# IN THE COURT OF CRIMINAL APPEALS OF TEXAS

**NO. AP-76,769**

**CARL WAYNE BUNTION, Appellant**

**v.**

**THE STATE OF TEXAS**

**ON DIRECT APPEAL FROM CAUSE NO. 588227**
**IN THE 178TH DISTRICT COURT**
**HARRIS COUNTY**

**ALCALA, J., filed a concurring opinion.**

## CONCURRING OPINION

I join this Court's majority opinion that affirms the sentence of Carl Wayne Buntion, appellant. I agree with the majority opinion's conclusion that the trial court's ruling properly excluded a jury instruction requested by appellant, and thus I agree with this Court's overruling of his twenty-fifth point of error. Although I agree with this Court's and the trial

court's view of the law that applies to appellant's case, I also agree with appellant that there appears to be an inequity in the law. I write separately to discuss that inequity.

Appellant challenges the omission of a life-without-parole instruction at the sentencing phase of his trial for capital murder. Because of the date of his offense, the sentencing scheme that applies to appellant is set forth by Code of Criminal Procedure Article 37.0711. *See* TEX. CODE CRIM. PROC. art. 37.0711. That article provides for the possibility of a life sentence with parole for this offense. *Id*. In contrast, under the current capital-murder sentencing scheme set forth in Code of Criminal Procedure Article 37.071, other defendants whose offenses occurred at a later date have a possibility of a life sentence without parole. *See id.* art. 37.071. Thus, because of the date of appellant's offense, he, unlike other defendants, was ineligible for a sentence of life without parole, and more importantly, he was ineligible for a jury instruction that would inform the jury that a life sentence would preclude his parole.

A brief overview of the punishment scheme for capital murder is helpful to understanding appellant's complaint. Under the punishment scheme currently set forth in the Code of Criminal Procedure, defendants convicted of capital murder are treated differently with respect to parole eligibility depending on the date that their offenses were committed. *Compare id.* art. 37.071 (providing for punishment at a capital-murder trial for offenses occurring on or after September 1, 1991, to be set either at death or life without parole), *with* art. 37.0711 (providing for punishment at a capital-murder trial for offenses occurring before

September 1, 1991, to be set either at death or life imprisonment with the possibility of parole). In short, those defendants convicted at trial of capital-murder offenses occurring before September 1, 1991 are eligible for life imprisonment with the possibility of parole, but defendants convicted of capital-murder offenses occurring on or after September 1, 1991, have no possibility of parole. Furthermore, with respect to the trial court's instructions to the jury, Article 37.071 requires the trial court to inform the jury that a defendant who is not sentenced to death must be sentenced to life without parole, whereas Article 37.0711 has no similar requirement regarding parole eligibility. *Compare id.* art. 37.071, *with* art. 37.0711.

Here, because appellant's offense occurred in June 1990, at a point in time before the September 1, 1991 cutoff for applicability of Article 37.071, the trial court refused to instruct the jury that appellant could be sentenced to life without parole. Appellant contends that, because the jury was not given the life-without-parole option, its only alternative to a death sentence was a life sentence with the possibility of parole, and he suggests that this made it more likely that the jury would favor answering the special issues so as to result in a death sentence. Although the concurring opinion cannot imagine any defendant desiring to be sentenced to life without parole when he is eligible for a sentence of life with parole, that is precisely what is occurring here. We need look no further than the instant case before this Court.

