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**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

**********

# REPLY BRIEF OF APPELLANT

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## 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], "T" will designate the trial transcripts and “AB” will designate the Appellee’s Brief.

## 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 State restated the issue on appeal, making the sweeping proposition that this Court should abandon its relative culpability analysis as it violates the State Constitution’s Conformity Clause and since the U.S. Supreme Court has already provided guidance in assessing culpability of codefendants with the *Enmund-Tison* analysis. (AB, p. 51).

The State's argument seeking abandonment of this Court's relative culpability analysis was not properly preserved for this Court's review. When this matter was remanded for entry of a new sentencing order, the circuit court informed the parties that in his view this Court's order simply asked him "to reconsider the death penalty based on the absence of the outcome of the codefendant's trial." (R1. 218). Defense counsel agreed that it appeared to be a matter of the court to reevaluate and issue a new sentencing order. (R1. 218). The prosecutor agreed. (R1. 219). Thereafter, the defense filed a memorandum in support of a life sentence. (R1. 115-116). The prosecution did not file any memorandum and made no argument below that relative culpability was no longer viable in view of this Court's decision in *Lawrence v. State*, 308 So.3d 544 (Fla. 2020). The circuit court proceeded to enter its new sentencing order, which addressed relative culpability. It is clear from the foregoing that the State did not properly preserve its current argument that relative culpability violates the Conformity Clause [Art. I, §17, Florida Constitution]. *See Harrell v. State*, 894 So.2d 935, 940 (Fla. 2005)(stating requirements for proper preservation).

Even if this Court determines the claim that relative culpability violates the conformity clause was properly preserved for review, the

arguments advanced by the State are unfounded. Notably, the State does not challenge the court's finding that the defendants were equally culpable. Such a challenge would fail, in any event, in view of the court's clear findings. The trial court made the following salient findings of equal culpability: The trials were conducted in "identical fashion" (R1. 120), the State sought death against Charles on the "same identical charges" as Mr. Cruz (R1. 121), the Charles jury heard "virtually the same case" (R1. 121), Charles was found guilty as charged, the juries in both cases "reached exactly the same verdicts" (R1. 121), both defendants "acted in concert" (R1. 141), the defendants appeared to have "equal footing" in the commission of the crimes (R1. 141), both defendants "participated equally" in the crimes (R1. 141), "culpability lies equally" on both defendants (R1. 142), the actions of both defendants weighed "equally in culpability" (R1. 142), and "[B]oth defendants are equally culpable in this court's eyes." (R1. 169). Further, the record also shows the jury in co-defendant Charles' case found exactly the same aggravating circumstances as the jury in Mr. Cruz's case. (R. 3918-3924).[1]

[1] The trial court's determination regarding the relative culpabilities of codefendants is a finding of fact which should not be disturbed on appeal if it is 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

Rather than challenging the defendants' equal culpability, the State maintains the equal culpability analysis is no longer viable after *Lawrence*. The State claims that this Court, as "part of the old comparative proportionality review," would also perform a relative culpability analysis in cases with multiple defendants. The State acknowledges that relative culpability analysis holds that equally culpable codefendants should be treated alike in capital sentencing and receive equal punishment. (AB, p. 51)(quoting *Shere v. Moore*, 830 So.2d 56, 60 (Fla. 2002)). The State maintains that "just as" comparative proportionality violated the state's excessive punishment provision, article 1, Section 17, requiring conformity with the U.S. Supreme Court precedent on Eighth Amendment protections, "so too does relative culpability." (AB, p. 51). The State's assertion claiming that relative culpability analysis violates the state's conformity clause is without merit. The State relies on this Court's decision in *Lawrence*, which held that comparative proportionality review violates the conformity clause. The State declares that when this Court receded from comparative proportionality review "it also receded" from its relative

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(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).

culpability precedent. (AB, p. 54). The Court in *Lawrence* did no such thing. The State's argument that the proportionality addressed in *Lawrence* encompassed relative culpability is baseless.

