CHAPTER 11: HOMICIDE

INTRODUCTION

Prior to 1994, the Texas Penal Code (TPC) had five types of criminal homicide. They were Capital Murder, Murder, Voluntary Manslaughter, Involuntary Manslaughter and Criminally Negligent Homicide. Currently, Texas has six types of criminal homicide. TPC ch. 19 provides four types, while ch. 49 has one additional form of criminal homicide. Finally, there is also the offense of capital sabotage in the Government Code, which is discussed in ch. 16 *infra*. Texas is somewhat unique in that it no longer has the offense of Voluntary Manslaughter.

One of the current crimes is capital murder, and Texas executes more people, and has the second highest number of people on death row, as compared to other states. Under current law, certain types of feticides are criminal homicides. Ch. 19 of the TPC can be found at http://www.capitol.state.tx.us/statutes/docs/PE/content/word/pe.005.00.000019.00.doc

The offense of intoxication manslaughter, TPC sec. 49.08, can be found in chapter 49 at http://www.capitol.state.tx.us/statutes/docs/PE/content/word/pe.010.00.000049.00.doc

The number of reported murders and other criminal homicides in Texas in 2004 was 1,359. This represented a 4.1 percent decrease in the number of murders as compared to 2003. The murder rate in 2004 was 6.0 murders for every 100,000 persons. This rate was down 6.3 percent from 2003. These rates and numbers are higher than the national figures, which have also generally been decreasing.

BASIC DEFINITIONS

Only the death of an "individual" can be a criminal homicide. "Individual" is defined in TPC sec.1.07 (a)(26) as a "human being, who is alive, including an unborn child at every stage of gestation from fertilization until birth." Thus, in general (see below), death of a fetus can be a criminal homicide.

While Texas law recognizes the traditional approach and the concept of "brain death," as legal death, (see the section "The End of Human Life" in your text), the only TPC definition of "Death" is found in TPC sec. 1.07 (a)(49): '"Death" includes, for an individual who is an unborn child, the failure to be born alive.' However, to avoid conflict with a female's constitutional right to an abortion, the legislature enacted TPC sec. 19.06 which provides that TPC ch. 19 does not apply to the death of an unborn child if it involves

> (1) conduct committed by the mother of the unborn child;
> (2) a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent, if the death of the unborn child was the intended result of the procedure;

> (3) a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent as part of an assisted reproduction as defined by Section 160.102, Family Code; or
> (4) the dispensation of a drug in accordance with law or administration of a drug prescribed in accordance with law.

For more on this topic see the text section on "The Beginning of Human Life" and the California approach as exemplified by the case of *People v. Davis* in that same section. Also refer to case 1 in "Cases and Comments" in the text. The right to an abortion is a part of the right to privacy which is discussed in ch. 2 of the text.

TPC CH. 19: FOUR TYPES OF CRIMINAL HOMICIDE

TPC section 19.01 states that there are four types of criminal homicide. They are Murder, Capital Murder, Manslaughter and Criminally Negligent Homicide. They are discussed in that order below.

Murder

Under TPC section 19.02 there are three basic ways to commit murder:

> (1) intentionally or knowingly causes the death of an individual;
> (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or
> (3) commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual."

Type (2) is sometimes referred to as "depraved heart murder," which is discussed in the "Depraved Heart Murder" section of the text. Type (3) is a form of felony murder which is discussed in the "Felony Murder" section of your text.

Murder is usually a felony of the first degree, the possible punishment for which is imprisonment in the institutional division for life or for any term of not more than 99 years or less than 5 years and/or by a fine not to exceed $10,000. The only exception to this that the crime is a felony of the second degree if the requirements of TPC sec. 19.02 (d) are satisfied:

> At the punishment stage of a trial, the defendant may raise the issue as to whether he caused the death under the immediate influence of sudden passion arising from an adequate cause. If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree.

The CCA explained this statute in *McKinney v. State*, 179 S.W.3d, 565, 569 (Tex.Crim.App. 2005):

> During the punishment phase of the trial, a defendant may argue that he caused the death while under the immediate influence of sudden passion arising from an adequate cause. "Sudden passion" is "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." Texas Penal Code sec. 1902 (a)(2).
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> "Adequate cause" is a "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." Texas Penal Code sec. 19.02 (a)(1).
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> Sudden passion is a mitigating circumstance that, if found by the jury to have been proven by a preponderance of the evidence, reduces the offense from a first degree felony to a second degree felony. Texas Penal code sec. 19.02 (c) and (d.).

