

**BEFORE THE GOVERNOR OF THE STATE OF TEXAS
AND
THE TEXAS BOARD OF PARDONS AND PAROLES**

In re
Patrick Henry Murphy, Jr.
TDCJ # 999461,

Petitioner.

**SUPERSEDING APPLICATION FOR COMMUTATION OF
DEATH SENTENCE TO A LESSER PENALTY OR, IN THE
ALTERNATIVE, A 90-DAY REPRIEVE IN ORDER TO
AWAIT NEW LEGISLATION**

AND

**REQUEST FOR INTERVIEW AND HEARING
PURSUANT TO 37 TEXAS ADMINISTRATIVE CODE
§§ 143.43(f)(3), 143.57**

Respectfully submitted by

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TO THE MEMBERS OF THE TEXAS BOARD OF PARDONS AND PAROLES:

Irving Police Officer Aubrey Hawkins was murdered in the line of duty on Christmas Eve in 2000. The crime was horrific and necessitated that severe punishment be meted out to those responsible. Six men participated in the aggravated robbery at the sporting goods store that Hawkins responded to that night. Five guns fired eleven shots at Officer Hawkins. Five men have since lost their lives because of the role they played in Officer Hawkins' death.

Patrick Henry Murphy was not one of the six men in the sporting goods store that night. Murphy did not fire any of the five guns that were fired when Officer Hawkins was killed. Murphy was not present at the scene when Officer Hawkins was killed.

The jury that convicted Murphy of capital murder was allowed to find him guilty of capital murder if it believed he merely entered into an agreement that the robbery at the sporting goods store should happen regardless of whether it believed he played a major role, or any role, in the robbery. There is currently a bipartisan and bicameral effort in the Texas Legislature to enact legislation that would make those convicted

of capital murder pursuant to the charge given to Murphy's jury ineligible for a death sentence.

Counsel respectfully request the Board recognize that Murphy should not be executed when his conviction was obtained pursuant to a charge which members of the Texas Legislature have recognized cannot sustain a death sentence. Counsel request the Board find that it would be inappropriate for Murphy – who was not present at the scene when Officer Hawkins was murdered – to become the sixth man to lose his life and fifth man to be executed for Officer Hawkins' murder. Counsel request the Board recommend the Governor commute Murphy's sentence to a lesser penalty. In the alternative, Counsel request the Board recommend the Governor issue a ninety-day reprieve to give the Legislature an opportunity to vote on the currently-pending legislation before Murphy is executed.

Reasons for recommending commutation:

Like other state officials, Texas police officers take an oath that they will, with God's help and to the best of their abilities, "preserve, protect, and defend the Constitution and laws of the United States and

of this State.”¹ Of course, what is required of police officers in furtherance of this oath is of a considerably different magnitude than what is expected of other state officials who take the same oath. Police officers are the ones we rely on to directly confront and apprehend those who break our laws, and, if possible, to arrest them while they are in the very act of breaking our laws. Without a body charged with enforcing our laws, our society would be a far cry from the modern one we enjoy today. Law enforcement officers provide the safety and security without which modern cities could never have developed. They are who preserve order in society and prevent us from descending into anarchy. For that, for the bravery they show in accepting this call, and for the great sacrifices they are called to make and do make, the rest of us owe a great debt of gratitude to the individuals who choose to make their profession enforcing our laws.

Pursuant to the oath he took to defend the laws of our State, on December 24, 2000, Irving Police Officer Aubrey Hawkins answered a call on his radio around 6:20 pm. Officer Hawkins had met his family for dinner at an Olive Garden restaurant in Irving, but was called away

¹ Tex. Const. art XVI, § 1.

to respond to a call about suspicious persons inside the local Oshman's sporting goods store.

The call had been made by a woman whose friend, from the parking lot, saw employees inside the store being patted down and led to the back of the store. George Rivas, Larry Harper, Donald Newbury, Randy Halprin, Joseph Garcia, and Michael Rodriguez were all inside of the store. Patrick Murphy, who had escaped from a south Texas prison with the others, had made known to Rivas, the group's leader, that he did not want to take part in the robbery, and was waiting in the parking lot in front of the store in a Suburban.

