IN THE FLORIDA SUPREME COURT

ENRIQUE GARCIA, :

Appellant, :

vs. : Case No. 64,841

STATE OF FLORIDA, :

Appellee. :

:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR MANATEE COUNTY
STATE OF FLORIDA

SUPPLEMENTAL BRIEF OF THE APPELLANT

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STATEMENT OF THE CASE

The original judgment imposing sentences of death upon Appellant, Enrique Garcia, was entered by the trial court on December 14, 1983. (R2926-2927) Garcia filed a motion in this Court asking it to relinquish partial jurisdiction to the trial court for him to enter a clarified sentencing order which set out more specifically his findings in aggravation and mitigation. The motion was granted on October 2, 1984. (R3080) On November 14, 1984 the trial court filed his "Amended Judgment" concerning the sentences of death he imposed upon Garcia. (R3081-3083) This brief is directed to the findings of the court contained in said Amended Judgment.

ISSUE I.

THE TRIAL COURT ERRED IN SENTENCING ENRIQUE GARCIA TO DEATH BECAUSE IT WAS NOT PROVEN THAT HE HIMSELF KILLED, ATTEMPTED TO KILL, OR INTENDED TO KILL, AND BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCES UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Amended Judgment rendered by the trial court puts little flesh on the bare bones of the original judgment.

Particularly noticeable is the court's failure to address the applicability of Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1983).[1/] (The trial court's failure

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[1/] Please see discussion of Enmund in Issue IX of Garcia's initial brief, found at pages 42-44 thereof.

to deal with Enmund in his original sentencing order was one of the grounds included in Garcia's motion to require the trial court to enter a clarified order.) The extent of Enrique Garcia's involvement in the homicides was very much an issue at his trial. The jury specifically found him guilty only of felony murder in the deaths of Willie West and Martha West (R2202,2792,2793), and did not find that he carried a firearm during the attempted murder of Rosenna Welch. (R2202,2794) Yet the Amended Judgment fails to discuss Garcia's involvement in the homicides in the context of Enmund and to assess the impact of the specific jury verdicts on the imposition of the death penalties.

In Brumbley v. State, 453 So.2d 381,387 (Fla.1984) this Court held:

> We have already concluded that appellant's conviction for first-degree murder rests upon the felony murder rule because the evidence was not sufficient to show that appellant joined in the intent of Smith to kill Rogers. In Enmund v. Florida, the United States Supreme Court held that the Eighth Amendment does not permit imposition of the death penalty on a person participating in a felony during which a murder is committed but who does not himself kill, attempt to kill, intend that a killing take place or intend or contemplate that lethal force will be used. 458 U.S. at 797, 102 S.Ct. at 3376. In the present case the trial court's findings of fact in support of the sentence of death do not specifically discuss evidence of the extent of appellant's involvement in the murder and the events leading up to the murder. Without such findings of fact by the trial court, we have no basis for concluding that appellant's sentence of death meets the Enmund test. Therefore, it is necessary that the case be remanded to the trial court to consider whether the death penalty may be applied in this felony murder case.

Pursuant to Brumbley, this case must be remanded to the trial court for him to consider whether Enmund allows the death penalty to be imposed upon Enrique Garcia in light of the felony murders of which he was convicted.

Even as amended, the trial court's finding that the capital felonies were committed for the purpose of avoiding or preventing a lawful arrest is erroneous. The Amended Judgment sets forth the following facts in support of this aggravating circumstance (R3081-3082):

> The evidence discloses that it was agreed among all participants in the crimes that since one of the participants was known by the victims, that all the victims would have to be killed so no one could identify them.

Where, as here, the victims are not law enforcement officers, the State must prove beyond a reasonable doubt that the dominant motive for the homicides was the elimination of witnesses. Doyle v. State, 9 FLW 453 (Fla. Oct.18, 1984) and cases cited in Garcia's initial brief. That proof was lacking. For one thing, the trial court's conclusion that Garcia and the other three men agreed in advance to kill the victims requires a premeditated design to kill, but the jury rejected the idea that the homicides were premeditated by convicting Garcia of felony murder. See Rivers v. State, 9 FLW 476 (Fla. Nov.1, 1984). Also, the court's finding of witness elimination as the motive for the homicides is inconsistent with his findings in the next paragraph of the Amended Judgment that the male victim was killed for the purpose of inducing the female victim to disclose where the money was hidden, and that the latter was killed because she refused to make this

disclosure. Finally, the mere fact that the victims knew one of the participants in these offenses (Benito Torres) is not sufficient to justify the finding of this aggravating circumstance. See Doyle, supra.

With regard to the aggravating circumstance of especially heinous, atrocious, or cruel, the Amended Judgment begins by noting that the jury was not instructed on this aggravating circumstance. (R3082) The trial court then recites the following facts in support of his finding that this circumstance applies in Garcia's case (R3082):

> The testimony discloses that the guns were furnished by two co-defendants, but used by this defendant and another defendant. This defendant, in addition to the purpose set forth in (e), admitted he had killed the male victim so that the female victim would disclose where the money was hidden. He also admitted that when the female victim would not disclose its location, he killed her too. The evidence further shows that it was he who ordered the other gunman to kill the third victim because he was out of bullets. The evidence, without contradiction, shows that the two killings were done in execution style while the two victims were laying on the floor.

In order to arrive at the facts set forth above, the trial court apparently relied upon out-of-court admissions allegedly made by Enrique Garcia. The only eyewitness to the crimes to testify at Garcia's trial, Rosenna Welch, did not ascribe to Garcia any of the conduct referred to by the trial court. She could not even say who fired any of the shots at the Farm Market. (R2028,2031) More importantly, contrary to what the trial court found, the jury must have concluded that Garcia's alleged out-of-court statement was unworthy of belief, and that he was not a

"triggerman," as they found him guilty only of felony murder, and did not find that he used a firearm in the attempted murder of Rosenna Welch. (R2202,2792,2793,2794)

Even if the trial court's factual recitation is correct, it does not establish that the homicides were especially heinous, atrocious, or cruel. They were essentially simple shootings, unaccompanied by such acts as would set them apart from the norm of capital felonies. As such the homicides do not qualify for this aggravating circumstance. See Clark v. State, 443 So.2d 973 (Fla. 1983), cert.denied, __U.S.__, 104 S.Ct. 2400, 81 L.Ed.2d 356 (1984), and cases cited in Garcia's initial brief.

The Amended Judgment characterizes the homicides as having been accomplished "execution style." (R3082) However, in Parker v. State, 9 FLW 347 (Fla. Sept.6, 1984) this Court held that an execution style shooting, unaccompanied by anything unusual in the manner or method of effecting the crime, could not be considered especially heinous, atrocious, or cruel.

The only mitigating circumstance found by the trial court is that Garcia has no significant history of prior criminal activity. (R3082) He rejected, without discussion, all other mitigating circumstances. As discussed in Garcia's initial brief, the court was obligated at least to consider the substantial evidence Garcia presented at his trial in mitigation, as well as the mitigating factor of Garcia's youthful age of 20 at the time of the offenses. The Amended Judgment does not reflect that the court gave any consideration to any statutory or non-statutory mitigating circumstances, except for the single statutory mitigating circumstance he found to exist.

CONCLUSION

Upon the arguments presented in this supplemental brief, Enrique Garcia prays this Honorable Court to reverse his sentences of death with directions to impose two life sentences. In the alternative, Garcia asks the Court to grant him a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602 by mail on this 17th day of December, 1984.

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RFM:js