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spell out as clearly as possible when and how to conduct the search so as to eliminate the potential for abuse.”⁹⁹

It is submitted that the model statute proposed here, or one similar to it, would be an effective means to this end, and would be appropriate for adoption in Oklahoma.

H. David Hanes

Criminal Procedure: Creating Great Risk of Death to More Than One Person As An Aggravating Circumstance

Decisions of the United States Supreme Court during the past decade have caused confusion with respect to the procedural requirements necessary for a death penalty statute to be constitutional under the eighth and fourteenth amendments to the United States Constitution. This confusion hampered the development of an Oklahoma capital sentencing procedure until 1976 when the legislature enacted the present death penalty statute.¹ The

⁹⁹ Simons, *supra* note 1, at 57.

¹ 21 OKLA. STAT. §§ 701.9-701.13 (Supp. 1980):

“§ 701.9. Punishment for murder.—A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.

“B. A person who is convicted of or pleads guilty or nolo contendere to murder in the second degree shall be punished by imprisonment in a state penal institution for not less than ten (10) years nor more than life.

“§ 701.10. Sentencing proceeding—Murder in the first degree.—Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secure in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

“§ 701.11 Instructions—Jury findings of aggravating circumstance.—In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding

Oklahoma Court of Criminal Appeals has only recently ruled on the statute.²

A complete analysis of the Oklahoma statute would be an extensive undertaking. The scope of this note will be limited to an examination of one of the aggravating circumstances: "The defendant knowingly created a great

of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

"§ 701.12 Aggravating circumstances.—Aggravating circumstances shall be:

"1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;

"2. The defendant knowingly created a great risk of death to more than one person;

"3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

"4. The murder was especially heinous, atrocious, or cruel;

"5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

"6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony; or

"7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

"§ 701.13. Death penalty—Review of sentence.—A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

"B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

"C. With regard to the sentence, the court shall determine:

"1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

"2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

"3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

"D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

"E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

"1. Affirm the sentence of death; or

"2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

"F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

² Irvin v. State, 617 P.2d 588 (Okla. Cr. 1980); Hays v. State, 617 P.2d 223 (Okla. Cr. 1980); Eddings v. State, 616 P.2d 1159 (Okla. Cr. 1980); Chaney v. State, 612 P.2d 269 (Okla. Cr. 1980), *cert. denied*, 101 S.Ct. 1731 (1981).

risk of death to more than one person.”³ Specifically, the note will focus on the interpretation of the phrase made by various state courts and the United States Supreme Court and suggest guidelines for its application in Oklahoma.

Background

The death penalty has existed throughout this nation’s history.⁴ When the eighth amendment was adopted in 1791, the states uniformly followed the common law practice of making death the exclusive and mandatory sentence for certain specified offenses.⁵ By 1972 those states still using capital punishment had abandoned mandatory death sentences, and instead allowed the jury “unguided and unrestrained discretion” in imposing the sentence of death in a capital case.⁶ In *Furman v. Georgia*⁷ the Supreme Court, in a five-to-four per curiam decision, held that the death penalty as employed in Georgia and Texas constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments.⁸ Each justice filed a separate opinion, which led to a blurring of the scope and parameters of the ruling. The opinions indicated that as a result of giving juries unguided discretion in the imposition of the death penalty for murder, the penalty was being imposed discriminatorily,⁹ wantonly and freakishly,¹⁰ and so infrequently¹¹ that any given death sentence was cruel and unusual.

In response to the confusion engendered by *Furman*, some states adopted mandatory death penalties for a limited number of specific crimes. Other states continued to assess the culpability of each defendant convicted of a capital offense and provided standards to guide the sentencer.¹²

The procedural requirements of a constitutional death penalty were addressed more specifically by the Supreme Court in 1976 when it examined collectively five¹³ of the post-*Furman* statutes. The Court specifically rejected mandatory execution for certain crimes as unconstitutional in *Woodson v. North Carolina*¹⁴ and in *Roberts v. Louisiana*.¹⁵ The remaining cases involved statutes of Florida, Georgia, and Texas, all of which attempted to eliminate

³ 21A OKLA. STAT. § 701.12(2) (Supp. 1979).

⁴ *In re Kemmler*, 136 U.S. 436, 444 (1890).

