

Texas parole law and the dp jury

Mark George deals with what the jury aren't allowed to know about

In the 1994 decision in *Simmons v. South Carolina* 512 U.S.154 the Supreme Court held that because in a capital case in S.Ca. the only alternative to a death sentence is a life sentence without the possibility of parole, it violates a defendant's right to 'due process of law' under the 14th amendment to the US constitution not to inform the jury that a life sentence means life without possibility of parole. In Texas, by contrast, a life sentence does permit of the possibility of parole but not until the prisoner has actually served at least 40 years. Tex. Code Crim. Proc. Ann., Art.42.18 s.8(b)(2).

In 1997 the Supreme Court heard the case of *Brown v. Texas* 118 S.Ct. 355. It was clear that the Court was deeply unhappy at the situation prevailing in Texas where the Courts had consistently denied a defendant the right to have the jury instructed as to the fact that parole would only be granted after a minimum of 35 years as it was at that time. The Court was very conscious of the apparent conflict between its decision in *Simmons* and the practice in Texas, but the Court's unease was all the greater for contrasting the position with a non-capital case in Tx. where a jury *would* be informed as to the parole provisions. Justice Stevens observed that "the Texas rule unquestionably tips the scales in favor of a death sentence that a fully informed jury might not impose."

The extent to which jurors are likely to misunderstand the realities of a life sentence are vividly displayed by the results of a survey of public opinion conducted in S. Carolina by the University of South Carolina's Institute for Public Affairs. It is apparent that the S. Carolina Penal Code is not required bedtime reading throughout the State. The survey conducted shortly before *Simmons's* trial showed that only 7.1% of all jury-eligible adults who were questioned firmly believed that an inmate sentenced to life imprisonment in S. 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 than 30 years. The importance of these misconceptions is highlighted by the fact also revealed by the survey that more than 75% 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.

The Texas Court of Criminal Appeals undertook a comprehensive discussion of *Simmons* as it related to the law in Texas in *Smith v. State* 898 S.W.2d 838 (Tex. Cr. App. 1995). The Court in *Smith* pointed out (at page 846) that parole is traditionally not a matter for jury consideration in a Texas capital murder trial. The Court further, "absolutely reject[ed]" the suggestion that *Simmons* had been extended to parole eligible defendants. *Smith*, 898 S.W. 2d at 848.

In a number of more recent decisions of the Texas Court of Criminal Appeals, the Court has rejected further attempts to invoke the assistance of *Simmons*. In *Griffith v. State* 983 S.W.2d 282 the Court held that the required instruction... "[was] appropriately refused by the trial court" relying on the case of *Smith* (above), and also referring to the cases of *Shannon v. State* 942 S.W.2d 591,594 (Tex. Cr. App. 1996) and *Broxton v. State* 909 S.W. 2d 912,918-919 (Tex. Cr. App. 1995). In *Jackson v. State* 992 S.W.2d 469 (Tex. Cr. App. 1999) the Court declined "the appellant's invitation" to revisit the previous decisions of the Court in this area saying, "As we explained in *Shannon* (above), "since parole is not a proper area of inquiry in Texas capital cases,...the judge does not abuse his discretion on denying [voir dire] questions pertaining to this topic." The Court of Criminal Appeals summarily rejected identical arguments in *Ladd v. State* 3 S.W.3d 547 (Tex. Cr. App. 1999) and *Busby v. State* 990 S.W. 2d 263 (Tex. Cr. App. 1999). Texas is in fact now the only State which has a life sentence with parole as an alternative to death but which does not instruct

its juries to this effect. Until it changed the law in 1993 N. Carolina was in a similar position to Texas. Now it requires trial courts to instruct capital sentencing juries concerning parole eligibility.

The Supreme Court has recently reaffirmed its decision in *Simmons* in the case of *Shafer v. South Carolina* 121 S.Ct. 1263. It seems likely that this case will now be added to the armoury of those lawyers in Texas who have previously sought to rely on *Simmons*. Whilst there is no more reason to think that the Texas Court of Criminal Appeals will be any more amenable to arguments that the rule in *Simmons* and *Shafer* can be applied to those who are parole eligible, however unlikely an event that may in

reality be, there may be some mileage in the argument that the reason that *Simmons* and now *Shafer* should be applied to Texas defendants is not because the rules for those who are parole eligible should necessarily be the same for those who are not, but that the point about giving a jury an instruction about the parole provisions is to prevent a jury from imposing a sentence of death because they are in ignorance of what a life sentence will in reality mean. To the extent that Texas juries, just like S. Carolina ones, sentence capital defendants in ignorance of what a life sentence would actually mean in terms of time to be served, the position is the same in Texas as in S. Carolina and the rule in *Simmons* and *Shafer* should apply.