Officer Hawkins was the first officer to arrive at the scene. As he drove around the back of the building, Murphy used a radio to inform the men in the store that Hawkins was headed to the back of the store. Murphy then drove to a nearby apartment complex.

When Hawkins got to the back of the building, he was shot eleven times by five different guns, fired by either four or five of the group of six men.² One of the group of six pulled Officer Hawkins out of his

² Executed in December 2018, Garcia consistently maintained he did not fire any of the shots that hit Officer Hawkins, as has Halprin, who has not been executed.

vehicle after he had been shot. As they were driving away in a Ford Explorer stolen from one of the employees of the sporting goods store, the group of six ran over Officer Hawkins and dragged his body several feet.

On January 22, 2000, officers in Woodland Park, Colorado located Halprin, Harper, Rivas, Rodriguez, and Garcia. Harper killed himself before he could be taken into custody. Two days later, Murphy and Newbury were apprehended in Colorado Springs, Colorado.

Murphy was tried, convicted, and sentenced to death for Officer Hawkins' murder in the 283rd District Court of Dallas County in November 2003. His jury was presented four theories by which they could convict Murphy of capital murder. Two of these required the jury only to find Murphy entered into a conspiracy to commit the robbery that resulted in Officer Hawkins' murder. Under Texas law, a defendant does not have to have participated in the crime to any extent to be found to have entered into a conspiracy. To be guilty of a conspiracy, a defendant merely needs to agree with one or more others that a felony should occur and then one member of the group has to take some action toward completing the felony. What this means in

Murphy's case is that two of the four options presented to the jury allowed it to find Murphy guilty even if they did not believe he was a major participant in the felony.

No federal law prevents a Texas jury from convicting a defendant of capital murder pursuant to a theory that the defendant entered into a conspiracy to commit a felony that resulted in the loss of a life. However, federal law – specifically, the Supreme Court's Eighth Amendment jurisprudence – does control which defendants convicted of capital murder can be sentenced to death. In cases where the defendant did not actually cause the death of the victim or intend for the victim to die but merely should have anticipated the victim would die, the Supreme Court has held the defendant can only be sentenced to death if he was a major participant in the felony. Murphy's jury was not asked in either the guilt or punishment stages of Murphy's trial to determine whether he played a major role in the robbery that resulted in the officer's murder. To allow Murphy's execution to go forward on March 28 without this finding having ever been made by a jury would be to violate the Eighth Amendment of the United States Constitution.

The Texas Court of Criminal Appeals affirmed Murphy's conviction and sentence on April 26, 2006.³ The conviction became final on January 8, 2007, when the United States supreme Court denied Murphy's petition for a writ of certiorari.⁴ All of the surviving co-defendants were also sentenced to death for Officer Hawkins' murder.

After dropping his appeals, on August 14, 2008, Rodriguez was the first to be executed for the murder. Rivas was executed on February 29, 2012. Newbury was executed on February 4, 2015. Garcia was executed on December 4, 2018. Including Harper, who killed himself after being found by officers, five men have lost their lives for the role they played in Officer Hawkins' murder.

The idea that, to be effective, the punishments doled out by a code of laws must be an adequate response to the crimes committed is as old as civilized society itself. Many of us are most familiar with the law of retaliation, or *lex talionis*, from the Mosaic law, including from the following passage from the twenty-first chapter of Exodus:

³ Murphy v. State, No. AP-74,851, 2006 WL 1096924 (Tex. Crim. App. 2006).

⁴ Murphy v. Texas, 549 U.S. 1119 (2007).

And if any mischief follow, then thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe.⁵

A similar provision is contained in the Code of Hammurabi.

