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CRIMINAL LAW

by

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THIS article examines significant criminal law decisions handed down by the United States Supreme Court and the Texas Court of Criminal Appeals. This paper summarizes the changes caused by these decisions on Texas statutes and case law.

I. CONFRONTATION WITH THE SEXUALLY ABUSED CHILD

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[1]

A. Generally

Two United States Supreme Court cases examined the constitutionality of devices that prevent a child complainant from facing a defendant without visual barrier.[2] Both cases addressed the right of a criminal defendant to be confronted by his accuser when that complainant is a child-victim of sexual abuse.

B. Hearsay Statements

In *Idaho v. Wright* the Supreme Court examined an Idaho rule of evidence that was used to allow the introduction of a child complainant's hearsay statement.[3] The statement, which incriminated the defendant, was made by a three year-old child to a doctor.[4] At the time the statement was made, the doctor was questioning the child about the defendant's touching of the child with his genitals.

The trial court allowed the statement to be admitted through the doctor even though the child did not testify at trial.[5] The statement was allowed under Idaho's "residual exception" to the rule against hearsay.[6] The

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1. U.S. CONST. amend. VI.
2. Idaho v. Wright, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990); Maryland v. Craig, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990).
3. *Wright*, 110 S. Ct. 3139, 111 L. Ed. 2d 638.
4. *Id.* at 3144, 111 L. Ed. 2d at 649.
5. *Id.* at 3141, 111 L. Ed. 2d at 638 (referring to trial court's admission of hearsay).
6. IDAHO R. EVID. 803(24).

residual exception allows the introduction of hearsay when it is shown to be trustworthy, material, probative, and admission will serve the interests of justice.[7] The Federal Rules of Evidence, like the Idaho Rules of Evidence, have such an exception.[8] In contrast, the Texas Rules of Criminal Evidence do not include such an exception.

The Supreme Court affirmed the reversal of defendant's conviction by the Idaho Supreme Court.[9] The United States Supreme Court found that regardless of any statutory exceptions, the hearsay statement did not possess sufficient reliability to satisfy the Confrontation Clause of the Constitution.[10] The rule against hearsay and the right to confrontation are not coextensive. A statement may come within a hearsay exception and yet fail constitutional scrutiny.[11]

The United States Supreme Court held that the totality of the circumstances surrounding a hearsay statement will be examined to determine whether the proponent of the hearsay has carried the burden of establishing reliability.[12] The totality of the circumstances to be considered, however, are limited.[13] Specifically, the Supreme Court determined that the trial court must examine the statement's reliability and trustworthiness without reference to other evidence offered at trial.[14]

The Court further observed that spontaneity, repetition, and lack of a motive to fabricate, are examples of valid considerations in determining the inherent reliability of a hearsay statement.[15] Corroboration, opportunity, and injury, however, are not valid because they add nothing to the intrinsic trustworthiness of the hearsay statement.[16]

In *Wright* the Court found that the state failed to rebut the presumption of unreliability.[17] The only valid factors considered by the trial court were the child's lack of motive to falsify and the unlikeliness of fabrication.[18] In light of the doctors leading questions, his preconception of the child's knowledge, and his failure to make any record of the conversation, the statement was not inherently trustworthy.[19]

Texas has no residual hearsay exception within the Rules of Criminal Evidence. However, Texas Code of Criminal Procedure, article 38.072, creates a hearsay exception in criminal prosecutions for sexual offenses, when the complainant/declarant is a child twelve years of age or younger.[20] One requirement of the statute is that the trial court must hold a preliminary hear-