It is clear from the transcript that the jury in *Simmons* imposed the death penalty because they were worried that the defendant might eventually be paroled. After deliberating for an hour and a half they sent a note to the judge asking the question "does the imposition of a life sentence carry with it the possibility of parole?" The jury were then instructed by the judge that they were not to consider the question of parole or parole eligibility and that this was not a proper consideration for them as the jury. 25 minutes later the jury returned with a sentence of death.

The same situation occurred in *Shafer*. In that case the jury, having been in retirement for almost 3 hours, sent a note to the judge asking if there was "any remote chance" of parole. In spite of repeated requests from *Shafer's* counsel that the judge should tell the jury what the South Carolina Code actually says about the meaning of a life sentence, the judge's response was to instruct them that "parole eligibility or ineligibility is not for your consideration." With that unhelpful instruction, which probably left the jury believing that *Shafer* would be paroled if given a life sentence, ringing in their ears, the jury then sentenced *Shafer* to death. It is clear that in both cases the jury's decision to vote for death was strongly influenced by the fact that they believed that this was the

In Nebraska, for example, although 80.4% of the people supported capital punishment in the abstract, only 51.6% preferred the death penalty when the alternative was life imprisonment when the defendant would be ineligible for parole for 25 years.

only way to be sure that the defendant would never be released. It also seems reasonable to conclude that in both cases, the jury might well have voted for a life sentence if they had been reassured that, in S. Carolina at least, a life sentence does not carry with it any prospect of parole. The Court in *Simmons* noted also that in *Gardner v. Florida* 430 U.S. 349 (1977) a plurality of the Court explained that sending a man to his death "on the basis of information which he had no opportunity to deny or explain" violated fundamental notions of due process.

There is no indication in any of the reports of the above mentioned Texas cases that the jury actually asked a similar question to that which the juries in *Simmons* and *Shafer* had asked. That is not to say however that none of those juries which voted for death would have voted for life if they had been informed as to the truth about parole eligibility. As the Court observed in *Gardner v. Florida* there is something fundamentally wrong about sentencing a man to death on the basis of a misconception as to when he might be released if given a life sentence instead.

In *Brown v. Texas* (above) the Supreme Court noted that poll data from various States supported the conclusion that full information would have an impact on juror's

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decision making. In Nebraska, for example, although 80.4% of the people supported capital punishment in the abstract, only 51.6% preferred the death penalty when the alternative was life imprisonment when the defendant would be ineligible for parole for 25 years. The data submitted showed that support for the death penalty dropped in each State when life imprisonment was presented as an alternative, when the defendant would be parole ineligible for 25 years. In Arkansas support for the death penalty fell from 77% to 62%, from 64% to 45% in Virginia and from 75% to 53% in Georgia when the alternative to death was a life sentence without parole for at least 25 years. Not surprisingly, these figures fell even more when the period of parole ineligibility was increased even further. Interestingly, in Kansas support for the death penalty fell to the same level (49%) when people were presented with the alternative of life without parole or life with 40 years of parole ineligibility. It is apparent that there comes a time when the prospect of parole is so remote, and the released defendant would be so enfeebled by advancing old age that people recognise that they can no longer be regarded as a risk to society.

In spite of the position that the Texas courts have enunciated, as a matter of practice, it may be possible to persuade the state attorney that the criticism of the position in Texas as set out in *Brown v. Texas* (above) coupled with the re-affirmation of the rule in *Simmons v. S. Carolina* and *Shafer* is such that to deny a defendant the right to have the jury truthfully informed as to the position regarding parole eligibility is to potentially

hand to a defendant a needless appeal point and that it is therefore wiser in all the circumstances to allow the instruction to be given. Even so, as a matter of tactics, some defence attorneys will decide that it is not actually in the interests of a particular defendant to let the jury have this information after all. The rationale behind this point of view is that if the jury know that there is a prospect, however remote, that the defendant may one day be released and that when he is released he will still represent a danger to society in general, they are more likely to vote to kill him. This argument, for which the behaviour of the juries in both *Simmons* and *Shafer* stands as most eloquent testimony may nonetheless have lost some of its force now that Texas has increased to 40 years the minimum time that must actually be served before a life prisoner becomes eligible for parole. Nonetheless, the fears of a community and the ease with which they can allay those fears by passing a death sentence cannot be easily dismissed.

Whatever tactical decisions may be taken by the defence lawyers about informing a Texas jury about the true meaning of a life sentence, there does not seem to be any justification for refusing to allow the jury to be so informed, should the defence ask for such an instruction. Not only would this bring the position in capital cases into line with non-capital ones, it would also surely be more compatible with the due process guarantees of the 14th amendment.

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