The State's reading of *Lawrence* disregards several important points. *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*** even mentioned in *Lawrence*. The State does not address the long line of cases from this Court recognizing the principle that decisions of this Court should not be considered reversed *sub silentio* as this Court does not intentionally overrule itself *sub silentio*. *See Puryear 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). Relative culpability review was not set aside, rendered inapposite or reversed *sub silentio* by this Court's decision in *Lawrence*.

Moreover, the State disregards the basis of the *Lawrence* decision. The Court in *Lawrence* concluded that Art. I, §17, Florida Constitution [conformity clause], required doing away with comparative proportionality because there was a United States Supreme Court's opinion directly on point. The conformity clause, by its own terms, provides that

> "…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…" (emphasis supplied)

Specifically, *Lawrence* relied on *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). *Lawrence, supra* at 548, 550, and 551. However, the decision in *Pulley* did not rule on, discuss or mention relative culpability review. The State points to no language in *Pulley* which addressed the constitutionality or legality of relative culpability review.[2] In this respect, the State does not even acknowledge that Art. I, §17, Florida Constitution, is limited by its own language to decisions of the United States Supreme Court. 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.

[2] Surprisingly, given the central importance of the *Pulley* decision on the present issue, the State cites to *Pulley* only once in its brief. (AB, p. 54).

Constitution. *Id.*, 465 U.S. at 879. *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).

This clear statement by the Court in *Lawrence* cannot be ignored. Rather, this Court reached its decision *precisely* because there was a decision of U.S. Supreme Court on *directly on point*. As such, neither *Lawrence* nor *Pulley* nor Art. I, 17, Florida Constitution, prohibits application of relative culpability review by this Court.

Relative culpability review stands separate and apart from comparative proportionality review as it addresses a unique circumstance of the case being adjudicated, not a comparison with other, unrelated capital cases. Comparative proportionality review, as interpreted previously by this Court, required an analysis of other capital cases in order to ascertain the propriety of the death penalty. *See, e.g., Simmons v. State,* 934 So.2d 1100, 1122 (Fla. 2006). By contrast, relative culpability in a capital case deals with the very same case stemming from the very same facts. And, in this case, the very same aggravating factors.

The importance of direct precedent on point cannot be understated. The State makes no mention of the specific interpretation this Court employs in conformity clause cases. For example, this Court's interpretation of the Florida Constitution's other conformity clause, Art. I, §12, Florida Constitution, which became effective in 1983[3], is determinative on the proper analysis to be used when confronting the effect of decisions by the U.S. Supreme Court. In *Bernie v. State*, 564 So.2d 988 (Fla. 1988), this Court ruled that Florida courts were bound to follow the interpretations of the United States Supreme Court with relation to the fourth amendment, as well as prospective decisions of that Court. *Id*., at 991-992. However, in *Soca v. State*, 673 So.2d 24, 26 (Fla. 1996), this Court ruled:

> "…in the absence of a controlling U.S. Supreme Court decision, Florida courts are still `free to provide its citizens with a higher

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[3] Searches and Seizures. --- The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence obtained. *This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.* (emphasis supplied)

> standard of protection from governmental intrusion than that afforded by the Federal Constitution.' *State v. Lavazzoli*, 434 So.2d 321, 323 (Fla. 1983); see also *Traylor v. State*, 596 So.2d 957, 961 (Fla. 1992) (affirming the rule of primacy of Florida's constitution)."

The Court in *Soca* further ruled that "when the United States Supreme Court has not previously addressed a particular search and seizure issue which comes before us for review, *we will look to our own precedent for guidance*." *Id*., at 27 (emphasis supplied). The Court concluded that there was no U.S. Supreme Court **on point** to overrule its holding in *Grubbs v. State*, 373 So.2d 905 (Fla. 1979). *Id*. The Court noted the U.S. Supreme Court had not specifically decided the issue in this case and it rejected the State's argument that *Grubbs* had been overruled under the conformity clause amendment to Art. I, §12, Florida Constitution. *Id*.

