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The State of South Carolina

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TO: Honorable David H. Wilkins
Chairman, House Judiciary Committee
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FROM: Donald J. Zelenka
Chief Deputy Attorney General

DATE: May 8, 1990

RE: House Bill 4572

1. The proposal to amend House Bill 4572 to provide for life imprisonment without parole for the leader of a "narcotics trafficking network" and to provide for the death penalty when a death results from the leader's drug trafficking activities is constitutional.

2. This Office favors and supports the Wilkins proposal for the death penalty for drug lords.

3. United States Supreme Court opinions clearly indicate that the Supreme Court would find the mandatory death penalty provisions for an offense which does not involve death in current House Bill 4572 to be unconstitutional. (1975-76 Op.Atty.Gen. Daniel R. McLeod No. 4388, p. 224).

You have requested an opinion concerning certain amendments made to House Bill 4572 dealing with the punishment for the crime of being "leader of a narcotics trafficking network." Particularly, you inquire whether House Bill 4572, as currently amended, meets constitutional muster and whether amendments you are considering proposing would similarly meet constitutional muster. I will address the current Bill, as amended, pending before the House initially, and then your suggested amendments.

Let me say at the outset that it is, of course, well-known that this Office favors the concept of using severe penalties to combat drug trafficking. The drug trafficker must fully understand the consequences of the horrible damage he is inflicting upon our society. At the same time, as this Office is the chief prosecutor, I must ensure that we can uphold in court the punishment for drug trafficking which is established by the Legislature. It does little good to provide for a punishment which can never be legally imposed upon the criminal.

House Bill 4572 creates in Section 1 a new statutory crime set forth in Section 44-53-476 defined as follows:

> A person is a 'leader of a narcotics trafficking network' if he occupies a position of authority or control as an organizer, supervisor, financier, or manager of an organization consisting of five or more persons which is engaged in a continuing scheme or course of conduct to unlawfully manufacture, distribute, dispense, deliver, bring into or transport into this state any controlled substance classified in Schedules I, II, III, or IV, or any controlled substance analog thereof in amounts exceeding the statutory quantity necessary to constitute the offense of trafficking in that controlled substance is provided in Section 44-53-370(e).

Further, the punishment for this crime was recently amended to include the following:

> A person who is a 'leader of a narcotics trafficking network' is guilty of a felony and upon conviction, must be punished by a sentence of death, which sentence must be reviewed by the Supreme Court as provided in Section 16-3-25 in the same manner other death sentences are reviewed, except that to uphold this sentence no statutory aggravating circumstance must be present or found to be present.

My reading of the statute makes it appear that whenever one is found guilty of being a leader of a narcotics trafficking network he would then be subject automatically to the sentence of death as provided for within this Bill. It is

also clear from the language in this statute that no additional statutory aggravating circumstances need to be shown prior to the sentence of death and it would further appear that no sentence of less than death is authorized by the statute.

It would appear that the United States Supreme Court has previously ruled in other cases that the kind of mandatory death penalty provisions as set forth in this Bill create an unconstitutional sentencing scheme for two separate reasons. First, the Supreme Court of the United States and the Supreme Court of South Carolina have held that mandatory death penalties are unconstitutional. In Furman v. Georgia, 408 U.S. 238 (1972) (per curiam), the Supreme Court, in effect, invalidated all capital punishment statutes then in existence because of its conclusion that the statutes permitted juries' absolute discretion in making the capital sentencing determination resulting in the death penalty being arbitrarily and capriciously imposed, in violation of the Eighth and Fourteenth Amendments. Subsequently, in Woodson v. State of North Carolina, 428 U.S. 280 (1976), the Supreme Court plurality agreed that the imposition of the mandatory death sentence under the North Carolina statutory scheme violated the prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments. The plurality decision in Woodson traced the history of mandatory death penalties and asserted that it evidenced the incompatibility of the mandatory death penalties with contemporary standards of decency and concluded that it was constitutionally inappropriate. The plurality decision of the Supreme Court stated as follows:

> As the above discussion makes clear, one of the most significant developments in our society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense. North Carolina's mandatory death penalty statute for first degree murder departs markedly from contemporary standards respecting the imposition of the punishment of death and death cannot be applied consistently with the Eighth and Fourteenth Amendments' requirement that the state's power to punish be exercised within the limits of civilized standards.

