IN THE SUPREME COURT OF FLORIDA
CASE NO. SC21-1767

CHRISTIAN CRUZ,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY
STATE OF FLORIDA

AMENDED ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Cruz". Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State. Citations to the trial transcript will be noted by (TT, __) followed the page number; citations to the first direct record on appeal will be noted by (ROA, __) followed by the page number; citations to this second direct record on appeal will be noted by (R, __) followed by the page number.

STATEMENT OF THE CASE

On October 21, 2013, Appellant and co-defendant Justen Charles were indicted for the April 2013 murder of Christopher Jemery along with related felonies. Appellant's trial began on February 18, 2019, and on February 28, 2019, the jury found him guilty on all four counts: First Degree Murder, Burglary While Armed, Robbery with a Firearm, and Kidnapping. On March 7, 2019, following penalty phase proceedings, the jury unanimously recommended that Appellant should be sentenced to death. On December 18, 2019, the trial court imposed that sentence for the murder of Christopher Jemery. In his direct appeal Appellant made

various guilt and penalty phase claims for relief, and all but one was rejected. However, this Court found that one had merit and reversed Appellant's death sentence and remanded for a new sentencing order because the trial court referred to non-record facts in its initial sentencing order. This Court also found that there was not competent, substantial evidence to support the jury's finding that Cruz was the shooter. After reevaluating the case without the consideration of evidence presented only in Justen Charles's trial and without the conclusion that Appellant was the shooter, the trial court nonetheless again sentenced Appellant to death on December 14, 2021. This appeal follows.

STATEMENT OF THE FACTS

Guilt Phase Proceedings

On April 26, 2013, Christopher Jemery had recently returned to his apartment in Deltona from a late-night run to McDonald's when Appellant and Justen Charles broke into his apartment. (TT, 20). Cruz and Charles were there intending to rob a man who used to live there and was a small-time drug dealer. (TT, 20). Unfortunately for all involved, but for Jemery most of all, the drug dealer had recently moved out and was allowing Jemery, who was not a drug

dealer or user, to stay there. (TT, 20). The defendants beat Jemery severely, leaving a large amount of blood in the apartment, and when they were unable to find the money and drugs they were looking for, they took Jemery from his home. (TT, 21-2). He was bound with wire and duct tape on his arms and mouth and tossed in the trunk of his own car. (TT, 22). He was driven to an industrial complex in Sanford, walked into nearby trees, and shot once in the head and left for dead. (TT, 22-3).

The first witness to testify was Aaron Hinson, a paramedic with the Sanford Fire Department. (TT, 37). He was the first on scene to where Jemery had been shot. (TT, 46). When they found him, Jemery was lying on his side in the bushes with duct tape around his head, covering his mouth, with his hands duct-taped and bound behind his back. (TT, 47). Jemery was still alive, bloody and struggling to breathe. (TT, 47). Hinson had to cut the duct tape away from Jemery because it had been wrapped around his mouth and head multiple times. (TT, 48-9). Although still breathing, Jemery was completely unresponsive. (TT, 52-4). On the way to the hospital they administered Jemery oxygen and he was able to groan and squeeze Hinson's hand. (TT, 55-8).

Next to testify was Donald Ripley, who worked with the Sanford Police Department. (TT, 63). He reported to the crime scene after Jemery was recovered and transferred to the hospital. (TT, 65-6). He photographed the scene where Jemery was shot and collected several pieces of evidence, including clothing, medical waste, duct tape, a phone cord piece, and a keychain. (TT, 67-72). Ripley later reported to the hospital where Jemery was being treated to take photographs of his injuries. (TT, 82-3).

Bill Tucker, a latent fingerprint expert with the Florida Department of Law Enforcement (FDLE) testified. (TT, 85). He received several pieces of duct tape, an empty duct tape roll, and a receipt to process for fingerprints and compare to some known standards. (TT, 90). He was able to develop one print of value on a piece of duct tape recovered from Jemery, and it was a thumb print that was a match to Appellant. (TT, 94-103). He was unable to develop any prints of value from the other pieces of evidence. (TT, 105).

Craig Beers, an agent with FDLE, was a member of the Volusia County Sheriff's Office's Major Case Squad at the time of Jemery's murder. (TT, 123-4). He received a call the day after the murder of a

suspicious incident at an apartment complex and responded to the scene. (TT, 124-5). He'd also been notified that an unidentified person in critical condition had been found near the Sanford airport. (TT, 125-6). The first information he received was that there was a lot of blood in the entrance of an apartment, along with a mop and an empty roll of duct tape. (TT, 126-7). Since he'd been told the person in Sanford was wrapped in duct tape, he suspected the two crime scenes may be related and notified his supervisor. (TT, 127). At that point they showed Jemery's girlfriend a picture of the person found in Sanford, and she confirmed that was the person missing from the apartment in Volusia. (TT, 130). Beers collected surveillance footage from several locations that helped police track Cruz's and Charles's movements the night of the murder. (TT, 132). They were observed at a bar called Shotz, then at a McDonald's, dropped off at a Circle K, and finally on a bus near the crime scene. (TT, 132-4). Jemery's car was not at his apartment, but was found at a later date backed into some bushes near a Publix in Deltona. (TT, 135). In the trunk investigators found black electrical cord and a white cloth with blood on it; the car was then secured for further processing. (TT, 136-7). A couple weeks later Appellant was arrested on unrelated charges in

Orlando and was interviewed by Beers. In that interview he denied knowing about Jemery, or being in Deltona, or knowing who Justen Charles was. (TT, 138-9). After Charles was arrested his home was searched and police found clothing and shoes that matched what the defendants were wearing the night of the murder. (TT, 140-4).

Christina Raghonath, Jemery's girlfriend at the time of the murder, then testified. (TT, 163). She and Jemery had recently moved from New Hampshire, but she was staying at her dad's place because Jemery thought the apartment complex wasn't completely safe. (TT, 164). Jemery was a friend of Mark Walters, the original tenant of the apartment, and had only been living there for a few weeks before this incident. (TT 164-6). Raghonath spent a lot of time at the apartment, but didn't sleep there every night. (TT 167-8). The last time she saw Jemery was the night he was murdered, and she was texting with him around 11 p.m. when he said he'd pick up their daughter after school the next day. (TT, 167-8). When he never showed to pick up their daughter and wasn't responding to calls or texts, she went to his apartment. (TT, 169). When she'd left it, the place had been clean and well-kempt; when she arrived she described walking "into a bloodbath". (TT, 171). She wasn't able to stop by the apartment until

5:30 p.m. because she'd been working, and when she arrived, she found blood everywhere and a mop near the front door as if there'd been an attempt to clean up, so a neighbor was asked to call the police. (TT, 171-2). Later that night police came to her house to have her identify a John Doe, and after looking at photos of Jemery taken at the hospital, she was able to positively identify him. (TT, 173). At the hospital she observed bruises, scrapes, and other injuries he hadn't had the day before. (TT, 174). She confirmed that a television that had been in the apartment the day before was now missing. (TT, 177).

A deputy, Michael Drake, with the VCSO arrived after Raghonath's 911 call and described a similar blood-soaked scene upon entering the apartment. (TT 179-187). He noted that one of the bedrooms appeared ransacked and had additional blood, and that all the kitchen cabinets had been opened. (TT, 190). He then secured the scene for processing. (TT, 192).

Mark Walters, the previous tenant, testified that despite the age difference between him and Jemery, they'd met because they did similar physical labor jobs. (TT, 205-7). Walters had previously seen Cruz and Charles around the apartment complex but had not

interacted with them much. (TT, 210-1). They had previously been to his apartment on one or two occasions to buy and smoke marijuana, but they didn't spend a lot of time there and didn't interact with much more than the chairs they sat on. (TT, 212-6). Walters admitted he was a small-time drug dealer known around the complex, but he did not leave any of his marijuana or money behind when he left. (TT, 218-21). Walters stated he'd never given either Cruz or Charles a prescription bottle that would have his name on it. (TT, 223). Walters first arrived at Jemery's apartment on April 26, 2013, a little before noon. (TT, 223). He noticed the same mop and blood that Raghonath later encountered but thought maybe Jemery had merely hurt himself and hadn't had a chance to fully clean up. (TT, 223-5). He tried calling Jemery but didn't get an answer, so he went home and took a nap. (TT, 224-5). Later in the day he woke up, and when he still didn't get an answer, he went back to the apartment where he encountered Raghonath. (TT, 225-6). Walters said the second time he saw the apartment it looked the same as when he'd seen it in the morning, and he cooperated with the police's investigation. (TT, 226-8).

Timothy Walker was a resident in the same apartment complex as Jemery and had known co-defendant Charles for about ten years. (TT, 245-9). Walker also knew Walters and knew that Walters would sell marijuana to anyone who asked. (TT, 245-6). Walker knew Walters had recently moved out and had met Jemery several times before he moved in, said they were friends. (TT, 247). Walker had only known Cruz for a few months and hadn't spent a lot of time with him. (TT, 250). The day of the murder both defendants arrived at Walker's apartment to hang out around noon, and they spent the whole day smoking and talking on the front porch. (TT, 251-2). While they were there and with Cruz present, Charles asked about Walter's apartment and marijuana, and Walker told them Walters no longer lived there. (TT, 252-3; 266-8). Walker left to work a shift, and when he returned the defendants and other individuals were at his apartment wanting to celebrate his new job, so the group went to a bar called Shotz. (TT, 253-7). They got some McDonald's on the way back to his apartment, and when they arrived back around 2 a.m. Cruz and Charles left saying they were going to the store. (TT, 257-9). They did not return that night. (TT, 259). He tried calling Charles a few times when they never returned but got no answer and

eventually went to sleep. (TT, 260). He heard Charles arrive in the morning around 7 or 8 a.m. but couldn't say whether Cruz was with him and didn't see or speak to him again. (TT, 260-2). Walker described Charles as streetwise and as a hothead. (TT, 264).

