

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

FILED
March 23, 1998
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE, (
 (
 Appellee, (
 (Gibson Criminal
 (
 (Hon. Dick Jerman, Judge
 v. (
 (No. 02S01-9612-CC-00108
 (
 (
 RONNIE MICHAEL CAUTHERN, (
 (
 Appellant. (

CONCURRING OPINION

 I concur in affirming the conviction for first degree
 murder and the sentence of death in this case.

Though it was error to charge the jury the revised 1989
 definition of aggravating circumstance (i)(5), as I stated in State
 v. Bush, 942 S.W.2d 489 (Tenn. 1997), where the same error was
 made:

While "depravity of mind," in my view, is
 fatally deficient in meaning, the language of
 the 1989 statute, "serious physical abuse
 beyond that necessary to produce death," is
 plain and provides a meaningful standard for
 determining the appropriateness of death as a
 penalty. As a practical matter, then, the
 substantive effect of the "error" in this case
 was to elide, or even to correct, the

1 unconstitutional portion of this aggravating
2 circumstance.

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6 Id. at 526. Consequently, as in Bush, I agree that giving the
7 erroneous instruction to the jury is not grounds for reversal of
8 the sentence.

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10 Additionally, though in some prior cases I have found
11 that the evidence was insufficient to establish torture as an
12 aggravating circumstance, see e.g., State v. Odom, 928 S.W.2d 18,
13 26 (Tenn. 1996); State v. Cazes, 875 S.W.2d 253, 272 (Tenn. 1994)
14 (Reid, J., concurring and dissenting); State v. Van Tran, 864
15 S.W.2d 465, 483 (Tenn. 1993) (Reid, C.J., concurring and
16 dissenting); State v. Black, 815 S.W.2d 166, 196 (Tenn. 1991)
17 (Reid, C.J., concurring and dissenting), the facts of this case
18 support a finding of torture. "Torture involves the infliction of
19 pain by a perpetrator upon a victim. It necessarily involves the
20 intent by the perpetrator to cause the victim to suffer" pain
21 beyond that necessary to produce death. State v. Hodges, 944
22 S.W.2d 346, 361-62 (Tenn. 1997) (Reid, J., dissenting). Here, the
23 facts show that Rosemary Smith was placed in a closet while her
24 husband was murdered, and then raped twice before she was
25 strangled. The evidence of torture in this case is significantly
26 greater than in these previous cases; consequently, I agree that
27 the evidence supports aggravator (i)(5).

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29 For the reasons set forth by the majority, the sentence
30 of life without parole is not applicable to this case; however, I

1 do not agree that the defendant can waive the charging of an
2 applicable sentence to the jury. Where the offense of first degree
3 murder is committed on or after July 1, 1993, the statute
4 specifically provides that the jury shall determine "whether the
5 defendant shall be sentenced to death, to imprisonment for life
6 without possibility of parole, or to imprisonment for life." Tenn.
7 Code Ann. § 39-13-204 (Supp. 1996). Particularly in capital cases,
8 the constitutional rights of a defendant subject to sentencing, as
9 well as the State's interest in just sentences, require that the
10 jurors be given an accurate instruction regarding every possible
11 sentence for a crime, despite the contrary desires of the
12 defendant.

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14 The prosecutor's closing argument was, as discussed in
15 the majority opinion, totally inappropriate; however, it probably
16 did not affect the sentence given the evidence in the record.
17 Likewise, it was error to exclude the note written to the defendant
18 by his son and the majority correctly placed the burden on the
19 State to prove that the error did not affect the sentence. As
20 reasoned in the majority opinion, given the evidence in mitigation
21 concerning the relationship between the defendant and his son, the
22 error was harmless beyond a reasonable doubt.

23
24 Though I have previously found that the proportionality
25 review utilized by the Court was deficient in both form and
26 substance, this opinion discusses factors which are relevant and
27 significant and it uses life imprisonment cases as well as capital

1 cases. It appears that the majority is making modest progress in
2 developing a rational and realistic procedure for determining
3 proportionality, and I do not disagree with the conclusion that
4 death is not a disproportionate sentence in this case.

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6 I agree that the record does not reveal any reversible
7 error; accordingly, I concur in affirming the conviction and
8 sentence.

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Reid, J.