Filing # 150232913 E-Filed 05/24/2022 04:57:55 PM

RECEIVED, 05/24/2022 05:06:25 PM, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC21-1767

CHRISTIAN CRUZ,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

****

A CAPITAL APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR VOLUSIA COUNTY

CRIMINAL DIVISION

****

INITIAL BRIEF OF APPELLANT

J. RAFAEL RODRIGUEZ
Specially Appointed Public
Defender for Christian Cruz

LAW OFFICES OF
J. RAFAEL RODRIGUEZ
6367 Bird Road
Miami, Florida 33155
(305) 667-4445
(305) 667-4118 (FAX)
jrafrod@bellsouth.net

Oral Argument Requested

Appellant, Christian Cruz, respectfully requests oral argument in this capital appeal.

TABLE OF CONTENTS

TABLE OF CITATION OF AUTHORITIES

Constitutions

Statutes

Rules

INTRODUCTION

Appellant was the Defendant in the trial court and Appellee, the State of Florida, was the prosecution. The parties will be referred to as they stood in the lower court. The symbol "R" will designate the record on appeal in SC20-60, “R1” will designate the record on appeal in the present case [SC21-1767], and "T" will designate the trial transcripts.

STATEMENT OF JURISDICTION

This Court has appeal jurisdiction in this case. Art. V, §3(b)(1), Florida Constitution. Defendant was sentenced to death. Rule 9.030(a)(1)(A)(i), Florida Rules of Appellate Procedure, provides that the Florida Supreme Court has jurisdiction of final orders of courts imposing sentences of death. *See also* §921.141(5), Florida Statutes.

STATEMENT OF THE CASE

Guilt Phase

Defendant Christian Cruz was charged by Indictment with one count of first degree premeditated murder of Christopher Jemery, or while engaged in the perpetration or attempted perpetration of burglary and/or robbery and/or kidnapping, in violation of §782.04(1)(a)1 and/or §782.04(1)(a)2, Florida Statutes [**Count V]**; one count of burglary by entering or remaining in a dwelling the property of Christopher Jemery,

while armed, and during the course of the burglary carrying a firearm, in violation of §§810.02(2)(b) and 775.087(2)(a)3, Florida Statutes [**Count VI**]; robbery with a firearm by knowingly taking away a television and/or container of medication or narcotics and/or U.S. currency, of some value, from the person or custody of Christopher Jemery, with the intent to permanently or temporarily deprive Christopher Jemery of the property, and in the course of the robbery carrying and discharging a firearm, causing the death of Christopher Jemery, in violation of §§812.13(2)(a) and/or 775.087(2)(a)(3), Florida Statutes [**Count VII**]; and kidnapping by forcibly, secretly or by threat, confining, abducting, or imprisoning Christopher Jemery against his will, with the intent to commit or facilitate the commission of any felony and/or inflict bodily harm upon or to terrorize Christopher Jemery, in violation §787.01(1)(a)2&3, Florida Statutes [**Count VIII**]. (R. 2426-2428; R1. 20-22).[1] The State filed a notice of intent to seek

[1] The indictment jointly charged Defendant Cruz and co-defendant Justen Charles with the same crimes but on different counts. Charles was subsequently tried and found guilty on all counts. (R. 3915-3917). Following a penalty phase, the jury in Charles's case found six aggravating factors but did not vote for death. (R. 3918-3924). The trial court sentenced Charles to life imprisonment. (R. 3925-3937).

the death penalty and a List of Aggravating Factors in Defendant's case. (R. 2672-2673).[2]

Preliminary Proceedings

Prior to trial, the defense filed a motion to suppress physical evidence seized and statements made pursuant to an arrest on May 9, 2013. (R. 2818-2821). The State filed a response to the motion. (R. 2918-2921). On January 25, 2019, the trial court conducted a hearing on the motion to suppress. (R. 1007-1067). The court denied the motion to suppress. (R. 1067; R. 2972-2973). The defense filed several penalty phase motions.[3]

---

[2] This notice listed six aggravating factors: 1) defendant previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; 2) defendant was engaged in the commission of, or in the attempt to commit, or flight after committing, robbery, burglary or kidnapping; 3) defendant committed the capital felony for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; 4) defendant committed the capital offense for pecuniary gain; 5) defendant's capital felony was especially heinous, atrocious, or cruel; and 6) defendant's capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

[3] The motions were as follows: 1) Motion to Preclude the Death Penalty Due to the State's Failure to Provide Timely Notice of Intent to Seek Death (R. 2822-2829); 2) Motion to Preclude the Death Penalty due to the Failure of Florida's Death Penalty Scheme to Genuinely Narrow Class of Eligible Offenders (R. 2873-2875); 3) Motion to Preclude the Death Penalty Due to Lack of Elements Within the Indictment (R. 2876-2879); 4) Motion to Preclude the Death Penalty *Ex Posto Facto* (R. 2880-2883); 5) Motion to Prohibit the Death Penalty based upon the Holding and Reasoning of *Roper v. Simmons* (R. 2884-2888); 6) Motion to Preclude or Limit Victim Impact Evidence (R. 2889-2897); 7) Motion in Limine regarding

On January 25, 2019, the court conducted a hearing on the motions. (R. 1068-1101). The court denied most of the defense motions. (R. 1070; R. 1075; R. 1076; R. 1079; R. 1086). The court granted the motion in limine regarding reference to non-statutory mitigators. (R. 1091). The court held in abeyance the motion to preclude or limit victim impact evidence pending a proffer. (R. 1088-1089). The court granted in part the motion to require disclosure of favorable information re: prospective jurors. (R. 1099; T. 1101). The court entered an omnibus order on the foregoing motions. (R. 2974-2981).

The Trial

Trial commenced in the cause on February 12, 2019. The court conducted voir dire. (R. 40-983). The jury was selected and sworn. (R. 983-984). The court gave the jury preliminary instructions and excused the jury for the day. (R. 984-995). Prior to the presentation of testimony, an alternate juror was excused due to illness. (T. 7-9). The court gave jurors a preliminary instruction. (T. 11-19). The State presented an opening statement. (T. 19-31). Defendant's counsel thereafter presented opening statement. (T. 31-35). The defense invoked the rule of sequestration. (T.

---

reference to “Non-Statutory Mitigators” (R. 2922-2924); and 8) Motion to Require Disclosure of Favorable Information Re: Prospective Jurors (R. 3939-3941).

35). At trial, the State called numerous witnesses in its case-in-chief. Prior to the testimony of Agent Craig Beers, the defense renewed its pre-trial motions. The court announced its previous rulings would stand, including the ruling on the motion to suppress. (T. 119). The defense renewed its previous objections and motions, specifically the statement based on the motion to suppress. The court announced that its ruling would stand. (T. 408). Following the testimony of Det. Charles Lee, the State rested its case. (T. 598). The court conducted a colloquy with Defendant and ascertained that Defendant was not going to testify. (T. 598-601). The court read the instruction on stipulations and the defense read a portion of the report prepared by Deputy Drake, who had previously testified. (T. 603-605). The defense rested. (T. 605). Defendant presented his arguments on motions for judgments of acquittal. (T. 609-610). The court denied the motion. (T. 610). The court conducted an additional charge conference. (T. 610-657; T. 662-679). Subsequently, counsel for the State presented closing argument. (T. 681-723). The defense then presented closing argument. (T. 724-744). Counsel for the State presented a rebuttal closing argument. (T. 744-754). The court instructed the jury. (R. 3296-3319; T. 754-798). The jury retired to deliberate. (T. 798). The court reconvened to consider the jury's verdicts. Defendant was found guilty on all four (4)

counts as charged in the indictment. (R. 3320-3324; T. 802-805). The jury was polled. (T. 805-806). The court instructed the jury to return the following Monday for the penalty phase. (T. 806-807).

Penalty Phase

The court gave the preliminary instructions. (R. 1130-1135). The prosecutor gave an opening statement. (R. 1135-1147). The defense gave an opening statement. (R. 1147-1156). The State called several witnesses and presented victim impact statements. Thereafter, the State rested its case. (R. 1179). The defense called numerous witnesses. The defense rested its case. (R. 1792). The State presented a rebuttal witness. The State rested. (R. 1843). The court conducted a charge conference. (R. 1845-1854; R. R. 1855-1857; R. 1863-1869). The court conducted a colloquy with Defendant to ascertain whether he wanted to testify. (R. 1854-1855). The prosecution presented a penalty phase argument. (R. 1870-1893). The defense presented its penalty phase argument. (R. 1894-1920). The court instructed the jury. (R. 1920-1945; R. 3557-3566). After deliberations, the jury returned a verdict finding all six aggravating factors. These factors were sufficient for a possible sentence of death. The jury found that at least one or more of the jurors found one or more of the mitigating circumstances. Finally, the jury found that the aggravating

factors outweighed the mitigating circumstances and that at least one aggravating factor or factors are sufficient to warrant a sentence of death and that the aggravating factor or factors outweigh the mitigating circumstances. The jury unanimously found that Defendant should be sentenced to death. (R. 1946-1950; R. 3567-3573). The jury was polled. (R. 1950-1952).[4]

The *Spencer* Hearing and Final Order

On June 5, 2019, the court conducted the final sentencing hearing, pursuant to *Spencer v. State*, 615 So.2d 688 (Fla. 1993). (R. 1963-2031). The defense called three witnesses, Dr. Francisco Gomez, Dr. Pedro Sáez, and Dr. Randy Otto. (R. 1968-1975; R. 1976-1989; R. 1990-2023). The State did not present any additional testimony or evidence. (R. 2024; R. 2028). Defendant made a statement. (R. 2025-2027). The parties agreed to submit sentencing memoranda. (R. 2028). On August 6, 2019, the State filed a sentencing memorandum. (R. 3703-3720). On November 26, 2019, the defense filed a sentencing memorandum. (R. 3741-3774).

On December 18, 2019, the court issued its sentencing order. (R. 3778-3830). The court denied the motion of judgment of acquittal which it

[4] The court reset the case for a *Spencer* hearing. (R. 1953-1954). No Pre-Sentence Investigation Report (PSI) was ordered. (R. 2410-2411).

had taken under advisement. (R. 2419). The court announced it had found five aggravating factors great weight. The court considered all 37 mitigating circumstances and gave 24 slight weight, eleven moderate weight, one great weight and one extraordinarily great weight. (R. 2422). The court imposed the death penalty on Count V. The court sentenced Defendant to life imprisonment term on Counts VI, VII, and VIII. (R. 2423; R. 3829; R. 3835). The court ordered all sentences to run concurrently. (R. 3844). Defendant filed a notice of appeal. (R. 3847; R. 3850).