Similarly, in *Smallwood v. State*, 113 So.3d 724 (Fla. 2013), this Court considered whether a prior U.S. Supreme Court decision on search and seizure was controlling under the conformity clause of Art. I, §12, Florida Constitution. This Court further refined the proper conformity clause analysis. The Court quoted its prior decision in *State v. Daniel*, 665 So.2d 1040 (Fla. 1995), *receded from on other grounds*, *Holland v. State*, 696 So.2d 757, 760 (Fla. 1997), where the Court explained that "[a]ny Supreme Court pronouncement *factually and legally* on point with the present case [will] automatically modify the law of Florida to the extent of

any inconsistency. 665 So.2d at 1047 n.10 (emphasis supplied)." *Smallwood, supra* at 730. This Court in *Smallwood* concluded the U.S. Supreme Court's decision in *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.E.d2d 427 (1973), was not factually and legally on point with the circumstances of the instant case. *Smallwood, supra* at 730. Indeed, a unanimous Court recently used the term "materially indistinguishable" when considering issues ruled on by the U.S. Supreme Court in Art. I, §12, conformity clause cases. *McGraw v. State*, 289 So.3d 836, 837 (Fla. 2019). The Court considered whether the case fell "squarely within the rule" announced in the pertinent U.S. Supreme Court decision. *Id*., at 839.

The decision in *Pulley,* 465 U.S. 37, *supra*, is not factually and legally on point, and does not make the relative culpability analysis used by this Court a violation of the conformity clause. Art. I, §17, Florida Constitution. In *Pulley*, the defendant appealed on grounds that the California Supreme Court failed to compare Harris's sentence with sentences imposed in similar capital cases and thereby to determine whether they were proportionate. *Id*., 465 U.S. at 39. The Court explained that Harris's request for proportionality review purports to inquire whether the penalty is unacceptable in a particular case because it is disproportionate to the

punishment imposed on others convicted of the same crime. The precise issue, as stated by the Court, was whether the Eighth Amendment requires a state appellate court, before it affirms a death sentence, *to compare the sentence in the case before it with penalties imposed in similar cases* if requested to do so by the prisoner. *Id.*, 465 U.S. at 43-44 (emphasis supplied). The Court concluded that its prior precedents did not establish this type of proportionality review as a constitutional requirement. *Id.*, at 45. In *Pulley*, therefore, the Court held that proportionality review requiring comparison of a sentence with penalties imposed in similar cases was not mandated by the Eighth Amendment. There is no language in *Pulley* which speaks to, let alone dismisses, the type of relative culpability analysis used by this Court since at least 1975. *See Slater v. State*, 316 So.2d 539 (Fla. 1975). Rather, the Court in *Pulley* solely discussed cross-case comparisons. The issues are, therefore, not materially indistinguishable. This Court in *Lawrence* relied on the *Pulley* opinion to reach its decision finding comparative proportionality review unauthorized under the conformity clause. There is no basis to extend the reach of *Lawrence* under the conformity clause to dispense with relative culpability.

The State argues that relative culpability is “similarly situated” to comparative proportionality review and that when this Court receded from

comparative proportionality review it also receded from its relative culpability review. (AB, p. 54). The State avers that relative culpability is merely an aspect of comparative proportionality review and is, therefore, covered by the *Lawrence* decision. (AB, pp. 54-55). This argument disregards the entire line of *sub silentio* decisions of this Court as previously noted. Further, the State's proposed "similarly situated" conformity clause "test" runs completely counter to this Court's extended jurisprudence on the need for a U.S. Supreme Court decision to be factually and legally on point with the circumstances of the case under review. The State's argument should be soundly rejected.

The State cites to a footnote in Justice Canady's opinion, concurring in part and dissenting in part, in *McCloud v. State,* 208 So.2d 668, 693 n.6 (Fla. 2016)(Canady, J., concurring in part and dissenting in part) to support its argument that relative culpability is part of comparative proportionality review. In his opinion, however, Justice Canady's main point was that the Court erred in its relative culpability analysis because all the codefendants were either convicted of a lesser degree of murder or otherwise ineligible for the death penalty. *Id*., at 690. There was no mention of the conformity clause test employed by this Court nor any consideration of the unique inquiry used in relative culpability analysis. The Court in *Lawrence* did not