Woodson v. North Carolina, 428 U.S. at 301. The Court found other deficiencies in the North Carolina statute because it failed to provide a constitutionally tolerable response to Furman v. Georgia's rejection of unbridled jury discretion and the imposition of capital sentences and further that it failed to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death. 428 U.S. at 302-305. See also Gregg v. Georgia, 428 U.S. 153 (1976). In rejecting a similar mandatory capital sentencing provision in Roberts (Stanislous) v. Louisiana, 428 U.S. 325 (1976), the plurality acknowledged that the provision was drawn more narrowly than the North Carolina statute at issue in Woodson but it emphasized:

> The futility of attempting to solve the problems of mandatory death penalty statutes by narrowing the scope of the capital offense stems from our society's rejection of the belief that 'every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.' Id. at 333.

More recently, the United States Supreme Court was faced with a situation in Sumner v. Shuman, 107 S.Ct. 2716 (1987), in which a challenge to the Nevada statute that mandates the death penalty for a prison inmate who is convicted of murder while serving a life sentence without possibility of parole. In that decision, Justice Blackmun, for the Court, analyzed that the history of capital punishment cases, particularly as it deals with the Court's previous reaction to mandatory death sentences and concluded that the Nevada mandatory statute violated the Eighth and Fourteenth Amendments to the United States Constitution. The Court traced its history and concluded that it had established a "constitutional mandate of individualized determinations in capital sentencing proceedings." The Court stated that "we unequivocally relied on the rulings in Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982), that the Eighth and Fourteenth Amendments require that the sentencing authority be permitted to consider any relevant mitigating evidence before imposing a death sentence." Sumner v. Shuman, 107 S.Ct. 2723. The Court concluded "that a departure from the individualized capital-sentencing doctrine is not justified and cannot be

reconciled with the demands of the Eighth and Fourteenth Amendments." In conclusion, the Court stated the following:

> Any legitimate state interest can be satisfied fully through the use of a guided-discretion statute that ensures adherence to the constitutional mandate of heightened reliability in the death-penalty determinations through individualized-sentencing procedures. Having reached unanimity on the constitutional significance of individualized sentencing in capital cases, we decline to depart from that mandate in this case today. We agree with the courts below that the statute under which the respondent Shuman was sentenced to death did not comport with the Eighth and Fourteenth Amendments. Importantly, the Court also noted that elimination of the mandatory sentencing procedure also eliminates the problem of the possibility of jury nullification which has been known to arise under mandatory sentencing schemes. Sumner, 107 S.Ct. 2727, fn. 13. In that context it concluded that if a jury does not believe that the defendant merits the death sentence and it knows that such a sentence will automatically result if it convicts the defendant of the murder charge, the jury may disregard its instructions in determining guilt and render a verdict of acquittal or of guilty of only a lesser included offense.

Further, "guided discretion statutes that we have upheld, as well as the current Nevada statute, provide for bifurcated trials in capital cases to avoid nullification problems. Bifurcating the trial into a guilt-determination phase and a penalty phase tends to prevent the concerns relevant at one phase from infecting jury deliberations during the other." Sumner v. Shuman, 107 S.Ct. 2727, fn. 13. Similarly, the Supreme Court of South Carolina has held that mandatory death penalty statutes are unconstitutional. State v. Rumsey, 267 S.C. 236, 226 S.E.2d 894 (1976); State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986) (Section 16-3-40, providing for an automatic penalty of death upon conviction, is unconstitutional, relying upon Furman v. Georgia, supra).

Since the current Bill establishes a mandatory death penalty for anyone convicted of the crime of "leader of a narcotics trafficking network," it is evident from the above

recitation of numerous United States Supreme Court decisions, that a court would hold the Bill violates the Eighth and Fourteenth Amendments.

