WHAT ABOUT THE PAROLE PROCESS WHEN ONE HAS A LIFE SENTENCE ON A CAPITAL MURDER CHARGE?

Download this Article (Adobe Acrobat)

Prepared by Bill Habern and David O'Neil

Habern, O'Neil & Buckley L.L.P.

Huntsville Area Office

Box 8930

Huntsville, Texas 77340

(888) 942-2376 Fax (936) 435-1089

Web site paroletexas.com

Houston Office

4300 Scotland

Houston, Texas 77007

(713) 865-5670 Fax (713) 865-5655

What About Parole on a Life Sentence on a Capital Murder Case [1]

Fall, 2001

By David O'Neil and Bill Habern

(Habern, O'Neil & Buckley L.L.P.)

INTRODUCTION

In any capital murder case where a jury must decide the fate of the defendant before it, the most nagging question some jurors face is not whether the defendant should be executed for his crime, but whether and when he will again be released to society, if he is not sentenced to death. This has been implicitly recognized by District Attorneys around the state in their strenuous and consistent opposition to proposals that Texas adopt "life without parole" as a sentencing option in capital cases. Fearing that jurors would be less inclined to impose the death penalty if they knew a defendant would never be released to society, many District Attorneys have waged an aggressive and successful battle against life without parole legislation. Their efforts were largely responsible for the recent defeat of that legislation when it was again considered last session.

With this same concern in mind, many prosecutors around the state also opposed the 1999 amendment to Article 37.071, Code of Criminal Procedure. That amendment, which ultimately passed, requires that, upon defense request, a jury in a capital case be instructed as follows:

Under the law applicable in this case, if the defendant is sentenced to imprisonment in the institutional division of the Texas Department of Criminal Justice for life, the defendant will become eligible for release on parole, but not until the

actual time served by the defendant equals 40 years, without consideration of any good conduct time. It cannot accurately be predicted how the parole laws might be applied to this defendant if the defendant is sentenced to a term of imprisonment for life because the application of those laws will depend on decisions made by prison and parole authorities, but eligibility for parole does not guarantee that parole will be granted.

MISCONCEPTIONS ABOUT PAROLE

The significance of article 37.071 for defendants and defense attorneys in capital cases cannot be overstated. *Simmons v. South Carolina,* 114 U.S. 2187, 129 L. Ed.2d 133 (1994) involved a defendant convicted of a 1990 capital murder. In addressing whether the court improperly excluded an instruction that the defendant was not eligible for parole, the court noted that, at the sentencing phase, the defense:

[O]ffered into evidence, without objection, the results of a statewide public-opinion survey conducted by the University of South Carolina's Institute for Public Affairs. The survey had been conducted a few days before petitioner's trial, and showed that only 7.1 percent of all jury-eligible adults who were questioned firmly believed that a inmate sentenced to life imprisonment in South Carolina actually would be required to spend the rest of his life in prison. Almost half of those surveyed believed that a convicted murderer might be paroled within 20 years; nearly three-quarters thought that release certainly would occur in less that 30 years. More than 75 percent of those surveyed indicated that if they were called upon to make a capital-sentencing decision as jurors, the amount of time the convicted murderer actually would have to spend in prison would be an "extremely important" or a "very important" factor in choosing between life and death (citations omitted). *Id*, at 2191, L.Ed.2d at 159.

It is doubtful that a Texas survey would reveal any more accurate a view of what a life sentence means in Texas. It was, after all, as recently as 1989 that one convicted of capital murder was eligible for parole after only 15 years. Further, in the wake of the *Ruiz* decision, parole rates reached an all time high. For example, in 1990 the parole approval rate was 79%. By 1997 it had dropped to 16% overall. Today parole approval runs about 25%. Prison overcrowding even prompted the legislature to pass the Prison Management Act, which authorized additional good time credits to inmates, in order to alleviate prison overcrowding. Criminal defense attorneys practicing in the 1980s and early 1990s can still remember advising their clients that they would probably serve only "a dime on the dollar" before they were paroled (thus the 79% approval ratio). These are the historic realities that shape jurors attitudes about what a life sentence means today.[2]

Of course this reality changed with the prison expansion of the 1990s. No longer was Texas constrained by available prison facilities. Expansion meant that Texas would be in compliance with federal court orders limiting prison overcrowding. So swift was the expansion, that many defendants who were advised under the "dime on a dollar" rule are still serving time on their convictions.

