The State of South Carolina

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Honorable James C. Anders
Solicitor, Fifth Judicial Circuit
Post Office Box 7485
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Re: Applicability of Section 16-3-20(C)(3)(8), Statutory Aggravating Circumstances to Use of Automatic Weapon in a Public Place that Results in Two Deaths

Dear Solicitor Anders:

You have asked us to render an opinion as to whether the death penalty may be sought, i.e., whether any statutory aggravating circumstances may be alleged to exist, under a specific hypothetical factual situation. In your factual situation, you assert that two high school students were killed by three other high school students. You assert that the alleged murder weapons were a fully automatic British Sten sub-machine gun and one pistol. The weapons were fired into a van carrying several people, striking and killing two occupants of the van, while the van was on a busy street. I will assume for the purposes of this response that the potential defendants knew that there were people inside the van and adequate evidence exists to show malice aforethought (see Yates v. Aiken, Op. No. 22962, filed February 6, 1989, amended January 29, 1990), and sufficient evidence on the

defendants to show that the defendant killed, attempted to kill, or intended that a killing take place or that lethal force was to be used to satisfy the threshold requirements of Enmund v. Florida, 458 U.S. 782 (1982), or that the defendant's participation is major and his mental state is one of reckless disregard or indifference to human life even though no specific intent to kill to satisfy the mandates of Tison v. Arizona, 481 U.S. 137 (1987). These threshold constitutional considerations must exist before any criminal defendant who is convicted of a crime of murder causes the offender to be death penalty eligible. Of course, this opinion assumes a number of facts which are not available to us and which would have to be proven; an opinion of the Attorney General cannot make factual findings. Op. Atty. Gen., December 12, 1983. Moreover, any decision to seek the death penalty in a particular instance remains with you as Solicitor. See, Op. Atty. Gen., July 12, 1989.

Under South Carolina law, if the state is able to prove beyond a reasonable doubt the existence of any defined statutory aggravating circumstance the death penalty may be imposed if the jury or judge depending upon the circumstances of guilt determines that penalty to be the appropriate punishment. Under your factual scenario, there are two statutory aggravating circumstances which standing alone could support the state's ability to request the death penalty:

1. Murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct. Section 16-3-20(C)(a)(8).

2. The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person. Section 16-3-20(C)(a)(3), CODE OF LAWS (1989 Supp.).

Section 16-3-20(C)(a)(8) was passed as part of the Omnibus Criminal Justice Improvements Act of 1986 to provide for the possibility of seeking the death penalty when multiple murders arose form one criminal act or pursuant to one scheme or course of conduct. Clearly, under your alleged

factual situation where two individuals sitting in the van were killed as a result of the defendants' course of conduct, if proven, would satisfy this statutory circumstance of "murder wherein two or more persons are murdered by the defendant as a result of one act or pursuant to one scheme or course of conduct." Clearly a situation where a weapon was fired into a van known to have more than one individual and two people died as a result of that criminal activity meets the requirement of "one act" or "one course of conduct." I would suggest that this type of activity is precisely the same type of conduct the legislature intended to sanction by the 1986 Amendment to the Death Penalty Act.

It would also appear that your suggested factual situation, if proven, would satisfy the statutory aggravating circumstance set forth in Section 16-3-20(C)(3), CODE OF LAWS (1976), where the usage of the British Sten sub-machine gun and pistol put more than one person in a zone of danger or great risk of death. The particular aggravating circumstance reads as follows:

> The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

There is no South Carolina case that has interpreted this circumstance. Professor William S. McAninch has written "[t]his presumably contemplates the use of a weapon or device other than an ordinary pistol or rifle, perhaps an automatic weapon or some explosive device, the impact of which would not be directed against a single person." See The Death Penalty in South Carolina, Aculsc Press (1981), pp. 79-80. Professor McAninch has more recently written the following concerning this circumstance:

> Presumably this circumstance is aimed at deterring a terrorist type of situation. What is meant by a device [or weapon] which would normally be hazardous to the lives of more than one person is not clear, but from the remaining language of the section, it would appear that this circumstance only applies to weapons and devices such as bombs or machine guns.

McAninch and Fairey, The Criminal Law of South Carolina (2nd Edition 1989), p. 114. My research of the application of similar aggravating circumstances in other states reveals that most probably the interpretation of Professor McAninch is too narrow, even though clearly applicable to your factual situation.

