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IN THE SUPREME COURT OF FLORIDA

EMILIA CARR,)
)
)
Appellant,)
)
vs.)
)
STATE OF FLORIDA,)
)
Appellee.)
_____)

CASE NUMBER SC11-476

APPEAL FROM THE CIRCUIT COURT
IN AND FOR MARION COUNTY, FLORIDA

SUPPLEMENTAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
ARGUMENT	1
<p>EMILIA CARR'S DEATH SENTENCE IS DISPROPORTIONATE, WHERE HER MORE CULPABLE CO-PERPETRATOR, JOSHUA FULGHAM, RECEIVED A LIFE SENTENCE. THUS, EMILIA CARR'S DEATH SENTENCE VIOLATES HER CONSTITUTIONAL RIGHTS TO A FAIR TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL, AND PROTECTION FROM CRUEL AND UNUSUAL PUNISHMENT UNDER BOTH THE FLORIDA AND UNITED STATES CONSTITUTIONS.</p>	
CONCLUSION	18
CERTIFICATE OF SERVICE	19
CERTIFICATE OF FONT	19

TABLE OF CITATIONS

<u>CASES CITED:</u>	<u>PAGE NO.</u>
Connor v. State 803 So. 2d 598 (Fla. 2001)	10, 11
England v. State 940 So. 2d 389 (Fla.2006)	8
Kight v. State 784 So.2d 396 (Fla.2001)	8
Murray v. State 692 So. 2d 157 (Fla. 1997)	2
Puccio v. State 701 So.2d 858 (Fla.1997)	2
Scott v. Dugger 604 So. 2d 465 (Fla. 1992)	10
Shere v. Moore 830 So.2d 56 (Fla.2002)	8, 10
Smith v. State 998 So.2d 516 (Fla.2008)	8
Taylor v. State 937 So. 2d 590 (Fla. 2006)	2
Wade v. State 41 So. 3d 857 (Fla. 2010)	8

OTHER AUTHORITIES CITED:

Amendment VIII, United States Constitution	2
Amendment XIV, United States Constitution	8
Article I, Section 16, Florida Constitution	8
Article I, Section 9, Florida Constitution	2

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ARGUMENT

EMILIA CARR'S DEATH SENTENCE IS DISPROPORTIONATE, WHERE HER MORE CULPABLE CO-PERPETRATOR, JOSHUA FULGHAM, RECEIVED A LIFE SENTENCE. THUS, EMILIA CARR'S DEATH SENTENCE VIOLATES HER CONSTITUTIONAL RIGHTS TO A FAIR TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL, AND PROTECTION FROM CRUEL AND UNUSUAL PUNISHMENT UNDER BOTH THE FLORIDA AND UNITED STATES CONSTITUTIONS.

INTRODUCTION

Since Joshua Fulgham's trial and resulting life sentence occurred long after Appellant's trial and sentence of death, this Court ordered supplemental briefs on the issue of the relative culpability of Emilia Carr compared to her co-perpetrator, Joshua Fulgham. Following the State's suggestion, Appellant's record on appeal

was supplemented with Fulgham's record on appeal, including his previously untranscribed penalty phase.

STANDARD OF REVIEW

Claims that are composed of constitutional issues, including claims surrounding proportionality of sentence, uniformity in death penalty proceedings, and disparate treatment of defendants involve mixed questions of law and fact, and are reviewed *de novo*. Taylor v. State, 937 So. 2d 590, 598 (Fla. 2006); Connor v. State, 803 So. 2d 598, 605 (Fla. 2001); Murray v. State, 692 So. 2d 157, 159 (Fla. 1997). Usually, a trial court's determination concerning the relative culpability of the co-perpetrators in a first-degree murder case is a finding of fact and will be sustained on review if supported by competent substantial evidence." Puccio v. State, 701 So.2d 858, 860 (Fla.1997).

However, no trial court has ever addressed this particular issue due to the unusual procedural posture of this case. Joshua Fulgham and Emilia Carr were each tried in two separate trials, in front of two different trial judges, with two different juries, and two different legal teams. Both were convicted of first-degree murder. Each trial concluded with a full blown penalty phase concluding with an advisory verdict. Emilia Carr's jury recommended death by a bare majority vote of seven to five. Joshua Fulgham's jury recommended life imprisonment without

possibility of parole. Neither jury knew what sentence was imposed on the other co-perpetrator. Emilia Carr's trial judge did not have the benefit of knowing that Joshua Fulgham would ultimately be sentenced to life, when that court sentenced her to death. In light of this peculiar set of facts and circumstances, Appellant submits that this Court has the duty to assess the co-perpetrators' relative culpability and the resulting disparate sentences under a *de novo* standard of review.

