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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 REPLY BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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EMILIA CARR,)
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ARGUMENT

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT, 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.

A. This Court Should Consider the Relative Culpability Issue In This Direct Appeal.

The State initially contends that this Court should not consider Appellant's relative culpability in comparison to that of the codefendant, Joshua Fulgham, despite the unusual procedural posture of this case. (Supp. Answer

Brief, at 29). The State argues that this issue is more properly litigated in postconviction proceedings. The State then states:

No case identified by Carr, and no case of which the State is aware, has resolved a "relative culpability" claim without considering the factual findings of the Circuit Court.

(Supp. Answer Brief, at 32).

This Court did exactly that in Witt v. State, 342 So. 2d 497, 500-1 (Fla. 1977), in considering whether or not to uphold the death sentence where the codefendant had pleaded guilty to second-degree murder and life imprisonment three months after Witt had been sentenced to death. In addressing whether Witt's death sentence was properly imposed in light of the subsequent sentence of his codefendant, this Court stated:

Our final and most difficult responsibility is to review the imposition of the death penalty and determine if it may be properly imposed in this case. Subsequent to appellant Witt being sentenced to death in February, 1974, the codefendant Gary Tillman on May 6, 1974, entered and had accepted by the same trial court, in a separate trial, a plea of guilty conditioned upon life imprisonment. The plea agreement was presented by the public defender and the state's attorney, and agreed to by defendant Tillman after extensive inquiry by the trial judge. The case was appealed to the Second District Court of Appeal on other grounds and affirmed per curiam. Tillman v. State, 304 So.2d 161 (Fla.2d DCA 1974).

Under these circumstances we cannot judicially ignore the discretionary inconsistency in the life sentence given appellant's codefendant Tillman in his severed proceeding. The trial judge agreed

to sentence Tillman to life imprisonment in exchange for Tillman's plea of guilty following a determination of competency to stand trial, yet the facts in this case on their face appear to justify the imposition of the death sentence for both the appellant and the codefendant.

After carefully reviewing the records of the two proceedings, we hold the facts and circumstances support the imposition of the death penalty on the appellant Witt and a life sentence for Tillman. Testimony of five psychiatrists who examined Tillman indicated Tillman had a severe mental or emotional disturbance and was subject to domination by Witt. Witt's dominance was enhanced by his age of thirty years, compared to Tillman's age of eighteen. These factors correspond to the provisions of Section 921.141(6)(b) and (e), Florida Statutes (1975), and constitute sufficient mitigation with respect to Tillman's participation to justify a life sentence for Tillman and a death sentence for Witt for this otherwise aggravated murder.

The procedural posture of Appellant's case is no different than that of Witt's. As in Witt, this Court has both records before it in this direct appeal. As this Court did in Witt, careful review of both proceedings can be accomplished. “After carefully reviewing the records of the two proceedings...”. Witt v. State, 342 So. 2d 497, 500 (Fla. 1977). Witt’s codefendant (Tillman) was allowed to plead to a life sentence only after his competency to proceed to trial had been in question. “Testimony of five psychiatrists who examined Tillman indicated Tillman had a severe mental or emotional disturbance and was subject to domination by Witt.” The age difference was also a major factor; Witt was thirty and his codefendant was only eighteen at the time of the murder. As

mentioned in the opinion, the Witt trial judge presided over both cases.

Such is not the case here. This case is somewhat unique in that both coperpetrators/codefendants had full-blown trials, albeit with different juries, different judges, and different defense teams. The only constant in the two cases was the prosecution. On that note, as Appellant pointed out in her reply brief, the prosecution theory was inconsistent at each codefendant's trial. In Appellant's trial, the prosecution portrayed Emila Carr as the mastermind and dominant one. At Joshua Fulgham's trial, Fulgham was the "bad actor" who was the expert at manipulating women, especially his wife, the victim, and Emila Carr, his codefendant and lover. (Appellant's Reply Brief, at 10-11).

Since this Court does have the record of both proceedings below, this Court is in the unusual position of being able to conduct fact-finding. Fulgham's trial judge did not render findings of fact when he sentenced Fulgham to life imprisonment without parole. There was no legal requirement for him to do so, since the jury recommended a life sentence. In fact, this Court is in a much better position than Appellant's trial judge to determine the relative culpability and appropriate sentence in light of all of the evidence in both trials.

Additionally, judicial economy is a factor or, at least, should be. At least some members of this Court have considered judicial economy when dealing with

issues in a "disorderly" fashion:

In all probability the mitigating evidence presented during the rule 3.850 hearing will be incorporated into the record on remand or, if not, the same or similar evidence will be presented. See McCrae v. State, 582 So.2d 613, 615 n. 1 (Fla.1991) (testimony presented during rule 3.850 hearing incorporated into record on remand). In light of this evidence it is clear to me that if death is again imposed, the override sentence will not be upheld. Cf. Stevens v. State, 613 So.2d 402 (Fla.1992); McCrae. Therefore in the interest of judicial economy, I would remand with instructions to impose a life sentence.

Heiney v. State, 620 So. 2d 171, 174 (Fla. 1993), (KOGAN, Judge, concurring in part and dissenting in part). This direct appeal is the appropriate proceeding and this Court is the appropriate, neutral body to determine the issue of relative culpability of Emilia Carr and Joshua Fulgham.

B. At the Very Least, Joshua Fulgham, the Codefendant, Who Received a Life Sentence for the Murder of His Wife, Is Equally Culpable to Appellant.