7. *Id.*
8. FED. R. EVID. 803(15).
9. *Wright*, 110 S. Ct. 3139, 111 L. Ed. 2d 638.
10. *Id.* at 3153, 111 L. Ed. 2d at 660 (*citing* U.S. CONST. amend. VI).
11. *Id.* at 3148, 111 L. Ed. 2d 653-54.
12. *Id.* at 3148-51, 111 L. Ed. 2d at 654-58.
13. *Id.*
14. *Id.* at 3150, 111 L. Ed. 2d at 657.
15. *Id.* at 3150, 111 L. Ed. 2d at 656.
16. *Id.* at 3152, 111 L. Ed. 2d at 659.
17. *Id.* at 3152-53, 111 L. Ed. 2d at 660.
18. *Id.* at 3152, 111 L. Ed. 2d at 659.
19. *Id.* at 3148, 111 L. Ed. 2d at 654.
20. TEX. CODE CRIM. PROC. ANN. art. 38.072 (Vernon Supp. 1990).

ing on the statement's reliability.[21]

Prior to *Wright*, the Texas Court of Criminal Appeals upheld the validity of article 38.072 in *Buckley v. State*.[22] In *Buckley* the defendant chose to contest the general constitutionality of the statute but not the applicability of the statute to his case.[23] Had the defendant challenged the statute as applied, then he might have ultimately received the benefit of the *Wright* decision, since the *Buckley* trial judge made no express determination of the statement's reliability before admitting it into evidence. The failure to show reliability was the core of the *Wright* opinion.[24] Thus, in future cases utilizing article 38.072, it will be necessary to do more than merely have a hearing on the statement's reliability. The trial judge must make an express finding of reliability supported by a sufficient indicia of trustworthiness inherent in circumstances surrounding the statement, and its contents, regardless of other evidence introduced at trial.

C. Closed Circuit Testimony

The Supreme Court decided, in *Maryland v. Craig*, that a child complainant may testify by means of one-way closed circuit television, but only after the trial court has found that the procedure is necessary to protect the child from being traumatized by the defendant's presence.[25] If such a finding is made, the admission of testimony by television from the out-of-court witness does not violate the Confrontation Clause of the Sixth Amendment.[26] The Court determined that there were other satisfactory ways to challenge the testimony without a face-to-face confrontation.[27]

In *Craig* a Maryland statute allowed one-way closed circuit television testimony by a child complainant.[28] The statute required the trial judge to determine whether, by testifying, the child would suffer serious emotional distress, preventing reasonable communication.[29] The United States Supreme Court found that the foundation required by the Maryland procedure was insufficient. To employ such a procedure, a trial court must find that the child witness would be traumatized, not by the courtroom generally, but specifically by the presence of the defendant.[30] No such finding was made by the trial court in *Craig*, nor did the statute require such a finding.[31] The state decision was vacated and the case remanded for further

21. *Id.* § 2(b)(2).
22. 786 S.W.2d 357 (Tex. Crim. App. 1990) (statute allowing for admission as substantive evidence, any pretrial statement of a witness, when that witness is available at trial, does not offend Confrontation Clause).
23. *Id.* at 359.
24. *See supra* notes 12-19 and accompanying text.
25. *Craig*, 110 S. Ct. 3157, 111 L. Ed. 2d 666.
26. *Id.* at 3169, 111 L. Ed. 2d at 686.
27. *Id.* at 3170, 111 L. Ed. 2d at 686.
28. MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1989).
29. *Id.* § (a)(1)(ii).
30. *Craig*, 110 S. Ct. at 3169, 111 L. Ed. 2d at 685.
31. *Id.* at 3171, 111 L. Ed. 2d at 687.

proceedings.[32]

The Texas Code of Criminal Procedure, article 38.071, allows the introduction of testimony by a child complainant by means of closed circuit television, and videotape recordings.[33] The Texas Court of Criminal Appeals held in *Briggs v. State* that although article 38.071 may violate the right of confrontation in particular cases, it is not invalid on its face.[34] In neither *Briggs*, nor in a previous decision, *Long v. State*,[35] did the Texas Court of Criminal Appeals focus on to what extent a showing of necessity is required to invoke the procedure.

The *Craig* case does not overrule *Briggs* or *Long*. Nor does it invalidate article 38.071. However, in all future cases the child must testify in the courtroom absent a hearing and a finding by the trial court that the child complainant would be so traumatized by the defendant's presence that reasonable communication would be impossible.