Until Article 37.071 was changed to permit instructing a capital jury that life meant at least 40 years, there was no way to debunk the outdated myths that prevail among potential capital jurors. Most prospective jurors are still familiar with cases like that of Kenneth McDuff,[3] and believe that it is still the rule to release dangerous murderers to the streets after obscenely short prison stints. As a result, capital jurors may well feel powerless to protect society form capital defendants unless they impose the ultimate sanction. It is precisely on this point that a 40 year instruction can be a powerful tool in the capital defense arsenal.

LIMITS ON PAROLE CONSIDERATIONS IN CAPITAL CASES

But if telling a juror that "life means 40" is good, convincing them that life really means a lot more than 40 years is even better. Anyone familiar with the current realities of parole in Texas knows that the chances of a first parole in Texas on a capital case are slim to none. We have yet to actually witness how the Board will consider 40 year parole cases when they start appearing. So far the only cases that have been considered are under the prior law which required the service of either 15 or 20 years prior to parole consideration on a life capital murder sentence. Under SB 45, passed by the 75th Legislature and codified in Section 508.046, Government Code, the normal parole review conducted by a panel of three members of the Board no longer applies in cases of Indecency with a Child under Section 21.1(a)(1), Texas Penal Code; Aggravated Sexual Assault under Section 22.021, Texas Penal Code; and Capital Murder convictions where a life sentence has been assessed that requires 35 or 40 calender years before parole eligibility. In those cases, the full 18 member Parole Board must vote on parole, and parole is only granted if at least 12 favorable votes are cast. In Fiscal Year 2001, 60 capital murder offenders were considered for parole, and only 3 were approved (5.00%).

However, unless a state statute requires it, capital jurors will never learn how remote the odds are that a capital murder offender will be paroled on the 40th anniversary of incarceration. "As a general rule, states have the freedom to formulate the type of jury instructions given in state courts." *Tigner v. Cockrell,* No. 01-50238, 2001 WL 987719, at 2 (5th Cir. August 28, 2001), *citing California v. Ramos,* 436 U.S. 992, 1000, 103 S.Ct. 3446, 3452-53, 77 L.Ed.2d. 1171 (1983). In Texas, because the legislature disallows the consideration of parole in jury deliberations, courts have refused to recognize a constitutional right for the defense to conduct voir dire on the issue of parole. *Rose v. State*, 752 S.W.2d 529, at 532 (Tex.Crim.App. 1987); *but see Loredo v. Texas*, 13000-524-CR, 2001 WL 1019406 (Tex. App.-Corpus Christi Aug. 31, 2001).

The Supreme Court has carved a narrow exception to the general rule. In *Simmons,* the defendant was tried and convicted for the capital murder of an elderly woman. During voir dire, the court prohibited any questions regarding parole. The defense proffered, inter alia, the above quoted statewide public-opinion survey conducted by the University of South Carolina's Institute for Public Affairs. The trial judge still denied the defense the opportunity to ask jurors what they understood a life sentence to mean under South Carolina law.

The only issue in sentencing was whether Simmons would receive life, without the possibility of parole, or death. The prosecution presented evidence of Simmons's future dangerousness. The defense attempted to counter this by showing that the defendant's prior acts of violence had been directed solely at elderly woman; there were no elderly woman in any prison to which he would be sent; and if he were sentenced to life, he would never be released from prison. The defense argument was rejected by the trial court, and the court denied the defense's proposed instruction that Simmons was not eligible for parole.

Further, during sentencing deliberations, the jury asked: "Does the imposition of a life sentence carry with it the possibility of parole?" *Simmons,* 114 U.S. at 2192, L.Ed.2d at 160. The court answered:

You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plan and ordinary meaning." Id.

