

**SUBJECT:** Revising jury instructions in sentencing proceeding of death penalty cases

**COMMITTEE:** Criminal Jurisprudence — committee substitute recommended

**VOTE:** 8 ayes — Collier, K. Bell, Cason, Cook, Crockett, Hinojosa, A. Johnson, Murr

0 nays

1 absent — Vasut

**WITNESSES:** For — (*Registered, but did not testify:* Lauren Johnson, ACLU of Texas; Kathy Mitchell, Just Liberty; Amanda List, Texas Appleseed; Shea Place, Texas Criminal Defense Lawyers Association; Emily Gerrick, Texas Fair Defense Project; Jennifer Allmon, The Texas Catholic Conference of Bishops)

Against — (*Registered, but did not testify:* Ray Hunt, HPOU)

**BACKGROUND:** Code of Criminal Procedure art. 37.071 establishes the procedures used after a defendant has been found guilty in a capital felony case.

Under Penal Code sec. 12.31, if the state is not asking for the death penalty in the case, the judge must sentence the defendant to life without parole if the defendant was over 18 years old when the offense was committed. If the prosecutor is asking for the death penalty, courts must conduct a separate punishment proceeding to decide if the defendant will receive the death penalty or life in prison without parole.

The sentencing proceeding is conducted in the trial court and with the trial jury. After both sides present evidence, courts must submit the following questions to the jury:

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

- for cases in which the jury charge allowed the defendant to be found guilty as a party to an offense, whether the defendant actually caused the death or did not actually cause the death but intended to kill the deceased or another or anticipated that a human life would be taken.

Under Code of Criminal Procedure art. 37.071, sec. 2(d)(2), the court must tell the jury that it may not answer either of the two questions "yes" unless it agrees unanimously and it may not answer any issue "no" unless 10 or more jurors agree.

Under sec. 2(e), if a jury answers yes to each question, the court must ask it whether, taking into consideration all the evidence, there are sufficient mitigating circumstances to warrant a sentence of life in prison without parole rather than a death sentence. The court must tell the jury that if it answers that circumstances warrant a sentence of life without parole, that will be the sentence.

Under sec. 2(f), the court must tell the jury that in answering the question about mitigating circumstances, the jury must answer "yes" or "no" and that it may not answer the issue "no" unless it unanimously agrees and may not answer the issue "yes" unless 10 or more jurors agree. If the jury answers "yes" on the first two questions and "no" on the question about mitigating circumstances, the court must sentence the defendant to death.

Under sec. 2(g), if the jury answers "no" on either of the first two questions or "yes" to the question about mitigating circumstances or is unable to answer any question, the court must sentence the defendant to life without parole.

Under sec. 2(a)(1), the court, the prosecutor, the defendant, and the defendant's counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on the questions.

DIGEST: CSHB 252 would revise the jury instructions given during the sentencing phase of a capital felony trial.

It would remove the requirement that courts inform the jury that it may not answer "no" to questions about the defendant's continuing threat to society and the defendant's role as a party to an offense unless 10 or more jurors agree and that it may not answer "yes" to the question about mitigating circumstances unless 10 or more jurors agree.

Instead, the instructions to the jury would have to be that it may not answer any issue submitted about the defendant's continuing threat to society and the defendant's role as a party to an offense "yes" unless the jury agrees unanimously, and unless the jury answers an issue "yes" unanimously, the jury shall answer the issue "no."

When giving instructions relating to mitigating evidence, the court would have to charge the jury that it may not answer the issue "no" unless the jury agrees unanimously, and unless the jury answers the issue "no" unanimously, the jury shall answer the issue "yes."

The bill would take effect September 1, 2021, and would apply only to criminal proceedings that began on or after that date.

**SUPPORTERS  
SAY:**

HB 252 would eliminate misleading jury instructions in capital felony cases so jurors had accurate information about their duties. The current confusion over the questions put to juries deciding punishment in a capital case can result in jurors casting votes based not on how they want to answer the question but on their perception of requirements to reach certain vote counts.

The current instructions provided to juries can be misleading because they suggest to juries that certain decisions require a specific number of votes. Jurors have reported being confused by the instructions. For example, one reported that he believed a defendant was not a future danger but voted the other way because he did not think he could persuade nine other jurors to his point of view. Such confusion adds to the pressures of a capital felony trial with possible sequestration or media attention.

Those involved in a trial currently are prohibited from informing jurors about the effect of the jury's failure to agree on the questions. Because of the requirement that all jury verdicts in criminal trials be unanimous, life without parole will be imposed if, in the final tally for a question, a single juror answers "no" to the questions about future dangerousness or involvement as a party or answers "yes" to the mitigating circumstances question.

HB 252 would clear up confusion by requiring jury instructions to clearly state how a question should be answered if the jury is not unanimous on questions about future dangerousness, involvement as a party, and mitigating evidence.

Jurors being asked by the state to decide between life and death should have clear instructions to ensure fairness and truth in sentencing and public confidence in their decisions. The current instructions can distort sentencing by incentivizing vote switching over honest votes. HB 252 would not discourage deliberation by juries nor change the questions they answer or the effect of those answers; it simply would eliminate misleading information that can skew jurors' votes.

CRITICS  
SAY:

By revising instructions about certain questions so juries were told only about unanimous votes, HB 252 could increase the difficulties juries have in making punishment decisions in capital cases and discourage deliberations.