⁵ See *Woodson v. North Carolina*, 428 U.S. 280, 291-92 (1976).

⁶ *Lockett v. Ohio*, 438 U.S. 586, 598 (1978).

⁷ 408 U.S. 238 (1972).

⁸ *Id.* at 239-40.

⁹ *Id.* at 240 (Douglas, J., concurring).

¹⁰ *Id.* at 306 (Stewart, J., concurring).

¹¹ *Id.* at 310 (White, J., concurring).

¹² See Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1710 (1974).

¹³ *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

¹⁴ *Woodson v. North Carolina*, 428 U.S. 280 (1976).

¹⁵ 428 U.S. 325 (1976).

arbitrary and capricious sentencing through the use of various procedural safeguards. The Court upheld these statutes.¹⁶ The *Gregg* opinion reasoned that to comply with the *Furman* sentencing guidelines a procedure should not create a "substantial risk that the death penalty [will] be inflicted in an arbitrary and capricious manner."¹⁷

The Georgia code, under consideration in *Gregg*, required the sentencer to consider "any mitigating circumstances or aggravating circumstances otherwise authorized by law" and listed ten aggravating circumstances, at least one of which had to be found to exist by the sentencer in order to return a death sentence.¹⁸ The Florida system resembled the Georgia system except for the basic difference that in Florida the sentence is determined by the trial judge rather than by the jury.¹⁹ The Texas procedure narrowed capital offenses to five categories.²⁰ When murder occurred in one of the five circumstances, the death penalty had to be imposed if the jury made certain additional findings against the defendant.²¹

State Interpretations

The United States Supreme Court addressed the aggravating circumstance of creating a great risk of death to more than one person in *Gregg* and *Proffitt*. The Georgia statute describes the aggravating circumstance as: "The offender by his act of murder, armed robbery, or kidnapping 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."²²

¹⁶ See FLA. STAT. ANN. § 921.141 (West Cum. Supp. 1977); GA. CODE ANN. § 27-2534.1 (1977); TEX. CODE CRIM. PROC. ANN. § 37-07 (Vernon Cum. Supp. 1977).

¹⁷ *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

¹⁸ GA. CODE ANN. § 27-2534.1 (1977).

¹⁹ 428 U.S. 242, 253 (1976).

²⁰ TEX. PENAL CODE, art. 1257 (1973): "(1) The person murdered a peace officer or fireman who was acting in the lawful discharge of an official duty and who the defendant knew was a peace officer or fireman;

"(2) the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson;

"(3) the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

"(4) the person committed the murder while escaping or attempting to escape from a penal institution;

"(5) the person, while incarcerated in a penal institution, murdered another who was employed in the operation of the penal institution. . . .

"(c) If the jury does not find beyond a reasonable doubt that the murder was committed under one of the circumstances or conditions enumerated in Subsection (b) of this Article, the defendant may be convicted of murder, with or without malice, under Subsection (a) of this Article or of any other lesser included offense."

Article 1257 has been superseded by § 19.03 of the new Texas Penal Code, which is substantially similar to article 1257.

²¹ 428 U.S. 262, 264 (1976).

²² GA. CODE § 27-2534.1(B)(3) (1977).

In *Gregg* this aggravating circumstance was challenged as being vague and therefore susceptible of widely differing interpretations, thus creating substantial risk that the death penalty would be arbitrarily imposed by juries.²³ In rejecting this argument, the Supreme Court admitted that the phrase was "susceptible of an overbroad interpretation."²⁴ However, the Court stopped short of striking the circumstance because it approved of the construction given the phrase by the Supreme Court of Georgia in *Chenault v. State*,²⁵ the only case that had relied on this circumstance. In *Chenault* the defendant, during a Sunday morning church service, stood up, shot and killed the organist and another person, and then turned and began to fire randomly into the congregation.²⁶ The United States Supreme Court favorably compared this application to another where the Georgia Supreme Court reversed a finding of great risk when the victim was simply kidnapped in a parking lot and then found shot dead on an isolated road.²⁷

