VOICE For The Defense
TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION
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DEFENSE LAWYERS COURSES OUTSTANDING SUCCESS

TCDLA and the State Bar have joined together to sponsor an experimental program to train young and inexperienced attorneys to defend criminal cases, and to be prepared to accept appointments to defend indigent accused. The project has received the highest praise from judges, instructors and students.

The Criminal Defense Lawyers Skills Course has been conducted under a Texas Criminal Justice Council grant of $104,541 in federal funds administered through the Law Enforcement Assistance Administration.

The Course has been developed into a three-day intensive study of the practice of criminal defense law, with a fast-paced mixture of lecture, videotape and live demonstrations, and small group discussions. Excellent written materials including forms, sample motions, check-lists and articles have been developed, drawing from the files of top practitioners in Texas.

The Course is directed by an Executive Committee appointed by **TCDLA** and the State Bar. Chairman is **TCDLA** President Phil Burleson. Other members are George Gilkerson, Lubbock; Weldon Holcomb, Tyler; Former State Senator Charles Herring, Austin. H. C. Pittman, State Bar Executive Director, and Bill Reid, **TCDLA** Executive Director, are ex-officio members.

Project Administrator is Ernest Stromberger of Austin Stromberger, a journalist, has used his extensive organizational and promotional talents to produce and focus Bar attention on the Courses. **TCDLA** member Clif Holmes of Austin has served as Consultant on Curriculum and Editor of Materials. Holmes has applied his experience from the State Bar's general Practice Skills Course and actual practice of law to develop an excellent program.

TCDLA President Phil Burleson of Dallas (left) and Richard "Racehorse" Haynes of Houston, check notes during videotaping of jury argument demonstration for Criminal Defense Lawyers Skills Course.

The 12-month project began January 1, 1973, with four months of organization, planning, course design and curriculum development. The first of nine scheduled Courses was held in Dallas, May 17-19. Others have been held in: Corpus Christi, June 7-9; Longview, June 21-23; El Paso, August 9-11; Houston, September 6-8; San Antonio, September 20-22; Lubbock, October 4-6; Houston II, October 18-20; and the final one is scheduled for Fort Worth, November 1-3, 1973.

Over 700 lawyers will have been trained through the Courses when the first year of the project is completed, and more than 200 experienced criminal defense lawyers will have participated in presenting the Courses.

The final phase of the project will involve extensive evaluation, and plans for continuation of the program.

TCDLA President and Chairman of the Course Executive Committee Phil Burleson states, "This project has contributed more to raising the overall quality of criminal defense practice in Texas than any other **TCDLA** or Bar project."

"It is innovative and effective. We hope to continue to improve it, and to disseminate our findings to other states for their implementation of such Courses."

**JOIN NOW!
YOUR "VOICE FOR
THE DEFENSE"
TCDLA**

TCDLA GROWING

TCDLA memberships will reach 800 in October, it is estimated. At the end of September 1973, **TCDLA** membership had grown to 714. This figure includes 608 full members, 13 affiliate, and 87 student members.

This is a spectacular growth for a young Association which began with 30 members in July 1971, and which had 250 charter members as of the end of November 1971.

All members are urged to contact prospective members who should join **TCDLA**. The Board of Directors has acted to make membership more attractive to young lawyers by providing a dues rate of $50 for those admitted to practice less than two years. The Board has also opened a new category of membership, the Affiliate-Military member, with dues of $50. JAG officers in Texas are eligible. Regular membership is $100.

Membership Committee Co-Chairmen are C. David Evans, San Antonio, and George Luquette, Houston.

For membership information, contact Evans, Luquette, or the State office of **TCDLA**, P. O. Box 12964, Austin, Texas 78711, or call AC 512-478-2514.