II. DOUBLE JEOPARDY

"[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."[36]

Justice Brennan, in the final weeks of his service to the Supreme Court, wrote an opinion significantly expanding the rights of defendants who are threatened with successive prosecutions for the same conduct. His majority opinion in *Grady v. Corbin*[37] stands for the proposition that if one has been previously convicted (or acquitted) of a crime, then that person may not be retried for the same conduct.[38] This simple interpretation of the Fifth Amendment's Double Jeopardy Clause supplants an ancient, hypertechnical application known as the *Blockburger* test.[39]

In *Corbin* the defendant was accused of a double vehicular homicide. After the accident, Corbin received two traffic tickets. One of the tickets charged him with driving while intoxicated (DWI), a misdemeanor. Before Corbin was scheduled to appear to answer that charge, the district attorney's office began their investigation into the homicide cases.

No prosecutor, however, moved to stay the misdemeanor case.[40] Instead, the state agreed to a minimum sentence in exchange for Corbin's plea to the DWI charge. Later, after he pled guilty to the DWI, Corbin was indicted

32. *Id.* at 3171, 111 L. Ed. 2d at 688.

33. TEX. CODE CRIM. PROC. ANN. art. 38.071 (Vernon Supp. 1990). For purposes of Confrontation Clause analysis, the cases do not distinguish between live one-way television and pretrial videotaping.

34. Briggs v. State, 789 S.W.2d 918 (Tex. Crim. App. 1990) (statute constitutionally applied when child testified for state).

35. 742 S.W.2d 302 (Tex. Crim. App. 1987) (statute unconstitutionally applied where child was called to testify only as rebuttal witness).

36. U.S. CONST. amend. V.

37. 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990).

38. *Id.*

39. *See* Blockburger v. United States, 284 U.S. 299 (1932).

40. New York state has a statute that makes such a stay possible. *See* N.Y. CRIM. PROC. LAW § 170.20(2) (McKinney 1982).

for homicide. His attorney moved to dismiss the charges on the basis of double jeopardy.

When Corbin's attorney made his motion, the test for double jeopardy was stated as follows: "[T]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[41] Clearly, homicide and DWI have distinctly different elements and may be separately prosecuted under the *Blockburger* test.

In his opinion, Justice Brennan, writing for five members of the Court, stated that *Blockburger* is not the final inquiry into whether a subsequent prosecution is barred.[42] Rather, "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[43] Under the facts, Corbin could not be tried for homicide without relitigating the DWI.

Article I, section 14 of the Texas Constitution and article 1.10 of the Texas Code of Criminal Procedure each contain language closely resembling the Double Jeopardy Clause of the Fifth Amendment.[44] The Texas Court of Criminal Appeals has recently stated that these state provisions are conceptually identical to the related federal provisions.[45] In 1987 the Texas Court of Criminal Appeals recognized that, after *Blockburger*, the United States Supreme Court had noted that it may violate the Double Jeopardy Clause to prove the same conduct in successive prosecutions.[46] *Corbin* is now the minimum constitutional standard and may breathe life into old Texas cases under the carving doctrine, which the Court of Criminal Appeals abandoned in 1982 on the basis of *Blockburger*.[47]

III. SEARCH AND SEIZURE

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[48]

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41. *See Blockburger*, 284 U.S. at 299.

42. *Corbin*, 110 S. Ct. at 2093, 109 L. Ed. 2d at 564.

43. *Id.*

44. TEX. CONST. art. I, § 14, interp. commentary (Vernon 1984); TEX. CODE CRIM. PROC. ANN. art. 1.10 (Vernon 1977).

45. Phillips v. State, 787 S.W.2d 391 (Tex. Crim. App. 1990) (consecutive sentences allowed in single trial for offenses arising from same conduct).

46. May v. State, 726 S.W.2d 573, 575 (Tex. Crim. App. 1987) (citing Illinois v. Vitale, 447 U.S. 410 (1980) (defendant convicted of involuntary manslaughter could not later be prosecuted for DWI arising from same conduct)).

