

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

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 6 ayes — Collier, K. Bell, J. González, Hunter, Moody, Pacheco

1 nay — Murr

2 absent — Zedler, P. King

WITNESSES: For — 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; (*Registered, but did not testify:* Nicholas Hudson, American Civil Liberties Union of Texas; Kathleen Mitchell, Just Liberty; Eric Kunish, National Alliance on Mental Illness-Austin; Alycia Speasmaker, Texas Criminal Justice Coalition; Emily Gerrick, Texas Fair Defense Project; Chris Harris; Zoe Russell; Jason Vaughn)

Against — None

BACKGROUND: Code of Criminal Procedure art. 37.071 establishes the procedures used after a defendant has been found guilty in a capital felony case. If the state is not asking for the death penalty in the case, under Penal Code sec. 12.31, the judge must sentence the defendant to life in prison or to life without parole. 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
- in 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.

The prosecutor must prove each of these issues beyond a reasonable doubt, and the jury must answer "yes" or "no" to each question.

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

Under Art. 37.071 sec. 2(e), if a jury answers yes to each question, the court must ask it whether, taking into consideration all of 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 Art. 37.071 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 Art. 37.071 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 Art. 37.071 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:

HB 1030 would revise the jury instructions given during the sentencing phase of a capital felony trial. It would remove 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.

The bill would take effect September 1, 2019, and would apply only to criminal proceedings that begin on or after that date.

**SUPPORTERS
SAY:**

HB 1030 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 not based on how they want to answer the question but on what they perceive to be requirements to reach certain vote counts.

Jurors are told that questions about a defendant's future dangerousness and level of involvement as a party must be answered either "yes" unanimously or "no" by a vote of 10-2. Similarly, jurors are told that the vote on whether mitigating circumstances warrant life without parole over death must be answered either "no" unanimously or "yes" by a vote of 10-2. This makes it appear that juries must reach only these vote counts and that a life without parole sentence could not be imposed unless 10 jurors agree. In addition, those involved in a trial are prohibited from informing jurors of the effect of a failure of the jury to agree on the questions.

The instructions can be misleading. 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. Life without parole is imposed even if the vote count answering "no" to the first questions and "yes" to the question about mitigating circumstances is something other than 10-2.

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. Confusion about the vote count adds to the pressures of a capital felony trial with possible sequestration or media attention.

HB 1030 would clear up this confusion by eliminating the instructions regarding votes of "no" on the future danger and party to an offense questions and "yes" on the mitigating circumstances questions. Juries would be told only that they could not answer "yes" to the future danger and party to an offense questions or "no" to the mitigating circumstance question unless the votes were unanimous.

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 1030 would not discourage deliberation by juries or change the questions they answer or the effect of those answers, only eliminate misleading information that can skew jurors' votes.

**OPPONENTS
SAY:**

HB 1030 could distort the sentencing phase of capital felony cases by discouraging deliberation and consensus by jurors. The current sentencing structure is designed to have jurors deliberate and come to an agreement on questions without focusing on the punishment being imposed by answers to those questions. Removing the instructions about certain questions so that juries are told only about unanimous votes could encourage holdouts instead of open-minded discussion and ultimately agreement by a jury considering the important decision of life or death.