Before these early law codes containing this law of retaliation were instituted, there was no check placed on punishment, and punishments inflicted would often far exceed what was necessary to address the crimes committed.⁶ The Mosaic law, including the rule of *lex talionis*, is often misunderstood as an endorsement of vengeance; in point of fact, it was a restriction on the punishment that could be doled out. In other words, the passage in Exodus is properly understood as saying no *more* than a life should be required for a life and no *more* than an eye should be required for an eye. The law recognized that the punishment must be great enough to satisfy those who were wronged. Otherwise, individuals would take actions to vindicate their wrongs. At the same time, the law recognized there must be a limit to the punishment. “The law was seen as very different from revenge. It was

⁵ Exodus 21: 23-35 (King James Version).

⁶ See generally Shane Claiborne, *Executing Grace* 64 (HarperOne 2016); Morris J. Fish, *An Eye for an Eye: Proportionality as a Moral Principle of Punishment*, Oxford J. of Legal Studies, Spring 2008, at 57, 61.

simply about balancing the scales, finding a way to reconcile harm done.”⁷

This recognition that punishments must be adequate in order to prevent those who are wronged from taking justice into their own hands is at the foundation of our modern legal system, and is, in fact, the basis upon which the Supreme Court has found death to be an appropriate punishment in some cases. As Justice Stewart wrote in *Gregg v. Georgia*, 428 U.S. 153 (1976), “In part, capital punishment is an expression of society’s moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.”⁸

Society’s moral outrage is rightfully great when someone who is charged with preserving order and enforcing our law is killed. Because they are the ones who maintain order and prevent society from regressing into one ruled by vigilante justice, the murder of a police officer, acting in the line of duty, deserves a harsher punishment than

⁷ Claiborne, *supra* note 6, at 64.

⁸ *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

most other murders. Our state legislators acknowledged this when they enacted our modern death penalty statute, which recognizes the murder of a peace officer as being one which can be charged as capital.

While there are those who believe that a punishment of death should never be imposed, certainly the brutal murder of Officer Aubrey Hawkins is deserving of a harsh punishment. There must, however, be a limit to that punishment. It is our system of adequate and appropriate yet not excessive punishment that Officer Hawkins died preserving.

Five guns played a role in Officer Hawkins' murder. Five individuals have lost their lives as a result of the role they played in his murder, four of whom have been executed by the State of Texas for their roles in taking Officer Hawkins' life. Carrying out the execution of Patrick Murphy, who neither fired a shot at Officer Hawkins nor had any reason to know others would do so, would not be proper retaliation but would instead simply be vengeance. As explained in greater detail below, because his jury did not have to determine whether Murphy was a major participant in the robbery, his execution would violate the Eighth Amendment. For these reasons, Counsel respectfully asks the Presiding Officer to designate at least one member of the Board to

interview Murphy at the Polunsky Unit, the Board set his application for a hearing as soon as practicable, and the Board recommend the Governor commute Murphy's death sentence to a lesser penalty.

Alternatively, for reasons described below, Counsel requests this Board recommend the Governor grant Murphy a ninety-day reprieve.

Reasons for recommending reprieve:

As the members of the Board are aware, a person does not have to have actually killed an individual to be found guilty of capital murder and sentenced to death, so long as the provisions of section 7.02 of the Texas Penal Code are met. Section 7.02 contains two very different subsections. Under section 7.02(a), a person can be held criminally responsible for the actions of another if he solicits, encourages, directs, aids, or attempts to aid the other person in the commission of the offense. In the case of Officer Hawkins' murder, section 7.02(a) allowed juries to find a co-defendant guilty if they believed he either aided, or attempted to aid in the murder or aided or attempted to aid in the robbery which resulted in the officer's murder. In other words, to be convicted under 7.02(a), a jury has to find a defendant participated to some extent in either the murder or the underlying offense.

