

1983 WL 182044 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

November 2, 1983

***1 Re: Opinion Request on the Death Penalty Act**

Honorable Dudley Saleeby, Jr.
Solicitor
Twelfth Judicial Circuit
Box Q
City-County Complex
Florence, South Carolina 29501

Dear Solicitor Saleeby:

I am in receipt of your request for an opinion from this office on the interpretation of 'murder was committed by a person with a prior record of conviction for murder.' [Section 16-3-20\(C\)\(a\)\(2\), CODE OF LAWS \(1976\)](#). This section provides for the above to be a statutory aggravating circumstance under the death penalty act. In particular, you are concerned with its applicability to an individual who had committed another murder subsequent to the instant charge and had been convicted. This factual situation has never been addressed by our Supreme Court which, of course, would be the interpreter of the statute's proper construction. [Johnson v. Pratt, 200 S.C. 315, 20 S.E.2d 865 \(1942\)](#). Therefore, since the matter may be in litigation our office cannot issue a formal opinion, but we are issuing this letter of legal advice to you for whatever use you deem appropriate.

The South Carolina Death Penalty Act provides that an individual convicted of murder may receive the death penalty if the jury or judge finds the existence of the aggravating circumstance of 'murder was committed by a person with a prior record for murder.' [Section 16-3-2-\(C\)\(a\)\(2\), CODE OF LAWS \(1976\) \(1982 Supp.\)](#). The rules of statutory construction developed by our Supreme Court establish that a criminal statute must be strictly construed against the state and any ambiguity or doubt or uncertainty must be resolved in favor of the defendant. [State v. Germany, 216 S.C. 182, 57 S.E.2d 165 \(1950\)](#). [State v. Lewis, 141 S.C. 483, 86 S.E. 1057 \(1927\)](#). In addition, full effect must be given to each section of a statute, words therein must be given their plain meaning, and words or phrases must not be added or taken away from the statute. [Hartford Acc. and Indem. Co. v. Lindsay, 273 S.C. 79, 254 S.E.2d 301 \(1979\)](#).

In your factual situation, interpretation can be narrowed to the phrase 'committed by a person with a prior record.' Since it must be construed that the General Assembly was not merely using surplusage when it included the word 'prior' before 'record' in the Death Penalty Act meaning must be placed upon that usage. 'Prior' is defined as 'the former; earlier; preceding . . .' [Black's Law Dictionary 1074 \(Rev. 5th Ed. 1979\)](#). The Arizona Supreme Court has addressed a similar statute and held that the conviction must occur prior to the commission of the murder. [State v. Lopez, 587 P.2d 1184 \(1978\)](#). The statute in [Lopez](#) by its terms contemplated convictions which were entered prior to the commission of the offense being punished. The Texas Court of Criminal Appeals held that where subsequent to the date of the offense for which the accused was being tried, the accused pleaded guilty to an offense committed before the trial, the conviction could not be utilized as a 'prior conviction.' [O'Rear v. State, 158 S.W.2d 996 \(Tex. Crim. App. 1942\)](#).

***2** Other states have death penalty statutes dissimilar from our statute that do not create a temporal nexus between the present murder charge and the date of the prior conviction. For example, the Florida Supreme Court held that the aggravating factor 'defendant was previously convicted of another . . . felony' was appropriately applied to two felony convictions that occurred contemporaneously with the instant case, but both were entered 'previous' to sentencing. [Lucas v. State, 376 So.2d 1149 \(Fla. 1979\)](#).

The same aggravating circumstance used by Florida is used in North Carolina and Mississippi. In [State v. Goodman](#), 257 S.E.2d 569 (N.C. 1979), the North Carolina Supreme Court held that the 'previously convicted' language of the death penalty statute refers criminal activity conducted prior to the events under which the present murder charge arose. In Mississippi, the Supreme Court was faced with the question as to whether its legislature meant previous to the commission of the capital offense or previous to the trial for it. [State v. Jones](#), 381 So.2d 983 (Miss. 1980). Unlike the South Carolina statute, the Mississippi Court found that in employing the word 'previously,' the statute designated no time frame. The Court then concluded that a conviction that occurred after the capital murder was properly admitted into evidence for purposes of showing an aggravating circumstance. The Court stated as follows:

We conclude the legislature intended to relate the word 'previously' to the time of trial, so that a conviction between the time the capital offense was committed and the time of trial for it may be admitted into evidence as an aggravating circumstance. We think this, because a wide leeway is permitted the appellant to offer mitigating circumstances in avoidance of the death sentence, while an extremely limited type of behavior may be offered by the state in seeking capital punishment. In our opinion, the legislature undoubtedly intended a weighing of both at the time of sentencing so the past behavioral patterns likely to affect the defendant's future behavior might be evaluated by the jury in deciding whether the defendant will live or die. We think there is no more justification for terminating consideration of the defendant's criminal behavior at the time of the offense than there is for terminating consideration of favorable behavior at that time. All go to the question of whether the most severe punishment will serve a legitimate social purpose untainted by vindictiveness. [State v. Jones](#), 381 So.2d at 995.

It is my opinion that the statutory language used by Florida, North Carolina, Mississippi, and now Arizona is unfortunately distinguishable from our statute in important areas. The South Carolina statute does link the murder occurrence to the prior record. An interpretation that made the previous murder event an aggravating circumstance would establish 'prior' or 'record' as mere surplusage in the phrase 'prior record' contrary to statutory construction and would require it instead to be interpreted as criminal activity conducted prior to the events out of which the charge of capital murder arose. Cf., [State v. Goodman](#), 257 S.E.2d 569 at 584 (N.C. 1979). An even broader interpretation that would include your post-event homicide and conviction would not be in line with the general rule that the criminal statute must be strictly construed against the state on any ambiguity resolved in favor of the defendant accused of the charge. [State v. Germany](#), *supra*. In conclusion, it is my opinion that under your proposed facts, the failure of the homicide event or conviction to have occurred prior to the pending murder event will preclude it from being a proper aggravating circumstance.

*3 It is clear that statutory construction is in the province of the courts who become the final arbiter of the intention of the legislature. The Supreme Court might adopt a construction similar to Mississippi's interpretation. In light of the recent history of our Court's strict construction against the State in favor of defendants, especially in death penalty cases, however, it appears that an interpretation allowing the conviction as an aggravating circumstance may not be successful.

However, our Supreme Court has once held that the courts are not to narrow the construction so that offenders may escape. [Green v. Thornton](#), 219 S.E.2d 827 (S.C. 1975). Accordingly, the issue could go either way and cannot be resolved definitively short of a judicial resolution of the issue.

As is the traditional relationship in this State between the Circuit Solicitors and the State Attorney General, Mr. Medlock's administration continues the long standing policy of deferring to the local solicitor's judgment in such cases inasmuch as the local solicitor possesses all of the facts surrounding the case and certainly a closer and clearer perspective of issues presented by the case. Accordingly, out of respect for you professionally and for the office that you hold, we defer to your judgment as to whether or not the death penalty is to be sought in such a case and will support your decision on the matter.

If you have any questions about this advice, please feel free to contact me.

Sincerely,

Donald J. Zelenka

Assistant Attorney General

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