In addition to arguing that this Court should not consider this issue in this direct appeal proceeding, the State argues that the record does not support Appellant's position. More specifically, the State paraphrases Appellant's argument as an "assertion that the co-defendant, Fulgham, was the 'main actor' in Heather Strong's murder, and that Carr was influenced to commit an uncharacteristic act' because of her 'emotional involvement and parental connection' with Fulgham." (State's Supplemental Answer Brief, at 33-4).

The State then proceeds to rely exclusively on the sentencing order written by Appellant's trial court. Appellant's trial judge did not have the benefit, unlike this Court, of the voluminous testimony and evidence introduced by the State at Joshua Fulgham's guilt phase trial, much less his penalty phase. In asserting that the record fails to support Appellant's argument on this issue, the State does mention, in passing, the transcript of Fulgham's penalty phase. The State makes no mention of the multitude of transcripts containing the State's prosecution of Fulgham that proved his guilt beyond all reasonable doubt.

This Court ordered supplemental briefing on the issue of relative

culpability in this case. Appellant addressed that issue, and only that issue, in her supplemental brief filed in August, 2003. In contrast, in their supplemental answer brief, the State focuses only on the findings of fact by Appellant's trial judge. Specifically, the State focuses on Appellant's trial judge rejection of the statutory mitigating factor of extreme duress or substantial domination by another. The State then addresses Appellant's trial judge rejection of nonstatutory mitigation dealing with Appellant's childhood (which included sexual abuse); her intelligence; her maturity; the lack of domination by her codefendant; and her relative culpability in the murder of Heather Strong. (Supplemental Answer Brief, at 34-7).

Appellant's trial judge's assessment of relative culpability was based only on the evidence presented at Appellant's trial. That assessment is uninformed and therefore invalid.

His rejection of mitigation is completely irrelevant to the issue of the relative culpability of each codefendant. Similarly, the mitigating evidence presented at Fulgham's penalty phase is completely irrelevant to the issue of relative culpability. Appellant's trial judge, unlike counsel for the State, did not have access to the evidence presented at Joshua Fulgham's trial. The State also

makes passing reference to the substantial mitigation presented by Fulgham's defense team at his penalty phase. (Supplemental Answer Brief, at 37).

As stated in Appellant's supplemental brief, almost all of the evidence establishing the relative culpability for the murder of Heather Strong comes from each co-perpetrator's admissions. (Supplemental Brief, at 3). An accused's inculpatory statements are usually the most accurate way to assess a defendant's culpability. Looking at each codefendant's most incriminating statement, it is abundantly clear that Joshua Fulgham, who received a life sentence, was at least as culpable, if not more so, than Emilia Carr, who was sentenced to death.

Appellant emphasizes that fact by pointing out the following:

- ◆ The only physical evidence that actually connected either of them to the crime were several of Fulgham's fingerprints found on the duct tape used to restrain the victim to facilitate her murder. (XCII 1633-44; XCIII 1759, 1765).
- ◆ One of the many mental health professionals presented by Fulgham's defense team at the penalty phase testified that Fulgham took full responsibility for this crime. (CXXI 578).
- ◆ Joshua Fulgham admitted that his motive in murdering his wife

was to prevent her from returning to Mississippi with their children.
(CXIX 277-83).

- ◆ Joshua Fulgham had the most to gain from his wife's murder. He would keep his children and he would extract revenge for her having him jailed and for her extramarital affairs.
- ◆ Joshua Fulgham initially concocted the plan to murder his wife.
- ◆ Fulgham's heightened premeditation is clear where he began thinking of the plan to murder while in jail one month before the crime.
- ◆ Fulgham's heightened premeditation is further proven by the advance preparation of a document transferring custody the children. (XCV 2071-3; CXIX 283-4).
- ◆ Joshua Fulgham brought the victim to the crime scene.
- ◆ Fulgham admitted that he probably would not have killed his wife if she had not admitted her infidelity while he was in jail. (XCVIII 2387-9; CX 1560).
- ◆ Fulgham began considering where to kill his wife when he was still in jail as evidenced by his questioning of Appellant about the wooded area behind her house. (LXXXIX 1058-9, 1068, 1103-4).
- ◆ The evidence is clear that Appellant had no idea that Fulgham was

asking her about the woods behind her house because he planned use it as the scene of the murder. (XLVII 2409-10).

- ◆ Heather Strong repeatedly asserted that she fully expected Fulgham to kill her one day. (CXVIII 121-4).
- ◆ In the month leading up to the murder, Fulgham continued to manipulate both his wife and the appellant by lying to both of them about his future with each. (CXXI 724-9; CXXXIX 1039-82; State's Exhibit 6; CXXII 723-4).
- ◆ Fulgham expressed regret that he had not previously killed his wife. (CXXXIX 1041, 1103-4).
- ◆ Fulgham had drawn up papers to divorce Heather Strong, the victim. (LXXXIX 1175).
- ◆ Fulgham was a serial spouse abuser who had physically abused Heather, the victim, throughout their eleven year relationship.
- ◆ Appellant's most incriminating statement to police admitted that she was a principal to murder without understanding the concept. She explained that it was Fulgham that ultimately caused Heather's death by placing his hand over her mouth and nose which was covered by the garbage bag. She

expressed complete surprise when, after her admitted presence at, and role in Heather's demise, she was placed under arrest for first-degree murder and was not free to leave.

- ◆ The State's theory of prosecution was inconsistent at each of the codefendants' trials, portraying each as the more culpable, depending on who was being prosecuted.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those in the supplemental initial brief, 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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CERTIFICATE OF SERVICE

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, 11120 NW Gainesville Road, Ocala, FL 34482, on this 21st day of October, 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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