

NO. 1128979R

THE STATE OF TEXAS            )(    IN THE 396<sup>TH</sup> JUDICIAL  
VS.                               )(    DISTRICT COURT  
FREDERICK DEWAYNE MALONE   )(    TARRANT COUNTY, TEXAS

COURT'S CHARGE


MEMBERS OF THE JURY:

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the jury. It is my duty to preside over the trial and to decide what evidence is proper for your consideration. It is also my duty at the end of the trial to explain to you the rules of law that you must follow and apply in arriving at your verdict.

First, I will give you some general instructions which apply in every case. Then I will give you some specific rules of law about this particular case, and finally I will explain to you the procedures you should follow in your deliberations.

FILED  
THOMAS A. WILDER, DIST. CLERK  
TARRANT COUNTY, TEXAS

OCT 10 2008

TIME 9:03 a.m.  
BY \_\_\_\_\_ DEPUTY 

You, as jurors, are the judges of the facts. But in determining what actually happened, that is, in reaching your decision as to the facts, it is your sworn duty to follow all of the rules of law as I explain them to you.

You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences. It is also your duty to base your verdict solely upon the evidence that has been presented to you in court.

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

The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the Defendant, unless the jurors are satisfied beyond a reasonable doubt of the Defendant's guilt after careful and impartial consideration of all the evidence in the case. The prosecution has the burden of proving the Defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the Defendant.

It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution's proof excludes all "reasonable doubt" concerning the Defendant's guilt.

As you determine the facts, you must consider only the evidence presented during the trial, including the sworn testimony of the witnesses and the exhibits. Remember that any statements, objections, or arguments made by the lawyers are not evidence. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing

to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

Also, do not assume from anything I may have done or said during the trial that I have any opinion concerning any of the issues in this case. Except for the instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

While you should consider only the evidence, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts which have been established by the evidence.

You are to decide whether the State has proved beyond a reasonable doubt that the Defendant is guilty of the crime charged. The Defendant is not on trial for any act, conduct, or offense not alleged in the indictment. Neither are you concerned with the guilt of any person or persons not on trial as a defendant in this case.

Our law provides a defendant may testify in his own behalf if he elects to do so. This, however, is a privilege accorded to the Defendant, and in the event he does not testify, that fact cannot be taken as a circumstance against him. In this case the Defendant has not testified, and you are instructed that you cannot and must not refer or allude to this fact throughout your deliberations or take it into consideration for any purpose whatsoever as a circumstance against the Defendant.

A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.

Each party to an offense may be charged with commission of the offense.

A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids or attempts to aid the other person to commit the offense; or if, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose, and was one that should have been anticipated as a result of the carrying out of the conspiracy. Capital murder, murder and aggravated robbery are felonies.

Mere presence alone will not constitute one a party to an offense.

Now, bearing in mind these instructions, the Defendant, Frederick Dewayne Malone, stands charged by indictment with the offenses of capital murder and murder, alleged to have been committed on or about the 30th day of December, 2006, in Tarrant County, Texas. To these charges, the Defendant has pleaded not guilty.

A person commits the offense of murder 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 that causes the death of an individual.

A person commits capital murder when such person intentionally commits the murder in the course of committing or attempting to commit the offense of robbery.

A person commits robbery if, in the course of committing theft and with intent to obtain and maintain control of property of another, he intentionally or knowingly threatens or places another in fear or imminent bodily injury or death.

A robbery becomes aggravated if a deadly weapon is used or exhibited during the robbery.

"In the course of committing theft" means conduct that occurs in an attempt to commit, during the commission or in immediate flight after the attempt or commission of theft.

"Attempt" to commit an offense occurs if, with specific intent to commit an offense, a person does an act amounting to more than mere preparation that tends, but fails, to effect the commission of the offense intended.

"Individual" means a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.

"Bodily injury" means physical pain, illness, or any impairment of physical condition, including death.

"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.



"Theft" is the unlawful appropriation of the corporeal personal property of another with the intent to deprive such person of said property.

"Appropriation" and "appropriate" mean to acquire or otherwise exercise control over property other than real property. Appropriation of property is unlawful if it is without the owner's effective consent.

