.[43] The court held that lay opinion testimony may be sufficient to raise the defense so as to require submission of the issue to the jury.[44]

Courts also continue to deal with challenges to the use of expert testimony to bolster conclusory adversarial positions. In *Wade v. State*[45] the Dallas court of appeals sustained the use of expert testimony at the punishment phase of trial regarding the possible differing effects of confinement versus probation on minor sexual assault victims who had lived with the man who

33. 773 S.W.2d 525 (Tex. Crim. App. 1988).
34. *Id.* at 534.
35. Williams v. State, 767 S.W.2d 872, 875 (Tex. App.—Dallas 1989, no pet.).
36. 761 S.W.2d 360 (Tex. Crim. App. 1988).
37. *Id.* at 373-75.
38. U.S. CONST. amend V.
39. Buchanan v. Kentucky, 483 U.S. 402, 422-24 (1987).
40. 109 S. Ct. 3146, 106 L. Ed. 2d 551 (1989) (per curiam).
41. U.S. CONST. amend. VI.
42. 109 S. Ct. at 3148-50, 106 L. Ed. 2d at 554-57.
43. 757 S.W.2d 729 (Tex. Crim. App. 1988).
44. *Id.* at 736.
45. 769 S.W.2d 633 (Tex. App.—Dallas 1989, no pet.).

assaulted them.[46] The court further concluded that even if the admission of expert testimony was an error, it was harmless because the witness discussed both the benefits and problems associated with a prison sentence.[47]

In *Shaw v. Texas*[48] an expert testified that the complainant's behavior following a "power rape" by an acquaintance was normal for persons so victimized and that the attacker fit the "power rapist" profile. The appellant argued that the expert did not have personal knowledge and that the trial court improperly admitted the expert's testimony that a rape occurred and that the defendant was the rapist. The appellate court held that no expert testimony of this import should have been permitted.[49] The court, however, deemed the error harmless in view of defense counsel's voir dire examination of prospective jurors and cross-examination of the expert witness, coupled with the trial court's repeated admonitions to the jury concerning the expert's testimony.[50]

In a similar case, *Miller v. State*,[51] the Dallas court of appeals reversed an aggravated sexual assault conviction due to ineffective assistance of counsel.[52] The crucial issue at trial was the credibility of the ten-year-old complainant. The most harmful testimony against the defendant came from a counselor with the Dallas County Rape Crisis and Child Sexual Abuse Center, whose testimony in other cases also lead to reversals. The counselor testified regarding the high probability of the validity of the charge, her opinion that the child was abused, the "thirty-point assessment plan" utilized to discover false reports, and her own exceptional ability to detect contrived stories. Finding the testimony improper on several grounds,[53] the court concluded that defense counsel's failure to challenge or object to the testimony constituted ineffective assistance of counsel under the two-pronged test of *Strickland v. Washington*.[54]

IV. FOURTH AMENDMENT

The constitutionality of roadblocks used to detect intoxicated drivers is currently before the United States Supreme Court in *Michigan Department of State Police v. Sitz*.[55] In *Higbie v. State*[56] a plurality of the Texas Court of Criminal Appeals concluded that such roadblocks infringe upon constitutional privacy and travel rights in violation of the fourth amendment[57] by

46. *Id.* at 635.
47. *Id.* at 636.
48. 764 S.W.2d 815, 817-18 (Tex. App.—Fort Worth 1988, pet. ref'd).
49. *Id.* at 820.
50. *Id.*
51. 757 S.W.2d 880 (Tex. App.—Dallas 1988, pet. ref'd).
52. *Id.* at 880-81.
53. *Id.* at 883-84. No witness, even an expert, may testify that another witness is telling the truth; the court noted that the witness's testimony, in this case, also constituted improper bolstering of her own testimony. *Id.*
54. *Id.* at 884; *see* Strickland v. Washington, 466 U.S. 668, 687-96 (1984).
55. 170 Mich. App. 443, 429 N.W.2d 180 (1988), *cert. granted*, 110 S. Ct. 46, 107 L. Ed. 2d 15 (1989).
56. 780 S.W.2d 228 (Tex. Crim. App. 1989).
57. U.S. CONST. amend. IV.

