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Vicarious Liability Requires a Finding of Capital Murder When a Nonfelon Kills a Peace Officer in Response to a Felon's Lethal Provocation.

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CASE NOTES

CRIMINAL LAW—Capital Murder—Vicarious Liability Requires a Finding of Capital Murder When a Nonfelon Kills a Peace Officer in Response to a Felon's Lethal Provocation

Blansett v. State,
556 S.W.2d 322 (Tex. Crim. App. 1977).

Clifford S. Blansett and Billy Wayne Dowden entered the Orange city jail and by armed force attempted to release Dowden's brother. Dowden initiated a gunbattle with Officer Windham who was in the dispatcher's office. During the gunfight, Captain Danny Gray was killed by a bullet from Officer Windham's gun. There was no evidence that Blansett ever fired his gun.

Blansett was indicted under section 19.03(a)(1) of the capital murder statute of the Texas Penal Code,[1] and received a life sentence.[2] On appeal to the Texas Court of Criminal Appeals, Blansett argued that he could not be found guilty of capital murder on the theories of causation and criminal responsibility presented to the jury. Held—*Affirmed.* The doctrine of vicarious liability requires a finding of capital murder when a nonfelon kills a peace officer in response to a felon's lethal provocation.[3]

A fundamental principle of criminal law is that there must be not only

1. TEX. PENAL CODE ANN. § 19.03(a)(1) (Vernon 1974) states, "A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and the person murders a peace officer . . . who is acting in the lawful discharge of an official duty and who the person knows is a peace officer . . . ." Murder is "intentionally or knowingly [causing] the death of an individual." *Id.* § 19.02(a)(1).

2. Capital murder is punishable by life imprisonment or death. *Id.* § 12.31(a). To impose the death penalty the jury must answer affirmatively all special issues submitted under article 37.071(b) of the Texas Code of Criminal Procedure. These issues are:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

TEX. CODE CRIM. PRO. ANN. art. 37.071(b) (Vernon Supp. 1978). Only the jury's refusal to answer the issue of deliberateness affirmatively prevented Blansett from receiving the death penalty. Blansett v. State, 556 S.W.2d 322, 327 n.6 (Tex. Crim. App. 1977). For a thorough discussion of the constitutionality of the death penalty in felony-murder cases, see Comment, *The Constitutionality of Imposing the Death Penalty for Felony Murder,* 15 HOUS. L. REV. 356 (1978).

3. Blansett v. State, 556 S.W.2d 322, 325-26 (Tex. Crim. App. 1977).

a wrongful act but a criminal intention to do that act in order for an individual to be held criminally responsible.[4] This principle is embodied in the requirement of mens rea.[5] Unless an individual has the required mens rea at the time of the offense, an injury inflicted by him cannot amount to a crime.[6] When there is more than one individual involved in the infliction of an injury it is possible for the mens rea of one to be attributed to the other. The felony-murder rule can be used as a means of attributing to one felon the required mens rea for murder for the acts of his cofelon.[7]

The common law felony-murder rule required that the defendant or a confederate commit the fatal act in furtherance of the initial felony.[8] This rule was followed throughout the United States until the Pennsylvania Supreme Court adopted proximate cause as a basis for imposing liability

4. *E.g.*, Powell v. Texas, 392 U.S. 514, 535 (1968); Lambert v. California, 355 U.S. 225, 227 (1957); Morissette v. United States, 342 U.S. 246, 274 (1952). The Texas Penal Code has codified this requirement. *Compare* TEX. PENAL CODE ANN. § 1.07(a)(8) (Vernon 1974) *with id.* § 6.01(a) *and id.* § 6.02.

5. Mens rea has a universal meaning. If a person voluntarily violates a command of the criminal law, that person has acted in a blameworthy manner and is criminally responsible. Mens rea is used synonymously with culpability, scienter, intent, and malice aforethought. *See* United States v. Crimmins, 123 F.2d 271, 272 (2d Cir. 1941); Banks v. State, 85 Tex. Crim. 165, 166, 211 S.W. 217, 217 (1919); Harris v. State, 8 Tex. Crim. 90, 100-01 (1880); Sayre, *Mens Rea,* 45 HARV. L. REV. 974, 1004-16 (1932).

6. Morissette v. United States, 342 U.S. 246, 250 (1952); *see* Perkins, *A Rationale of Mens Rea,* 52 HARV. L. REV. 905, 925 (1939).