Editor-in-Chief
EMMETT COLVIN, JR., Dallas

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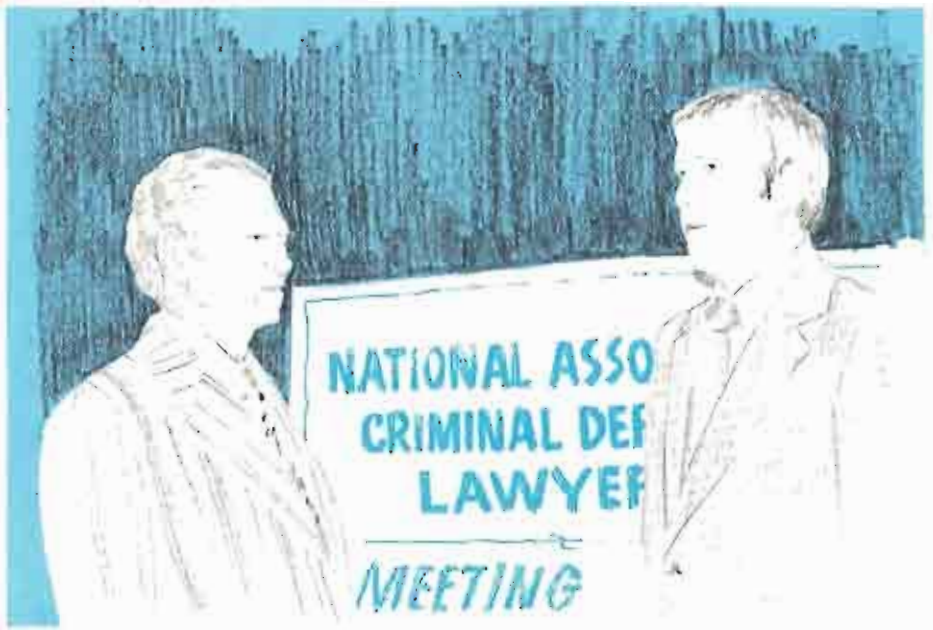
THE WIZARD OF ID

by Brant parker and Johnny hart



Charles Tessmer, 1972-73, President of National Association of Criminal Defense Lawyers, (left), confers with Phil Burleson, President TCDLAat National Association Annual Meeting in Dallas, August 16-18, 1973.

TEXAS LEADS NATION

Texas Criminal Defense Lawyers Association has provided leadership and direction for criminal defense lawyer organizations nationwide.

The strength and vitality of **TCDLA** was demonstrated when it was asked to assist the National Association. When Charles Tessmer of Dallas became President of National in August 1972, the National headquarters were moved to **TCDLA's** Austin office, and **TCDLA** Executive Director Bill Reid was named **NACDL** Executive Secretary.

Recent correspondence from other states indicates that organizations based on the Texas model have been established in Arkansas, California, and Tennessee.

During 1972-1973, **TCDLA** gave **NACDL** a significant boost and brought National membership to over 1,500. In addition, **TCDLA** was instrumental in establishing the National College of Criminal Defense Lawyers and Public Defenders, located at Bates College of Law, University of Houston.

President Tessmer led the negotiations to obtain the cooperation of the American Bar Association and the National Legal Aid and Defenders Association to establish the College. The grant request for $250,000 in federal LEAA funds was drafted in the Austin office. **TCDLA's** 1972-1973 President, C. Anthony Friloux, Jr., was named Dean of the College, and did an outstanding job in planning and organizing the College's first offering, an intensive three-week course in defense practice and skills.

The National College program was held July 30 through August 16, 1973, with 90 students representing all sections of the United States attending. The students observed a parade of the most outstanding criminal defense practitioners in the Nation who came to share their experience and knowledge.

National held its annual meeting in Dallas, Texas, August 16-18, 1973, and the National Board gave much-deserved praise to Tessmer, Friloux, and other Texans who had worked to build the National Association and establish the College. At this meeting, **NACDL** opted to accept the **TCDLA** offer to continue to share headquarters in Austin and to provide mutual assistance.

Texans serving on the **NACDL** Board of Directors are Charles Tessmer, Dallas; Joe B. Goodwin, Beaumont; Frank Maloney, Austin; and C. Anthony Friloux, Jr., William Walsh, and Percy Foreman, all of Houston. Ms. Ann Hardy of Austin was named Executive Secretary of **NACDL**. Inquiries about **NACDL** membership and activities should be directed to Ms. Hardy, Executive Secretary, **NACDL**, P. O. Box 12964, Austin, Texas 78711.

TCDLA ASSISTS ON MARIHUANA ISSUES

The new Texas Controlled Substances Act has raised many issues involving marihuana cases where the alleged offense occurred prior to the effective date of the Act.

TCDLA and its members are in the forefront of actions to resolve these issues favorably to the defense.

The Court of Criminal Appeas decided on Oct. 10, 1973, that the resentencing provisions of Section 4.06 are an unconstitutional interference with the Executive's powers of commutation and pardon. Copies of the opinion were immediately provided to all **TCDLA** members.

