

- SUBJECT:** Adding life without parole option for capital murder cases
- COMMITTEE:** Criminal Jurisprudence — favorable, without amendment
- VOTE:** 6 ayes — Hinojosa, Dunnam, Garcia, Kitchen, Martinez Fischer, Shields
1 nay — Talton
2 absent — Keel, Green
- SENATE VOTE:** On final passage, May 3 — voice vote (Fraser, Jackson, Lindsay, Nelson, Ogden, Shapiro, Staples, Wentworth, Zaffirini recorded nay)
- WITNESSES:** (*On House companion bill, HB 365:*)
For — James C. Harrington, Texas Civil Rights Project; Keith S. Hampton, Texas Criminal Defense Lawyers Association; Bill Wilson, Mission Presbytery; Barry Macha, Wichita County District Attorney; Charles C. Holt, Common Cause of Texas; Guy James Gray, Jasper County District Attorney; William Harrell, American Civil Liberties Union of Texas, National Association for the Advancement of Colored People of Texas; J. Fred Baca; Dr. Mark D. Cunningham; *Registered but did not testify:* Richard Daly, Texas Catholic Conference

Against — Charles “Chuck” Rosenthal, Harris County District Attorney; William “Rusty” Hubbarth, Justice For All; Greg Davis, Dallas County District Attorney’s Office; Kevin D. Johnson

On — Chuck Mallin, Tarrant County District Attorney’s Office; Lon Curtis, Bell County District Attorney’s Office; Chris Heaton, Texas Municipal Police Association; Tony Fabelo, Criminal Justice Policy Council; Delia Perez Meyer
- BACKGROUND:** Penal Code, sec. 12.31(a) provides that an individual found guilty of a capital felony in a case where the state seeks the death penalty shall be punished by imprisonment for life or by death. When the state does not seek death, an individual found guilty of a capital offense shall be punished by life imprisonment.

Subsection (b) requires that when the state seeks the death penalty in a capital felony trial, prospective jurors must be informed that a sentence of life imprisonment or death is mandatory on conviction. In a capital felony trial where the state does not seek the death penalty, prospective jurors must be informed that the state is not seeking the death penalty and that a sentence of life imprisonment is mandatory on conviction.

Government Code, sec. 508.046 requires all members of the Board of Pardons and Paroles to vote on the release on parole of certain inmates eligible for release, including inmates convicted of a capital felony, with at least two-thirds of the members voting in favor of parole before the inmate can be released. Board members cannot vote on the release until they receive a copy of a written report from the Texas Department of Criminal Justice (TDCJ) on the probability that the inmate would commit an offense after being paroled.

Government Code, sec. 508.145 outlines eligibility for release on parole. Subsection (a) stipulates that an inmate sentenced to death is not eligible for release on parole. An inmate serving a life sentence for a capital felony is not eligible for parole until the actual time served, without consideration of good conduct time, equals 40 calendar years.

Code of Criminal Procedure, art. 37.071 outlines the procedure if a defendant were found guilty in a capital case. Sec. 1 requires the judge to sentence the defendant to life imprisonment in cases where the state does not seek the death penalty. Sec. 2 provides that a separate sentencing proceeding will be held in cases where the capital defendant is found guilty and the state seeks the death penalty.

Sec. 2(b) requires the court to submit the following issues to the jury on conclusion of the presentation of evidence in the sentencing phase:

- ! whether there is a possibility that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
- ! in cases where the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Texas law, whether the defendant actually caused the death of the deceased

or did not actually cause the death, but intended to kill the deceased or another or anticipated that a human life would be taken.

The state is required to prove these issues beyond a reasonable doubt, and the jury must return a special verdict of “yes” or “no” on each issue submitted.

Sec. 2(d) requires the court to charge the jury that:

- ! in deliberating on the issues submitted under subsection (b), the jury shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant’s background or character or the circumstances of the offense that mitigates for or against imposition of the death penalty;
- ! the jury may not answer any issue submitted under subsection (b) “yes” unless it agrees unanimously and it may not answer any issue “no” unless 10 or more jurors agree; and
- ! members of the jury need not agree on what particular evidence supports a negative answer to any issue submitted under subsection (b).

Sec. 2(e)(1) requires the court to instruct the jury that if it returns an answer of “yes” to each issue submitted under subsection (b), it shall answer the following issue:

- ! whether there is a sufficient mitigating circumstance to warrant that a sentence of life imprisonment rather than a death sentence be imposed, taking into consideration all of the evidence, including the circumstances of the offense and the defendant’s character, background, and personal moral culpability.

Sec. 2(e)(2) requires the court, on the written request of the defense attorney, to:

- ! instruct the jury that if it answers that a circumstance warrants a sentence of life imprisonment rather than a death sentence, the court will sentence the defendant to imprisonment in the institutional division of TDCJ for life; and

! charge the jury in writing that the defendant will become eligible for release on parole after the actual time served is 40 years and that, although the way future parole laws could be applied to the defendant cannot be predicted, eligibility for parole does not guarantee that parole will be granted.