7. *See* State v. Canola, 374 A.2d 20, 21 (N.J. 1977); Commonwealth v. Redline, 137 A.2d 472, 476 (Pa. 1958). The drafters of the Model Penal Code recommended eliminating the felony-murder rule except to the extent of establishing murder by an act "committed recklessly under circumstances manifesting an extreme indifference to the value of human life." *See* MODEL PENAL CODE § 201.2, Comments at 33-39 (Tent. Draft No. 9, 1959). England abolished felony-murder in section 1 of the Homicide Act of 1957. *See* Homicide Act, 1957, 5 & 6 Eliz., c. 11, § 1.

8. *E.g.*, Butler v. People, 18 N.E. 338, 339 (Ill. 1888); Commonwealth v. Campbell, 89 Mass. (7 Allen) 541, 544 (1863); State v. Canola, 374 A.2d 20, 21 (N.J. 1977); Commonwealth v. Redline, 137 A.2d 472, 480 (Pa. 1958). The traditional application of the felony-murder rule is known as the agency theory. Under this theory, the felony-murder rule would be inapplicable where the killing was committed by one resisting the felony because the purpose of the doctrine, to deter felons from killing accidentally or negligently by holding them strictly liable, would not be served by holding felons responsible for homicidal acts of others. *See* Commonwealth v. Redline, 137 A.2d 472 (Pa. 1958). There are two well recognized exceptions to the felony-murder rule. The "gun battle" exception holds felons responsible for killings done in response to their initiation of gunfire; felons who initiate gunbattles invite resistance. People v. Washington, 402 P.2d 130, 134, 44 Cal. Rptr. 442, 446 (1965); *see* People v. Antick, 539 P.2d 43, 48, 123 Cal. Rptr. 475, 480 (1975). The "shield" exception holds felons responsible for the fatal acts of nonfelons where the felons use an innocent person as a shield to aid in the felony or escape. The fatal act is placing the human shield in the path of opposition gunfire. Wilson v. State, 68 S.W.2d 100, 101 (Ark. 1934); State v. Kress, 253 A.2d 481, 487 (N.J. 1969); Keaton v. State, 41 Tex. Crim. 621, 632-33, 57 S.W. 1125, 1129 (1900); Taylor v. State, 41 Tex. Crim. 564, 572, 55 S.W. 961, 964 (1900).

under the felony-murder rule.[9] While the proximate cause theory of the felony-murder rule was adopted by a minority of jurisdictions,[10] the majority retained the common law requirements.[11]

Historically, the Texas courts have applied the felony-murder rule within the framework of the common law requirements.[12] The felony-murder rule has consistently been construed to mean that any cofelon is liable as a principal for a killing which occurs in the course of the intentional commission of another felony.[13] Mere attempt or commission of the felony, however, will not satisfy the requirement of intent or knowledge to commit murder.[14] The requisite mens rea for the murder arises only when

9. *See* Commonwealth v. Almeida, 68 A.2d 595, 599-600 (Pa. 1949), *cert. denied,* 339 U.S. 924 (1950) (police officer shot by fellow officer); Commonwealth v. Moyer, 53 A.2d 736, 745 (Pa. 1947) (robbery victim killed in gunfire; no proof who fired fatal shot). The proximate cause theory of the felony-murder rule expands the common law scope of a felon's responsibility and holds felons liable for any death which is a foreseeable consequence of the initial criminal act. The felony-murder rule is applicable under that theory when the fatal act is done by one resisting the felony. It is foreseeable that resistance will be encountered in the commission of a forcible felony. *See* People v. Hickman, 319 N.E.2d 511, 517 (Ill. 1974), *cert. denied,* 421 U.S. 913 (1975); Commonwealth v. Almeida, 68 A.2d 595, 599 (Pa. 1949), *cert. denied,* 339 U.S. 924 (1950). The Pennsylvania Supreme Court subsequently reversed its position and overruled *Almeida.* Commonwealth *ex rel.* Smith v. Myers, 261 A.2d 550, 558-60 (Pa. 1970).

10. *See* People v. Hickman, 319 N.E.2d 511, 514 (Ill. 1974), *cert. denied,* 421 U.S. 913 (1975); Johnson v. State, 386 P.2d 336, 340 (Okla. Crim. App. 1963). The proximate cause theory was also initially adopted in a few other states which apparently no longer follow it. *See* Commonwealth v. Almeida, 68 A.2d 595 (Pa. 1949), *cert. denied,* 339 U.S. 924 (1950), *overruled,* Commonwealth *ex rel.* Smith v. Myers, 261 A.2d 550, 558-60 (Pa. 1970). *Compare* Hornbeck v. State, 77 So. 2d 876, 878 (Fla. 1955) (adopting proximate cause) *and* People v. Podolski, 52 N.W.2d 201, 204 (Mich.) (adopting proximate cause), *cert. denied,* 344 U.S. 845 (1952) *with* Wright v. State, 344 So. 2d 1334, 1336-37 (Fla. Dist. Ct. App. 1977) (rejecting proximate cause) *and* People v. Scott, 185 N.W.2d 576, 581 (Mich. Ct. App. 1971) (rejecting proximate cause).

