SUBJECT: Prohibiting testimony that race is a predictor of future criminal behavior

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 8 ayes — Hinojosa, Dunnam, Talton, Garcia, Green, Kitchen, Martinez Fischer, Shields

0 nays

1 absent — Keel

SENATE VOTE: On final passage, March 5 — voice vote

WITNESSES: For — William Harrell, American Civil Liberties Union of Texas, National Association for the Advancement of Colored People of Texas; David P. Weeks, Walker County District Attorney; Chuck Noll, Harris County District Attorney's Office; *Registered but did not testify:* Keith S. Hampton, Texas Criminal Defense Lawyers' Association; Lesley Ramsey

Against — None

On — Michael T. McCaul, Office of the Attorney General

BACKGROUND: During the sentencing phase of Victor Hugo Saldano's 1995 capital murder trial, an expert witness, Dr. Walter Quijano, testified about 24 factors he said could help predict Saldano's future dangerousness. One of these factors was Saldano's race or ethnicity. The Texas Court of Criminal Appeals refused by 6-2 to grant Saldano a new trial or sentencing proceeding. When Saldano appealed his case to the U.S. Supreme Court, Attorney General (AG) John Cornyn told the court that references to Saldano's ethnicity during his sentencing hearing had violated his constitutional rights. The court set aside Saldano's death sentence and returned the case to the Texas Court of Criminal Appeals.

The AG identified six other capital murder cases in which Dr. Quijano had testified that race should be a factor in determining the defendant's future dangerousness. Two of the cases have been resentenced, and both received

the death penalty again. In four cases, the AG has confessed error to federal courts reviewing habeas claims, and a new sentencing proceeding has not yet been held. The seventh case still is going through the state habeas process, and the AG plans to confess error once it reaches the federal level.

When a person is found guilty of a crime, Code of Criminal Procedure, art. 37.07 allows for a sentencing proceeding in which evidence can be offered by the state and the defense on any matter the court deems relevant to the sentencing, such as prior criminal record, opinions about the defendant's character, and the circumstances of the offense for which the defendant is being tried.

In capital murder cases, arts. 37.071 and 37.0711 require a separate sentencing proceeding in which evidence can be presented by the state and the defense on any matter the court deems relevant to the sentence, including evidence of the defendant's background or character, or the circumstances of the offense that would lessen the defendant's culpability to a point that a death sentence should not be imposed. The state and the defense can present arguments for or against a sentence of death.

DIGEST:

SB 133 would amend Code of Criminal Procedure, arts. 37.07, 37.071, and 37.0711 to prohibit the state from offering evidence to establish that the defendant's race or ethnicity would make it likely that the defendant would engage in future criminal conduct.

The bill would take effect on September 1, 2001, and would apply to any sentencing proceeding beginning on or after that date, regardless of when the offense for which the defendant had been convicted occurred.

SUPPORTERS SAY:

SB 133 would correct a wrong in the Texas criminal justice system. It is fundamentally unfair for the state to present evidence that a defendant's race is a predictor of his or her likelihood to commit new crimes. The AG has argued before the U.S. Supreme Court that this practice is inappropriate and that race should not be considered as a factor in the criminal justice system. This pseudoscience should be disallowed in a courtroom just as other unreliable evidence, like lie detector tests, already is.

This bill would protect defense attorneys' right to discuss a defendant's race

when they believed it was a factor that could mitigate their client's guilt. It can be helpful in some cases for defense attorneys to discuss a defendant's race as one of the factors in the defendant's background that may lessen his or her culpability for a crime.

This bill would not prevent prosecutors from presenting evidence of racial bias in hate crimes cases. Prosecutors still could present evidence of a person's past actions, organization affiliations, and biases. A good prosecutor would not tell a jury that a white supremacist posed a future danger because he was white, but rather that he posed a future danger because of his history of violent actions toward other ethnic groups.

This bill would have no effect on the seven capital murder cases in which Dr. Quijano testified. In two of those cases, the defendants already have been resentenced, and the other five likely will be resentenced, regardless of whether this bill is enacted. This bill simply would prevent racial bias from being introduced improperly into future criminal cases.

OPPONENTS SAY:

SB 133 could limit what evidence was presented in a hate crimes case. For example, if a member of the Ku Klux Klan were being tried for committing racial hate crimes against African-Americans, a prosecutor could be prohibited from telling a jury that the defendant posed a future threat because of his being a "white supremacist."

This bill could cause the families of murder victims greater distress by requiring capital murder cases in which racial testimony was injected to have new sentencing hearings. These families already have endured months or years of litigation, and allowing convicted murderers to have new sentencing hearings on the basis of a small part of the testimony heard in the original sentencing hearing would cause additional pain and suffering.