SUBJECT: Ineligibility for release on mandatory supervision

COMMITTEE: Corrections — committee substitute recommended

VOTE: 8 ayes — Hightower, Alexander, Edwards, Farrar, Gray, Hupp, Marchant, Serna

0 nays

1 absent — Allen

WITNESSES: For — Sherri Wallace, Texas District and County Attorneys Association; Carlena Renee Friddle

Against — None

BACKGROUND: The mandatory supervision law, Code of Criminal Procedure Art. 42.18, sec. 8, requires persons to be automatically released from prison when their calendar time served plus good conduct time equals the length of their sentences. Felons who commit certain violent offenses are not eligible for release on mandatory supervision. The 74th Legislature authorized the Board of Pardons and Paroles to veto the automatic release on mandatory supervision of inmates who committed crimes after August 31, 1996. It also prohibited releasing inmates who had *previously* served a sentence for an ineligible offense as well as those who had previously committed a felony that involved a deadly weapon.

Persons released on mandatory supervision are supervised by a parole officer and subject to parole conditions set by the parole board until their time served in prison plus time on mandatory supervision equals their sentence.

For more information on mandatory supervision, including the history of the program and current restrictions on who can be released through the program, see *Mandatory Supervision Release: Safety, Cost and Legal Issues*, House Research Organization Session Focus Number 75-6, February 17, 1997.

DIGEST:

CSHB 432 would add second-degree murder (murder under the immediate influence of sudden passion arising from adequate cause) and second-degree indecency with a child (indecency involving contact) to the list of offenses that exclude an inmate from release on mandatory supervision.

CSHB 432 states that these additions would not be a change in law but a confirmation that inmates convicted of second-degree murder and second-degree indecency with a child are ineligible for release on mandatory supervision consistent with the intent of the 73rd Legislature when it enacted SB 1067 by Whitmire, et al., the rewrite of the Penal Code and the probation and parole statutes.

CSHB 432 would take immediate effect if finally approved by a two-thirds record vote of the membership in each house.

SUPPORTERS SAY:

CSHB 432 would not change current law but would simply confirm current law and practice. Attorney General Dan Morales ruled in Letter Opinion No. 96-126 issued November 1996 that legislative history and other parts of the statute indicate that the Legislature intended to include indecency with a child involving contact on the list of offenses that keeps an offender from being released under mandatory supervision. The same reasoning holds for including second-degree murder on the list, even though the attorney general's opinion did not address this issue.

In enacting SB 1067 by Whitmire et al., the 73rd Legislature clearly intended to exclude these offenders from release under mandatory supervision. Both were included on the list of offenses in Article 42.12, sec. 3g of the Code of Criminal Procedure that makes inmates ineligible for parole until their actual calender time served, not counting good conduct time, equals one-half their sentence, or 30 years. However, good conduct time is counted in calculating automatic release on mandatory supervision. Under this program eligible inmates must be released when their good conduct time plus their time served equals their sentences. If inmates convicted of second-degree murder and second-degree indecency with a child were eligible for mandatory supervision, they would routinely be released on mandatory supervision before becoming eligible for parole, the attorney general points out in his opinion. Clearly, this was not the intent of the Legislature. The courts look to legislative intent, the attorney general

said, when applying the plain meaning of a statute would lead to absurd results that the Legislature could not have intended.

Although these offenses were inadvertently left off of the mandatory supervision ineligibility list, the law has been enforced as if they were included. CSHB 432 would not change inmates' expectation of when they could be released from prison. CSHB 432 only confirms current law; it does not alter any punishment and would not raise any *ex post facto* issues by retroactively changing a punishment.

CSHB 432 properly includes a statement that it would not change current law but would just confirm the law already in existence. If the bill included a statement that it applied only to those who commit offenses after its effective date, a court could read CSHB 432 as something other than a confirmation of current law. Such a reading could incorrectly ignore legislative intent from 1993 and lead to the mistaken assumption that it did not apply to persons convicted since 1993.

Second-degree indecency with child and second-degree murder are serious offenses, and persons who commit them should not be eligible for release on mandatory supervision. Indecency with a child involving contact seriously hurts the most vulnerable members of society. These offenders must be denied release on mandatory supervision to keep them off the streets as long as possible. Inmates convicted of injury to a child already are denied mandatory supervision release, and indecency with a child is a similar offense that should be subject to like penalties. Similarly, murder — no matter what the category — should carry serious penalties, including no possibility of release under mandatory supervision.

OPPONENTS SAY:

Adding second-degree indecency with a child and second-degree murder to the list of offenses that make an inmate ineligible for mandatory supervision would be an unwise change in law. The attorney general's opinion is inaccurate; if the Legislature had intended to put these offense on the list, it would have done so. Defendants should be dealt with under the law as it reads, not as it "should" read. Retroactively applying the changes contemplated by CSHB 432 would be unfair and could raise *ex post facto* issues.

Exclusion from mandatory supervision should be reserved for only the most serious offenses, not for second-degree indecency with a child and second-degree murder. Sexual assault — already on the list — can cover assault of a child. Indecency with a child should be treated as a lesser offense. Likewise, second-degree murder should be treated as a lesser offense than first-degree murder because it involves a mitigating factor of sudden passion arising from adequate cause. Persons who have killed under passion arising from adequate cause should be eligible for release on mandatory supervision because they do not represent the same threat to society as first-degree murderers.

The 74th Legislature authorized the Board of Pardons and Paroles to review inmates eligible for mandatory supervision who committed offenses after August 31, 1996. The board can veto release on mandatory supervision of inmates who would endanger the public. This ensures that persons who commit second-degree indecency with a child or second-degree murder since that time will be released on mandatory supervision only if they would not represent a danger.

OTHER OPPONENTS SAY:

CSHB 432 should not use "confirmation of intent" as an indirect way to add these offenses to the list of those making offenders ineligible for mandatory supervision release. A better approach would be to expand the list and make the bill apply to offenses committed on or after the effective date of the law, as with any other legislation changing criminal law. This would ensure that offenders who commit offenses after the bill's effective date would be excluded from release on mandatory supervision. Offenders who commit offenses before the bill's effective date would continue to be governed by the attorney general's opinion as to legislative intent, even though this may be vulnerable to a court challenge. If a court did find fault with the opinion, the impact would be limited to those inmates who committed crimes before CSHB 432 took effect.

NOTES:

The committee substitute added second-degree murder to the list of offenses making an inmate ineligible for automatic release on mandatory supervision. It also added the statement that the intent of CSHB 432 is not to change current law but to confirm the intent of the 73rd Legislature.

HB 52 by Greenberg would add third-degree indecency with a child (indecency involving exposure) to the list of offenses that prohibit an inmate from being eligible for release on mandatory supervision. Rep. Greenberg plans to offer an amendment incorporating HB 52 into CSHB 432.