11. State v. Canola, 374 A.2d 20, 23 (N.J. 1977); *see, e.g.,* People v. Washington, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965); People v. Wood, 167 N.E.2d 736, 738, 201 N.Y.S.2d 328, 331-32 (1960); Commonwealth *ex rel.* Smith v. Myers, 261 A.2d 550, 553 (Pa. 1970).

12. *See, e.g.,* Rodriquez v. State, 548 S.W.2d 26, 28 (Tex. Crim. App. 1977); Hilliard v. State, 513 S.W.2d 28, 33 (Tex. Crim. App. 1974); Gonzales v. State, 171 Tex. Crim. 373, 374, 350 S.W.2d 553, 554 (1961). Some Texas cases are confusing in that proximate cause language was used to establish the causal relation between act and result. *See* Thompson v. State, 514 S.W.2d 275, 276 (Tex. Crim. App. 1974) (robbery of guard during jail escape should be anticipated); Miers v. State, 157 Tex. Crim. 572, 578, 251 S.W.2d 404, 408 (1952) (defendant initiated scuffle which resulted in death of victim); Taylor v. State, 41 Tex. Crim. 564, 572, 55 S.W. 961, 965 (1900) ("shield" case). Proximate cause as a theory of liability under the felony-murder rule has never been used in Texas as in other jurisdictions. *Compare* Hilliard v. State, 513 S.W.2d 28, 32 (Tex. Crim. App. 1974) *with* People v. Hickman, 319 N.E.2d 511, 513-14 (Ill. 1974), *cert. denied,* 421 U.S. 913 (1975).

13. *E.g.,* Hilliard v. State, 513 S.W.2d 28, 32 (Tex. Crim. App. 1974); Crawford v. State, 511 S.W.2d 14, 16 (Tex. Crim. App. 1974); Walker v. State, 138 Tex. Crim. 343, 347, 135 S.W.2d 992, 994 (1939).

14. *E.g.,* Hilliard v. State, 513 S.W.2d 28, 32 (Tex. Crim. App. 1974); Richard v. State,

one of the felons, in furtherance of the initial felony, commits an act clearly dangerous to human life that results in death.[15] Because of this requirement, the Texas courts do not extend the scope of the felony-murder doctrine beyond liability for killings done at the hands of the felons themselves.[16]

Apart from the felony-murder rule, an individual may be held criminally responsible under the theory of vicarious liability for a murder he did not commit.[17] There are two distinct aspects of vicarious liability. When a killing is done by a nonfelon acting in response to the defendant's lethal provocation, liability is imposed under the California theory of vicarious liability.[18] Under such circumstances the defendant is guilty of murder based on his acts in conscious disregard for life.[19] When a defendant's involvement with a murder committed under these circumstances arises not from his own provocation, but from the provocation of an accomplice, the defendant's liability must be based on basic rules governing complicity.[20] This second aspect of vicarious liability is codified in the criminal responsibility sections of the 1974 Texas Penal Code.[21] Under current law, one is liable as a party for the primary offense based on either his own conduct or the conduct of another for whom he is criminally responsible.[22] Criminal responsibility arises when an individual, acting with intent to promote or assist the commission of an offense, aids or encourages another person to complete the offense.[23] Criminal responsibility also arises from

426 S.W.2d 951, 953 (Tex. Crim. App. 1967) (dissenting opinion); Burton v. State, 122 Tex. Crim. 363, 365, 55 S.W.2d 813, 814 (1932).

15. Article 42 of the 1925 Texas Penal Code codified the requirement that the actor commit the killing. Tex. Penal Code art. 42 (1925). Article 19.02(a)(3) narrows the scope of article 42 by adding the requirement that the initial act be clearly dangerous to human life and limits its application to murders committed in the course of a felony. TEX. PENAL CODE ANN. § 19.02(a)(3) (Vernon 1974).

16. *See, e.g.*, Rodriquez v. State, 548 S.W.2d 26, 28-29 (Tex. Crim. App. 1977); Hilliard v. State, 513 S.W.2d 28, 32 (Tex. Crim. App. 1974); Lopez v. State, 482 S.W.2d 179, 182 (Tex. Crim. App. 1972).