An analysis of Gregg v. Georgia, 428 U.S. 153 (1976), and Proffitt v. Florida, 428 U.S. 242 (1976), as well as other states' constructions of the "great risk of death to another person" factor, provides some guidance on this issue and would suggest that the limited construction cited above was not the intent of the General Assembly nor is constitutionally required. In Gregg and Proffitt, the United States Supreme Court reviewed similar aggravating factors in Georgia ["... knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person." Ga. Code Ann. Section 27-2534.1(b)(3), now O.C.G.A. Section 17-10-30(b)(3)] and Florida ["... knowingly created a great risk of death to many persons." Fla. Stat. Section 921.141(5)(c)] death penalty statutes and sustained them from vagueness challenges. The Court warned in both instances, however, that each state's respective aggravating factor was susceptible to an impermissible overbroad construction. However, in each case, it approved the construction given the aggravating factor by the state courts.

In Gregg, focusing on the language "great risk of death to more than one person," the Supreme Court approved the construction given by the Georgia courts in Chenault v. State, 234 Ga. 216, 215 S.E.2d 223 (1975), the only case to which that factor had been applied at that time. In Chenault, involving the death of Dr. Martin Luther King's mother, the defendant had stood up in church, shot and killed the organist and another person, and then turned and began to fire randomly into the congregation. The Court compared this situation favorably with that present in Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258 (1975), in which the Georgia court reversed the finding of "great risk" where the victim was simply kidnapped in a parking lot and then found shot dead on an isolated road. Gregg, supra, 428 U.S. at 202. Chenault does represent a situation of an indiscriminate act of gun shooting affecting a large number

of people. However, the contrast with the far different kidnapping and killing of one individual, suggests a broad range of possible fact situations in which the aggravating factor could constitutionally be construed to apply. The Georgia court later construed a great risk of death to more than "one person" factor to apply where a defendant and two others robbed a 7-11 Store. At the time of the robbery, an armed guard and two employees were in the public area of the store. A struggle ensued between the guard and the robbers. The guard was killed, having been shot six times with a .32 calibre automatic revolver. While several of the robbers were also shot, no other people were hurt or threatened. However, the Georgia court concluded that "a .32 calibre automatic ... is a weapon which is normally hazardous to the lives of more than one person, when used in a public place." Jones v. State, 243 Ga. 820, 256 S.E.2d 907 (1979). The focus there was on the type of weapon used, not upon any indiscriminate shooting spree.

On the other hand, the Georgia court has recently rejected the use of the factor where someone was shot from a fairly close range simply because others were in the vicinity. Phillips v. State, 297 S.E.2d 217 (1982). In Pope v. State, 345 S.E.2d 831 (Ga. 1986), the factor was rejected where the defendant entered a drugstore where the only people in the store were the victim pharmacist and a teenaged girl. The victim and the girl were placed in a bathroom. The victim later left the bathroom and a struggle ensued. The girl, hearing the struggle, left the room, picked up a mop and hit the defendant while there was a struggle for the gun. The victim lost his balance and was shot as he rose and died from the wound. The defendant then shot the girl in the neck, but she survived. The court held that the defendant "did not by his act of shooting Lee Webb (the pharmacist) create a great risk of death to Lisa Kirk." 345 S.E.2d at 845. The Georgia courts also have rejected the existence of the factor where a shotgun was used to kill a victim at close range while lying face down on the ground where there was no showing that the defendant's act "knowingly" created a great risk of death to more than one person even though another individual was also lying face down near the victim but not injured. Harrison v. State, 257 Ga. 528, 361 S.E.2d 149 (1987). The Georgia court referred to Phillips and Pope with approval.

In Proffitt, the Supreme Court approved the construction given the aggravating factor "great risk of death to many persons" by the Florida court in Alvord v. State, 322 So.2d 533 (Fla. 1975). In that case, a great risk of death to many persons was found to exist when a defendant had murdered two victims to avoid a surviving witness. The Florida court had also found this circumstance to apply to the facts in Proffitt where the defendant killed the victim with a knife and then with his fist hit the victim's wife who was sleeping in the bed. The United States Supreme Court was troubled by this construction of the aggravating factor. See 428 U.S. at 256 n. 13. This concern would appear to stem from the fact that though the specific aggravating factor refers to a great risk of death to "many persons" in Proffitt only one other person was threatened. Subsequent to Proffitt, Florida courts have refused to construe this aggravating factor to apply where only one or two other persons are present during the murder but not harmed or threatened. See Lewis v. State, 377 So.2d 640 (Fla. 1979); Kampff v. State, 371 So.2d 1007 (Fla. 1979). On the other hand, where two persons, not the intended victims, were shot during the defendant's "raging gun battle," the aggravating factor was construed to apply notwithstanding the few number of people involved. Lucas v. State, 376 So.2d 1149 (Fla. 1979).