Joshua Mott, a crime scene investigator for VCSO, was called to Jemery's apartment to process the scene in response to a missing person. (TT, 271-3). Mott took many photos of the crime scene, Jemery's car, and the murder scene. (TT, 278). At the apartment he collected a blood droplet on the floor with a swab and found a live bullet on the floor. (TT, 284-9). Mott found and collected imprints of many footprints from two sets of shoes in blood and other material throughout the apartment, including ones he was able to develop with fingerprint powder. (TT, 292-8). He also found McDonald's fries and nuggets in the living area that appeared relatively untouched. (TT, 300). The door to a porch area that could be accessed from outside the apartment had a bunch of vertical blinds that had been knocked off or askew. (TT, 300-1). All the drawers and cabinet doors were open when Mott arrived, and he checked items in the trash can for fingerprint evidence. (TT, 302-3). Mott collected an empty cardboard tube for a duct tape roll and a shoebox for Air Jordans.

(TT, 305-8). Mott then went to process the scene where Jemery was found in Sanford. (TT, 314). He discovered a spent .22 shell casing near where Jemery had been which was the same caliber and manufacturer as the live round found back at the apartment. (TT, 317-320). Mott also collected a piece of duct tape at the scene that appeared to be the end of a duct tape roll. (TT, 324-5). After Jemery's car was found Mott processed that too, including finding a bloody white shirt in the trunk of the car. (332-3). He took swabs from several locations in the car attempting to find DNA. (337-40). Sometime after the murder Mott also processed a duplex where co-defendant Charles had been arrested. (TT, 343). There, he found several items that clearly belonged to Charles and Cruz, including Cruz's wallet. (TT, 344; 349). He also collected a hat and several pairs of shoes. (TT, 345-6). In a car at the residence Mott also discovered a prescription bottle belonging to Walters. (TT, 351). Finally, Mott collected DNA samples from Cruz, Charles, and Walters. (TT, 355-6).

Eugene Mefford with VCSO then testified, he was a patrol deputy at the time of the murder. (TT, 367-8). He was first tasked with reporting to the hospital to photograph and catalogue Jemery's injuries. (TT, 368). Jemery's left eyebrow was lacerated and there was

redness on his right torso that was consistent with being bound by duct tape. (TT, 371-2). Mefford found that his right ear also had a laceration and there was general redness and abrasions on his face. (TT, 372-3). Jemery had a wound above his right ear that was consistent with a gunshot wound. (TT 372-3). There were also trauma-induced injuries to the top of Jemery's head. (TT, 373). Mefford catalogued more redness consistent with duct tape binding and injuries to Jemery's hands and wrists. (TT, 374-6). Mefford then assisted with processing the apartment for prints and was able to develop and collect one print of a value on an empty McDonald's cup found in the trash. (TT, 378-9). He also collected usable prints on a discarded Walgreens bag and an Air Jordan shoebox. (TT, 380-3).

Dr. Sara Zydowics is the medical examiner who performed the autopsy on Jemery's body on April 26, 2013. (TT, 411-7). On Jemery's hands and wrists she found abrasions, bruising, and a gummy residue. (TT, 422-3). On one arm, his left shoulder, and right torso, were large, bruised areas consistent with blunt force trauma. (TT, 423-6). On his lower back was more severe bruising that reached the skeletal muscle, which she testified indicated more serious blunt force trauma than the previous injuries. (TT, 428-9). Jemery also had

bruising and lacerations on his face consistent with blunt force trauma. (TT, 429-30). There were blunt force impacts to the top of his head that were concentrated in force such that they must have been made with an instrument rather than a fist, consistent with getting hit with the butt of a pistol or pistol-whipped and were too small to be from a bat or a pipe. (TT, 432-3; 441). There was one gunshot wound to Jemery's head, entering above his right ear, and traveling in a slight downward path to the left side of his head, where it impacted his skull and didn't exit. (TT, 434-6). The wound was toward the front of his head and didn't go through his brainstem, which is likely why he survived as long as he did. (TT, 434-6). All of Jemery's injuries occurred while he was still alive. (TT, 437). Stippling from gun powder around the entrance wound indicate that it was not a contact wound but would have occurred from a distance of three to four feet away. (TT, 440). Some of Jemery's injuries, especially the ones on his right arm, are consistent with defensive wounds. (TT, 443). Zydowicz ran a toxicology screen which revealed Jemery did not have any alcohol, marijuana, or other illegal drug in his system at the time of his death. (TT, 445-7).

The next witness, Debra Dirienzo, worked for VCSO and was provided 35 latent fingerprints to perform match comparisons to prints from Cruz and Charles. (TT, 457-63). The print that was collected from the McDonald's cup recovered at Jemery's apartment matched the right thumb of Charles. (TT, 463-7; 472-3). A fingerprint lifted from the Air Jordan shoe box at Jemery's apartment matched Cruz's right ring finger. (TT, 468). On Jemery's cell phone, which was recovered from his car, two fingerprints matching Cruz were identified. (TT, 469).

Nicole Lee, a DNA analyst with FDLE, then testified. (TT, 477). There was a swab of blood collected at Jemery's apartment that she matched to Charles with a 1 in 8.2 quintillion chance. (TT 493-4). Blood swabs taken throughout the apartment, from a cassette player in the trunk of Jemery's car and from the trunk carpeting were all matched to Jemery. (TT, 496-501). The collar of a white shirt in Jemery's trunk, and blood on that shirt were consistent with Jemery's DNA. (TT, 502-5). A swab from the front right kick panel and a spot on the right front door of Jemery's car matched Cruz. (TT, 505-7). DNA from the front left door and gear shift was a mixture of 4 individuals that included Charles. (TT, 507-9).

Steven Hanily performed fracture match analysis for FDLE, which is studying pieces or fragments together to see if they were ever part of one whole object. (TT, 519-20). In this case, he was asked to analyze a couple pieces of duct tape recovered from Jemery and an empty duct tape roll that had been recovered from his apartment. (TT, 523-4). One of the pieces of tape had a bit of cardboard stuck to it, so he attempted to match that against the cardboard roll. (TT, 528). Based on his inspection, his expert opinion was that the piece of duct tape and the roll had originally been one item. (TT, 532).

Elise Sosa, who worked in the impression evidence section for FDLE, was tasked with analyzing the shoe prints recovered by law enforcement. (TT, 534). She examines footwear impressions both for class characteristics, which are the designed manufacturer treads, and acquired characteristics that are caused by normal wear and tear that cause unique markings. (TT, 537-8). She was also given two pairs of shoes to analyze against the shoeprint impressions: a pair of FUBUs size 11 (Charles's) and a pair of Air Jordans size 9 (Cruz's). (TT, 544-5). For a large number of shoe print impressions that were collected throughout the apartment she was able to match both pairs of shoes as either having just the matching class characteristics, and

also matching the unique, acquired characteristics of the shoes. (TT, 547-58).

Graham Cage, an officer with the Orlando Police Department, then testified. (TT, 562). He was on patrol duty in downtown Orlando on May 9th, 2013, a couple weeks after Jemery's murder. (TT, 563). He and his partner spotted a white Dodge Charger driving erratically and attempted to make a stop, but initially lost track of the car. (TT, 564-5). About 30 minutes later they found what they believed to be the same car and found that the engine was still hot to the touch, but no one was in the car. (TT, 565). Cage spotted a Hispanic male in his late teens continually peeking at them from around a corner as they were near the car and given the late hour and no one else in the area, Cage and his partner approached. (TT, 565-6). At this point defense counsel objected to the rest of Cage's testimony but was overruled by the judge. (TT, 566-7). When Cage rounded the corner into the alley, he spotted the same male along with another man and woman standing in a small patio area. (TT, 568). They smelled the odor of burnt cannabis coming from the individuals so began searching them. The other male allowed himself to be searched, but when they asked the Hispanic male, he took off down the alley. (TT,

568-9). Cage gave orders to the person to stop running and was forced to deploy a taser to subdue him. (TT, 570). That later identified this individual as Cruz. (TT, 571). Because of the use of the taser, Cage had to wait for a supervisor to arrive to assess the use of force. (TT, 572). While they were waiting, Cruz made statements that struck Cage as weird and out of place with being arrested for a relatively minor crime, saying, "Why don't just shoot and kill me now?" and "I'm as good as dead?". (TT, 572). When Cage learned of Cruz's murder case on a later date the comments suddenly became more relevant, and he added them to his report. (TT, 572-3).

Detective Chuck Lee with the VCSO was the final witness for the State. (TT, 576). He was the major case agent investigating Jemery's death and was involved in the interview they had with Cruz on May 10th, 2013. (TT, 576-8). Lee corroborated Beers's testimony that Cruz denied being in the Belltower Apartments where Jemery lived or even in the Deltona area recently. (TT, 584-5). The McDonald's meal and cup that were found at Jemery's apartment were bought by Jemery, as confirmed by a receipt they found in his car. (TT, 586). They did not recover Jemery's car until May 3rd, and in it they found his damaged phone that ultimately had Cruz's

fingerprints on it. (TT, 588). During the investigation they learned that a television, a bottle of medicine, and some cash had been stolen from Jemery's apartment. (TT, 589). Lee also learned that Jemery's bank account was accessed after he went missing at a bank in Casselberry. (TT, 589-90). Lee recovered surveillance footage from the ATM which showed two transactions about 45 minutes apart, and the person doing it had a tattoo on their right bicep that matched a tattoo on Cruz's right bicep. (TT, 591). Lee confirms that Cruz is left-handed and was wearing size 9 shoes when arrested. (TT, 595-6).