17. *See* People v. Antick, 539 P.2d 43, 48-49, 123 Cal. Rptr. 475, 480-81 (1975); People v. Gilbert, 408 P.2d 365, 374, 47 Cal. Rptr. 908, 918 (1965), *rev'd on other grounds*, 388 U.S. 263 (1967); People v. Washington, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 446 (1965); *accord*, People v. Reed, 75 Cal. Rptr. 430, 435-36 (Dist. Ct. App. 1969); People v. Bosby, 64 Cal. Rptr. 159, 165 (Dist. Ct. App. 1967), *aff'd sub nom.* Harrington v. California, 395 U.S. 250 (1969).

18. *See* People v. Antick, 539 P.2d 43, 48, 123 Cal. Rptr. 475, 480 (1975).

19. *Id.* at 48, 123 Cal. Rptr. at 480.

20. *Id.* at 48, 123 Cal. Rptr. at 480.

21. *See* TEX. PENAL CODE ANN. §§ 7.01, .02 (Vernon 1974).

22. *Id.* § 7.01(a). Article 7.01 abolished the traditional distinctions between principals and accomplices; all participants are equally innocent or guilty as parties. *See id.* § 7.01(c). Texas previously had a complicated scheme of categories which followed the common law, covering accountability for the acts of others. *See generally* Perkins, *Parties to Crime*, 89 U. PA. L. REV. 581 (1941). The Texas law of vicarious liability applies to all crimes, not solely murder. *See* TEX. PENAL CODE ANN. §§ 7.01, .02 (Vernon 1974).

23. TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 1974).

participation in a conspiracy. One who engages in a conspiracy is criminally responsible for the completed felonies of co-conspirators if those crimes should have been anticipated and were committed in furtherance of the conspiracy's objective.[24] The statute specifically provides that the co-conspirator is liable for the completed offense "though having no intent to commit it";[25] criminal responsibility is based solely upon the intent to join the conspiracy.[26]

For an individual to be held criminally responsible for the result of a conspiracy, his conduct, or the conduct of a co-conspirator, must be a direct cause of that result.[27] The causation provision of the Texas Penal Code provides that a person's acts are the cause "if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient."[28] The "but for" language holds a defendant responsible if the result would not have occurred in the absence of his conduct.[29] Until *Blansett v. State*,[30] however, this provision had not been used to impose liability on a conspirator when a nonconspirator was the direct cause of the result.

In *Blansett* the defendant urged that the evidence was insufficient to support a conviction of capital murder and that the court erred in instructing the jury on the theories of causation and criminal responsibility.[31] Blansett's fundamental argument was that he could be found guilty of murder only by application of the felony-murder rule.[32] Further, application of the felony-murder rule would not support a conviction of capital murder as the killing was neither intentional nor done by one of the felons.[33] Declining to apply the felony-murder doctrine, the Texas Court of Criminal Appeals affirmed the conviction by finding that Blansett intentionally caused Officer Gray's death.[34]

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24. *Id.* § 7.02(b).

25. *Id.* § 7.02(b).

26. *See* Cross v. State, 550 S.W.2d 61, 63 (Tex. Crim. App. 1977); Skidmore v. State, 530 S.W.2d 316, 319 (Tex. Crim. App. 1975); TEX. PENAL CODE ANN. § 7.02(b) (Vernon 1974).

27. *See* Anderson v. State, 157 Tex. Crim. 630, 631, 252 S.W.2d 189, 190 (1952); Criswell v. State, 151 Tex. Crim. 473, 477, 208 S.W.2d 896, 898 (1948); Flournoy v. State, 124 Tex. Crim. 395, 396, 63 S.W.2d 558, 559 (1933). The requirement of direct causation is not confined to conspiracies. *See* TEX. PENAL CODE ANN. § 6.04 (Vernon 1974).

28. TEX. PENAL CODE ANN. § 6.04(a) (Vernon 1974).

29. Skidmore v. State, 530 S.W.2d 316, 320 (Tex. Crim. App. 1975); *see* Bubany, *The Texas Penal Code of 1974*, 28 Sw. L.J. 292, 307-09 (1974).

30. 556 S.W.2d 322 (Tex. Crim. App. 1977).

31. *Id.* at 324. The court instructed the jury that Blansett could be found guilty based on his responsibility for Dowden's acts if he intentionally aided or assisted in the execution of the conspiracy and if Dowden's acts were the cause of Officer Gray's death. *Id.* at 326 n.5.

32. *Id.* at 324 n.1. The Texas felony-murder rule is incorporated in TEX. PENAL CODE ANN. § 19.02(a)(3) (Vernon 1974).

33. Blansett v. State, 556 S.W.2d 322, 325 (Tex. Crim. App. 1977).

34. *Id.* at 325.

