

SUBJECT: Life without parole for capital murder and eliminating life sentences

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 8 ayes — Keel, Riddle, Pena, Denny, Hodge, P. Moreno, Raymond,
Reyna

0 nays

1 absent — Escobar

SENATE VOTE: On final passage, April 14 — 26-5 (Estes, Fraser, Jackson, Nelson,
Shapiro)

WITNESSES: For — Tim Cole; Bernadette Ruiz; (*On committee substitute*: Gregory T.
Miller, for Tim Curry, Criminal District Attorney of Tarrant County)

Against — Keith Hampton, Texas Criminal Defense Lawyers Association;
John Rolater, for Bill Hill, Dallas County Criminal District Attorney; Roe
Wilson, Harris County District Attorney

BACKGROUND: Capital murder — murder committed under one of the eight specified
circumstances listed in Penal Code, sec. 19.03 — carries a penalty of death
or life in prison. Under Government Code, sec. 508.145(a), offenders
sentenced to death for capital murder are never eligible for parole.

Capital murderers sentenced to life in prison are eligible for parole after
serving 40 years, without consideration of good conduct time. Under
Government Code, sec. 508.046, the Board of Pardons and Paroles may
grant parole to a capital felon given a life sentence only upon a two-thirds
vote of the entire 18-member board and only after receiving a report from
the Texas Department of Criminal Justice on the probability that the
inmate would commit an offense after being paroled.

Prosecutors decide whether or not to seek a death penalty in a capital
murder trial. In a capital trial in which the prosecutor seeks the death
penalty, prospective jurors must be told that upon conviction the offender
will be sentenced either to death or life in prison. If the prosecutor does

not seek the death penalty, prospective jurors must be told that a sentence of life in prison is mandatory upon conviction. Code of Criminal Procedure, Art. 37.071, requires that in capital cases in which the prosecutor does not seek the death penalty and the defendant is found guilty, judges sentence the person to life in prison.

In capital trials in which the state seeks the death penalty, a separate sentencing procedure must be held to determine if the person will be sentenced to death or to life in prison. The sentencing procedure involves juries answering questions commonly referred to as being about "future dangerousness" and "mitigating circumstances." In general, if the jury finds that a defendant would be a future danger and finds no mitigating circumstances, the defendant is given the death penalty. If the jury decides that there are mitigating circumstances or that the defendant would not be a future danger, the defendant is given a life sentence.

A penalty of life in prison also can be imposed for first-degree felonies, some serious drug offenses, some offenses committed by repeat felons, and some repeat felony sex offenses. For the purpose of determining parole eligibility, a life sentence is considered 60 years. Therefore, if an inmate receiving a life sentence is required to serve one-half of the sentence before becoming eligible for parole, the inmate must serve 30 years before parole is considered.

Defendants given life sentences for serious, violent offense listed in Code of Criminal Procedure, 42.12 sec. 3g, often referred to as "3g offenses" or for a felony offense involving a deadly weapon, must serve at least 30 years, without consideration of good conduct time, before being considered for parole. In general, other offenders are eligible for parole when their time served plus good conduct time equals one-fourth of their sentence or 15 years, whichever is less. One exception is that those serving a life sentence for some repeat sex offenses become eligible for parole only after serving 35 years, without consideration of good conduct time.

DIGEST:

SB 60 would institute "life without parole" as a possible sentence in death penalty cases, eliminate "life" sentences as an option for capital murder and other offenses, establish a requirement for attorneys appointed in death penalty cases, and establish requirements for reforming some pre-1991 death sentences.

The bill would take effect September 1, 2005, and would apply only to offenses committed on or after that date.

Life without parole. CSSB 60 would create a sentence of life-without-parole for capital murders and eliminate the current sentence of "life" that can be imposed for capital murder, first-degree felonies, some offenses committed by repeat felons, and some other drug offenses.

In capital murder cases in which the state sought the death penalty, a person found guilty would have to be sentenced either to life without parole or death. In capital murder cases in which the state did not seek the death penalty the sentence would be life without parole. Capital felons being sentenced by a judge would have to receive life without parole. Those serving sentences of life without parole would not be eligible for release on parole.

CSSB 60 would amend the laws governing the sentencing procedures and questions asked of jurors in capital cases to reflect the potential sentence of life-without-parole instead of a life sentence.

Someone found guilty of a first-degree felony would have to be punished by a term of five to 99 years and could no longer be given a life sentence. Certain repeat offenders who under current law must be punished by a life term would have to receive a term of 99 years.