express any views on relative culpability as mentioned in footnote 6 in *McCloud* for good reason; the issue was not discussed in *Pulley, supra*. Additionally, the State cites to *Kormondy v. State*, 845 So.2d 41, 47 (Fla. 2003). While *Kormondy* mentioned that relative culpability was part of its proportionality review it did so briefly before treating the issues separately. This Court has always given separate consideration to relative culpability as a distinct issue. This is properly so because the two inquiries address different issues. In fact, some cases have placed them in different categories. *See, e.g., Gonzalez v. State*, 136 So.3d 1125, 1164-1165 (Fla. 2014)(disparate treatment discussed as non-statutory mitigator and not under comparative proportionality); *Jennings v. State*, 718 So.2d 144, 153-154 (Fla. 1998)(disparate sentence category not under proportionality category); *Caballero v. State*, 851 So.2d 655, 662-663 (Fla. 2003)(separate categories).

Nearly forty years ago, this Court in *Palmes v. Wainwright*, 460 So.2d 362 (Fla. 1984), made clear that proportionality review and relative culpability are entirely separate matters. The Court considered a death row defendant's petition for writ of habeas corpus and an appeal of the denial of his motion to set aside judgment and sentence. The defendant maintained that the State's chief witness was immunized from prosecution and, as

such, he was subjected to disparity of treatment of an equally guilty accomplice as to violate the principle of proportionality. This Court ruled as follows:

> "Petitioner's argument misapprehends the function of proportionality review. Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved. ***Disparate treatment of accomplices which may be a ground for mitigation is an entirely separate matter***. Prosecutorial discretion in granting of immunity for the purpose of investigating and obtaining testimony about crimes does not render death sentences imposed on convicted persons arbitrary." *Id*., at 364 (emphasis supplied).

When considering a U.S. Supreme Court decision under the conformity clause this Court first ascertains whether the U.S. Supreme Court has not previously addressed an issue which comes before the Florida Supreme Court for review. If not, "we will look to our own precedent for guidance." *Soca, supra*, at 27. The U.S. Supreme Court decision must be "on point." *Id.* That is, the U.S. Supreme Court decision must be factually and legally on point. *Smallwood*, *supra,* at 730. *See also State v. Scarlet*, 800 So.2d 220 (Fla. 2001) (rejecting argument that decision of U.S. Supreme Court regarding applicability of parole revocation hearings are equally applicable to probation revocation hearings); *State v. Rolling*, 695 So.2d 278, 292 n.10 (Fla. 1997)(…"when the United States Supreme Court has not previously addressed a particular search and seizure issue which

comes before us for review, we are free to look to our own precedent for guidance.").[4] The same analysis applies to evaluating the conformity clause of Art. I, §17, Florida Constitution, when reviewing Eighth Amendment decisions from the U.S. Supreme Court. Where there is no binding U.S. Supreme Court case on point, this Court continues to interpret the cruel and unusual clause of Florida's constitution. *See, e.g., Lambrix v. State*, 217 So.3d 977, 988 (Fla. 2017)(defendant's Eighth Amendment totality of punishment claim rejected on State court precedent); *Stephens v. State*, 975 So.2d 405, 427 (Fla. 2007)(defendant's claim that application of death penalty is cruel and unusual because he suffers from brain damage, mental impairment and has mental and emotional age of less than 18 based rejected on Florida precedent).[5]

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[4] The State argues that because the U.S. Supreme Court has never held that a defendant must receive a life sentence when an equally culpable codefendant also receives a life sentence this Court should recede from applying relative culpability. (AB, p. 56). This argument has it completely backward. In conformity clause interpretation cases, this Court is guided by a U.S. Supreme Court opinion directly on point. An opinion of the U.S. Supreme Court which does not exist cannot, by definition, qualify as a decision under the conformity clause of Art. I, §17, Florida Constitution.

[5] *Compare State v. Poole*, 297 So.3d 487, 505 (Fla. 2020)(binding Supreme Court precedent in *Spaziano v. Florida*, 468 U.S. 447, 464-465 (1984), holds Eighth Amendment does not require a jury's favorable recommendation before a death penalty can be imposed so the same is true of article 1, section 17).