Second, another apparent constitutional defect in the Bill is that it fails to satisfy the Eighth Amendment requirements set forth in Tison v. Arizona, __U.S.__, 107 S.Ct. 1676 (1987); Cabana v. Bullock, 474 U.S. __, 106 S.Ct. 689 (1986); and Enmund v. Florida, 458 U.S. 782 (1982). In Enmund, the Supreme Court of the United States held that the imposition of the death penalty on a person who aids and abets a felony in the course of which murder is committed by others but who does not himself kill, attempt to kill, or intend to kill, was held to violate the Eighth and Fourteenth Amendments to the United States Constitution. See also Yates v. Aiken, 290 S.C. 523, 349 S.E.2d 84 (1986); State v. Peterson and Stubbs, 287 S.C. 244, 335 S.E.2d 800 (1985) (during the penalty phase of a death penalty case which involves conspiracy liability, the trial judge should charge that the death penalty cannot be imposed on an individual who aids and abets in a crime in the course of which a murder is committed by others, but who did not himself kill, attempt to kill, or intend that killing take place or that lethal force be used, relying upon Enmund v. Florida). More recently, in Tison v. Arizona, Justice O'Connor, for the Court, stated that the Eighth Amendment does not prohibit the death penalty as being disproportionate in a case where a defendant whose participation in a felony that results in a murder is major and his mental state is one of reckless indifference to human life. In Tison, the Court stated, "Enmund held that when 'intent to kill' results in its logical though not inevitable consequence -- the taking of human life -- the Eighth Amendment permits the state to exact the death penalty after a careful weighing of the aggravating and mitigating circumstances. Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that can be taken into account in making a capital sentencing judgment on that conduct causes its natural, though not always inevitable, lethal result." Tison, 107 S.Ct. at 1688.

Reviewing the proposed statutory definition of leader of a narcotics trafficking network does not require any finding that a death has occurred, only that the individual "leader" occupies a position of authority or control in a continuing scheme or course of conduct to unlawfully manufacture, distribute, dispense, deliver, or bring into transport into this state any defined controlled substance in the trafficking level. Recently, the Supreme Court of South Carolina spoke of the damaging effects drugs have on society generally:

> The drug 'cocaine' has torn at the very fabric of our nation. Families have been ripped apart, minds have been ruined, and lives have been lost. It is common knowledge that the drug is highly addictive and potentially fatal. The addictive nature of the drug, combined with its expense, has caused our prisons to swell with those who have been motivated to support their drug habit through criminal acts. In some areas of the world, the entire governments have been undermined by their cocaine industry. As stated by Chief Justice Gregory in his dissent in Ball, 'one who possesses this controlled substance, even for his own use, fosters the prosperity of the lucrative and destructive industry of illicit cocaine manufacture and trafficking.' Ball, 292 S.C. at 75, 354 S.E.2d at 909 (Gregory, C.J., dissenting). Because of our present 'war on drugs,' and because any involvement with cocaine contributes to the destruction of an ordered society, we hold that the mere possession of cocaine is a crime of moral turpitude.

State v. Jimmy Major, Op. No. 23182 (filed March 19, 1990). Clearly, the crime suggested as a "leader of a narcotics trafficking network" is a crime abhorrent to all good and rational thinking citizens. As stated, the need to deter and punish is necessary and important to ordered society. It is the position of the Office of the Attorney General that this crime be treated most severely with a sentence of life without possibility of parole.

I have surveyed the state and federal case law and have been unable to find any support for the proposition since Furman v. Georgia that the death penalty is currently