The Georgia interpretations apparently restrict the application of the aggravating circumstance to situations where (1) several persons are present at the murder; and (2) the defendant uses a weapon that, by its nature, will threaten the lives of those other than the intended victim. In subsequent decisions the Georgia court consistently required the presence of both factors to support a finding of the aggravating circumstance.²⁸ In *Jones v. State*²⁹ the defendant and two other men attempted to rob a convenience store. Two employees were in the public area of the store when a struggle ensued between the victim and one of the robbers and shots were fired. Two of the offenders were wounded.³⁰ The setting of the murder was a public place with more than one person present. The Georgia court expressly concluded that the murder weapon, a .32 caliber automatic, was a weapon that was normally hazardous to the lives of more than one person when used in a public place.³¹

In *Proffitt* the United States Supreme Court examined the Florida version of the specific aggravating circumstance.³² Only once prior to *Proffitt* had Florida relied on this aggravating circumstance to support a sentence of death.³³ In that case the Florida Supreme Court focused its analysis on the number of persons present and therefore endangered by the defendant's conduct. The Florida court held that the defendant created a great risk of death because he "obviously murdered two of the victims in order to avoid a sur-

²³ 428 U.S. 153, 202 (1976).

²⁴ *Id.*

²⁵ 234 Ga. 216, 215 S.E.2d 223 (1975).

²⁶ *Id.*, 215 S.E.2d at 225.

²⁷ *Jarrell v. State*, 234 Ga. 410, 424, 216 S.E.2d 258, 269 (1975).

²⁸ *See, e.g.*, *Jones v. State*, 243 Ga. 820, 256 S.E.2d 907 (1979).

²⁹ *Id.*

³⁰ *Id.*, 256 S.E.2d at 909-10.

³¹ *Id.*, 256 S.E.2d at 916.

³² FLA. STAT. § 921.141(5)(c) (Supp. 1976-1977), which provides: "The defendant knowingly created a great risk of death to many persons."

³³ *Alvord v. State*, 322 So. 2d 533 (Fla. 1975).

viving witness to the murder of the other victim.”³⁴ *Proffitt* reduced to one the number of other persons required to be present for a finding of the aggravating circumstance. The Florida court found that Proffitt had created a great risk of death to many persons by killing the victim and then beating the victim’s wife. The United States Supreme Court acknowledged that *Proffitt* could be construed to have broadened the interpretation of the statute, but it refused to find that in fact it had.³⁵ The United States Supreme Court concluded that the Florida provisions, as construed by the Supreme Court of Florida, were not impermissibly vague.³⁶

Although the United States Supreme Court’s warning in *Proffitt* seems clear, subsequent Florida decisions show no consistent requirement for the number of persons who must be endangered before the aggravating circumstance can be found. In 1977 the Florida court did not reject a finding by the trial court that the defendant knowingly created a risk of death to the nearly forty persons present during a liquor store robbery.³⁷ Although many persons were in the area, the facts did not support a finding that those individuals were subjected to a “great risk of death.” One victim was shot with a handgun at close range. The other victim was shot with a shotgun in a parking lot where only one other person was present.³⁸

In subsequent decisions the Florida court has sustained its inconsistency as to the number of persons required to have been threatened before a finding of the aggravating circumstance would be upheld. Although earlier holdings³⁹ found the presence of one or two other persons to be sufficient, in 1979 the Florida court rejected a finding of the aggravating circumstance where five shots were fired at close range and two persons other than the defendant and the victim were present.⁴⁰ The court explained:

When the legislature chose the words with which to establish this aggravating circumstance, it indicated clearly that more was con-

³⁴ *Id.* at 540.

³⁵ *Proffitt v. Florida*, 428 U.S. 242, 256 n.13 (1976). The Court explained: “While it might be argued that this case broadens that construction, since only one person other than the victim was attacked at all and then only by being hit with a fist, this would be to read more into the State Supreme Court’s opinion than is actually there. That court considered 11 claims of error advanced by the petitioner, including the trial judge’s finding that none of the statutory mitigating circumstances existed. It did not, however, consider whether the findings as to each of the statutory aggravating circumstances were supported by the evidence. If only one aggravating circumstance had been found, or if some mitigating circumstance had been found to exist but not to outweigh the aggravating circumstances, we would be justified in concluding that the State Supreme Court had necessarily decided this point even though it had not expressly done so. However, in the circumstances of this case, when four separate aggravating circumstances were found and where each mitigating circumstance was expressly found *not* to exist, no such holding on the part of the State Supreme Court can be implied.” [Court’s emphasis.]

