HOUSE JOURNAL

EIGHTY-THIRD LEGISLATURE, SECOND CALLED SESSION

PROCEEDINGS

FOURTH DAY — THURSDAY, JULY 11, 2013

The house met at 2 p.m. and was called to order by the speaker.

The roll of the house was called and a quorum was announced present (Record 30).

Present — Mr. Speaker; Allen; Alonzo; Alvarado; Anchia; Anderson; Ashby; Aycock; Bell; Bohac; Bonnen, D.; Bonnen, G.; Branch; Burkett; Burnam; Button; Callegari; Canales; Capriglione; Carter; Clardy; Coleman; Collier; Cook; Cortez; Craddick; Creighton; Crownover; Dale; Darby; Davis, J.; Davis, S.; Davis, Y.; Deshotel; Dukes; Dutton; Elkins; Fallon; Farney; Fletcher; Flynn; Frank; Frullo; Geren; Giddings; Goldman; Gonzales; González, M.; Gonzalez, N.; Gooden; Guerra; Guillen; Gutierrez; Harless; Harper-Brown; Herrero; Hilderbran; Howard; Huberty; Hughes; Hunter; Isaac; Johnson; Kacal; Keffer; King, K.; King, P.; King, S.; King, T.; Kleinschmidt; Klick; Kolkhorst; Krause; Kuempel; Larson; Laubenberg; Lavender; Leach; Lewis; Longoria; Lozano; Lucio; Márquez; Martinez; Martinez Fischer; McClendon; Menéndez; Miles; Miller, D.; Miller, R.; Moody; Morrison; Muñoz; Murphy; Naishtat; Nevárez; Orr; Otto; Paddie; Parker; Patrick; Perez; Perry; Phillips; Pickett; Pitts; Price; Raney; Ratliff; Raymond; Reynolds; Riddle; Ritter; Rodriguez, E.; Rodriguez, J.; Rose; Sanford; Schaefer; Sheets; Sheffield, R.; Simmons; Simpson; Smith; Springer; Stephenson; Stickland; Taylor; Thompson, E.; Thompson, S.; Toth; Turner, E.S.; Turner, S.; Villalba; Villarreal; Vo; Walle; White; Workman; Wu; Zedler; Zerwas.

Absent, Excused — Eiland; Farias; Farrar; Hernandez Luna; Oliveira; Sheffield, J.; Smithee; Turner, C.

The speaker recognized Representative Dutton who offered the invocation.

The speaker recognized Representative Lozano who led the house in the pledges of allegiance to the United States and Texas flags.

LEAVES OF ABSENCE GRANTED

The following member was granted leave of absence for today because of family business:

C. Turner on motion of Raymond.

The following member was granted leave of absence for today to attend a funeral:

Eiland on motion of Raymond.

The following member was granted leave of absence temporarily for today because of important business:

J. Sheffield on motion of Burkett.

The following member was granted leave of absence for today because of personal business:

Farias on motion of Raymond.

The following members were granted leaves of absence for today because of important business in the district:

Farrar on motion of Moody.

Hernandez Luna on motion of Perez.

Smithee on motion of Ritter.

The following member was granted leave of absence for today because of illness:

Oliveira on motion of Perez.

CAPITOL PHYSICIAN

The speaker recognized Representative Dukes who presented Dr. Lynn Stewart of Austin as the "Doctor for the Day."

The house welcomed Dr. Stewart and thanked her for her participation in the Physician of the Day Program sponsored by the Texas Academy of Family Physicians.

HCR 7 - ADOPTED
(by Larson, et al.)

Representative Larson moved to suspend all necessary rules to take up and consider at this time **HCR 7**.

The motion prevailed.

The following resolution was laid before the house:

HCR 7, In memory of William Douglas Jefferson of San Antonio.

HCR 7 was read and was unanimously adopted by a rising vote.

On motion of Representative McClendon, the names of all the members of the house were added to **HCR 7** as signers thereof.

INTRODUCTION OF GUESTS

The speaker recognized Representative Larson who introduced family members of William Douglas Jefferson, father of Chief Justice Wallace Jefferson.

(J. Sheffield now present)

(Kacal in the chair)

HCR 11 - ADOPTED
(by Frullo)

Representative Frullo moved to suspend all necessary rules to take up and consider at this time **HCR 11**.

The motion prevailed.

The following resolution was laid before the house:

HCR 11, Congratulating former state representative Carl H. Isett on his promotion to the rank of captain in the U.S. Navy Reserve.

HCR 11 was adopted.

On motion of Representative Lewis, the names of all the members of the house were added to **HCR 11** as signers thereof.

HR 23 - ADOPTED
(by Raymond)

Representative Raymond moved to suspend all necessary rules to take up and consider at this time **HR 23**.

The motion prevailed.

The following resolution was laid before the house:

HR 23, In memory of Kristine Elizabeth Meza and honoring the Kristine Meza Foundation.

HR 23 was read and was unanimously adopted by a rising vote.

On motion of Representative Raymond, the names of all the members of the house were added to **HR 23** as signers thereof.

INTRODUCTION OF GUESTS

The chair recognized Representative Raymond who introduced family members of Kristine Elizabeth Meza.

HR 63 - ADOPTED
(by Guillen)

Representative Guillen moved to suspend all necessary rules to take up and consider at this time **HR 63**.

The motion prevailed.

The following resolution was laid before the house:

HR 63, Commemorating the 120th anniversary of the founding of the T. R. Keck and Sons hardware store and lumberyard in Cotulla.

HR 63 was adopted.

HR 61 - ADOPTED
(by Giddings, White, Allen, S. Turner, and Bell)

Representative Giddings moved to suspend all necessary rules to take up and consider at this time **HR 61**.

The motion prevailed.

The following resolution was laid before the house:

HR 61, Commending Dr. George C. Wright on his 10 years as president of Prairie View A&M University.

HR 61 was adopted.

On motion of Representative Dutton, the names of all the members of the house were added to **HR 61** as signers thereof.

MAJOR STATE CALENDAR
HOUSE BILLS
SECOND READING

The following bills were laid before the house and read second time:

SB 2 ON SECOND READING
(Kolkhorst, Moody, Carter, and P. King - House Sponsors)

SB 2, A bill to be entitled An Act relating to the punishment for a capital felony committed by an individual younger than 18 years of age.

SB 2 was considered in lieu of **HB 4**.

(Speaker in the chair)

LEAVES OF ABSENCE GRANTED

The following members were granted leaves of absence for the remainder of today because of important business in the district:

Bell on motion of E. S. Turner.

N. Gonzalez on motion of Ratliff.

Márquez on motion of Ratliff.

SB 2 - (consideration continued)

SB 2 - REMARKS

REPRESENTATIVE KOLKHORST: I would like to first thank Abel Herrero and Criminal Jurisprudence for their work on this bill. I'd like to thank the joint authors, Joe Moody, and Stefani, and Matt Schaefer and others of the committee. I think that Chairman Herrero has done a great job of bringing in expert witnesses that have really made us look at this bill, and while we have some differences, I think that after the bill was passed out—and I want to thank Representative Canales for his making us stretch and grow and look and say that this is not the final answer. But to make this constitutional after the Supreme Court's decision of *Miller v. Alabama*, this bill seeks to reconcile the Texas capital punishment sentencings for 17-year-olds. The progression has been that through the years the

Supreme Court, starting in 1989, has offered rendering, and the most recent being the *Miller* decision, which says you cannot automatically give someone under the age of 18 life without parole without having some options. And so, this takes life without parole out of the picture.

I know that Representative Schaefer had offered an amendment last special session that I left to the will of the house that would put life without parole as an option. We have discussed it with the committee, and I believe that the cleaner way, and part of that was some of the amendments that were attempted in the third reading during the last special session, made me look and say those that are sentenced to life without parole when they were 17, that are in prison right now that have exhausted all of their appeals processes, would have a very hard time commuting their sentences. With the way **SB 2** is written, I believe they have a real chance of commuting. The governor can commute those sentences, and to me, I think that's important in light of the *Miller* decision, which is not retroactive, and so with that, I appreciate Representative Schaefer's standing down on adding life without parole, and I think this is the way to go. I yield to my colleague, Representative Canales.

REPRESENTATIVE CANALES: The senate bill and the house bill, are they exactly the same?

KOLKHORST: Yes, sir, they are.

CANALES: Okay. And I appreciate your hard work on this and your diligence, and you know I still disagree, but it is better than what we had before, and I'll give you that. Let me ask you a question—does your bill in any form or fashion take into account mitigating circumstances?

KOLKHORST: Representative Canales, let me first say I appreciate what you have looked at in mitigating circumstances. And the bill that you filed, **HB 10**, it did two things; if I could speak to your bill and then I'll answer that question. Your bill, **HB 10**, would have made life with parole at 30, and then it also made mitigating factors to consider life without parole. This bill, while it takes away life without parole, does not have mitigating factors because we're not adding life without parole.

CANALES: And I understand that, I guess my question becomes, and this is my belief—the court said in *Miller v. Alabama* if you're going to have life without parole, you need to have a range of punishment. So, what you're saying is because we don't have life without parole, life with parole, beginning with the option for parole at 40 years, that doesn't need to take into account mitigating circumstances, because life without parole is off the table?

KOLKHORST: That is correct. And could I for a second just read from Justice Kagan when she said, "State law mandated that each juvenile die in prison even if a judge or jury would have thought that his youth and its intended characteristics, along with the nature of his crime, made a lesser sentence, for example, life with the possibility of parole, more appropriate."

CANALES: And I've read the opinion and I'm aware, and I see what you're doing, and I see what your bill does, and I see your logic behind saying we don't need mitigating circumstances because we don't have life without parole. So, getting past all that so we don't waste the chamber's time, my question then becomes to you, why wouldn't we want to take into account mitigating circumstances?

KOLKHORST: Why wouldn't we?

CANALES: Why wouldn't we want the jury to have that option?

KOLKHORST: I do think through the entire process that you go through in a capital murder trial, being the most heinous of our crimes, as we look in the Penal Code, I think that mitigating factors are considered throughout. All this bill considers is the sentencing option, which before *Miller v. Alabama*, and the progression, as you remember, when we had *Roper*, and then we had *Graham*, here's the point being, at one point a 17-year-old, which is considered an adult in Texas courts, had two options: the death penalty or life without parole.

CANALES: And thank God we've come past that.

KOLKHORST: Then, when we fixed the law to say you couldn't give the death penalty to anyone under the age of 18, and we fixed that, then it was an automatic—if you were convicted of the crime, and you were 17 years old, of capital murder, it was an automatic life without parole, so you were in prison forever. And as Justice Kagan wrote in hers, that in effect acted as a death sentence.

CANALES: Sure, and you read the opinion probably as many times as I have, and the reason that they've got a problem with the sentences is because, and they reiterate over and over, that youth have a diminished capacity to understand what they're doing. And not only that, Representative, they have the greatest chance for rehabilitation. And so, my question becomes, so the jury finds someone guilty, and then they leave, they walk out of the courthouse, they've got no more discretion whatsoever. So basically, at that point, it's 40 years—

KOLKHORST: That is true, and that is what we decided in a bill in 2009—

CANALES: Is this because you or the rest of the members in the Criminal Jurisprudence Committee don't trust Texas jurors? Because I trust them. I know that in my district if somebody committed a capital offense, if they shot a police officer, they'd get the max in my district. They would. And so, what I'm saying is, are the people that are proponents of this legislation saying we don't trust Texas juries to make the right decision?