"Property" means tangible or intangible personal property or documents, including money that represents or embodies anything of value.

"Deprive" means to withhold property from the owner permanently.

"Effective consent" means assent in fact, whether express or apparent, and includes consent by a person legally authorized to act for the owner.

Consent is not effective if induced by deception or coercion or force or threats.

"Owner" means a person who has title to the property, possession of the property, or a greater right to possession of the property than the person charged.

**"Possession" means actual care, custody, control or management of property.**

**"Firearm" means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion of burning substance or any device readily convertible to that use.**

**A person acts intentionally, or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.**

**A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.**

Now, if you find from the evidence beyond a reasonable doubt that on or about the 30<sup>th</sup> day of December, 2006, in Tarrant County, Texas, the Defendant, Frederick Dewayne Malone, did intentionally cause the death of an individual, Antonio Marin, by shooting him with a firearm, and the said Defendant was then and there in the course of committing or attempting to commit the offense of robbery of Antonio Marin or Ruben Marin, or that the Defendant, Frederick Dewayne Malone, acting with intent to promote or assist in the commission of the offense of Capital Murder, if any, solicited, encouraged, directed, aided or attempted to aid Desmond Brooks in the commission of the offense of Capital Murder, if any, or that the Defendant, Frederick Dewayne Malone agreed to rob Antonio Marin or Ruben Marin, and that, while in the course of committing or attempting to commit the offense of robbery of Antonio Marin or Ruben Marin, if any, the shooting of Antonio Marin, if any, was done intentionally and in furtherance of the conspiracy to rob Antonio Marin or Ruben Marin, if any, and was an offense that should have been anticipated as a result of carrying out the

conspiracy, then you will find the Defendant guilty of the offense of capital murder.

Unless you so find from the evidence beyond a reasonable doubt or if you have a reasonable doubt thereof, you will acquit the Defendant of the offense of capital murder and next consider whether he is guilty of the offense of murder.

If you find from the evidence beyond a reasonable doubt that on or about the 30th day of December, 2006, in Tarrant County, Texas, the Defendant, Frederick Dewayne Malone, did then and there intentionally, with the intent to cause serious bodily injury to Antonio Marin, commit an act clearly dangerous to human life, namely, shoot Antonio Marin with a firearm, which caused the death of Antonio Marin, or that the Defendant, Frederick Dewayne Malone, acting with intent to promote or assist in the commission of the offense of murder, if any, solicited, encouraged, directed, aided or attempted to aid Desmond Brooks in the commission of the offense of murder, if any, then you will find the Defendant guilty of the offense of murder.

Unless you find from the evidence beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict "Not Guilty" and next consider whether he is guilty of the offense of aggravated robbery.

If you find from the evidence beyond a reasonable doubt that on or about the 30<sup>th</sup> day of December, 2006, in Tarrant County, Texas, the Defendant, Frederick Dewayne Malone, did then and there intentionally or knowingly, while in the course of committing theft of property and with the intent to obtain or maintain control of said property, cause bodily injury to Antonio Marin by shooting him with a firearm, and the defendant used or exhibited a deadly weapon, to wit: a firearm, or that the Defendant, Frederick Dewayne Malone, acting with intent to promote or assist in the commission of the offense of aggravated robbery, if any, solicited, encouraged, directed, aided or attempted to aid Desmond Brooks in the commission of the offense of aggravated robbery, then you will find the Defendant guilty of aggravated robbery.

Unless you find from the evidence beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict "Not Guilty."

You are instructed that if you find from the evidence beyond a reasonable doubt that the Defendant is guilty of either capital murder or murder or aggravated robbery under the instructions given to you previously, but you have a reasonable doubt as to which of said offenses, if any, he is guilty, then you should resolve that doubt in favor of the Defendant and find him guilty only of the offense of murder or aggravated robbery.

If you find from the evidence that the defendant is not guilty of capital murder, murder, or aggravated robbery, or if you have a reasonable doubt as to whether the defendant is guilty of any of these offenses, then you will find the defendant "Not Guilty."

You are instructed that you may consider all relevant facts and circumstances surrounding the killing, if any, and the previous relationship existing between the accused and the deceased, if any, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the shooting in question, if any.