The First Appeal

On direct appeal, this Court in *Cruz v. State*, 320 So.3d 695 (Fla. 2021), considered the following issues: 1) Whether the trial court erred in denying Defendant's motion to suppress; 2) Whether the trial court erred in denying Defendant's motion in limine to exclude testimony by Det. Cage regarding his statement upon being arrested; 3) Whether the trial court abused its discretion when it responded to a jury question during voir dire that they would not be allowed to ask questions; 4) Whether Defendant was denied a fair trial as a result of the prosecutor's improper comments during guilt phase opening statement; 5) Whether there was sufficient evidence to support the jury's verdict findings that Defendant possessed and/or discharged a firearm; 6) Whether Defendant's convictions must be

reversed due to the cumulative effect of the guilt phase errors; 7) Whether Defendant was denied a fair penalty phase as a result of the prosecutor's improper comments during penalty phase opening statement; 8) Whether Defendant was denied a fair penalty phase as a result of the prosecutor's improper comments during penalty phase closing argument; 9) Whether Defendant was denied a fair penalty phase as a result of the State's improper presentation of evidence of the robbery at Hungry Howie's; 10) Whether Defendant was denied a fair penalty phase as a result of testimony by the State's expert that Defendant was involved in another robbery of a drug dealer; 11) Whether the trial court erred by failing to instruct the jury to make an *Enmund-Tison* finding in the penalty phase verdict; 12) Whether the trial court's sentencing order has errors that, both individually and cumulatively, require reversal of Defendant's death sentence and a remand for resentencing by the trial court; 13) Whether Florida's capital punishment scheme is, and as applied, unconstitutional; 14) Whether Defendant's sentence of death must be vacated due to the cumulative effect of the penalty phase errors; and 15) Whether there was sufficient evidence to sustain Cruz's murder conviction. *Id*., at 711-712.

In its opinion, this Court ruled that 1) the officers had sufficient reasonable articulable suspicion to conduct an investigatory stop based on

the totality of the circumstances and that Cruz's unprovoked utterances were admissible (*Id*., at 713-714); 2) the motion in limine was properly denied because Officer's Cage's testimony regarding Cruz's unsolicited statements subsequent to arrest were relevant to Cruz's awareness of criminal conduct and reasonably related to flight to avoid prosecution (*Id*., at 715); 3) the trial court's response to the juror's inquiry regarding the ability to ask questions did not constitute fundamental error and further there was no error in the court's failure to consult defense counsel (*Id*., at 715); 4) the prosecutor's opening statement comments did not constitute fundamental error (*Id*., at 715-716); 5) there was no competent, substantial evidence in the record to support the jury's findings that Cruz possessed a firearm and discharged a firearm during the commission of the crime causing the victim's death (*Id*., at 716-717); 6) there was no merit to Cruz's cumulative error claim as to the guilt phase (*Id*., at 717); 7) and 8) the prosecutor's opening and closing argument comments did not amount to fundamental error (*Id*., at 717-720); 9) the trial court did not err in admitting evidence of the Hungry Howie's robbery (*Id*., at 721); 10) Defendant was not denied a fair penalty phase when the State's expert testified Defendant had been involved in a prior robbery of a drug dealer (*Id*., at 721-722); 11) there was no fundamental error when the trial court failed to instruct the

jury that they must make findings satisfying the *Enmund-Tison* culpability requirement (*Id*., at 722-723); 12) under *Lawrence v. State*, 308 So.3d 544 (Fla. 2020), there was no need to address Defendant's proportionality argument in comparison with other death penalty cases; the trial court erred in relying on facts not in evidence in its order; competent substantial evidence supported the court's findings regarding the aggravating factors: prior violent felony aggravator, the murder committed in the course of a felony aggravator, the financial gain aggravator, the HAC aggravator, the avoid arrest aggravator, and the CCP aggravator; and the court did not abuse its discretion in weighing the mitigating circumstances (*Id*., at 723-730); 13) Florida's capital sentencing scheme is constitutional (*Id*., at 730-731); 14) there were no individual errors in the jury portion of the penalty phase and, thus, no cumulative error, and a new penalty phase is not required, but a new sentencing order must be entered and cumulative error pertaining the judge's portion of the penalty phase would not be addressed (*Id*., at 731); and 15) competent, substantial evidence supports Cruz's first-degree murder conviction. (*Id*., at 731).

This Court did not reach the issue of relative culpability, noting:

"We do not reach the issue of relative culpability and Cruz's argument that Charles' life sentence should also provide a life sentence for

Cruz because of the need for resentencing caused by the error of reliance on facts not in evidence." *Id*., at 723.

Proceedings on Remand and New Sentencing Order

On remand, court conducted a hearing on August 23, 2021. At this hearing, the court informed the parties that in his view this Court's order simply asked him "to reconsider the death penalty based upon the absence of the outcome of the codefendant's trial." (R1. 218). Defense counsel agreed that it appeared to be a matter for the court to reevaluate and issue a new sentencing order. (R1. 218). The prosecutor agreed. (R1. 219). The court questioned whether to bring Defendant back, noting "[I]t's a formality of me having to go through the reanalysis of all the evidence and then make a new judgment." (R1. 219).

On December 13, 2021, the defense filed a sentencing memorandum in support of a life sentence. The defense noted the trial court had relied on evidence from Justen Charles' trial to sentence Cruz to death. Further, the trial court improperly determined that no *Enmund-Tison* analysis was necessary by finding that Cruz had killed the victim. The defense maintained that the evidence actually pointed to Charles as the shooter since he could have been identified by the victim. Lastly, the defense argued that life imprisonment was appropriate because this Court found

there was no competent, substantial evidence to support the jury's finding that Cruz was the shooter and the basis for the trial court's imposition of the death penalty was premised on the conclusion that Cruz was the shooter. (R1. 115-116).

On December 14, 2021, the court held a second hearing. The court orally gave a summarized version of the new sentencing order. (R1. 281-292). The court announced it had made two weight amendments in its new order: On CCP the great weight finding was reduced to moderate weight (R1. 287), and on Mitigating Circumstance 30 the slight weight was increased to moderate weight. (R1. 290-291). On the same day, the court filed its written sentencing order. (R1. 119-250).[5]

[5] On February 14, 2022, the court conducted a status hearing regarding the record on appeal. (R1. 251-260). The court verified that no presentence investigation report had been ordered. (R1. 256).

The Resentencing Order

The court's resentencing order (R1. 119-170) was almost identical to its first sentencing order (R. 3778-3830) with the following exceptions:

Order of 12/14/21

Page 3: Added: "The defendant appealed his sentence of death to the Florida Supreme Court. In an opinion issued by the Court, the Court found that there were insufficient facts at trial that prove, by a "competent and substantial" standard, the jury's finding that Mr. Cruz was the shooter in this case. Therefore, this court finds that the defendant was not the shooter in this case and sets aside the jury's findings." (R1. 121).

Order of 12/14/21

Page 5: Deleted from Order of 12/18/19 (R1. 123): "Justen Charles' girlfriend testified that while at her apartment the defendant displayed a firearm. The firearm was a .22 caliber handgun. Mr. Charles's girlfriend testified that she wanted Mr. Charles to remain with her but that Mr. Charles and the defendant left the apartment claiming that they would come back." (R. 3782).

Order of 12/14/21

Page 14: Deleted from Order of 12/18/19 (R1. 132): “He [Mr. Jemery] was then robbed. It is clear that the robbery was done with a firearm. This conclusion is supported by the testimony of Mr. Charles’ girlfriend who testified that earlier that same evening, Mr. Cruz brandished a .22 caliber firearm which he showed her. She also testified that Mr. Charles carried a 9mm handgun with him as well.” (R. 3791).

Order of 12/14/21

Page 18: Added: “It is a fair argument in this case to note that it is not known which defendant, whether Mr. Cruz or Mr. Charles or both, inflicted the injuries during the physical beating of Mr. Jemery. Furthermore, it hasn’t been conclusively established which defendant pulled the trigger on the gun that killed Mr. Jemery.” (R1. 136).

Order of 12/14/21

Page 19: Added: “Before delving into the elements of this aggravator [CCP] it is important to take into consideration the Florida Supreme Court's opinion handed down in this case. The main issue to address centers on the jury’s specific finding that Mr. Cruz was in fact the person who pulled the trigger and shot Mr. Jemery in the head. The

court finds that the jury's finding is not supported by competent and substantial evidence and therefore rejects that finding." (R1. 137).

Page 19: Deleted from Order of 12/18/19: "Before delving into the elements of this aggravator [CCP] it is important to highlight the material difference between Mr. Cruz's trial and his co-defendant's (Mr. Charles) trial. In Mr. Cruz's trial the jury made a specific finding that Mr. Cruz was in fact the person who pulled the trigger and shot Mr. Jeremy in the head. In Mr. Charles' trial, the State adopted the theory (and Mr. Charles consented) to the fact that Mr. Charles was not the person who shot Mr. Jemery. This matter will be further explained in the proportionality analysis below. (R. 3796-3797).

Order of 12/14/21

Page 20: Added: "The record evidence supports that conclusion. [Careful Plan under CCP] A reasonable inference based on the circumstantial evidence in this case was that Mr. Jemery was compelled to walk into the field, while bound, and then shot. (R1. 138).

Page 20: Deleted from Order of 12/18/19: "The court rejects the testimony of jail house witnesses who testified in Mr. Charles' trial and said that:

"Mr. Charles told Mr. Cruz not to kill Mr. Jemery – to let him go. But Mr. Cruz replied that `he had to be killed because he could identify them.''

Such testimony was at best totem pole self-serving hearsay, and at worst nothing more than jailhouse gossip. Although the testimony was offered in the Charles' trial, the court (1) finds it important enough to include it in this order because defense counsel for Cruz was not present when the statements were made; and (2) this court (and I would surmise the Charles' jury) found the testimony to not be credible, not worthy of consideration and dismisses it." (R. 3797-3798).

Order of 12/14/21

Page 21: Added: "There was no fact that showed Mr. Jemery did anything to incite the defendants… There was no just cause or provocation that Mr. Jemery offered which would have *triggered any reason for his killing*." [Heightened Premeditation under CCP]. (R1. 139).

Page 21: Deleted from Order of 12/18/19: "There was no just cause or provocation that Mr. Jemery offered which would have *caused him to be killed*." (R. 3798).

Order of 12/14/21

Page 21: Added: “Mr. Jemery’s killing served no purpose; *other than making sure he never spoke*.” (R1. 139).

Order of 12/14/21

Page 22: Added: “The court assigns this factor MODERATE WEIGHT.” (R1. 140).

Page 22: Deleted from Order of 12/18/19: “The court assigns this factor *GREAT WEIGHT*.” (R. 3799).

Order of 12/14/21

Page 23: Added: [*Enmund-Tison* Analysis]: “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.

The law is supportive of this court's conclusion. In its opinion the Florida Supreme Court stated as follows: [Opinion quoted: *Cruz v. State*, 360 So.3d 696, 717 (Fla. 2021)].

In sum, the defendant's actions were inseparable from the actions of the 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." (R1. 141-142).

Page 23: Deleted from Order of 12/18/19: "The jury found Mr. Cruz to be the individual who shot and killed Mr. Jemery. In Mr. Charles' case, the State abandoned any efforts to establish Mr. Charles as the shooter. The jury in Mr. Charles' case did not have to make a determination as to who the shooter was because of the State's concession. However, the jury in Mr. Charles' case did find him guilty of both, premediated AND felony murder.

Therefore, this court finds that Mr. Cruz in fact killed Mr. Jemery and no further analysis is needed." (R. 3800).