Thus, before defendants are allowed to have the judge or jury consider sudden passion, defendants must prove:
(1) that there was a adequate (legally recognized) provocation for the emotion or passion;
(2) an emotion or passion such as terror, anger, rage, fear or resentment existed;
(3) that the homicide occurred while the passion or emotion still existed;
(4) that the homicide occurred before there was a reasonable opportunity for the passion or emotion to cool (dissipate); and,
(5) that there was a causal connection between the provocation, the passion, and the homicide.

A second degree felony is punishable by imprisonment for not more than 20 years nor less than 2 years, and/or a fine not to exceed $10,000. This is where the old offense of “voluntary manslaughter” ended up after amendments to the TPC effective in 1994. Thus, there is currently no offense of voluntary manslaughter in Texas. For more information on voluntary manslaughter, see the “Voluntary Manslaughter” section of your text.

Case on Murder and the missing body

Fisher v. State (1993) Can a person be convicted of murder (or any form of criminal homicide) if the body of the victim is never found or identified? Is the defendant’s confession admissible under the corpus delicti rule if the body is never found and identified? Article 1204 of the 1925 TPC provided that no person could be convicted of a criminal homicide unless the victim’s body or portions thereof were found and identified as being those of the victim. This article was not re-enacted in the new Penal Code which took effect in 1974. In *Fisher v. State*, 851 S.W.2d 298 (Tex.Crim.App. 1993) the CCA answered both questions in the affirmative. The defendant was tried for the murder of his girlfriend under the new TPC. Neither the victim’s body nor remains were ever found or identified. A friend of the defendant, Marquez testified that Fisher had confessed to him. Fisher confided that he had drowned the victim in a bathtub, cut off her head, fingers and arm and, among other things, burned part of the body. The police found some bones, but because DNA testing was not then available, they could not be identified as belonging to the victim. Fisher was convicted of murder and sentenced to 30 years imprisonment. The CCA affirmed the conviction.

Under Texas law, (and that of most states) a confession is not admissible unless the *corpus delicti* of the crime is established. Basically, the *corpus delicti* of a crime is evidence that the crime in question has been committed by someone. It is not necessary to prove that the confessor committed the crime. Fisher's confession was admissible as evidence as long as it was supported by evidence of the corpus delicti. The CCA held that the corpus delicti rule was satisfied, and the confession was admissible.

> We also have no difficulty determining the record evidence was sufficient to satisfy the corpus delicti rule. Viewed in the light most favorable to the verdict, the State's evidence established that B__ B__ vanished suddenly and without a trace; that her personal affairs (receipt of mail, friendships, payment of debts, etc.) were left strangely unresolved; that she had had a strained relationship with appellant in the months before her disappearance; that she had had neither sufficient money nor a vehicle with which to leave San Antonio; that appellant was seen around the time of her disappearance (a) attempting to dispose of her property (a suitcase) under unusual circumstances, (b) in apparent possession of bones from severed human hands, and (c) with indications (facial bruise, scratches) that he might have been in a struggle with someone; that the carpet in B__ B__'s and appellant's home was steam cleaned around the time of B__ B__'s disappearance, suggesting that the carpet might have been bloodstained; and that significant amounts of blood of recent origin were found in B__ B__'s and appellant's home. Reasonable persons could conclude that this evidence tended to prove that B__ B__ was killed by criminal means. (851 S.W.2d at 304).

The CCA also held that Article 1204 of the 1925 Penal Code had been specifically repealed as part of the enactment of the new TPC. Death could now be proven by circumstantial evidence alone. The CCA concluded that Fisher's admissible confession and other circumstantial evidence (including that used to satisfy the corpus delicti rule) were sufficient to prove that the victim was dead. Today, DNA testing would probably have allowed for identification of the bones and eliminated many of the problems in this case.