KOLKHORST: I think that we're here today to set policy—

CANALES: And the policy that we're setting is that Texas juries aren't smart enough or can't take into consideration the facts that are before them to actually sentence somebody. That's what the law that we're—your bill and the senate bill ostensibly says Texas juries, the legislature doesn't think Texas juries are bright enough, smart enough to think for themselves to sentence somebody.

KOLKHORST: So, you're saying that maybe, then, we're not trusting them enough to find them guilty?

CANALES: No, that's not what I'm saying.

KOLKHORST: I would race to that conclusion, but I'm not going to. And so, we do trust Texas juries here—there is lots of leeway. And certainly, we trust DAs when they bring forth a charge of capital murder, being the highest of high crimes.

CANALES: What is it about Texas juries that precludes you or makes you want to file a bill or be a proponent of a bill that takes their ability to consider mitigating factors in sentencing options away from a jury? Are you scared that they won't do the right thing?

KOLKHORST: I would say this, if you want to consider a lesser sentence, that's what we come to the legislature to do every session. And life with parole has been set by this body, this august body, at 40 years, 40 hard years.

CANALES: That's life—

KOLKHORST: In 2009, hold on a second, I am going to answer your question. In 2009, that is what this body decided again, and put it in Senator Hinojosa's bill.

CANALES: So this body decided that 40 years was life, is that what you said?

KOLKHORST: Life with parole is established at 40 years.

CANALES: So now we've gone from life without parole to life. So the options now are life or life?

KOLKHORST: No, it used to be what we call LWOP, which is life without parole, right? And then life, a sentence with the possibility of parole at 40 years, which we leave to the Board of Pardons and Paroles.

CANALES: So when somebody, under this bill, they get out, let's just say by the time they're charged and convicted, they were 17 years old, they're 57 years old. What opportunities are they going to have to regain society after spending, you know, six decades, or four decades—

KOLKHORST: Ten years is a decade, so that would be four decades.

CANALES: They'd be 57. And what is—

KOLKHORST: Yes. With you showing such great concern to those offenders, let's talk about the victims who have zero life left.

CANALES: Representative, I'm asking you a question—

KOLKHORST: We have had hours of conversation about this, Terry, and I know you and I differ on this—

CANALES: We can both talk all day, but I'm asking you to be respectful of my questions. Can you be respectful of my questions?

KOLKHORST: Absolutely, I have stood up here and answered your questions for three weeks now about this bill. This is not a bill that I revel in carrying. I do not like that we have a dead victim, I do not like that we have families that have had—

CANALES: Neither do I. You know what I don't like? I don't like this chamber passing laws that are unconstitutional. That's what I don't like. If that's what you want to be a proponent of, I'll let you do it. Thank you, Representative.

KOLKHORST: Do you serve on the Supreme Court of the United States?

REPRESENTATIVE DUTTON: Madam Chair, let me ask you—in two areas, I have a problem with this bill. One of which has to do with, as I think we talked a little bit about in the last special session, about Texas' law of parties and how that would be applied under this bill related to juveniles. And one of the reasons it seems to me that we are having to change the law based on *Miller* is because *Miller* says to us that juveniles tend to have a diminished capacity for reasoning. Those are my words, not *Miller*'s words, but that's essentially what it is, wouldn't you agree?

KOLKHORST: And I think that the decision by *Miller* based, and it reiterated from *Roper* and *Graham*, which the dissenters of the *Miller* case being four justices, said that those justices that agreed and confirmed *Miller v. Alabama* said that, that is what *Graham* says to me more. It talks about the diminished capacity of a juvenile.

DUTTON: And so, if you recognize that, if you start with that as the premise for this bill, then does it not follow that if we have a law like the law of parties, which allows again this juvenile, which we recognize has a diminished capacity for reasoning, to now be caught in a situation where they were along for the ride, but somehow or another now got tagged with the crime. And that's what bothers me, because it seems to suggest otherwise, that while we recognize they have a diminished capacity, but somebody didn't influence them to get to the point where they were a non-active participant in the crime, they're not the person who actually did the shooting. And what I'm asking is, based on that, wouldn't it be far better if we didn't apply this to juveniles who were convicted solely on the basis of the law of parties?

KOLKHORST: So, I would answer that question with, I know that law of parties has been debated a lot on this particular floor. This bill, **HB 4**, **SB 2**, does not specifically speak to the law of parties.

DUTTON: That's correct, I understand that.

KOLKHORST: And while I know it's, I think it's chapter 7.02 talks about law of parties, and my estimation in looking at *Graham v. Florida*, which reiterated that a juvenile, will not allow a juvenile to be sentenced to life without parole for a non-homicide offense. And *Graham* cleaned that up, that happened to be someone who was carrying cocaine, who could've gotten life without parole, and so, as we move forward, I know law of parties is a very difficult issue—

DUTTON: Particularly in Texas. I mean, you're aware of the way Texas applies the law of parties, which is substantially different than other jurisdictions.

KOLKHORST: I do, and how culpable someone is. So, Representative Moody and I were discussing a case in Harris County where a man was shot while two 17-year-olds, as he was telling me, were holding down the son and the wife. And how culpable were those two 17-year-olds to that particular case? Those are things that I think juries and DAs have to decide. And I will tell you that my heart tugs at law of parties. I understand it, I am respectful of it, I don't have the answer to it, but Mr. Canales just spoke very, I would say, vigorously about trusting our juries, and that is sometimes what we have to do.

DUTTON: Well, I want to ask you about that too, because my opinion's a little bit different.

KOLKHORST: Please do.

DUTTON: I was waiting, I see your co-counsel was giving you some additional—

KOLKHORST: Yep, I've got tons of stuff.

DUTTON: I assume it's not in support of my theory, but that's okay. Let's talk about the jury part of this. In very few crimes in the State of Texas does this legislature become the jury. Would you agree with that?

KOLKHORST: This legislature?

DUTTON: Yes, this house becomes the jury.

KOLKHORST: You know, if I look through the Penal Code, I think we set mandatory minimums, we set ranges, we set—we're not the jury, but we set policy.

DUTTON: Right, but aren't we really—I guess I differ a little in that it's not a policy if we're deciding the terms. The policy would be the mitigating factors, for example, that might be considered. But the policy in terms of numbers, when we start fixing numbers to sentences, we in effect become the jury.

KOLKHORST: We give guidance to the sentencing based on the severity of the crime. We do. That is something that legislatures, not just this legislature, but legislatures all over the United States, which if you read the dissent on the *Miller v. Alabama*, that is part of why four justices dissented.

DUTTON: Right, but when you talk about the severity of the crime, none of us in here get an opportunity to hear the evidence. We don't hear any of that. All we can do is provide, as I think you said a moment ago, some guidance and counseling for a jury to make the ultimate determination first on guilt or innocence and then secondly on punishment. Except it seems to me that now what we're saying is that we are going to become the jury of peers for the person who is convicted, such that we won't let them be considered for parole until they serve at least 40 years.

KOLKHORST: Let me answer that in a couple of ways. So 14 to 16-year-olds right now; if they are transferred from the family courts, it is a mandatory life with parole at 40. The attempt of **SB 2** is to mirror what we already do in that particular instance. I do not stand before you for a moment, Harold, to say that we should not, in the future, look at this. And if I could read you a footnote from *Miller v. Alabama* on page 20, the states note that "26 states and the federal government make life without parole the mandatory or mandatory minimum punishment for some form of murder, and would apply the relevant provisions to 14-year-olds." And it goes on to talk about that—more than half of the states do have mandatory minimums.

DUTTON: I understand, but I guess my—the only reason I'm raising this is because I think we do need to have the discussion involving the legislature telling the judiciary in terms of sentencing other than providing some guideposts. For example, I think juries ought to be empowered to make the ultimate decision regarding guilt or innocence, I think you'd agree with me. We would never sit in this chamber and decide that well, we want to figure out a scheme by which we could determine guilt or innocence. And so, we wouldn't do that, but then we turn around on the other side and say that, well, we think this crime is so bad that we think the person ought not to be eligible for parole if they're convicted under this statute until they've served at least 40 years.

To me, there is a contradiction that exists in that, such that we either have a policy where we rely and trust our judicial system, and particularly that system which relies on jury determinations—it seems to me that those are so contradictory, to make it appear as if this legislature has decided that we ought to be mad at somebody. Because that's really what it amounts to, is that we are saying that we're mad at them, and so we're going to tell the whole system of jurisprudence that we have to never consider this person's status, no matter how significantly it may have changed, but don't consider them until after 40 years. I think that's a discussion that I'm inviting in this bill because it's the only one we've got before us. I'd love to have it in terms of everything in the Penal Code, but Lois, this is the only bill I've got. And so, it just bothers me that now we're going to compound it by adding more people to it. And let me just point out one other thing to you. Out of the cases, I think there's about 18 cases we have right now, are you aware that 13 of them involve convictions based solely on the law of parties?

KOLKHORST: I know that we've seen a lot of those statistics, but I don't think I've seen that one.

DUTTON: Okay. That's what's been shared with me, I think that's correct. But again, I'm going back to, and I'm not flip-flopping with you, but the thing that bothers me most is this application of the law of parties to juveniles. Particularly given the fact that we have already established and recognized that juveniles, on the one hand, suffer from some diminished capacity to reason, but we allow mandatory sentences that are minimum sentences, like 40 years, before we can—let me ask how it works, though, in practice, and maybe you can help me,

or your counsel there can. A juvenile is convicted under the law of parties, and now the sentencing phase begins. What happens? Is the jury told that, first of all, this person is not going to be eligible for parole until having served 40 years?

KOLKHORST: Harold, as I understand it and have seen it work in my district, I do believe that the jury is instructed on what parole eligibility means. And I would say that when we talk life with parole at 40, we sometimes consider that that person is going to get out at 40. The Board of Pardons and Paroles may not even let that person out at 40 depending on what their decisions are and some of the factors that enter in.

DUTTON: So, is the jury told then, when they're considering after conviction that life without parole means that this particular juvenile will not be eligible for parole until after having served a minimum of 40 years?

KOLKHORST: I believe that the jury will be instructed of that, and this is a mandatory sentence. Prior to this bill, and prior to *Miller v. Alabama*, a 17-year-old that was tried and convicted and found guilty of capital murder had no other option but life without parole. They would be in there forever, and we have 17-year-olds, they're no longer 17, we have offenders in our system that are now serving life without parole.

One of the thoughts that I had between the last special session, where Mr. Schaefer offered an option to this bill and said to the juries you can give life with parole or life without parole with a few mitigating factors that follow other parts of our Penal Code, was that I thought about those that are sitting in prison because *Miller* is not retroactive as it's currently written, that—and I talked a lot with the governor's office and the Board of Pardons and Paroles about commutations of sentences. Because, truly, I believe that *Miller*'s decision says you can't, anyone under the age of 18 should not be sentenced to life without parole. And so, in this particular bill, not adding life without parole allows, just like when the *Roper* decision came down and I was told by the chairman of Pardons and Paroles that the governor then asked them to identify those sentences, those that had been sentenced and imprisoned, so that he could commute those sentences. I'm hoping that also happens. Now, maybe that is of little solace, but I will tell you that for those that—and the reason I'm carrying this bill is that I was asked, I did not seek this bill, I was asked by the family of a loved one who had been murdered, and it is a capital murder, that I carry this, because one that was involved was 17 years old.