In *Texas* ex rel. *Smith* v. *Blackwell*, the Court granted a writ of prohibition against District Judge Blackwell's resentencing of Frank Demolli, an inmate serving a 25-year sentence for possession of marihuana.

TCDLA Was requested by the Court to act as a*micus curiae* in the case. **TCDLA's** Amicus Curiae Committee Chairman, Thomas G. Sharpe, Jr., Brownsville, prepared **TCDLA's** brief and argued the case before the Court on Sept. 5, 1973. **TCDLA** Director Sam Houston Clinton, Jr., Austin, was appointed to represent Demolli's interest in the case, and Clinton filed a brief and presented oral argument. Other **TCDLA** members filing a*micus* briefs were Richard Haynes and Marvin Teague, both of Houston.

There are several unresolved issues now pending before the Court. In the case of *Jones* v. *Texas*, No. C73-4002-IT, **TCDLA** member Melvyn Bruder of Dallas seeks to have the Court direct that a marihuana offense involving less than two ounces which occurred prior to August 27, 1973, be treated as a misdemeanor in all respects, rather than being treated as a felony with misdeameanor punishment applicable by virtue of Section 6.01 (c) of the Act. The Court heard the case on Oct. 31,1973.

On Oct. 31, 1973, the Court will consider an application for habeas corpus from Houston where the defendant has been in jail pending appeal in excess of the maximum possible sentence for possession of less than four ounces of marihuana under the new Act. The cause is No. 47,859, *Cooper E. Giles*.

TCDLA will serve as *amicus curiae* in this case which is expected to resolve the issue of the validity of Section 6.01 (c) of the Act.

PUNISHMENT Procedure and Pitfalls

By Sam Houston Clinton, Jr.

Editor's Note: Sam Houston Clinton, Jr., of Austin, is a charter member and a director of TCDLA. This paper was developed in connection with Clinton's presentations at the San Antonio and Lubbock Criminal Defense Lawyers Skills Courses.

I. BIFURCATED TRIAL PROCEDURE (Article 37.07, CCP)

A. Verdict or Finding of Guilt

B. Assessment of Punishment

1. Automatically by Judge (Art. 37.07, Sec. 2 (b)) *UNLESS*

2. Contingently by Jury (Art. 37.07, Sec. 2 (b))

a. state seeking death penalty in capital case (deleted in new code).

b. defendant filing sworn application for probation "before the trial began" and jury may recommend probation,

c. defendant filing written election for jury assessment "at the time he enters his plea in open court."

3. Jointly by Judge and Jury (*Powers*, 492 S.W.2d 277 (1973))

a. defendant filing written election for jury assessment of punishment, and

b. defendant filing sworn application for probation showing prior felony conviction.

II. PUNISHMENT EVIDENCE (Art. 37.07, Sec. 3(a)): "Prior criminal record of the defendant, his general reputation and his character."

A. Generally (*Allben*, 418 S.W.2d 517, 519 (1967)): But evidence by no means limited to statutorily stated factors. "Evidence legally admissible to mitigate punishment or evidence that is relevant to the application for probation, if any, is also admissible." Accord *Coleman*, 442 S.W.2d 338, 340 (1969).

B. Prior Criminal Record — one not void under e.g. *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258 (1967)

1. Final conviction in court of record
Ramos, 419 S.W.2d 359 (1967)
Beard, 458 S.W.2d 85 (1970)
But details of offense precluded, *Cain*, 468 S.W.2d 856 (1971)

2. Prior probated or suspended sentence
Glenn, 442 S.W.2d 360, 362 (1969)
Macias, 451 S.W.2d 489 (1970)
Perry, 464 S.W.2d 660 (1970)
Taylor, 470 S.W.2d 663 (1971)

3. Final conviction "material to offense charged"
See *Ramos*, 419 S.W.2d 359 (1967)

4. Juvenile record
Not admissible at punishment hearing before jury, *Slaton*, 418 S.W.2d 508, 511 (1967)
Admissible at punishment hearing before court, *Walker*, 493 S.W.2d 239, 240 (1973)

C. General Reputation — reputation in community as a peaceable and law abiding citizen, etc.

1. Reputation is opinion based on hearsay, *Brown*, 477 S.W.2d 619, 620 (1972) — not awareness of specific acts, *Shelton*, 494 S.W.2d 851, 853-854 (1973), nor discussion of alleged offense being tried, *Frison*, 473 S.W.2d 479 (1971); but post offense acquisition of hearsay qualifies, *Chamberlain*, 453 S.W.2d 267 (1970), *Glenn*, 442 S.W.2d 360 (1969); see generally *Bolding*, 493, S.W.2d 181, 185 (1973).