47. *Ex Parte* McWilliams, 634 S.W.2d 815 (Tex. Crim. App. 1982) (Texas abandons doctrine allowing state to punish for only one offense occurring in single transaction).

48. U.S. CONST. amend. IV.

A. Visitors in the Home

The United States Supreme Court has diminished the Constitution's protection of persons in their own homes,[49] while extending greater security to overnight guests.[50]

In *Illinois v. Rodriguez* the Supreme Court ruled that the police may rely on the apparent authority of a third party for the necessary consent to search a home, even when it is later discovered that the third person had no authority to consent.[51]

In *Rodriguez* a woman asked police to accompany her to the defendant's apartment. She claimed the defendant had beaten her there earlier that day. The woman had a key, and she told police that she had possessions in the apartment. Upon entry, the police found drugs. The defendant was arrested and convicted on a drug charge.

In reality, the woman was only an occasional guest at the apartment. Both the Illinois appellate court and the United States Supreme Court recognized that the woman had no actual authority to consent to a search of the premises.[52] However, the Supreme Court decided that if the police made a mistake, the determinitive question was whether it was a reasonable mistake.[53] Reasonableness does not demand the government be factually correct.[54] Therefore, since the Fourth Amendment only prohibits unreasonable searches, the evidence may be admissible against Rodriguez, the homeowner.

As for the impact on Texas criminal law, *Rodriguez* clearly alters the law in Texas.[55] No Texas Court had previously held that police can search a home when they are completely mistaken or misled about the basis for the consent to search. In the other case involving visitors in the home, *Minnesota v. Olson*, the Supreme Court recognized an overnight guest's expectation of privacy in another's home.[56] This case does not drastically change Texas law which had previously recognized such rights.[57]

B. Anonymous Tips

In *Alabama v. White* the United States Supreme Court reexamined the use of anonymous tips by the police as a basis for making an investigative stop.[58] In *White* the Court held that an anonymous tip is a proper basis for stopping a suspect's car when the tip has accurately predicted the future behavior of

49. Illinois v. Rodriguez, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990).
50. Minnesota v. Olsen, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990).
51. *Rodriguez*, 110 S. Ct. 2793, 111 L. Ed. 2d 148.
52. *Id.* at 2798, 111 L. Ed. 2d at 157.
53. *Id.* at 2801, 111 L. Ed. 2d at 161.
54. *Id.* at 2799, 111 L. Ed. 2d at 158.
55. *See* Reynolds v. State, 781 S.W.2d 351 (Tex. App.—Houston [1st Dist.] 1989, pet. ref'd) (conviction reversed when defendant's son did not have permission to invite police into bathroom).
56. Minnesota v. Olson, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990).
57. *See* Chapa v. State, 729 S.W.2d 723 (Tex. Crim. App. 1987) (passenger had reasonable expectation of privacy in interior of taxicab).
58. Alabama v. White, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990).

the suspect.[59] The tip, in *White*, identified the name of the suspect, her time and place of departure, her car, her destination, and where contraband could be found.[60] Finding the preliminary predictions accurate, the Supreme Court held that based on a totality of circumstances test, the stop and search were justified.[61]

Prior to *White*, in a case with similar facts, a Houston court of appeals suppressed the fruits of just such an anonymous tip.[62] That case also relied on the protection of the Fourth Amendment. Since *White*, the Texas Court of Criminal Appeals has applied the analysis of the United States Supreme Court in only one other case.[63] In *Rojas v. State* the basis for the search of the defendant's car was an anonymous tip describing the suspect's vehicle, the specific time and place where it could be found (a funeral), and that a large amount of marihuana was contained in the trunk.[64] The Texas Court of Criminal Appeals reversed the defendant's conviction for possession of marihuana.[65]

Although surveillance and arrest corroborated the specific details of the tip in *Rojas*, the court of criminal appeals distinguished the facts from *White*.[66] The Court found that unlike *White*, the tipster in *Rojas* admitted to receiving the information secondhand. The original source of the hearsay evidence was not accredited by any indicia of reliability. The time and place of the funeral were generally known, consequently the Court held that the tip lacked sufficient detail to ensure reliability.[67]