Shortly thereafter, the jury returned with a sentence of death. Writing for a plurality in *Simmons*, Justice Blackmun said:

In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole. *Id,* at 2194, L.Ed.2d at 163.

The court likened this to the due process violation it found in *Gardner v. Florida*, 430 U.S. 349, 51 L.Ed.2d 393 (1977), where a defendant was sentenced to death on the basis of information contained in an undisclosed presentence report which he was therefore unable to rebut. *Simmons*, 114 U.S. at 2194, L.Ed.2d at 165.

Defense attorneys have failed to convince either the 5th Circuit or the Texas Court of Criminal Appeals to expand the application of *Simmons* to cases where the jury's alternative to a death sentence was life with the possibility of parole. *See Allridge v. Scott* 41 F.3d 213 (5th Cir. 1994) (relief denied because parole ineligibility was not a matter of law); *Wheat v. Johnson*, 238 F.3d 357 (5th Cir. 2001) (*Simmons* not applicable because it constitutes a "new rule", however, court restates that there is no constitutional right to question venire on Texas parole system and eligibility); *Collier v. State*, 959 S.W.2d. 621 (Tex.Crim.App. 1997) (refusing to apply *Simmons* under Texas law where there life carries possibility of parole).

THE PAROLE ISSUE - A DOUBLE-EDGED SWORD

However, because the holding in *Simmons* was predicated upon the prosecution's future dangerousness argument, the 10th Circuit has suggested that "it is arguable *Simmons* could be interpreted to allow a parole-eligible defendant to present evidence of the likelihood of parole if the prosecution argues he presents a future danger." *Moore v. Reynolds,* 153 F.3d 1086, 1116 (10th Cir. 1998). Recall, however, that *Simmons* involved a case where the court was confronted with compelling evidence that South Carolina jurors had substantial misunderstandings about what a life sentence meant. Similar evidence should be proffered when asking a trial court to extend *Simmons* beyond its facts.

Even under a strict reading of *Simmons*, Texas courts cannot restrict all voir dire on the issue of parole. Where parole is mentioned in the jury charge, the defense cannot be denied the opportunity to voir dire the potential

jurors on whether they can follow the law contained in the charge. Thus, in *Stringfellow v. State*, 859 S.W.2d 451 (Tex.App.-Houston [1st Dist.] 1993, pet. ref'd), the trial court erred when it denied a defense request to ask jurors whether they could follow the court's instruction concerning parole. Also, in *Loredo v. Texas*, 13000-524-CR, 2001 WL 1019406 (Tex.App.-Corpus Christi Aug. 31, 2001), the court held that "questions concerning whether jurors can follow the pertinent law concerning parole were proper because they were an issue applicable to appellant's punishment trial and because the statute provides for their inclusion." *Id.* at 2(citing *Lane v. State*, 828 S.W.2d. 764, 766 (Tex.Crim.App. 1992)).

Article 37.071's mandated parole instruction now insures that defense attorneys are at least entitled to ask the jury whether they can follow the law regarding parole, and recite that law as contained in the jury charge. Questioning should also be permitted about whether a juror has any preconceived opinions about parole that would interfere with their ability to follow the law. If a juror cannot disregard parole considerations, the juror must be excused for cause. Arguably, a juror should also be excused for cause if the juror cannot set aside a belief that, regardless of what the court instructs, there is a chance that the defendant could become eligible for parole before serving 40 flat years.

Loredo and *Simmons* do not go so far as to imply that a defendant is entitled to present a capital jury evidence about the parole process during the sentencing stage. The jury instruction required by Article 37.071 explicitly recognizes that there is no way to accurately predict "how the parole laws might be applied to this defendant." If taken as true, this would make any evidence as to the parole process speculative. To assert that this legislative assertion is erroneous would certainly fly in the face of a parole process that has seen wild fluctuations in the parole approval rates in just the past 10 years. Perhaps a way to get such information to the jury is in response to prosecution assertions or prosecution evidence that the defendant will likely be paroled, if sentenced to life in prison.

Where the prosecution opens the door to the likelihood of parole, the defense should be prepared to walk through it with evidence of the unlikelihood of parole based upon current parole approval rates.