Order of 12/14/21

Page 24: Deleted from Order of 12/18/19 [MITIGATING CIRCUMSTANCES]: "This court, without knowing any of the facts of the case, urged Mr. Cruz to strongly consider the possibility of a death sentence in contrast with the life sentence that the State was offering. Mr. Cruz rejected all plea offers and chose to go forward with the trial. The court's colloquy on this issue will reflect everyone's efforts in getting Mr. Cruz to consider the State's offer to no avail." (R. 3801).

Order of 12/14/21

Page 44: Added [Mitigating Circumstance 30]: "As stated above, no one knows who actually shot and killed Mr. Jemery. However, it is a reasonable conclusion to believe that both defendants were present when Mr. Jemery was killed. Both defendants acted in concert and lock-step when it came down to committing this crime. The fact that Mr. Charles was older (24 years of age) at the time of the offense does not necessarily mean that he was the leader.
Therefore the court assigns *MODERATE WEIGHT* to this mitigator." (R1. 162).

Pages 43, 44: Deleted from Order of 12/18/19 [Mitigating Circumstance 30]: The jury found in this case that Mr. Cruz was in fact the shooter and killer of Mr. Jemery. The circumstantial evidence in this case demonstrates that both, Mr. Cruz and Mr. Charles acted in concert and step when it came down to committing this crime. The fact that Mr. Charles was older (24 years of age) at the time of the offense does not necessarily mean that he was the leader.

The act of shooting Mr. Jemery made him the main offender of this crime. To find in favor of this mitigator would run contrary to the evidence in the case, and the jury's verdict. Therefore the court assigns SLIGHT WEIGHT to this mitigator." (R. 3820; R. 3821).

Order of 12/14/21

Page 46: Deleted from Order of 12/18/21 [Mitigating Circumstance 33]: "The fact that the jury in Mr. Charles' case did not return a verdict of death will be discussed below." (R. 3822).

Order of 12/14/21

Page 50: Deleted from Order of 12/18/19 [Proportionality Review]: "The court (and without objection from the defense) deferred the imposition of sentence until the time that Mr. Charles' case was tried. The trial occurred roughly six months after the verdict in Mr. Cruz's trial. Mr.

Charles's trial went exactly the same way as Mr. Cruz's with one exception. One of the jury findings in Mr. Cruz's guilt-phase was a determination that Mr. Cruz was the shooter. Satisfied that Mr. Cruz had been determined to be the actual killer of Mr. Jemery, the State conceded and stipulated that Mr. Charles was not the shooter. Despite the stipulation of the State, the jury in Mr. Charles' case found him guilty of both, Premeditated and Felony Murder- just like Mr. Cruz. The penalty phase verdict provided the greatest insight into the analysis of this case. In the penalty phase verdict for Mr. Charles, the jury found that:

1. All aggravators were proven beyond a reasonable doubt.
2. That the aggravators warranted a possible sentence of death.
3. That at least one or more mitigating circumstances had been established.
4. That the aggravators outweighed the mitigating circumstances.
5. That Mr. Charles should be sentenced to life.

With the exception of their finding of a life sentence for Mr. Charles, Mr. Cruz's verdict was identical. That means that two separate juries of twelve people heard the same case and reached almost the same exact conclusion in their verdicts. This court is convinced that the

only thing that made a difference in Mr. Charles' case and spared him the death penalty was the fact that the State stipulated that he was not the shooter in this case." (R. 3827-3828).

Order of 12/14/21

Page 51: Added: "In conclusion, after reanalyzing this case in its totality, the outcome is not affected by the failure to conclusively establish whether Mr. Cruz, or Mr. Charles, pulled the trigger that ultimately caused Mr. Jemery's death. Both of the defendants are equally culpable in this court's eyes. The jury in Mr. Cruz's case returned a verdict of death and this corut finds the evidence is supportive of the jury's findings and verdicts. It is therefore, ADJUDGED that as to count five of the indictment, and for the killing of Christopher Jemery, the defendant Christian E. Cruz, is hereby sentenced to death in accord with the method proscribed by law…" (R1. 169).

Page 51: Deleted from Order of 12/18/19: Sentences on Counts VI-VIII, and "As to count V of the indictment, and for the offense of First Degree Premeditated Murder and Felony Murder of Christopher Jemery, you are hearby Adjudicated Guilty and as sentence you are hereby committed to the custody of the Florida Department of

Corrections to be put to death in the manner prescribed by law." (R. 3829).

This appeal follows.

STATEMENT OF THE FACTS

The facts of the case are reported in this Court's opinion in *Cruz v. State*, 320 So.3d 695 (Fla. 2021):

"In 2013, Christian Cruz and codefendant Justen Charles were indicted for the first-degree murder of Christopher Jemery, as well as burglary while armed, robbery with a firearm, and kidnapping. Cruz and Charles were tried separately but before the same trial court. Charles' trial occurred after Cruz's trial but before Cruz's sentencing. The evidence presented at Cruz's trial showed that on April 26, 2013, [Christopher] Jemery was attacked in his Deltona apartment. The evening before the attack, both Cruz and Charles were together in an apartment in the vicinity of Jemery's apartment. Cruz and Charles were aware that the former resident of the apartment where Jemery was living sold drugs out of the apartment, and Cruz and Charles discussed Jemery's apartment the day before the murder." *Id*., at 705.

"The evidence showed that both Cruz and Charles forefully entered Jemery's apartment. The physical evidence obtained from the apartment

showed that there was an assault and attack on Jemery. Blood throughout the apartment demonstrated that Jemery was beaten while inside the apartment. Bloody footprints matching the shoes of Cruz and Charles were found inside the apartment. One of the bedrooms appeared ransacked and had additional blood, the kitchen cabinets had been opened, and a television was taken from the apartment." *Id*., at 705.

"Cruz and Charles then placed Jemery in the trunk of Jemery's rental car, drove him to a remote location, and shot him in the head. Jemery was found near the Sanford airport in Seminole County, Florida. Workers at an industrial area saw what they thought was the body of a person lying on the ground in a field adjacent to their warehouse. Because the body lacked identification, the person was given the name John Doe. John Doe was later identified as Christopher Jemery." *Id*., at 705.

"Upon first arrival at the field, emergency personnel made a notation that Jemery was bound with wire and duct tape on his arms and mouth, was alive but nonresponsive, and his breathing was very shallow. Medical examiner testimony would later reveal that Jemery was shot in the head and also sustained a number of injuries to his head, face, hands, and torso, including cuts, bruises, lacerations, and defensive wounds. His wrists showed what appeared to be tape residue from being bound with duct tape.

Jemery initially survived the attack but succumbed to his injuries in a hospital within a day." *Id*., at 705-706.

"Evidence showed that the duct tape recovered from the area where Jemery was found matched the leftover roll of duct tape found in Jemery's apartment. A live .22 bullet was found on the floor of Jemery's apartment, which was the same caliber and manufacturer as the .22 shell casing found near Jemery's body. Cruz's fingerprint was found on a piece of duct tape recovered from Jemery's body. Cruz's DNA was found on a swab of blood taken from the front right kick panel and the right front door of Jemery's rental car. Cruz's fingerprint was also found on the Air Jordan shoe box found at Jemery's apartment and on Jemery's cell phone, which was recovered from his rental car. Jemery's rental car was not at his apartment and was later found backed into some bushes near a grocery store in Deltona. The evidence also showed that the same night Jemery was taken from his apartment, Cruz was seen on a bank's ATM surveillance camera using Jemery's bank card and personal identification number (PIN) to withdraw $440 cash from Jemery's account." *Id*., at 706.

"At the time of his death, Jemery was renting his apartment from a friend, Mark Walters. Jemery had recently returned to Florida with his girlfriend and young daughter. Walters had previously lived in the

apartment in Deltona but had recently vacated the apartment. Walters allowed Jemery to reside in the apartment but retained the ability to go into and out of the apartment. Walters was also a small-time drug dealer who sold drugs from and around his apartment when he lived there. When Jemery took residence in Walters' apartment, he concluded that the area was not safe. Although he planned to have his girlfriend and young child move into the apartment with him, he asked his girlfriend not to do so because he was concerned for their safety. Instead, his girlfriend moved in with her family who also lived near the area." *Id*., at 706.

"The morning of April 26, 2013, Walters came by the apartment and noticed that there was a large amount of blood on the floor of the apartment. He did not see Jemery and assumed that somehow Jemery had injured himself. Walters did not call the police. Testimony also established that a prescription bottle belonging to Walters was later recovered from Charles' vehicle after Jemery was killed. Christina Raghonath, Jemery's girlfriend, also stopped by Jemery's apartment that morning and called the police when she saw what she described as a "blood bath." Raghonath later went to the hospital to identify Jemery when he was found." *Id*., at 706.

"On the evening of May 9, 2013, Cruz was arrested on unrelated charges. Officers Cage and Hilliker of the Orlando Police Department were on patrol at night in Parramore, a high-crime and high-drug area. They witnessed a white sedan driving erratically and making numerous traffic violations, so they tried to initiate a traffic stop but lost sight of the vehicle. After they conducted an area search for the vehicle, they found what they thought was the same white sedan parked nearby. The vehicle was still hot when they found it, and as they checked the license tag of the vehicle, they noticed a male peeking around the corner of the surrounding townhomes several times over a period of 10 to 15 minutes. Officers Cage and Hilliker went around the corner where the male was standing and came upon 3 individuals. As they approached, the officers smelled the odor of burnt cannabis coming from the 3 individuals. Officer Cage asked one of the individuals, who ultimately went unidentified, if he had anything illegal on him. The man said he did not and consented to a search, during which Officer Cage failed to find anything. After searching the first male, Officer Cage turned to the next male, later identified as Cruz. Officer Hilliker observed that Cruz was very nervous. Officer Cage asked Cruz to stand and come to him and asked him if he had anything illegal on him. Cruz

responded that he did not. After Cruz took a step or two towards the officers, and while in between them, Cruz started running." *Id*., at 706-707.

"After both officers ran after Cruz for about 15 feet and requested him to stop, Officer Cage deployed his taser on Cruz, resulting in Cruz falling to the ground. Officer Hilliker handcuffed him but could not cuff the second had until Officer Cage deployed a second cycle of the taser. Officer Hilliker immediately stood Cruz up and searched him. They did not find any drugs, drug paraphernalia, or vehicle keys. When they walked Cruz back to the patrol vehicle and sat him on the curb, Cruz said something to the effect of, "Why don't you just kill me now," and "I'm as good as dead." *Id.*, 707.

"The jury rendered a verdict unanimously recommending a penalty of death, determined the aggravating factors outweighed the mitigating circumstances, and found that the State had established beyond a reasonable doubt the existence of the following aggravating factors: (1) Cruz was previously convicted of a felony involving the use or 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 (HAC); and (6) the first-

degree murder was committed in a cold, calculated, and premediated manner (CCP)." *Id*., at 710.

"A *Spencer* hearing was held on June 5, 2019. The trial court delayed imposition of Cruz's sentence until the conclusion of Charles' trial. The defense called 3 witnesses, and Cruz gave a statement expressing his remorse and apologizing to Jemery's family. Sentencing occurred on December 18, 2019, and the trial court followed the jury's recommendation and sentenced Cruz to death. The trial court found 5 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 the first-degree murder was committed for pecuniary 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); and (5) the first-degree murder was committed in a cold, calculated, and premediated manner (great weight). 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 1, and extraordinarily great weight to 1." *Id*., at 710.

