IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE,	)	FOR PUBLICATION
	)	FILED: _____
Appellee,	)	
	)	
	)	
VS.	)	Cheatham Criminal
	)	
	)	
ANTHONY DARRELL DUGARD HINES,	)	No. 01-S-01-9303-CC-00052
	)	
Appellant.	)	

OPINION ON PETITION TO REHEAR

A petition to rehear has been filed on behalf of the defendant-appellant, Anthony Darrell Dugard Hines. After consideration of the same, a majority of the Court is of the opinion that the petition should be granted to address the first issue presented.

In Issue One, the defendant contends that the trial court's instruction to the jury regarding the aggravating circumstance in T.C.A. §39-2-203(i)(1982)[1] was unconstitutional and that the trial court committed constitutional error in its definition of the term "depravity". The defendant first asserts that federal courts have recently

[1]T.C.A. §39-2-203(i)(5)(1982) provided that the death penalty could be imposed where "the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind."

held that instructions given by the trial courts of this state regarding circumstance (i)(5) violate the Eighth Amendment to the United States Constitution. We note, however, that in the two cases cited by the defendant, Houston v. Dutton, 50 F.3d 381 (6th Cir. 1995), and Rickman v. Dutton, 854 F. Supp. 1305 (M.D. Tenn. 1994), the trials were conducted prior to the release of State v. Williams, 690 S.W.2d 517 (Tenn. 1985), and the sentencing juries were therefore instructed in the bare language of the statute without the limiting definitions adopted by this Court in Williams. In the present case the trial court instructed the jury in accord with Williams.

The defendant next contends that the instructions given regarding "depravity" were constitutionally insufficient. He notes Justice Stevens' opinion on the denial of the writ of certiorari in Barber v. Tennessee, ____U.S. _____, 115 S.Ct. 1177, 130 L.Ed.2d 1129 (1995), stating that the definition of "depravity" as "wicked or morally corrupt" in that case was "plainly impermissible" under Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), and Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. l853, 100 L.Ed.2d 372 (1988). In the defendant's case the trial court instructed the jury that "depravity means moral corruption; wicked or perverse act."

While we continue to abide by our original holding that this aggravating circumstance has been constitutionally applied under the circumstances of this case and is not

unconstitutionally vague, we write to clarify that, even if the instructions given by the trial judge were unconstitutional under Godfrey and Maynard, the failure to give a constitutionally proper instruction on depravity was harmless error beyond a reasonable doubt. In our earlier opinion in this case, we noted that under Williams, 690 S.W. 2d at 529, "torture" means "the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious." Likewise, "depravity" is inherent in the state of mind of a murderer who willfully inflicts such severe physical or mental pain on a victim prior to death or at a time very close to that of the victim's death. Id. The facts of this case fully satisfy these definitions of "torture" and "depravity". Based upon our earlier analysis of the facts relevant to this aggravating circumstance, see Opinion pp. 14-15, we find beyond a reasonable doubt that, if there was constitutional error in the instruction on depravity in this case, the result would have been the same had this aggravating circumstance been properly instructed under the above definitions from Williams. See Clemmons v. Mississippi, 494 U.S. 738, 754, 110 S.Ct. 1441, 1451, 108 L. Ed. 2d 725 (1990). Furthermore, it is clear 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[2]

[2]The trial court instructed the jury in accord with Williams that "torture" means "the infliction of severe physical or mental pain upon the victim while he or she remains alive or

independent of depravity. See Opinion pp. 14-15 Compare State v. Van Tran, 864 S.W.2d 465, 478-480 (Tenn. 1993). We are therefore convinced beyond a reasonable doubt that removal of depravity as a basis for establishing aggravating circumstance (i)(5) would have made no difference in the defendant's sentence.

Last, the defendant argues that the failure of the trial court to define torture as the intentional infliction of unnecessary pain and suffering violated the Eighth Amendment. He relies upon the case of Wade v. Calderon, 29 F.3d 1312, 1320 (9th Cir. 1994), cert. denied, ____U.S. _____, 115 S.Ct. 923, 130 L.Ed.2d 802 (1995). Without accepting the defendant's argument that such an instruction is constitutionally mandated, we note that in our opinion in this case we held that "evidence of the stab wound to the vagina was sufficient to support a finding that the wounds were intentionally inflicted," Opinion p. 15, so that, if it was error not to instruct the jury that torture must be intentionally inflicted, such error was harmless beyond a reasonable doubt in the instant case.

Accordingly, we find without merit the challenges presented in defendant's petition to rehear regarding the constitutionality of the application of aggravating circumstance (i)(5) in this case. The petition to rehear is denied.

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conscious."

The sentence of death, having been heretofore stayed, will be carried out as provided by law on the first day of June, 1996, unless otherwise ordered by this Court, or other proper authorities. Costs on this appeal are adjudged against defendant.

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CHARLES H. O'BRIEN, SPECIAL JUDGE

Concur:

Anderson, C.J.
Drowota, J.

Dissent:

Reid, J.