

SUBJECT: Prohibiting death penalty for crimes by persons with severe mental illness

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 5 ayes — Collier, J. González, Hunter, Moody, Pacheco

3 nays — Zedler, K. Bell, Murr

1 absent — P. King

WITNESSES: For — Brian Middleton, Fort Bend County District Attorney's Office; Greg Hansch, National Alliance on Mental Illness Texas; Will Francis, National Association of Social Workers-Texas Chapter; Edward Keith, Regional Public Defender for Capital Cases; Michael Barba, Texas Catholic Conference of Bishops; Bobby Mims, Texas Criminal Defense Lawyers Association; Elsa Alcala and Amanda Marzullo, Texas Defender Service; Patrick McCann; (*Registered, but did not testify*: Nicholas Hudson, American Civil Liberties Union of Texas; Philip Kazen, Bexar County Criminal District Attorney's Office; Dennis Borel, Coalition of Texans with Disabilities; Cate Graziani, Grassroots Leadership and Texas Advocates for Justice; Kathleen Mitchell, Just Liberty; Christine Yanas, Methodist Healthcare Ministries of South Texas, Inc.; Eric Kunish, National Alliance on Mental Illness Austin; Alycia Speasmaker, Texas Criminal Justice Coalition; Emily Gerrick, Texas Fair Defense Project; Texas NAACP; Kevin Stewart, Texas Psychological Association; Kyle Piccola, The Arc of Texas; Chris Harris; Zoe Russell; Jason Vaughn)

Against — Vincent Giardino, Tarrant County Criminal District Attorney's Office; (*Registered, but did not testify*: Frederick Frazier, Dallas Police Association and state FOP; Ray Hunt, Houston Police Officer's Union; AJ Louderback, Sheriffs Association of Texas; Mitch Landry, Texas Municipal Police Association)

On — Raoul Schonemann

BACKGROUND: Penal Code sec. 12.31 establishes the penalties for capital felonies, as

defined in statute. In capital murder cases in which the state seeks the death penalty, individuals found guilty must be sentenced to death or life in prison without parole in the Texas Department of Criminal Justice. In capital murder cases in which the state does not seek the death penalty, those found guilty must be sentenced to life without parole.

Penal Code sec. 8.01 establishes the state's insanity defense, which makes it an affirmative defense to prosecution for an offense that, at the time of the conduct charged, the actor did not know that his conduct was wrong as a result of severe mental disease or defect.

DIGEST:

CSHB 1936 would prohibit death sentences for capital murder defendants who were determined under the criteria in the bill to be a person with severe mental illness at the time of the offense. If found guilty of capital murder, these defendants would have to be sentenced to life in prison without parole.

The bill would define "person with severe mental illness" to mean a person who had schizophrenia, a schizoaffective disorder, or a bipolar disorder and, as a result of that disorder, had active psychotic symptoms that substantially impaired the person's capacity to appreciate the nature, consequences, or wrongfulness of the person's conduct or to exercise rational judgment in relation to the person's conduct.

Notice of intent to raise issue. A defendant planning to offer evidence that the defendant was a person with severe mental illness at the time of the alleged offense would have to file a notice with the court at least 30 days before a trial. The notice would have to tell the court that the defendant intended to offer the evidence and certify that a copy of the notice had been given to the prosecutor in the case.

Unless timely notice was given, evidence that the defendant was a person with severe mental illness at the time of the commission of the alleged offense would not be admissible at the guilt or innocence stage of the trial unless the court found that good cause existed for failing to give notice.

Jury determination. The issue of whether the defendant was a person with severe mental illness at the time of the commission of the alleged offense would be submitted to the jury only if the issue was supported by evidence. The jury would have to decide the issue and return a special verdict on the issue that was separate from the jury's verdict on guilt or innocence. A defendant would have to prove by clear and convincing evidence that the defendant was a person with severe mental illness at the time of the commission of the alleged offense.

Appointment of expert. On the request of either party or on the judge's own motion, the judge would have to appoint a disinterested expert experienced and qualified in the field of diagnosing mental illness to examine the defendant and determine whether the defendant was a person with severe mental illness.

The judge could order the defendant to submit to an exam by the expert. Exams would have to be narrowly tailored to determine whether the defendant had the specific disorder claimed and could not include an assessment of the risk of danger the defendant could pose to any person. Appointed experts would have to provide the defense attorney and the prosecutor with all notes and data from the exam.