DUTTON: I think I understand, but let me ask this. Would you be opposed to a jury knowing that life without parole means the person, or life with the possibility of parole means that a person has to serve 40 years, would you be opposed to the jury knowing that during the guilt and innocence phase?

KOLKHORST: I am assuming that they know that.

DUTTON: But I'm talking about during the guilt and innocence phase, though, not during the punishment phase. I don't know that—

KOLKHORST: I think that most jurors would, I would assume, and maybe I'm a different cat here, and I would know. They're given an instruction, they know that life—

DUTTON: Well, but that's in the punishment phase.

KOLKHORST: Right, but jury selection, I'm sure that they get asked those questions. It's a mandatory sentence, Harold, this is not—there are no options on this particular bill.

DUTTON: I see my learned co-counsel back there—the question I guess I'm asking is—

KOLKHORST: Would I take an amendment to this—

DUTTON: No, not an amendment, I'm just wondering if—because what I'm trying to prevent is a jury saying, well wait a minute, if they had told me if I found him guilty it would be 40 years, I might have chosen another sentence because I don't want the juvenile to serve 40 years, because quite frankly, in some people's eyes, 40 years before you're eligible for parole is substantively a life sentence.

KOLKHORST: The magnitude and the seriousness of these cases, as a juror, I cannot imagine that they do not know that it is a—and I'm sure that it will be reiterated by both the state and the defense lawyers that it is a mandatory life with parole. Before it was life without parole, no option. No option.

DUTTON: And finally, let me ask you this, do you know whether or not we have joint trials for juveniles who are charged with the same offense even though some of them may be based solely on the law of parties?

KOLKHORST: Currently, right now?

DUTTON: Yes.

KOLKHORST: I am not aware.

DUTTON: Do you know whether Texas law restricts or prohibits—

Amendment No. 1

Representative McClendon offered the following amendment to **SB 2**:

Amend **SB 2** (house committee report) as follows:

(1) On page 1, line 13, strike "for" and substitute "[~~for~~]".

(2) On page 1, line 14, strike "life" and substitute "for life or for a term of not more than 99 years or less than 25 years".

(3) On page 1, line 17, between "(2)" and "life", insert "for".

(4) On page 2, line 2, strike "life imprisonment" and substitute "either [~~life~~] imprisonment for life or imprisonment for a term of not more than 99 years or less than 25 years".

(5) Strike SECTION 2 of the bill (page 2, lines 9-15), substitute the following appropriately numbered SECTIONS, and renumber subsequent SECTIONS of the bill accordingly:

SECTION ____. Section 1, Article 37.071, Code of Criminal Procedure, is amended to read as follows:

Sec. 1. (a) If a defendant is found guilty in a capital felony case in which the state does not seek the death penalty, the [~~judge shall sentence the~~] defendant shall be sentenced to imprisonment in the Texas Department of Criminal Justice for a term of not more than 99 years or less than 25 years, for life, or for life [~~imprisonment~~] without parole as described by this section and by Section 12.31, Penal Code.

(b) The judge shall impose a sentence of imprisonment for life without parole on a defendant who was 18 years of age or older at the time the capital felony was committed.

(c)(1) The judge or jury shall impose a sentence of imprisonment for a term of not more than 99 years or less than 25 years or a sentence of imprisonment for life on a defendant who was younger than 18 years of age at the time the capital felony was committed. Notwithstanding the exception language provided by Section 2(b), Article 37.07, the determination of whether the judge or jury will assess punishment under this subsection is governed by Section 2(b), Article 37.07.

(2) Evidence may be offered by the state and the defendant as to any matter the court considers relevant to the sentence, as governed by Section 3, Article 37.07, including evidence of the defendant's background or character and evidence of the circumstances of the offense. In determining the appropriate sentence, the judge or jury shall consider any relevant mitigating factor or circumstance, including any factor or circumstance that may have contributed to the commission of the offense.

SECTION ____. Section 508.145(b), Government Code, is amended to read as follows:

(b)(1) An inmate serving a life sentence under Section 12.31(a)(1), Penal Code, for a capital felony is not eligible for release on parole until the actual calendar time the inmate has served, without consideration of good conduct time, equals 40 calendar years.

(2) An inmate serving a sentence of imprisonment for a term of not more than 99 years or less than 25 years under Section 12.31(a)(1), Penal Code, for a capital felony is not eligible for release on parole until the actual calendar time the inmate has served, without consideration of good conduct time, equals 25 calendar years.

REPRESENTATIVE MCCLENDON: Mr. Speaker and members, if I could just have your attention, please, because this bill is extremely important. I know that Representative Kolkhorst has spent a lot of quality time on this bill, and I want you to know, Lois, that I appreciate the time that you have spent and the work that you have put in to bring yourself up to snuff regarding the juvenile justice system and regarding what is going on with these children, and they are children. We know that there was an omission in previous law that created an uncertainty about how to sentence 17-year-olds convicted of capital felonies where the death penalty is not being sought.

The amendment that I have offers an uncomplicated and improved way of providing a remedy for that omission, which I seriously hope you will consider. I will explain the details, but after I do I would like to say something prior to talking about the amendment. Some of you may not know that I served for 17 years as a juvenile probation officer and administrator in the Bexar County Juvenile Probation Department before I decided I wanted to go into elected office. I can tell you I have seen and I have worked closely with a lot of juveniles in trouble with the law, a lot of dysfunctional families, and a lot of people who have come to help these children. I am well aware that some of the criminal acts that some of them are capable of doing and many of these acts are horrendous. It's perfectly possible that some of them are so tough that they would bite off your ear if they thought they had a reason to do it. This is important because I want you all to hear this.

This sentencing proposal is not soft on crime, but what it does is to serve the central role that juries and judges play in the sentencing process following conviction and provides three penalty options to make the sentence appropriate to the actions of the person charged with the capital felony. This proposal creates three possible sentencing options instead of the two charges now in the bill. Under this proposal, the maximum penalty would be life without parole. The next level would be life with parole. And the next level would be a penalty range of 25 to 99 years, sometimes called indeterminate sentencing by the courts. This would be a more appropriate range of penalties for those offenders who may have been on the scene of the capital felony, but may not have shot the gun or wielded the knife. They would still have criminal responsibility under the law, but their sentencing would be more appropriate to their level of participation in the criminal act.

Let me give you an example. Let me just say your nephew, and think about your nephew. And your nephew gets involved with a bad crowd. Your nephew goes out with this crowd and your nephew wants to be involved with what they're doing, because he wants to be a big man and he's going to make a horrible and a stupid decision. When a group of them go in and they rob a convenience store, but the nephew is chicken and he doesn't go in with them. He sits in the car and he doesn't have a gun and he doesn't have a knife, but he sits in the car because he's chicken, but he wants to be involved with them because he wants to be with them, he wants to be accepted, but he doesn't go in and he's not involved. He still has a responsibility and it's a criminal responsibility under the law, but the sentencing should be more appropriate to their level of participation in the criminal act.

By not requiring a mandatory life sentence upon conviction, and providing three sentencing levels, this means the jury and the judge would maintain a role in having a meaningful sentencing hearing to consider mitigating factors and mitigating circumstances. This provides for a much needed and time-proven check and balance in the administration of criminal justice for juveniles. The eligibility for release on parole has been addressed, for a juvenile defendant will be eligible for parole consideration after 25 years of an indeterminate sentence or 40 years of a life sentence. Basically, that makes 25 years the minimum penalty

upon conviction. This will provide some latitude, taking into consideration how the law of parties in our current law applies to youth who are not directly responsible, but might still be convicted of a capital felony under the law.

There ought not be only a mandatory sentence of life for youths charged with capital felonies when we can offer a choice between a maximum life sentence without parole, life with parole, or a penalty within the range of 25 to 99 years. This is keeping with the constitutional requirement of due process and a fair trial. If we adopt this proposal, we will be able to avoid another trip to the U.S. Supreme Court to interpret the legislation as it is expressly stated in **HB 4** and **SB 2**. And before I move adoption, I will be glad to take a question from my colleague.

CANALES: I want the body to hear—that's the first question. This bill actually provides a range of punishment that is tougher than Ms. Kolkhorst's bill, doesn't it?

MCCLENDON: Yes, it does.

CANALES: This one provides life without parole, doesn't it?

MCCLENDON: Yes, it does.

CANALES: So, if a jury that we trust wanted to give them life without parole, we give them that option, don't we?

MCCLENDON: Yes, we do.

CANALES: But we also give them a range of punishment because the world's not black and white, is it?

MCCLENDON: You're right.

CANALES: There's shades of gray and levels of culpability, is that correct?

MCCLENDON: You're correct.

CANALES: So, what you're bill seeks to do is put the largest range of punishment—which her bill removes—so nobody can claim this bill's soft on crime, can they?

MCCLENDON: No, they cannot.

CANALES: Because this one's actually got a larger range of punishment. And so, but it allows the jury to be a jury, doesn't it? It allows the jury to think about and consider mitigating circumstances and do what their function is. Is that not correct?

MCCLENDON: It's correct, and I just want to—

Amendment No. 2

Representative Herrero offered the following amendment to Amendment No. 1:

Amend Floor Amendment No. 1 by McClendon to **SB 2** (house committee report) as follows:

(1) Add the following appropriately numbered new item to the amendment and renumber subsequent items appropriately:

( ) On page 2, between lines 8 and 9, insert the following:

(c) Notwithstanding Subsection (a)(1) or (b)(1), an individual described under those subdivisions who is adjudged guilty of a capital felony under Section 19.03(a)(1) or (8) shall be punished by imprisonment in the Texas Department of Criminal Justice for life, and the judge shall inform the prospective jurors in the case accordingly.

(2) On page 2, line 15, between "12.31(a)(1)" and the comma, insert "or (c)".

REPRESENTATIVE HERRERO: Members, I've looked at this amendment offered by Representative McClendon and I do see a lot of points that are important after all of the testimony that we received in committee and in reviewing the *Miller v. Alabama* case. And that is that the *Miller v. Alabama* case found that in that situation, a juvenile could not be sentenced to life without parole as the only sentencing that could be administered to this convicted 17-year-old. And in that analysis, part of what the rationale was that there needs to be—that that equated essentially to a death sentence for a 17-year-old. That life without parole meant—equated to a death sentence, which the Supreme Court had previously already found to be unconstitutional in administering a death sentence to a 17-year-old.

What the Supreme Court also said in its ruling was that in considering the sentencing for a 17-year-old, there must be a meaningful opportunity for the 17-year-old to be rehabilitated. And so, in that analysis, it does not say specifically that you cannot have as an option life without parole, but interpretation that many individuals have obtained is the fact that you can have life without parole as an option as long as you have mitigating factors in determining whether or not that 17-year-old deserved that life without parole as a sentence. The Supreme Court says you have to do that because that allows an individual sitting in the jury to determine—or the judge—to determine whether or not the individual being sentenced deserves the harshest punishment available to be given to that individual depending on factors in determining what led to this individual committing the crime, what were the circumstances, and the extent of the crime.

And so, what this amendment does—it offers—it's not soft on crime because it maintains the life without parole for the sentencing option. So for those most heinous crimes, the juror or the judge can determine that this is one individual who deserves the harshest punishment, which is life without parole. But it also takes into consideration other factors—or it takes into consideration factors and also allows other options for the jury in determining whether or not to sentence this individual to the harshest punishment, which is life without parole, but also says we also have to have a sentence of life. So the 17-year-old would first be eligible for parole when that person has served a minimum of 40 years in prison. Then they would determine—the parole board would determine whether or not this individual would be eligible to be released, and if not, they will continue on that sentence of life.