"In its sentencing order, the trial court conducted an *Enmund-Tison* analysis, finding as follows:

> `The jury found Mr. Cruz to be the individual who shot and killed Mr. Jemery. In Mr. Charles' case, the State abandoned any efforts to establish Mr. Charles as the shooter. The jury in Mr. Charles' case did not have to make a determination as to who the shooter was because of the State's concession. However, the jury in Mr. Charles' case did find him guilty of both, premediated murder AND felony murder. Therefore, this court finds that Mr. Cruz in fact killed Mr. Jemery and no further analysis is needed.'

In the sentencing order, the trial court explained that he heard and considered evidence of the case in Cruz's and codefendant Charles' trials. Further, in addressing the mitigating circumstances that Cruz acted under extreme duress or under the substantial domination of another person, the trial court found that Cruz and Charles `were equally culpable for the actions of each other.'" *Id*., at 711.

ISSUES PRESENTED

(I)

RELATIVE CULPABILITY MANDATES REVERSAL OF THE TRIAL COURT'S RESENTENCING ORDER IMPOSING THE DEATH PENALTY FOR DEFENDANT SINCE AN EQUALLY CULPABLE CO-DEFENDANT, WHO WAS FOUND GUILTY OF THE SAME OFFENSES AND FOUND TO HAVE THE SAME AGGRAVATING FACTORS BY A JURY, RECEIVED A SENTENCE OF LIFE IMPRISONMENT BY THE SAME JUDGE

STANDARDS OF REVIEW

(I) Where more than one defendant is involved in a capital case, the Florida Supreme Court performs an analysis of relative culpability guided by the principle that equally culpable codefendants should be treated alike in capital sentencing and receive equal punishment. *Blake v. State*, 972 So.2d 839, 849 (Fla. 2007)(quoting *Brook v. State*, 918 So.2d 181, 208 (Fla. 2005)). A trial court's determination regarding the relative culpabilities of codefendants is a finding of fact which will not be disturbed on appeal if it is supported by competent, substantial evidence. *Puccio v. State*, 701 So.2d 858, 860 (Fla. 1997).

SUMMARY OF ARGUMENT

(I) The trial court sentenced Defendant to death even though an equally culpable co-defendant, who was found guilty of the same offenses and found to have the same aggravating factors, was sentenced to life

imprisonment. In its initial sentencing order, the trial court ruled the jury's finding that Defendant was the shooter was a sufficient basis for distinguishing the sentences between Defendant's death sentence and the co-defendant's sentence. On appeal, this Court found the jury's special finding was not supported by competent, substantial evidence. Because the trial court relied on this finding and on nonrecord evidence, the case was remanded for entry of a new sentencing order. On remand, the trial court entered a resentencing order. In this order, the circuit court found that although there was no competent, substantial evidence that Defendant was the shooter, and despite the fact that both Defendant and codefendant Charles were equally culpable, a sentence of death was warranted. The trial court's resentencing order imposing the death penalty should be vacated. The court made a specific finding that both defendants were equally culpable. The record shows that both defendants were found guilty of the same offenses and both were found to have the same aggravating factors. Relative culpability mandates reversal of the trial court's resentencing order. This Court has long employed relative culpability to uphold the principle that equally culpable defendants should be sentenced alike. This Court's decision in *Lawrence v. State*, 308 So.3d 544 (Fla. 2020), did not do away with relative culpability. *Lawrence* dealt exclusively

with the imposition of a comparative proportionality review requirement predicated on the 8th Amendment. Relative culpability review was ***not*** addressed or even mentioned in *Lawrence.* *Lawrence* relied on the U.S. Supreme Court's decision in *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), to hold that Florida's conformity clause prohibits application of proportionality review. *Lawrence, supra* at 551. The decision in *Pulley* did ***not*** address or rule on relative culpability review. While the Court in *Pulley* directly addressed comparative proportionality, there has been no United States Supreme Court opinion prohibiting relative culpability. As such, Art. I, §17, Florida Constitution (conformity clause) is neither implicated nor violated by this Court's relative culpability analysis. The U.S. Supreme Court has employed an analysis of co-defendants' roles to ascertain the propriety of the death penalty in any given case. This analysis, by definition, requires an assessment on the respective roles of the defendants in the same case. Rather than prohibiting an assessment of the differing roles of defendants in the same case, the U.S. Supreme Court has accepted the concept as part of capital litigation review. In addition, equal protection and due process authorize relative culpability review. These constitutional provisions are not exclusive to the 8th Amendment's cruel and unusual punishment clause. Rather, due process

and equal protection stem from the 5th and 14th Amendments. Florida's conformity clause (Art. I, §17) only addresses the 8th Amendment's cruel and unusual prohibition and does not refer or allude to either equal protection or due process. Moreover, this Court continues to apply its independent obligation to review for sufficiency in cases subsequent to *Lawrence*. This independent obligation has been interpreted to require a review of the record to determine the sufficiency of the evidence to support a finding of guilt for first-degree murder and a review of the record to assess whether the death penalty was proper. Relative culpability review properly forms part of this Court's independent obligation to review the *entire* record in capital cases. This naturally and logically flows from the need for meaningful appellate review in capital cases. This Court should adhere to the doctrine of *stare decisis* and not recede from the application of relative culpability. The decision in *Lawrence*, of course, was governed by the Supreme Court decision in *Pulley v. Harris, supra*. No such direct precedent from a higher legal authority exists in this case regarding relative culpability. Relative culpability review is neither unsound in principle nor unworkable in practice as has been demonstrated in numerous opinions of this Court over decades. As such, there is no basis to recede from this Court's long line of precedents applying relative culpability review.

ARGUMENT

(I)

RELATIVE CULPABILITY MANDATES REVERSAL OF THE TRIAL COURT'S SENTENCING ORDER IMPOSING THE DEATH PENALTY FOR DEFENDANT SINCE AN EQUALLY CULPABLE CO-DEFENDANT, WHO WAS FOUND GUILTY OF THE SAME OFFENSES AND FOUND TO HAVE THE SAME AGGRAVATING FACTORS BY A JURY, RECEIVED A SENTENCE OF LIFE IMPRISONMENT BY THE SAME JUDGE

The trial court improperly sentenced Defendant to death. An equally culpable co-defendant, Justen Charles, who was convicted on the same offenses and who was found to have the same aggravating factors by a jury, was sentenced to life imprisonment by the same judge. Pursuant to this Court's relative culpability review, Defendant's death sentence should be vacated and his sentence should be reduced to life imprisonment.

(1)

This Case

In order properly understand the extent of the trial court's error imposing a death sentence on Defendant it is necessary to thoroughly review the pertinent facts giving rise to the trial court's determination that a death sentence was appropriate even though an equally culpable co-defendant, found guilty of the same offenses and found to have the same aggravating factors, was given a life sentence.

(a)

The Initial Sentencing Order

In its initial sentencing order, the circuit court rejected Defendant's argument (R. 3768-3772) that the co-defendant's life sentence should accord Defendant a life sentence as well. (R. 3769-3772). *The court accepted that both defendants were equally culpable*. (R. 3822). The State maintained that the jury made a specific finding that Defendant was the actual shooter, rather than placing blame on the co-defendant. (R. 3718). The State asserted that Defendant was found to be "solely responsible" for the shooting the victim. (R. 3718). This argument was wholly disingenuous since the State never offered the co-defendant's jury the option of deciding whether he had actually possessed or discharged the firearm. (R. 3957-3959). The circuit court noted that the case against the co-defendant was tried "in identical fashion," and that the jury heard virtually the same case. However, the jury reached a different conclusion. (R. 3779). The trial court pointed out in Charles' case the State abandoned any efforts to establish Charles as the shooter. The jury in Charles' case did not determine who the shooter was because of the State's concession. The jury in Defendant's case did make the finding. As such, the trial court found that Defendant did in fact kill the victim and "no further analysis is needed." (R.

3799-3800). In the initial sentencing order, the court noted that the co-defendant's case went exactly the same way as Defendant's with the exception that the jury determined that Defendant was the actual killer while the State conceded that Charles was not the shooter. (R. 3827). The jury in Charles' case found the same aggravating factors. (R. 3960-3966). The only thing that made a difference in Charles' case and spared him the death penalty was the fact that the State stipulated he was not the shooter. (R. 3828). On that basis, the circuit court found the death sentence would not be disproportionate. (R. 3828). This conclusion was made although there was no evidence that Defendant was the shooter. The State elicited on direct examination of Det. Lee that he had no information as to which of the two defendants actually fired any shots in the case. (T. 597). The court's analysis was flawed and in error. Here, the record shows that the cases against both Defendant and co-defendant were "identical" but for the jury finding regarding possession and discharge of a firearm. This option was not given to the co-defendant's jury. As such, under a relative culpability review, it is apparent that Defendant's sentence of death was disproportionate since the verdict forms were drafted such as to virtually guarantee a disparate outcome.

(b)

The First Appeal

On appeal, this Court agreed with Defendant's argument there was insufficient evidence to support the jury's finding that Defendant was the shooter. This Court ruled as follows:

> "The jury found Cruz guilty of first-degree premeditated murder and felony-murder, burglary while armed, robbery with a firearm, and kidnapping. By special verdict in connection with each charged crime, the jury also found that Cruz possessed a firearm and discharged a firearm during the commission of the crime causing the death of Jemery. Cruz argues that there was insufficient evidence to support the jury's verdict findings that Cruz possessed and discharged a firearm. We agree and conclude that there is no competent, substantial evidence in the record to support the jury's findings." *Cruz v. State*, 320 So.3d 695, 716-717 (Fla. 2021).

This Court concluded the error was not harmless and remanded the case. This Court ruled:

> "In sentencing Cruz to death, the trial court relied on evidence from Charles' trial, specifically the testimony of Charles' girlfriend regarding seeing Cruz with a .22 caliber firearm, as well as the

stipulation in Charles' trial that Cruz was the shooter. However, there is no competent, substantial evidence presented in Cruz's trial to support the jury's finding that Cruz was the shooter. We cannot determine what weight the trial court gave to the finding that Cruz was the shooter or what part the nonrecord evidence from codefendant Charles' trial played in Cruz's sentence. Here, this was error that cannot be considered harmless. *Id*., at 725.

(c)

The Resentencing Order

On remand, the circuit court entered a resentencing order. The court, however, failed to provide an adequate explanation for Defendant's disparate death sentence when compared to co-defendant Charles' life sentence. The court simply excised all references to Charles' trial without conducting an analysis of the disparate sentences imposed. Specifically, the court noted the following:

> "…Given the proximity of co-defendant Charles' scheduled trial, this court delayed the imposition of sentence until conclusion of the Charles' trial. Mr. Charles was tried in identical fashion—with the State seeking a death penalty against him for the same identical charges as Mr. Cruz. The Charles jury heard virtually the same case and found him guilty as charged in the indictment. However, on October 30, 2019, the jury reached a different conclusion on the sentence Mr. Charles received. Charles' sentence verdict was for life in prison without the possibility of parole for his participation in the killing of Mr. Jemery.