C. *DWI Roadblocks*

Another area determined by the United States Supreme Court to be unprotected by the terms of the Fourth Amendment are DWI roadblock sites. In *Michigan Department of State Police v. Sitz* Justice Rehnquist, on behalf of five members of the Court, wrote that while roadblocks constitute seizures, they are nevertheless reasonable seizures under the Fourth Amendment.[68] Citing statistics and media reports on drunk driving, the opinion concludes that if police officers want to briefly stop every single person driving along a public road, they may, regardless of whether it is an effective method of law enforcement.[69]

Sitz overrules *Higbie v. State*, in which the Texas Court of Criminal Appeals applying the Fourth Amendment struck down a conviction resulting

59. *Id.*
60. *Id.* at 2414, 110 L. Ed. 2d at 306-07.
61. *Id.* at 2417, 110 L. Ed. 2d at 310.
62. Doyle v. State, 779 S.W.2d 492 (Tex. App.—Houston [1st Dist.] 1989, no pet.) (conviction reversed though tip contained personal knowledge of suspect's name, location, description of car, quantity and location of contraband).
63. Rojas v. State, 797 S.W.2d 41 (Tex. Crim. App. 1990).
64. *Id.* at 42.
65. *Id.* at 44.
66. *Id.*
67. *Id.*
68. Michigan Dep't of State v. Sitz, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990).
69. *Id.* at 2485-87, 110 L. Ed. 2d at 420-22.

from a DWI roadblock.[70] Whether the Texas Constitution provides greater protection against DWI roadblocks is an open question. A Dallas Court of Appeals case may ultimately answer that question when it is reviewed by the Court of Criminal Appeals.[71] A recent Corpus Christi Court of Appeals case confirmed that while roadblocks set up for general exploratory purposes remain improper, it is permissible to maintain roadblocks to check drivers licenses and proof of insurance.[72]

IV. SELF-INCRIMINATION

"No person shall . . . be compelled in any criminal case to be a witness against himself . . . ."[73]

A. Article 38.22

Texas has a statute that provides a criminal defendant with greater protection than the Fifth Amendment of the United States Constitution or the Texas Constitution.[74] Article 38.22 limits the circumstances when an oral statement by a defendant may be admissible in evidence.[75] The Texas Court of Criminal Appeals recently examined the application of one of those circumstances.[76]

In *Port v. State* the Court of Criminal Appeals reviewed the admission of an oral statement pursuant to article 38.22 section 3(c).[77] This provision allows for the introduction of an oral statement when the accused has previously been admonished about his rights, and when the statement contains assertions of fact or circumstances that are found to be true, and which tend to establish the guilt of the accused.[78] In *Port* the defendant was charged with murder. The defendant admitted to police that he had shot the decedent twice in the head. He also identified the gun used. Neither of these statements led the police to new evidence. However, an autopsy confirmed that the decedent had been shot in the head, and a ballistics test showed that the gun identified by the defendant fired the shots.[79] The Texas Court of Criminal Appeals found that these scientific tests were sufficient to provide the corroboration required under article 38.22 section 3(c).[80]

A prior Texas Court of Criminal Appeals case held that article 38.22 sec-

70. Higbie v. State, 780 S.W.2d 228 (Tex. Crim. App. 1989); *see also* King v. State, No. 1005-87, (Tex. Crim. App. Nov. 14, 1990, n.w.h.) (not yet reported) (stating that *Sitz* overrules *Higbie*).

71. *See* State v. Wagner, 791 S.W.2d 573 (Tex.App.—Dallas 1990, pet. granted) (suppression upheld because roadblock violates Texas and federal constitutions).

72. State v. Sanchez, No. 13-89-157 (Tex. App.—Corpus Christi, Nov. 15, 1990, n.w.h.) (not yet reported).

73. U.S. CONST. amend. V.

74. TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon Supp. 1991).

75. *Id.* §§ 2-3.