subjecting motorists to detention and investigation in the absence of reasonable suspicion.[58] The court noted that, while there is a limited exception that enables searches for enforcement of administrative or regulatory statutes, the roadblocks in *Higbie* did not fall within the exception since they were preemptive in nature.[59]

The United States Supreme Court addressed the issue of drug courier profiles in *United States v. Sokolow*.[60] The Court rejected the Ninth Circuit's position that, absent evidence of ongoing criminal activity, personal characteristics are irrelevant in determining if reasonable suspicion exists for a detention.[61] The Court also reasoned, however, that the personal characteristics relied upon to support reasonable suspicion have neither greater nor lesser evidentiary value simply because they match characteristics used in drug courier profiles.[62]

In *Bower v. State*[63] the Texas Court of Criminal Appeals formally adopted the totality of circumstances test for determining whether probable cause has been shown for the issuance of a warrant.[64] In doing so, the court followed the United States Supreme Court's lead in *Illinois v. Gates*.[65] The *Bower* court also held that an officer who approaches the front door of a home via the driveway and receives no response, may peer into the garage through unobstructed windows.[66] Applying the plain view doctrine and rejecting the notion of an unreasonable intrusion upon protected curtilage, the court adopted a type of open invitation doctrine in sustaining the reasonableness of the conduct.[67]

In *Oviedo v. State*[68] the Corpus Christi court of appeals applied the exigent circumstances exception to the warrant requirement of the fourth amendment[69] in the context of a warrantless body search.[70] The Tyler court

58. 780 S.W.2d at 239-40 (plurality opinion). Several judges dissented from these general propositions but concurred in the result, having found that the particular roadblock at issue was unconstitutional. *See id.* at 240-47 (Davis, J. concurring and dissenting), 247 (Campbell, J., concurring).

59. 780 S.W.2d at 239-40.

60. 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1988).

61. *Id.* at 1585-86, 104 L. Ed. 2d at 10-11.

62. *Id.* at 1587, 104 L. Ed. 2d at 12. *But see* Valcarcel v. State, 765 S.W.2d 412, 418 (Tex. Crim. App. 1989) (law enforcement officer's testimony about drug courier profile was prejudicial to defendant).

63. 769 S.W.2d 887 (Tex. Crim. App.), *cert. denied*, 109 S. Ct. 3266, 106 L. Ed. 2d 611 (1989); *see also* Gibson v. State, 769 S.W.2d 706, 708 (Tex. App.—Eastland 1989, pet. grt'd) (totality of circumstances approach used to determine establishment of probable cause); Coats v. State, 769 S.W.2d 724, 725-26 (Tex. App.—Fort Worth 1989, pet. grt'd) (totality of circumstances test applied to assess reasonableness of warrantless searches).

64. 769 S.W.2d 903.

65. 462 U.S. 213, 238 (1983).

66. 769 S.W.2d at 899.

67. *Id.* at 895-99. Resolving an issue of first impression, the court also rejected the defendant's contention that seizure of records from appellant's automobile was unlawful because the warrant had not specifically identified the car as the locale of such papers. *Id.* at 905.

68. 767 S.W.2d 214 (Tex. App.—Corpus Christi 1989, no pet.).

69. U.S. CONST. amend. IV.

70. 767 S.W.2d at 217-18.

of appeals, in *McDonald v. State*,[71] rejected the state's justification of its warrantless search and seizure as an administrative inspection of a business licensed to sell liquor. The court of criminal appeals reversed, holding that the Tyler police conducted the search under statutory authority that substitutes for a warrant.[72]

V. DOUBLE JEOPARDY AND COLLATERAL ESTOPPEL

In *Garcia v. State*[73] a defendant involved in a single shooting episode killed one officer and shot at another. His trial for capital murder resulted in a conviction for voluntary manslaughter. The state indicted him seven months later for attempted capital murder with respect to the other officer. He urged collateral estoppel as a bar to this prosecution, and the appellate court granted relief.[74] The court of criminal appeals reversed because the first conviction had been reversed on appeal while the court of criminal appeals was considering the second case.[75] The court thus reasoned that the first conviction was not a final and valid judgment for collateral estoppel purposes.[76]