Capital Murder

A capital murder (sec. 19.03) is a capital felony. It is a sec. 19.02 knowing or intentional murder plus at least one of the following additional elements:

> 1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;
>
> (2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat . . .,
>
> (3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;
>
> (4) the person commits the murder while escaping or attempting to escape from a penal institution;

(5) the person, while incarcerated in a penal institution, murders another:
(A) who is employed in the operation of the penal institution; or
(B) with the intent to establish, maintain, or participate in a combination or in the profits of a combination;

(6) the person:
(A) while incarcerated for an offense under this section or Sec.19.02, murders another; or
(B) while serving a sentence of life imprisonment or a term of 99 years for an offense under Sec. 20.04, 22.021, or 29.03, murders another;

(7) the person murders more than one person:
(A) during the same criminal transaction; or
(B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct;
(8) the person murders an individual under six years of age; or

(9) the person murders another person in retaliation for or on account of the service or status of the other person as a judge or justice of the supreme court, the court of criminal appeals, a court of appeals, a district court, a criminal district court, a constitutional county court, a statutory county court, a justice court, or a municipal court.

A capital felony is punishable by death or life imprisonment without parole. If the prosecution is not seeking the death penalty, life without parole is the mandatory sentence. Prior to 2005, capital felony life imprisonment was life with the possibility of parole after 40 years.

See the discussion of "Capital and Aggravated Murder" in your text. The Texas statute is also reproduced in that section of the text. In states with the death penalty, the analogue of Texas' Capital Murder is First Degree Murder.

Until recently, the TPC provided that no one under 17 years of age at the time of the offense could be executed. In *Roper v. Simmons*, 125 S.Ct. 1193 (2005), the U.S. Supreme Court held that it was a violation of the Eighth Amendment ban on cruel and unusual punishment to execute anyone who was under 18 at the time the crime was committed. The case of *Roper v. Simmons* is reproduced in your text in ch. 3. TPC sec. 8.07 now provides that no one under the age of 18 at the time of the crime may be executed.

Capital Sentencing Procedures

Capital sentencing is a complicated process, the full discussion of which is beyond the scope of this work. Briefly, and at the risk of oversimplification, if a defendant is convicted of capital murder there are 2 basic steps which will determine whether or not the defendant gets the death penalty. Texas Code of Criminal Procedure (CCP) art. 37.071, sec. 2(d) provides "aggravating factors:"

> (b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:
>
> (1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party [accomplice, solicitor or coconspirator] under Sections 7.01 and 7.02, Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.

If the prosecution proves (b)(1) (or both when the defendant is convicted as a party to the offense), beyond a reasonable doubt, the defendant is eligible for the death penalty. However, in the second step, the jury is also allowed to consider any mitigating evidence that would counsel against the death penalty. Examples of mitigating evidence would be a criminogenic family, child sexual abuse, low I.Q., and emotional problems) If they find that mitigating evidence warrants life without parole rather than death, the jury must return with a sentence of life without parole.

Capital Punishment in Texas

When capital punishment was declared "cruel and unusual punishment" under the Eighth Amendment by the U.S. Supreme Court in 1972, there were 45 men on death row in Texas and seven in county jails with a death sentence. All of the sentences were commuted to life sentences by the Governor of Texas, and death row was cleared by March 1973. (Some of these offenders were ultimately released on parole.) However, later in 1973, revisions to the Texas Penal Code once again authorized the death penalty and allowed for executions to resume effective Jan 1, 1974. Under the new statute, the first man (John Devries) was placed on death row on Feb. 15, 1974. Devries avoided execution when he committed suicide a few months later by hanging himself with bed sheets.

In 2005, although 38 states authorized the death penalty, only 60 persons were executed in 16 states. Texas led the way with 19. The next highest was five each in three other states Texas typically executes more people per year than any other state. Texas leads the nation in number of persons executed since 1930-2004 (633) and 1977-2004 (336). Texas death row inmates spend an average of 8.2 years on death row. This is below the national average of 10.2 years. In 2004, California had the largest death row population (637) followed by Texas (446). In 2004 Texas had received 23 new admission to death row. California was second with 11. As is the case nationally, inmates on death row are disproportionately Black. Texas, like a majority of states that have the death penalty, uses lethal injection.