³⁶ *Id.* at 456.

³⁷ *McCaskill v. State*, 344 So. 2d 1276 (Fla. 1977) (sentence modified on other grounds).

³⁸ *Id.* at 1277.

³⁹ *Proffitt v. Florida*, 428 U.S. 242 (1976); *Alvord v. State*, 322 So. 2d 533 (Fla. 1975).

⁴⁰ *Kampff v. State*, 371 So. 2d 1007 (Fla. 1979).

templated than a showing of some degree of risk of bodily harm to a few persons. "Great risk" means not mere possibility but a likelihood or high probability. The great risk of death created by the capital felon's actions must be to "many" persons. By using the word "many", the legislature indicated that a great risk of death to a small number of people would not establish this aggravating circumstance.⁴¹

Yet, in the same year the Florida court also upheld a finding of the aggravating circumstance where only two other persons were present and injured.⁴² The court focused on the nature of the defendant's conduct, saying: "Both crimes were part of the conduct surrounding the capital felony. All three crimes resulted from the appellant's raging gun battle. This is precisely the kind of conduct to which the statute refers."⁴³

In another 1979 case, the facts of which are not distinguishable from those in the case above, where two persons other than the victim were present and in the possible path of bullets, the Florida court found insufficient grounds for a finding of a great risk to many persons.⁴⁴

This inconsistent application of the Florida aggravating circumstance casts doubt on the constitutionality of the statute. Without a consistent interpretation, the sentencer does not have the guidance needed to avoid imposition of the death penalty in the arbitrary manner prohibited by *Furman*.

Moreover, the Florida approach of analyzing the number of persons killed or endangered does not serve to measure the defendant's degree of culpability. The focus of analysis in a review of death sentences should be on the nature of the defendant's conduct. The United States Supreme Court has held mandatory death sentences for murder to be unconstitutional.⁴⁵ Therefore, each murder must be examined to determine whether the defendant's act of killing was of such a degree of culpability that he should be put to death. The interpretations by the Supreme Court of Louisiana of that state's version of this aggravating circumstance⁴⁶ illustrate this examination of the nature of the defendant's conduct.

In *State v. English*⁴⁷ the Louisiana court construed the legislative intent from the wording of the provision to mean that the aggravating circumstance should be found "when the single course of conduct contemplates and causes the knowing creation of great risk of death or great bodily harm to more than one person" and not when "it appears that the defendant intended to commit each murder by a distinct act, that is, by shooting each intended victim individually at short range."⁴⁸

⁴¹ *Id.* at 1009-10.

⁴² *Lucas v. State*, 376 So. 2d 1149 (Fla. 1979).

⁴³ *Id.* at 1153.

⁴⁴ *Lewis v. State*, 377 So. 2d 640 (Fla. 1979).

⁴⁵ *Furman v. Georgia*, 408 U.S. 238 (1972). See text accompanying note 8, *supra*.

⁴⁶ LA. CODE CRIM. PRO. ANN. art. 905.4(d) (West Supp. 1978), which provides: "The offender knowingly created a risk of death or great bodily harm to more than one person."

⁴⁷ 367 So. 2d 815 (La. 1979).

⁴⁸ *Id.* at 824.

The distinction is between the situation where the distinct act of the defendant not only kills the victim but also creates a risk of death to more than one person⁴⁹ and the situation where several acts by the defendant, *i.e.*, a consecutive course of conduct, contemplates and causes such a risk.⁵⁰ In the latter situation, the defendant's act of killing, *i.e.*, the physiological action that sets in motion the forces that kill, creates a risk of death only to the victim. It is any subsequent and related acts by the defendant that threaten the lives of others.