The amendment also offers another option. It says jury or judge, if you find that this was an individual that did not know the crime was going to be committed, was sitting in the vehicle and then was told by the individual that had gone into the store, killed the individual, came back out to leave, they would be able to give them a different sentence other than life or life without parole. Another example would be that you have a 14-year-old who was being used as a prostitute by the pimp and when she turned 17, she finds a circumstance where she ends up killing the individual, taking the money, and fleeing. And in those cases, this amendment would allow the jury or the judge to say we don't believe that that circumstance deserves life without parole, we also don't believe that this sentence, to fit the crime, is life, but instead, at that point the jury could also consider whether we sentence the 17-year-old to 25 years in prison or 99 years in prison. And so, I support this amendment for those positions. Looking at this amendment, I felt that it required an exemption that in those cases where a 17-year-old kills an officer in the line of duty, or where a 17-year-old kills a firefighter in the line of duty, that that individual should be sentenced to life. And that's what this amendment to the amendment does, and I yield for questions.

(Harper-Brown in the chair)

CANALES: So, in looking at Ms. McClendon's amendment, Representative McClendon, looking at your amendment, what your amendment does is it provides life for anybody who murders a police officer in the line of duty or a firefighter.

HERRERO: That's correct.

CANALES: Okay, but it also provides, in the most heinous of circumstances, a sentence that Representative Kolkhorst's bill doesn't, it provides life without parole.

HERRERO: That's correct. For the most heinous crimes, this amendment would reinstate the ability for a jury or a judge to say you deserve the most harshest punishment which is life without parole.

CANALES: Does her bill do that?

HERRERO: This bill that's written and before us does not do that. In fact, it eliminates the option of life without parole and leaves the only option, no discretion to the judge or jury, to only a sentence a 17-year-old in any or all circumstances that are convicted of capital murder are—

CANALES: You are the chair of the Criminal Jurisprudence Committee, is that correct?

HERRERO: Yes.

CANALES: In your opinion, this amendment is tougher on crime, wouldn't it be?

HERRERO: In my opinion, yes.

CANALES: And this would afford a jury the opportunity to sentence somebody to never get out, isn't that correct?

HERRERO: That's correct.

CANALES: But under the bill as written, there's a good chance they're getting out. Isn't that correct?

HERRERO: Under the bill it would be a sentence of life, which again would be eligibility for parole after the person has served 40 years in prison.

CANALES: Okay, and what, basically, this amendment coupled with your amendment does is it allows a jury to take into account and be a jury.

HERRERO: That's right. It gives the jury or the judge, the person sentencing the individual, the ability to have options in determining which sentences are most appropriate and not in violation of cruel and unusual punishment.

CANALES: Representative, why do you think it's important for us to let a jury be a jury and not let the legislature be a jury?

HERRERO: I think it's a fact-case scenario. We cannot anticipate every fact that potentially could exist out there and I think it's best left for a judge or jury, the person actually having heard the evidence and the testimony of the witnesses to determine what the appropriate sentence is and for that reason, that's why I support this amendment.

CANALES: So, the way the bill is written, there are no options, are there?

HERRERO: I'm sorry?

CANALES: So, the way the bill's written, there are no options?

HERRERO: No, the only sentence that a jury or a judge would be forced to give is life.

CANALES: Essentially, the legislature's a jury.

HERRERO: In retrospect, in your analysis, I agree that at this point, we would be, at this point, serving as judge and jury at this moment and determining that for all cases—

CANALES: When we haven't heard—

HERRERO: —would be sentenced to life.

CANALES: When we haven't heard one fact about any of the case. We haven't sat in the case, we didn't hear how it happened, what happened, who was there. We've heard nothing.

HERRERO: That's correct.

CANALES: So, in that point we just have a one-size-fits-all can and this is how it goes. Does that seem like justice to you?

HERRERO: It does not, but then also to add to that, in my review of the *Miller v. Alabama* case, the court was clear that there has to be mitigating factors if you're going to have life without parole, that it is an individual sentence as opposed to a one-fits-all sentence, and so that's why I believe this amendment would help not only be tougher on crime, but also help satisfy the constitutional requirements set forth by the *Miller v. Alabama* case.

CANALES: I know that I believe in life without parole and I think that you do, am I mistaken?

HERRERO: I do as well.

CANALES: Apparently, that's not within the bill as written and I want life without parole on the bill for the most heinous of actors, but it's not as written.

HERRERO: I agree with you that I also want life without parole for the most heinous crimes, but you are correct, as the bill is written it does not include that as an option.

CANALES: And once again, as the amendment stands, we're not acting as a judge or jury—

Amendment No. 2 was adopted.

REPRESENTATIVE MOODY: I just want to walk though a couple of things. We've been debating this in our committee for quite a while now. When I was a prosecutor, and some other people have served as lawyers in criminal trials here, you certify a jury on punishment range. That's something, if it's going to go to the jury, you certify the jury that they're willing to consider the entire range of punishment and so that's what I want to ask you today when you vote on this amendment, and think about the policy that we are setting. Okay, so in a trial, I would ask to consider the low end and the high end and whether they will be able to consider that because if they couldn't, that juror would be struck because they could not consider the full range. I want to ask you the same questions. Policy-wise, if you think 25 years up to the top end is acceptable for capital murder, for someone convicted of capital murder, then you should vote for this amendment.

Currently, in our law today, the 14 to 16-year-olds that are certified as adults, there's an automatic punishment that is 40 years mandatory before they are eligible for parole. That's the law today. Voting for this would widen that out and it would drop that bottom number to 25. So yes, there is life without parole in this amendment, but understand that what we are doing here is dropping the bottom end out. We can think about a bill that was very recently passed, continuous sexual assault of a child. That punishment range, when a weapon is used, is 25 to 99 or life. So what you'd be saying here is that the bottom end punishment for sexually assaulting a child with a weapon and not killing them, you get 25 to 99 or life. And if you kill them, the range would still be 25 to 99 or life and then you can add life without parole at the top. You are shifting that down if this amendment is accepted.

And I will say that life without parole was discussed in committee. Mr. Canales' bill had that in his bill and in fact, those that were there to advocate for children and advocates that did not like automatic sentences, the one point that they brought up about his bill that they did not like was that it included life without parole. He heard that just the same as I heard it, just the same as the chairman heard it in that committee. The one piece of that bill that they did not like and did not want was life without parole. So, those that were advocating for children came and said we do not want life without parole. The defense lawyers

came and said we don't want that in there, we like the rest of the bill, but we don't like that. The prosecutors came and they said we want what Lois' bill said and our members don't want life without parole either. So that's where we're out in this discussion.

KOLKHORST: Representative Moody, just through laying out the bill three times in the committee that you serve on, one of the things that I think you make an excellent point on, but I want to bring up when it says 25 to 99, anyone that receives a 99 sentence, in actuality, doesn't it act as a parole at 30 years? Almost?

MOODY: Yes, that is correct.

KOLKHORST: So it's a misnomer sometimes when you say 99 or 60. The maximum is kind of 60 because you cut it in half and it goes to 30.

MOODY: That's correct.

KOLKHORST: So, if a jury said 30, they would be considered at 25, on this particular bill. Correct?

MOODY: Correct.

KOLKHORST: And then one more question. On the commutation of the sentences, is *Miller V. Alabama* retroactive?

MOODY: In terms of, is it going to impact the cases where they've been sentenced to life without parole?

KOLKHORST: That have exhausted all of their appeals. That's correct. It is not retroactive.

MOODY: No.

KOLKHORST: Right, and so, one of the discussions that I know I've had with Representative Schaefer and that he wanted life without parole, but one of the things that drove me were some of the amendments that we saw on third reading of the first called session was that I kind of drew the conclusion that commutation of the sentences of people that were sentenced when they were 17 that are sitting there with life without parole, the cleanest way to help them maybe get commutation is to keep **SB 2** the way it is, is that correct?

MOODY: I think that would actually be the simplest way to commute those sentences because it becomes automatic. Otherwise, I think with this amendment, you are throwing everything back into a punishment phase, so those cases that are out there that need to go back, unless there's something negotiated, my guess is there wouldn't be with this type of range. You'd go back and you'd be asking for your punishment hearing. So you're going to be having all of those offices go back and spending money to that process, and I think just overall having a process like this is going to be more expensive as the offices go through these. Really and truly most of these defendants are indigent, so their defense bill is being paid by the taxpayers, as well. So, this sentencing range is going to—or this amendment would definitely throw all that back into question, and I think it would be a lot more difficult for folks back home to deal with if it's added on.

KOLKHORST: In that way, set up a resentencing phase in which you have a new jury that then decides the sentences—

MOODY: Well, at that point you're retrying the entire case because you've got an entirely new jury present that is going to have to hear everything over again, and so, I just want—

KOLKHORST: Thank you, Mr. Moody.

MOODY: Thank you. And I have great respect for you, Ruth, and I'm proud to work with you on so many criminal justice issues that you care passionately about and helping you with the Tim Cole issues. This is one, on a policy stance, I have to stand on the other side of you and I do that with utmost respect for you and your beliefs because I know you believe strongly in these issues, but I do need to stand against this because I don't think, as a policy, 25 years as the bottom end for capital murder is okay. I don't think you should be okay with that either.

REPRESENTATIVE LEWIS: Short series, just a few things, Representative Moody, if I might ask. Now, as you see this language, if this language as it's available, 25 to 99 years. I would presume that that 25 to 99 years would be under the general parole laws, is that correct?

MOODY: Yes.

LEWIS: So, this would take it out of the specialized parole laws for murder on life, that you've got to serve 40 years, and it would go in the general parole laws that we have for people who are sentenced between 25 and 99. Would that be correct?

MOODY: Yes, Judge. I believe that is correct.

LEWIS: Does that mean then that you have to serve 25 years or serve your sentence before you are eligible for parole, or does it mean that you get good conduct time and that if your time served plus good conduct time equals 25 years you can get parole? What does that mean?

MOODY: I think it's written in a way that does create a hard 25, and I don't think it includes good time credit. Is that correct?

LEWIS: Do we know that?

MOODY: I believe that's the way it is written, but it does lower the bottom threshold to 25.

LEWIS: So, but if someone gets 50 years, they don't have to serve 50. They would get good time credit and unless it's a, you know, it's under the 3g weapons and so forth, that would be one thing, but otherwise they would have good conduct time credit, is that right or wrong? But above 25 you would get the good time credit, is that right?

MOODY: That is correct.

LEWIS: All right, now the way this is written with Abel Herrero's, Chairman Herrero's amendment, there are two circumstances that it would be life without parole, is that correct?

MOODY: Yes.

LEWIS: And that's, as I understand it, that's what, a peace officer or fireman or a child under 10?

MOODY: It wouldn't mean that you'd get life without parole, it'd mean that life and life without would be an option.

LEWIS: Right.

MOODY: In those circumstances, that it wouldn't fall subject to the 25 to 99, which is the other part of the amendment.

LEWIS: Thank you very much. I appreciate it.

Representative Moody moved to table Amendment No. 1, as amended.