The case was decided by strict application of the statutes to the facts.[35] Although neither Blansett nor Dowden actually committed the murder, their conduct in entering the jail was intentional.[36] The intent required for capital murder was said to be established by the intentional use of firearms in conscious disregard for life.[37] The necessary causal relation was established by finding that the death of Officer Gray would not have occurred but for the intentional conduct of Blansett and Dowden.[38] Using the rationale advanced by the California Supreme Court in *People v. Gilbert*,[39] the court announced that the acts of Officer Windham were not a concurrent cause such as would relieve Blansett of liability.[40] The officer, while in the discharge of his official duty, acted in reasonable response to lethal provocation.[41]

The *Blansett* court stated that the defendant could be equally guilty of murder either because of his own conduct or because of his responsibility for Dowden's acts in initiating the gunfire.[42] The court, however, founded its decision on a jury charge submitted on the theory of criminal responsibility.[43] Blansett's contention that the criminal responsibility provisions do not apply to capital murder was expressly rejected.[44] The court's rejection of this contention was based on an earlier case in which the death penalty was upheld because of the defendant's responsibility for the acts of another.[45]

In assessing Blansett's liability the court of criminal appeals had several options. The most apparent option available was utilization of the felony-murder rule. Under the traditional felony-murder rule, Blansett could not

35. *See id.* at 325-26. In deciding the case the court applied the culpability, causation, criminal responsibility, and capital murder provisions of the Texas Penal Code. *See* TEX. PENAL CODE ANN. §§ 6.03(a), 6.04(a), 7.02, 19.03(a)(1) (Vernon 1974).

36. Blansett v. State, 556 S.W.2d 322, 324-25 (Tex. Crim. App. 1977).

37. *Id.* at 325.

38. *Id.* at 325.

39. 408 P.2d 365, 47 Cal. Rptr. 909 (1965), *rev'd on other grounds*, 388 U.S. 263 (1967).

40. Blansett v. State, 556 S.W.2d 322, 325-26 (Tex. Crim. App. 1977).

41. *Id.* at 326.

42. *Id.* at 326.

43. *Id.* at 326.

44. *Id.* at 326.

45. *Id.* at 326-27 (citing Livingston v. State, 542 S.W.2d 655 (Tex. Crim. App. 1976), *cert. denied*, ___ U.S. ___, 97 S. Ct. 2642, 53 L. Ed. 2d 250 (1977)). A series of Texas cases have established that an individual can be found guilty of capital murder based on criminal responsibility. *See* Livingston v. State, 542 S.W.2d 655, 660 (Tex. Crim. App. 1976) (cofelon killed robbery victim), *cert. denied*, ___ U.S. ___, 97 S. Ct. 2642, 53 L. Ed. 2d 250 (1977); Smith v. State, 540 S.W.2d 693, 696 (Tex. Crim. App. 1976) (cofelon killed robbery victim); *Ex parte* Wilson, 527 S.W.2d 310, 311 (Tex. Crim. App. 1975) (cofelon killed kidnap victim); *cf.* Thompson v. State, 514 S.W.2d 275, 276 (Tex. Crim. App. 1974) (armed robbery); Leviness v. State, 157 Tex. Crim. 160, 165-66, 247 S.W.2d 115, 118 (1952) (murder). Little reasoning is advanced by the court for this result; liability is based on strict application of criminal responsibility. *See* TEX. PENAL CODE ANN. §§ 7.01, .02 (Vernon 1974).

have been guilty of murder as the killing was not done by his cofelon.[46] In order to be consistent with established Texas law, the court did not consider extension of the felony-murder rule by use of the proximate cause theory.[47] The court could have based liability on Blansett's own conduct. Again, he could not have been found guilty of murder as he committed neither the killing nor an act provocative of lethal resistance.[48] Thus, in order to find Blansett guilty of murder, it was necessary for the court to employ vicarious liability.[49]

Under certain very limited circumstances a defendant can be found guilty under the theory of vicarious liability.[50] This theory was established in the landmark decision of *People v. Washington,*[51] where the robbery victim killed one of the felons. The California Supreme Court held the defendant liable for the murder of his cofelon.[52] The court reasoned that as the felons initiated the gunbattle, it was not necessary that the defendant or his accomplice commit the killing; liability was based upon the intentional commission of acts that were likely to kill, accompanied by a conscious disregard for life.[53]

Subsequent decisions by the California Supreme Court delineated the principles applicable in assessing the criminal liability of felons for killings committed by persons resisting their crimes.[54] In essence these principles are that, if during a felony, one of the felons commits an act which implies malice and a nonfelon kills in reasonable response to that act, the felon

46. *See, e.g.*, Rodriquez v. State, 548 S.W.2d 26, 28 (Tex. Crim. App. 1977); Hilliard v. State, 513 S.W.2d 28, 33 (Tex. Crim. App. 1974); Gonzales v. State, 171 Tex. Crim. 373, 374, 350 S.W.2d 553, 554 (1961).