Statements made by the defendant during an exam could not be admitted into evidence during the trial.

Effect of determination. If the jury determined that the defendant was not a person with severe mental illness at the time of the commission of an alleged offense and the defendant was convicted of that offense, the judge would have to conduct a sentencing proceeding under the standard procedures used in capital cases. At that proceeding, defendants could present evidence of a mental disability as allowed under those standard procedures.

The bill would take effect September 1, 2019, and would apply to trials that started on or after that date, regardless of when the offense was committed.

SUPPORTERS
SAY:

Justice is not served and individuals' rights are not protected when the state executes a person who at the time of an offense was a person with a severe mental illness, and CSHB 1936 would help prevent such executions. The death penalty should be limited to the most culpable offenders, and those with severe mental illness at the time of an offense do not fit the criteria. The bill would establish fair standards and procedures to determine if defendants in a capital case had a severe mental illness while holding defendants accountable for their actions with a punishment of life without parole.

Given a series of U.S. Supreme Court decisions, including ones barring execution of defendants with intellectual disabilities, those who were juveniles at the time of an offense, and those incompetent at the time of execution, it is inconsistent to allow the execution of defendants described by the bill. CSHB 1936 would be in line with those court decisions and the treatment of defendants with reduced culpability. The bill also could help address concerns about the possibility of executing an innocent person with severe mental illness due to issues including a potential for false confessions and an impaired ability to help their defense.

Current laws and procedures are insufficient to address issues of severe mental illness at the time an offense is committed and do not set an appropriate standard. Current determinations about whether someone is competent to stand trial or to be executed do not consider a person's mental illness and impairments at the time of an offense.

The insanity defense imposes an inappropriate standard that applies a complete defense to conviction and does not address the issues contemplated in the bill. When successful, this defense results in a defendant being declared not guilty by reason of insanity. Usually these defendants are sent to a mental health institution from which they eventually could be released if certain conditions are met. Under CSHB 1936, individuals who met the standards in the bill would not go unpunished but would receive life without parole if convicted.

CSHB 1936 is narrowly drawn to apply to the most severely mentally ill and to require decisions to be made on a case-by-case-basis. Defendants would have to prove their claim by clear and convincing evidence to ensure an adequate burden of proof. Disinterested experts also would be used to evaluate the defendant. The bill would set deadlines for notices to courts about an intent to raise the issue of severe mental illness, and if the notice was not timely, the issue would not be admissible at the guilt or innocence phase. Baseless claims would be avoided because the issue could be submitted to the jury only if it was supported by evidence.

The process that would be established by the bill could save the state money because trials themselves could be shorter, confinement for the convicted would be different, and appeals would be streamlined.

OPPONENTS
SAY:

Current law establishes appropriate standards and procedures for determining who can receive death sentences, and the state does not need to create a new standard and process to properly handle cases of defendants with severe mental illness or to implement court rulings about the death penalty. Under current law, a person can be declared incompetent to stand trial or a defendant may be found not guilty by reason of insanity. In addition, a jury can consider mental illness as a mitigating circumstance when imposing a sentence in a capital case and can impose life without parole. There is a thorough appeals system through state and federal courts, and those with death sentences must be competent to be executed.

The criteria that would be established by CSHB 1936 to define persons with severe mental illness would create a broader, lower standard for being found ineligible for the death penalty. The current insanity defense considers if an individual, as a result of severe mental disease or defect, did not know that the individual's conduct was wrong. Part of the standard created by CSHB 1936 would consider whether a person appreciated the nature, consequences, or wrongfulness of conduct or exercised rational judgment. This new standard would be untested in Texas and likely would be raised by numerous defendants. In addition, the standard would have to be met by clear and convincing evidence, a burden of proof not commonly

used in criminal cases.

The bill could result in trial delays or additional appeals. The issue of severe mental illness could be raised up until 30 days before a trial that likely would have been in the preparation phase for a year or two, potentially delaying the trial. If the issue was not raised under the deadlines in the bill, a defendant might later raise the issue of ineffective assistance of counsel. Texas' procedures in capital murder cases have been well established through litigation and practice, and any court scrutiny of the change in the bill could lengthen the process.