The parties than read a stipulation into the record that was a portion of Deputy Drake's initial police report in the case. (TT, 604). In it, Drake included a conversation he'd had with Walters the day Jemery was reported missing, where Drake told Walters that Jemery's girlfriend reported there being blood in the apartment, but Walters denied that and stated, "They're trying to get me in trouble." (TT, 604). Walters then stated that there was in fact blood inside and denied changing his story to Drake, saying instead that he'd denied being the one trying to clean up the blood, and accurately described the size of the blood pool. (TT, 605).

The State then rested. The defense gave a summary judgment of acquittal argument stating that no evidence of premeditation, grand theft, forced entry, or taking of force was presented, which was denied by the judge. (TT, 609-10). Each side then gave closing arguments, during which there were no objections. (TT, 681-754). Cruz was found guilty on all counts, including that the first-degree murder was a felony murder and premeditated, and that Cruz actually possessed and discharged a firearm causing Jemery's death. (TT, 803-5).

Penalty Phase Proceedings

Both the State and the defense gave their openings statements without objections. (ROA, 1135-1156).

The first State witness was Deandre Perez, a former employee of Hungry Howie's. (ROA, 1158). Perez was working a shift at the pizza store when two individuals entered through the back door unexpectedly. (ROA, 1158-9). There were five people on the shift, but two were delivery drivers who were out on deliveries at the time. (ROA, 1159). One of the men grabbed another employee by her hair while the other walked up to Perez and pistol-whipped him in the face. (ROA, 1159). Perez gave them the money in the till, and they

left; they were wearing masks during the encounter. (ROA, 1160). Perez was hit twice by one of the men holding a gun, once above his eyebrow and once on the cheek. (ROA, 1160-1). A surveillance video capturing the robbery was introduced into evidence. (ROA, 1161-4). A review of this video shows that Cruz was the man, wielding a gun in his left hand, who pistol-whipped Perez on the right side of his face, while Charles was the man, wielding a gun in his right hand, who grabbed the female employee and never hit anyone. (See State's Exhibit 1 in the Penalty Phase, ROA, 3328).

Charles Lee then testified, to confirm the timeline of events of Cruz's crimes and arrest: Jemery was murdered on April 26th, 2013, the Hungry Howie's robbery occurred on May 6th, and Cruz was arrested in Orlando on May 10th. (ROA, 1168-9). He also testified that the distance from Jemery's apartment to where he was located was 9.8 miles, or approximately an 18-minute drive, while the distance to the bank where his debit card was used was 13.7 miles, or a little under half an hour drive. (ROA, 1168-9).

The State then presented victim impact statements from Jemery's sister, Samantha Jeffers, his mother, Leslie Welch, and Christina Raghonath. (ROA, 1168-9). They then rested. (ROA, 1179).

The defense started their mitigation presentation by calling Cruz's father, Juan Cruz[1]. (ROA, 1180). When asked about a family history of alcohol abuse Juan said there were "some drinkers" in the family, that his own father died from alcoholism and this grandfather committed suicide. (ROA, 1181). He married Appellant's mother in 1988, and the couple moved to Lakeland in 1989 so he could look for work. (ROA, 1182-3). They had two kids together, a daughter in 1992 and Appellant in 1993. (ROA, 1182-3). Juan testified that his relationship with his wife began to deteriorate in 1992 due to her spending habits, and within a few years he got fed up with it and moved back to Puerto Rico in 1995 unannounced. (ROA, 1183-5). He tried to visit from time to time, but often the address he had when he arrived was outdated and they'd already moved. (ROA, 1186-7). He finally returned in 2008 because Appellant and Appellant's mother were having issues. (ROA, 1188). Juan stated that he fell into depression at one point and required medication and counseling. (ROA, 1191). After their divorce had been finalized in 2002, Juan paid child support of $349 a month, and assisted Appellant's mother with

[1] Juan Cruz, and other witnesses sharing surnames with each other, or the Appellant will be referred to by their first name to avoid confusion.

getting her share, $12,000, of an insurance payout. (ROA, 1193-4). When he returned, he said that Cruz had been "following the wrong people" and he wanted to help him get on a better path. (ROA, 1195-6).

The next witness was Saul Areizaga, the choir director for Cruz's church growing up. (ROA, 1202). Saul had known Cruz since Cruz was 8 years old and interacted with him and his family multiple times a week for years. (ROA, 1203). Cruz and his family were constantly being evicted because the mother couldn't hold a job, and the Areizaga family would sometimes give them money. (ROA, 1204-5). Saul described Cruz as a docile, shy kid who seemed sad a lot of the time but would light up when he played with other kids. (ROA, 1208-9). When Cruz was about 16, he discovered Saul's son smoking weed and hanging out with a bad crowd, and Cruz talked him into leaving and going home. (ROA, 1210-11). At some point Cruz's demeanor and dress changed, including growing out dreadlocks, and Saul believed he was trying to emulate a man he knew named Javier Cintron. (ROA, 1211-3).

Next Saul's wife Irish Areizaga testified. (ROA, 1214). She met Cruz the same time Saul did and had the same amount of interaction

as Cruz grew up. (ROA, 1214). She described Cruz as shy, reserved, and sad, but was playful with the other children. (ROA, 1215-16). Once, when Cruz was 11 or 12, Irish witnessed Cruz's mother's boyfriend at the time, Charles Garrett, chasing the mother around like he was trying to kill her, while Cruz and his sister sat in the car screaming. (ROA, 1216-7). She shared the same story about Cruz getting their son out of a bad situation and credits Cruz for being a positive influence. (ROA, 1219-21).

A third member of the Areizaga family, Brandon Areizaga, then testified. (ROA, 1224-5). Brandon is the son of Saul and Irish and is a couple years younger than Cruz. (ROA, 1224-5). He's known Cruz since they were both little kids, and they had a shared interest in cars and video games. (ROA, 1225-6). They met at church and mostly would interact there. (ROA, 1226). Brandon saw Cruz as a mentor who steered him from bad things, and all the music he listens to is music Cruz introduced him to. (ROA, 1227-8). He testified that Cruz was often introverted around other people, but would open up with Brandon, although he never spoke about his dad. (ROA, 1230-2). When Cruz was about 15, Brandon noticed that he started changing, especially his appearance, to fit in with other kids at school. (ROA,

1234). He said he doesn't believe Cruz's mother had the resources to take care of him, and that he would at times get bullied as they grew up. (ROA, 1233-5).

Another of Cruz's friends, Luis Robles, testified. (ROA, 1238). Luis met Cruz at church when they were young children and is the same age. (ROA, 1238-9). He would sometimes visit Cruz's home, but the location changed often and there usually wasn't a lot to eat or drink. (ROA, 1240). Cruz's mother seemed neglectful when they were younger and would show favoritism toward Cruz's siblings. (ROA, 1241-2). One of the things they did together was play basketball, but only pickup games because Cruz's mother wouldn't pay for him to be in a league. (ROA, 1243). The only thing Cruz ever said about his dad was that he wished his dad were around more. (ROA, 1245). Cruz seemed lonely when they were growing up and appeared to look forward to getting older. (ROA, 1245-6). Cruz eventually found a role model in Javier Cintron, who was supposedly gang-affiliated and someone Luis's parents would not let him be around. (ROA, 1248-50).

Robert Bobiak then testified. (ROA, 1258). Bobiak was a teacher for over 40 years and was one of Cruz's high school teachers. (ROA,

1263-4). He remembered that Cruz didn't have the best grades but was a very cooperative student. (ROA, 1264). He testified that Cruz was an ESOL, English as a Second Language, student, but doesn't recall him being particularly bullied. (ROA, 1265). Cruz was average-sized and Bobiak never noticed him take the lead when students broke up into groups. (ROA, 1266-7).

The next witness was Carmen Robles, Luis's mother. (ROA, 1270). Carmen met Cruz and his family through church when he was a little kid, and his parents were still together. (ROA, 1271). She was not very close with the family but does remember that at some point the parents got divorced and Cruz's father moved back to Puerto Rico. (ROA, 1271-3). She felt sorry for Cruz and his siblings because they didn't have a place to be and didn't look happy, and he seemed disoriented due to a lack of stable parenting. (ROA, 1273-4). When Cruz was older his family was living with a man named Javier Cintron, someone Carmen said is "not trustworthy", and there was a change in Cruz after they moved in. (ROA, 1276-7). Cruz often appeared depressed. (ROA, 1279).