47. *See* Rodriquez v. State, 548 S.W.2d 26, 28 (Tex. Crim. App. 1977); Hilliard v. State, 513 S.W.2d 28, 33 (Tex. Crim. App. 1974); Gonzales v. State, 171 Tex. Crim. 373, 374, 350 S.W.2d 553, 554 (1961). Faced with substantially the same facts as *Blansett,* the Illinois Supreme Court imposed liability by expansion of the felony-murder rule rather than by use of vicarious liability. *See* People v. Hickman, 319 N.E.2d 511, 517 (Ill. 1974), *cert. denied,* 421 U.S. 913 (1975). See cases and text note 9 *supra.*

48. *See* People v. Gilbert, 408 P.2d 365, 373, 47 Cal. Rptr. 909, 917 (1965), *rev'd on other grounds,* 388 U.S. 263 (1967).

49. *See generally* People v. Antick, 539 P.2d 43, 48, 123 Cal. Rptr. 475, 480 (1975).

50. *See, e.g,* People v. Antick, 539 P.2d 43, 49-50, 123 Cal. Rptr. 475, 481-82 (1975) (no vicarious liability for crime unless accomplice could be found guilty); People v. Gilbert, 408 P.2d 365, 374, 47 Cal. Rptr. 909, 918 (1965) (felon's act must be in furtherance of conspiracy), *rev'd on other grounds,* 388 U.S. 263 (1967); People v. Washington, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 446 (1965) (felon's act must be one from which malice can be implied and provocative of lethal resistance).

51. 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

52. *Id.* at 132, 44 Cal. Rptr. at 445.

53. *Id.* at 133, 44 Cal. Rptr. at 445-46.

54. *See* People v. Antick, 539 P.2d 43, 123 Cal. Rptr. 475 (1975) (police officer killed cofelon); Taylor v. Superior Ct., 477 P.2d 131, 91 Cal. Rptr. 275 (1970) (robbery victim killed cofelon), *overruled on other grounds,* People v. Antick, 539 P.2d 43, 123 Cal. Rptr. 475 (1975); People v. Gilbert, 408 P.2d 365, 47 Cal. Rptr. 909 (1966) (police officer killed cofelon), *rev'd on other grounds,* 388 U.S. 263 (1967).

and his cofelon are guilty of murder.[55] The required malice can be implied when, acting with a base, antisocial motive and with conscious disregard for life, a felon intentionally commits an act which involves a probability that death will result.[56] The killing by the nonfelon must be attributable to a life-threatening act of the felon to which the nonfelon has made a reasonable response.[57] The killing is not attributable to the object felony, but to the felon's conscious disregard for life.[58] The retaliatory acts, therefore, cannot be an intervening cause as they are a "response to the dilemma thrust upon" the nonfelon by the intentional acts of the felon.[59]

The holding of the Texas Court of Criminal Appeals affirmatively establishes that Texas has adopted the California theory of vicarious liability.[60] Prior to the decision in *Blansett* this theory was unique to California.[61] By holding Blansett responsible for a killing done in response to his cofelon's actions, the Texas court has boldly extended the scope of criminal responsibility.

While reaching an arguably proper result, the court of criminal appeals erred in its application of the California theory of vicarious liability. The court suggested that Blansett could be vicariously liable for capital murder based on his own conduct.[62] As there was no evidence that Blansett fired

55. Utilization of the rules defining principals and criminal conspiracies requires that the overt conduct precipitating the response be in furtherance of the conspiracy. *See* People v. Antick, 539 P.2d 43, 48-49, 123 Cal. Rptr. 475, 480-81 (1975); Taylor v. Superior Ct., 477 P.2d 131, 133, 91 Cal. Rptr. 275, 277 (1970), *overruled on other grounds,* People v. Antick, 539 P.2d 43, 123 Cal. Rptr. 475 (1975); People v. Gilbert, 408 P.2d 365, 373, 47 Cal. Rptr. 909, 917 (1965), *rev'd on other grounds,* 388 U.S. 263 (1967).

56. People v. Antick, 539 P.2d 43, 48-49, 123 Cal. Rptr. 475, 480-81 (1975); People v. Gilbert, 408 P.2d 365, 373, 47 Cal. Rptr. 909, 917 (1965), *rev'd on other grounds,* 388 U.S. 263 (1967); *accord,* People v. Bosby, 64 Cal. Rptr. 159, 165 (Dist. Ct. App. 1967) (cofelon killed robbery victim), *aff'd sub nom.* Harrington v. California, 395 U.S. 250 (1969).