2. Community may include several locations:
Arocha, 495 S.W.2d 957, 958 (1973).
Ayers, 288 S.W.2d 511,512 (1956)

3. State's witness' acquisition of knowledge of reputation subject to testing on voir dire outside presence of jury, *Crawford*, 480 S.W.2d 724 (1971); *Coleman*, 199 S.W. 473 (1917) discusses proper method.

4. Defendant's witness' knowledge of reputation, his sincerity and credibility and weight of testimony may be tested by "have you heard" questions inquiring of acts of or charges against accused that are inconsistent with witness' testimony, *Johnson*, 459 S.W.2d 637 (1970) and cases collated, so long as question does not show or assert truth of matter, *Webber* 472 S.W.2d 136 (1971); *McNaulty*, 135 S.W.2d 987, 988 (1939); *Billingsley*, 473 S.W.2d 501 (1971), and is not asked in bad faith, *Blanco*, 471 S.W.2d 70 (1971); *Root*, 334 S.W.2d 154 (1960).

D. Character

1. Formerly "general good character *in respect to particular* trait involved in offense charged," *Cockrell*, 95 S.W.2d 408 (1936); *Hamman*, 314 S.W.2d 301, 303-305 (1958); Smith, 414 S.W.2d 659, 661 (1967) — to show improbable that defendant committed act charged; *but now* probably broader reference to "inherent qualities" of defendant, *Childs*, 491 S.W.2d 907, 908-909 (1973).

2. Defendant may be contradicted, impeached, discredited, attacked, sustained, bolstered up and cross examined as to new matter, except where law forbids certain matters to be used against him, *Webber*, 472 S.W.2d 136 (1971). A specific illegal but unprosecuted act is not admissible to show character, but broad disclaimers by defendant will invite what may be otherwise inadmissible assertions by State, *Valerio*, 494 S.W.2d 892, 897-898 (1973); *McCrea*, 494 S.W.2d 921 (1973).

3. Defendant's witness testifying generally to good character traits and law abiding habits may become "reputation" witness and subject to being tested by State's "have you heard" questions, *Childs*, 491 S.W.2d 907 (1973); *Salazar*, 494 S.W.2d 548 (1973).

E. Mitigation and Probation: including "legally admissible evidence which is relevant to a fair determination of application for probation," *Davis*, 478 S.W.2d 958 (1972).

1. Admissible

a. Condition of mind of accused at time of homicide, *Brazile*, 497 S.W.2d 302 (1973)

b. Previous unchaste character *of prosecutrix in* statutory rape case, *Vasquez*, 491 S.W.2d 173 (1973).

c. Steady work and earnings, *Coleman*, 442 S.W.2d 338, 340 (1969)

d. Psychiatric care and treatment, *Allaben*, 418 S.W.2d 517, 519 (1967).

2. Inadmissible

a. Sociological, economic and political conditions in neighborhood, *Tezeno*, 484 S.W.2d 374, 379-380 (1972).

b. Prior relationship with prosecutrix in statutory rape case, *White*, 444 S.W.2d 921 (1969); but see *Brazile*, 497 S.W.2d 304 (1973).

c. Psychiatric opinion that probation better for defendant than penitentiary, *Schulz*, 446 S.W.2d 872, 874 (1969) — an invasion of province of jury.

d. Probation officer testimony as to requirements and purpose of probation, *Logan*, 455 S.W.2d 267, 270 (1970) — matters of common knowledge and of law set out in charge of court.

3. "Opening the Door"

a. Where "entire tenor" of witness' testimony is geared toward persuading jury to grant probation by showing good character and law abiding habits, defendant has placed his reputation in evidence and witness may be asked "have you heard" questions, *Childs*, 491 S.W.2d 907 (1973); *Salazar*, 494 S.W.2d 548 (1973).

b. Similarly testifying defendant may be discredited by references to specific extraneous offenses, *Davis*, 478 S.W.2d 958 (1972); to generalized conduct, *McCrea*, 494 S.W.2d 821, 823-825 (1973): "have you shot 'speed' within the past?" or "what's been the extent of your use of marijuana?", *Valerio*, 494 S.W.2d 892, 897-898 (1973): weren't you "one of the biggest narcotic dealers in the City of Houston?" or to subjective reactions, *Santiago*, 444 S.W.2d 758, 759 (1969): "Are you sorry or have any regret for having committed offense?"