Cruz's older sister, Sonia Cruz Santos, who goes by Sonita, was the next witness. (ROA, 1282). Sonita stated that their father left

suddenly when she was about three years old. (ROA, 1283). After that they would often move from home to home or shelter to shelter her whole life, with their longest stay being about a year. (ROA, 1284-5). She would find out they were moving because their mom would show up to get them from school with the car packed with belongings. (ROA, 1286-7). When Sonita was about nine years old their mother met Charles Garrett, and soon had another son. (ROA, 1288; 1291). She has tried to suppress much of their time with him but testified that Garrett was manipulative and controlling and she felt like they were always walking on eggshells around him trying not to upset him or make him angry. (ROA, 1289-90). She and Cruz saw Garrett physically attack their mother on multiple occasions. (ROA, 1290). Her mother wore makeup and long sleeves to coverup the bruises, and though she would leave him at times, she always got back together with him restarting the cycle. (ROA, 1291-2). A specific incident she recalls was a time Garrett kidnapped their baby brother, injuring Sonita in the process, and Cruz could only sob in his room and pace back and forth until they called 911. (ROA, 1292-3). Often during Garrett's violent outbursts Cruz would be crying and seek Sonita out for help, and she was forced to comfort him even though

she could barely hold it together. (ROA, 1293-4). In another incident Garrett hit her for wearing the "wrong" shoes to church and made the kids wait outside the car for an hour or two while presumably having a conversation with their mother. (ROA, 1294). She described their few years living with Garrett as traumatizing, but she had to internalize a lot of it so she could be there for Cruz. (ROA, 1294-5). Even after their mother got an injunction, one time Garrett found them at home and started breaking windows and trying to kick in the doors until police were called. (ROA, 1296-7). Sonita and Cruz were close enough in age that they were usually at the same school, and she said he was happy, hyper, funny kid who was fairly popular. (ROA, 1298-9). However, he would at times get picked on, and once she pulled him out of a fight and he got upset with her because he got saved by a girl and he thought he could have won. (ROA, 1299-1300). When they got to high school Cruz was tall and skinny, and when he took to wearing his hair in dreadlocks he earned the nickname, "The Alien". (ROA, 1300-1). As they grew up, their family was often evicted and spent a lot of time at church. (ROA, 1301-2). She believes when their father came back, he treated her more favorably than Cruz, and that when they were disciplined by their

mother Cruz always got it worse because he was a boy. (ROA, 1305-6). Additionally, even when their father did return, Cruz was still angry because he felt their father wasn't doing enough to repair the fractured relationship. (ROA, 1308). Sonita can't believe that Cruz did the things he's been convicted of because she remembers him as a weak kid, not bold and daring. (ROA, 1309). She finished her testimony by reading a suicide letter Cruz wrote her from jail. (ROA, 1312-3).

The next witness was Joel Latorre, who was the youth leader at Cruz's church. (ROA, 1324). He interacted with Cruz several times a week from when Cruz was four to about 14. (ROA, 1324-5). While he saw Cruz play with the other kids, he described him as introverted and that Cruz would rarely express emotions like happiness, and that he was very quiet and humble, only speaking when spoken to. (ROA, 1326-30). Latorre worried about Cruz as he was growing up because his dad was gone and his mother wasn't financially stable, and Cruz was struggling emotionally and becoming increasingly withdrawn. (ROA, 1330-1). Latorre was part of a church committee that managed a support fund for needy families, and Cruz's mother was a constant user of that support even though she always seemed to have money

to have her nails and hair done and be well-dressed. (ROA, 1333-4). Cruz's father returned in 2004 but it was clear his parents didn't get along and that Cruz still didn't have much of a relationship with him, Latorre didn't even see them sit together at church. (ROA, 1334-7). When Latorre learned Cruz had been arrested his first thought was about who Cruz could have been with, because he never saw Cruz as a leader or influencer and had always thought of him as someone who could be easily persuaded and led around. (ROA, 1341-2). On cross examination Latorre admitted that Cruz's sister also appeared malnourished, and that there were kids from other families that were clearly struggling in the church. (ROA, 1359). He also recalled that at least 20 different members of the church opened up their homes to Cruz's family throughout the years. (ROA, 1362).

Next to testify was Sonia Rodriguez, another member of Cruz's church. (ROA, 1365-6). Rodriguez met Cruz's mother at the church in 2002, and the families became close because their kids were similar ages. (ROA, 1366). Cruz and his siblings spent a lot of time at Rodriguez's house, and at some point, she took over a bulk of the work of caring for them so their mother could work. (ROA, 1366). Cruz was a polite, passive child with good manners and got along

with her children. (ROA, 1369-70). At the time, Rodriguez was an advocate for domestic violence victims, assisting them with navigating the court process of getting injunctions, and she assisted Cruz's mother with getting away from Garrett. (ROA, 1370-1). When Garrett found out she was helping Cruz's mother, he showed up at Rodriguez's house to threaten her. (ROA, 1380-1). Later, she would assist Cruz's mother with transferring the kids for visitation with Garrett, and he was also aggressive with her. (ROA, 1380-1). Garrett would curse at her and be verbally abusive toward Cruz's mother, and once had to be subdued by several church members when he made a scene. (ROA, 1381-2). In addition to helping the Cruz family with childcare, she assisted them financially and even let them stay at her house for a few months. (ROA, 1383-4).

Another of Cruz's teachers, Marilyn Masilunis, testified. (ROA, 1389). She was Cruz's middle school P.E. teacher. (ROA, 1389). She recalled Cruz as a laid-back student who often sat out the activities to socialize with other students. (ROA, 1392). She also had car pickup duty and would see him there at times, and he was always polite and never talked back. (ROA, 1392-3). Cruz had good conduct grades, never seemed aggressive or got in fights, and had several friends.

(ROA, 1395-400). He was also provided a free breakfast by the school. (ROA, 1404).

Catherine Connell, Cruz's ESE teacher in high school, was next to testify. (ROA, 1410-1). ESE is short for Exceptional Student Education and is a class for students with learning disabilities, behavior issues, or other problems. (ROA, 1411). Cruz had a psychological assessment done in 2002 as part of the process of qualifying for this ESE class, and in it is an IQ score of 95. (ROA, 1412-4). She remembered Cruz as being polite with no discipline problems who got along with other students, but that he rarely turned in his assignments. (ROA, 1418-20). This resulted in him failing her class, which he took in 2010. (ROA, 1418). He was not in her class because of any learning disabilities. (ROA, 1421).

One of Cruz's high school math teachers, Sandra McGowen, also testified. (ROA, 1427). She said that when Cruz was in her class he looked like a lost soul, and though he didn't cause any problems in class he just seemed like he had too much else going on in his life to care about school. (ROA, 1429). She tried talking to the guidance office about helping him, but since he wasn't a behavioral issue, he was ignored. (ROA, 1430).

Emanuel Reyes, another member of Cruz's church, testified. He met Cruz at the church, Cruz would have been about six and Reyes was 16. (ROA, 1446). He said Cruz was good respectful kid that never got in trouble, but due to the age gap they only interacted at church. (ROA, 1447-8). However, when Cruz hit his late teens he did a complete reversal, seeming to emulate Javier Cintron, mimicking the way he dressed, behaved, talked, and looked. (ROA, 1448-9). He went from clean-cut to dreadlocks and tattoos and the way he carried himself changed. (ROA, 1450). He also recalls Cruz's mom asking his family for money often. (ROA, 1451).

The next witness of Luz Fantauzzi. (ROA, 1456). She was an older woman at the church that Cruz would call "grandma". (ROA, 1458) She met Cruz in his teens and though he behaved well she was worried he was sad, and once admitted to her that missed his father's love. (ROA, 1457-8).

Suheil Pizarro was another member of the church who testified. (ROA, 1462). She met Cruz at the church in 2007. (ROA, 1462). She said he was very loving and attentive and treated her children like his little brothers. (ROA, 1462-3). She believes he would have made a good father. (ROA, 1463-4).

Lee Garrett was the next to testify. (ROA, 1466). He is Cruz's younger half-brother, younger by nine years, and grew up with Cruz for most of his life. (ROA, 1466-7). He saw Cruz as his closest friend and looked up to him. (ROA, 1467). His earliest memory of his dad, Charles Garrett, is very strong because he remembers his dad trying to force his way into the house. (ROA, 1469). He went to church with his family growing up and remembered Cruz giving him advice as they got older that he now appreciates, such how he needed to be himself and not follow Cruz into bad habits like slacking off in school. (ROA, 1470-1).

Cruz's mother, Sonia Cruz, then testified. (ROA, 1476). She testified that Cruz's dad left them in 1996, and that she still doesn't know why because he never expressed any issues to her. (ROA, 1483). She didn't speak any English or even know how to drive a car at the time, so she went to the church for help. (ROA 1483-5). She didn't hear from Juan for over a year, and when he did call it was in relation to a car he'd left behind. (ROA 1491-2). For about three years it was just her and her two kids, with her working two jobs. (ROA, 1493-5). They often had to live with other people from church and had to share a room. (ROA, 1496). She was slowly learning English

and was only getting minor financial support from Juan. (ROA, 1499-1500). Juan didn't come to visit until the early 2000s, and she thinks his absence had an effect on Cruz. (ROA, 1501-2). She met Charles Garrett in 2000 and was with him for about three years. (ROA, 1478; 1506). They had a child, Lee, together in August 2001. (ROA, 1479). She said at first the relationship was fine, but then he would get upset for no reason, throwing, and breaking things, yelling and slamming doors, cursing, all in front of the kids. (ROA, 1506). His outbursts were unpredictable and could happen at any time, even in the middle of the night. (ROA, 1507). She would usually see Cruz shaking and crying during these events. (ROA, 1508). Eventually she got him to receive counseling through the church that seemed to be working, but then one day Cruz asked something that upset Garrett in the car, and he started driving recklessly and extremely quickly, scaring everyone in the car. (ROA, 1512-4). She finally petitioned for a restraining order after an incident when he threw a frozen ham at her and absconded with infant Lee. (ROA, 1480). Even after she got the injunction, she saw him again when he was waiting at their house, and after screaming and trying to break in she had to call the police and have him arrested. (ROA, 1514-8). As for Cruz, she stated

that he was liked by his teachers but had to take ESOL classes. (ROA, 1519). There was also an incident in 2004 when he was accidentally hit by a golf club in the head and had to be hospitalized. (ROA, 1481). She was never able to enroll him in organized sports because she couldn't afford it, and often when they had to move homes quickly, they would have leave items behind. (ROA, 1526-32). She recounted a couple stories when her kids wanted things she couldn't afford, but then through the power of prayer she was able to receive the items through charitable donations. (ROA, 1529-32). When Cruz's father finally returned to Florida, he would take Sonita out for activities but not Cruz. (ROA, 1533-4). Even though Cruz often seemed sad, she never sought counseling for him, and after he turned 16, he spent more time sleeping at other people's homes than hers. (ROA, 1539-43). After she received as windfall of money, she took the family to New York to look for her family. (ROA, 1544-7). After reconnecting with her family, Cruz moved to New York to stay with them and get a job. (ROA, 1549). She said she talked to him while he was staying there and knew he'd gotten some jobs and was working toward his GED. (ROA, 1551). While her finances were never good as her kids grew up, they were always fed and had free lunch and breakfast

through school. (ROA, 1559-60). She did her best to raise them with morals and values, which is why they went to church so much. (ROA, 1564). She had a robust support system through that church. (ROA, 1566).