For information on the disposition of offenders on death row who were not executed (including reversals of convictions), see http://www.tdcj.state.tx.us/stat/permanentout.htm

As is the case nationally and in most states, Blacks are overrepresented on Death Row. Currently 41% of the inmates on death row in Texas are Black. However, Blacks comprise only around 12 % of the state's population. Hispanics and Whites are both underrepresented on Death Row. This overrepresentation has

caused much concern that racism may be playing a part in deciding the sentence in convictions for capital murder. A number of research studies have shown racial effects in assessing the death penalty. However, the Supreme Court in *McCleskey v. Kemp*, 107 S.Ct. 1756 (1987) refused to overturn the death penalty in spite of empirical evidence of racial discrimination.

The effectiveness of counsel at capital murder trials is also a serious concern in Texas and many states. For instance, in *Burnett v. Collins*, 982 F.2d 922 (5th Cir. 1993), the defendant alleged that counsel abused alcohol during the trial. Perhaps the best known case is *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) where counsel slept through much of the trial. The Fifth Circuit (*en banc*) ordered a new trial. There is also concern that innocent people are being convicted and executed.

Eighth Amendment limitations on punishment are discussed in ch. 3 of your text. The death penalty is discussed in the same chapter in the section entitled "The Amount of Punishment: Capital Punishment."

Selected cases on Capital Murder

Jurek v. Texas, 1976. In *Furman v. Georgia,* 92 S.Ct. 2726 (1972), which included *Texas v. Branch*, a majority of the Supreme Court struck down all then-existing capital punishment statutes, including that of Texas. In 1973 the Texas legislature decided to reinstate the death penalty by enacting a new capital murder statute and establishing new procedures for capital cases. Most of the states that reinstated the death penalty followed the approach of the Model Penal Code. Texas did not. The constitutionality of capital punishment in discussed in ch. 3 of your text. The constitutionality of Texas' new capital murder provisions came before the Supreme Court in *Jurek v. Texas*, 96 S.Ct. 2590 (1976).

Jerry Lane Jurek was a 22 year old male convicted of kidnapping and drowning a 10 year old female who refused to have sex with him. The Texas Court of Criminal Appeals (CCA) affirmed the conviction and sentence. The U.S. Supreme Court granted certiorari and a stay of execution to decide the constitutionality of Texas' new death penalty scheme. Although the statute at that time did not explicitly provide for "mitigating circumstances," Texas' statute was interpreted by the CCA to allow consideration of mitigating circumstances. Although there was no majority opinion by the Supreme Court, five Justices basically concluded that, as interpreted, it was a valid form of "guided discretion" statute like those of Georgia and Florida which were also found constitutional. The plurality (four justices) concluded:

> . . . Texas' capital-sentencing procedures, like those of Georgia and Florida, do not violate the Eighth and Fourteenth Amendments. By narrowing its definition of capital murder, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first-degree murder case before a death sentence may even be considered. By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function. By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of

> death sentences under law. Because this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed, it does not violate the Constitution. (95 S.Ct. at 2958)

Although the basic legal structure has been validated by the Supreme Court, problems with procedural and evidentiary details involving the consideration of mitigating circumstances by juries have led to the overturning of a number of capital murder convictions in Texas. A recent example is *Smith v. Texas*, 125 S.Ct. 400 (2004).

Black v. State, 2000. This case answered the question of whether a conviction under sec. 19.03 (a)(8), involving murder of a child under six requires proof that the defendant knew the child was under six year of age. In *Black v. State*, 26 SW3d 895 (Tex.Crim.App. 2000, per curiam), the CCA held that there is no requirement of proof that the defendant knew or intended that the victim was under six. Although the court did not discuss TPC sec. 6.02 (b), it noted that the legislature did require knowledge in sec. 19.03 (a)(1) with regard to the murder of a peace officer, but specifically omitted to require knowledge in the section about children under six. This comparison reflected a legislative intent not to impose a knowledge requirement regarding the killing of children under six year of age.