III. CHARGE TO JURY: ". . . the court shall give such additional written instructions as may be necessary and the order of procedure and the rules governing the conduct of the trial shall be the same as are applicable on the issue of guilt or innocence," Article 37.07, Sec. 3(b), and verdict is not complete until jury has rendered assessment of amount of punishment; if jury fails to agree, mistrial is mandated and jeopardy does not attach, Article 37.07, Sec. 3(c).

IV. COURT ASSESSMENT: After hearing evidence, court is to forthwith announce decision in open court, Article 37.07, Sec. 3(d); but is authorized to obtain presentence report, Article 42.12, Sec. 4: ". . . a *probation officer* shall *fully investigate* and report to the court in writing the circumstances of the offense, criminal record, social history and present condition of the defendant," including "whenever practicable . . . a *physical and mental examination of the defendant*" — contents and accuracy of which are not subject to challenge, *Valdez*, 491 S.W.2d 415 (1973).

V. SENTENCING (Chapter 42, CCP)

A. Generally: order of the court "pronouncing the judgment and ordering the same to be carried into execution in the manner prescribed by law," Article 42.02, CCP, made after defendant is given allocution and in his presence.

B. Reasons to Prevent (Article 42.07)

1. Receipt of proper pardons;
2. Asserted insanity — jury may try issue;
3. Good grounds for motion for new trial or in arrest of judgment;
4. Identity of one claimed to be arrested escapee.

C. Indeterminate Sentence (Article 42.09): sentence shall fix as minimum the time provided by law as the lowest term of confinement and as the maximum the term stated in the verdict or judgment.

D. Credit for time (Article 42.03)

1. Resentence credit discretionary, *Griffith*, 457 S.W.2d 60 (1970).

2. Postsentence credit mandatory, *Robinson* v. *Beto*, 426 F.2d 797 (5 Cir., 1970); *Griffith*, 457 S.W.2d 60 (1970); Acts 1973, 63rd Leg., Ch. 91.

3. "Good time" credit pending appeal mandatory, Acts 1973, 63rd Leg., Ch. 91; *Pruett* v. *Texas*, ____ F.2d ____, (5 Cir., 1972).

SEARCH AND SEIZURE CHECK LIST

By Jack J. Rawitscher

Editor's Note: Jack Rawitscher of Houston is a charter member and a director of TCDLA. He has spoken extensively on search and seizure problems at TCDLA Institutes, and was on the program of the National Association of Criminal Defense Lawyers at their annual meeting in Dallas, August 16-18, 1973.

I. Search and Seizure in General.

A. What constitutes a search. See *Katz v. U.S.*, 88 S.Ct. 507.

B. Scope of protection. See *Katz v. U.S.*, supra.

C. Fruit of the poisonous tree doctrine. *Wong Sun* v. *U.S.*, 371 U.S. 471, 83 S.Ct. 407.

D. Consent and waiver. *Schneckloth v. Bustamonte*, 41 L.W. 4726 (1973); *Bumper v. North Carolina*, 391 U.S. 543.

E. Fourth and Fourteenth Amendment principles. *Warden, Maryland Penitentiary v. Hayden*, 87 S.Ct. 1642.

F. Standing to complain. *Jones v. U.S.*, 362 U.S. 257, 80 S.Ct. 725.

II. Search Warrant Practice.

A. Search Warrant Affidavit.

1. Matters subject to search.

2. Area that may be searched.

3. Name, if known, of the person supposed to have charge of the premises.

4. Description of the property.

5. The affidavit must show probable cause for belief the matters sought are being concealed by the parties at the place to be searched.

B. Aguilar Two-Prong Test.

1. Underlying circumstance from which the informant concluded that the items subject to search were where he claimed they were.

a) Held sufficient:

i) Tip and surveillance by police officer. *Acosta v. Texas*, 403 S.W.2d 434.

ii) Personal observations of criminal activity. *Gaston v. Texas*, 440 S.W.2d 297.

b) Held insufficient:

i) Facts attested to not related to time of issuance of warrant. *Heredia v. Texas*, 468 S.W.2d 833.

ii) A tip without any details. *Powers v. State*, 456 S.W.2d 97.