The next witness was Saul Areizaga, Jr. (ROA, 1590). He met Cruz when he was four, Cruz was a couple years older. (ROA, 1591). Their interactions mostly happened at church, although in high school they ended up at the same school and became closer friends. (ROA, 1591-2). Cruz was a quiet kid and only became more reserved as they got older. (ROA, 1592). When Cruz was about 16, Saul Jr. got concerned he was depressed because on a church retreat Cruz started crying while telling Saul Jr. he was going through a lot of stuff. (ROA, 1593-4). In high school Cruz also had a sudden change in appearance where he changed his clothes and grew out dreadlocks. (ROA, 1596).

The last family member to testify was Cruz's aunt, Lizzette Perez; she is married Sonia Cruz's brother. (ROA, 1617). She met Cruz when Sonia found her family in New York in 2009 when he was 16, she described him as a nice, respectable young man. (ROA, 1617-8). She and her husband had a timeshare in Central Florida, so they

were able to come down and see Cruz once a year. (ROA, 1618-9). His mom always mentioned their financial trouble, so Perez and her husband were always offering to have the family come stay with them in New York. (ROA 1620). One day in 2012 her husband mentioned that Sonia had inquired about sending Cruz to New York but hadn't specified any details. (ROA, 1621). When they called her to follow up she said she'd already put him on a bus without telling them, and when they picked him up he had no money and almost no clothes. (ROA, 1621-2). Cruz stayed with them from July through Thanksgiving. (ROA, 1622). Perez bonded with Cruz while he was there treating him like her own son and learned a lot about what he went without growing up, especially not having a father. (ROA, 1623-4). Cruz mostly abided by the rules and restrictions they set up for him. (ROA, 1625-7). He got two part-time jobs while he was there that he eventually lost when the flu made him bed-ridden for three days. (ROA, 1627). He enjoyed the jobs while he had them though and liked having his own money to spend. (ROA, 1628-9). While there he opened up about his resentments toward his family and his issues with his father, who was not a good parent even when he was there. (ROA, 1631-2). She also said that Cruz's mother never called while

he was in New York and was never available when they tried calling her. (ROA, 1632-3). Cruz complained that his mother spent all her time on the church and never took care of him or his siblings, and Perez says she personally felt Sonia cared more for other members of the church than her own kids. (ROA, 1633-4). Perez tried to help Cruz start getting his GED, but they need some immunization records that were in Florida and Cruz's mother kept making excuses for why she couldn't go pick them up. (ROA, 1637-40). This is what caused Cruz to return to Florida, but Perez made a deal with him that if he completed his GED, he could move back to New York with her. (ROA, 1641-2). Cruz wrote her twenty-two letters while awaiting trial, and in one he complained that his mother wasn't helping him. (ROA, 1643-51). Shortly after writing that letter is when he attempted suicide. (ROA, 1651-2). Perez believes Cruz is a bright kid whose grades did not reflect his ability, and that he flourished in the short time he lived with her. (ROA, 1663-5).

The final defense witness was Dr. Francisco Gomez, a forensic and neuropsychologist. (ROA, 1675). In addition to interviewing Cruz for a 12-hour period over three days he spoke to his family, a friend, reviewed reports from other family members, and reviewed records

from the school, the jail, and medical records. (ROA, 1684). Gomez testified that when children don't have stable parenting, they are much more likely to have bad life outcomes if they don't find some sort of other positive, constant role model. (ROA, 1693-4). He also said that though adulthood is defined as 18, studies show that the frontal lobe that has impacts on impulse control and risk-taking isn't fully developed until someone is about 25. (ROA, 1695-6). Gomez noted several risk factors Cruz had or experienced growing up that can lead negative life out comes: possible neurocognitive impairment from a childhood head injury, though Gomez could not do any testing due to intervening brain trauma caused by Cruz's suicide attempt; trauma from abuse, neglect, and exposure to domestic violence; a hyperactive disposition; some behavior problems, particularly in high school with fighting; learning issues mainly with memory and language; bipolar disorder II, which is characterized by very poor judgment and impulse control during a manic episode; low levels of parental involvement; poor family bonding and family conflict; residential mobility from constantly moving homes; parental child separation for the majority of his childhood; cultural issues stemming from Latinos having a tendency to ignore mental health

problems; academic failure; some delinquent friends; and access to drugs and firearms (Cruz admitted he owned a gun). (ROA, 1697-1726). Gomez testified that this particular crime was an acute event, likely influenced by Cruz's mental health disorder, and not the culmination of chronic criminal behavior. (ROA, 1740-1). Cruz had just moved from a stable environment in New York to his old unstable one in Florida, and without any kind of reasonable coping skills he was unable to adapt to the change and reverted to acting in the moment rather than thinking ahead. (ROA, 1744). He also said that Cruz's self-medicating of his bipolar disorder with drugs and alcohol would only have exacerbated his symptoms. (ROA, 1745-6). Cruz never was diagnosed or treated for his bipolar disorder until he got to the jail and started exhibiting suicidal thoughts. (ROA, 1749-50). On cross Gomez testified to several protective factors that can help to mitigate the effects of risk factors: positive attitudes and beliefs instilled by the church community; social organization through school; conflict resolution skills; good physical, mental, spiritual, and emotional health; parental and/or adult supervision. (ROA, 1764-7). Cruz also had a long-time girlfriend for four years who was from an

affluent family that would have had a positive influence on him. (ROA, 1772).

A stipulation was then read to the jury stating, "The injury to Christopher Jemery by being shot rendered him immediately unable to feel pain." (ROA, 1792). The defense then rested, and the State called one witness in rebuttal. (ROA, 1792-3).

Dr. William Riebsame is a licensed psychologist. (ROA, 1793-4). He spent most of his career, starting in 1990, as a forensic psychologist, including becoming board-certified in 2006. (ROA, 1794-5). He is now heavily involved in what are called "Miller-Graham" cases where juveniles who were sentenced to life are getting new sentencing hearings due to a couple United States Supreme Court opinions. (ROA, 1796-7). He is staying involved because he did their initial evaluations in the 1990s and early 2000s and is being asked to reevaluate them for the courts. (ROA, 1796-7). Riebsame interviewed Cruz for two hours after the conviction in this case and reviewed much of the discovery materials related to this crime. (ROA, 1797-9). He said Cruz was agreeable during the interview, had been following his medication schedule, and the medication seemed to be working. (ROA, 1799-1800). He gave Cruz an IQ test with a result of

95, matching the previous IQ test from his youth. (ROA, 1801). Based on information he reviewed and received from Cruz he believes Cruz may have had ADHD as a child, which is often a precursor to bipolar disorder in adults. (ROA, 1806-8). While Cruz admitted to drinking alcohol, smoking weed, and taking "Molly" the night of the crime, Riebsame doesn't believe his description of his thought processes that night amount to any extreme emotional disturbance. (ROA, 1810-1). He testified that Cruz was able to plan the crime, discuss it with others, and had the wherewithal to not speak to police about it. (ROA, 1810-1). Riebsame could not diagnose the severity of Cruz's bipolar disorder when he met him because he was stable, but that he was likely moderate-to-severe when he attempted suicide in 2015. (ROA, 1811-2). Conversely, at the time of the crime he had a girlfriend, friends, and no evidence of severe depression leading Riebsame to believe he was not experiencing nearly as strong of symptoms. (ROA, 1811-2). Cruz told him he did the crime because he was selling and doing drugs at the time, and he thought there'd be money and drugs at the apartment. (ROA, 1813). Cruz said he'd been bullied when he was younger, so in his teens he responded by "becoming a badass" and being more aggressive and starting fights;

after his short stint of stability in New York, he reverted back to the "thug life" when he returned. (ROA, 1815). Cruz stated that his codefendant Charles was not coercive or domineering, and even chastised him as being stupid for giving a statement to the police. (ROA, 1816). Riebsame did not see any evidence from anything he reviewed or speaking to Cruz that his childhood head injury caused cognitive impairment. (ROA, 1817). Cruz described having opportunities for both positive and negative role models growing up. (ROA, 1819-21). Riebsame believed that the draw of Cruz's peer group in Florida, along with the ability to drink and do drugs without restrictions are why he chose not to return to New York. (ROA, 1833). He agreed that the science supports a brain is still developing until 25, but Cruz's behavior of eliminating the only witness to the robbery and refusing to speak to police show that he understood the consequences of his actions and was trying to negate them.

The State then rested. Defense counsel had no objections to the jury instructions and there were no objections during closing arguments. The jury came back with a verdict recommending a penalty of death by a 12-0 vote and determining the aggravating factors outweighed the mitigating circumstances, and finding the

following aggravators: 1) Cruz was previously convicted of a felony involving the use of a threat of violence to another person; 2) the first-degree murder was committed while Cruz was engaged in a robbery, burglary, or kidnapping; 3) the first-degree murder was committed for the purpose of avoiding arrest; 4) the first-degree murder was committed for financial gain; 5) the first-degree murder was especially heinous, atrocious, or cruel; 6) the first-degree murder was committed in a cold, calculated, and premeditated manner. (ROA, 1946-1950).