The State cites to several federal circuit court opinions arguing that federal circuit courts have held the relative culpability analysis is not constitutionally mandated under the Eighth Amendment. (AB, pp. 61-62). These cases, while interesting, are not binding in any conformity clause analysis. This Court in *Smallwood, supra*, interpreted the conformity clause of Art. I, §12, Florida Constitution, and ruled: "Article I, Section 12 only references decisions of the United States Supreme Court; therefore, *the conformity clause does not apply with regard to decisions of other federal courts*." *Id*., at 730 (emphasis supplied). *See also State v. Cross*, 487 So.2d 1056, 1057-1058 (Fla. 1986)(emphasizing only decisions of U.S. Supreme Court are binding in conformity clause cases under Art. I, Section 12).[6]

[6] In any event, the federal circuit cases cited by the State do not undermine Florida's relative culpability analysis as they are factually and legally distinguishable. For example, in *Beardslee v. Woodford*, 358 F.3d 560 (9th 2004), the Ninth Circuit distinguished, rather than rejected, Florida's relative culpability analysis as announced in *Slater v. State*, 316 So.2d 539 (Fla. 1975), noting that the facts in *Slater* were far different from those before it. *Id*., 358 F.3d at 580. In *Getsy v. Mitchell*, 495 F.3d 295, 304 (6th Cir. 2007), the defendants were not even convicted on the same counts. *United States v. Lee*, 374 F.3d 637, 653 (8th Cir. 2004), dealt with an interpretation of the Federal Death Penalty Act. The court in *Meyer v. Branker*, 506 F.3d 358, 375 (4th Cir. 2007), ruled on an evidentiary issue regarding admission of a co-perpetrator's life sentence. The court in *Brogdon v. Blackburn*, 790 F.2d 1164, 1170 (5th Cir. 1986), concerned application of Louisiana's comparative review process. In *Bush v. Singletary*, 99 F.3d 373, 375 (11th Cir. 1996), Florida had already conducted its proportionality review and rejected the defendant's claim.

The State cites to several state court decisions from other jurisdictions in support of its argument. (AB, p. 63). These decisions, likewise, have no binding effect under the conformity clause.[7]

This Court should look to its own precedent for guidance. *Soca, supra,* 673 So.2d, at 27; *Rolling, supra*, 695 So.2d. at, 292 n.10. This Court has consistently held that a relative culpability analysis comports with the Florida law. There is nothing in either *Lawrence* or *Pulley* which undermines such analysis. 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

[7] Moreover, the cases cited by the State are factually and legally distinguishable. In *People v. Caballero*, 794 N.E.2d 251, 206 Ill. 65, 93 (2002), the Illinois Supreme Court rejected the argument that a defendant is eligible for the death sentence only if he was more culpable than his codefendant. The Court accepted that the codefendants' relative culpability was one factor to be considered. *Id*., 206 Ill.2d at 92-93. In *Postelle v. State*, 267 P.3d 114 (Okla. 2011), the Oklahoma Court of Criminal Appeals noted that there was a basis for the defendant's jury to find him more culpable than his co-defendants. In *People v. Maciel*, 304 P.3d 983, 150 Cal.Rptr.3d 305, 57 Cal.4th 482 (2013), the California Supreme Court dealt with the issue on jury instructions regarding the sentences and immunities granted to co-perpetrators. *Id*., at 57 Cal.4th 549.

case who is equally guilty and whose case is equally aggravated is spared execution.

The State cites to passages from *Lawrence* which address the fact that comparative proportionality review is not mentioned in Florida's death penalty statute or in the provisions granting this Court exclusive jurisdiction over death penalty cases. (AB, p. 52-53). The State attempts to equate the same rationale to relative culpability, noting it is "similarly situated." (AB, p. 54). Of course, this argument is unavailing since *Lawrence* relied on a direct decision of the U.S. Supreme Court regarding proportionality review, which governed this Court's conclusion that such review was prohibited by the conformity clause. No such direct decision applies in this case. Further, no statute, rule or constitutional provision prohibits relative culpability review. This Court has had no difficulties in applying relative culpability for the past half-century.