Hughes v. State, 1995 The first form of capital murder involves killing a police officer who is "acting in the lawful discharge of an official duty . . ." What if the officer's actions at the time were unconstitutional or illegal? Does that mean the killing of the officer is therefore not a capital murder? In *Hughes v. State* 897 SW2d (Tex.Crim.App. 1995, cert. den. 115 S.Ct. 1967), Hughes' vehicle was pulled over by two Department of Public Safety Troopers responding to a dispatcher's report that described Hughes and his car. Hughes allegedly had attempted to use a stolen credit card. Trooper Frederick approached the driver's side of Hughes' vehicle and was shot. The second trooper fired at Hughes car as it sped away. Hughes was not apprehended until two days later, by which time Trooper Frederick died of the gunshot wounds. Hughes argued that the stop violated the Fourth Amendment, and that the officer was not "acting in the lawful discharge of an official duty." The CCA rejected Hughes' argument and held that the legality of the officer's conduct is irrelevant. It was enough that the officer was acting in his capacity as a peace officer. The officer was on duty, in uniform and on patrol. The CCA wrote:

> Whether or not Frederick's stop of appellant was constitutionally reasonable "is not relevant to determining if [Frederick] was acting in the lawful discharge of his duties." . . . The record reflects that Frederick was "acting within his capacity as a peace officer" at the time of the offense. He was on duty, in uniform and patrolling Interstate 10 with his partner when they heard and responded to the dispatcher's report. (897 S.W.2d at 298)

The court also cited an earlier case where it held that the fact that the arrest was illegal was irrelevant to the statute.

Dowden v.State, (1988). The facts of this case are highly unusual. The victim police officer was not killed by Dowden, but by another police officer. Can Dowden be guilty of the murder of a peace officer? It is important to note that this is not a felony murder prosecution. The CCA in Dowden v. State 758 S.W.2d (Tex.Crim.App. 1988) held that he could and affirmed the capital murder conviction. The facts were as follows.

On June 28, 1974, at 1:00 a.m., the appellant's [Billy Wayne Dowden's] brother, Charles Ray Dowden, was arrested for robbing a 7-11 convenience store [clerk] in Orange, Texas. He was taken to the police station where he was booked and placed in the city jail on the second floor of the police station.

"The appellant, who had been at the convenience store with his brother, decided to aid his brother in escaping from jail, and he drove to his brother's house, where he picked up his sister-in-law, and told her of his plan to get his brother out of jail. The appellant and his sister-in-law then drove to Clifford Blansett's house, where they picked up a rifle and a pistol, and the three drove to the police station, arriving there around 4:00 a.m. on that same morning.

"The appellant and Blansett entered the police station and went to the dispatcher's booking office, where two police officers and one dispatcher were working. The appellant slammed open the door to the dispatcher's office, pointed an automatic pistol at the police officers and declared, 'I have come to get Charles.' The officers were stunned at the outset, but quickly regained their composure. Captain Gray (the deceased) lunged at the appellant, grabbed the hand in which he was holding the gun and, placing his other arm around the appellant's body, forced him into the hall. The door, operating on a spring closing device, closed automatically behind them. At this moment, the two men remaining in the office could not see what was happening, but they heard a shot fired in the hallway. No longer being able to see Captain Gray, they presumed that he had been shot by the appellant and was dead.

"Meanwhile, the officer remaining in the dispatcher's office, Officer Windham, drew his pistol, and the dispatcher, Denton, slipped into a small room adjoining the dispatcher's office to load a shotgun. There ensued an exchange of gunfire between the appellant and Officer Windham and Denton.

"After the fusillade subsided, Officer Windham heard 'moving around in the hall.' Whereupon Denton hollered, 'He's coming in through the door' (or 'He's at the door'). There was more 'moving around' and then another bullet came through the booking window. Following this last shot the door came 'crashing open,' and Windham immediately 'shot twice and then again.' According to Officer Windham's testimony, when he fired these shots he was on his knees at the edge of the booking counter closest to the door. The pistol was in his left hand, around the corner of the cabinet, and aimed at the door. On cross-examination, Windham admitted that he did not look before he fired because he thought that only the appellant could be coming through the door. Upon being asked why he shot without looking, he said he thought that he would be killed if he did not.

"Officer Windham's three shots at the person in the doorway were the last shots fired. The two men, Windham and Denton, not knowing whether their assailants had left or whether they had taken a breather, radioed for help. It was not until Windham crawled back to join Denton in the back room that he knew that the man lying in the doorway was Captain Gray, and not the appellant. A ballistics examination revealed that Captain Gray was killed by Officer Windham." 758 S.W.2d at 267-68.