I note here that it is debatable whether a defendant who is facing a capital-murder conviction at trial will perceive the possibility of a life sentence with parole eligibility to be

something that is of benefit to him. On the one hand, at first blush, parole eligibility under Article 37.0711 seems beneficial to a defendant in that he has the possibility of one day being released from prison. *See id.* art. 37.0711. But eligibility for release does not guarantee actual release, and the heinousness of capital murder makes parole unlikely. On the other hand, a sentence of life without parole closes the door on the chance of parole for the remainder of a defendant's life, but many defendants may anticipate such an outcome anyway, even if they are theoretically eligible for parole under Article 37.0711. *See id*. arts. 37.071, 37.0711. Consequently, a defendant reasonably may believe that, because Article 37.071 requires a trial court to instruct the jury that the only alternative to a death sentence is a life sentence without parole, this instruction may sway a jury's decision in answering the special issues in a way that results in a life sentence rather than a death sentence, and thus the sentencing scheme in Article 37.071 is more beneficial to him than the scheme in Article 37.0711. *See id.* For this reason, a rational defendant who is entitled to the possibility of parole under Article 37.0711 might choose to intentionally and knowingly waive his right to the life-with-parole option under that article so as to proceed at trial under the punishment scheme set forth in Article 37.071, which provides for a minimum sentence of life imprisonment without parole. *Compare id.* art. 37.071, *with* art. 37.0711. The problem is that it does not appear that the Legislature has provided a sentencing scheme that would permit a trial court to instruct the jury in this way, even at a defendant's request, as here. Thus, even though the Legislature has enacted legislation requiring a trial court to instruct

juries that a defendant convicted at a trial for capital murder for offenses occurring on or after September 1, 1991 will be sentenced either to death or to life without parole, no legislation currently permits that identical instruction for offenses occurring before that date, even when a defendant waives his right to seek parole and he is effectively seeking to be sentenced to life without parole. This is an inequity that exists under our current statutory scheme.[1]

This inequity could be addressed through a legislative enactment applicable to a defendant convicted of capital murder for an offense occurring before September 1, 1991, who intentionally, knowingly, and voluntarily waives his right to the possibility of a sentence of life with parole. Under those circumstances, a statute could require the trial court (1) to instruct the jury that the only alternative to a death sentence is a sentence of life imprisonment without parole, and (2) to sentence a defendant to life without parole in the

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[1]I observe that members of this Court have, on numerous occasions, highlighted deficiencies in the existing law and suggested ways in which the Legislature might act to remedy them. *See*, *e.g.*, *In re Allen*, 462 S.W.3d 47, 55 (Tex. Crim. App. 2015) (Yeary, J., concurring) (urging the Legislature to provide a workable definition of intellectual disability in the capital-sentencing context and to create an appropriate procedure for litigating that issue); *Green v. State*, 374 S.W.3d 434, 447 (Tex. Crim. App. 2012) (Price, J., concurring) (urging the Legislature to amend the competency-to-be-executed statute to clarify proper standard of review on appeal); *Hollen v. State*, 117 S.W.3d 798, 803 (Tex. Crim. App. 2003) (Holcomb, J., concurring) (urging the Legislature to revise the felony driving-while-intoxicated statute to eliminate risk of improper verdict based on prejudice introduced by evidence of prior convictions); *Dixon v. State*, 201 S.W.3d 731, 737 (Tex. Crim. App. 2006) (Cochran, J., concurring) (suggesting that the Legislature enact new penal statute focused upon criminalizing continuous sexual abuse); *Lefevers v. State*, 20 S.W.3d 707, 712 (Tex. Crim. App. 2000) (Keasler, J., concurring) (urging the Legislature to substantively amend harassment statute); *Tyra v. State*, 897 S.W.2d 796, 802 (Tex. Crim. App. 1995) (Maloney, J., concurring) (suggesting that the Legislature should re-examine statute governing deadly-weapon findings to determine whether it had served its intended function).

event that the jury's answers to the special issues did not compel a death sentence. Because the Legislature already has determined that society's interest in the punishment of defendants for capital murder is best served by informing the jury about a sentence of life without parole as an alternative to a death sentence, it appears to me that this anomaly in the statutory scheme is likely a product of legislative oversight.

I also note that there are currently 251 people on Texas's death row, with the majority of those offenders—167 people, or about two-thirds of the population—having been there for over ten years. Because many of those individuals were sentenced to death before the life-without-parole option was available as an alternative to a death sentence for those convicted of capital murder, a statutory enactment could also address this situation by permitting the parties, under limited circumstances, to agree to reform a death sentence to life imprisonment without parole in a post-conviction proceeding.