The Supreme Court of Louisiana consistently applied the *English* interpretation in subsequent cases. In *State v. Martin*⁵¹ the defendant entered a trailer and shot the four persons present. The court upheld the finding of the aggravating circumstance, concluding that the "defendant murdered the victims one after the other as a part of a single consecutive course of conduct in order to prevent any of the victims from reporting to the police the murders of the others."⁵²

In *State v. Sonnier*⁵³ the Louisiana court reaffirmed the *English* interpretation and held that "where an offender kills two or more persons during single consecutive course of conduct for the purpose of preventing any one of those killed from disclosing the murder of the other, or others, then the offender's conduct is within the contemplated statutory meaning."⁵⁴

The differentiation between the distinct act interpretation and the course of conduct interpretation is not merely an academic one. The choice of interpretation can be determinative of the finding of the aggravating circumstance. For example, in *Martin*⁵⁵ the defendant's act of pulling the trigger and killing each victim did not create a risk of death to anyone but that victim. Under the distinct act interpretation the aggravating circumstance could not have been found. Another example is *State v. Williams*,⁵⁶ where the defendant, armed with a sawed-off shotgun, and his partner entered a supermarket and proceeded immediately toward the security guard, who was bagging groceries. The partner reached to remove the guard's pistol from its holster. As the guard moved his hand toward his pistol, the defendant yelled

⁴⁹ An example would be where the defendant had set a fire, or had exploded a bomb in a bus station, or had shot randomly into a crowd.

⁵⁰ For example, where the defendant, in the course of robbing a grocery store, kills the manager in the store office and then engages in a shoot-out with police in the crowded store while attempting to escape.

⁵¹ 376 So. 2d 300 (La. 1979).

⁵² *Id.* at 312.

⁵³ 379 So. 2d 1336 (La. 1980).

⁵⁴ *Id.* at 1362. In a separate opinion, one justice viewed the majority's interpretation as overly broad, and suggested that the single, distinct act analysis was what was contemplated by the legislature. In his opinion, the majority expanded the category to include every multiple murder, resulting in a statutory construction that casts doubt upon the constitutionality of Louisiana's entire capital punishment scheme by violation of the requirements of *Gregg* and *Proffitt*. *Id.* at 1367 (Dennis, J., concurring in part, dissenting in part).

⁵⁵ 376 So. 2d 300 (La. 1979).

⁵⁶ 383 So. 2d 369 (La. 1980).

and immediately shot the guard in the face at point-blank range. In addition, during the course of the robbery, two customers were shot, each one in the foot and apparently accidentally, by the defendant.⁵⁷ The distinct act approach would not support a finding of the aggravating circumstance because there was no evidence that the act of killing the victim threatened the other patrons present. However, the aggravating circumstance could be found by examining the defendant's whole course of conduct during the robbery.⁵⁸

Oklahoma

The Oklahoma legislature understood *Furman* to mean that the only constitutional statutory scheme for the imposition of death was one wherein no discretion existed.⁵⁹ In 1973 the legislature repealed the existing capital punishment provisions and enacted a new statute⁶⁰ thought to comply with

⁵⁷ *Id.* at 371.

⁵⁸ The Louisiana court decided that it was unnecessary and merely cumulative to inquire further into whether the jury's finding of risk was proper because the jury had properly found another aggravating circumstance to exist. *Id.* at 374.

⁵⁹ *Riggs v. Branch*, 554 P.2d 823, 828 (Okla. Cr. 1976). See *Pate v. State*, 507 P.2d 915 (Okla. Cr. 1973).

⁶⁰ 21 OKLA. STAT. §§ 701.1 through 701.6 (Supp. 1973), reads as follows:

"701.1 *Murder in the first degree.*—Homocide, when perpetrated without authority of law and with a premeditated design to effect the death of the person killed, or of any other human being, is murder in the first degree in the following cases:

"1. When perpetrated against any peace officer, prosecuting attorney, corrections employee or fireman while engaged in the performance of his official duties;

"2. When perpetrated by one committing or attempting to commit rape, kidnapping for the purpose of extortion, arson in the first degree, armed robbery or when death occurs following the sexual molestation of a child under the age of sixteen (16) years;

"3. When perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of the witness, or when perpetrated against any human being while intending to kill such witness;

"4. When perpetrated against the President or Vice President of the United States of America, any official in line of succession to the Presidency of the United States of America, the Governor or Lieutenant Governor of this state, a judge of any appellate court or court of record of this state, or any person actively engaged in a campaign for the office of the Presidency or Vice Presidency of the United States of America.

