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HENRY McMASTER
ATTORNEY GENERAL

February 3, 2006

Barry J. Barnette
Principal Deputy Solicitor, Seventh Judicial Circuit
Spartanburg County Courthouse
180 Magnolia Street
Spartanburg, South Carolina 29306

Re: Opinion Request
Applicability of Statutory Aggravating Circumstance

Dear Sir:

You have requested an opinion from this Office on the applicability of § 16-3-20(C)(a)(1)(I) ["the murder was committed while in the commission of... (I) dismemberment of a person"] to a situation where the dismemberment occurred more than one month after the victim was killed and buried [and the purpose of the killing was not for the dismemberment of the body]. It is my opinion that this factual scenario does not satisfy the legislative intent of "while in the commission of" language which the state must prove beyond a reasonable doubt to satisfy this particular statutory aggravating factor.

"Dismember" is defined as "to cut, tear, or pull the limbs off" or "to divide into pieces." The American Heritage Dictionary (4th Ed. Houghton Mifflin 2000). It is further described as "to deprive of a limb or bodily member or its use." Roget's II: The New Thesaurus (Houghton Mifflin 1995). Surveying capital litigation, this term has been more frequently used in other states in support of different statutory aggravating factors of "physical torture", "heinous, atrocious, or cruel" or "exceptional depravity" when the dismemberment occurred prior to, at, or near the time of death. See State v. Mata, 266 Neb. 668, 668 N.W.2d 448 (2003); Thorson v. State, 895 So.2d 85 (Miss. 2005); Losch v. State, 834 N.E.2d 1012 (Ind. 2005) ("dismemberment" aggravator supported by severing head at time of incident sufficient to

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overcome mitigators). But see, Robedeaux v. State, 866 P.2d 417 (Okla. 1993) (“heinous” factor not shown where there is no evidence dismemberment occurred prior to death).

Other courts in interpreting similar aggravating factors have looked towards the timing of the acts. For example in “torture” circumstances, the Tennessee Court has held that dismemberment after death cannot support the “torture” factor, but the separate aggravator of “depravity of mind” may be shown by conduct “at or near the time of the offense.” In State v. Williams, 690 S.W.2d 517, 529 (Tenn. 1993), the Court stated that “if acts occurring after the death of the victim are relied upon to show “depravity of mind” of the murderer, such acts must be shown to have occurred so close to the time of the victim’s death, and must be of such a nature, that the inference can be fairly drawn that the depraved mind of the murderer existed at the time the fatal blows were inflicted upon the victim. In an unpublished decision, State v. Terry, 2000 Westlaw 284067 (Tenn.Crim.App. 2000), the court stated:

It is without doubt that postmortem **dismemberment** of a corpse, when the perpetrator intends that the harm be done specifically to a corpse, is sufficient by itself to establish depravity of mind if the mutilation occurred proximate in time to the murder. See Williams, 690 S.W.2d at 530. We construe the phrase “proximate in time to the murder” to encompass any postmortem mutilation that can be considered incident to the murder and not considered separate, distinct or independent from it, that is, whether the mutilation was planned or merely an afterthought of the perpetrator to conceal the crime. Under these guidelines, we conclude that the evidence is overwhelming that the appellant’s gruesome acts to the victim’s corpse were not separate and distinct from the actual act causing death. Rather, the mutilation was part of the appellant’s continuing plan to obscure the identity of the victim. Moreover, we find that the manner of the post-death mutilation in the present case is evidence of the absence of emotions ordinarily associated with murder. This void of human emotion is evidence from which a rational jury could find a “wicked or perverse act.”

In Byford v. State, 116 Nev. 215, 994 P.2d 700 (), the Nevada Court concluded that post-mortem dismemberment could satisfy the aggravating factor of “mutilation”, and concluded that mutilation occurred when Byford set the body on fire. The Nevada Court reasoned:

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In *Flanagan v. State*, 105 Nev. 135, 141, 771 P.2d 588, 592 (1989), this court declined to decide if **dismemberment** of a corpse is mutilation within the meaning of the statute. In another case, we also did not reach the issue, but stated that postmortem amputations of the victim's body showed depravity of mind (a former aggravator). See *Cavanaugh v. State*, 102 Nev. 478, 487, 729 P.2d 481, 486 (1986). In at least two other cases, without discussing this issue, we noted attacks inflicted on victims after their death as additional evidence of mutilation. *Calambro v. State*, 114 Nev. 106, 111 952 P.2d 946, 949 (1988) ("After driving the bar through the skull, appellant attempted to separate the victim's skull in half."); *Parker*, 109 Nev. at 395, 849 P.2d at 1070 (the murderer plunged a knife into the dead victim's chest).

