



of mind"), prior to the 1989 amendment, is unconstitutionally vague. Even as defined in State v. Williams, 690 S.W.2d 517, 529-30 (Tenn. 1985), the use of "depravity," as an aggravating circumstance violates both the state and federal constitutions and requires that the sentence be vacated. See State v. Black; State v. Van Tran, 864 S.W.2d 465, 485-90 (Tenn. 1993) (Daughtrey, J., dissenting); Shell v. Mississippi, 498 U.S. 1, 111 S. Ct. 313 (1990) (per curiam; Marshall, J., concurring).

In the present case, the jury was instructed that "depravity" means "moral corruption; wicked or perverse act." In denying certiorari in the case of Barber v. Tennessee, \_\_\_\_ U.S. \_\_\_\_, 115 S. Ct. 1177 (1995), Justice Stevens found that the definition of "depravity" as "wicked or morally corrupt" was "plainly impermissible" under the Court's holdings in Godfrey v. Georgia, 446 U.S. 420, 428-29, 100 S. Ct. 1759 (1980), and Maynard v. Cartwright, 486 U.S. 356, 363-64, 108 S. Ct. 1853 (1988). While acknowledging this authority, the majority nevertheless concludes that "any unconstitutional vagueness in the instruction concerning 'depravity' was harmless beyond a reasonable doubt because, as review of the record establishes, this aggravating circumstance was sufficiently proved by evidence of torture independent of depravity." The majority, then, relies upon torture, not "depravity." The evidence clearly is not

sufficient to support a finding of torture.

In State v. Williams, the Court held that "[t]orture" means the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious." 690 S.W.2d at 529 (emphasis added). In the present case, the cause of death was multiple stab wounds to the chest. There was also a later stab wound to the victim's vagina; however, the conviction cannot rest upon this injury to the victim because there is no evidence in the record that she was alive and conscious when that wound was inflicted. The evidence supports a finding of mutilation of a corpse as well as it supports torture of a human being.

At resentencing, the medical examiner, Dr. Charles Harlan, testified that the wound to the vaginal area was a "perimortem injury; that is, it occurred at approximately the time of death, either slightly before, during, or slightly after." According to Dr. Harlan, "Death would have occurred within a few minutes after infliction of the wounds to the chest, and probably would have been in the range of four to five minutes, possibly as much as six minutes," but the victim would have remained conscious only for "probably three to four minutes" after receiving the chest wounds. Dr. Harlan agreed that the vaginal wound "could have just as easily occurred after the loss of consciousness or death, as

before." Thus, there was not sufficient proof for the jury to conclude beyond a reasonable doubt that the victim was conscious at the time the wound to the vaginal area was inflicted. This evidence might be sufficiently close in time to support "depravity" but not torture.

Since, in my view, the instructions regarding "depravity" is constitutionally deficient, as acknowledged by the majority, and the aggravating circumstance (i)(5) was not proved by evidence of torture, I cannot agree with the majority's conclusion that the unconstitutionally vague definition of depravity was harmless error. That conclusion is a bald assertion without a principled explanation. Sochor v. Florida, 504 U.S. 527, 541, 112 S. Ct. 2114, 2123 (1992) (O'Connor, J., concurring). On this issue, I would remand for resentencing under a proper (i)(5) instruction. See State v. Black, 815 S.W.2d at 196-97 (Reid, C.J., dissenting). For the reasons stated in my earlier dissent, I would impose a sentence of life imprisonment.

---

Lyle Reid, J.