***Spencer*[2] Hearing**

A *Spencer* Hearing was held on June 5, 2019. The defense called three witnesses.

The first was Dr. Francisco Gomez, who had testified in the penalty phase. (ROA, 1968). He was called to clarify his diagnosis of bipolar disorder type II. (ROA, 1974). He testified that Cruz indeed suffered from it, including at the time of his offense, and his diagnosis wasn't based just on the jail telling him, but his review of documents from and symptoms throughout Cruz's life. (ROA, 1974-5).

[2] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

The next witness was Dr. Pedro Saez, a licensed psychologist and neuroscientist. (ROA, 1976). Saez first evaluated Cruz in March of 2016. (ROA, 1977). Cruz had suffered a severe injury that included damage to parts of his brain as a result of a recent suicide attempt in December of 2015, so Saez conducted a variety of cognitive and intellectual functioning tests. (ROA, 1978). Based on his tests, although he found Cruz competent to proceed, he also found that he had substantial impairments consistent with a major neurocognitive disorder, including receiving a 71 on an IQ test. (ROA, 1979). Previously, in the penalty phase, the State expert Dr. Riebsame testified he had reviewed this report, but determined the low findings were apparently due to the recency of the injuries and reflected a short-term impairment, because Riebsame did not detect any neurocognitive issues. (ROA, 1802-3). Saez testified that you would expect to see some recovery from such an injury, and the majority of that recovery would occur in a two-year window. (ROA, 1981-2). Saez reevaluated Cruz a month prior to the *Spencer* Hearing, administering the same tests he had in 2016. (ROA, 1982). He said that Cruz still presents with residual cognitive disabilities due to his anoxic brain injury but downgraded the diagnosis to a mild

neurocognitive disorder. (ROA, 1983). He gave another IQ test and received a score of 79. (ROA, 1984). Saez testified that they saw improvement from 2016 to 2019, but that the deficits Cruz still has appear to be permanent cognitive disabilities. (ROA, 1984-5).

The final witness was Dr. Randy Otto, a faculty member at the University of South Florida and does evaluations for people involved in legal matters. (ROA, 1990). He has a focus on developmental psychology, which looks at the emotional, behavioral, and cognitive changes associated with aging and development, especially in juveniles. (ROA, 1991-2). He was asked by defense counsel to put together a report of developmental factors and how they were relevant to understanding a person's cognitive, emotional, and behavioral functioning as it might relate to delinquent and criminal behavior. (ROA, 1993). He testified generally about how society puts restrictions on the type of things people can do until certain ages, recognizing that people tend to have poorer judgment or impulse control at younger ages. (ROA, 1994-8). As to someone like Cruz who was 19 at the time of the murder, there is a change in brain chemistry in adolescence into early adulthood where there is an increase in dopamine, a chemical that increases the good feeling of rewards and

gratification, and the brain function that inhibits that develops later. (ROA, 1998-9). This combination of increased dopamine without the control leads to risk-taking and living in the moment rather than thinking ahead. (ROA, 1999-2000). The effects of peer pressure on decision-making, risk-taking, and reckless behavior peeks in early adolescence, but we can see lingering effects even into early adulthood. (ROA, 2005). These factors all partly explain why adolescents and young adults engage in criminal behavior, and the peak age for doing so is 17. (ROA, 2008-9). Otto then testified to some risk factors that can affect a person's development, such as being born premature, being exposed to drugs or alcohol in utero, nutrition and emotion well-being growing up, or experiencing any illnesses or brain injuries. (ROA, 2011). He then said that the last part of the brain to develop is the prefrontal cortex, which is the part of the brain that allows you to execute, plan, deliberate, and anticipate. (ROA, 2018). He stated that dropping out of high school is often the result of looking for a short-term solution to a long-term problem. (ROA, 2020). He also said that the juvenile justice system is different from the adult system in that the focus is on rehabilitation, because

they're different from adults and there's a higher chance of rehabilitation. (ROA, 2021-2).

Cruz then gave a statement, expressing his remorse and apologizing to Jemery's family. (ROA, 2025-7).

Sentencing and Sentencing Order

On December 18, 2019, the trial court held a sentencing hearing for Cruz. The trial court found five aggravating factors: 1) Cruz was previously convicted of a felony involving the use or threat of violence to another person for the Hungry Howie's robbery committed shortly after murdering Jemery (great weight); 2) The first-degree murder was committed while Cruz was engaged in a robbery, burglary, or kidnapping, merged with that the first-degree murder was committed for financial gain (great weight); 3) The first-degree murder was committed for the purpose of avoiding arrest (great weight); 4) The first-degree murder was especially heinous, atrocious, or cruel (great weight); 5) The first-degree murder was committed in a cold, calculated, and premeditated manner (great weight). (ROA, 3785-99). The trial court considered and found as proven all 37 of Cruz's proffered mitigators, assigning slight weight to 24, moderate

weight to 11, great weight to one, and extraordinarily great weight to one. (ROA, 3800-25).

The judge agreed with the jury recommendation and sentenced Cruz to death for the murder of Christopher Jemery. (ROA, 2423).

In his first direct appeal, Cruz made several claims of relief related to both the guilt and penalty phases. This Court found he was entitled to relief because the trial judge relied on non-record evidence that was only introduced in Charles's trial in reaching the decision to sentence Cruz to death. *Cruz v. State*, 320 So.3d 695, 725 (Fla. 2021). His death sentence was vacated, and the case was remanded for a resentencing by just the trial court and a new sentencing order. *Id.*

On December 14, 2021, the trial court held a new sentencing hearing orally summarizing the new sentencing order. (R, 281-92). The court announced it had made two changes to weight, amending the finding of weight on the CCP aggravator from great to moderate, and increasing the weight on mitigating circumstance 30 from slight to moderate. (R, 287). The trial court also filed its new sentencing order, sentencing Cruz again to death. (R, 119-250).

This appeal follows.

SUMMARY OF THE ARGUMENT

Issue I: Cruz argues that his sentence violates this Court's precedence on relative culpability because an equally culpable defendant received a life sentence. Relative culpability, however, is prohibited by the state constitution. In *Lawrence v. State* this Court recognized that comparative proportionality review violates the conformity clause, and relative culpability is merely an aspect of that review. Florida's constitution has a conformity clause regarding the Eighth Amendment which requires this Court to interpret the state constitution's excessive punishments provision in conformity with the United States Supreme Court's Eighth Amendment jurisprudence. The U.S. Supreme Court has never held that the relative culpability analysis Cruz urges this Court to keep is required by the federal constitution, despite restricting the imposition of the death penalty in many respects throughout the years, and seven federal circuit courts of appeal have found that it is not constitutionally required. The assessment of the death penalty on each defendant is supposed to be an individualized assessment not just of the crime, but of that defendant's character, background, and unique circumstances; relative culpability review completely ignores

the mitigation aspect of sentencing and focuses instead solely on the crime. In cases involving multiple defendants, the U.S. Supreme Court has only provided what has become the *Enmund-Tison* test to ensure the death penalty is properly imposed. Cruz's conduct in this case satisfies that test and thus his sentence should be upheld despite his codefendant's life sentence.

ARGUMENT

ISSUE I: THIS COURT SHOULD ABANDON ITS RELATIVE CULPABILITY ANALYSIS AS IT VIOLATES THE STATE CONSTITUTION'S CONFORMITY CLAUSE AND THE U.S. SUPREME COURT HAS ALREADY PROVIDED GUIDANCE IN ASSESSING CULPABILITY OF CODEFENDANTS WITH THE *ENMUND-TISON* ANALYSIS

This Court, as part of its of old comparative proportionality review, would also perform a relative culpability analysis in cases with multiple defendants, holding "that equally culpable codefendants should be treated alike in capital sentencing and receive equal punishment." *Shere v. Moore*, 830 So. 2d 56, 60 (Fla. 2002). Just as comparative proportionality violated the state's excessive punishment provision, article 1, Section 17, requiring conformity with the U.S. Supreme Court precedent on Eighth Amendment protections, so too does relative culpability.

This Court recently had the opportunity to address its previously court-created comparative proportionality review in *Lawrence v. State*, 308 So.3d 544 (Fla. 2020). In that case, this Court held that such review violated the Florida Constitution's conformity clause, which reads, "[t]he prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution." Fla. Const. art. I, § 17.

In so doing, this Court overruled a previous decision, *Yacob v. State*, 136 So.3d 539 (Fla. 2014) which held that comparative proportionality review had survived the 2002 ballot initiative that had added the conformity clause, pointing to three provisions of Florida law: Florida's capital punishment statute, section 921.141 of Florida statutes; the due process clause of article 1, section 9 of the Florida Constitution; and article V, section (b)(1) of the Florida Constitution, which grants this Court mandatory, exclusive jurisdiction over appeals from final judgment of trial courts imposing the death

penalty. *Lawrence*, 308 So.3d at 548-9. *Lawrence* found those arguments unavailing.