This type of sentence reformation to life without parole may, in some appropriate cases, serve society's best interest by guaranteeing that a defendant will spend the remainder of his natural life in prison. For example, the Governor, through a clemency proceeding, or a state prosecutor in response to a habeas application, might reasonably believe that reforming a sentence from death to life without parole is appropriate under circumstances showing that a defendant is gravely ill, has a serious mental illness or intellectual challenge, has demonstrated that he is no longer a future danger to society based on remorse or some other events, or when there are enough questions about his guilt or the imposition of his

death sentence that a life sentence without parole is the just outcome. Similarly, a defendant might reasonably agree to reform a death sentence to life without parole under those same circumstances because his post-conviction legal challenges concern only the imposition of the death penalty rather than his guilt.

I agree with appellant that there is an inequity in permitting a jury instruction about the life-without-parole option only in more recent capital-murder cases, but disallowing such an instruction in older capital-murder cases. I also agree with him that the absence of a life-without-parole instruction might possibly influence a jury's decision in favor of a death sentence. Appellant has identified a significant problem with the law affecting death-sentenced defendants, but I am compelled to conclude that, as this is framed as a jury-charge complaint, the solution lies in the legislative rather than the judicial branch.

My colleague's concurring opinion is symbolic of the uphill climb that capital-murder defendants face in their efforts to have this Court even acknowledge that there is a problem, much less work for a solution that might be beneficial to society. Rather than agreeing that this is a problem that the best and brightest minds in the Legislature may wish to work together towards rectifying, the concurring opinion attempts to obscure a possible solution by making the problem appear unresolvable. I quickly address each of the arguments in the concurring opinion to demonstrate their fallibility.

With respect to the suggestion that considerations of equity should focus on the State's right to make a decision about whether to seek the death penalty and jurors' right to decide

death-penalty cases, I note that this argument misunderstands the nature of appellant's complaint. Appellant's challenge is that, having been granted a retrial on punishment for capital murder, it is inequitable for him to be denied a jury instruction that other defendants on trial for that same offense receive as a matter of right under the law. Nothing about appellant's complaint implicates the State's or jurors' rights in any way. As far as post-conviction modifications to life without parole that might occur, obviously the Legislature would define the parameters of that type of modification, but I suspect it would require the agreement of the State and a representation to a trial judge that the modification is in society's best interest.

The suggestion that the prohibition on ex post facto laws is implicated here is similarly misinformed. I agree that the Legislature could not enact a law that required life without parole for all capital-murder defendants whose offense dates place them within the statutory sentencing scheme that permits life with parole for this offense. But that is not what I am proposing, nor is it what actually occurred here. This Court has described an ex post facto violation based on the theory that "'the Legislatures of the several states, shall not pass laws, after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it.'" *Ex parte Heilman*, 456 S.W.3d 159, 163 (Tex. Crim. App. 2015) (quoting *Calder v. Bull*, 3 U.S. 386 (1798)). Nothing about the Legislature permitting a jury instruction when a defendant waives parole implicates the ex post facto prohibition. *See State v. Fortin*, 843 A.2d 974, 1014 (N.J. 2004) (holding that defendant could validly

waive protection of *Ex Post Facto* clause in order to obtain jury instruction based on statute which required sentence of life imprisonment without parole for capital murder, and further observing that "[o]ther jurisdictions also have allowed defendants to waive ex post facto challenges to the application of life imprisonment without the possibility of parole sentencing options that took effect after the commission of a capital murder").[2] Furthermore, merely permitting the State and a defendant to agree to reform a sentence from death to life without parole would also not implicate the ex post facto prohibition because this would be only by the agreement by the parties and not punishment set forth by the Legislature for a law violation. I am unaware of any authority, state or federal, that has held that a defendant's desire to intentionally, knowingly, or voluntarily waive his potential to receive parole would in any way implicate an ex post facto prohibition, and to suggest this without any supporting authority is questionable.