Sec. 2(f) requires the court to charge the jury that in answering the issue submitted under subsection (e), the jury:

- (1) shall answer the issue “yes” or “no”;
- (2) may not answer the issue “no” unless it agrees unanimously and may not answer the issue “yes” unless 10 or more jurors agree;
- (3) need not agree on what particular evidence supports an affirmative finding on the issue;
- (4) shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant’s moral blameworthiness.

Sec. 2(g) requires the court to sentence the defendant to death if the jury returns a finding of “yes” on each issue submitted under subsection (b) and a finding of “no” on an issue submitted under subsection (e). The court shall sentence the defendant to life imprisonment if the jury returns a finding of “no” on any issue submitted under subsection (b), or a finding of “yes” on an issue submitted under subsection (e), or if the jury is unable to answer any issue submitted under subsection (b) or (e).

Code of Criminal Procedure, art. 44.29(c) requires an appellate court setting aside or invalidating the sentence of a defendant sentenced to death on the basis of an error affecting punishment to order only a new punishment hearing under art. 37.071 as though a finding of guilt had been returned. The court must empanel a jury in the same manner as a jury would be empaneled for other capital murder trials.

DIGEST:

CSHB 365 would amend Penal Code, sec. 12.31(a) to allow an individual found guilty of a capital felony to be sentenced to life without parole, whether or not the state sought the death penalty. It would modify subsection (b) to require that prospective jurors be told that a sentence of life imprisonment without parole would be one of the possible mandatory sentences upon conviction.

The bill would conform Government Code, sec. 508.046 by adding the phrase “punishable by imprisonment for life” after the words “capital felony.”

An inmate serving a sentence of life imprisonment without parole would not be eligible for release on parole.

SB 85 would add three new subsections to sec. 1 of Code of Criminal Procedure, art. 37.071. Subsection (a) would require the judge to conduct a separate sentencing proceeding to determine whether the defendant would be sentenced to life imprisonment or life without parole in cases in which the state did not seek the death penalty and the defendant was found guilty or pleads guilty or nolo contendere. The proceeding would be conducted before the trial jury unless the defendant pled guilty or no contest and requested that a jury assess punishment or a new jury were necessary because an appeals court overturned the sentence. Evidence could be introduced by the state and the defense in the same manner as though the defendant were being sentenced in a noncapital case.

Subsection (b) would require the court to instruct the jury that, after taking into account all of the evidence, it should assess a sentence of life imprisonment or life without parole. The court would be required to tell the jury that a sentence of life without parole meant the defendant would be ineligible for parole and that life imprisonment meant the defendant would not be eligible for parole until the defendant served 40 calendar years in prison without credit for good time.

Subsection (c) would require the court to sentence the defendant to life imprisonment if the jury could not assess punishment or assessed punishment of life imprisonment. The court would be required to sentence the defendant to life without parole if the jury assessed that punishment.

In capital cases in which the state sought the death penalty, the bill would amend sec. 2(e)(1) to require the judge to instruct the jury to consider whether a sufficient mitigating circumstance existed to warrant imposition of a sentence of life imprisonment or life imprisonment without parole rather than a death sentence.

SB 85 would strike sec. 2(e)(2) and instead require the judge to instruct the jury that:

- ! if the jury returned a finding of “yes” on each issue submitted under subsection (b) and a finding of “no” on an issue submitted under subdivision (1), the judge would sentence the defendant to death;
- ! if the jury returned a finding of “yes” on each issue submitted under subsection (b) and either returned a finding of “yes” on an issue submitted under subdivision (1), the judge would sentence the defendant to life imprisonment without parole; and
- ! if the jury returned a finding of “no” on an issue submitted under subsection (b), the judge would sentence the defendant to life imprisonment.

The judge, after instructing the jury under sec. 2(e)(2), would have to further charge the jury that a defendant sentenced to imprisonment for life without parole would be ineligible for release on parole or mandatory supervision, and that a defendant sentenced to life imprisonment would be ineligible for release on mandatory supervision and ineligible for release on parole until the defendant’s actual calendar time served equaled 40 years, without consideration of good conduct time.

The judge would have to sentence the defendant to:

- ! death if the jury returned a finding of “yes” on each issue submitted under subsection (b) and a finding of “no” on an issue submitted under subsection (e)(1);
- ! life imprisonment without parole if the jury returned a finding of “yes” on each issue submitted under subsection (b) and returned a finding of “yes” or was unable to answer an issue submitted under subsection (e)(1); or
- ! life imprisonment if the jury returned a finding of “no” on any issue submitted under subsection (b) or was unable to answer any issue submitted under subsection (b).

The bill would amend Code of Criminal Procedure, art. 44.29 to strike the requirement that a defendant be sentenced to death before an appellate court could order new punishment hearing.

SB 85 would take effect on September 1, 2001, and would apply only to capital offenses committed on or after that date.