MCCLENDON: You know, we all care about these juveniles, but we also know that these juveniles can participate in activities that we would all be ashamed of. I have been involved with the system for quite a number of years and I have seen all kinds of crimes—horrendous crimes that these juveniles have done, and I think when you just only have two options to deal with these offenders, somebody falls through the cracks. To keep that from happening, I think you need to have at least three options. And that makes it easier for those who are in charge of the courts. You have the probation officers in the courts, you have the district attorneys in the courts, but above all of them, you have the judges, and they listen to the recommendations of the district attorneys. I just think DAs need to have the options in order to be able to give appropriate sentencing to somebody like the kid who was sitting in the back of the car.

REPRESENTATIVE S. TURNER: Representative McClendon, I am just trying to get a clear understanding between your amendment and then the bill itself. The bill as it came to the floor, there was what, only two options in the bill?

MCCLENDON: Yes, Representative Turner, there were two options.

S. TURNER: And the main one was life without parole and life with parole after 40 years?

MCCLENDON: Right. Correct.

S. TURNER: Now correct me if I am wrong. I know I was listening to Representative Moody talk about what people did not want in terms of the life without parole, but the life with parole is after the 17-year-old has been there for 40 years and the person wouldn't be eligible for parole until he or she was 57 years old, correct?

MCCLENDON: That's my understanding.

S. TURNER: And it's my understanding that the average life for a person in prison is really right around 57 years old anyway.

MCCLENDON: That's right.

S. TURNER: So life with parole at 40 years is pretty much a life sentence anyway.

MCCLENDON: Correct.

S. TURNER: And now the *Miller* court says that the judges should take into account various factors that may be involved. At the least the jury should have—there should be some room for judges to kind of view each individual case individually, correct?

MCCLENDON: That's it exactly.

S. TURNER: And your amendment maintains everything in **SB 2**, but you provide a third option.

MCCLENDON: An additional option.

S. TURNER: And so that everyone is clear, your third option is 25 years to 99.

MCCLENDON: Correct.

S. TURNER: Okay, so with 25 to 99 years, a person can't be considered for parole until that person has been in prison for 25 years.

MCCLENDON: Absolutely.

S. TURNER: Which means if a person is 17, after 25 years, what is that, 52? A person would be 52 before they could be considered for parole.

MCCLENDON: He or she would be 52 years old before they could even be considered for parole.

S. TURNER: Right. So what your amendment simply does is provide an additional option—25 years to 99—for the judge to consider, depending on the individual case, correct?

MCCLENDON: Correct.

S. TURNER: Which is in line with the *Miller* decision.

MCCLENDON: It is line with the *Miller* decision.

S. TURNER: And for those who have said that the bill as it currently stands may still not comport, be constitutional with the *Miller* decision—your amendment simply adds just one more option, 25 to 99 years, to meet constitutional muster.

MCCLENDON: Correct.

S. TURNER: Okay. Thank you very much.

CANALES: The way I break it down, Representative, and I hope the chamber is listening. Mr. Moody came up here and said that it drops the bottom line. Well, yes it does. That's right. By 15 years, is that correct?

MCCLENDON: Yes.

CANALES: So you go down 15 years, which you're allowing that jury, but we also put in this bill the ability to put somebody away who kills a cop for life, and tell them, "You're never getting out."

MCCLENDON: You're never, ever, ever, ever getting out.

CANALES: Never getting out. But their bill doesn't do that, does it?

MCCLENDON: No, it does not.

CANALES: But in order to do that, we have to create the range of punishment, which you do by dropping that barrier 15 years.

MCCLENDON: You have to do that and that's in line with the *Miller* decision.

CANALES: So I'm with you. I think that I'd rather have the option to put one of these guys away forever. And I'll drop that bottom line 15 years so we can have that option because I trust Texas juries. How about you?

MCCLENDON: I trust Texas juries and I trust the district attorneys.

CANALES: Do you know what? I'd rather the jury do their job than the legislature try to be a jury. Thank you.

REPRESENTATIVE NAISHTAT: What is extremely important in this bill, and I think you'll agree, is that it authorizes the judge and the jury to individualize sentencing; to look carefully at the unique characteristics of a young offender; the maturity level, the sense of responsibility; the vulnerability to influence and pressure; and the possibility for rehabilitation in determining the sentence within the range. Is that right?

MCCLENDON: That is correct.

NAISHTAT: That is so important, wouldn't you agree?

MCCLENDON: I would agree.

NAISHTAT: It moves in the direction of what the Supreme Court ultimately will probably require, and that is authorizing judges and juries to have some discretion so they can look and not have to do something that's mandated.

MCCLENDON: Exactly, and in the *Miller* case, there is recognition that no matter how horrendous these crimes are, we're still talking about children whose minds and brains have not matured. And there is still a chance for some semblance of rehabilitation, and that's why the case came down to that.

NAISHTAT: We're looking at young people, young adults who did something very bad at a very, relatively young age and we need to make sure that judges and juries can consider the individualized circumstances of what happened when they're determining a sentence.

MCCLENDON: And not many were given that option. The way the bill is written now, they don't have that option.

NAISHTAT: I think it's a good amendment.

The motion to table Amendment No. 1, as amended, prevailed.

Amendment No. 3

Representative Canales offered the following amendment to **SB 2**:

Amend **SB 2** (house committee report) as follows:

(1) On page 1, line 14, between "(1)" and "life", insert the following:
a term of not more than 99 years or less than 25 years, if the individual committed the offense when younger than 18 years of age and was found guilty in the case only as a party under Section 7.02(b), Penal Code;

(2)

(2) On page 1, line 15, between "18 years of age" and "[~~individual's case", insert "and was found guilty in the case as the principal actor and not as a party under Section 7.02(b), Penal Code".~~

(3) On page 1, line 17, strike "(2)" and substitute "(3) [~~(2)~~]".

(4) On page 2, line 2, between "a sentence of" and "life imprisonment", insert the following:
imprisonment for a term of not more than 99 years or less than 25 years is mandatory on conviction of the capital felony, if the individual committed the offense when younger than 18 years of age and was found guilty in the case only as a party under Section 7.02(b), Penal Code;

(2) a sentence of

(5) On page 2, line 4, between "18 years of age" and "[~~ease", insert "and was found guilty in the case as the principal actor and not as a party under Section 7.02(b), Penal Code".~~

(6) On page 2, line 6, strike "(2)" and substitute "(3) [~~(2)~~]".

(7) On page 2, line 13, strike "life imprisonment or" and substitute "a term of not more than 99 years or less than 25 years, to life imprisonment, or".

(8) Add the following appropriately numbered SECTION to the bill and renumber subsequent SECTIONS of the bill accordingly:

SECTION ____. Section 508.145(b), Government Code, is amended to read as follows:

(b)(1) An inmate serving a sentence of imprisonment for a term of not more than 99 years or less than 25 years under Section 12.31(a)(1), Penal Code, for a capital felony is not eligible for release on parole until the actual calendar time the inmate has served, without consideration of good conduct time, equals one-half of the sentence.

(2) An inmate serving a life sentence under Section 12.31(a)(2) [~~12.31(a)(1)~~], Penal Code, for a capital felony is not eligible for release on parole until the actual calendar time the inmate has served, without consideration of good conduct time, equals 40 calendar years.

CANALES: What my amendment seeks to do is, you've heard a lot about capital murder. We've heard a little bit of talk about what the law of parties does. And that's the guy who was in the car who didn't pull the trigger. And the problem with the law of parties in Texas is the prosecution does not have to prove intent. It's almost a negligent standard. And with this bill, what my amendment does is it says if you were convicted under the law of parties; you're not the person who

pulled the trigger, you didn't know the guy was going to do it; you're not as culpable as him. It says that the range of punishment is now from 25 to life; and so what this does is give a range of punishment for the law of parties.

REPRESENTATIVE NEVÁREZ: Representative Canales, can you tell this body the constitutional ramifications of your amendment when you consider along with the rest of the bill as it's been represented by Representative Kolkhorst?

CANALES: Well, I don't think that it makes it any more constitutional, but I think that it makes it better. It allows, once again, a jury to consider mitigating factors. I think the bill as it stands, you heard the representative tell you, it doesn't include mitigating factors because it doesn't have to. And apparently we don't want the jury to consider mitigating factors under the current bill. I think that's the job of a jury, to consider mitigating factors; what happened during the case, what's going on.

NEVÁREZ: Now with respect to the law of parties and these individuals that you describe that may fall outside some sort of direct culpability in terms of the capital offense, would you say that that injects a mitigating circumstance or factor into the overall bill?

CANALES: Absolutely it does. Because if you're not the person who pulled the trigger—for instance, one of the cases that references *Miller v. Alabama*, there are some kids that go into a convenience store. And it's questionable as to whether one of the kids knew the other guy had a shotgun, and that was raised in the case, and that's the reason we're here. *Miller v. Alabama* gave that kid life without parole. And so, he wasn't the guy that pulled the trigger. In fact, there's not even hard evidence to say he knew that was going to happen. But nevertheless, there was no mitigating factors and he got sent up for life.

NEVÁREZ: I was listening to the debate between you and Representative Kolkhorst and your opinion regarding, basically, the way that the bill is written is the options are life and life. Which is really not an option.

CANALES: Since *Miller v. Alabama*, they filed this bill and what this bill does is says, you have a life with parole option beginning at 40. That is a life sentence.

NEVÁREZ: So when you have a bill written that is really no option because it's life and life, would you say that your amendment now actually provides for an option that is not just life and life?

CANALES: It provides an option for those who are charged under the law of parties, so yes, it does do that.

NEVÁREZ: For those members who are apt to follow the governor's instructions to a tee, do you believe this amendment does what the governor's call asks us to do and address this area of the law within juvenile justice?

CANALES: I believe it—well, it improves the bill is what I can tell you. I think that under the law of parties, the world is not black and white; there are shades of gray. People who are charged under the law of parties, I believe there is the potential that they're not as culpable as some of the other members, and that's what we're allowing with this amendment to do—allowing a jury to be a jury.

NEVÁREZ: Thank you, Representative Canales, for attempting to improve the bill.

REPRESENTATIVE SCHAEFER: I just want to correct a statement by my good friend Representative Terry Canales regarding whether or not a person who has been charged with a capital felony based on the law of parties—maybe the driver of the botched robbery—that they don't have to prove intent. Our law specifically states in Article 37 of the Code of Criminal Procedure that in a capital murder case, the jury must find beyond a reasonable doubt that that person charged under the law of parties intended to kill the deceased or anticipated that a human life would be taken. That has to be proved as separate questions by the jury in a capital murder case. So folks, we do not send people to prison under the law of parties willy nilly. We don't do that in Texas. We take the law of parties very seriously and we require the jury to make very specific yes or no answers about the fact that even if I was not the one that pulled the trigger, that I either intended for that person to be killed or I anticipated that they would be killed. And that has to be found beyond a reasonable doubt by a jury.

DUTTON: I don't know if I misunderstood you, but I thought, if I understood you correctly, what you just said was that a jury has to find under the law of parties that a person intended to kill someone?

SCHAEFER: In a capital case, which is what we're talking about right here, the jury has to make a specific finding, and I'm reading directly from the statute—

DUTTON: Well, you don't have to read it to me. Is that what you're saying?

SCHAEFER: Yes, sir, intended to kill the deceased—

DUTTON: Yes, but that's for the person who actually did the killing.

SCHAEFER: No, it's not, Representative Dutton.

