

SUBJECT: No death penalty for certain accomplices, separate trials for capital murder

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 6 ayes — Gallego, Hodge, Kent, Pierson, Riddle, Vo

2 nays — Christian, Fletcher

2 present not voting — Miklos, Moody

1 absent — Vaught

WITNESSES: For — Bryan McCann, Campaign to End the Death Penalty; Delia Perez Meyer, Texas Moratorium Network; Allen Place, Texas Criminal Defense Lawyers Association; Gloria Rubac, representing Carlos Santana; and seven individuals; (*Registered, but did not testify*: Scott Cobb and Alison Dieter, Texas Moratorium Network; Kristin Houle, Texas Coalition to Abolish the Death Penalty; Lily Hughes, Campaign to End the Death Penalty; Andrew Rivas, Texas Catholic Conference; Hector Uribe, Texas Hispanic Criminal Defense Lawyers Association; Joanna Vaughn, Friends Meeting of Austin; Abel Zamora, American Civil Liberties Union of Texas; and six individuals)

Against — Eric Kugler, Harris County District Attorney's Office; (*Registered, but did not testify* Marc Chavez, Lubbock County District Attorney's Office; Katrina Daniels, Bexar County District Attorney Susan D. Reed)

BACKGROUND: **Law of parties.** Penal Code, sec. 7.02 defines four types of actions that can result in a person being held criminally responsible for the actions of another person. The actions fall into two broad areas: the liability of conspirators and the liability of accomplices.

“Conspirator liability” is established under the law of parties in Penal Code, sec. 7.02(b). Under this section, if persons conspire to commit a serious crime and, in the process of committing the crime, one of the them commits another crime that should have been anticipated, all parties can be guilty of the crime actually committed, even though they did not intend to commit it.

Penal Code sec. 7.02(a) describes three other types of actions, called the liability of accomplices. Under sec. 7.02(a)(2), an accomplice must have solicited, encouraged, directed, aided, or attempted to aid another person in committing a crime, while intending to promote or assist in the crime.

Sec. 7.02(a)(3), requires the accomplice, while intending to promote or assist in the crime, to have failed to make a reasonable effort to prevent a crime that the person had a legal duty to prevent.

The final area of accomplice liability rarely comes into play in capital murder cases. Found in Penal Code, sec. 7.02(a)(1), it requires an accomplice to have caused an innocent or nonresponsible person to do something illegal or to have aided that innocent person in doing something illegal.

Those who are charged under the law of parties are charged with the actual crime committed, not with a violation of a specific part of the law of parties.

**Joint trials.** Under Code of Criminal Procedure, art. 36.09, defendants involved in the same offense can be tried jointly or separately, at the courts' discretion. Courts must order separate trials if a defendant makes a motion to be tried separately and presents evidence that a joint trial would be prejudicial to any defendant or that one of the defendants has a previous conviction.

For more information on the law of parties, see House Research Organization Interim News Number 80-7, October 9, 2008, *Should Accomplices to Capital Murder be Eligible for the Death Penalty*.

**DIGEST:**

HB 2267 would prohibit death sentences for defendants found guilty in capital cases only as a party under Penal Code sec. 7.02(b), the conspirator liability section of the state's law of parties. Prosecutors would be prohibited from seeking the death penalty in cases in which a defendant's liability was based solely on that section. This would apply only to sentences imposed in a criminal proceeding that began on or after the bill's effective date.

HB 2267 also would prohibit courts from jointly trying defendants if either defendant was to be tried for a capital felony. Courts would have to order a severance for any two or more defendants jointly charged with a

capital felony. It would apply only to trials commenced on or after the bill's effective date.

The bill would take effect September 1, 2009.

**SUPPORTERS  
SAY:**

HB 2267 would address the most troubling aspects of the state's law of parties by prohibiting a death sentence for an accomplice who was a party to a murder under the conspirator liability part of the law. This part of current law allows accomplices to be found guilty of capital murder, and to be eligible for a death sentence, if they should have anticipated the murder. This standard should not be used to make a person eligible for a death sentence. HB 2267 would leave other parts of the law of parties intact.

The cases of Kenneth Foster and Jeffery Wood have called attention to deficiencies in Texas' law of parties and especially to the conspirator liability portion of the law. Foster was sentenced to death for his role in the 1996 capital murder of Michael LaHood, Jr. Foster was driving three friends around San Antonio as they committed robberies, and one of them committed murder during what was described as a botched robbery. Foster was tried jointly with Brown, the triggerman, and found guilty of capital murder under the law of parties, with both Foster and Brown receiving death sentences. Just before Foster's scheduled execution in 2007, Gov. Perry commuted his sentence from death to life in prison.

The execution of Jeffery Wood for his role as an accomplice to capital murder was put on hold in August 2008, when a federal judge issued a stay that was unrelated to the law of parties. Wood was convicted for his role in a 1996 robbery-murder. During the planned robbery, Wood was in a truck outside a convenience store in which David Reneau murdered a store employee. Wood and Reneau were tried separately, and Reneau was executed in 2002.