"The State may not create a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole. *Simmons*, at 114 U.S. 2198, 129 L.Ed.2d at 171.

Likewise, the state should not be able to argue or present evidence that the defendant is likely to be paroled, while preventing the defense from arguing or showing the contrary. Any preemptive attempt by the defense to put in evidence of the likelihood of parole, could prove to be a risky proposition considering Justice O'Connor's conclusion, in her concurring opinion in *Simmons*, that "in such cases the...State may also...inform the jury of any truthful information regarding the availability of commutation, pardon, and the like (citation omitted)." Id. at 2201, L.Ed.2d at 177. "The like" may include the high parole rates in the 1980's that led to the release of Kenneth McDuff. Such a comparison could be devastating to the defense.

HOW THE PAROLE PROCEDURE IN TEXAS WORKS

WHEN THE OFFENDER IS SERVING LIFE ON A DEATH PENALTY CASE

In November, 1999 the Texas Parole Board adopted new regulations and procedures. The rules are continuing to be revisited and revised by the current board. We have attempted to take the rules and policies of the Texas Parole Board and restate them in basic language so that the reader may have an outline of these procedures and regulations. This outline is by no means a complete or technically detailed statement of all of these rules or procedures, but deals with the usual process that one would experience in the normal course of a parole review on a capital murder life sentence.

1. The Parole Panel In Most Non Death Penalty Cases Usually Consists of a Three Member Board Panel

On January 1, 1990, a whole new system was put in place to oversee the Texas Criminal Justice System. Legislation increased the Parole Board to eighteen members. Three of these eighteen will be the panel of Board members who are assigned to consider your client's case. There is luck in the draw, and there is no way to control who will be on the panel. Of the three members, an offender must receive two favorable votes. If two members tie, then the third member breaks the tie. Otherwise, the third member doesn't even see the case file. In the past, generally an offender would have been interviewed by one of the three panel members and the other members would "desk vote" the case. Now the Board has the discretion to decide to interview or not to interview. In most cases the board members do not interview inmates. However, one of the things we would do in representing your client is to attempt

to secure an interview with each member of the panel, and attempt to get one member of the panel to personally interview the client.

DEATH PENALTY CASES WHERE LIFE IS IMPOSED REQUIRES 12 FAVORABLE BOARD VOTES OF THE TOTAL OF 18 VOTES CAST

In cases involving life on a capital murder, aggravated sexual assault or indecency with a child by touching, the panel consists of all 18 board members, and requires12 favorable votes by the board in order to obtain a favorable vote. These offenses are known in parole terms as Senate Bill 45 cases, and the statute regulating this issue is found at Art. 508.046 Tx. Govt. Code. Usually 7 negative votes will terminate parole consideration, and no votes are cast beyond the 7^{th} vote.

2. The Tentative Parole Date

In the past if the Board voted a favorable release, and had no further problems arise such as a disciplinary case or a protest, then within weeks that person could be on the streets. That procedure is currently in place, however, it now may take several months before a person is released after they are approved by the Board. The board may defer parole release until the inmate has completed specific tier vote conditions. For example, the offender may be required to attend a tier vote rehabilitation program that might last anywhere from three to twenty four months in length before release.

Also, partially due to the enormous increase in the population and also due to the fact that the Parole Division of TDCJ is the processing agency for release. One will be seen by the Transitional Officer (also called an Institutional Parole Officer [IPO]) on the Unit of assignment, for the initial parole interview. One should be prepared to possibly be interviewed several weeks or months prior to their " eligibility date".

The parole process generally begins about six months prior to the parole date, when the file is pulled in Austin, and it begins the parole process from that point.

3. Determining the Parole Date

The Board's current rules indicate the use of a mathematical figure drawn from individual inmates records and history to allegedly determine a "parole guideline". Because of the very nature of a conviction of this sort, any score is going to be a high score not calculated to be a benefit for one subject to a parole on a life sentence. Parole Guidelines are covered in another article on our web page. We mention the topic here just to insure the reader is aware that such issues are present in the parole process.