Section 7.02(b) contains no such requirement. Under 7.02(b), one can be held accountable for the actions of another if he merely enters into a conspiracy to commit a felony. Finding a person entered into a conspiracy does not require a jury to find the defendant participated at all in the offense. The jury simply must find that the defendant agreed someone would commit an offense and that an action was taken – either by the defendant or someone else – in furtherance of that agreement. In the case of Officer Hawkins’ murder, this means a jury could find one of the co-defendants guilty pursuant to section 7.02(b) simply by finding he agreed the Oshman’s robbery (which resulted in the officer’s murder) should occur.

Though the distinction between 7.02(a) and 7.02(b) is often overlooked and the entirety of 7.02 is commonly referred to as “the law of parties,” the distinction between the two subsections is critical when analyzing whether a defendant convicted of capital murder is eligible for a death sentence. The Supreme Court has held that to be eligible for a death sentence, a person who did not actually kill the victim must have exhibited a reckless indifference for life and have been a major

participant in the offense that resulted in the death of the victim.⁹

When a jury finds a defendant guilty under 7.02(a), the jury has found the defendant participated, to some extent, in the offense that resulted in a murder. Accordingly, under Supreme Court precedent, a defendant convicted under 7.02(a) could be eligible for a death sentence. When a jury finds a defendant guilty under 7.02(b), it has made no finding that the defendant participated in the offense to any degree. As such, these defendants should be found to be ineligible for the death penalty.

Legislation is proposed seeking to make those convicted of capital murder pursuant to the law of the parties ineligible for execution in almost every session the Texas legislature meets. The legislation proposed this session and mentioned above differs from previously introduced bills in that it recognizes the critical distinction between 7.02(a) and 7.02(b). Senate Bill 929¹⁰ was filed by Texas Senator Juan Hinojosa on February 20, 2019. This bill, if enacted, would add a subsection to Article 37.071 of the Texas Code of Criminal Procedure that would expressly prohibit a death sentence for any individual whose

⁹ *Tison v. Arizona*, 481 U.S. 137, 157 (1987); *Enmund v. Florida*, 458 U.S. 782, 801 (1982).

¹⁰ Tex. S.B. 929, 86th Leg., R.S. (2019).

jury was permitted to find him guilty of capital murder under 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.¹¹

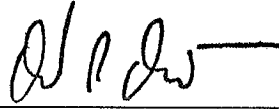
As mentioned above, two of the four theories under which Patrick Murphy's jury was permitted to find him guilty of capital murder allowed the jury to find Murphy guilty if it believed he entered into a conspiracy to commit robbery pursuant to Section 7.02(b). The other two theories required the jury to find that Murphy assisted in the robbery pursuant to Section 7.02(a). Because the jury returned only a general verdict, it is impossible to know whether Murphy was convicted under 7.02(a) or 7.02(b). That the jury was permitted to find him guilty under 7.02(b) means the jury was not required to find Murphy participated to any degree in the robbery. Undersigned counsel argued in Murphy's federal habeas proceedings that his resulting death sentence is therefore unconstitutional. The federal courts, however, found that Murphy was not allowed to raise that claim in federal proceedings because his earlier attorneys did not properly present it to the state courts of Texas.

¹¹ Tex. H.B. 4113, 86th Leg., R.S. (2019).

To be clear, the proposed legislation, if passed in its current form, would not apply retroactively. Murphy would not automatically be entitled to relief if it passes in its current form. Nevertheless, Counsel believe its passage would constitute a new legal basis by which Murphy could seek to have his claim heard by the state courts.

If Patrick Murphy's execution is allowed to proceed on March 28, 2019, as scheduled and the currently pending legislation subsequently passes, he would have been executed without having had the chance to have the Texas Court of Criminal Appeals decide whether the same concern that led Senators Hinojosa and Luico and Representative Leach to file their respective bills should dictate a finding that his execution would be or his capital murder conviction is improper. Counsel respectfully requests this Board recommend the Governor issue a ninety-day reprieve for Murphy. Ninety days should be a sufficient time for the Legislature to act on this proposed legislation and, if it passes, for Counsel to file a pleading that asks the Court of Criminal Appeals to review Murphy's conviction or sentence in light of the new law.

Respectfully submitted, this 12th day of March, 2019.



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