In *Sorola v. State*[77] the jury convicted the defendant of capital murder. The trial court imposed a sentence of life imprisonment after erroneously discharging the jury. Neither the court nor the jury addressed the special issues. The San Antonio court of appeals reversed the conviction and the defendant was exposed to the death penalty again. The Texas Court of Criminal Appeals reasoned that double jeopardy principles were not implicated since, by virtue of the court's error, there was no final verdict in the first trial.[78]

In *Ex parte Keith*[79] the court of appeals reversed the defendant's previous conviction for involuntary manslaughter due to insufficient evidence.[80] The appellate court, however, held that double jeopardy principles did not bar a second trial for the lesser included offense of criminally negligent homicide.[81] The court explained that since criminally negligent homicide requires a finding of negligence as opposed to recklessness, which is the mental state necessary to sustain a conviction for involuntary manslaughter, the elements of the crimes are different enough to sustain a second prosecution.[82]

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71. 778 S.W.2d 88 (Tex. Crim. App. 1989).
72. *Id.* at 90.
73. 768 S.W.2d 726 (Tex. Crim. App. 1987), *reh'g denied*, 768 S.W.2d 729 (Tex. Crim. App. 1989).
74. *Id.* at 727.
75. *Id.* at 729.
76. *Id.*; *see also* Hosey v. State, 760 S.W.2d 778, 780 (Tex. App.— Corpus Christi 1988, pet. ref'd) (double jeopardy claim premature where previous conviction, alleged to arise from same factual issues, was not yet final).
77. 769 S.W.2d 920 (Tex. Crim. App.) (en banc), *cert. denied*, 110 S. Ct. 569, 107 L. Ed. 2d 563 (1989).
78. 769 S.W.2d at 927.
79. 761 S.W.2d 442 (Tex. App.—Houston [14th Dist.] 1988, pet. granted).
80. *Id.* at 443.
81. *Id.* at 443-44.
82. *Id.*

In *Lockhart v. Nelson*[83] the defendant's punishment was enhanced under an Arkansas habitual criminal statute. The state produced evidence of four previous criminal convictions, one of which had been pardoned. The United States Supreme Court held that resentencing utilizing a different prior conviction for enhancement does not offend double jeopardy principles.[84]

VI. HEARSAY/CONFRONTATION

In *Powell v. State*[85] the court of criminal appeals applied its ruling in *Long v. State*[86] to additional provisions of the law relating to videotape testimony by child victims.[87] The court held that these provisions constitute an unconstitutional abridgement of the right of confrontation secured by the sixth amendment to the United States Constitution and Article I of the Texas Constitution.[88] The court also noted that its position in *Long* was vindicated by the United States Supreme Court's decision in *Coy v. Iowa* that struck down a similar statute allowing separation of witness and defendant by a screen.[89]

The introduction of videotape evidence also raises hearsay issues. *Hall v. State*[90] concerned a conviction for aggravated sexual assault of a three-year-old child. The trial court ruled that the child was incompetent to testify but admitted the child's hearsay statement as an excited utterance. The defendant then sought to introduce a videotape in which the child did not specifically implicate him and, moreover, suggested another party may have been responsible. The trial court excluded the videotape. The Amarillo court of appeals reversed, reasoning that the videotape should have been admitted as a prior inconsistent statement.[91]

In *Rainey v. State*[92] the appellate court held that the right of confrontation was not abridged by a statute permitting the introduction of hearsay testimony from the person to whom the child victim first reported the incident.[93] The court noted, however, that the defendant in *Rainey* had the opportunity to cross-examine both the child and the person to whom the

83. 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988).

84. 109 S. Ct. at 290-92, 102 L. Ed. 2d at 273-75.

85. 765 S.W.2d 435 (Tex. Crim. App. 1989).