**Joshua Fulgham's and Emilia Carr's Admissions to Law Enforcement
Establish the Only Evidence of the Relative Culpability of Each in the
Murder of Heather Strong.**

Almost all of the evidence establishing the relative culpability for the murder of Heather Strong comes from each co-perpetrator's admissions. Both repeatedly lied to law enforcement during questioning. Eventually, each confessed to some role in the death of Heather Strong. Although fairly consistent on the sequence of events, each of the co-perpetrator's account varied to some degree. Ultimately, each co-perpetrator's most inculpatory admissions to the crime established that each were equally guilty of the first-degree murder of Heather Strong. The only real physical evidence that actually connected either of them to the crime, were several latent fingerprints belonging to Joshua Fulgham. These were found on the duct tape used to

restrain the victim to facilitate her murder. (XCII 1633-44; XCIII 1759, 1765).

A. Joshua Fulgham's Admitted Role in the Murder Heather Strong

One of the many mental health professionals, **presented by Fulgham's defense team** at the penalty phase, testified that **Joshua Fulgham took full responsibility for this crime.** (CXXI 578). When Fulgham was released from jail at the end of January, his relationship with Heather remained tumultuous. (CXIX 277-83). On February 13, Fulgham wanted to visit his children, but Heather refused. She threatened to take their children and return to Mississippi where her family still lived. (CXIX 277-83). Joshua Fulgham admitted that his motive in murdering his wife was to prevent her from returning to Mississippi with their children. (CXIX 277-83). In preparation, Fulgham had his mother draft a document transferring primary custody of their children to him. (XCV 2071-3; CXIX 283-4).

Although Fulgham first attempted to blame the actual killing on his co-perpetrator, the appellant, he ultimately came clean. Approximately two years before the murder, Heather had angered Fulgham by meeting an old boyfriend at a bar. At that time, Fulgham and Emilia discussed getting rid of Heather and blaming it on the boyfriend. On the day of the murder, Fulgham called Emilia,

reminded her of that conversation, and asked if she was still up for it. Emilia answered affirmatively. (XCV 2071-3). Fulgham maintained that they did not plan to kill Heather that day. The original plan was to simply scare her into signing the paper changing primary custody. (XCV 2067, 2071-3).

Using a ruse that Emilia had hidden money in the trailer behind her residence, Fulgham convinced Heather to accompany him to the crime scene. According to their prearranged plan, Emilia entered the trailer a short while after Fulgham and Heather. Realizing her potential fate, Heather broke away from Fulgham in an attempt to escape. Emilia hit her with a flashlight¹ to prevent her escape. (XCV 1964-90). The two of them then put Heather in a chair. Fulgham sat on her legs while Emilia stood behind her with her hands on Heather's head. (XCV 2064-6). Fulgham insisted that it was Emilia, not him, who placed her hand over Heather's mouth and nose which was already covered with the garbage bag. Similarly, Fulgham denied that he ever placed his hands around Heather's neck that night. (XCV 2055). These denials came only after law enforcement pointed out that only his prints were found on the duct tape. When confronted with that evidence, Fulgham insisted that he did not act alone,

¹A forensic examination of the flashlight revealed no latent fingerprints of any value. (XCV 1772-3).

and that he should not go down for this by himself. (XCV 256-9).

B. Emilia Carr's Admitted Role in Heather Strong's Death

As set forth in the initial brief, Emilia continued to imply that she had more information about Heather Strong's fate, but repeatedly asked for immunity in exchange for testimony that she could provide as a witness to the crime, although not an "actual" participant. Ultimately, the appellant admitted to being a principal to felony murder, not realizing that her culpability was the same.

The most incriminating account provided by the appellant was obtained through a secretly recorded conversation with Fulgham's sister, Michelle. That conversation revealed that, pursuant to a prearranged plan, Fulgham tricked Heather into coming to the trailer (the scene of the crime), by telling her that the appellant had hidden some money there. As Fulgham had previously instructed her, the appellant remained inside her house for several minutes after Fulgham arrived at the trailer with Heather in tow. When the appellant later entered the trailer, Fulgham and Heather were arguing about his recent incarceration and Heather's plan to return to Mississippi with the children. At that point, Fulgham hit Heather in the head with a flashlight. In Heather's attempt to escape, she ran

into the appellant who was blocking her way. Fulgham then dragged Heather back to the chair and began to duct tape her to that chair. After unsuccessfully trying to snap Heather's neck, the two of them placed the garbage bag over Heather's head and suffocated her. Prior to killing her, they forced Heather to sign a letter giving custody of their children to Fulgham. During the secretly recorded conversation with Michelle, the appellant repeatedly expressed her surprise that Fulgham had carried out his plan. She had never taken him seriously, until the deed was done. (XXXVIII 1446-1526).