57. People v. Antick, 539 P.2d 43, 48-49, 123 Cal. Rptr. 475, 480-81 (1975); Taylor v. Superior Ct., 477 P.2d 131, 133, 91 Cal. Rptr. 275, 277 (1970), *overruled on other grounds,* People v. Antick, 539 P.2d 43, 123 Cal. Rptr. 475 (1975). Acts less serious than initiating gunfire can be provocative of lethal resistance. Threatening conduct may effectively initiate gunfire. Taylor v. Superior Ct., 477 P.2d 131, 134, 91 Cal. Rptr. 275, 277 (1970), *overruled on other grounds,* People v. Antick, 539 P.2d 43, 123 Cal. Rptr. 475 (1975); *accord,* People v. Reed, 75 Cal. Rptr. 430, 435-36 (Dist. Ct. App. 1969) (police officer killed robbery victim).

58. People v. Antick, 539 P.2d 43, 48, 123 Cal. Rptr. 475, 480 (1975); Taylor v. Superior Ct., 477 P.2d 131, 133, 91 Cal. Rptr. 275, 277 (1970), *overruled on other grounds,* People v. Antick, 539 P.2d 43, 123 Cal. Rptr. 475 (1975); People v. Gilbert, 408 P.2d 365, 373-74, 47 Cal. Rptr. 909, 917-18 (1965), *rev'd on other grounds,* 388 U.S. 263 (1967).

59. People v. Antick, 539 P.2d 43, 48, 123 Cal. Rptr. 475, 480 (1975); People v. Gilbert, 408 P.2d 365, 373-74, 47 Cal. Rptr. 909, 917-18 (1965), *rev'd on other grounds,* 388 U.S. 263 (1967).

60. *See* Blansett v. State, 556 S.W.2d 322, 325-26 (Tex. Crim. App. 1977).

61. Sheriff v. Hicks, 506 P.2d 766, 768 (Nev. 1973); State v. Canola, 374 A.2d 20, 25 (N.J. 1977).

62. Blansett v. State, 556 S.W.2d 322, 326 (Tex. Crim. App. 1977). The trial court correctly submitted the case to the jury solely on Blansett's responsibility for Dowden's acts. *Id.* at 326 n.5.

his gun or engaged in any other life-threatening conduct,[63] he cannot be said to have committed a lethally provocative act from which the intent for murder could be implied.[64] By suggesting that Blansett's liability could be based on his conduct, the court misinterpreted the theory of vicarious liability.

Vicarious liability could properly be used to establish Dowden's guilt. In initiating the gunbattle, Dowden intentionally and with conscious disregard for life engaged in conduct likely to kill.[65] Initiating a gunbattle is conduct which exhibits an intent to kill.[66] The felonious intent to kill Officer Windham was transferred into an intent to kill Officer Gray; Dowden therefore had the requisite intent for murder.[67] To find Dowden guilty of murder, it was necessary to establish that his acts were the cause of Officer Gray's death.[68] As the death would not have occurred but for the initiation of the gunbattle, Dowden's acts were the cause of death.[69] Officer Windham's retaliatory response could not operate to break the causal chain and relieve Dowden of liability for the result of that response.[70] Officer Windham was acting not only in the discharge of his official duty, but in self-defense.[71] Dowden thus could be held guilty of capital murder as the necessary elements of intent and causation were present.

In order to hold Blansett vicariously liable for capital murder it was necessary to take an additional step which the court of criminal appeals failed to do.[72] Proper application of the California theory of vicarious liability requires that when the murder is attributable to provocation by the defendant's co-conspirator, the defendant's liability must be based on the rules governing principals and criminal conspiracies.[73] Although Blansett did not fire his gun, he accompanied Dowden to the jail to assist in the execution of the conspiracy.[74] Once murder was established for Dowden, the crime could be imputed to Blansett under the co-conspirator's criminal

63. *Id.* at 324.

64. *See* People v. Gilbert, 408 P.2d 365, 373, 47 Cal. Rptr. 909, 917 (1965), *rev'd on other grounds*, 388 U.S. 263 (1967). Entering the jail with firearms is a necessary element of the initial felony, implements for escape. *See* TEX. PENAL CODE ANN. § 38.10 (Vernon 1974).

65. *See* People v. Antick, 539 P.2d 43, 48, 123 Cal. Rptr. 475, 480 (1975).

66. People v. Gilbert, 408 P.2d 365, 373, 47 Cal. Rptr. 909, 917 (1965), *rev'd on other grounds*, 388 U.S. 263 (1967).

67. *See* People v. Antick, 539 P.2d 43, 49, 123 Cal. Rptr. 475, 481 (1975).