The CCA concluded that Dowden was the cause of the officer's death and acted with the requisite culpability.

> In the instant case all of appellant's actions were voluntary. Under our present case law the evidence is sufficient to prove that appellant intentionally and knowingly caused the death of Captain Gray, knowing that he was a peace officer. By acting intentionally, appellant showed that he was aware of the nature of his conduct and that initiating a shoot-out in the police station would result in the death of one of the officers on duty. The evidence is also sufficient to prove that appellant acted knowingly and therefore his malicious conduct was sufficient to hold him criminally responsible for Captain Gray's resulting death. 758 S.W.2d at 268.

Manslaughter

Manslaughter (TPC sec. 19.04) is recklessly causing the death of an individual. This offense is roughly equivalent to the offense of involuntary manslaughter found in some jurisdictions. Manslaughter is a felony of the second degree, which is punishable by imprisonment for not more than 20 years nor less than 2 years, and/or a fine not to exceed $10,000. Cases involving driving while intoxicated would probably be prosecuted under TPC sec. 49.08, Intoxication Manslaughter (see below), rather than under this section.

Criminally Negligent Homicide

Criminally negligent homicide (TPC sec. 19.05) is causing the death of an individual by criminal negligence. It is a state jail felony under which in general, a person can be confined in a state jail for not more than two years nor less than 180 days. In addition, a fine of not more than $10,000 may be assessed.

Criminally Negligent Homicide differs from Manslaughter only in terms of the culpability or *mens rea*. Criminally negligent homicide involves criminal negligence. Manslaughter involves recklessness. Thus, Manslaughter involves conscious risk creation (the actor is aware of the risk surrounding his conduct or the results thereof, but consciously disregards that awareness). Criminally negligent homicide involves inattentive risk creation. The actor ought to have been aware of the riskiness of his or her conduct but failed to perceive the risk.

As discussed in ch. 5, recklessness and criminal negligence are more serious forms of culpability than the negligence that can result in civil liability. Unlike civil or ordinary negligence, recklessness (defined in sec. 6.03) requires some subjective awareness of the risk. Ordinary negligence is a totally objective standard. Criminal negligence, (defined in sec. 6.03), requires a "gross" deviation from the standard of care a reasonable or ordinary person would have exercised under the same circumstances. Criminal negligence is roughly equivalent to "gross negligence" which is a more serious form of culpability than ordinary negligence. Ordinary negligence can be made out by showing any deviation from the standard of care that a reasonable person would exercise.

Chapter 7, Subchapter B of the TPC discusses the criminal liability of corporations. The CCA has held in *Vaughn & Sons, Inc. v. State*, 737 S.W.2d 805 (Tex.Crim.App. 1987) that a corporation can be liable for criminally negligent homicide. This topic is discussed in your text in the "Corporate Murder" section.

TPC SEC. 49.08 INTOXICATION MANSLAUGHTER

The final type of criminal homicide in Texas is found in TPC ch. 49, "Intoxication and Alcoholic Beverage Offenses." A person is guilty of intoxication manslaughter (TPC sec. 49.08) if the person operates a motor vehicle in a public place, operates an aircraft, watercraft or an amusement ride, or assembles a mobile amusement ride and " is intoxicated and by reason of that intoxication causes the death of another by accident or mistake."

"Intoxicated is defined in TPC sec. 49.01 (2) as having a blood alcohol content of 0.08 or more or "not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body . . ."

This offense is a felony of the second degree. A second degree felony is punishable by imprisonment for not more than 20 years nor less than 2 years, and/or a fine not to exceed $10,000

Note that this is a strict liability offense. This type of offense is discussed in ch. 5 of your text. Guilt attaches even if the death is caused by accident or mistake. Recall that TPC sec. 6.02 (b) allows courts to read in *mens rea* or culpability requirements unless the statutes specifically provide otherwise. This is one of those cases. Under TPC sec. 49.11, TPC sec. 6.02 (b) does not apply to this offense. Many observers are critical of strict liability offenses because they arguably punish conduct which is not blameworthy. Supporters of strict liability offenses counter that such offenses are usually fine-only offenses. This is clearly not the case for sec. 49.08 for which a person could be imprisoned for up to 20 years.