DUTTON: Who's it for? Wait, stop, I don't understand you then. Maybe I'm not hearing you well. You're saying that a person who did not intend to kill someone cannot be charged with a capital felony in Texas. Is that what you're saying?

SCHAEFER: This is on guilt or innocence. That question is presented to the jury and if they came back and said no, that person did not intend to kill—

DUTTON: If I could take just a minute, the way law works, real simply, is this: for any murder, it's an intentional killing, okay? What the law of parties does is now takes that and extends it to a party who did not actually kill anybody, but it allows them to be charged with the same crime.

SCHAEFER: Representative Canales made the assertion to this body that we would be convicting someone who never intended for someone to be killed. And that's clearly not the case.

DUTTON: That is absolutely true, Mr. Krause.

SCHAEFER: Representative Dutton, I'm reading directly from the statute—

DUTTON: Let me ask you this, maybe you'll understand it this way. Two people, you and Mr. Canales, come to rob Ms. McClendon, and you have the gun, and you rob her and kill her. Did Mr. Canales kill her?

SCHAEFER: Representative Dutton—

DUTTON: Just answer me, yes or no? Did Mr. Canales kill her?

SCHAEFER: Representative Dutton, we are talking about a capital murder—

DUTTON: That's what I just asked you about is a capital case, Mr. Krause. I'm just trying to make sure you understand what you're saying because I don't really believe you're trying to misrepresent this to this body. I think you just don't understand the law. I want to try to help you get to the understanding.

SCHAEFER: I believe I do understand the law.

DUTTON: Answer my question then. My question is what does Mr. Canales get charged with in the example I gave you?

SCHAEFER: He can be charged with murder.

DUTTON: He can? He cannot? That's your understanding of the law. I'm sorry. If I called you somebody else, I apologize. What I was trying to get you to understand is that, in the example I gave you, Mr. Canales could also be charged with murder. And I just wanted to be sure you understood that. Mr. Canales did not pull the trigger, but under Texas law, he can still be charged with murder.

SCHAEFER: He's going to be charged with murder, but the reality is that the law requires that if he's charged with capital murder, not first degree murder, capital murder—

DUTTON: Capital murder, that's what I'm saying to you.

SCHAEFER: And that's what's relevant here because that's what we're dealing with today.

DUTTON: I got it, Mr. Schaefer, but what I'm trying to get you to understand though is, you said that unless you actually did the killing, you couldn't be charged with murder. That is false.

SCHAEFER: I understand, under the law of parties, that someone who did not actually pull the trigger could be charged with murder. Section 7.02 of the Penal Code clearly states that.

DUTTON: Section 7.02, right. But you said something contradictory to that a moment ago.

SCHAEFER: Maybe I did. Maybe I didn't understand your fact pattern at the time, I'm sorry.

DUTTON: Okay, but you said it before I gave you the fact pattern. The fact pattern was to try to help you understand that what Mr. Canales said was absolutely true—that you can actually be charged with capital murder, but you didn't pull the trigger. And that's what I thought you said couldn't happen.

SCHAEFER: Who's on first?

DUTTON: Oh, I understand, I got it, I understand, Mr. Schaefer. Do you understand what I'm saying?

SCHAEFER: Well, I don't know that I entirely understand your line of questioning, but the point that I'm simply trying to make is to clear up this notion that someone can be charged and found guilty under the law of parties for a capital murder case and there being no intent to kill.

DUTTON: No intent on whose part?

SCHAEFER: On the person who is charged under the law of parties.

DUTTON: No, that's not true, I beg to differ with you.

SCHAEFER: You can't argue with what the statute says.

DUTTON: If you're convicted of a killing, you didn't have to intend to do it, but you do it in the act of committing another felony, you can be charged with capital murder.

SCHAEFER: Mr. Dutton, we'll have to agree to disagree, because I'm reading directly from the Code of Criminal Procedure, and it says even if you didn't actually cause the death of the deceased, but intended to kill the deceased or anticipated that a human life would be taken—

DUTTON: You've read that to me three times, I got it all three times, but I also read it in law school, so you don't have to read it to me a fourth time. What I'm trying to explain to you is that you are trying to suggest that every killing has to be an intentional act in Texas. And what I'm what I'm trying to give you is a law school criminal law course that says it doesn't have to be an intentional killing.

SCHAEFER: My only assertion is that in capital murder, it does have to be intentional. That's my only—

DUTTON: So you don't know what the felony murder rule is, have you ever heard of that?

SCHAEFER: I do understand what the felony murder rule is—

DUTTON: Tell me what that is, Mr. Schaefer. What is the felony murder rule?

SCHAEFER: It is the law of parties that we have—

DUTTON: No, the felony murder rule is not the law of parties. The felony murder rule simply says, and maybe your co-counsel can explain it to you better than I can, but the felony murder rule simply says that if a person in Texas in the act of committing a felony causes a death result, then you can be charged with felony murder.

SCHAEFER: Right. Sure. That's the case of someone who robbed a convenience store and jumps in a car and escapes at a high rate of speed and kills someone in an accident on the highway.

DUTTON: But you realize that you don't have to intentionally kill somebody, is my whole point.

SCHAEFER: I understand that.

DUTTON: You don't have to intentionally kill someone to be charged with murder in Texas.

SCHAEFER: My only point in coming to the microphone here is to dispel this notion that we are doing something that violates our conscience on a capital murder case where the law of parties is involved. We're not doing that. This person has to have been found to have intentionally killed that person or anticipated that a life would be taken. That is clear under our statute for capital felony murder.

DUTTON: Well, that's not what the law says, Mr. Schaefer. And you can repeat it over and over again to yourself, but that is not what the law itself says. And I just want you to—

SCHAEFER: And it's also not a valid argument just to come up here and say because the law says that doesn't mean that isn't so. And it doesn't make it right that you stand at the back mic and say that either. I would refer the members to the actual Code of Criminal Procedure, and they can read it for themselves.

DUTTON: Well, you know, but you're the one saying it, and I just, you know, I'm not trying to attack you. I hope you don't consider that. I'm just trying to help you to understand that I think you're misreading the law or you're limiting your reading to just that one section, and to have a better understanding of what murder is in Texas or what capital murder even is, I think you need to read beyond the statute that you keep reading. And that may be what the problem is, is that you're limiting it to that, and that's what I'm trying to tell you. That is not the sum and substance of capital murder in Texas, the section you keep reading from. And that Mr. Canales is correct, you could be charged even though there was no intent on your part to actually kill someone.

SCHAEFER: Well, this will not be the first time that you and I will have to agree to disagree.

DUTTON: I'm sorry?

SCHAEFER: This probably won't be the first time that you and I will have to agree to disagree.

DUTTON: Well, that's a cliché too, Mr. Schaefer, and I just hope that that doesn't mean that you have so closed-minded that you're not here to learn something.

Representative Schaefer moved to table Amendment No. 3.

CANALES: With all due respect to Representative Schaefer and his, what I believe, flawed interpretation of the law—there is a case here in Texas that, *State v. Kenneth Foster, Jr.*, where the jury was only required to find only that the shooting was done to facilitate a robbery as the law of parties. It basically said that he didn't have to have intent to kill the person. He didn't have to have intent to kill the person. Let me say that again. He did not have to intend to kill the person, but he still gets the same sentence as the guy who did. And I don't think that's fair. What I'm trying to say is that the jury needs to be able to do their job,

and when you are charged under the law of parties, when you are charged as a party or an accessory, you may not be as culpable as the guy who pulled the trigger. Let the jury decide that.

And what my amendment does is it creates a range of punishment. This body should quit inserting itself into the jury process and allow a jury to be a jury and allow them to assess the level of culpability of those involved in the crime. This is by no means soft on crime. This is saying we trust our Texas juries. The beautiful part and most impressive part and the reason that a jury system is so beautiful is because the people that come and sit on that jury bring with them all their lifetime experiences. They bring with them the things that they've learned. They bring with them who they are to that jury, and they are adults over the age of 18 who are allowed to sit in judgment of somebody and judge the facts of the case. And in this case, this is not the person that pulled the trigger; this is somebody who may have been sitting in the car. He did not intend to kill that person. The intent is not there. That is not the way the law in Texas of parties reads, and I beg to differ with Representative Schaefer. And I ask you that we accept this amendment.

REPRESENTATIVE CARTER: Representative Canales, I know you've looked at Section 7.02 related to criminal responsibility for conduct of another.

CANALES: Yes.

CARTER: And you'll agree with me, I'm sure won't you, that the section actually lays out different standards by which the prosecution can prove up law of parties beyond a reasonable doubt. Would you agree with me on that?

CANALES: I didn't hear you. Can you repeat yourself?

CARTER: Do you happen to have that section in front of you?

CANALES: No, I don't. I wish I did.

CARTER: Okay. So, under the law of parties, the prosecution must prove one of three things. First, that the individual acted with some type of culpability required for the offense, and in doing so, causes or aids an innocent or nonresponsible person to engage in the conduct prohibited.

CANALES: Now, exactly—some kind of culpability, but not the intent to kill.

CARTER: Yes, that is correct. So there is a culpability that must be proven beyond a reasonable doubt required for the actual offense. That's one of the three potential criteria or elements involved that must be proven beyond a reasonable doubt by the prosecution. And the second one, which is an alternate element, is acting with intent. So, the prosecution can come in and say—

CANALES: Hold on. Intent for what? Can you clarify yourself for the body?

CARTER: Yes. This is intent to promote or assist the commission of the offense. So, the prosecution must prove beyond a reasonable doubt that—

CANALES: The object offense, not the murder. So if the object offense is a robbery—

CARTER: This says the commission of the offense.

CANALES: The offense, yes.

CARTER: And it goes on to say, by the way—

CANALES: Ms. Carter, you're a prosecutor, and I'll ask you to clarify yourself because what you're—

CARTER: I'm just reading the statute.

CANALES: Well, but you're reading it in a way that's misleading. The offense is not the capital murder. The offense could have been an underlying offense.

CARTER: Well, Representative Canales, I just suggest to you that to say there's no intent that must be proven—there must be, under this second element of this section.

CANALES: Are you saying that would be intent to commit the murder?

CARTER: Are you saying, as you had said, that there is no reason to prove intent? That's not true—

CANALES: Intent to commit the murder, Ms. Carter, not the offense.

CARTER: I understand—

CANALES: Intent to commit the murder.

CARTER: The third element is having a legal duty to prevent—

CANALES: Are you able to distinguish that there might be the intent of the object offense, which is that they went to go rob the liquor store, and the intent to commit the murder?

CARTER: Representative Canales, the third element has to do with a legal duty to prevent the commission of the offense. And so, if somebody's there, as in the *Miller* case, in which there is a robbery and a store and there are two gentlemen, one actually holding a gun, who's armed. The other one has, under this third element, a responsibility to say, "Stop."

CANALES: What if that gentleman is outside?

CARTER: That is why we have law of parties, which, by the way, is used in the reverse. You've got—and we heard testimony about this—you've got two people who are being charged with a crime. You've got the trigger guy pointing to the other guy saying, guess what—

CANALES: You can create hypotheticals all day. The issue is intent.

CARTER: I think that members should move to and vote to table this amendment.

CANALES: We can talk about hypotheticals all day. When I say that you don't need the intent, they don't have to prove the intent to commit the murder. They can transfer that intent from the other person, and that is a degree of culpability less. And what I would say is allow a jury to determine the factors that are suitable to the sentence of the crime. I trust Texas juries, and I hope that this body does, too. I move not to table the amendment. Vote no.