86. 742 S.W.2d 302 (Tex. Crim. App. 1987), *cert. denied*, 485 U.S. 993 (1988). *Long* was accorded complete retroactive application in *Ex parte Hemby*, 765 S.W.2d 791, 794 (Tex. Crim. App. 1989).

87. TEX. CODE CRIM. PROC. ANN. art. 38.071, § 4 (Vernon Supp. 1990) (videotape of testimony with defendant able to see and hear child, but child unable to see the defendant); *Id.* § 5 (prohibiting defendant from calling child as witness where the procedure in § 4 is used).

88. 765 S.W.2d at 436-37; U.S. CONST. amend. VI; TEX. CONST. art. I, § 10.

89. 765 S.W.2d at 436; *see* 487 U.S. 1012 (1988) (statute permitting testifying complainant's separation from defendant by screen violates right of confrontation).

90. 764 S.W.2d 19 (Tex. App.—Amarillo 1988, no pet.).

91. *Id.* at 21; *see* TEX. R. CRIM. EVID. 612(a). In Dove v. State, 768 S.W.2d 465 (Tex. App.—Amarillo 1989, pet. ref'd), the court found it unnecessary to reach appellant's constitutional challenge to the admission of the child victim's outcry statements. The court reversed because extraneous act evidence, in the form of the hearsay outcry statements of other children, was erroneously admitted. *Id.* at 468.

92. 763 S.W.2d 470 (Tex. App.—Houston [14th Dist.] 1988, no pet.).

93. *Id.* at 473-74; *see* TEX. CODE CRIM. PROC. ANN. art. 38.072 (Vernon Supp. 1990).

statements were made.[94]

VII. DEADLY WEAPON

The indictment in *Ex parte Beck*[95] alleged that the defendant killed the victim by shooting him with a gun. The jury found that the defendant used a deadly weapon in the commission of the crime. She was, accordingly, ineligible for probation. On appeal the defendant claimed that she was denied a fair trial because she was not given notice that the use of a deadly weapon was an issue. The Texas Court of Criminal Appeals held that any allegation in an indictment that death was caused by a named instrument necessarily avers the use of a deadly weapon in commission of the crime.[96] The indictment thus provided adequate notice, required by *Ex parte Patterson*,[97] that the state would seek an affirmative finding of a deadly weapon.[98]

The Texas Court of Criminal Appeals addressed the issue of whether or not possession of a gun can support an affirmative finding of a deadly weapon in *Patterson v. State*.[99] The state executed a search warrant, found 1.10 grams of methamphetamine in a bag on a table near the defendant and seized a gun next to him. The jury convicted Patterson of possession of less than twenty-eight grams of the controlled substance. There was also an affirmative finding of the use of a deadly weapon, which prohibited the possibility of probation.[100] The court of criminal appeals held that even simple possession of a gun could support an affirmative finding that a deadly weapon was used in commission of the offense.[101] The court further concluded that the circumstances in the case supported a finding that the gun was used to protect and facilitate custody of the contraband.[102] The court of criminal appeals addressed the issue of adequate notice again in *Ex parte Franklin*,[103] and held that a shotgun is per se a deadly weapon.[104] This follows from the fact that a shotgun is a firearm and all firearms are deadly weapons per se by statute.[105]

VIII. COUNSEL

In *Gentry v. State*[106] the court addressed the right to counsel in the context of oral confessions. The defendant, in an effort to secure his mother's release, contacted jail officials and orally confessed to a deputy sheriff. Following negotiations with the prosecutor, the defendant confessed on video-

94. 763 S.W.2d at 473.
95. 769 S.W.2d 525 (Tex. Crim. App. 1989).
96. *Id.* at 526-27; *accord* Gilbert v. State, 769 S.W.2d 535, 536-37 (Tex. Crim. App. 1989).
97. 740 S.W.2d 766, 775 (Tex. Crim. App. 1987).
98. 769 S.W.2d at 528.
99. 769 S.W.2d 938 (Tex. Crim. App. 1989).
100. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3g.(a)(2) (Vernon Supp. 1990).
101. 769 S.W.2d at 941.
102. *Id.* at 942.
103. 757 S.W.2d 778 (Tex. Crim. App. 1988).
104. *Id.* at 783.
105. *Id.* (citing TEX. PENAL CODE ANN. § 1.07(a)(11)(A) (Vernon 1974)).
106. 770 S.W.2d 780 (Tex. Crim. App. 1988).