"5. When perpetrated by any person engaged in the pirating of an aircraft, train, bus or other commercial vehicle for hire which regularly transports passengers;

"6. When perpetrated by a person who effects the death of a human being in exchange for money or any other thing of value, or by the person procuring the killing;

"7. Murder by a person under a sentence of life imprisonment in the penitentiary;

"8. When perpetrated against two or more persons arising out of the same transaction or occurrence or series of events closely related in time and location;

"9. When perpetrated against a child while in violation of Section 843, Title 21 of the Oklahoma Statutes; and

"10. Intentional murder by the unlawful and malicious use of a bomb or of any similar explosive."

"§ 701.2 *Murder in the second degree.*—Homocide is murder in the second degree in the following cases:

"1. When perpetrated without authority of law, and with a premeditated design to ef-

the mandate of *Furman*.⁶¹ The 1973 statute was declared unconstitutional by the United States Supreme Court in July, 1976.⁶²

In the same year, a special session of the legislature enacted a new statute, resembling the statutes of Florida and Georgia, that is in operation today.⁶³ Basically, the statute provides for a bifurcated proceeding. The guilt or innocence of the defendant is determined in the first stage. In the second,

fect the death of a person, or of any other human being, but by an act not enumerated in the preceding section;

"2. When perpetrated by an act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual; or

"3. When perpetrated without any design to effect the death by a person engaged in the commission of any felony other than the felonious acts set out in Section 1 of this act."

"§ 701.3 *Punishment for murder in the first degree—Instructions regarding lesser and included offenses.*—Every person convicted of murder in the first degree shall suffer death. In the case of a jury trial, the jury shall determine only whether the defendant is guilty or not guilty of murder in the first degree and upon a finding of guilty shall so indicate on their verdict and state affirmatively in their verdict that the defendant shall suffer death. In a case where the jury trial is waived and the case is tried to the court, or upon a finding by the court that the defendant is guilty of murder in the first degree, the court shall enter a judgment and sentence of death. In a jury trial for murder in the first degree, nothing in this section shall preclude the trial judge from instructing the jury regarding lesser and included offenses and lesser degrees of homicide if the evidence warrants such instructions; but in every instance where an instruction authorizes the jury to consider lesser and included offenses and lesser degrees of homicide, the judge shall state into the record his reasons for giving the instruction based upon the evidence adduced at trial."

"§ 701.4 *Punishment for murder in the second degree—Indeterminate sentence.*—Every person convicted of murder in the second degree shall be punished by imprisonment in the State Penitentiary for not less than ten (10) years nor more than life. The trial court shall set an indeterminate sentence in accordance with this section upon a finding of guilty by the jury of murder in the second degree."

"§ 701.5 *Review of judgment and sentence of death.*—The Court of Criminal Appeals when reviewing a judgment and sentence of death, shall, in the first instance, determine whether errors of law occurring at trial require reversal or modification, but if the Court shall determine that there are no errors of law in the record requiring reversal or modification, the Court shall then convene for the purpose of reviewing the sentence of death. The Court shall set a date certain for an evidentiary hearing, the purpose of which will be to determine if the sentence of death comports with the principles of due process and equal protection of the law. Upon the hearing the Court shall determine whether the sentence of death was a result of discrimination based on race, creed, economic condition, social position, class or sex of the defendant or any other arbitrary fact; and the Court shall specifically determine whether the sentence of death is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

"§ 701.6 *Modification of death sentence.*—Should the Court determine that the sentence of death is discriminatory or is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, the Court shall modify the sentence of death to life in the penitentiary at the hard labor. (Emphasis added)"

⁶¹ 408 U.S. 238 (1972).

⁶² *Williams v. Oklahoma*, 428 U.S. 907 (1976); *Justus v. Oklahoma*, 428 U.S. 907 (1976); *Rowbotham v. Oklahoma*, 428 U.S. 907 (1976); *Lusty v. Oklahoma*, 428 U.S. 907 (1976); *Green v. Oklahoma*, 428 U.S. 907 (1976); *Davis v. Oklahoma*, 428 U.S. 907 (1976).