CSSB 60 also would eliminate life sentences currently available as a punishment for some serious drug offenses in the Texas Controlled Substances Act. Punishments for these crimes would have to be for whatever range of years — either five to 99 years, 10 to 99 years or 15 to 99 years — that is available currently.

Attorney qualifications. The standards developed by the Court of Criminal Appeals and local selection committees for establishing the qualifications of appointed attorneys in death penalty cases would have to prohibit the appointment of lead attorneys and lead appellate attorneys handling direct appeals who had been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any criminal case. The six requirements in current law that must be met by any attorney appointed in a death penalty case would be applied to lead trial attorneys only.

The Court of Criminal Appeals would have to amend its standards by January 1, 2006, and local selection committees by the 75th day after CSSB 60's effective date.

Reformation of sentences. CSSB 60 would establish requirements for reforming death sentences in capital murder cases in which offenses were committed before 1991, when the questions used to determine whether a death sentence would be imposed were changed. If the Court of Criminal Appeals found insufficient evidence to support a jury's sentence of death in one of these cases, or other specified errors, a defendant would receive a life term. Sentences for crimes committed after 1991 that were reformed by the Court of Criminal Appeals would be changed to either a life sentence, if committed before the effective date of CSSB 60, or life-without-parole, if committed on or after the bill's effective date.

**SUPPORTERS
SAY:**

By instituting a sentence of life-without-parole, CSSB 60 would give juries more appropriate punishments to impose in capital murder cases. Currently, juries in capital cases must vote either for the death penalty or for life in prison, which carries with it the possibility of parole, and these are not always adequate choices. In some cases, death may not be appropriate but a jury might feel that a person should never be released from prison. Under CSSB 60, juries no longer would be forced to vote for a death sentence to ensure that murderers never got out of prison. Under this bill, juries could reserve the death penalty for the most heinous cases, while ensuring that other criminals stayed behind bars for life.

CSSB 60 is necessary because the possibility of parole for some capital murders is unacceptable, even if remote. 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. The possibility of never being released from prison would be more of a deterrent for some offenders.

A sentence of life without parole would allow a more appropriate sentence in cases in which the crime was heinous but due to other factors the prosecutor did not seek the death penalty. For example, forensic evidence or eye witnesses could be lacking or mitigating circumstances could rule out a death penalty, but the offender still might belong behind bars for the

rest of his or her life. Life-without-parole also would provide a choice for cases in which an offender committed a capital murder while under the age of 18. Since the U.S. Supreme Court has banned execution of these offenders, only a life sentence is available for these cases in Texas.

Life without parole would not mislead victims' families or the public because it would mean just what it says — that offenders would spend the rest of their lives in prison. CSSB 60 would bring peace of mind to murder victims' families and friends by guaranteeing that offenders sentenced to life in prison actually stayed 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. Concerns that a person sentenced to life-without-parole would be released under clemency or a prison management act are far-fetched.

There is no evidence that allowing a sentence of life without parole would dilute the death penalty or lead to its demise. Experiences in other states have shown that having a sentence of life-without-parole does not decrease the number of death sentences handed down by juries.

Texans support life without parole. A fall 2004 survey by the Scripps Howard Texas Poll reported that 78 percent of those surveyed favored the creation of a sentence of life-without-parole

CSSB 60 would bring Texas in line with the federal government and 36 of the 38 states with the death penalty that have a sentence of life-without-parole, according to the Death Penalty Information Center. Eleven of the 12 non-death penalty states also have the option of life without parole.

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. Many other states have life without parole and manage their prison populations. Studies have shown that these offenders do not pose a disproportionate risk of violence in prison.

Concerns that instituting a sentence of life without parole would jeopardize Texas' death penalty scheme are unfounded. CSSB 60 would pass judicial muster because the sentencing guidelines that would be used follow the outline of current law by requiring juries to answer specific

questions about future dangerousness and mitigating circumstances and by mandating a specific sentence based on jury responses. Other states' sentencing schemes that include life without parole have passed judicial muster.

In some cases taxpayer resources would be better used to permanently house dangerous capital murderers than to pursue the death penalty and respond to a lengthy appeals process. 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 \$14,600 — could be cheaper in many cases.

