SUBJECT: Jury instructions about parole eligibility in capital cases

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 8 ayes — Hinojosa, Dunnam, Garcia, Green, Keel, Nixon, Smith, Wise

1 nay — Talton

WITNESSES: For — Rita Radostitz; Dudley Sharp III, Justice For All

Against — Dianne Clements, Justice for All

On — Lon Curtis and Barry Macha, Texas District and County Attorneys Association; Dennis Longmire, College of Criminal Justice, Sam Houston State University

BACKGROUND: Texas juries consider sentencing only after finding a defendant guilty. In cases involving capital murder, the penalty options are death or life in prison, with eligibility for parole only after serving 40 years without consideration of good-conduct time. A 1989 amendment to the Texas Constitution (art. 4, sec. 11) authorized the Legislature to enact laws that require or permit courts to tell juries about defendants' parole eligibility. Under Code of Criminal Procedure, art. 37.07, sec. 4, a written statement outlining when a defendant may be considered for parole must be given to jurors deciding the punishment for "3g" offenses, the most serious crimes, named for their listing in art. 42.12, sec. 3g of the code.

Although capital murder is on the 3g list, art. 37.07 specifies that information about parole eligibility not be given to juries deciding punishment in such cases. Elsewhere in the code (art. 37.071), the procedures for deciding punishment in capital murder cases do not include any requirement that juries be given information about the parole eligibility of persons sentenced to life in prison.

For more information on this issue, see *Supreme Court Justices Raise Issues Over Jury Instructions for Death Penalty Cases*, House Research Organization Interim News, January 16, 1998.

DIGEST:

HB 150 would require courts in capital murder cases, if requested by the defense attorney, to instruct the jury that if the jury decides that circumstances warrant a sentence of life in prison rather than death, the court will sentence the defendant to life in a Texas Department of Criminal Justice facility. The court would have to tell the jury in writing that under applicable laws, if the defendant was sentenced to life in prison, he or she would become eligible for release on parole, but not until the actual time served equaled 40 years, without consideration of good-conduct time.

Courts would have to tell the jury that it cannot be predicted accurately how the parole laws might be applied to the defendant because that would depend on decisions made by prison authorities, but that parole eligibility does not guarantee that parole would be granted.

This bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. It would apply only to sentencing procedures that begin on or after the effective date.

SUPPORTERS SAY:

It is only right that juries be fully informed about sentencing options in capital cases as they are in other cases, especially given the seriousness of punishment in capital cases. Courts have interpreted the Texas statutes and Constitution to mean that juries are prohibited from considering parole when deciding the sentence of a person convicted of capital murder unless the Legislature explicitly requires such a jury instruction. While in practice many judges allow these instructions and most prosecutors do not object to them, HB 150 would provide an explicit jury instruction to ensure that the Texas statutes are fair.

HB 150 is especially important given the comments by four U.S. Supreme Court justices in October 1997 questioning the Texas law. The comments accompanied the court's denial of a request to hear an appeal by Texas death-row inmate Arthur Brown, Jr. (*Brown v. Texas*, 118 S.Ct. 355 (1997)), who had sought to tell the jury how much time he would have to serve before being eligible for parole if sentenced to life in prison rather than to death. While the justices denied a request to hear Brown's appeal, the Legislature should heed their questions about the adequacy of the Texas law.

The four justices raised the issue of whether jurors have adequate information when deciding whether to impose the death penalty. The justices wrote that

the current rule prohibiting judges from telling juries when defendants convicted of capital murder will be eligible for parole under the life-sentence option "unquestionably tips the scales in favor of a death sentence that a fully informed jury might not impose." HB 150 would address this problem by ensuring that all juries are fully informed.

The justices' comments are a warning signal that Texas needs to address the issue of jury instructions in capital cases. Otherwise, the state's death-penalty statutes could be overturned on grounds that a lack of jury instructions about parole in capital cases is unconstitutional. State laws and procedures that allow juries information about parole eligibility in all cases of serious crime except capital murder could be construed as inconsistent and unfair, raising questions about whether Texas is providing defendants with adequate due process under the law or instead is imposing unconstitutionally cruel and unusual punishment. It would be far better for the Legislature to craft a law allowing all juries to receive information about parole than to wait for the court to overturn a death penalty case on procedural grounds and impose a strict new standard by judicial order.

HB 150 is necessary to ensure equal and consistent due process throughout Texas. After the Supreme Court justices issued their opinion in *Brown*, some courts reportedly began acceding to defense requests to include information about eligibility for parole in their instructions to juries deliberating penalties in capital cases. However, others continued to exclude instructions about parole eligibility.

In addition, another U.S. Supreme Court decision could be interpreted as meaning that Texas juries must be told about parole eligibility to ensure due process. The court concluded in *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187 (1994) that due process requires that jurors receive information about parole eligibility if they considered the issue of the defendant's future dangerousness in deciding whether to impose the death penalty or life in prison *and* state law prohibits parole from a life sentence. Although Texas does not allow life without parole, it does require juries to weigh the risk of future danger before deciding punishment in a capital case. In some cases, especially when sick or older inmates are concerned, Texas' law requiring 40 years in prison is not meaningfully different from life without parole.

OPPONENTS SAY:

Absent a court opinion by a majority of justices directly overturning the Texas law or a stronger signal from a majority of the Supreme Court, the state should not change its legally tested and well established death-penalty procedures. The court has had ample opportunity to review and rule on the issue but has chosen not to do so. Any premature change in Texas law could generate more litigation, with the result that a majority of the U.S. Supreme Court could find fault with the Texas law.

Rulings by the Texas Court of Criminal Appeals and the Fifth U.S. Circuit Court of Appeals indicate that the *Simmons* case on jury instructions applies only when a state bars a defendant from ever being paroled. Since Texas does not have life without parole, the case would not apply here.

OTHER OPPONENTS SAY:

To enact a true truth-in-sentencing law, jurors in capital cases also should be informed that capital felons given life sentences could be granted parole only upon a two-thirds vote of the 18-member Board of Pardons and Paroles.

NOTES:

The companion bill, SB 39 by Lucio, passed the Senate on April 30 and was reported favorably, without amendment, by the House Criminal Jurisprudence Committee on May 5, making it eligible to be considered in lieu of HB 150.