4. Conditions Precedent to a Parole Date

The goal in the representation of one subject to parole is to acquire the earliest parole date possible. The tentative parole date may include conditions which the inmate must satisfy. For example, if one were doing ten years for a drug related offense, and did not have a high school degree, the conditions the inmate might likely be required to meet prior to a tentative parole date would include completion of a drug rehabilitation program and obtaining a high school certificate or G.E.D. If that inmate had done all he could do to comply with those two conditions, then, all other things equal, the inmate could be released on the tentative parole date.

5. What can happen after a Parole Interview?

There are five things that can occur in a case after the interviews are complete, and the votes are totaled:

A) The case may be deferred for an additional time if the Board discovers the need to request from trial officials or others additional information that the panel feels it should review.

B) The decision could be to deny a favorable consideration of parole at this time and order a subsequent parole

hearing on a set month and year in the future. This is called a "set-off." All capital murder cases where life is imposed, and where parole is denied the set off is automatically for two years.

C) The panel can determine that the total situation seems to favor release on parole and further investigation, (FI), including notification of trial officials and investigation of the parole plan, which are done prior to a final decision being made. Generally this is what inmates in the past have referred to as a "19", and indicates that we are looking toward a release subject to protests from those who are authorized to file a protest (protests will be discussed later). The old term "19" no longer exists. Today the information forwarded to inmate is attached to this outline as exhibit "A").

D) The panel may recommend the inmate for an intensive drug, alcohol treatment, or other program in the prison which must be successfully completed prior to being released. The panel can also recommend release at some date in the future and require that other programs be completed prior to that date for release to occur. Today it is most common for an offender to be given a favorable vote subject to the successful completion of what has become called the "Tier Group Program". This refers to those programs which one must complete in order to be paroled. These programs can last from three to twenty four months.

6. What Happens if One Gets Past the Panel Vote?

The next step if one is approved or gets a tentative parole date, is to notify the trial officials (and others, as will be discussed) of the initial favorable action by the panel. The rule provides that no less than ten days prior to the anticipated release date the following people are given the opportunity to effect a veto of the parole:

a. The current sheriff in the county of conviction.

b. The current district attorney in the county of conviction.

c. The current judge of the convicting court.

If the inmate is to parole to a county, other than the one where the conviction occurred, the protest notices will also be sent to the following:

a. The administrative judge of the county where the inmate is to parole.

b. The district attorney in the county where the inmate is to parole.

c. The sheriff in the county where the inmate is to parole.

Finally, if the crime occurred after September 1, 1987 the law requires that the following persons be notified and allowed the opportunity to protest. If the crime occurred prior to the September date, the Board may, and usually does, grant notice to protest to the following:

a. victims who have filed impact statements; and

b. victims who have filed with the Board a written request that they be notified when parole is considered. (It is seldom such persons choose to be notified in order to help an offender get out).

A protest from anyone can result in the case being sent back to the panel to reconsider and re-vote the case. A protest, while not an unusual problem, can indeed be a real problem. There have been many cases where we have had a favorable vote, and then have to go to another interview with the panel to attempt to get the panel to over ride the protest which has been filed. In the case of *Johnson v. Keene,* 110 F.3d 299 (5th Cir. 1997***) a major*** issue in that case involved a challenge to the whole arena of rules regarding parole protests. In *Johnson* the 5th Circuit ruled that since under the Texas statute there is no "reasonable expectation of a liberty interest" no due process applies to the granting of parole, and the inmate has no right to know who protested nor what the contents of that protest included. If no protests are filed, or if a protest is filed and overcome, then the offender is processed and paroled.

How To Approach A Parole Presentation For A Death Case Where Life Was Imposed

When representing someone in a parole matter keep in mind that in Texas the Board members do not have to interview or interact with the inmate except where the action is an application for clemency of a death penalty under Board rule 143.43. In that case, the board chairman will appoint a board member to conduct an interview with the offender.[4] Under normal conditions, most inmates do not get to have face to face interaction with a board member. Under the statute, Art. 508.153 (a) (2) a representative of the victim will be granted a face to face interview with the board. In general, most board members will grant a representative of the inmate a similar opportunity to appear before at least one board members, however, there are a number of board members whose policy is to not grant such interviews. (See Art. 508.082 Tx. Gov't Code).