Former Section 42.18, subsection 8, is also not implicated by anything I suggest in my opinion. That section addresses cases that discharge though parole. But a defendant may not

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[2]In *State v. Fortin*, the New Jersey Supreme Court cited a number of cases from other jurisdictions in support of its conclusion that the *Ex Post Facto* clause would not serve as an impediment to a defendant's waiver of parole under these circumstances. *See* 843 A.2d 974, 1015 (N.J. 2004) (citing *Furnish v. Commonwealth*, 95 S.W.3d 34, 50-51 (Ky. 2002) (observing that defendant may make a "knowing, intelligent and voluntar[ ]y waiver of any right to attack this statute as a violation of the *ex post facto* prohibition"); *Willie v. State*, 738 So.2d 217, 220 (Miss. 1999) (holding that on remand for resentencing "jury should be instructed on all three options available under the amended statute" and if defendant "agrees to a sentence of life in prison without parole, the trial judge should take care to ascertain that [defendant] has validly waived his *ex post facto* rights before accepting the plea agreement"); *State v. McDonnell*, 987 P.2d 486, 494 (Or. 1999) (holding that defendant could waive *ex post facto* challenge in order to be sentenced under amended sentencing scheme); *Wade v. State*, 825 P.2d 1357, 1363 (Okla. Crim. App. 1992) (same)).

discharge a life sentence that by definition applies to a person's natural life. Again, the concurring opinion confuses eligibility to seek parole with a defendant's intentional, knowing, and voluntary waiver of his right to seek parole. Eligibility is an entirely different thing than being granted parole. The chances of a defendant confined to life in prison for capital murder who is eligible for parole actually being paroled are slim, at best. That reality is what prompted this appellant to seek waiving the pipe dream of parole for the solid jury instruction that would inform the jury that he would never be released on parole.

Section 508.145 of the Texas Government Code is similarly not implicated by anything in my opinion. *See* TEX. GOV'T CODE § 508.145. That section describes the eligibility dates for parole. But that section does not mandate that a defendant must request parole or that he cannot intentionally, knowingly, or voluntarily waive his right to parole. To suggest that this section is implicated here is curious.

Lastly, there is no inconsistency between anything in my opinion and Article 44.2511 of the Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. art. 44.2511. That Article applies to sentence reformations by this Court when there is reversible error in the punishment phase of trial. Nothing in that Article would apply to the procedures discussed in this opinion, but it is worth mentioning that the type of sentence reformation that I have in mind exists under our law today for other circumstances. *See id*. Article 44.2511 permits reformation to life in prison when a defendant's case has been reversed in the punishment phase of trial for something other than insufficient evidence and the "prosecuting attorney

files a motion requesting that the sentence be reformed to confinement for life." *Id*. Thus, whatever concerns the concurring opinion may have about the ability of the State's attorney to alter a jury's determination to sentence a defendant to death should be assuaged by the fact that the Legislature already permits this practice under this Article. *Id*. Nothing in this opinion suggests anything more expansive with respect to the State's ability to make decisions that are in the best interest of society than already exists under our law.

It is extremely concerning that the inequities in our law are shrugged off with a lack of concern for those who are affected. As the Legislature has already observed in its enactment of Article 44.2511, there are times when society's interests are best served by sentence reformations. If a mere suggestion that the Legislature at least consider remedying this problem draws an antagonistic response, it is clear to me that a solution to this problem does not lie in this Court. The solution lies with the Legislature.

I offer my comments in the spirit of hoping that society's best interest may be best served with equitable laws that apply fairly to all people. This opinion is intended as a mere starting point for what I recognize must ultimately be the Legislature's policy decision. Aside from taking into account the equitable considerations affecting all of the concerned parties, such a policy would empower the State by providing more options by which justice for all could be achieved. With these comments, I join this Court's majority opinion.

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