Comparative proportionality review is not referenced anywhere in Florida's death penalty statute and *Yacob* and its predecessor *State v. Dixon*, 283 So. 2d 1 (Fla. 1973) were unable to tie such review to any section of the statute. *Lawrence*, 308 So.3d at 549. Instead, as Justice Canady pointed out in dissenting from that part of the *Yacob* decision, comparative proportionality could only be properly understood as a judicially-created means to ensure the death penalty would be implemented in a way to avoid the constitutional concerns mentioned in *Furman v. Georgia*, 408 U.S. 238 (1972). *Yacob*, 136 So.3d at 561 (Canady, J., concurring in part and dissenting in part). While such review was consistent with the statute's aims, it was neither required nor authorized by it. *Id.* Similarly, comparative proportionality does not appear anywhere in the article granting this Court exclusive jurisdiction over death penalty cases. *Id.* at 561-2. Finally, under the federal constitution, the Eighth Amendment's prohibition on cruel and unusual punishment is made applicable to the states via the due process clause of the Fourteenth Amendment, and therefore it is a particular aspect of due process; the due process

clause is not an independent justification for comparative proportionality review. *Id.* As comparative proportionality had no justification or authorization in other constitutional provisions or state statutes, and the U.S. Supreme Court had found in *Pulley v. Harris*, 465 U.S. 37 (1984) that it is not required by the Eighth Amendment, this Court eliminated comparative proportionality review from its scope of appellate review. *Lawrence*, 308 So.3d at 552.

This Court's relative culpability analysis, which requires a life sentence in circumstances like Cruz's where an equally culpable codefendant is sentenced to life, is similarly situated to the now-defunct comparative proportionality review. In fact, the State argues that when this court receded from comparative proportionality review in *Lawrence* it also receded from its relative culpability precedent; one member of this Court has previously pointed out that relative culpability is merely an aspect of comparative proportionality review and is precluded by the conformity clause:

> I previously expressed my view that comparative proportionality review by this Court is precluded by the conformity clause in article I, section 17 of the Florida Constitution, which requires this Court to interpret our state constitutional prohibition on cruel or unusual punishment in conformity with the decisions of the United States Supreme Court interpreting the parallel provision

> of the United States Constitution. *Yacob v. State*, 136 So.3d 539, 557–63 (Fla.2014) (Canady, J., concurring in part and dissenting in part). Because relative culpability is an aspect of our comparative proportionality review, I would conclude, for the same reasons detailed in *Yacob*, that it too is precluded by the conformity clause. But because my view on the subject was expressly rejected by the majority in *Yacob* and because I have stated that "[u]ntil the State presents an argument justifying receding from our precedent on the subject that was clearly established in *Yacob,* I will follow that precedent," *Delgado v. State*, 162 So.3d 971, 983 (Fla.2015) (Canady, J., concurring), I therefore do not rely on my view of the conformity clause to reach the conclusion that McCloud's sentences should be affirmed.

McCloud v. State, 208 So.3d 668, 693 n.6 (Fla. 2016) (Canady J., concurring in part and dissenting in part). This Court has seemingly agreed with this fact in a different case in a majority opinion as well:

> Due to the uniqueness and finality of the death penalty, this Court addresses the propriety of all death sentences in a proportionality review. In deciding whether death is a proportionate penalty and to ensure uniformity in the application of this ultimate penalty, this Court independently reviews and considers all the circumstances in a case and compares those circumstances with other capital cases.
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> . . .
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> In evaluating proportionality, *one of the factors that can be considered* is the disparate treatment among codefendants. Such an analysis, of necessity, includes the relative culpability of each codefendant.

Kormondy v. State, 845 So. 2d 41, 47 (Fla. 2003) (emphasis added). This Court should formally recede from its relative culpability analysis and uphold Cruz's death sentence.

The U.S. Supreme Court has not mandated comparative proportionality review of death sentences, citing it as merely an additional safeguard but not a constitutional necessity, and this Court correctly held in *Lawrence* that such review violated the state constitution's conformity clause. Not only is relative culpability merely an aspect of that now receded from review, the U.S. Supreme Court has never held that a defendant must receive a life sentence when an equally culpable codefendant also receives a life sentence, and so it too is merely an additional safeguard and not a constitutional necessity.

That Court has, however, provided guidance on assessing the appropriateness of the death penalty when there are multiple participants via *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987), which this Court has described as the *Enmund-Tison* test and explained:

> [T]he Supreme Court's decisions in *Enmund* and *Tison* addressed the constitutionality, in multi-participant felony murder cases, of imposing a death sentence on someone

> other than the person who actually killed the victim. We summarized those cases as standing for the proposition that "the death penalty may be proportional punishment if the evidence shows both that the defendant was a major participant in the crime, and that the defendant's state of mind amounted to reckless indifference to human life."

Cruz v. State, 320 So.3d at 722. *Enmund* was a case where the U.S. Supreme Court overturned the defendant's death sentence because he did not take, attempt to take, or intend to take a life when he was the getaway driver for a robbery gone wrong. 458 U.S. at 783-8. *Tison* held that a death sentence could be appropriate even if the defendant was not the actual killer if they were a major participant in the crime and the evidence showed they acted with reckless indifference to human life. 481 U.S. at 158.

The *Enmund-Tison* test, and not this Court's relative culpability analysis, is the constitutional guidance the U.S. Supreme Court has promulgated when assessing the culpability of codefendant murderers, and whether the death penalty is appropriate for each individual defendant. Cruz need only have been a major participant in the crime and have at least a state of mind that amounted to reckless indifference to human life for the death penalty to be appropriate in his case; the *Enmund-Tison* test makes no mention

about the penalty received by codefendants, but instead focuses on the individual. As the Court made clear in *Enmund*:

> The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on *his* culpability, not on that of those who committed the robbery and shot the victims, for we insist on "individualized consideration as a constitutional requirement in imposing the death sentence," *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978) (footnote omitted), which means that we must focus on "relevant facets of the character and record of the individual offender." *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976).

458 U.S. at 798. In its resentencing order, the trial court applied *Enmund-Tison* and found that Cruz's conduct satisfied its culpability requirement:

> It is unknown at this time which defendant pulled the trigger which caused Mr. Jemery's death. The evidence adduced at trial only shows that both of the defendants acted in concert during the commission of the crime. In fact, the evidence shows that both defendants were together before, during, and after the killing of Mr. Jemery. More importantly, the evidence also showed that the defendants appeared to have equal footing in the commission of the crimes. Although there was evidence that the planning component of the crime was attributable to Mr. Charles, the force and execution of the plan was attributable to both. That means that they both participated equally in accomplishing the robbery, kidnapping and murder of Mr. Jemery.
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> . . .

> In sum, the defendant's actions are inseparable from the actions of his co-defendant. Culpability lies equally in their hands. It makes little difference in this court's analysis who the actual shooter was because the actions of both weighed equally in culpability.

(R, 141-2). In fact, this Court has already applied *Enmund-Tison* to Cruz's conduct on direct appeal, finding that the record supported he "was not merely an aid or abettor in a felony where a murder was committed by others," and that the record supported the finding of his "major participation in the felony committed, combined with reckless indifference to human life." *Cruz*, 320 So.3d at 722-3. Cruz's major participation in the attack and murder of Christopher Jemery satisfies *Enmund-Tison* and therefore his death sentence is constitutional under controlling U.S. Supreme Court precedent applying the Eighth Amendment.

Abandoning relative culpability analysis is also in line with the Supreme Court's approach to capital sentencing in another aspect. In its current application relative culpability completely ignores one half of the sentencing equation: mitigation. In Cruz's and Charles's cases, two different juries heard two different mitigation presentations about two completely different individuals. The

Supreme Court has stated that, "Individual jurors bring to their deliberations qualities of human nature and varieties of human experience"; and that the "capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant." *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987). Additionally, "[t]he decision to impose the punishment of death must be based on a particularized consideration of relevant aspects of the character and record of each convicted defendant." *Woodson*, 428 U.S. at 303. No two defendants are the same, and this Court's approach using relative culpability, which is an aspect of its defunct comparative proportionality analysis, currently allows for a situation where an equally culpable defendant who has led a charmed, easy life to receive an unreasonable benefit if they happen to commit a murder with someone who has suffered from severe trauma, abuse, and mental illness and thus were able to convince a jury to spare them the death penalty due to substantial mitigation. It also ignores the role the Supreme Court says individual jurors are supposed to play in our system, and their personal decisions to decide whether a particular defendant should be spared the death penalty based on the

defendant's unique circumstances. Applying the Supreme Court-approved *Enmund-Tison* analysis instead allows for the individualized sentencing envisioned by that Court.

Importantly, seven federal circuit court of appeals, including the 11th, have addressed this exact issue, and found that the type of relative culpability analysis this Court engages in is not constitutionally required. *See*, *Beardslee v. Woodford*, 358 F.3d 560, 579-81 (9th Cir. 2004) (rejecting the argument that "different sentences for equally culpable co-defendants violate the prohibition against arbitrary imposition of the death penalty in Furman," and concluding that no constitutional error arose from the trial court's refusal to allow the codefendants' sentences into evidence); *Bush v. Singletary*, 99 F.3d 373, 375 (11th Cir. 1996) (per curiam) (holding that no federal constitutional claim arose by reason of the fact that the defendant's death sentence was disproportionate to that of his codefendant, whose death sentence had been vacated on appeal); *Hatch v. Oklahoma*, 58 F.3d 1447, 1466 (10th Cir. 1995) (rejecting the defendant's claim that the Constitution required "a proportionality review of his sentence relative only to his codefendant"), *overruled in part on other grounds by Daniels v. United*

States, 254 F.3d 1180, 1188 n. 1 (10th Cir. 2001); *Getsy v. Mitchell*, 2007 F.3d 295, 305 (6th Cir. 2007) (no constitutional requirement to do a proportionality review when a codefendant was sentenced to life by a separate jury); *United States v. Lee*, 374 F.3d 637, 653 (8th Cir. 2004) (no constitutional requirement for proportional review of sentences and thus no basis for relief when codefendant received a life sentence from a jury); *Meyer v. Branker*, 506 F.3d 358, 375 (4th. Cir. 2007) ("Since a co-perpetrator's sentence is neither an aspect of the defendant's character or record nor a circumstance of the offense" the Constitution does not require admission of codefendant's sentence in front of a jury); *Brogdon v. Blackburn*, 790 F.2d 1164, 1170 (5th Cir. 1986) ("The fact that Brogdon's codefendant received a life sentence instead of a death sentence failed to present a constitutional challenge in this case. Sentencing hearings in capital cases focus not only upon the circumstances of the underlying crime, but also upon the personal attributes of each of the defendants."). This shows a general consensus among federal courts that relative culpability is not constitutionally required, and therefore violates the conformity clause of our state constitution.

