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Governor Greg Abbott
Governor of the State of Texas
Austin, Texas

27 March 2019

Dear Governor Abbott:

We represent Patrick Henry Murphy, Jr. Mr. Murphy is scheduled to be executed tomorrow, Thursday, March 28, 2019, after 6 o'clock p.m.

Thirteen months ago, you commuted Thomas Whitaker's death sentence to a sentence of life in prison without the possibility of parole. In your Proclamation announcing your decision to commute Mr. Whitaker's sentence, you noted important to your consideration was the fact that he was not the person who killed the victims in his case, his mother and younger brother. At the same time, you observed that Mr. Whitaker did play a role in the murders. Namely, Mr. Whitaker recruited the person who killed his mother and brother.

Section 7.02 of the Texas Penal Code contains two separate theories by which a defendant can be held responsible for a murder committed by another person. Mr. Whitaker's jury was permitted to find him guilty of capital murder through Section 7.02(a). Under 7.02(a), a defendant can be convicted of a murder committed by another person only if he assists, solicits, encourages, directs, aids, or attempts to aid the person who committed the murder or provides such assistance in a felony that results in a murder. Because he solicited Mr. Brashear to kill his mother and brother, Mr.

Whitaker could be convicted of their murders, which were committed by Brashear, through Section 7.02(a).

When a jury convicts a defendant of a murder committed by another pursuant to Section 7.02(a), the jury has made a finding the defendant participated, to some degree, in the murder or in a felony that resulted in a murder. In cases where the State subsequently asks the jury to sentence the defendant to death, this finding is critical. In a pair of cases, *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987), the Supreme Court held that to be sentenced to death, a defendant must fall into one of three categories. The jury must find the defendant either: 1) caused the death of the victim; 2) intended the victim to die; or 3) acted in a way that demonstrated a reckless indifference to life *and* played a major role in the felony that resulted in the murder. In cases where the defendant played some role in a murder that was premeditated, the requirement is easily satisfied. For example, someone who recruits someone else to kill his victims clearly intended the victims die. The tougher cases involve defendants convicted pursuant to a felony murder scheme, in which the defendant, and perhaps even the killer, did not intend the victim be killed. Because these defendants neither killed the victims in their cases nor intended they be killed, they can only be sentenced to death if the jury finds they *both* played a significant role in the felony that resulted in the murder *and* displayed a reckless indifference to life. The first of these two prongs requires the jury to consider the defendant's conduct; the second, his mental state.

Regarding the required finding related to the defendant's mental state, in cases where a defendant is convicted of capital murder under either Section 7.02(a) or Section 7.02(b), the jury must find that the defendant should have anticipated a loss of life would result from his actions.¹ When a jury finds that the defendant should have anticipated his actions would result in the loss of a life, it has made a finding related to the defendant's mental state, a finding perhaps sufficient to establish the defendant displayed a reckless indifference to life.

As mentioned above, when a jury convicts a defendant under Section 7.02(a), it has made a finding related to the defendant's conduct. However, no such finding is made when a jury convicts a defendant of capital murder pursuant to Section 7.02(b). Under Section 7.02(b), a defendant can be convicted of capital murder if he enters into a conspiracy to commit a felony that results in a murder. Finding a defendant entered into a conspiracy does not require a jury to find he participated at all in either the murder or the felony that resulted in a murder. To find a defendant conspired to commit a felony, a jury need only find he agreed someone should commit a felony. Patrick

¹ Tex. Code Crim. Proc. art. 37.071, § 2(b)(2).

Murphy's jury was allowed to convict him as a party under Section 7.02(b), and he was subsequently sentenced to death. Because the trial court's charge allowed the jury to convict him under any one of four theories, it is impossible to know whether the jurors convicted Murphy under one of the 7.02(b) theories or even whether the jury agreed under which theory Murphy was guilty. If the jury did convict him pursuant to one of the section 7.02(b) theories, Murphy was sentenced to death without his jury ever having to find he was a major participant in the robbery that resulted in Officer Aubrey Hawkins' murder.

