

## SENTENCING - TORTURE AGGRAVATOR

**Christopher Nicholson v. State of Indiana, Ind. Sup. Ct., No. 48S00-0109-CR-434 (May 24, 2002, 11 pages).**

The Indiana Supreme Court recently issued an Opinion that the Court's first encounter with torture as an aggravating circumstance. The decision resulted in the revision of the Defendant's sentence.

The Defendant was charged and convicted of murder as well as several other crimes. The jury recommended life without parole and the trial court subsequently ordered two (2) concurrent life without parole sentences to run consecutively with three (3) term of year sentences. In the first appeal, the High Court found several errors in the sentencing order. The Trial Court had failed to satisfy the heightened sentencing standard for life without parole set out in Harrison v. State, and had also incorrectly imposed two (2) life sentences for a single murder.

On remand, the Trial Court issued a new sentencing order, yet again sentenced Nicholson to life without parole. In this appeal, the Defendant argued that the State did not prove beyond a reasonable doubt two (2) of the statutory aggravators utilized by the Trial Court.

A court may impose the life without parole if the State proves at least one aggravator beyond a reasonable doubt and the Court finds that the mitigating circumstances are outweighed by the aggravating circumstances. Moreover, a high degree of specificity is required in explaining the factors and the weighing process that led to the sentence. Indeed, the Trial Court's statement must identify each mitigating and aggravating circumstance, must include the specific facts and reasons which lead the Court to find the existence of each such circumstance, must articulate that the mitigating and aggravating circumstances have been evaluated and balanced, and must set forth the Trial Court's personal conclusion that the sentence is appropriate.

The Defendant first challenged the statutory aggravator of “intentionally” killing the victim. The Supreme Court reviewed the trial court record, and found that it could not conclude that the Defendant had the conscious objective to kill the victim. While the Court had no trouble upholding the murder conviction based upon conduct committed “knowingly”, the evidence did not prove beyond a reasonable doubt that it was Nicholson’s intent to kill.

The second aggravator was an allegation that Nicholson had tortured the victim while she was alive. Noting that the statute did not define the word “torture” the Court explained that this case was a matter of first review on this precise topic. The State had argued that the torture aggravator was satisfied by proof of infliction of severe physical or mental pain. However, the Court concluded that pain alone could not be sufficient, since any stabbing or shooting victim would also by definition be a torture victim. Ultimately, the Supreme Court concluded that the torture aggravator “requires something more - an appreciable period of pain or punishment intentionally inflicted and designed either to coerce the victim or for the torturer’s sadistic indulgence”. Put another way, torture is “the gratuitous infliction of substantial pain or suffering in excess of that associated with the commission of the charged crime”. Again, the Court failed to find sufficient evidence in the record to support the definition of torture.

Since neither of the charged aggravators supported the sentence of life without parole, the Court indicated it had three (3) options. It could either remand the matter to the Trial Court for clarification and/or a new sentencing determination; affirm the sentence if the error is harmless; or independently reweigh the proper aggravating and mitigating circumstances. In the case at bar, the Court elected appellate reweighing.

Without the presence of any statutory aggravator, a life without parole sentence is impermissible. However, the Court concluded that consecutive sentences and full enhancements on each count were warranted. The Court thus remanded with instructions to impose consecutive term of year sentences.