tape. No one contacted his court appointed counsel prior to the confession. The defendant contended on appeal that the prosecutor's bypass of his counsel violated the Code of Professional Responsibility.[107] The court held that application of the exclusionary rule was not warranted by violation of the rules governing attorney conduct.[108] The court found that appellant waived his right to counsel and that any violation of the code, in this case, was harmless error.[109]

The Texas Court of Criminal Appeals considered the right to counsel in two other cases. In *Forte v. State*[110] the court determined that a breath test is not a critical stage of a proceeding and, accordingly, there is no constitutional right to counsel.[111] The same court, in *Cates v. State*,[112] determined that a Department of Human Resources investigator, whose job was to investigate allegations of child abuse and refer his finding for prosecution of the offender, was required to give *Miranda*[113] warnings to the suspect prior to interrogation.[114] The court noted that the investigator was not conducting an interview to combat an abuse problem but was in fact conducting a criminal investigation.[115]

IX. OTHER SIGNIFICANT DECISIONS

In 1987, the Texas Legislature removed the requirement for a new trial on guilt or innocence when the only error occurs during the punishment phase.[116] The legality of retroactive application of the statute remains unresolved,[117] but the United States Supreme Court recently granted certiorari in *Youngblood v. Lynaugh*,[118] a case with the potential to impact that question. In *Youngblood*, the Fifth Circuit Court of Appeals, on ex post facto grounds,[119] held that a 1985 law that permits deletion of those portions of jury verdicts which are improper[120] could not be applied retroactively.

The Texas Court of Criminal Appeals resolved an inconsistency in prior decisions concerning capital murder cases in *Beets v. State*.[121] The court held that killing to receive insurance or retirement benefits fell within the ambit of

107. SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. XII, § 8 (Code of Professional Responsibility) DR 7-104(A)(1) (1988).
108. 770 S.W.2d at 790-92.
109. *Id.*
110. 759 S.W.2d 128 (Tex. Crim. App. 1989).
111. *Id.* at 139.
112. 776 S.W.2d 170 (Tex. Crim. App. 1989).
113. Miranda v. Arizona, 384 U.S. 436 (1966).
114. 776 S.W.2d at 173.
115. *Id.* at 174.
116. TEX. CODE CRIM. PROC. ANN. art. 44.29(b) (Vernon Supp. 1990).
117. The issue was recently before the court of criminal appeals in Childress v. State, No. 690-88 (Tex. Crim. App. Jan. 17, 1990) but the case was reversed on other grounds. *Id.*, at slip op. 4.
118. 882 F.2d 956 (5th Cir.), *cert. granted*, 110 S. Ct. 560, 107 L. Ed. 2d 555 (1989).
119. *Id.* at 959-60; *see* U.S. CONST. art. I, § 9.
120. 882 F.2d at 960; *see* TEX. CODE CRIM. PROC. ANN. art. 37.10(b) (Vernon Supp. 1990).
121. 767 S.W.2d 711 (Tex. Crim. App. 1988).

the capital murder statute.[122] This decision reversed the court's previous holding that the statute only applied to murder for hire cases.[123]

In *Nelson v. State*[124] the defendant testified, outside the presence of the jury, regarding his prior convictions. The trial court ruled that the convictions were too remote for use in impeachment.[125] During the penalty phase, the state utilized this prior testimony against the defendant. The court of criminal appeals ruled that his testimony should not have been used against him, holding that he had testified for a limited purpose and was therefore entitled to reclaim the privilege.[126]