In sum, this court heard and considered the evidence of this same case in two occasions. The first instance being the jury trial of Christian Cruz. The second instance being the jury trial of Justen Charles. In both instances the jurors reached exactly the same verdicts—with the exception of a life recommendation for Mr. Charles. A more thorough discussion on this issue will be offered in the Proportionality Review section of this order." (R1. 120-121).

Subsequently, when discussing *Enmund-Tison*, the court stated:

"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." (R1. 141).

In conclusion, the court noted:

"In sum, the defendant's actions are inseparable from the actions of the 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." (R1. 142).

In the Proportionality Section of the resentencing order, the circuit court made the following observation:

"Mr. Cruz was charged with this [sic] offenses at the same time that his co-defendant was charged with the same identical set of offenses. In fact one indictment contained both of their names and offenses. Changes to the death penalty scheme in Florida provided an inordinate amount of delay in bringing this case to conclusion." (R1. 167-168).

> …So in reviewing whether the imposition of a death sentence is appropriate in this case, this court finds that the sentence would not be disproportionate to the codefendants case." (R1. 168).
>
> In its conclusion, the trial court wrote:
>
> "In conclusion, after reanalyzing this case in its totality, the outcome is not affected by the failure to conclusively establish whether Mr. Cruz, or Mr. Charles pulled the trigger that ultimately caused Mr. Jemery's death. Both defendants are equally culpable in this court's eyes. The jury in Mr. Cruz's case returned a verdict of death and this court finds the evidence is supportive of the jury's findings and verdicts." (R1. 169).

The court laid out a perfect case establishing equal culpability and, yet, reached a conclusion that Defendant's sentence was not disproportionate with Mr. Charles' sentence without offering or suggesting any explanation whatsoever. This Court has long held that a trial court must articulate in writing the basis for its decision imposing the death penalty. *See, e.g., Holmes v. State*, 374 So.2d 944, 950 (Fla. 1979) (primary purpose of requiring written findings is to provide an opportunity for "meaningful review" and to show the sentence was imposed as a result of "reasoned judgment"). *See also Morgan v. State*, 453 So.2d 394, 397 (Fla. 1984)(trial judge's findings in regard to death penalty should be of "unmistakable clarity" so that proper review can be accomplished without speculation); *Fennie v. State*, 855 So.2d 597, 608 (Fla. 2003)(trial court has obligation to consider unique circumstances surrounding each capital case

and each individual defendant which will facilitate "meaningful review" of capital cases). In the present case, the trial court's order failed to meet this standard by not setting forth its fully articulated reasons why and on what basis equally culpable defendants were treated differently.[6] The resentencing order does not provide this Court with an adequate basis justifying the unequal treatment of equally culpable defendants.[7] *See Gregg v. Georgia*, 428 U.S. 153, 195, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)(stressing the further safeguard of meaningful appellate review to avoid the arbitrary and capricious imposition of the death penalty)(opinion of Stewart, Powell, and Stevens, J.J.). *See also Proffitt v. Florida*, 428 U.S.

[6] The absence of a fully articulated analysis of the issue of relative culpability may be explained by the trial court's remarks at a status conference following remand, where the court stated that this Court's order simply asked him "to reconsider the death penalty based upon the absence of the outcome of the codefendant's trial" (R1. 218) and noted: "[I]t's a formality of me having to go through the reanalysis of all the evidence and then make a new judgment." (R1. 219).

[7] By contrast, the trial court's first sentencing order candidly conceded that the only apparent reason for the disparity was the jury's [now discredited] finding that Defendant was the shooter: "This court is convinced that the only thing that made a difference in Mr. Charles' case and spared him the death sentence was the fact that the State stipulated that he was not the shooter in this case." (R. 3828).

242, 253, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)(opinion of Stewart, Powell, and Stevens, J.J.).[8]

However, the record before this Court clearly shows that both Defendant and codefendant Charles were, at a minimum, equally culpable. The trial court did make the following salient findings:

- "*Mr. Charles was tried in identical fashion*—with the State seeking a death penalty against him for the *same identical charges* as Mr. Cruz. The *Charles jury heard virtually the same case* and found him guilty as charged in the indictment." (R1. 120) (emphasis supplied)

- "In sum, this court heard and considered the evidence of this same case in two occasions. The first instance being the jury trial of Christian

[8] Relative culpability review in multi-defendant capital cases has been a feature of Florida death penalty law for decades. A defendant in such a case would expect to have the benefit of a well-reasoned determination of whether he will be subjected to the death penalty in the event it is found that the defendants in the case are equally culpable and an equally culpable codefendant is sentenced to life. In *Hicks v. Oklahoma*, 447 U.S. 343, 346, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980), the Supreme Court held that a state creates a liberty interest when it provides a criminal defendant with a substantial and legitimate expectation of certain procedural protections. An arbitrary deprivation of such entitlement may create an independent federal constitutional violation. The entire purpose of the Due Process Clause is to prevent arbitrary deprivations of liberty or property. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 434, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994). In the present case, Defendant had a substantial and legitimate expectation that the trial court's relative culpability review would be a thorough and meaningful one. The court's order did no such thing.

Cruz. The second instance being the jury trial of Justen Charles. In both instances *the jurors reached exactly the same verdicts*—with the exception of a life recommendation for Mr. Charles." (R1. 121) (emphasis supplied)

- "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." (R1. 141). (emphasis supplied).

- *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*." (R1. 142) (emphasis supplied).

- "*Mr. Cruz was charged with this [sic] offenses at the same time that his co-defendant was charged with the same identical set of offenses*. In fact one indictment contained both of their names and offenses." (R1. 167-168) (emphasis supplied).

- “In conclusion, after reanalyzing this case in its totality, the outcome is not affected by the failure to conclusively establish whether Mr. Cruz, or Mr. Charles pulled the trigger that ultimately caused Mr. Jemery’s death. *Both defendants are equally culpable in this court’s eyes*.” (R1. 169) (emphasis supplied).

Thus, the record shows that the trials were conducted in “identical fashion,” the State sought death against Charles on the “same identical charges” as Mr. Cruz, the Charles jury heard “virtually the same case,” Charles was found guilty as charged, the juries in both cases “reached exactly the same verdicts,” both defendants “acted in concert,” the defendants appeared to have “equal footing” in the commission of the crimes, both defendants “participated equally” in the crimes, “culpability lies equally” on both defendants, the actions of both defendants weighed “equally in culpability,” and “[B]oth defendants are equally culpable in this court’s eyes.”[9]

A trial court’s determination regarding the relative culpabilities of codefendants is a finding of fact which will not be disturbed on appeal if it is

[9] The record also shows that the jury in co-defendant Charles’ case found exactly the same aggravating circumstances as the jury in Mr. Cruz’s case. (R. 3918-3924).

supported by competent, substantial evidence. *Puccio v. State*, 701 So.2d 858, 860 (Fla. 1997). *See also Sexton v. State*, 775 So.2d 923, 935 (Fla. 2000); *Marquard v. State*, 850 So.2d 417, 424 (Fla. 2002) (citing *Puccio*); *Hernandez v, State*, 4 So.3d 642, 671 (Fla. 2009)(same); *Gonzalez v. State*, 136 So.3d 1125, 1165 (Fla. 2014)(same); *McCloud v. State*, 208 So.3d 668, 687 (Fla. 2016)(same). The record here abundantly supports the finding of equal culpability.

Indeed, a close reading of the resentencing order lends support to a finding that Charles had *greater* culpability. *The trial court noted evidence showed that the planning component of the crime was attributable to Charles* (R1. 141), and that Charles was familiar with the area around the victim's apartment and that he knew the small-time dealer (Walters) who lived in the apartment and had purchased drugs from there before. (R1. 123).

The record demonstrates Charles' equal, if not greater culpability. For example, it was Charles who inquired about Walters' apartment (T. 252-253; T. 266). Law enforcement found a Scion vehicle at Charles' home where they discovered a Mark Walters prescription bottle. (T. 351). Eight of Charles' latent prints were associated with the Scion. (T. 470). As the prosecutor noted below, it was Charles' footprint that was on the door

that was kicked in when the burglary began (T. 695), it was Charles who drove to a secluded location at the end of an industrial park (T. 696), it was Charles' shoeprint impression on the victim's shirt. (T. 710-711); and it was Charles' blood in the entryway and hallway. (T. 711). The prosecutor argued that "they" [both defendants] decided to bind and gag the victim (T. 685), that "they" beat him and pistol-whipped him (T. 685; T. 693), that "they" thoroughly searched the victim's apartment (T. 685; T. 694), that "they" bound-and-gagged him into the trunk (T. 686; T. 695; T. 707), and that "they" dragged him under the trees. (T. 686; T. 696). On appeal, the State should abide by the prosecution's clearly stated views on the joint and equal culpability of both defendants.

In its resentencing order, the court discussed the various aggravating factors in the case and invariably included *both defendants* in its analysis. (R1. 126; R1. 128-129; R1. 131-133; R1. 134; R1. 136; R1. 138; R1. 139). Consequently, this Court should not disturb the trial court's finding of equal culpability. Given the equal culpability of both defendants, relative culpability review mandates that equally culpable defendants should be treated equally. Defendant's sentence should be reduced to life imprisonment in view of Charles' life sentence.

(2)

The Issue on Appeal

Although raised on appeal, this Court did not reach the issue of relative culpability, noting:

> "We do not reach the issue of relative culpability and Cruz's argument that Charles' life sentence should also provide a life sentence for Cruz because of the need for resentencing caused by the error of reliance on facts not in evidence." *Cruz v. State*, 320 So.3d 695, 723 (Fla. 2021).

This issue is now before the Court.

(3)

Death is Different/Heightened Reliability

Any discussion concerning issues in capital litigation requires recognition of the unique punishment of death in American jurisprudence. The need to safeguard a defendant's due process rights is even more important in capital cases, such as the present case, because the sentence of death is final, and therefore, such cases are *qualitatively different* from other punishments. *See Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991-92, 49 L.Ed.2d 944 (1976). There is "a corresponding difference in the need for reliability in the determination that death is the

appropriate punishment in a specific case." *Id. See also Johnson v. Mississippi*, 486 U.S. 578, 584, 108 S.Ct. 1981, 1986, 100 L.Ed.2d 575 (1988); *Ford v. Wainwright*, 477 U.S. 399, 411, 106 S.Ct. 2595, 2602, 91 L.Ed.2d 335 (1986); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978); *Gardner v. Florida*, 430 U.S. 349, 357-358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977)(plurality opinion); *Zant v. Stephens*, 462 U.S. 862, 884-885, 103 S.Ct. 2733, 77 L.E.2d 235 (1983); *Ring v. Arizona*, 536 U.S. 584, 605-606, 122 S.Ct. 2428, 2441, 153 L.Ed.2d 556 (2002); *State v. Dixon*, 283 So.2d 1, 7 (Fla. 1973)(death is a unique punishment in its finality); *Pham v. State*, 70 So.3d 485, 499 (Fla. 2011)("'death is a uniquely irrevocable penalty requiring a more intensive level of judicial scrutiny or process than would lesser penalties'")(quoting *Tillman v. State*, 591 So.2d 167, 169 (Fla. 1991)). Capital proceedings must satisfy the requirements of the Due Process Clause. *Gardner v. Florida, supra*, 430 U.S., at 358. Moreover, such proceedings require a heightened degree of reliability grounded in the Eighth Amendment, United States Constitution. *See Allen v. Butterworth*, 756 So.2d 52, 59 (Fla. 2000)(citing *Crump v. State*, 654 So.2d 545, 547 (Fla. 1995), *Walker v. State*, 707 So.2d 300, 319 (Fla. 1997) and *Woodson v. North Carolina, supra*, 428 U.S. at 305)). The uniqueness of the death penalty is

underscored by the fact that the Florida Constitution requires automatic Supreme Court review. Art. V, §3(b)(1), Florida Constitution. Additionally, there is a statutory requirement for automatic Supreme Court review. §921.141(5), Florida Statutes. Thus, death penalty review is not left to the vagaries of the individual district courts of appeal and ensures uniformity of death-penalty law statewide.