The motion to table Amendment No. 3 prevailed.

REMARKS ORDERED PRINTED

Representative Martinez moved to print all remarks on **SB 2**.

The motion prevailed.

Amendment No. 4

Representative Dutton offered the following amendment to **SB 2**:

Amend **SB 2** (house committee report) by striking SECTION 2 of the bill (page 2, lines 9-15), substituting the following appropriately numbered SECTIONS, and renumbering subsequent SECTIONS of the bill accordingly:

SECTION ____. Section 1, Article 37.071, Code of Criminal Procedure, is amended to read as follows:

Sec. 1. (a) If a defendant is found guilty in a capital felony case in which the state does not seek the death penalty, the [~~judge shall sentence the~~] defendant shall be sentenced to imprisonment for life or for life [~~imprisonment~~] without parole as required by this section and by Section 12.31, Penal Code.

(b) The judge shall impose a sentence of imprisonment in the Texas Department of Criminal Justice for life without parole with respect to a defendant who was 18 years of age or older at the time the capital felony was committed.

(c)(1) The jury shall impose a sentence of imprisonment in the Texas Department of Criminal Justice for life with respect to a defendant who was younger than 18 years of age at the time the capital felony was committed. In imposing the sentence, the jury shall determine the number of calendar years the defendant must serve before becoming eligible for parole.

(2) The judge shall charge the jury in writing as follows:

"Under the law applicable in this case, it is possible that any sentence of life imprisonment might be reduced by the award of parole. However, the defendant will not become eligible for parole until the actual time served equals the number of calendar years determined by you as the jury in this case, without consideration of good conduct time, and the eligibility for parole does not guarantee that parole will be granted.

"It cannot accurately be predicted how the parole law might be applied to this defendant if the defendant is sentenced to life imprisonment, because the application of this law will depend on decisions made by prison and parole authorities.

"You may consider the existence of the parole law. However, you are not to consider the manner in which the parole law may be applied to this particular defendant."

SECTION ____. Section 508.145(b), Government Code, is amended to read as follows:

(b) An inmate serving a life sentence under Section 12.31(a)(1), Penal Code, for a capital felony is not eligible for release on parole until the actual calendar time the inmate has served, without consideration of good conduct time, equals the number of [~~40~~] calendar years determined by the jury at sentencing.

DUTTON: Madam Speaker and members, the way this process works is, we empower—we write the statute. And then the statute is enforced by either a DA and a county. They bring charges, okay. They bring the charges and then what happens is more often or sometimes there's a trial. During this trial, there is a jury. In most cases, a panel. That jury decides whether that person is guilty or innocent. That's the first phase. If they decide that the person is guilty. The second phase is the punishment phase, where the jury gets to decide how that person should be punished. One of the things that disturbed me about this bill—and Chairwoman Kolkhorst and I talked about it during the last special session—was about the fact that when this happens under *Miller*, we are trying to determine back and forth how many years should a person spend in prison before they become eligible for parole.

Now, you had an amendment a moment ago, I think Ms. Ruth Jones McClendon had an amendment that would have changed it to 25. The bill says 40. There are states that say all different numbers of years, and I don't know whether, if any of them are right or wrong, but my amendment does one thing. It says that the 12 people who found the person guilty will determine their punishment. I think that gets us out of trouble. I think that keeps the statute from being challenged on the basis of being constitutional or not constitutional. Because if we empower the jury to make the determination, that's all that's necessary.

I don't think the 12 people who heard the case—we ought to somehow or another tell them that's all that we need from them, because we had 150 members in this house who now know better what the punishment ought to be than those people who heard the case. But if you are going to suggest that, well, wait a minute, you ought to spend—the bill ought to have 40 years for a person to spend before they are eligible for parole. It makes no sense. How did we get 40? Well, somebody said, "Well, that was half of 80". I said, "Well, yeah, I guess that's true, but that doesn't explain how this legislative body came up with 40 years." The real answer, I think, lies in this amendment. All this amendment really does, substantively, is provide that the jury will decide the punishment for a person that that jury found convicted, found them convicted of engaging in the conduct for which this statute says you shouldn't have done. That's really all this amendment does, and I'll be happy to answer any questions if there happen to be any.

CANALES: Does this deal with the law of parties, Mr. Dutton?

DUTTON: No, sir, it doesn't.

CANALES: Can you explain what it does deal with, please?

DUTTON: It deals only with the fact that the jury is now going to be empowered. The jury that heard the case, the jury that heard the evidence, the jury that decided guilt or innocence—that that jury now is going to determine the punishment.

CANALES: That's a novel idea, I appreciate this amendment.

DUTTON: Well, to some people it probably is. I think rather than this argument or discussion we've been having whether 40 years is correct and whether or not this statute is going to be challenged on the basis of whether it is constitutional—because I will tell you that there are some people that are going to argue that the Supreme Court has argued that you can't have life without parole, well, I think most of us would agree that if you had life, but you weren't eligible for parole until you've served 100 years, it would still be life without parole. Well, some might argue that if you said well, life, but you've got to serve 50 years before you are eligible for parole, is still life without parole. There are many of us who believe life—that you're not eligible until 40, so after serving 40 calendar years, that that's still life without parole. The statute is going to be challenged on that basis. But the one way it will not be challenged is if this legislature says that we're going the let the jury—we're going to give the power to the jury to decide the punishment. That's what this amendment does, and I would ask for your favorable support of this amendment.

KOLKHORST: I appreciate my colleague and always learn from him, and I would just say that this bill—as he says—gives an open-ended date to let the jury decide. Currently, in our statute, we say that life with parole is at 40 years.

Representative Kolkhorst moved to table Amendment No. 4.

DUTTON: Well, you know, I've been here long enough to know when the fix is in. I know that that means that no matter what's said at this front mic or this back mic that you're going to get the same number of votes. You know, if we were debating the Bill of Rights and somehow or another it had been considered, we'd get the same number of votes today that we've been getting on every amendment. But I wanted to appeal to all of you who happen to be thinking—you know, as my pastor says, I want to appeal to the sheep, not the goats. And if you happen to be one of those sheep, one of those things you ought to recognize is that when we empower juries to decide the fate of individuals who are charged with crimes, that's the best this system has to offer. That's absolutely the best this system of criminal jurisprudence has to offer. There are some countries, however, as you all know, where they don't get to decide that; where the legislature decides the punishment for everybody. Their legislative body actually determines the punishment for everybody. You do the crime, and you're found guilty, well, it says on here that it's 35-40 years.

One of the things we have done in here, oddly enough, is to try to put in what we call mitigating factors. We've tried to assess those, determine what those are. Well, you don't need to determine those if you let a jury decide it, but you do need it if you let this legislature—and the reason for that is we don't get to hear the evidence. We get to hear absolutely none of it. And yet, this bill presupposes that we are in a better position to decide the punishment than the jury of the person's peers who heard the evidence, who decided that that person was guilty, and then now we take it away from them and we say well, we're going to give you a life sentence and you're going to have to serve 40 years before you're paroled. The jury ought to be the best arbiter of whether or not that person ought to take 40 years before they are rejuvenated or rehabilitated or whether or not

they want to do something else. And whether they want to do 100 years, I don't know. As a lawyer, I trust the jury system in this state and in this country. I trust that system, because I would rather take my fate to those 12 jurors than, quite frankly, members. On a day like today, I'd trust those jurors before I'd trust most of you in here. And the reason is, because those jurors would be empowered to listen. And today, I think you're just empowered to vote, and I would ask you to vote no on the motion to table.

(Speaker in the chair)

The motion to table prevailed by (Record 31): 87 Yeas, 44 Nays, 1 Present, not voting.

Yeas — Anderson; Ashby; Aycock; Bohac; Bonnen, D.; Bonnen, G.; Branch; Burkett; Button; Callegari; Carter; Clardy; Cook; Craddick; Creighton; Crownover; Dale; Darby; Davis, J.; Davis, S.; Elkins; Fallon; Farney; Fletcher; Flynn; Frank; Frullo; Geren; Goldman; Gonzales; Gooden; Harless; Harper-Brown; Hilderbran; Huberty; Hughes; Hunter; Isaac; Johnson; Kacal; Keffer; King, K.; King, P.; King, S.; King, T.; Klick; Kolkhorst; Krause; Kuempel; Larson; Laubenberg; Lavender; Leach; Lewis; Lozano; Miller, D.; Miller, R.; Moody; Morrison; Murphy; Otto; Paddie; Parker; Patrick; Perry; Phillips; Pitts; Price; Raney; Ritter; Sanford; Schaefer; Sheets; Sheffield, R.; Smith; Springer; Stephenson; Stickland; Taylor; Thompson, E.; Toth; Turner, E.S.; Villalba; White; Workman; Zedler; Zerwas.

Nays — Allen; Alonzo; Alvarado; Burnam; Canales; Capriglione; Coleman; Collier; Cortez; Davis, Y.; Deshotel; Dukes; Dutton; Giddings; González, M.; Guerra; Guillen; Gutierrez; Herrero; Howard; Longoria; Lucio; Martinez; Martinez Fischer; McClendon; Menéndez; Miles; Muñoz; Naishtat; Nevárez; Pickett; Raymond; Reynolds; Riddle; Rodriguez, E.; Rodriguez, J.; Rose; Simmons; Simpson; Thompson, S.; Turner, S.; Villarreal; Vo; Walle.

Present, not voting — Mr. Speaker(C).

Absent, Excused — Bell; Eiland; Farias; Farrar; Gonzalez, N.; Hernandez Luna; Márquez; Oliveira; Smithee; Turner, C.

Absent — Anchia; Kleinschmidt; Orr; Perez; Ratliff; Sheffield, J.; Wu.

Amendment No. 5

Representative Dutton offered the following amendment to **SB 2**:

Amend **SB 2** (house committee report) as follows:

(1) Add the following appropriately numbered SECTION to the bill and renumber subsequent SECTIONS of the bill accordingly:

SECTION ____. Section 7.02, Penal Code, is amended by amending Subsection (b) and adding Subsection (c) to read as follows:

(b) Except as provided by Subsection (c), if [~~If,~~] in the attempt to carry out a conspiracy to commit one felony[~~,~~] another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though

having no intent to commit it, provided that [~~if~~] the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

(c) Notwithstanding any other law, an individual may not be charged with a capital felony under Subsection (b) if the individual is younger than 18 years of age at the time the capital felony is committed by one of the conspirators.

(2) On page 2, line 16, strike "The change" and substitute "(a) Except as provided by Subsection (b) of this section, the change".

(3) On page 2, between lines 22 and 23, insert the following:

(b) The change in law made by this Act in amending Section 7.02, Penal Code, applies only to an offense committed on or after the effective date of this Act. An offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose. For purposes of this subsection, an offense was committed before the effective date of this Act if any element of the offense occurred before that date.

DUTTON: Mr. Speaker, members, I am not going to belabor the point. You know, I want to go home, too. I would suggest that some of you stay home after what you did today. But having said that, you know, as my mom used to say, you throw a rock and you hit a pack of dogs, the one you hit always howls.