Evidence of conduct that is not part of the charged incident is not generally admissible at a punishment hearing. In *King v. State*,[127] however, the court of criminal appeals held that the defendant opened the door to testimony concerning another controlled substance delivery that occurred two days after the charged offense.[128] He opened the door when, in support of his application for probation, he testified truthfully that he had never been convicted of an offense and that he would abide by the condition of his probation not to violate the law.[129] In *Murphy v. State*,[130] on the other hand, the court reiterated the general principle that uncharged conduct is generally inadmissible and stated that past criminal conduct is not relevant to a material issue raised by an application for probation.[131] Moreover, an application for probation does not automatically open the door to evidence of specific acts of misconduct.[132]

In *Barber v. State*[133] the defendants were convicted of engaging in an organized criminal activity, an offense that requires the participation of at least five persons.[134] The state indicted ten persons. The trial court dismissed charges against three and directed verdicts in favor of two more at the close of the state's case. The trial court instructed the jury that it was limited to the five defendants on trial in considering whether five or more persons were involved. The jury acquitted two of the defendants, but the court sustained the convictions of the remaining three persons, rejecting their contention that the essential element of participation by at least five persons was not satisfied.[135] The court reasoned that there was sufficient evidence before the jury to support a finding that the convicted defendants had the intent to

122. *Id.* at 737 (opinion on rehearing); *see* TEXAS PENAL CODE ANN. § 19.03(a)(3), (b) (Vernon 1989).
123. 767 S.W.2d at 727.
124. 765 S.W.2d 401 (Tex. Crim. App. 1989).
125. *Id.* at 402.
126. *Id.* at 405.
127. 773 S.W.2d 302 (Tex. Crim. App. 1989).
128. *Id.* at 303.
129. *Id.*
130. 777 S.W.2d 44 (Tex. Crim. App. 1989) (opinion on rehearing).
131. *Id.* at 63-64.
132. *Id.* at 68.
133. 764 S.W.2d 232 (Tex. Crim. App. 1988).
134. TEX. PENAL CODE ANN. § 71.01-.02 (Vernon 1989).
135. 764 S.W.2d at 335-36.

form a criminal combination.[136]

Polygraph results are inadmissible at trial. The Fifth Circuit, however, in *Bennett v. City of Grand Prairie*[137] held that those results may properly be used in support of probable cause for the issuance of a search warrant.[138] Although the decision is binding only as a matter of federal law, it is likely to be cited in support of the use of polygraph results in various contexts at both the state and federal level.

A discussion of cases decided in the Survey period would be incomplete without some mention of *Ex parte Adams*,[139] due to its notoriety, if not its legal significance. In *Adams*, the district court recommended a new trial after the state effectively conceded error with respect to the suppression of evidence.[140] In setting aside Adams' conviction, the Texas Court of Criminal Appeals applied principles that, in theory, are well established. Those principles prohibit the state's knowing use of perjured testimony and require a prosecutor to disclose information with impeachment value to the defense. In *Adams*, the state knowingly suppressed a crucial witness's prior inability to identify Adams in a police lineup and failed to disclose or correct her perjurious trial testimony that she had identified *Adams*. The case is of legal significance for its express use[141] of the standard of materiality regarding the prosecutor's failure to disclose exculpatory evidence, as enunciated by Justices Blackmun and O'Connor in *United States v. Bagley*.[142] A new trial is required when error undermines confidence in the outcome of a proceeding.[143]

136. *Id.* at 336-37.
137. 883 F.2d 400 (5th Cir. 1989).
138. *Id.* at 404-06.
139. 768 S.W.2d 281 (Tex. Crim. App. 1989). Adams was convicted of capital murder of a police officer in 1977. He was sentenced to death but the United States Supreme Court reversed. 448 U.S. 38 (1980). The Governor commuted his sentence to life imprisonment; thereafter, the court of criminal appeals affirmed his conviction and life sentence. 624 S.W.2d 568 (Tex. Crim. App. 1981).
140. 768 S.W.2d at 284.
141. *Id.* at 291.
142. 473 U.S. 667, 684 (1985) (opinion of Blackmun & O'Connor, JJ.) (adopting the standard of materiality applied to ineffective assistance of counsel claims in Strickland v. Washington, 466 U.S. 668, 693 (1984)).
143. 768 S.W.2d at 290.