(4)

The Trial Court's Authority to Override a Jury's Death Recommendation

This Court in *State v. Dixon*, 283 So.2d 1, 6-7 (Fla. 1973), decided in the aftermath of the United States Supreme Court decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), noted that "discretion and judgment are essential to the judicial process," and should be "reasonable and controlled, rather than capricious and discriminatory." The Court in *Dixon* further stated:

> "The third step added to the process of prosecution for capital crimes is that the trial judge actually determines the sentence to be imposed-guided by, but not bound by, the findings of the jury. To the layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience." *Id.*, at 8.

Following the *Dixon* opinion, this Court in *Ross v. State*, 386 So.2d 1191 (Fla. 1980), had occasion to review a trial court's "undue weight" given to the jury's recommendation of death. This Court found the trial judge had not made an independent judgment on whether or not the death penalty should be imposed since the trial judge felt compelled to impose the death penalty because of the jury had recommended death to be the appropriate penalty. The Court in *Ross* reiterated that Florida's statutory scheme requires the reasoned judgment of the trial judge to be interposed between the emotions of the jurors and a death sentence. *Id*., at 1197. *See also Delgado v. State*, 162 So.3d 971, 980 (Fla. 2015)(citing *Ross*).[10]

Florida's current death penalty statutory scheme requires a judge to impose a life sentence upon a jury recommendation of life imprisonment. §921.141(3)(a)1, Florida Statutes. However, the statute recognizes the trial judge's authority to impose life imprisonment even with a death recommendation by the jury. §921.141(3)(a)2, Florida Statutes. *See Joseph v. State*, __ So.3d ___, 2022 WL 405557, *16 (Fla., 2/10/22). Thus, it is not enough for a trial judge to rely on a jury's death recommendation and end the analysis on whether or not to impose the

[10] *See Lambrix v. Singletary*, 520 U.S. 518, 525-526, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997)(noting that in Florida a judge has an independent obligation to determine the appropriate punishment).

death penalty. Yet, it appears that this is what the trial judge did in this case. In his conclusion, the trial judge noted

> "The jury in Mr. Cruz's case returned a verdict of death and this court finds the evidence is supportive of the jury's findings and verdicts." (R1. 169).

Determining whether there was sufficient evidence to support the jury's findings on aggravating factors does not fulfill a trial judge's independent obligation to determine the appropriate punishment.[11] What is clearly absent in the order is a reasoned consideration of the relative culpabilities of the defendants (Cruz and Charles) under the standard employed by this Court in numerous opinions and how the death sentence imposed on Defendant was merited despite being patently disparate.

(5)

Relative Culpability

This Court has long considered relative culpability in its analysis of death penalty cases. In *Slater v. State*, 316 So.2d 539 (Fla. 1975), shortly

[11] It should be noted that the same jury which recommended Defendant be sentenced to death is the same jury that found Mr. Cruz actually shot and killed Mr. Jemery despite the fact that there was no competent, substantial evidence to support the jury's special finding. *Cruz v. State, supra*, 320 So.3d at 716-717. Consequently, the jury's erroneous guilt phase findings raise serious doubts about the weight to be accorded to their penalty recommendation.

after the *Furman*[12] decision, this Court had occasion to review a death sentence handed down by the circuit court on a defendant after the triggerman codefendant was sentenced to life imprisonment on a plea to first degree murder. This Court reduced the sentence to life imprisonment. The Court noted:

> "We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same." *Id*., at 542.

Following the *Slater* decision, this Court continued to apply the principle of relative culpability on a regular and systematic basis. *See, e.g*., *Hazen v. State*, 700 So.2d 1207, 1214-1215 (Fla. 1997)(defendant's death sentence vacated due to life sentence imposed on more culpable codefendant); *Puccio v. State*, 701 So.2d 858, 863 (Fla. 1997)(defendant's death sentence vacated in view of non-death sentences of the other equally culpable participants in the crime); *Ray v. State*, 755 So.2d 604, 611-612 (Fla. 2000)(trial court's entry of disparate sentences was error where State sought death penalty for both defendants and trial court's remarks indicated a belief that both defendants were equally culpable for shooting).

---

[12] *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

This Court has narrowed the application of relative culpability over time, noting that a defendant sentenced to death is not entitled to have his sentence vacated where the co-defendant(s) received life imprisonment in the following situations:

-The defendant has been found to be more culpable. *See, e.g., Woods v. State*, 490 So.2d 24, 27 (Fla. 1986); *Downs v. State*, 572 So.2d 895, 901 (Fla. 1990); *Howell v. State*, 707 So.2d 674, 683 (Fla. 1998); *Jennings v. State*, 718 So.2d 144, 154 (Fla. 1998); *Brown v. State*, 721 So.2d 274, 282 (Fla. 1998); *Evans v. State*, 808 So.2d 92, 108-109 (Fla. 2001); *Kormondy v. State*, 845 So.2d 41, 47 (Fla. 2003); *Blake v. State*, 972 So.2d 839, 849-850 (Fla. 2007); *Hunter v. State*, 8 So.3d 1052, 1074 (Fla. 2008); *Victorino v. State*, 23 So.3d 87, 106-107 (Fla. 2009); *Cannon v. State*, 228 So.3d 505, 509-510 (Fla. 2017); *Bargo v. State*, 331 So.3d 653, 665 (Fla. 2021).

-The defendant was the dominating force or actor. *See, e.g., Marek v. State*, 492 So.2d 1055, 1058 (Fla. 1986); *Larzelere v. State*, 676 So.2d 394, 407 (Fla. 1996); *Sexton v. State*, 775 So.2d 923, 935 (Fla. 2000); *Gonzalez v. State*, 136 So.3d 1125, 1165 (Fla. 2014); *Cannon v. State*, 180 So.3d 1023, 1041 (Fla. 2015).

-The codefendant(s) received lesser sentences due to purely legal reasons, such as a lesser jury verdict, age or plea bargaining. *See, e.g., Brown v. State,* 473 So.2d 1260, 1268 (Fla. 1985); *Larzelere v. State*, 676 So.2d 394, 407 (Fla. 1996); *Henyard v. State*, 689 So.2d 239, 254 (Fla. 1996); *Farina v. State*, 801 So.2d 44, 56 (Fla. 2001); *Shere v. Moore*, 830 So.2d 56, 60-61 (Fla. 2002); *Caballero v. State*, 851 So.2d 655, 662-663 (Fla. 2003); *Krawczuk v. State*, 92 So.3d 195, 207 (Fla. 2012); *Jeffries v. State*, 222 So.3d 538, 548 (Fla. 2017); *Walton v. State*, 246 So.3d 246, 252 (Fla. 2018). *See also McCloud v. State*, 208 So.3d 668, 690-693 (Fla. 2016)(Canady, J., dissenting).

This Court is faced with the trial court's crystal-clear finding of equal culpability. In its original order, the trial court grounded its decision imposing the death penalty on Mr. Cruz based on the jury's finding that Defendant had shot and killed the victim. The court specifically distinguished Mr. Cruz and Mr. Charles based on the jury's finding that Cruz was the shooter. When discussing *Enmund-Tison*, the court stated:

> "*The jury found Mr. Cruz to be the individual who shot and killed Mr. Jemery*. In Mr. Charles' case, the State abandoned any efforts to establish Mr. Charles was the shooter. The jury in Mr. Charles' case did not have to make a determination as to who the shooter was because of the State's concession. However, the jury in Mr. Charles' case did find him guilty of both, premediated AND felony murder. Therefore, this court finds that Mr. Cruz in fact killed Mr. Jemery and no further analysis is needed." (R. 3800)(emphasis supplied).

In its Proportionality review, the trial court noted the following:

> "*Mr Charles' trial went exactly the same way as Mr. Cruz's with one exception. One of the jury findings in Mr. Cruz's guilt phase was a determination that Mr. Cruz was the shooter*. Satisfied that Mr. Cruz had been determined to be the actual killer of Mr. Jemery the State conceded and stipulated that Mr. Charles was not the shooter." (R. 3827)(emphasis supplied).

The court also found:

> "With the exception of their finding of a life sentence for Mr. Charles, Mr. Cruz's verdict was identical. That means that two separate juries of twelve people heard the same case and reached almost the same exact conclusion in their verdicts.
>
> *This court is convinced that the only thing that made a difference in Mr. Charles' case and spared him the death penalty was the fact that the State stipulated that he was not the shooter in this case.*
>
> *So in reviewing whether the imposition of a death sentence is appropriate in this case, this court finds that the sentence would not be disproportionate to the co-defendants case*." (R. 3828) (emphasis supplied).

Confronted with this Court's ruling that no competent, substantial evidence supported the jury's special finding that Defendant was the shooter, the trial court in a stunning about-face in its resentencing order announced that "it hasn't' been conclusively established which defendant pulled the trigger on the gun that killed Mr. Jemery," but that "it doesn't matter which person inflicted the injuries," (R1. 136), and that after reanalyzing the case in its totality, "the outcome is not affected by the failure to conclusively establish whether Mr. Cruz, or Mr. Charles pulled the

trigger that ultimately caused Mr. Jemery's death." (R1. 169). The trial court's "reanalysis" does not withstand an objective assessment of the facts and circumstances in this case. It cannot be claimed that Defendant being the shooter justifies disparate treatment at sentencing in its original order and then later claim that it does not matter after all whether Defendant was the shooter in the resentencing order. The facts have remained the same *except* that the crucial finding that Defendant was the shooter was properly rejected by this Court. The "Defendant is the shooter" finding, which formed the basis of the trial court's initial disparate sentencing decision, is no longer viable. Consequently, this Court is now faced with the spectacle of equally culpable defendants being treated unequally, contrary to a host of decisions from this Court.

On this record, the exceptions noted for relative culpability relief ***do not*** apply. Here, the trial court explicitly found that both defendants were equally culpable. The trial court did not make findings that Defendant was the triggerman or was most culpable. The trial court did not find, nor does the record show, that Defendant was the dominating force. The record does not show that codefendant Charles was ineligible for the death penalty as a matter of law. Further, the record does not show that codefendant Charles was convicted on an offense which was not

comparable to Defendant's conviction. Rather, the record shows that both defendants were convicted of the same offenses and were found to have the same aggravating factors. On this record, relative culpability supports an order of this Court vacating Defendant's death sentence.

Pursuant to relative culpability review, this Court may direct that a defendant's death sentence be reduced to life imprisonment where an equally culpable codefendant was sentenced to life imprisonment. *See Slater, supra,* 316 So.2d at 543; *Hazen, supra,* 700 So.2d at 1215; *Puccio, supra,* 701 So.2d at 863; *Ray, supra,* 755 So.2d at 612. This is precisely the situation in this case.