This is this law of parties bill and I know I had a conversation with Mr. Schaefer about this, and I don't know if anybody understands it any better than they did when we had that conversation. But I don't think that a bill that recognizes that juveniles have a somewhat diminished capacity for reasoning which then allows them to be caught up in a statute based on that lack of reasoning makes any sense to me. And that's what this is about and that's what this amendment does. This amendment simply says that an individual who is charged with capital felony will not be eligible to be charged solely under our statute regarding the law of parties, and that's what doesn't make sense. And I don't know, maybe it's too late in the process, but I'll tell you this the first time somebody's teenager is riding in a car with another teenager, and that teenager which your son or daughter is riding with commits a crime and your son or daughter gets caught up in that simply because of the law of parties, call me.

KOLKHORST: I think that Mr. Dutton brings up excellent points about law of parties and I know he's championed this. I do believe we should review that in our next session and I appreciate his efforts in this matter and it is very thought provoking statement to end with is that none of this is easy and it can affect our lives and it does affect our constituents' lives.

Representative Kolkhorst moved to table Amendment No. 5.

DUTTON: Members, here's the deal. You'll get to go home if you vote for this amendment. I'll take the other 347 amendments down. No, seriously, I don't have any other amendments than this one. You know, I've been here long enough to see the writing on the wall. I remember, just by way of a note—that I was here when we did workers' comp and I sat on a committee where all the amendments that were going to be accepted were written on green paper. Nobody told me and

the chairman that our amendments, which were on white paper, weren't going to be accepted. So, this is one of those days where the green paper wins, and I'd ask you to vote no on the motion to table, all 43 of you.

The motion to table prevailed.

KOLKHORST: I appreciate this is a tough issue. I move passage.

REPRESENTATIVE GIDDINGS: I want to read—all of this is on the record—a letter from Linda White that appeared in the *Houston Chronicle* on June 20th. Ms. White says this:

> "My daughter, Cathy, was killed by two 15-year-old boys more than 26 years ago. I know personally the grief of losing a child to violence. I am also a retired professor with an interest in death, dying, grief, and loss, and an advocate for the elimination of life without parole and other extreme sentences for children. I believe children are more than the worst thing they have ever done. I also believe that our country is better when we seriously consider our responsibility to ensure that all children—even those who commit serious crimes—have an opportunity to thrive. I was thrilled a year ago when the U.S. Supreme Court, in *Miller v. Alabama*, ruled that it is unconstitutional to impose a mandatory sentence of life in prison without the possibility of parole upon someone who was convicted for a crime committed when younger than 18.
>
> Finally, it seemed, our country would reform the ways it holds young people accountable for the crimes they have committed. Rather than a process based in retribution, I hoped we were moving toward a model focused on ensuring that we rehabilitate our children, then help to reintegrate them into society. Twelve months later, there have been steps forward, as several states have eliminated life without parole for children from sentencing schemes. But other states have continued to focus on punitive, reactive policies that ignore the spirit—and sometimes the letter—of this watershed decision. Rather than succumb to this short-sighted approach, we who believe in justice and fairness must work to ensure that children are held accountable in ways that acknowledge their capacity for change and focus on rehabilitation and reintegration into society. Texas eliminated sentences of life without parole for children in 2009, and made life with the possibility of parole after 40 years the mandatory punishment for 14- to 16-year-olds. The legislature is considering a bill during the current special session that would also eliminate life without parole for 17-year-olds and replace it with the same penalty as faced by younger teens. While this sentence represents an improvement over one in which a child is told he or she will die in prison, it is still extreme and inconsistent with what we know about children, brain development, and the impact of trauma. As any parent knows, children and teens often make bad decisions. This is because their brains are not yet fully developed and they lack the capacity to think through the long-term impacts of their actions. This is

compounded for children who have been exposed to traumas such as abuse and neglect, which is the sad reality for many of the children who face these sentences. And in Texas, just as in most of America, black youth are disproportionately serving these extreme sentences.

Cathy died in November of 1986. The boys arrested and charged in her death were certified to stand trial as adults. I didn't see them as humans at that time, and I was pleased when they both were sentenced to long terms in prison. I feel different today. Twelve years ago, I met with one of the youths, Gary Brown, in a mediated dialogue. I discovered a young man whose early life had been one of abuse and neglect, a world apart from that of my childhood and that of my children. Though he offered no excuses for his actions, what he told me helped me to understand how he could have committed such a tragic deed and enabled me to place my daughter's murder in a larger context. His total remorse was an incredibly healing encounter for me. Gary was released from prison in 2010 after serving 23 years of a 54-year sentence. He is a remarkably different person than he was as a teenager. He is proof that young people, even those who have done horrible things, can be transformed. My experience with Gary has reminded me that we have a responsibility to protect our youth from the kind of childhood that he had and that we need to hold children accountable in ways that acknowledge their childhood, their inherent capacity for change, and their ability to make positive contributions to our world. As Texas prepares to pass new legislation and as other states move forward toward *Miller* implementation, it is my prayer that we will operate with this in mind and implement meaningful alternatives to death-in-prison sentences for children that provide youth the opportunity to return home and become productive members of society."

Again, this is an article by Linda White of Magnolia, Texas that appeared in the *Houston Chronicle* on June 20, 2013.

KOLKHORST: I want to say to all of the members that were involved today, to Harold Dutton, Terry Canales, to Ruth Jones McClendon, it was high emotion today and it should be. I'm going to end today with one quote from Justice Roberts when he dissented on the decision *Miller v. Alabama*, but I think it sums it up: "It is a great tragedy when a juvenile commits murder—most of all for the innocent victims, but also for the murderer whose life has gone so wrong so early, and for society, as well, which has lost one or more of its members to deliberate violence and must harshly punish one another." I know this is a tough issue, I appreciate all the help. We will be visiting this issue again.

SB 2 was passed to third reading.

HB 4 - LAID ON THE TABLE SUBJECT TO CALL

Representative Kolkhorst moved to lay **HB 4** on the table subject to call.

The motion prevailed.

HCR 6 - ADOPTED
(by Moody, Pickett, Márquez, N. Gonzalez, and M. González)

Representative Moody moved to suspend all necessary rules to take up and consider at this time **HCR 6**.

The motion prevailed.

The following resolution was laid before the house:

HCR 6, In memory of El Paso County Commissioner Daniel Richard Haggerty.

HCR 6 was unanimously adopted by a rising vote.

On motion of Representative Hughes, the names of all the members of the house were added to **HCR 6** as signers thereof.

SB 2 ON THIRD READING
(Kolkhorst, Moody, Carter, and P. King - House Sponsors)
CONSTITUTIONAL RULE SUSPENDED

Representative Raymond moved to suspend the constitutional rule requiring bills to be read on three several days and to place **SB 2** on its third reading and final passage.

The motion prevailed by (Record 32): 121 Yeas, 8 Nays, 1 Present, not voting.

Yeas — Allen; Alonzo; Alvarado; Anchia; Anderson; Ashby; Aycock; Bohac; Bonnen, D.; Bonnen, G.; Branch; Burkett; Button; Callegari; Capriglione; Carter; Clardy; Coleman; Cook; Cortez; Craddick; Creighton; Crownover; Dale; Darby; Davis, J.; Davis, S.; Davis, Y.; Dutton; Elkins; Fallon; Farney; Fletcher; Flynn; Frullo; Geren; Giddings; Goldman; Gonzales; Guerra; Guillen; Harless; Harper-Brown; Herrero; Hilderbran; Howard; Huberty; Hughes; Hunter; Isaac; Kacal; Keffer; King, K.; King, P.; King, S.; King, T.; Kleinschmidt; Klick; Kolkhorst; Krause; Kuempel; Larson; Laubenberg; Lavender; Leach; Lewis; Longoria; Lozano; Lucio; Martinez; Martinez Fischer; Menéndez; Miller, D.; Miller, R.; Moody; Morrison; Muñoz; Murphy; Naishtat; Orr; Otto; Paddie; Parker; Patrick; Perry; Phillips; Pickett; Pitts; Price; Raney; Ratliff; Raymond; Reynolds; Riddle; Ritter; Rodriguez, E.; Sanford; Schaefer; Sheets; Sheffield, J.; Sheffield, R.; Simmons; Simpson; Smith; Springer; Stephenson; Stickland; Taylor; Thompson, E.; Toth; Turner, E.S.; Turner, S.; Villalba; Villarreal; Vo; Walle; White; Workman; Wu; Zedler; Zerwas.

Nays — Canales; Collier; González, M.; Nevárez; Perez; Rodriguez, J.; Rose; Thompson, S.

Present, not voting — Mr. Speaker(C).

Absent, Excused — Bell; Eiland; Farias; Farrar; Gonzalez, N.; Hernandez Luna; Márquez; Oliveira; Smithee; Turner, C.

Absent — Burnam; Deshotel; Dukes; Frank; Gooden; Gutierrez; Johnson; McClendon; Miles.

STATEMENTS OF VOTE

When Record No. 32 was taken, my vote failed to register. I would have voted yes.

Gooden

When Record No. 32 was taken, I was in the house but away from my desk. I would have voted no.

Miles

The speaker laid **SB 2** before the house on its third reading and final passage.

SB 2 was read third time and was passed by (Record 33): 113 Yeas, 23 Nays, 1 Present, not voting.

Yeas — Alvarado; Anchia; Anderson; Ashby; Aycock; Bohac; Bonnen, D.; Bonnen, G.; Branch; Burkett; Button; Callegari; Capriglione; Carter; Clardy; Cook; Cortez; Craddick; Creighton; Crownover; Dale; Darby; Davis, J.; Davis, S.; Deshotel; Elkins; Fallon; Farney; Fletcher; Flynn; Frank; Frullo; Geren; Goldman; Gonzales; Gooden; Guerra; Guillen; Harless; Harper-Brown; Herrero; Hilderbran; Howard; Huberty; Hughes; Hunter; Isaac; Johnson; Kacal; Keffer; King, K.; King, P.; King, S.; King, T.; Kleinschmidt; Klick; Kolkhorst; Krause; Kuempel; Larson; Laubenberg; Lavender; Leach; Lewis; Longoria; Lozano; Lucio; Martinez; Menéndez; Miller, D.; Miller, R.; Moody; Morrison; Muñoz; Murphy; Orr; Otto; Paddie; Parker; Patrick; Perez; Perry; Phillips; Pickett; Pitts; Price; Raney; Ratliff; Raymond; Ritter; Sanford; Schaefer; Sheets; Sheffield, J.; Sheffield, R.; Simmons; Simpson; Smith; Springer; Stephenson; Stickland; Taylor; Thompson, E.; Toth; Turner, E.S.; Villalba; Villarreal; Vo; White; Workman; Wu; Zedler; Zerwas.

Nays — Allen; Alonzo; Canales; Coleman; Collier; Davis, Y.; Dukes; Dutton; Giddings; González, M.; Martinez Fischer; McClendon; Miles; Naishtat; Nevárez; Reynolds; Riddle; Rodriguez, E.; Rodriguez, J.; Rose; Thompson, S.; Turner, S.; Walle.

Present, not voting — Mr. Speaker(C).

Absent, Excused — Bell; Eiland; Farias; Farrar; Gonzalez, N.; Hernandez Luna; Márquez; Oliveira; Smithee; Turner, C.

Absent — Burnam; Gutierrez.

ADJOURNMENT

Representative Larson moved that the house adjourn until 2 p.m. Monday, July 15 in memory of William Douglas Jefferson of San Antonio.

The motion prevailed.

The house accordingly, at 5:21 p.m., adjourned until 2 p.m. Monday, July 15.

APPENDIX

ENGROSSED

July 10 - HB 2