

THE UNIQUE AND IRRETRIEVABLE PUNISHMENT

Indiana has a mandatory death sentence law--no matter how the State labels it--because the trial judge or jury is not confined to the statutory mid-term for either increasing (aggravating) or decreasing (mitigating) the presumptive or basic sentence provided for the offense beyond a reasonable doubt. This is what the State did to all of Us currently on death row, with the acquiescence of the Indiana Supreme Court.

Everyone's case on death row is governed by different criminal statutes depending upon the time the alleged offense was committed. For example, i was sentenced to the penalty of death under the 1979 statute because that was the law in effect in 1981.

i've been held on death row longer than anyone else in Indiana. i was 27-years old when they brought me here on May 25, 1982.

i was convicted in 1982 of the 1981 murder of a Gary Police Officer during an armed bank robbery. i was sentenced to death in 1982 and re-sentenced to death in 1996.

The Indiana Supreme Court has determined that a fact, which is a material element of a crime, may not also constitute an aggravating circumstance to support an enhanced sentence. **Morgan v. State, 675 N.E.2d 1067, 1073 (Ind. 1996).** But, in cases when the sentence of death is requested the law is ignored. The murder sentences statute and the death sentences statute has seen numerous revisions. Our individual cases are treated differently, not because death is different, but because the Indiana Supreme Court is ruling from the bench and making up laws as they go along in an illegal attempt to save the statute.

There is no valid Indiana statute providing for the imposition of the death penalty. The amended statutory sentencing scheme violates the defendant's liberty interest. **Ind. Code 35-50-2-3(a)(b)** is the real sentencing statute for the basic sentence. It is the actual sentencing statute per se for murder

across the board in Indiana. **Ind. Code 35-50-2-9** is a supplement for an enhanced penalty and you don't need to have a death sentence to come under this law. **Davies v. State, 758 N.E.2d 981, 986 (Ind. App. 2001)**. The Supreme Court has carved out a narrow exception in cases where the defendant is eligible for either the death penalty or life without parole pursuant to Indiana Code Section **35-50-2-9**, but is instead sentenced to a term of years.

The trial court must make a statement of its reasons for imposing the sentence. **Ind. Code 35-50-2-9** is not the mid-term or basic sentencing statute per se. The changes in **Ind. Code 35-50-2-9 (2002)** was not merely procedural because it increased all the penalties and it took discretion from the trial court judge again. The new amendment to **Ind. Code 35-50-2-9 (2006)** also abrogated the actual sentencing statute for murder and it has made the death penalty enhancement mandatory when the jury arrives at that decision. The trial judge doesn't have any choice in the matter but shall sentence the defendant accordingly.

The Indiana Penal Code defining the crime of murder is patterned after the Illinois Code. Ever since the moratorium was declared on Illinois death penalty, pro-death penalty advocates in Indiana have been desperately trying to distance themselves from Illinois. They're pretending that the serious problems with Illinois' death penalty doesn't exist in Indiana. The judges who handed out death sentences to those of us on Indiana's death row never explained why they gave any defendant a sentence in excess of the presumptive sentence. This could only happen because no other sentence but death was considered.

Indiana law provide that in cases of murder, which is a class A-felony, the jury in its unbridled discretion could choose whether the convicted defendant should be sentenced to death or to life imprisonment. The mandatory death penalty laws that the United States Supreme Court's decision in **Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972)**, which held to be in violation of the Eighth and Fourteenth Amendments, is alive and widely practiced in Indiana.

The presumptive sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed. Thus,

Ind. Code 35-50-2-3(a)(b)(Sentences For Felonies-~~Murder~~). What is called the death sentences statute (**Ind. Code 35-50-2-9**) is really a misnomer. It is actually a specific list of factors that "may" be used to enhance a sentence including death. The death sentences statute is not a charge. It should be called exactly what it is--the death penalty enhancement statute.

What the State is doing to the people currently on Indiana's death row is more than simply improper. It's unequivocally illegal. Nearly 26 years after being strictly enforced, the law declaring that the court shall fix the penalty of and sentence a person convicted of an offense was held to be unconstitutional. With each revision of the statutes serious consequences arose negatively affecting the defendant's defenses that most of whom had before the changes were made. In light of this, the amended scheme --

- (a) changed the material elements;
- (b) changed the ultimate facts;
- (c) changed the range of penalties;
- (d) allowed the prosecutor the latitude to re-write or change the statute to remove any objectionable portion;
- (e) the trial court's historical function of separation of powers was changed to allow judicial legislation; and
- (f) changed the standard of review.

The whole sentencing statutory scheme was changed in a substantive way--not merely some procedures to be followed--all to the disadvantage and detriment of the defendants.

By: Zolo Agona Azania
 (c) Zolo Agona Azania

Zolo Agona Azania #4969
 Indiana State Prison
 1 Park Row Street
 Michigan City, Ind. 36360-6597