When police subsequently confronted the appellant with the secretly recorded conversation, she confirmed the sequence of events in a fairly consistent manner. She admitted that she was a principal to murder; that she was present; did nothing to stop it; and assisted as Fulgham ordered her. She admitted that she helped Fulgham tape Heather to the chair. She also admitted that she attempted, in a halfhearted manner, to break Heather's neck. She also admitted that she was the one who placed the garbage bag over Heather's head. However, Appellant pointed out that Fulgham was the one who brought Heather to the trailer; hit Heather with a flashlight; and taped the garbage bag around her neck and head. Furthermore, Fulgham was the one who ultimately

caused Heather's actual death by placing his hand over the garbage bag where it covered her mouth and nose. (XXXVIII 1526-1653; State's Exhibit 16).

**Emilia Carr's Death Sentence Is Disproportionate When Compared to
Joshua Fulgham's Life Sentence Where Fulgham Was, at the Very Least,
Equally Culpable for the Murder of His Wife.**

As this Court recently stated in Wade v. State, 41 So. 3d 857, 867-8 (Fla. 2010):

In Shere v. Moore, 830 So.2d 56, 60 (Fla.2002), we stated that “where more than one defendant was involved in the commission of the crime,” we would consider the relative culpability of the codefendants in determining the proportionality of the death sentence imposed. We deemed such analysis necessary because equally culpable codefendants should not be treated differently.

Relative culpability was not an issue in Wade, because Wade's co-defendant was convicted only of second-degree murder rather than first-degree murder. As this Court has held, “[i]n order to have that same degree of blame or fault the codefendants must, at a minimum, be convicted of the same degree of the crime.” Shere v. Moore, 830 So.2d 56, 61 (Fla.2002). Furthermore, “where the codefendant's lesser sentence was the result of a plea agreement or prosecutorial discretion, this Court has rejected claims of disparate sentencing.” England v. State, 940 So. 2d 389, 406 (Fla.2006) (quoting Kight v. State, 784 So. 2d 396, 401 (Fla.2001)); accord Smith v. State, 998 So. 2d 516, 528 (Fla.2008).

Neither of the above problems are present in the case at bar. Both Emilia Carr and Joshua Fulgham were convicted of the kidnapping and first-degree murder of Heather Strong, Fulgham's wife, albeit at separate trials with different trial judges, juries, and defense teams.

As to the issue of relative culpability, Joshua Fulgham's is clearly greater than Emilia Carr's. At the very least, the two of them are equally culpable. Therefore, Emilia Carr's death sentence must be vacated for the imposition of a life sentence without possibility of parole. Any contrary result would render Florida's death sentencing scheme fundamentally unfair and constitutionally infirm. Amend. VIII and XIV, U.S. Const. and Art. I, § 9 and 16.

Appellant contends that her death sentence, imposed by a bare majority vote, is fundamentally unfair, disproportionate, and unconstitutional. This Court must come to the same conclusion after a consideration of all of the factors present in this most unusual case. Heather Strong's murder was the culmination of a sick and twisted relationship with her husband, Joshua Fulgham. Emilia Carr was a late arrival to the chain of events that resulted in the very foreseeable murder of Heather Strong by her husband, Joshua Fulgham. Most importantly, Fulgham is at least as culpable, if not more so, for the death of his

wife, Heather Strong.

As Justice Anstead wrote in his partial concurrence, partial dissent in Shere v. Moore, 830 So. 2d 56, 65-6 (Fla. 2002):

Ray [775 So. 2d 604 (Fla. 2000)] and Slater [316 So. 2d 539 (Fla. 1975)] are two of numerous cases, going back some twenty-five years, in which this Court has acknowledged the principle that the relative culpability and punishment of a codefendant is an important factor to be considered in considering a capital defendant's sentence. See, e.g., McDonald v. State, 743 So. 2d 501 (Fla. 1999); Fernandez v. State, 730 So. 2d 277 (Fla. 1999); Jennings v. State, 718 So. 2d 144 (Fla. 1998); Howell v. State, 707 So. 2d 674 (Fla. 1998); Gordon v. State, 704 So. 2d 107 (Fla. 1997); Puccio v. State, 701 So. 2d 858 (Fla. 1997); Raleigh v. State, 705 So. 2d 1324 (Fla. 1997); Cole v. State, 701 So. 2d 845 (Fla. 1997); Slater v. State, 316 So. 2d 539 (Fla. 1975). In fact, there are at least seventy published opinions in which this Court has referred to this sentencing principle...This Court has adhered to this principle even when a codefendant is sentenced to life well after the defendant has been convicted and sentenced to death.