(6)

Lawrence v. State

This Court's decision in *Lawrence v. State*, 308 So.3d 544 (Fla. 2020), did not do away with relative culpability. In *Lawrence*, a post-conviction capital case, this Court held that the conformity clause of the Florida Constitution (Art. I, §17) expressly forecloses the imposition of a comparative proportionality review requirement predicated on the Eighth Amendment. *Id*., at 551. Following the *Lawrence* decision Rule 9.142(a)(5), Florida Rules of Appellate Procedure, was amended and currently provides as follows:

(5) Scope of Review. On direct appeal in death penalty cases, whether or not insufficiency of the evidence is an issue presented for review, the court shall review the issue and, if necessary, remand for the appropriate relief.[13]

There are several reasons why *Lawrence* cannot be read to eliminate this Court's long-standing application of relative culpability in capital case appeals.

(a)

Issues Addressed in Lawrence

Lawrence dealt exclusively with the imposition of a comparative proportionality review requirement predicated on the Eighth Amendment. *Lawrence, supra* at 551. The issue raised by the defendant in *Lawrence*, a post-conviction capital appeal, was that his death sentence was disproportionate *in comparison to other cases* in which the death penalty had been imposed. *Id*. at 548. Relative culpability review was ***not*** addressed or even mentioned in *Lawrence*. It has long been recognized that decisions of this Court should not be considered reversed *sub silentio* as this Court does not intentionally overrule itself *sub silentio*. *See Puryear*

[13] The Rule was amended to eliminate reference to proportionality. *In Re: Amendments to Rule of Appellate Procedure 9.142(A)*, 310 So.3d 19 (Fla. 2021).

v. State, 810 So.2d 901, 905 (Fla. 2002); *F.B. v. State*, 852 So.2d 226, 228-229 (Fla. 2003); *Dorsey v. State*, 868 So.2d 1192, 1199 (Fla. 2003); *Stevens v. State*, 226 So.3d 787, 792 (Fla. 2017); *Miller v. State*, 265 So.3d 457, 459 n.1 (Fla. 2018). Consequently, the long line of cases from this Court which have recognized and applied relative culpability review (*see, supra*) have not been set aside, rendered inapposite or reversed by this Court's decision in *Lawrence*.

(b)

Pulley v. Harris

Lawrence relied on the U.S. Supreme Court's decision in *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), to hold that Florida's conformity clause prohibits application of proportionality review. *Lawrence, supra* at 551. The decision in *Pulley* did not address or rule on relative culpability review. The Court in *Pulley* ruled that comparative proportionality, while providing an additional safeguard against arbitrarily imposed death sentences, was not constitutionally required under the U.S. Constitution. *Id.*, 465 U.S. at 879. This Court's ruling in *Lawrence* was exclusively premised on the *Pulley* decision:

> "When confronted with the issue in *Yacob*, this Court should have held that a judge-made comparative proportionality review

requirement violates art. I, section 17 of the Florida Constitution *in light of the Supreme Court's precedent establishing that comparative proportionality review is not required by the Eighth Amendment. See Pulley 465 U.S. at 50-51, 104 S.Ct. 871*." *Id*., at 550 (emphasis supplied).

As such, neither *Lawrence* nor *Pulley* nor Art. I, 17, Florida Constitution, prohibits application of relative culpability review by this Court.

(c)

No Direct U.S. Supreme Court Opinion on Relative Culpability

While the United States Supreme Court in *Pulley v. Harris, supra*, directly addressed comparative proportionality, there has been no direct U.S. Supreme Court opinion prohibiting relative culpability pursuant to the prohibition against cruel and unusual punishment provided in the Eighth Amendment. As such, Art. I, §17, Florida Constitution (conformity clause) is not implicated nor violated by this Court's relative culpability analysis. This is a logical conclusion because Art. I, §17, Florida Constitution (conformity clause) is specifically limited to decisions of the United States

Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment.[14]

The narrow application of the conformity clause is illustrated by this Court's long-established practice of conducting an independent review of the record for sufficiency of the evidence in death penalty cases, whether or not requested by the defense. An independent obligation to review sufficiency of the evidence is mentioned neither in Art. V, §3(b)(1), Florida Constitution, nor in §921.141(5), Florida Statutes.[15] Yet, in a multitude of cases, this Court has recognized its independent obligation in capital cases to review of the sufficiency of the evidence whether or not requested by the

---

[14] Art. I, §17, Florida Constitution, reads, in pertinent part:

> "Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the legislature. The 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…"

[15] Art. V, §3(b)(1), Florida Constitution, provides that this Court shall hear appeals from final judgments of trial courts imposing the death penalty. Section 921.141(5), Florida Statutes, provides that the judgment of conviction and sentence of death shall be subject to automatic review by this Court. Only Rule 9.142(a)(5), FRAP, provides for review of sufficiency of evidence whether or not insufficiency is an issue presented for review.

defense. *See, e.g., Crain v. State*, 894 So.2d 59, 72 (Fla. 2004); *Salazar v. State*, 991 So.2d 364, 378-379 (Fla. 2008); *Simpson v. State*, 3 So.3d 1135, 1147 (Fla. 2009); *Phillips v. State*, 39 So.3d 296, 308 (Fla. 2010); *Durousseau v. State*, 55 So.3d 543, 559 (Fla. 2011); *Hampton v. State*, 103 So.3d 98, 114 (Fla. 2012); *Cannon v. State*, 180 So.3d 1023, 1038 (Fla. 2015); *Lebron v. State*, 232 So.3d 942, 956 (Fla. 2017); *Guzman v. State*, 238 So.3d 146, 156 (Fla. 2018); *Craven v. State*, 310 So.3d 891, 907 (Fla. 2020).

This obligation of independent sufficiency review survives the *Lawrence* opinion. *See* Rule 9.142(a)(5), Florida Rules of Appellate Procedure (as amended in *In Re: Amendments to Rule of Appellate Procedure 9.142(A)*, 310 So.3d 19 (Fla. 2021)). This Court has applied this independent obligation to review for sufficiency in cases subsequent to *Lawrence*, including the present case. *See Cruz v. State*, 320 So.3d 695, 731 (Fla. 2021)(citing Rule 9.142(a)(5) and *Davis v. State*, 2 So.3d 952, 966-967 (Fla. 2008)). *See also Colley v. State*, 310 So.3d 2, 19 (Fla. 2020); *Allen v. State*, 322 So.3d 589, 603 (Fla. 2021); *Joseph v. State*, __ So.3d ___, 2022 WL 405557, *18 (Fla., 2/10/22).

The continued use of independent sufficiency review by this Court makes sense because it does not implicate the narrow focus of the

conformity clause in Art. I, §17, Florida Constitution. By the same token, relative culpability review survives the *Lawrence* opinion because such review likewise does not implicate the conformity clause in Art. I, §17.

(7)

Legal Authority for Application of Relative Culpability

(a)

Most Aggravated/Least Mitigated Murders

The law reserves the death penalty only for the *most* aggravated and *least* mitigated murders. *See Roper v. Simmons*, 543 U.S. 551, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)(capital punishment limited to offenders who commit a narrow category of most serious offenses and whose extreme culpability makes them most deserving of execution); *Atkins v. Virginia*, 536 U.S. 304, 319, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)(only the most deserving of execution to be put to death); *Sexton v. State*, 775 So.2d 923, 935 (Fla. 2000)(death penalty reserved for the most aggravated and unmitigated of most serious crimes); *Shere v. Moore*, 830 So.2d 56, 60 (Fla. 2002)(same). Under this principle, a defendant should not be sentenced to death where an equally culpable co-defendant, found guilty of the same offenses and found to have the same aggravating factors, was sentenced to life imprisonment by the same judge. Permitting such an

anomaly undermines this precept because while one individual qualifies as most deserving of execution, and is sentenced accordingly, another individual in the same case who is equally guilty and whose case is equally aggravated is spared execution.

(b)

Assessment of Culpability

The imposition of capital punishment requires an assessment of an individual's culpability. *Tuilaepa v. California*, 512 U.S. 967, 973, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994). The individual level of criminal responsibility of someone convicted of murder may vary according to the extent of that individual's participation in the crime. *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987); *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). Clearly, if an individual's culpability can be measured by his participation in a particular homicide in the context of the actions of his codefendants, the application of relative culpability review by this Court is an altogether legal and proper review which does not violate either the Federal or Florida Constitutions. On the contrary, relative culpability review complements the constitutional requirement of assessing an individual's culpability.

Further, subject to the overriding provisions of the United States Constitution in capital cases, as interpreted by the United States Supreme Court, the States are free to choose substantive factors relevant to the penalty determination. *See California v. Ramos*, 463 U.S. 992, 1001, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983). Within those constitutional limitations,[16] the States have traditional latitude to prescribe the method by which those who commit murder shall be punished. *Blystone v. Pennsylvania*, 494 U.S. 299, 309, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990). In Florida, this Court has applied relative culpability review in cases with two or more defendants. The Federal Constitution does not bar or prohibit this Court's relative culpability review as it is a proper function of the State's assessment on punishment for those who commit capital murder.

---

[16] Such limitations include the need for the States to establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold [*Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)], the requirement that the States refrain from imposing the death penalty on certain categories of defendants [*Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977); *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986); *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); *Roper v. Simmons*, 543 U.S. 551, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)], and the rule that the State's may not limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. [*Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)].

(c)

Due Process and Equal Protection

Art. I, §2, Florida Constitution, provides that all natural persons are equal before the law. Art. I, §9, Florida Constitution, provides that no person shall be deprived of life, liberty or property without due process of law. The Fifth Amendment, United States Constitution, provides that no person shall be deprived of life, liberty or property without due process of law. Fourteenth Amendment, Section 1, United States Constitution, provides that no State shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Defendant asserts that the unequal treatment of equally culpable defendants in a capital case violates equal protection under the U.S. and Florida Constitutions. This is not a new proposition. In *Hoffman v. State*, 474 So.2d 1178 (Fla. 1985), the defendant challenged his death sentence on equal protection grounds where the co-defendants received consecutive sentences of life imprisonment for their roles. This Court did not reject this claim on the basis that equal protection of the law did not apply. Rather, this Court distinguished *Slater v. State*, 316 So.2d 539 (Fla. 1975), on which the defendant relied, noting that it is permissible to impose different

sentences on capital defendants whose degrees of participation and culpability are different from one another *Id*. at 1182. *See also Steinhorst v. Singletary*, 638 So.2d 33, 35 (Fla. 1994)(when codefendants are not equally culpable, the death sentence of the more culpable codefendant is not *unequal justice* when another codefendant receives a life sentence)(emphasis supplied); *Slater v. State, supra*, 316 So.2d at 542 (Fla. 1975)(system of justice requires "equality before the law"). The Court in *Lawrence* did not address equal protection, but rather, focused on the cruel and unusual punishment limitation under the conformity clause of Art. I, §17, Florida Constitution. In contrast, equal protection in the Florida Constitution is not constrained by a corresponding conformity clause. Defendant maintains that in the present case the trial court violated equal protection when it sentenced Defendant to death while sentencing the codefendant Charles to a life sentence even though it made a finding that both defendants were "equally culpable."