76. Port v. State, 791 S.W.2d 103 (Tex. Crim. App. 1990).

77. *Id.* (discussing TEX. CODE CRIM. PROC. ANN. art. 38.22 § 3(c)).

78. TEX. CODE CRIM. PROC. ANN. art. 38.22 § 3(c).

79. *Port*, 791 S.W.2d at 106.

80. *Id.* at 108.

tion 3(c) did not require that the oral statement lead to or result in incriminating evidence.[81] Thus, as long as the statement is corroborated by other incriminating evidence, the statement is still admissible.[82] *Port*, on the other hand eliminates the need for any connection between the statement and the manner in which the statement is found to be true.[83]

B. DWI Videotapes

Both, the United States Supreme Court and the Texas Court of Criminal Appeals issued opinions deciding whether a DWI suspect's videotaped statements are admissible at trial.[84] Both decisions found that the standard "booking" questions directed by an officer to a suspect are not testimonial within the meaning of the Fifth Amendment.[85]

The Texas case, *Jones v. State*, did not determine when an officer's questioning of a DWI suspect may call for answers that are testimonial.[86] The Supreme Court case did. In *Pennsylvania v. Muniz* the United States Supreme Court found that an officer's question, "Do you know what the date was of your sixth birthday?" was testimonial.[87] The Court reasoned that the coercive environment in which the question was asked left the defendant to choose between admitting ignorance or guessing the correct date.[88] This was not a routine booking question. An incorrect answer, or the inability to answer, could be used to incriminate the defendant. Since the content of the answer was at issue, the inquiry sought testimonial evidence. Therefore, in the absence of warnings the statement should have been suppressed on the basis of *Miranda*.[89]

C. Fruit of Illegal Arrest

In *New York v. Harris* the United States Supreme Court held that a suspect's statement is not necessarily inadmissible simply because it was made following an illegal arrest.[90] The officers made a warrantless entry in the defendant's home without having probable cause to arrest the defendant for murder.[91] The Court found that while an oral confession made at the home was inadmissible, a written statement made shortly thereafter at the police station was admissible.[92] The distinction drawn by the Court was that the

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81. Briddle v. State, 742 S.W.2d 379 (Tex. Crim. App. 1987) *cert. denied*, 488 U.S. 986 (1988) (finding of property by third party, but not as result of defendant's inculpatory statement, satisfied art. 38.22 § 3(c)).
82. *Port*, 791 S.W.2d 106.
83. *Id.* at 108.
84. Pennsylvania v. Muniz, 110 S. Ct. 2638, 110 L. Ed. 2d 528 (1990); Jones v. State, 795 S.W.2d 171 (Tex. Crim. App. 1990).
85. *Muniz*, 110 S. Ct. 2638, 110 L. Ed. 2d 528; *Jones*, 795 S.W.2d 171.
86. *Jones*, 795 S.W.2d at 172.
87. *Muniz*, 110 S. Ct. at 2649, 110 L. Ed. 2d at 550.
88. *Id.*
89. *Id.* (*Miranda* warning required prior to interrogation).
90. New York v. Harris, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990).
91. *Id.* at 1642, 109 L. Ed. 2d at 20.
92. *Id.* at 1643-44, 109 L. Ed. 2d at 20-22.

arrest was illegal because it violated the physical integrity of the home.[93] This was not a concern once the defendant reached the police station, so the illegality was sufficiently attenuated.[94]

This case is at odds with a Texas case, *Beasley v. State*.[95] In *Beasley* following an illegal arrest of the defendant at his home, he was taken to the police station. Seven hours later he made a confession. The court of criminal appeals found there was insufficient attenuation between the primary illegality and the defendant's statement.[96] The court relied on the Fifth Amendment to suppress Beasley's confession.[97] Therefore, *Harris* overrules *Beasley* on this point, unless in a future case the Court of Criminal Appeals determines that the Texas Constitution gives more protection than the Fifth Amendment.

93. *Id.*
94. *Id.*
95. 728 S.W.2d 353 (Tex. Crim. App. 1987).
96. *Id.* at 356.
97. *Id.*