In Scott v. Dugger, 604 So. 2d 465 (Fla. 1992), this Court considered the propriety of disparate sentences for equally culpable codefendants where the codefendant was sentenced to life **subsequent** to the imposition of the death sentence on the defendant, and while the defendant's sentence was pending review in this Court. This Court vacated Scott's sentence of death, finding that the "record in this case shows that Scott and [his codefendant] had similar criminal records, were about the same age, had comparable low IQs, and were equally culpable participants in the crime." Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992). In

Shere, at 66-7, Justice Anstead also pointed out that:

This Court has applied this [Scott v. Dugger] same analysis in case after case. See, e.g., Fernandez, 730 So. 2d at 283 ("The record reveals and we find that appellant's degree of participation in the crime was similar to that of codefendant Abreu, a getaway driver who received a life sentence after a plea negotiation."); Puccio, 701 So. 2d at 863) ("We find that Puccio's sentence of death is disproportionate when compared to the sentences of the other equally culpable participants in this crime."); Hazen, 700 So. 2d at 1211-12 (holding that defendant nontriggerman accomplice to murder could not be sentenced to death when more culpable nontriggerman accomplice received sentence of life imprisonment.); Curtis, 685 So. 2d at 1237 (reversing death sentence where "the actual killer was sentenced to life"); Slater, 316 So. 2d at 542 (reversing death sentence where "the court that tried the appellant also permitted the 'triggerman' . . . to enter a plea of nolo contendere").

Both Fulgham and Carr were co-perpetrators; who were both present at the scene of the crime; who both planned Heather's abduction; and who both played significant roles in Heather's ultimate demise. Joshua Fulgham had physically and emotionally abused his wife for eleven years. The primary motive for the murder was the fact that Joshua Fulgham refused to live without his children and Heather Strong stood in his way. Fulgham was also angry with Heather for his arrest and resulting jail time when she accused him of pointing a gun at her.

Fulgham first hatched the plan and began to calculate a safe place to murder his wife. Fulgham probably would not have killed his wife, if she had not confessed her infidelity. Fulgham's rage over that infidelity, as well as his

recent month-long incarceration, which he blamed on Heather, ultimately sealed her fate. (XCVIII 2387-9; CX 1560).

The Plan to Murder His Wife, Heather Strong, Originated in the Mind of Joshua Fulgham, Which Makes Fulgham More Culpable Than Carr. At the Very Least, the Heightened Premeditation Aggravator Is Much More Applicable to Fulgham.

A. Fulgham Begins to Plan the Murder.

Joshua Fulgham began planning the murder of his wife, Heather, while he was locked up in the Marion County Jail, after she had him arrested on a domestic violence charge. Fulgham's phone calls from the jail to Emilia Carr reveal the genesis of his plan. Those phone calls also reveal Emilia Carr's ignorance of Fulgham's plan to murder his wife in order to keep his children. Likewise, Joshua Fulgham's phone calls to his wife, Heather, reveal her absolute certainty that Fulgham would kill her when he got out of jail.

Fulgham was “playing” both Emilia and Heather the entire time he sat in jail in the month before Heather’s murder. (CXXI 724-9). Joshua Fulgham’s phone calls to Emilia reveal when first hatched the details of the plan to murder his wife. The State emphasized this fact in their opening statement at the first phase of the trial. (LXXXVIII 861). In addition to frequently expressing regret that he failed to kill Heather before his arrest, his future plan to murder Heather was

already percolating in Fulgham's brain.

During a conversation with Emilia, Fulgham told her that he had been thinking about things. Fulgham asked Emilia whether the neighbors behind her residence could see into her backyard where the trailer (the scene of the future murder) rested. Fulgham also asked Emilia about the trailer itself. Emilia assured Fulgham that the neighbors could not see because of the heavily wooded area separating the properties. However, Emilia was clearly puzzled by the question. She asked why he wanted to know that information. (LXXXIX 1058-9, 1068, 1103-4). Probably realizing that the conversation was being monitored and recorded by law enforcement, Fulgham replied that he was "just wondering... I told you I've been sitting up in this motherfucker thinking about everything. We'll talk when I get home." (LXXXIX 1058-9).