constitutional when imposed in a situation where there is no proof that a death resulted. Particularly in Coker v. Georgia, 433 U.S. 584 (1977), Justice White stated that in his opinion the sentence of death for the crime of rape is grossly disproportionate and excessive punishment and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment. In his analysis, he concluded that death is a disproportionate penalty for rape was strongly indicated by the objective evidence of the present public judgment, as represented by the attitude of state legislatures and sentencing juries, concerning the acceptability of such a penalty, it appearing that Georgia is currently the only state authorizing the death sentence for the rape of an adult woman, that the death penalty was authorized for rape in only two other states but only when the victim is a child and that in the vast majority (9 out of 10) of rape convictions in Georgia since 1973, juries have not imposed the death sentence. Importantly, Justice White noted that although rape deserves serious punishment, the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the rapist who, as such and as opposed to the murderer, does not unjustifiably take human life. 433 U.S. 599-600. See also Buford v. State, 403 So.2d 943, 951 (Florida, 1981), (the death penalty is unconstitutional for the crime of rape), and Leatherwood v. State, 548 So.2d 389 (Mississippi, 1989), (the death penalty for rape is not appropriate where the state law requirement finding that the defendant actually killed, attempted to kill, intended that a killing take place, or contemplated that lethal force would be employed was not found). From my survey of other states with death penalty statutes, I could find no other state which similarly punishes an individual who took a leadership role in a drug trafficking network. Unless the requirements of Tison and Enmund are satisfied, it is my opinion that a death penalty under this statute would be vacated, based upon the numerous United States Supreme Court decisions cited previously, as a violation of the Eighth and Fourteenth Amendments where there was no showing that death resulted from the particular criminal activity of the "leader" and further no showing that the defendant whose participation in the felony resulted in the murder is major and whose mental state is one of reckless indifference for human life. Tison v. Arizona, 107 S.Ct. 1676, 1687-1688. (1987).

II.

You have also requested our opinion on the constitutionality of certain proposed amendments to House Bill 4572. These amendments would create the following punishment:

> Guilty of a felony and, upon conviction, except as provided in subsection (C), must be punished by a mandatory term of life imprisonment, no part of which may be suspended, and probation and parole must not be granted for any portion of the term. ...
>
> (C) A person engaging in the offense ... who murders or counsels, commands, induces, procures, or causes the murder of an individual is guilty of a felony and, upon conviction, must be punished as provided in Section 16-3-20 (punishment for murder).

Section 2 of your proposed amendment creates a new statutory aggravating circumstance for murder to allow the death penalty by amending Section 16-3-20(C)(A) to include "murder was committed while in the commission of ... (g) leading a narcotics trafficking network as defined in Section 44-53-476 ...." It provides that if the state seeks the death penalty and this aggravating factor is found beyond a reasonable doubt and the death penalty is not recommended by a jury, life without possibility of parole is the appropriate sentence.

It would appear that the possibility of the death penalty for a murderer who leads a narcotics trafficking network under the statutory scheme you suggest would be constitutional under the Eighth and Fourteenth Amendments. First, it requires a finding of a murder, i.e., the killing of another human with malice aforethought either express or implied. Second, the use of the statutory aggravating circumstance "murder was committed while in the commission of leading a narcotics trafficking network" performs a constitutionally adequate function of narrowing the class of murderers who are death-penalty-eligible as required by the United States Supreme Court's interpretation of the Eighth Amendment. See Lowenfield v. Phelps, __U.S.__, 108 S.Ct. 546 (1988). In Zant v. Stephens, 462 U.S. 862, 877 (1983), the United States Supreme Court stated that to pass

constitutional muster, a capital-sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." As recognized above, the circumstance here genuinely narrows the class of murderers death-eligible. Third, by utilizing our current statutory death penalty scheme, it is not a mandatory death penalty and allows the defense at sentencing to be "permitted to present any and all relevant mitigating evidence that is available," to comply with the mandates of the United States Supreme Court decisions in Lockett v. Ohio, 438 U.S. 586 (1978); Skipper v. South Carolina, 476 U.S. 1 (1986); Boyde v. California, __U.S.__, 110 S.Ct. 1190 (1990); and Blystone v. Pennsylvania, __U.S.__, 110 S.Ct. 1078 (1990). Further, under this statutory scheme, Enmund/Tison concerns can be satisfied by the procedures established by the Supreme Court of South Carolina in State v. Peterson and Stubbs, 287 S.C. 244, 335 S.E.2d 800 (1985), requiring the jury/judge conclude that the person actually killed or intended that a killing take place or that lethal force be used before the death penalty can be imposed. We note also that a similar statutory scheme is currently in place for a similar federal crime pursuant to 21 U.S.C. § 408. Further, as previously stated, we consider the life without parole sentence for the substantive offense when murder is not shown to have occurred to be constitutionally proportionate punishment and sound public policy for the reasons previously stated.

If you have any questions, please do not hesitate to contact me.

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