**SUPPORTERS
SAY:**

SB 85 would allow juries maximum flexibility in deciding punishments in capital felony cases. No longer would juries be forced to vote for a death sentence to ensure that murderers never got out of prison. Although capital murderers cannot be paroled under current law until they have served at least 40 years behind bars, many offenders, especially young ones, could live well beyond that 40 years. Parole rates can change rapidly and have been as high as 79 percent as recently as 1990. Jurors have a reasonable fear that a young, violent offender would live to see parole eligibility and could be released to prey on other innocent Texans. Even when they believe the offender should be locked up for life, sometimes juries will vote for death to guarantee the murderer never walks the streets again. Under this bill, juries could reserve the death penalty for the most heinous cases while ensuring that other criminals would stay behind bars for life.

This bill would help ensure that an innocent person was not executed and would address concerns about the morality of the state taking a life and the unequal application of the death penalty to the poor and to minorities. It also would bring Texas in line with the federal government and the 33 other states that permit a sentence of life without parole.

SB 85 would bring peace of mind to murder victims' families and friends by guaranteeing that offenders sentenced to life in prison actually would stay in prison for life. Currently, family and friends of victims are forced to monitor an inmate's status throughout a "life sentence" because release on parole remains possible.

This bill would pass judicial scrutiny by including explicit guidelines for juries and judges in selecting among the possible punishments in cases in which the state sought the death penalty. It would follow the outline of current law by requiring juries to answer special issues "yes" or "no" and mandating that the judge impose a specific sentence based on jury responses.

SB 85 would save taxpayers a portion of the millions of dollars now being spent on the lengthy trial and appeals process required when a death sentence is imposed. Although solid estimates of the cost of trying and appealing capital murder cases are lacking, life without parole – with an average annual incarceration cost of about \$14,800 to almost \$20,000 – could be cheaper in many cases.

TDCJ would have the expertise and resources to manage a prison population sentenced to life without parole. The department already deals with many hard-to-manage inmates, and privileges and punishments within a prison can be used as management tools. Even housing a large number of felons sentenced to life without parole would not present a problem for TDCJ, which now has capacity to hold over 151,000 inmates. Resources would be better used to permanently house dangerous capital murderers rather than to pursue the death penalty and respond to a lengthy appeals process.

OPPONENTS
SAY:

SB 85 is unnecessary. Texas already has a statute that effectively is life without parole. Capital murderers sentenced to life imprisonment face 40 years of actual calendar time in prison before they're even eligible for parole, and being eligible for parole does not guarantee that an inmate will be released. Two-thirds of the entire Board of Pardons and Paroles would have to approve an eligible inmate's release, an unlikely scenario in light of today's tough parole policies. In addition, inmates probably would never become parole eligible. The Criminal Justice Policy Council notes that, on average, capital murder defendants are 29 years old when they enter TDCJ, and the average prisoner lives to be only 64 years old. Statistically speaking, the average capital murder defendant sentenced to life in prison will die five years before becoming eligible for parole.

SB 85 inappropriately could replace the death penalty. Even if not explicitly repealed, the death penalty effectively could be eliminated if judges and juries consistently sentenced capital offenders to life without parole. But life without parole clearly would be inadequate punishment for the most heinous crimes because it would benefit those who had committed the most cold-blooded murders. Furthermore, while life without parole might satisfy one underlying purpose of the death penalty – protecting society – it would not fill other functions, such as deterring crime and providing closure to victims' families and friends.

The procedures used in Texas to determine punishment in capital murder cases have been well-litigated and established, and may not easily withstand change. Modifications to the law would be subjected to court scrutiny, halting executions while challenges were litigated. Currently, juries decide between the death penalty and a life sentence by considering questions about the offender's future dangerousness. Expanding the law to allow two types of prison terms could complicate the decision-making procedure, resulting in court challenges.

SB 85 could lead to increased demand for prison space, rising incarceration costs, and new problems for prison management. Life without parole would not be cheaper necessarily than the death penalty because many costs, such as a trial and appeals, may be incurred regardless of whether a person was sentenced to life without parole or to death. With incarceration costs ranging from about \$14,800 to almost \$20,000 per inmate per year, the expense of housing an ever-growing prison population of inmates sentenced to life without parole could drain criminal justice resources from other needs, especially considering that medical expenses incurred by aging inmates are three times those of younger offenders. Furthermore, managing inmates without being able to use parole as an incentive for good behavior could be difficult and expensive. TDCJ already has a shortage of correctional officers and has experienced a rise in the number of inmate assaults against staff in the last few years. These types of problems ultimately could generate exceptions to a life-without-parole sentence, such as a "special needs" parole to move dying and incapacitated inmates out of the prison system.

This bill would be an opening to instituting a sentence of life without parole in non-capital cases. This could distort the relationship between offense and punishment that reserves the harshest penalties for the most serious crime, capital murder. Also, substantially increasing the number of inmates in prison for life with no option for eventual release could add to security problems and ultimately create situations of overcrowding.

NOTES:

The companion bill, HB 365 by Hinojosa and McClendon, originally was set on the House General State Calendar for May 3. SB 85 was laid out in lieu of HB 365, then postponed until today. CSHB 365 differs from SB 85 in that it would have required punishment in cases in which the state did not seek

the death penalty to be determined in the same way as in cases in which death penalty was sought – by the way the jury voted on the issues.