Likewise, Defendant asserts that the unequal treatment of equally culpable defendants in a capital case violates due process under both the U.S. and Florida Constitutions. While this Court in *Lawrence* addressed due process regarding comparative proportionality, it did so exclusively in the context of the 8th Amendment's Cruel and Unusual Punishment Clause

application to the States under the 14th Amendment, which, in turn, implicated the expressly limiting authority granted to this Court under Art. I, §17, Florida Constitution. *Lawrence, supra* at 550 (quoting *Yacob v. State*,136 So.3d 539, 562 (Fla. 2014)(Canady, J., dissenting)). In contrast, due process in the Florida Constitution is not constrained by a corresponding conformity clause. Defendant maintains that protection from a demonstrably disparate sentence of death is afforded under Art. I, §9, Florida Constitution, and the 5th and 14th Amendments, United States Constitution, and deprivation of such protection is unconstitutional because it violates his life and liberty interests without due process. This is so because the entire purpose of the Due Process Clause is to prevent arbitrary deprivations of liberty or property. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 434, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994). In this case, the trial court's reanalysis of the case on remand laid out a pure case of equal culpability, and yet the court inexplicably reached a conclusion that Defendant's death sentence was proper despite Charles' life sentence. The trial court's arbitrary decision, shorn of any reasoned judgment justifying disparate treatment, deprived Defendant of the life and liberty protections guaranteed under due process. In sum, both equal protection

and due process support application of relative culpability review for the reasons stated.

Because no conformity clause, such as the one incorporated in Art. 1, §17, Florida Constitution, constrains or limits Florida's equal protection and due process sections, this Court is free to interpret state constitutional provisions according greater protection to individual rights than do similar provisions in the U.S. Constitution. *Arizona v. Evans*, 514 U.S. 1, 8, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995)(state courts absolutely free to interpret state constitutional provisions to accord greater protection). This principle has been applied by this Court in *Traylor v. State*, 596 So.2d 957 (1992). In *Traylor*, this Court noted:

> "Federal and state bills of rights thus serve distinct but complementary purposes…[W]hen called upon to construe their bills of rights, state courts should focus primarily on factors that inhere in their own unique state experience, such as the express language of the constitutional provision, its formative history, both preexisting and developing state law, evolving customs, traditions and attitudes within the state, the state's own general history, and finally any external influences that may have shaped state law.
>
> When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein. We are similarly bound under our Declaration of Rights to construe each provision freely in order to achieve the primary goal of individual freedom and autonomy. *Id*., at 962-963

In *Traylor*, this Court ruled that Art. I, §2, Florida Constitution, the equal protection clause, when read in conjunction with that Art. I, §16, Florida Constitution, encompasses the right of an indigent defendant to assistance of court-appointed counsel. *Id*., at 969. The Court noted: "[N]owhere is the right to equality in treatment more important than in the context of a criminal trial, for only here can a defendant be deprived by the state of life and liberty." *Id*. *See also Haliburton v. State,* 514 So.2d 1088, 1089-1090 (Fla. 1987)(police failure to notify defendant that an attorney was present and requesting to see him a violation of the State's due process clause); *Kelly v. State*, 999 So.2d 1029, 1041 (Fla. 2008)(Florida provides broader right to counsel under Art. I, §16, of state constitution than that provided by the federal courts under the 6th Amendment); *State v. Hoggins*, 718 So.2d 761, 770 (Fla. 1998)(holding that an accused's right to remain silent under Art. I, §9, Florida Constitution, precluded the use of post-arrest, pre-*Miranda* silence to impeach a defendant's testimony even though Federal Due Process clause permitted such a use); *State v. Horwitz*, 191 So.3d 429, 439 (Fla. 2016)(privilege against self-incrimination in Art. I, §9, Florida Constitution, offers more protection than the right provided in the 5th Amendment); *State v. McAdams*, 193 So.3d 824, 832

(Fla. 2016)(State due process clause requires that police notify an individual being questioned of attorney's presence and purpose).[17]

Defendant maintains that this Court's application of relative culpability comports with the state constitutional provisions regarding due process and equal protection. As this Court noted in *Traylor*, interpretation of the state constitution relies, in part, on the State's own unique experience, such as preexisting and developing state law. This Court's application of relative culpability review represents a long and clear line of authority employed to secure the fundamental rights of those facing sentence for capital murder.

(d)

Independent Supreme Court Review

As stated previously, this Court has a long-established practice of conducting an independent review of the record for sufficiency of the evidence in death penalty cases, whether or not requested by the defense. This obligation of independent sufficiency review survives the *Lawrence* opinion. *See* Rule 9.142(a)(5), Florida Rules of Appellate Procedure (as amended in *In Re: Amendments to Rule of Appellate Procedure 9.142(A)*, 310 So.3d 19 (Fla. 2021)). This Court has applied this independent

[17] The Court in *Horwitz* specifically distinguished the impact of the conformity clauses of Art. I, §§12 and 17, Florida Constitution, which require conformity with federal law. *Horwitz, supra* at 438 n. 3.

obligation to review for sufficiency in cases subsequent to *Lawrence*, including the present case*. See Cruz v. State*, *supra*, 320 So.3d at 731; *Colley v. State*, *supra*, 310 So.3d at 19 (Fla. 2020); *Allen v. State*, *supra*, 322 So.3d at 603. This review has been interpreted as one that requires a review of the record to determine the sufficiency of the evidence to support a finding of guilt for first-degree murder. *Colley v. State*, *supra*, 310 So.3d at 19; *Allen v. State*, *supra*, 322 So.3d at 603. This review also entails a review of the record to assess whether the death penalty was proper. *See, e.g., Aldridge v. State*, 351 So.2d 942, 944 n. 4 (Fla. 1977)(the fact that no mitigating circumstances were presented and defendant requested imposition of the death penalty has no bearing on court's independent duty to review the record in every case in which the death penalty is imposed). *See also Swan v. State*, 322 So.2d 485, 489 (Fla. 1975)(specific duty to consider the record in order to assure compliance with *Furman*); *Melendez v. State*, 498 So.2d 1258, 1262 (Fla. 1986)(Barkett, J., concurring)(citing *Aldridge* and *Swan*). Relative culpability review properly forms part of this Court's independent obligation to review the *entire record* in capital cases. This naturally and logically arises from the need for meaningful appellate review in capital cases. *See Holmes v. State*, *supra*, 374 So.2d at 950(primary purpose of requiring written findings is to provide an

opportunity for "meaningful review" and to show the sentence was imposed as a result of "reasoned judgment"); *Morgan v. State*, *supra*, 453 So.2d at 397(trial judge's findings in regard to death penalty should be of "unmistakable clarity" so that proper review can be accomplished without speculation); *Fennie v. State*, *supra*, 855 So.2d at 608(trial court has obligation to consider unique circumstances surrounding each capital case and each individual defendant which will facilitate "meaningful review" of capital cases). Relative culpability review is also grounded on the recognition that "death is different" and the need for heightened reliability.

(8)

Stare Decisis

This Court should adhere to the doctrine of *stare decisis* and not recede from the application of relative culpability. *Stare decisis* is a fundamental principle of Florida law. *State v. Dwyer*, 332 So.2d 333, 335 (Fla. 1976). This Court adheres to the doctrine of *stare decisis*. *See Puryear v. State*, 810 So.2d 901, 904-905 (Fla. 2002)(citing *Muhammad v. State*, 782 So.2d 343, 365 n. 16 (Fla. 2001) and *Tyson v. Mattair*, 8 Fla. 107, 124 (1858)). In *Brown v. Nagelhout*, 84 So.3d 304, 309 (Fla. 2012), this Court noted:

> "In Florida, `the presumption in favor of *stare decisis* is strong.' *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So.2d

612, 637-38 (Fla. 2003). *Stare decisis* `provides stability to the law and to the society governed by that law.' *Rotemi Realty, Inc. v. Act Realty Co.*, 911 So.2d 1181, 1188 (Fla. 2005)(quoting *State v. Gray*, 654 So.2d 552, 554 (Fla. 1995)). `Our adherence to *stare decisis*, however, is not unwavering. The doctrine of *stare decisis* bends where the adoption of the legal rule or where there has been an error in legal analysis.' *Puryear v. State*, 810 So.2d 901, 905 (Fla. 2002)(citation omitted)." *See also Dorsey v. State*, 868 So.2d 1192, 1199 (Fla. 2003).

The Court in *Brown* made clear that *stare decisis* does not yield based on a conclusion that a precedent is merely erroneous. The gravity of the error and the impact of departing from precedent must be carefully assessed. *Id*., at 309. *See also Robertson v. State*, 143 So.3d 907, 910 (Fla. 2014). *Stare decisis* provides stability to the law and to society governed by that law. *State v. Gray*, 654 So.2d 552, 554 (Fla. 1995).[18]

In *Lawrence v. State*, 308 So.3d 544 (Fla. 2020), this Court recognized that when this Court is bound by a higher legal authority, whether it be a constitutional provision, a statute or a decision of the Supreme Court, the law must be applied correctly to the case. The Court also noted that when it is convinced that a precedent clearly conflicts with the law the court is sworn to uphold the precedent normally yields. *Id*., at

[18] *Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. *See Vasquez v. Hillery*, 474 U.S. 254, 265-266, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986).

551-552 (quoting *State v. Poole*, 297 So.3d 487, 507 (Fla. 2020)). The decision in *Lawrence*, of course, was governed by the U.S. Supreme Court decision in *Pulley v. Harris, supra*, which found that the Eighth Amendment did not mandate comparative proportionality review. No such direct precedent from a higher legal authority exists in this case regarding relative culpability. Relative culpability review is neither unsound in principle nor unworkable in practice as has been demonstrated in numerous opinions of this Court over decades. As such, there is no basis to recede from this Court's long line of precedents applying relative culpability review.

CONCLUSION

Christian Cruz respectfully requests that this Honorable Court vacate his death sentence and direct entry of a sentence of life imprisonment.

Respectfully submitted,

J. RAFAEL RODRÍGUEZ
Specially Appointed Public
Defender for Christian Cruz
LAW OFFICES OF
J. RAFAEL RODRIGUEZ
6367 Bird Road
Miami, FL 33155
(305) 667-4445
(305) 667-4118 (FAX)
jrafrod@bellsouth.net

By: *s/ J. Rafael Rodríguez*
J. RAFAEL RODRÍGUEZ
FLA. BAR NO. 302007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing initial brief was electronically filed with the Clerk of Court, and that a true and correct copy of the foregoing initial brief was mailed to Christian Cruz, #D51268, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083, and electronically furnished via e-portal to Patrick A. Bobek, Esq., Office of the Attorney General, at email address CapApp@myfloridalegal.com, on this 24th day of May, 2022.

s/ J. Rafael Rodríguez
J. RAFAEL RODRÍGUEZ

CERTIFICATE OF COMPLIANCE

Appellant states that the size and style of type used in his initial brief is Arial 14-point font and the word count is 16,700 words in accordance with Rules 9.045 and 9.210, Florida Rules of Appellate Procedure and the exemptions listed therein.

s/ J. Rafael Rodríguez
J. RAFAEL RODRÍGUEZ