2. Informant is credible and reliable.

a) Held sufficient:

i) Previous true and correct information. *Acosta*, supra.

ii) Defendant's reputation. *U.S. v. Harris*, 91 S.Ct. 2075.

iii) Statements against interest by the informant. *U.S. v. Harris*, supra.

iv) Good reputation and lack of prior criminal record of informant. *Yantis v. State*, 476 S.W. 2d 24.

b) Held insufficient:

i) Information is hearsay to the informant and there is nothing to show the informant's information is credible and reliable. *Nicol v. State*, 470 S.W.2d 893.

III. Warrantless Searches.

A. Search incident to arrest.

1. Must have one or more purposes:

a) Fruits of the crime.

b) Instrumentalities used to commit the crime.

c) Weapons.

See *Amador-Gonzales*, 391 F.2d 308.

2. Minor traffic violation with nothing more does not justify a search. *Pace v. Beto*, 469 F.2d 1389.

3. A limited search for weapons may be made (traffic or otherwise). *Pace v. Beto*, supra.

4. If the arrest is illegal, the search is illegal. *Willet v. State*, 454 S.W.2d 398 (minor traffic case).

B. Warrantless search based on probable cause.

1. There must be exigent circumstances. *Coolidge v. New Hampshire*, 91 S.Ct. 2022.

2. Evanescent evidence (an extension of exigent circumstance). *Cupp v. Murphy*, ____ U.S. ____ (5/29/73).

C. Plain view doctrine. *Coolidge v. New Hampshire*, supra.

1. License checks. Plain view doctrine applies. See *Legall v. State*, 463 S.W.2d 731.

2. Must the plain view discovery be inadvertent? See *Coolidge v. New Hampshire*, supra.

D. Administrative searches, inspections and inventories of automobiles.

1. Safeguarding the owner's property. *Harris v. U.S.*, 390 U.S. 234.

2. Safety or protection of the general public. *Cady v. Dombroski*, ____ U.S. ____ (6/21/73).

3. Safeguarding the police from groundless claims of lost possessions. *U.S. v. Kelehar*, 470 F.2d 176.

NOTE: In all of these cases the police had lawful possession of the vehicle. These cases would not apply if the defendant were not taken into custody. (E.g., minor traffic violation)

IV. Stop and Frisk.

A. Pat down for weapons without probable cause to search held o.k. if based on suspicious behavior that put police officer in fear of his life or safety. *Terry v. Ohio*, 392 U.S. 1.

B. Temporary detention for investigation without probable cause to search based on suspicious behavior held o.k. *Onofre v. State*, 474 S.W.2d 699.

C. An inarticulate hunch, suspicion or good faith does not justify a pat down or detention. *Brown v. State*, 481 S.W.2d 106.

NEW PENAL CODE: JURY CHARGE IN MURDER CASE

Frank Maloney

Editor's Note: In view of the enactment of the new Texas Penal Code, effective January 1, 1974, the regular feature "Frank Case Comments" is replaced by the following sample jury charge on a plea of Not Guilty in a murder case, and included charges relating to lesser includable offenses.

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

The defendant, A. B., stands charged (by indictment, or information where indictment waived) with having on or about the _____ day of _____, 19____, intentionally and knowingly caused the death of C. D. by shooting him with a firearm, to-wit: a rifle in _____ County, Texas.[1]

To this charge the defendant has entered his plea of not guilty.

I.

A person commits murder if he intentionally or knowingly causes the death of an individual, unless justified by law.[2]

II.

"Individual" means a human being who has been born and is alive.[3]

A person acts "intentionally" with respect to the result of his conduct when it is his conscious objective or desire to cause the result.[4]

A person acts "knowingly" with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result.[5]

III.

Now, if you believe from the evidence beyond a reasonable doubt that the defendant, A.B., on or about the _____ day of _____, 19____, in _____ County, Texas, as alleged in the indictment (or information), did then and there either intentionally or knowingly cause the death of an individual, _____, (manner and means of causing death as alleged in indictment) by shooting him with a firearm, to-wit: a rifle, and you further believe beyond a reasonable doubt that the defendant was not justified by law as hereinafter defined, you will find the defendant guilty of the offense of murder. But if you do not so believe, or if you have a reasonable doubt thereof, you will acquit the defendant of the offense of murder.

(Herein define justification as it applies to the facts of the case. See Chapters 8 and 9, P.C., as follows:)

IV.