Murphy's trial attorney should have objected during his trial that Murphy's being sentenced to death would violate the Constitution because the jury was not required to find he was a major participant in the robbery that resulted in Officer Hawkins' murder. Murphy's trial attorney made no such objection. Because the attorney did not make the proper objection, the only way for Murphy to raise a claim that his death sentence is unconstitutional because his jury was not required to find he was a major participant in the robbery that resulted in Officer Hawkins' murder was through an ineffective assistance of trial counsel claim raised during his state habeas proceedings.

State habeas proceedings are critically important because, in most cases, these proceedings are a condemned man's only opportunity to raise a claim that his trial counsel provided him ineffective assistance. Realizing these proceedings are critical and that death-sentenced inmates often receive poor representation in these proceedings, the Texas Legislature adopted legislation in 2009 that created the state's Office of Capital Writs ("OCW"). This legislation came too late for Mr. Murphy, who received the quality of representation during his state habeas proceedings the Legislature sought to curtail by creating the OCW.

Murphy's state habeas attorney failed to raise a claim that his trial attorney was ineffective for not objecting that his death sentence resulted from a proceeding in which his jury was not required make a finding related to his conduct. Not only did Murphy's state habeas attorney fail to raise this claim, he failed to raise a single claim that was cognizable in habeas proceedings. Mr. Murphy effectively had no state habeas proceedings.

Because of Murphy's state habeas attorney's ineffectiveness, no state court has yet to address the merits of Murphy's claim. Undersigned counsel filed motions that asked the Texas Court of Criminal Appeals ("CCA") to reconsider its decisions in Murphy's direct appeal and state habeas proceedings to decide the merits of his claim. The second of these asked the court to consider the claim addressed in Murphy's motion to constitute a second habeas application if the court believed that was appropriate. Murphy was denied relief on all these pleadings. Murphy's only opportunity to have a

state court decide the merits of his claim was in his state habeas proceedings. Had the Legislature created the OCW a few years earlier and had that office been appointed to represent Murphy in state habeas proceedings, his claim would almost certainly have been raised, but again, this important legislation came too late to save Mr. Murphy.

Now, on the eve of Mr. Murphy's scheduled execution, legislation is pending that, if enacted, would remove death as a possible punishment for those sentenced under Section 7.02(b). Senate Bill 929 was filed by Texas Senator Juan Hinojosa on February 20, 2019. This bill, if enacted, would add a provision to the Texas Code of Criminal Procedure that would expressly prohibit a death sentence for any individual whose jury was permitted to find him guilty of capital murder under Section 7.02(b). Senator Eddie Lucio was added as a co-author on March 6. On March 7, 2019, Representative Jeff Leach filed an identical bill in the House.² To be clear, this legislation, if enacted as currently written, would not be retroactive. Its passage alone would not invalidate Murphy's sentence. However, it is our belief its passage would create a basis for our filing a successive habeas application in the CCA. If that court subsequently authorized the claim, we believe there is a substantial possibility the court would hold Mr. Murphy's death sentence is unconstitutional.

While the Board of Pardons and Paroles voted not to recommend you grant Mr. Murphy a reprieve, as you know, you can grant Murphy a one-time, thirty-day reprieve. Thirty days should be sufficient time to know whether the currently pending legislation will likely pass.

The legislation that created the OCW came too late to help Mr. Murphy. You have the authority to act so that he is not executed before additional legislation is passed that would clear convictions obtained in trials identical to his are not eligible for a sentence of death. We, respectfully, ask you to use that authority and grant Mr. Murphy a one-time, thirty-day reprieve.

/s/ David R. Dow

David R. Dow

/s/ Jeffrey R. Newberry

Jeffrey R. Newberry

² Tex. H.B. 4113, 86th Leg., R.S. (2019).