68. *See* Cross v. State, 550 S.W.2d 61, 63 (Tex. Crim. App. 1977); Skidmore v. State, 530 S.W.2d 316, 319-20 (Tex. Crim. App. 1975).

69. *See* Blansett v. State, 556 S.W.2d 322, 324 (Tex. Crim. App. 1977).

70. *See* W. LAFAVE & A. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 35 at 258 (1972).

71. *See* People v. Washington, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965); TEX. CODE CRIM. PRO. ANN. arts. 6.06, 6.07 (Vernon 1977); TEX. PENAL CODE ANN. § 9.31(a) (Vernon 1974).

72. *See* People v. Antick, 539 P.2d 43, 48, 123 Cal. Rptr. 475, 480 (1975).

73. *Id.* at 48, 123 Cal. Rptr. at 480.

74. Blansett v. State, 556 S.W.2d 322, 324-25 (Tex. Crim. App. 1977).

responsibility provision.[75] Instead of progressing through the necessary steps, the court of criminal appeals attempted to establish Blansett's guilt by combining his actions with those of Dowden.[76] The court's failure to properly utilize the two aspects of vicarious liability ensures its confused application in Texas. The state of the law should not be such that an individual could be sent to his death based on such an unclear precedent.

There is no question that under Texas law a defendant can receive the death penalty even though he did not commit the killing.[77] There is nothing in the Texas Penal Code that prevents vicarious liability for capital murder.[78] The haunting question remains as to whether this was the result intended by the legislature in enacting the capital murder and criminal responsibility statutes. The legislature apparently chose to set capital murder apart and limit its application to intentional or knowing murder committed under specific aggravating circumstances.[79] Under the current state of the law, the elements of capital murder can be supplied vicariously to reach a passive conspirator.[80] While perhaps the result was proper, the court's approach was erroneous. Consequently, the result reached raises more questions than it answers. The decision in *Blansett* ensures that the law regarding vicarious liability for capital murder will require further consideration.

In spite of the unanswered questions, this decision gives notice that an act committed with intent to promote or assist the commission of a felonious offense will render the actor responsible not only for the contemplated offense, but also for any collateral results.[81] The court has demonstrated the power of the Texas Penal Code to reach all offenders and hold them amenable to its dictates.

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75. *See* TEX. PENAL CODE ANN. § 7.02(b) (Vernon 1974).

76. *See* Blansett v. State, 556 S.W.2d 322, 325 (Tex. Crim. App. 1977).

77. *See* Livingston v. State, 542 S.W.2d 655, 660 (Tex. Crim. App. 1976), *cert. denied*, ___ U.S. ___, 97 S. Ct. 2642, 53 L. Ed. 2d 250 (1977); Smith v. State, 540 S.W.2d 693, 697 (Tex. Crim. App. 1976).

78. Crump, *Capital Murder: The Issues in Texas*, 14 HOUS. L. REV. 531, 538 (1977).

79. *Compare* TEX. PENAL CODE ANN. § 19.02 (Vernon 1974) *with id.* § 19.03.

80. *See* Blansett v. State, 556 S.W.2d 322, 326 (Tex. Crim. App. 1977); Livingston v. State, 542 S.W.2d 655, 660 (Tex. Crim. App. 1976), *cert. denied*, ___ U.S. ___, 97 S. Ct. 2642, 53 L. Ed. 2d 250 (1977); Smith v. State, 540 S.W.2d 693, 696 (Tex. Crim. App. 1976).

81. *See* Blansett v. State, 556 S.W.2d 322, 324-25 (Tex. Crim. App. 1977); Cross v. State, 550 S.W.2d 61, 63 (Tex. Crim. App. 1977); Livingston v. State, 542 S.W.2d 655, 658 (Tex. Crim. App. 1976), *cert. denied*, ___ U.S. ___, 97 S. Ct. 2642, 53 L. Ed. 2d 250 (1977). In *Cross* the defendant renounced his intention to participate in the robbery after the planning stage; he was found guilty of aggravated robbery. Cross v. State, 550 S.W.2d 61, 63 (Tex. Crim. App. 1977). In *Livingston* the defendant waited outside during the robbery; he was found guilty of capital murder and the death penalty was upheld. Livingston v. State, 542 S.W.2d 655, 661 (Tex. Crim. App. 1976), *cert. denied*, ___ U.S. ___, 97 S. Ct. 2642, 53 L. Ed. 2d 250 (1977). It would appear from the decision in *Livingston* that had the *Blansett* jury imposed the death penalty, it would have been upheld. *See id.* at 661.