It is a defense to prosecution for murder when the conduct of the defendant is justified by law.[6]

A person is justified by law in using force against another when and to the degree he reasonably believes that force is immediately necessary to protect himself against the other's use or attempted use of unlawful force.[7]

The use of deadly force against another is justified by law if the use of force is justified by law as above set out[8] and if a reasonable person in the defendant's situation would not have retreated[9] and when and to the degree the defendant reasonably believes that deadly force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly force.[10]

The term "deadly force" means force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury.[11]

The term "serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.[12]

The term "reasonable belief" means a belief that would be held by an ordinary and prudent man in the same circumstances as the defendant.[13]

V.

Now bearing the above instructions in mind if you find from the evidence, or if you have a reasonable doubt thereof, that at the time the defendant caused the death of C. D., if he did, the defendant reasonably believed that the use of deadly force and the degree of deadly force used, if it was, was immediately necessary to protect himself against the said C. D.'s use or attempted use of unlawful deadly force, and if you further find from the evidence, or if you have a reasonable doubt thereof, that a reasonable person in the defendant's situation would not have retreated, then you shall acquit the defendant of the offense of murder and say by your verdict not guilty.

VI.

You are instructed that the law qualified the right of self defense as follows: If a defendant brings about the necessity of using force against another, by provoking the other's use or attempted use of unlawful force against him, he cannot claim that his use of force was justified by reason of self defense, unless he abandons the encounter, or clearly communicates to the other his intent to do so reasonably believing he cannot safely abandon the encounter and the other nevertheless continues or attempts to use unlawful force against him.[14]

Now, if you believe from the evidence in this case beyond a reasonable doubt that the defendant brought about the necessity of using force against C. D. by provoking C. D.'s use or attempted use of force against him so that he, the defendant, might then use deadly force against C. D., if he did, you will not hold in favor of the defendant on the issue of self defense.

On the other hand, if you have a reasonable doubt that the defendant did not intend to provoke the difficulty or did not intend to provoke the use of force by the said C. D. or if you have a reasonable doubt that the defendant abandoned the

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1 Set out charging part of State's pleading.
2 19.02 (a) (1). (All citations are to Texas Penal Code 1973, unless otherwise specified.)
3 1.07 (17)
4 6.03 (a)
5 6.03 (b)
6 9.02
7 9.31 (a)
8 9.32 (1)
9 9.32 (2)
10 9.32 (3) (A)
11 9.01 (3)
12 1.07 (34)
13 1.07 (31)
14 9.31 (4)

encounter or clearly communicated to the said C. D. his intent to abandon the encounter reasonably believing he could not safely abandon the encounter, but the said C. D. nevertheless continued or attempted to use unlawful force against him, the said defendant, then the defendant's right of self defense is not in any way lessened and you will decide the issue of self defense in accordance with the law on that subject as above stated in paragraphs IV and V of the Court's charge.

(Where the facts raise the issue of verbal provocation, the Court should so charge.)[15]

(Where the facts raise the issue of force used in resisting arrest or search and the facts show that the officer used force, the Court should charge that force is justified in resisting an arrest or search when greater force than is necessary is used by the peace officer in effectuating the arrest or search.)[16]

(Where the facts raise the issue of consent to exact force used, the Court should charge on this issue.)[17]

VII.

If you do not find beyond a reasonable doubt that the defendant is guilty of the offense of murder or if you have a reasonable doubt thereof, you will proceed to consider whether the defendant is guilty of the lesser offense of voluntary manslaughter as follows:[18]

VIII.

Unless justified by law, a person commits the offense of voluntary manslaughter if he intentionally or knowingly causes the death of an individual or if he intends to cause serious bodily injury and commits an act clearly dangerous to human life and by such act causes the death of an individual, except that he causes such death in either case under the immediate influence of a sudden passion arising from an adequate cause.[19]

"Sudden passion" means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed, which passion arises at the time of the offense and is not solely the result of former provocation.[20]

"Adequate cause" means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.[21]

(Define "individual" [1.07 (17)]; "intentionally" [6.03 (a)], "knowingly" [6.03 (b)]).

"Act" means bodily movement, whether voluntary or involuntary, and includes speech.[22]

IX.