It would be unwise for Texas to have three capital murder sentencing options — death, life without parole, and a life sentence. Jurors could easily be confused over when to impose each type of sentence, which could result in jurors preferring to institute life without parole so they did not have to grapple with a tough decision over the death penalty. It would be particularly difficult to develop instructions for juries to follow so that the three options would be fairly imposed, especially instructions on how juries should choose between life-without-parole and life. This in turn could lead to court challenges to Texas' court-tested and well-established death penalty scheme

CSSB 60 would eliminate life sentences imposed for non-capital offenses to help eliminate confusion that jurors often have over the difference between a life sentence and one of 99 years. Under CSSB 60, jurors would have more control over sentences because they would have to pick a specific term, instead of the ambiguous punishment of a "life" sentence. Concerns about persons receiving terms of numbered years, instead of life sentences, and then being eligible for discretionary mandatory supervision are unfounded because serious and violent offenders would remain ineligible for discretionary mandatory supervision release even if given a numbered term.

Attorney qualifications. CSSB 60 would help ensure that lead attorneys appointed in death penalty cases met one important qualification — that they not be judged to have been ineffective counsel. To allow these attorneys to be appointed as lead counsel would be contrary to the principle of ensuring quality defense.

Reformation of sentences. The provisions in CSSB 60 dealing with the reformation of sentences is necessary to ensure that Texas' death penalty scheme would not violate constitutional prohibitions against ex post facto laws.

OPPONENTS
SAY:

CSSB 60 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 are 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 capital felon's release, an unlikely scenario in light of the tough parole policies of the last decade. In addition, inmates probably would never become parole eligible, given the age of the average capital murder defendant sentenced to life in prison and the average age of death for prison inmates.

CSSB 60 would be misleading and give only the illusion of comfort to victims. The bill would not guarantee that a person would never be *released* from prison. Releases due to court decisions, medical parole, executive clemency, or a prison management act designed to reduce overcrowding could lead to release even for those given life without parole.

CSSB 60 inappropriately could replace the death penalty or weaken the state's death penalty scheme. 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. 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.

Comparisons with the experiences of other states with sentences of life-without-parole are not valid. Other states have small death rows and few, if any, states execute as many people as Texas.

The procedures used in Texas to determine punishment in capital murder cases have been well litigated and established, and may not easily withstand change. Under SB 60, the question asked during a sentencing procedure about future dangerousness would be meaningless because

under both the death penalty and life without parole defendants would not be released. This could complicate the decision-making and result in court challenges.

CSSB 60 could result in problems with prison management. Managing inmates without being able to use parole as an incentive for good behavior could be difficult and expensive.

The bill also could lead to increased demand for prison space and increased incarceration costs. 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 at about \$14,600 per inmate per year, the expense of housing an ever-growing prison population of inmates sentenced to life without parole could tax criminal justice resources, especially considering that medical expenses incurred by aging inmates are significantly higher than those of younger offenders.

CSSB 60 would be an opening to instituting a sentence of life without parole in non-capital cases. This could distort the relationship between offenses and punishments in a system that reserves the harshest penalties for the most serious crime, capital murder.

Doing away with all life sentences would inhibit juries' ability to give "life" sentences as an expression of outrage at certain crimes. Also, because some defendants convicted and sentenced to terms of a specified number of years are eligible for release on discretionary mandatory supervision (DMS), while those given life for capital murder are not, CSSB 60 could eventually mean that someone could be released on DMS who would not qualify under current law.

Attorney qualifications. Disqualifying attorneys found to have rendered ineffective assistance of counsel from being appointed to certain positions could discourage some attorneys from admitting errors. This could make the job of the appellate attorneys, who may rely on attorney error for a favorable appeal, difficult. Lawyers could make mistakes early in their careers but learn from and provide good representation in the future.

OTHER
OPPONENTS
SAY:

Texas should have three options for sentences in capital murder cases — death, life without parole, and life in prison. This would give juries the maximum flexibility to tailor sentences to individual crimes and offenders.

CSSB 60 would not allow juries any flexibility in cases in which a jury had decided against the death penalty but thought that a defendant deserved at least a remote possibility of release much later in life. Designing a sentencing scheme to handle three options would not be difficult and would not result in a complicated scheme.

NOTES:

The Senate-passed version of SB 60 would eliminate parole for life sentences given in capital murder cases. The House committee substitute also would eliminate life as a sentence option for non-capital offenses and add the provision about qualifications of attorneys representing indigent defendants in capital murder cases.

The provisions in CSSB 60 concerning qualifications of attorneys appointed in death penalty cases were approved by the House on March 17 in HB 268 by Keel, which was reported favorably, as amended, by the Senate Criminal Justice Committee on May 20.