The conspirator liability provisions of the law of parties have been used to obtain death sentences for other accomplices, such as lookouts or getaway drivers who were not directly involved in the capital murder and did not kill or intend to kill but whom a prosecutor argued should have anticipated the murder. It is too difficult for a jury to determine what a person should have anticipated, and such conjecture about what went on in a defendant's mind should not be used to make someone eligible for a death sentence. Even though juries use the standard of whether the accomplice actually

anticipated the murder when imposing punishment, it is still too difficult to determine and inappropriate for life and death decisions

The conspirator portion of the law of parties violates the concept that punishment for a crime should be in proportion to a person's actions and culpability. Accomplices who fit the description in the conspirator liability portion of the law should not be punished in capital murder cases with the same severity as those who actually caused a death. The death penalty should be reserved for the worst of the worst, and allowing these accomplices, who did not themselves kill, to be put to death violates this principle.

The problem illustrated by these cases represents a fundamental flaw in Texas' statutes, not just a unique problem in one case. HB 2267 would not limit the role or importance of juries, which still would decide guilt or innocence.

The state should not rely on appellate court review or executive clemency to limit the death penalty in accomplice cases. The cases of Kenneth Foster and Jeffrey Wood illustrate that inappropriate death sentences can be imposed and upheld by appeals courts. The state's clemency system rarely results in recommendations for a pardon or commutation from the Board of Pardons and Paroles, and gubernatorial pardons should not be relied on to fix a flawed policy.

Under HB 2267, accomplices who fall under the conspirator liability portion of the law still would be harshly punished with life in prison without parole. This punishment is mandatory for anyone convicted of capital murder, including accomplices, who do not receive a death sentence.

HB 2267 would set the proper policy for the state, and there is no reason why the state's procedures for death penalty cases cannot be adjusted to implement it. There are opportunities during a case to identify accomplices who fall under the conspirator liability portion of the law and to take the death penalty off the table, and such changes would not threaten the state's capital punishment system.

**Joint trials.** All capital murder defendants would get fairer trials if they were tried separately, as HB 2267 would require. Under current law, courts do not always sever trials when they should. This creates a problem

because joint trials too easily allow one defendant to be tainted by evidence or information about another defendant, which can prejudice jurors, especially against accomplices. Severing capital murder trials would not be a financial burden on courts trying these cases because the state has a program to help reimburse counties for the investigation and prosecution of capital murders.

OPPONENTS  
SAY:

Texas has decided that the death penalty is an appropriate penalty for those who are intimately involved in committing capital murder, and the law should not be changed to eliminate this punishment option for one type of accomplice to such crimes. Death sentences are used for punishment, deterrence, and retribution, all of which are appropriate reasons to retain the death penalty option for accomplices to capital felonies who fall under the conspirator liability portion of the law. Current law holds accomplices to capital murder responsible for their own actions, not the actions of others.

Current law sets appropriate standards for imposing a death sentence when an accomplice is convicted under the conspirator liability portion of the law of parties. The law requires that to be found guilty, an accomplice should have anticipated the victim's death, but the standard for receiving a death sentence — found in the questions asked of jurors deciding punishment — is whether the person actually anticipated the victim's death. Jurors must unanimously decide beyond a reasonable doubt that an accomplice actually anticipated the death before the jury may impose a death sentence. In addition, all the other requirements for imposing a death sentence must be met, including findings about future dangerousness and any mitigating evidence.

Much of the criticism currently being leveled at the conspirator portion of the law of parties really should be directed toward the particular prosecutions and the juries' decisions in the Foster and Wood cases, not with the law itself. The law of parties should remain intact as it has been used to obtain death sentences for accomplices to some horrific crimes, including the killers of James Byrd, Jr., who in 1998 was dragged to his death in Jasper, Texas, and some of the inmates who escaped from a Texas prison in 2000 and went on a crime spree that included killing a police officer.

Checks and balances and safeguards help ensure that a death penalty is appropriate and legally justified. As with all death penalty cases,

prosecutors decide carefully when to seek the death penalty and reserve it for only the worst crimes in which the role of an accomplice meets the constitutional requirements for a death sentence. Juries consider the circumstances of each case, and before imposing a death sentence, must unanimously answer questions about a defendant's future dangerousness, the accomplice's role in the capital murder, and mitigating circumstances that would warrant a sentence of life without parole rather than death. If even one juror does not agree to impose a death sentence, the accused accomplice cannot be sentenced to death. The appeals process for death sentences through the state and federal courts is extensive and thorough.

The deterrent effect of being involved in a capital felony could be diluted if certain classes of accomplices to capital murder could not receive the death penalty. Potential death sentences also allow prosecutors to reach plea agreements in appropriate cases.

Texas law follows a tradition in criminal law and the policies of most of the 36 states that have the death penalty by holding all those participating in a crime responsible for the offense. This policy is especially appropriate and morally justifiable in capital murder cases, considered the worst of the worst offenses. Texas' sentencing laws for accomplices are constitutional based on decisions made by the U.S. Supreme Court.

**Joint trials.** Requiring the severing of capital murder trials is unnecessary because current law sets appropriate standards for severing trials, and judges act in good faith, severing trials when appropriate. Joint trials can be a cost-effective use of court resources.

OTHER  
OPPONENTS  
SAY:

It is unclear how HB 2267 would be implemented because accomplices are charged with the crime committed, not with a violation of a specific part of the law of parties. The charge given to the jury during the guilt-or-innocence phase of the trial includes instructions about the law of parties. However, jurors are not required under the law to agree on or record whether they considered a defendant guilty as the primary murderer or as an accomplice under the law of parties, or which, if any, section of the law of parties the jury applies to an offender. Developing a new procedure to identify accomplices found guilty under one section of the law could hold up capital trials and possibly shut down the death penalty in Texas while any changes to Texas' well established capital punishment system were litigated.