You are instructed that under our law a statement of a defendant made while he was in jail or in custody of an officer and while under interrogation shall be admissible in evidence if it appears that the same was freely and voluntarily made without compulsion or persuasion. However, before a statement made orally to officers may be considered voluntary, it must be shown by legal evidence beyond a reasonable doubt that prior to making such oral statement that the accused has been warned by the person to whom the statement is made, or by a magistrate, that (1) he has the right to remain silent and not make any statement, (2) that anything said by the defendant will be used against him at trial, (3) that the statement will be used against him in court, (4) that he has the right to terminate the questioning at any time during the interview or questioning, and (5) that he is entitled to the services of an attorney, his own or, if he is unable to employ one, a court-appointed attorney, to advise him prior to and during any questioning or interrogation.



So, in this case, if you find from the evidence, or if you have a reasonable doubt thereof, that prior to the time the defendant gave the alleged statement to Jose Hernandez, if he did give it, the said Jose Hernandez did not warn defendant in the respects enumerated above, or as to any one of such requirements, then you will wholly disregard the alleged confession or statement and not consider it for any purpose nor any evidence obtained as a result thereof. If, however, you find beyond a reasonable doubt that the aforementioned warning was given the defendant prior to his having made such statement, if he did make it, still, before you may consider such statement as evidence in this case, you must find from the evidence beyond a reasonable doubt that prior to making such statement, if he did, the defendant knowingly, intelligently and voluntarily waived the rights hereinbefore set out in the said warning, and unless you so find, or if you have a reasonable doubt thereof, you will not consider the statement, if any, for any purpose whatsoever or any evidence obtained as a result of the statement, if any.

You are instructed that if there is any testimony before you in this case regarding the Defendant's having committed bad acts other than the offense alleged against him in the indictment in this case, you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the Defendant committed such other bad acts, if any were committed, and even then you may only consider the same in determining the intent of the Defendant if any, in connection with the offense, if any, alleged against him in the indictment in this case, and for no other purpose.

It is your duty to consult with one another and to deliberate in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to reexamine your own opinions and change your mind if convinced that you were wrong. But do not give up your honest beliefs as to the weight or effect of the evidence solely

because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are judges of the facts. Your sole duty is to decide whether the State has proved the Defendant guilty beyond a reasonable doubt.

When you go to the jury room, the first thing that you should do is select one of your number as your presiding juror, who will help to guide your deliberations and will speak for you here in the courtroom.

Any verdict you render must be unanimous.

At the conclusion of your deliberations, the presiding juror should sign the appropriate verdict form, if any.

If you need to communicate with me during your deliberations, the presiding juror should write the message, ring the jury call button on the wall, and give it to the bailiff. I will either reply in writing or bring you back into the court to answer your message.

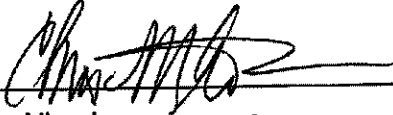
You are the exclusive judges of the facts proved, of the credibility of the witnesses and of the weight to be given to their testimony, but you are bound to receive the law from the Court, which is herein given, and be governed thereby.

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George Gallagher, Judge  
396<sup>th</sup> Judicial District Court  
Tarrant County, Texas

VERDICT FORMS

We, the jury, find the Defendant, Frederick Dewayne Malone, guilty of the  
offense of capital murder.

  
\_\_\_\_\_  
Presiding Juror

FILED 10/10/08  
THOMAS A. WILDER, DIST. CLERK  
TARRANT COUNTY, TEXAS

OCT 10 2008

-OR-

TIME 12:07  
BY [Signature] DEPUTY

We, the jury, find the Defendant, Frederick Dewayne Malone, guilty of the  
offense of murder.

\_\_\_\_\_  
Presiding Juror

-OR-

**We, the jury, find the Defendant, Frederick Dewayne Malone, guilty of the offense of aggravated robbery.**

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**Presiding Juror**

**-OR-**

**We, the jury, find the Defendant, Frederick Dewayne Malone, not guilty.**

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**Presiding Juror**