In Trawick v. State, 473 So.2d 1235 (Fla. 1985), the Court held the evidence was insufficient to show this aggravating factor where the murder victim was the only person inside the store when the defendant and his accomplices entered. The Court concluded that evidence that before entering the store, the petitioner fired a gun from a moving car, while admissible to show res gestae, should not have been relied upon because it was not directly related to the capital felony. See Elledge v. State, 346 So.2d 998 (Fla. 1977).

In addition to the Supreme Court's approved statutory constructions in Georgia and Florida, other states have also endeavored to construe and apply the aggravating factor in a constitutional manner. In Arizona, this factor has been found to exist where during the course of a robbery the defendant fatally shot two persons and wounded another [State v. Blazak, 643 P.2d 694 (Ariz. 1982)], where the defendant came up behind the intended victim in a crowded place, emptied his gun at him killing the victim and

wounding a person standing nearby [State v. Doss, 568 P.2d 1054 (Ariz. 1977)], and where the defendant shot three intended victims in a crowded bar, the court noting that when a defendant emptied his gun at victims he created a grave risk of death to other people in the immediate area [State v. McMurtrey, 664 P.2d 637 (Ariz. 1983)]. On the other hand, distinguishing the crowded bar and public place in Blazak and Doss, the Arizona Supreme Court found the "other person not within the "area of danger" where at the time of the victim's shooting, the other person was in another room. State v. Clark, 616 P.2d 888 (Ariz. 1980). Where the defendant simply pointed the gun at the "other person" but thereafter proceeded with the killing of the intended victim during which there was no indication he intended to kill or harm the other person, the Arizona court found that to apply the aggravating factor to these facts would "stretch the statute to extreme length." State v. Jeffers, 661 P.2d 1105 (Ariz. 1983).

Arkansas appears to have adopted an "extreme" construction of its similar circumstance. There the court found a knowing creation of a great risk of death to arise when the "other person" having heard shots from a store, entered it and came face to face with a defendant who had just murdered the victim and who ordered the "other person" to get into the store. The "other person" instead backed out and moments later the defendant ran out with a gun.

In Oklahoma, the court construed a similar factor to apply where, following the murder, the defendant pulled a gun out of a paper sack and simply pointed it at a group of other people as he walked along the street. Hays v. State, 617 P.2d 223 (Okla. Cr. App. 1980). While this might be an "extreme stretching" of the constitutional limits of the factor, the factor has more recently been applied to facts clearly within the constitutional parameters, i.e., mass murders. Stafford v. State, 665 P.2d 1205 (Okla. Cr. App. 1983) (defendant herded six victims into a meat freezer and opened fire at close range at all six); Davis v. State, 665 P.2d 1186 (Okla. Cr. App. 1983) (defendant fired six bullets from a .38 calibre revolver at four intended victims, killing two and wounding two); Jones v. State, 648 P.2d 1251 (defendant shot three victims in a bar, killing one and wounding two). Also, in Ross v. State, 717 P.2d 117 (Okla. Cr. 1986), the Court concluded that there was sufficient

evidence to find the existence of the aggravating circumstance where the defendant threatened a motel clerk with death if she did not cooperate, and then shot the police officer, who subsequently arrived at the scene, showing his willingness to act out the threat to the motel clerk as evidence of a great risk of death to more than one person, citing with approval the Hays decision.

In Louisiana, the execution of two victims lying side by side with six rapid rifle shots was found to constitute a single consecutive course of conduct by which defendant contemplated and caused a great risk of death to more than one person. State v. Sonnier, 379 So.2d 1336 (La. 1979), 402 So.2d 650 (La. 1981). See also State v. English, 367 So.2d 815 (La. 1979). The factor was also found where the defendant entered a bank with several customers inside with his automatic pistol drawn. He fired three shots at a security guard--two hit the guard and one hit the wall. Several of the customers had to duck and were in close proximity to the guard when the defendant fired the shots. State v. Berry, 391 So.2d 406 (La. 1980), 430 So.2d 1005 (La. 1983). On the other hand, the factor was not applicable where the defendant merely pointed his weapon at the "other person" who had chased after the defendant following the killing of the victim. State v. Lindsay, 404 So.2d 446 (La. 1981). Also: State v. Culberth, 390 So.2d 847 (La. 1980). In State v. Moore, 414 So.2d 340 (La. 1982), the factor was found not to apply where the "other person" was the victim's child and was never threatened or in danger during the stabbing of the victim.