During closing argument at the penalty phase, the State refuted Fulgham's story that Emilia was the one who suggested that she had the perfect place to kill Heather. That evidence was the telephone conversation between Emilia and Fulgham, where he questioned her about her backyard, its visibility by neighbors, and the old trailer on that property. The prosecution pointed out that Fulgham's story was entirely inconsistent with that phone conversation. It was

clear that, at that point, Emilia had no idea why he was questioning her about her backyard and the trailer. (XLVII 2409-10). Fulgham's calculated plan, first hatched a month before the murder, shows that he is more culpable for the demise of his wife. Fulgham had the plan, the motive, the most to gain, and more instrumental in carrying out the plan.

B. Fulgham Tricks Heather into Believing He Still Wants a Life With Her.

During his thirty days of incarceration, Fulgham was in frequent telephonic communication with both Heather, his wife, and Emilia Carr, his co-perpetrator. Fulgham was cleverly playing each woman to his own benefit. Fulgham was using Emilia to get the money to hire a lawyer and to bond him out of jail. (CXXXIX 1039-82; State's Exhibit 6; CXXII 723-29). During his conversations with Emilia, Fulgham frequently expressed regret that he had not previously killed his wife, Heather. "I should've kill the bitch," was his constant refrain. (CXXXIX 1041, 1103-4).

Heather Strong knew that Joshua Fulgham would eventually kill her, if she stayed with him too long. Fulgham's phone calls to Heather from jail are revealing of his animosity against Heather, as well as Heather's justifiable fear of Fulgham. Fulgham urges Heather to drop the charges against him. Heather hesitates and points out, "When you get out, you're gonna fucking kill me."

(CXVIII 121-2). Fulgham promises to go nowhere near her. Heather reluctantly says that she will not "push it [the charges]," but says that she cannot be with him anymore because, "I know what you gonna do." (CXVIII 121). "You're gonna kill me when you get out of jail." (CXVIII 122). "I'm thinking about whether or not I want to live or die.... I've lived with you for eleven years so I know what you're capable of... You're the one that's always filled my head with I'm gonna kill you and I'm gonna do this and I'm gonna do that. You. Nobody else." (LXXXIX 1041CXVIII 123-4).

Fulgham eventually convinced Heather that he still loved her, and that she still loved him. When she agreed to drop the charges against him, they talked about the idyllic life that they would soon be living together. (LXXXVIII 1010-23; CXVIII 124-52; State's Exhibit #5). Josh also promised that he was through with Emilia. He agreed with Heather that she is crazy, and that he did not believe the lies that she had been telling him about Heather's infidelity, while he was incarcerated.

Shortly before Fulgham's release, Heather confessed that she was still a little bit worried that Josh might "be crazy" when he came home. However, Heather admitted that she did not care, because she knew Josh did not want to

be in trouble with the law again. Josh promised never to hit her again and expressed his remorse for all the times in the past that he had hurt her. "You're so little. I'm so much bigger than you. It's a wonder I never hurt you bad when I used to do that to you. But I mean, I know I hurt you...but I mean, I could've hurt you really bad all them times....And I'm glad I didn't." (CXVIII 153).

Fulgham and Heather began having problems with their relationship shortly after he was released from jail. Fulgham had drawn up divorce papers to get rid of Heather legally. (LXXXIX 1175). Fulgham was a serial spouse abuser who had physically abused Heather throughout their eleven-year relationship. Within two weeks of his release, exactly as Fulgham had planned, Heather Strong was dead.

CONCLUSION

The fact that Joshua Fulgham is serving life imprisonment without possibility of parole for the murder of his wife, Heather Strong, while Emilia Carr has been sentenced to death is fundamentally unfair and unconstitutional under both the State of Florida and the United States Constitutions. At the very least, they are equally culpable for the murder of Heather Strong. Joshua Fulgham first thought of the plan, had the primary motive and the most to gain,

and had a history of physically abusing the victim, his wife. Fulgham drove the victim to the scene of the crime. After his conviction, Fulgham took full responsibility for the murder. The record on appeal supports the conclusion that he is the more culpable of the two co-perpetrators. At the time of the crime, Emilia Carr was almost eight months pregnant. The murder could not have been accomplished without Joshua Fulgham's full and active participation.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Honorable Court to vacate Appellant's death sentence and remand for sentencing to life imprisonment without possibility of parole.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically delivered by email to the Office of the Attorney General, Daytona Beach, Florida, capapp@myfloridalegal.com and Assistant Attorney General, kenneth.nunnelley@myfloridalegal.com mailed to Emila Carr, DOC #U24131, Lowell - Women's Annex, 11 120 NW Gainesville Road, Ocala, FL 34482, on this 19th day of August, 2013.

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I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

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