⁶³ 21 OKLA. STAT. §§ 701.7-701.13 (Supp. 1976).

sentencing stage of the trial, the jury shall not impose the death penalty unless at least one of the statutory aggravating circumstances⁶⁴ is found to exist and to outweigh one or more mitigating circumstances. While the jury may only consider the enumerated statutory aggravating circumstances, it may reflect on evidence submitted by the defendant regarding anything he considers to be a mitigating circumstance.⁶⁵

The Oklahoma version of this particular aggravating circumstance provides: "The defendant knowingly created a great risk of death to more than one person."⁶⁶ It has been relied upon to support a death sentence in only one case, *Hays v. State*.⁶⁷ In *Hays* the "great risk of death" was apparently created when sometime after the murder, the defendant pulled a revolver from a paper sack and pointed it at a group of teenagers who were taunting him as he staggered across an intersection.⁶⁸

The application of the course of conduct approach in *Hays* was extremely broad in that the defendant's act of waving the gun was unconnected with the act of killing, both in terms of time and location. It is also very doubtful that by merely waving the gun the defendant "created a great risk of death to more than one person."

The repealed 1973 statute encompassed both the consecutive course of conduct approach⁶⁹ and the stricter distinct act approach.⁷⁰ The wording of

⁶⁴ *Id.* Section 701.12 provides for the following aggravating circumstances:

"1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;

"2. The defendant knowingly created a great risk of death to more than one person;

"3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

"4. The murder was especially heinous, atrocious, or cruel;

"5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

"6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony; or

"7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

⁶⁵ 21 OKLA. STAT. § 701.10 (Supp. 1979). In *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), the United States Supreme Court held that in capital cases the sentencing authority must consider as a mitigating factor any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence less than death.

⁶⁶ 21 OKLA. STAT. § 701.12(2) (Supp. 1979).

⁶⁷ 617 P.2d 223 (Okla. Cr. 1980).

⁶⁸ *Id.* at 226.

⁶⁹ 21 OKLA. STAT. § 701.1(8) (Supp. 1973), which provided for mandatory infliction of the death penalty for murder in the first degree "when perpetrated against two or more persons arising out of the same transaction or occurrence or series of events closely related in time and location."

⁷⁰ 21 OKLA. STAT. § 701.1(10) (Supp. 1973), which provided for mandatory infliction of the death penalty for murder in the first degree for "intentional murder by the unlawful and malicious use of a bomb or of any similar explosive."

the present statute does not indicate a selection of either approach, so it may be assumed that the Oklahoma courts are not limited by the stricter distinct act interpretation. Of course, given the haste with which the present statute was enacted, it may be that the legislature gave no thought to the matter.

The distinct act approach is a very narrow interpretation of the aggravating circumstance. It would provide a concrete guideline for the jury in determining the culpability of a defendant in a capital case, and it would limit the number of fact situations wherein the aggravating circumstance could be found, leaving little discretion to the jury. However, it may be too narrow in that it would fail to include some fact situations where a great risk of death to others had been created.

The consecutive course of conduct approach is a far more workable guideline, but it must be applied narrowly because a too broad application may be unconstitutional by allowing the jury too much discretion in applying the aggravating circumstance to a particular fact situation. Under this approach, the defendant's acts that create the risk of death should be in close proximity, in terms of time, location, and intent, to the act of killing. It should be insufficient that the defendant, some time after the murder, committed an act that endangered others. To support the aggravating circumstance, the subsequent act should be inextricably linked to the killing.

Hays illustrates the danger of a too broad application. The waving of the revolver, even if dangerous, was at best tenuously connected with the killing. It cannot be said in that case that by waving the gun *Hays* became more culpable than if he had only shot the victim without any subsequent conduct. In future cases the Oklahoma Court of Criminal Appeals should require that any acts by the defendant that are used to support a finding of the aggravating circumstance must be more closely related to the act of killing for which defendant has been convicted.

Conclusion

Although the phrase "knowingly created a great risk of death to more than one person" on its face appears to be a relatively clear instruction, when one tries to apply it to a specific fact situation the ambiguity of the wording becomes obvious. The decisions of the United States Supreme Court apparently mandate a narrow application of the aggravating circumstance. The consecutive course of conduct approach is within constitutional parameters when the acts of the defendant that are used to support the aggravating circumstance are closely related to the act of killing. The application of the aggravating circumstance by the Oklahoma Court of Criminal Appeals should be far stricter than that in *Hays*.

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