In State v. Lowenfield, 495 So.2d 1245, 1256 (La. 1985), the Louisiana court held that under a similar aggravating circumstance without the public place requirement there was sufficient evidence shown under the facts therein. In Lowenfield, the defendant armed himself with a .22 calibre semi-automatic rifle and a .38 calibre revolver and climbed into a residence. He hid inside the house until the victims had arrived. Then he burst out and opened fire on everyone in the room -- three adults and one child and then killed another adult who was drawn by the sound of the gunfire. The Louisiana court concluded as follows:

> We are of the opinion that the evidence is sufficient to support the conclusion that the defendant murdered the victims as part of a single consecutive course of conduct in order to punish the victims for real or imagined wrongs he felt they had perpetrated on him. The defendant, in a swift and consecutive course of conduct fired an automatic rifle and a .38 calibre gun repeatedly into a small room occupied by five people. It cannot be seriously argued that the defendant did not contemplate a great risk of death or bodily injury to more than one person.

In North Carolina, the same factor was held to apply where the defendant drove onto the bumper of the victim's car, knowing there were two individuals in the car, stopped his car within several feet of the victim's car, fired a shotgun within two or three feet of the victim and the passenger. State v. Moose, 313 S.E.2d 507 (N.C. 1984).

In Missouri, the same factor has been held applicable where the defendant created a "great risk of death" to at least seven people by means of weapons sufficiently hazardous to strike the body of the victim thirteen times and to wound another person. State v. Griffin, 662 S.W.2d 854 (Mo. banc 1983).

In New Jersey, the court approved the use of the same factor where a defendant unloaded six rounds of his Colt .38 calibre revolver at the intended murder victim while the "other person" was sitting close to the victim on a couch. Several of the bullets struck the victim on the side next to which the "other person" was sitting. State v. Price, 478 A.2d 1249 (N.J. Super. 1984).

In Nevada, the finding of the similar aggravating circumstance was upheld in Ford v. State, 102 Nev. 126, 717 P.2d 27 (1986). In Ford, the aggravating circumstance was held to be sufficiently proven where on Thanksgiving the defendant drove her mechanically sound automobile onto a crowded sidewalk in Reno, Nevada, leaving six people dead.

In conclusion, the statutory aggravating circumstance has two components, both of which must be satisfied. First, the evidence must show that the defendant, "by his act of murder ... knowingly created a great risk of death to more than one

person in a public place." Second, the evidence must show that this "great risk" resulted from the use of a "weapon or device" that is "normally hazardous to the lives of more than one person." As I earlier stated, the courts have approved of the use of the factor when the weapon or device was a handgun or revolver. (State v. Price, 478 A.2d 1249 (.38 cal. revolver); Jones v. State, 256 S.E.2d 907 (1979) (.32 cal. revolver). Therefore, it would appear to be a constitutionally appropriate interpretation for a .38 calibre revolver or a fully automatic machine gun to fall within the terms in South Carolina. The real question then concerning the applicability of this circumstance is that the facts must show a knowing or purposeful state of mind vis a vis the creation of a great risk of death, that there is a likelihood or high probability of a great risk of death created, not just a mere possibility, and that there be at least another person within the "zone of danger" created by the defendant's conduct. These factors will have to be reviewed on a case by case basis with the understanding that the courts have approved its use when, though no actual injury occurred, the other person was so close to the defendant during his act of killing as to be within the "zone of danger" posing a real likelihood of risk of death, considering the type of weapon used and the actual conduct of the defendant. [Jones v. State, 256 S.E.2d 907 (Ga.); State v. McMurtsey, 664 P.2d 637 (Ariz.); State v. Berry, 391 So. 2d 406 (La.)].

Depending upon the course of your investigation and factual development of the crime, you may also want to consider the existence of the following statutory aggravating circumstance:

> (6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

The circumstance could be specifically directed at an individual who directed another to kill, even though he may not be the actual "triggerman." See State v. Cain, 377 S.E.2d 556 (S.C. 1988).

As you are aware, the Supreme Court of South Carolina has held that it is sufficient to support the death penalty that

only one aggravating circumstance be proven. State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984). Therefore, the existence of any or all of the above circumstances which appear to exist from your factual scenario may allow for the death penalty to be sought. I hope that this is responsive to your inquiry.

CONCLUSION

It is our opinion, based on the facts as presented, the death penalty may be sought where it is alleged that two high school students were murdered by the firing of an automatic weapon and a pistol into a van carrying several young people. Pursuant to and dependent upon the facts presented, there may be three different statutory aggravating circumstances available to you as Solicitor which would authorize you to seek the death penalty in this case.

Sincerely,

T. Travis Medlock

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