Our case law thus tends to support the conclusion that the aggravating circumstance set forth in NRS 200.033(8) includes postmortem mutilation. More important, this conclusion is consistent with the statutory language. Although a victim who has died cannot be tortured, mutilation can occur after death. By including both terms as a basis for the aggravator, the statute penalizes egregious behavior whether it occurs before or after a victim's death. We agree with the State's assertion that the legislative intent in making mutilation an aggravating circumstance "was to discourage the desecration of a fellow human being's body." We therefore take this opportunity to expressly hold that mutilation, whether it occurs before or after a victim's death, is an aggravating circumstance under NRS 200.033(8).

In South Carolina, two separate aggravating factors of "while in the commission of 'physical torture' and 'dismemberment of a person' exist." § 16-3-20(C)(a)(1)(i),(h). Similar to Nevada, it could be argued that by including both terms as aggravators, the dismemberment factor was to discourage the desecration of a fellow human being's body and that it can occur after the death.

The critical factor, however, for the particular aggravator is not whether the situation was

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“dismemberment”, but whether the “murder was committed while in the commission of dismemberment of a person.” In State v. Humphries, 325 S.C. 28, 30, 479 S.E.2d 52, 54 (1996), the South Carolina Supreme Court held that “the term ‘while in the commission of’ implies acts that are concurrent with the murder. That the murder may occur before the armed robbery actually is completed does not mean the robbery was not taking place.” In Humphries, the Court recognized that an attempted armed robbery would satisfy the aggravator. In State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1995), the Court held that under State v. Jones, 288 S.C. 1, 340 S.E.2d 782 (1985), crimes committed in a continuous series of acts are properly submitted under the “while in the commission of aggravating factors.” The Court found that the murder was committed while in the commission of larceny was supported where the continuing series of acts began with the stealing of a truck and ultimately resulted later in the death of the law enforcement officer at the traffic stop violation.

It has been noted that the phrase “while in the commission of” defines the aggravating factors. State v. Riddle, 301 S.C. 68, 73, 389 S.E.2d 665, 668 (1990)(Toal, concurring). In State v. Jones, the Court recognized that “while in the commission” elements were satisfied by “crimes consummated in a continuous series of acts with the murder” and “they were committed in the same place and were not separated by any substantial lapse of time”, citing State v. Damon, 285 S.C. 125, 328 S.E.2d 628 (1985). In Jones, the Court found that “while in commission” was proven even though the kidnapping and rape occurred after the murder and upon a different victim. In Damon, the Court rejected the claim that when the defendant’s motive for the murder was not robbery or larceny and that he stole the property as an afterthought did not void the factor where the property was stolen in a “continuing sequence of criminal acts at the time of the murder”, including ransacking the house, stripping the wallet found at the end of the road of money, and stealing a truck. See also, State v. Douglas, 359 S.C. 187, 205-206, 597 S.E.2d 1, 11 (S.C. App. 2005).

The question therefore must be resolved that the dismemberment one month after the murder was not “murder was committed while in the commission of dismemberment.” First, under the factual scenario, the murder was not committed with the intent to acquire the dismembered body parts. Second, the dismemberment did not occur “at the same place” as the murder. Jones. Third, the dismemberment did not occur at the same time as the murder. Jones. Fourth, dismemberment was not attempted at the same time or place of the murder. Humphries, supra. Fifth, “a substantial lapse of time”, one month passed between the murder and the dismemberment. Jones, Humphries, Damon. Since the dismemberment was neither concurrent

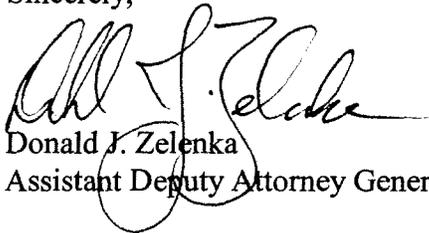
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with the murder nor the intent of the murder, the suggested factual scenario does not appear to provide any factual basis to support the existence of the particular aggravating factor. Although the actual or attempted dismemberment may occur after the murder, it must have occurred in a concurrent and continuing series of acts without a significant lapse of time.

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

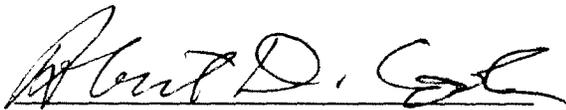
Sincerely,



Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb

Reviewed and Approved By:



Robert D. Cook
Assistant Deputy Attorney General