Now bearing in mind the foregoing instructions, if you believe from the evidence beyond a reasonable doubt, that the defendant, A. B., on or about the ____ day of _____, 19____, in the County of _____ and the State of Texas, while under the immediate influence of "sudden passion" arising from an "adequate cause" as those terms are hereinbefore defined, did then and there either intentionally or knowingly cause the death of an individual, C. D., by shooting him with a firearm, to-wit: a rifle, or he did then and there while intending to cause serious bodily injury to C. D. commit an act in that he did shoot the said C. D. with a firearm, to-wit: a rifle, and said act, if any, was an act clearly dangerous to human life, and said act, if any, caused the death of C. D., and you further believe beyond a reasonable doubt that the defendant was not justified by law as hereinafter defined, then you will find the defendant guilty of the offense of voluntary manslaughter, but if you do not so believe or if you have a reasonable doubt thereof, you will acquit the defendant of the offense of voluntary manslaughter.

(Herein define justification as it applies to the facts. See Chapters 8 and 9, P.C., and footnote 6.)

If you do not find beyond a reasonable doubt that the defendant is guilty of the offense of murder or of the offense of voluntary manslaughter, or if you have a reasonable doubt thereof, you will proceed to consider whether the defendant is guilty of the lesser offense of involuntary manslaughter as follows:[23]

X.

A person commits the offense of involuntary manslaughter if he recklessly causes the death of an individual.[24]

XI.

A person acts "recklessly" with respect to the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the defendant's standpoint.[25]

15 9.31 (b) (1)
16 9.31 (c) (1)
17 9.31 (b)
18 Art. 37.09, CCP, as amended by conforming amendments, S.B. 14, Texas Penal Code.
19 19.04
20 19.04 (b)
21 19.04 (c)
22 1.07 (1)
23 See footnote 18.
24 19.05 (a) (1)
25 6.03 (c)

XII.

Now if you believe from the evidence beyond a reasonable doubt that the defendant, A. B., on or about the _____ day of _____, 19 __, in the County of _____, State of Texas, did cause the death of C. D. by shooting him with a firearm, to-wit: a rifle (manner and means of causing death) and you further believe from the evidence beyond a reasonable doubt that the defendant was then and there aware of but consciously disregarded a substantial and unjustifiable risk that said result would occur, and said risk, if it was a risk, was of such a nature and degree that its disregard constituted a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the standpoint of the defendant, you will find the defendant guilty of the offense of involuntary manslaughter and so say by your verdict, but if you do not so believe, or if you have a reasonable doubt thereof, you will acquit the defendant.

(Chapter 8 and possibly Chapter 9 defense "necessity" should be charged at this juncture.)

(Where the facts raise criminally negligent homicide as a lesser includable offense the Court should instruct on the law concerning same; it is doubtful that criminally negligent homicide would ever be applicable as a lesser includable offense, but it is conceivable.)[26]

(In addition to the standard charges of failure to testify, unanimous verdict, jury exclusive judges of facts proved, etc., the Court should charge on burden of proof as follows:)

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved by the State beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with, an offense gives rise to no inference of guilt at his trial.[27]

"Element of an offense" means: (a) the forbidden conduct; (b) the required culpability (i.e. state of mind); (c) any required result; (and (d) the negation of any exception to the offense.)[28] [Charge (d) only when applicable.]

"Conduct" means an act or omission and its accompanying mental state.[29]

"Required culpability" means: intent (or whichever one of the four is applicable.)

Now bearing the foregoing instructions in mind if you fail to find each element of the offense is proved by the State beyond a reasonable doubt or if you have a reasonable doubt thereof you shall acquit the defendant and say by your verdict not guilty.

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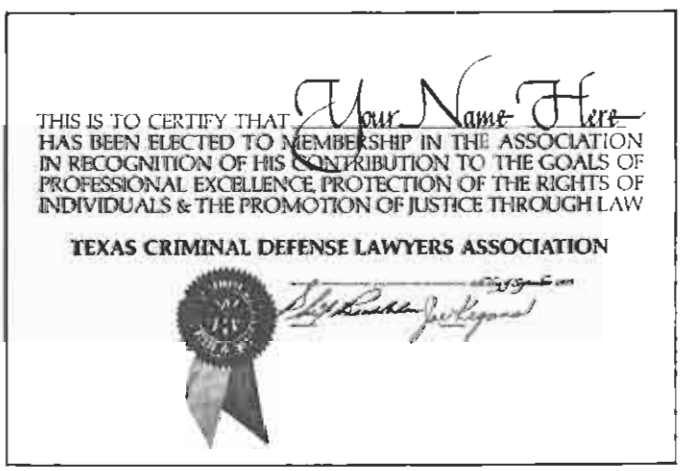
[26] 19.07
[27] 2.01
[28] 1.07 (13)
[29] 1.07 (8)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