Florida would also not be the only state to reach this conclusion if it receded from using this judicially-created safeguard. At least Illinois, Oklahoma, and California have all also recognized there is no constitutional requirement for imposing a life sentence just because an equally culpable codefendant received one. *See People v. Caballero*, 206 Ill.2d 65, 93 (Ill. 2002) ("We find no support in the case law for the proposition that a defendant may be sentenced to death only if he is more culpable than his codefendant who receives a prison sentence."); *Postelle v. State*, 267 P.3d 114, 139 (Okla. 2011) ("Furthermore, this Court has found that an accomplice's lesser sentence or immunity from prosecution does not render a defendant's sentence excessive and is not proof of error."); *People v. Maciel*, 57 Cal. 4th 482, 549 (Cal. 2013) ("We have consistently held that evidence of an accomplice's sentence or of the leniency granted an accomplice is irrelevant at the penalty phase because it does not shed any light on the circumstances of the offense or the defendant's character, background, history or mental condition.") (internal quotation marks omitted.).

Appellant's arguments for retaining the relative culpability analysis echo those this Court relied on in *Yacob* and disapproved of

in *Lawrence*. He relies on the same automatic review provisions of the Florida Constitution and the death penalty statute, § 921.141(5), that this Court pointed out do not provide for comparative proportionality review. These same provisions similarly lack any mention of a relative culpability analysis mandating equal treatment of equally culpable defendants in sentencing. The death penalty statute makes no mention of how to treat equally culpable defendants; the closest it comes to discussing culpability is with a statutory mitigating factor, "The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor." Fla. Stat. § 921.141(7)(d). The statute instead directs the jury to follow these steps:

> **(2) Findings and recommended sentence by the jury**.-- This subsection applies only if the defendant has not waived his or her right to a sentencing proceeding by a jury.
>
> (a) After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6).
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> (b) The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous. If the jury:

1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.

2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all of the following:

a. Whether sufficient aggravating factors exist.

b. Whether aggravating factors exist *which outweigh the mitigating circumstances found to exist.*

c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

(c) If a unanimous jury determines that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If a unanimous jury does not determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.

Fla. Stat. § 921.141(2) (emphasis added). Subsection 4 of the statute then directs the trial judge to make all the same findings, including "whether the aggravating factors outweigh the mitigating circumstances" in a written order before it can issue a sentence of

death. Fla. Stat. § 921.141(4). Nothing in the statute or the fact this Court has automatic review does anything to provide for a relative culpability analysis, just as it did not provide for comparative proportionality review.

Appellant attacks the trial court's resentencing order another way as well, alleging the court failed its obligation to independently weight aggravation and mitigation and instead deferred completely to the jury recommendation. This is not supported by the record. The court's 52-page resentencing order exhaustively went over every proposed aggravator and mitigator, laying out the facts that supported or rebutted each, and assigned each individual weights. (R 119-70). Instead of just rubber-stamping the jury's recommendation, the trial court clearly considered each aggravator and mitigator carefully, weighed them against each other, and reached the same conclusion as the jury, which was that death was the appropriate penalty.

Cruz argues that because, after *Lawrence*, this Court continues to review the sufficiency of the evidence whether the defendant requests it, that somehow shows relative culpability has survived. His reliance on this is misplaced as this Court reviews the sufficiency

of the evidence to sustain the *conviction* on first-degree murder, and whether competent, substantial evidence of the aggravators is supported by the record, not to address what sentence is imposed. *Kirkman v. State*, 233 So.3d 456, 469 (Fla. 2018) ("Kirkman does not separately challenge the sufficiency of the evidence. Nevertheless, this Court independently reviews the record in all death penalty cases to determine whether competent, substantial evidence supports the conviction.") This is to safeguard to ensure a death-penalty defendant's right to a fair trial was protected and that he was in fact death-eligible, and therefore is unrelated to the sentence or the Eighth Amendment prohibition on cruel and unusual punishment. It also does not implicate comparative proportionality or relative culpability. Even if this Court finds that review does implicate the Eighth Amendment and the conformity clause, that issue is not before this Court as the sufficiency of the evidence has already been analyzed and found satisfactory in Cruz's case. *Cruz*, 320 So.3d at 731.

He next argues that the U.S. Supreme Court has held that the imposition of capital punishment requires an assessment of an individual's culpability and that the States are free to choose

substantive factors relevant to the penalty determination within the constraints of Supreme Court precedent.[3] In so doing he makes a concession central to the State's argument: "relative culpability review *complements* the constitutional requirement of assessing an individual's culpability." Appellant's Initial Brief at 66 (emphasis added). That is exactly correct. While not mandated by the Supreme Court's precedent, relative culpability is an additional, complementary safeguard that states can choose to use, not a constitutional necessity, and therefore violates the conformity clause. And while states are free to enact more stringent protections than federally mandated, the Florida Supreme Court lost that ability in 2002 when the voters of the state passed a ballot initiative constraining its interpretation of the prohibition on cruel or unusual punishment to be in line with the U.S. Supreme Court's.

Cruz again argues that due process and equal protection are violated by his death sentence when an equally culpable codefendant received a life sentence. However, Cruz did receive equal protections

[3] *E.g. Atkins v. Virginia*, 536 U.S. 304 (2002) (execution of mentally retarded individuals violates the Eighth Amendment); *Roper v. Simmons*, 543 U.S. 551 (2005) (juvenile offenders are ineligible for the death penalty); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (death penalty not available in cases of child rape).

of the law and had the exact same procedure applied to him as Charles did. He received the individualized sentencing required for imposition of the death penalty, where not just the facts of the case, but his personal history and character—which will vary from Charles's—were weighed against each other. Proportionality review, and thus relative culpability, were designed to further the goals of *Furman* and therefore implicate the Eighth Amendment, not equal protection. *Peters v. State*, 128 So.3d 832, 850 (Fla. 4th DCA 2013). The federal constitution does not require, and the U.S. Supreme Court has never held, that equally culpable capital defendants must receive the same sentence, and that is because the determination of the death penalty looks at *both* aggravation and mitigation, not just the crime itself.

Finally, Appellant urges this Court to let *stare decisis* uphold relative culpability. Once this Court has determined that a precedent was clearly erroneous, "the proper question becomes whether there is a valid reason *why not* to recede from that precedent," and the critical consideration is typically reliance on that precedent, and reliance interests are lowest in cases that involve procedural or evidentiary issues, like this one. *Lawrence*, 308 So.3d at 551. This

Court explained why such an analysis led to *Yacob* yielding to the Florida Constitution and receding from comparative proportionality, and the same reasoning applies in this case:

> Viewing our erroneous decision in *Yacob* through this lens, we fail to find "a valid reason *why not* to recede from" it. *Poole*, 297 So.3d at 507. In light of the Supreme Court's decision in *Pulley*, the conformity clause expressly forecloses this Court's imposition of a comparative proportionality review requirement that is predicated on the Eighth Amendment. The reliance interests of death-sentenced defendants on this Court's comparative proportionality review are low to nonexistent, as defendants do not alter their behavior in expectation of such review. In contrast, victims and the State have strong interests in this Court's upholding death sentences obtained in compliance with section 921.141.
>
> Moreover, there is no reason to continue to apply erroneous precedent that, though well-intentioned, relies on perceived deficiencies in section 921.141 that do not exist. *See Yacob*, 136 So.3d at 549 n.2. Florida's death penalty statute comports with due process; it has been amended since *Yacob* to comply with federal and state constitutional requirements regarding death-eligibility, *see* § 921.141(3); it provides adequate safeguards against the arbitrary and capricious imposition of the death penalty; and, since *Yacob*, it has been amended to exceed what the federal and state constitutions require by mandating (in non-jury-waiver cases) that the jury's recommendation for death be unanimous, see § 921.141(2)(c).

Lawrence, 308 So.3d at 511-2 (footnotes omitted). The same logic applies here.

In rejecting comparative proportionality in *Lawrence*, this Court also did away with relative culpability so as to come in line with the Florida Constitution's conformity clause on the Eighth Amendment. Seven federal circuit courts of appeal and at least three other states have already recognized that such a relative culpability analysis between codefendants is not constitutionally required. Using the only federal guidance the U.S. Supreme Court has advanced when assessing codefendant murderers, *Enmund-Tison* should be the standard applied by this court, not relative culpability. Under that test, Cruz's major participation in the crimes he was convicted of and complete indifference for human life make him eligible for the death penalty and his sentence should stand.

CONCLUSION

Appellant's convictions and sentences of death should be upheld in all respects.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. mail to: J. Rafael Rodriguez, Attorney for Appellant, at 6367 Bird Road, Miami, FL 33155 jrafrod@bellsouth.net, on this 2nd day of August 2022.

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AMENDED[4] CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 14-point Bookman Old Style, and word count is 15,152 in compliance with Fla. R. App. P. 9.210 and 9.045.

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[4] Amendment only applies to the Amended Answer Brief of Appellee on the Title page and the Amended Certificate of Compliance. There are no changes to any other part of the brief.