We suggest a well written and indexed presentation be sent to be board at least prior to the file arriving at the particular parole jurisdiction where the case will initially be voted. If the representative making the presentation is a lawyer, then that lawyer must comply with the requirements of Sec. 508.083 through 508.085 of the Gov't Code. This means the lawyer must register with the parole division as one who will be doing parole work, and must file a fee affidavit. At the end of the year the lawyer must file an annual summary of his parole board activity with the agency. The penalties for failure to meet these terms and conditions are found in § 508.086 Tx Gov't Code.

It is suggested that the argument presented in the written presentation not exceed 15 to 20 pages, however, well indexed exhibits or attachments can extend the overall presentation to far more than 20 pages. Our experience is that the more concise the presentation the more likely it is to get serious attention from board members.

The board office where the initial vote will take place should be contacted, and the lawyer should express to that board member his/her desire to be allowed to make a face to face presentation. It is our practice to have two or three family members attend this interview with any lawyer from our office.

What Happens If a Request for a Face-To-Face Meeting is Refused?

In our office, if we are refused an interview with a board member, we do a short video(15 to 20 minutes is a good time frame) that includes a summary of the argument by the lawyer, and comments by family members or loved ones. The point is to try to set out the argument, and to let the board understand and see what kind of family is involved.

Another argument for use of the video is that other board members after the initial vote might also take the time to review the contents of the video.

One representing a life sentence before a parole board should continue to attempt to contact board members by phone if there is a refusal to grant a face-to-face interview.

DAVID P. O'NEIL

Dave O'Neil is a 1979 graduate of St. Mary's Law School. In 1973 he entered the United States Marine Corps, where he served as an infantry officer and then a lawyer, until his retirement at the rank of Lt.Col in 1994. In 1987, he obtained an LL.M. at the U.S. Army Judge Advocate General's School. From 1995-2000, he served as the Trial Services Director, State Counsel for Offenders, Texas Department of Criminal Justice. He has served as an adjunct professor at Sam Houston State University, College of Criminal Justice, where he also served as a full-time Visiting Assistant Professor in the 2000-2001 academic year. In 2000, O'Neil also became associated with the law firm of Habern, O'Neil, & Buckley , which is not a partnership. He is a Co-Chairman of the TCDLA Parole and Sentencing Committee, and a past president of the Walker County Bar Association.

WM. T. HABERN

Bill Habern is a 1972 graduate of the Texas Tech Law School. During the early 1970's he was one of the first to join the public defender program at the Texas Prison. He opened his own practice in the Huntsville area in 1975 specializing in post conviction, parole, prison, and sentencing issues. He was executive director of the Texas Criminal Defense Lawyers Project in 1979-80. In early 1980 he was court appointed to the defense team which successfully defended Eroy Brown, a prison inmate charged with killing a prison warden and farm major. Habern served many years as a member of the T.D.C.L.A. committee on prisons and parole. He is past Vice Chairman of the N.A.C.D.L.'s

federal sentencing committee. Presently he is Chairman of the T.D.C.L.A. Parole and Sentencing Committee. Habern is the author of a number of articles and outlines dealing with prison, parole, and sentencing issues. He is a regular seminar speaker on topics dealing with parole and prison issues. The firm has offices in both the Huntsville area (Riverside), and Houston, Texas.

[1]) This paper was presented to a capital murder seminar in Corpus Christi, Texas in the Fall of 2001.

[2] Attached as Exhibit 1 are the most recent results of parole approval on capital murder life sentences. The outcome is absolutely outrageous.

[3] *See* Bruce Tomaso, *McDuff's Deeds Leave Dark Legacy - He Killed after Parole,* Dallas Morning News, Nov. 16, 1998, at 1A.

[4]) Board rule §143.43 (d) affords a condemned offender the opportunity to equest an interview with the board by written application. Section (e) of that rule limits those who may be present to only a board member, the offender, and TDCJ staff. No defense lawyers are allowed under these rules.