Section 49.08 does not apply to injury or death of an unborn child if the offense against the unborn child is committed by the mother of the unborn child. Thus, if a pregnant woman is driving while intoxicated and has an accident which kills her fetus, it is not a crime.

EXERCISE

Holberg v. State involved the felony murder portion of Capital Murder and is an unusual case because of the facts, because one the defendant's allegations was that Texas' death penalty law violated the Establishment clause, and because the CCA articulated the reasons behind Texas' death penalty. In Holberg v. State 38 S.W.3d 137 (Tex.Crim.App. 2005, rehearing, den.) defendant was convicted of capital murder on the basis of intentionally committing a murder in the course of robbery and burglary in violation of sec. 19.03 (a)(2).

The victim was an 80 year old man who was approached on the street by Brittany Holberg (a 23 year-old prostitute and drug addict) who asked to use his telephone. Once at the victim's apartment, Holberg asked for money but the victim refused. In the course of a struggle over money, Holberg grabbed several

objects in the apartment and used them to club and stab the victim. As the victim lay on the floor, Holberg choked him with a lamp, hastening his death. She then went through his pockets, found his wallet and took $1,400 in cash as well as some clothing from the apartment.

The defendant argued that TPC sec. 19.03 and certain procedural and evidentiary rules in Texas Code of Criminal Procedure Art. 37.071 violated the First Amendment's Establishment Clause because

> (1) the sponsors of the House Bill creating those statutes could not articulate a reasonable, secular purpose for their enactment but did articulate, at length, the religious purpose for the punishment, while siding, in fact, with the viewpoint of a particular and identifiable religious sect," and (2) "the effect of [the statutes is] to advance the beliefs of fundamentalist Protestants over those of other branches of American Christianity and other sects and religions that oppose the death penalty on contrasting religious grounds. (38 S.W.3d at 139)

The CCA utilized the Supreme Court's test from *Lemon v. Kurtzman* (1971) to determine whether the statute had the purpose or effect of advancing or inhibiting religion. The CCA held for the State (Holberg is currently one of nine females on death row in Texas), and concluded that the laws were passed to further a number of rational, secular beliefs.

1. In your opinion, what are the rational, secular beliefs or reasons for the death penalty?

2. Compare your list with those of the CCA
http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=tx&vol=app/73127&invol=1

REVIEW QUESTIONS

Multiple Choice (Answers are found at the end of this chapter)

1. Which of the following is a form of strict liability criminal homicide in Texas?
   a. Intoxication Manslaughter
   b. Manslaughter
   c. Capital Murder
   d. Criminally Negligent Homicide
   e. Voluntary Manslaughter

2. Which of the following is not currently a form of criminal homicide in Texas?
   a. Manslaughter
   b. Voluntary Manslaughter
   c. Capital Murder
   d. Criminally Negligent Homicide
   e. Murder

3. Causing the death of a person by reckless behavior in Texas is the crime of
   a. Capital Murder.
   b. Criminally Negligent Homicide.

c. Voluntary Manslaughter.
d. Manslaughter.
e. Murder

4. Which of the following is an element that makes an intentional or knowing murder into a Capital Murder?
a. victim is governor or member of state legislature
b. victim is under 6 years of age
c. victim is over 65 years of age
d. defendant has a prior conviction for a violent felony
e. defendant used a firearm during the murder

5. With regard to causing the death of a fetus, in Texas,
a. this can never be a crime.
b. this can be a crime in certain circumstances.
c. this is always a crime in Texas.
d. the legislature has not addressed the matter.
e. this is a capital murder if the fetus is less than 6 weeks old.

6. In some cases death of a fetus in excluded from criminal liability because of
a. the death of a fetus is not within the definition of "death."
b. a fetus is not within the definition of "individual."
c. a fetus is considered a "person" under the Fourteenth Amendment.
d. federal legislation requires such exclusion.
e. a woman's constitutional right to an abortion.

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ANSWER KEY - CH. 11: HOMICIDE

1. a
2. b
3. d
4. b
5. b
6. e