The State argues relative culpability analysis is faulty because it does not take into account mitigation. The State points out that two different juries heard two different mitigation presentations about different individuals and, as such, the relative culpability analysis does not assess an individual's unique circumstances. The State claims that the *Enmund-Tison* analysis allows for individualized sentencing. (AB, pp. 59-61). In its

argument, the State ignores the *facts of this case*. Two different juries did reach different verdicts, however, Cruz's jury reached a conclusion that Cruz was the shooter, thereby foreclosing any feasible mitigation argument that he merited life imprisonment. This Court ruled there was no competent, substantial evidence to support the jury's finding that Cruz was the shooter. *Cruz v. State*, 320 So.3d 695, 716-717 (Fla. 2021). Therefore, to the extent that the State, in this case, emphasizes the jury's decision on the death penalty as a bar to any relative culpability analysis it is based on a faulty premise. The record shows the jury in Cruz's case was not aware of the life sentence imposed on Charles since the Charles trial was conducted after Cruz's trial. The judge, however, was fully aware of the Charles verdict and sentence. The court ruled that the only possible reason Charles was spared the death penalty was because the State stipulated he was not the shooter. (R. 3828).

Additionally, the U.S. Supreme Court has not been impeded in disallowing the death penalty *without* consideration of mitigation. In *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), the U.S. Supreme Court found that because the defendant did not have the intent to kill the imposition of the death penalty was impermissible under the Eighth Amendment. *Id*., 458 U.S. at 798. In *Tison v. Arizona*, 481 U.S.

137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), Court upheld the death penalty where the defendant was a major participant in the criminal act and the evidence show the defendants acted with reckless indifference to human life. *Id.*, 481 U.S. at 158. Neither *Enmund* nor *Tison* addressed mitigation. The State asserts that the only legitimate and constitutional consideration of co-defendant roles is limited to the *Enmund/Tison* analysis. (AB, p. 57). The State is wrong in this assertion. The courts in Florida, of course, must apply the *Enmund-Tison* analysis. However, neither *Enmund* nor *Tison* addressed the issue of relatively culpability. The *Enmund-Tison* analysis was limited to the issues presented. Those decisions are not factually and legally on point on the issue of relative culpability. As such, the conformity clause [Art. I, §17, Florida Constitution] does not prohibit this Court's continued relative culpability analysis. This Court retains primary responsibility to safeguard the rights of criminal defendants. *See Cabana v. Bullock*, 474 U.S. 376, 391, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), *abrogated on other grounds Pope v. Illinois*, 481 U.S. 497 (1987) ("Considerations of federalism and comity counsel respect for the ability of state courts to carry out their role as the primary protectors of the rights of criminal defendants"). There is nothing in this Court's relative culpability analysis which undermines the need for individualized

sentencing. In fact, the respective roles of the defendants in a multi-defendant certainly qualifies as a "circumstance of the offense." Jury Instruction 7.11, Florida Jury Instructions in Criminal Cases. *See, e.g., Downs v. Moore*, 801 So.2d 906, 912-913 (Fla. 2001)(evidence of lighter sentences imposed on codefendants covered by the non-statutory mitigating circumstance instruction); *Franqui v. State*, 804 So.2d 1185, 1195-1196 (Fla. 2001)(same); *Davis v. State*, 859 So.2d 465, 477 (Fla. 2003)(same).[8] If there is a clear lesson to be gleaned from the *Enmund-Tison* analysis is that it establishes the constitutional legitimacy of assessing the respective roles of defendants in multi-defendant cases. *See, e.g., Solem v. Helm*, 463 U.S. 277, 292, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983)("Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender. Thus

[8] *See also Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)("…we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment… requires consideration of the character and record of the individual offender *and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death*")(emphasis supplied).

in *Enmund* the Court determined that the petitioner's conduct was not as serious as his accomplices' conduct.").[9]

The State claims the court's resentencing order exhaustively went over every proposed aggravator and mitigator, laying out the facts that supported or rebutted each, and assigned each individual weights. The State maintains that the court did not just rubber-stamp the jury's recommendation. (AB, p. 66). The State does not address Defendant's specific argument that while the court laid out a perfect case establishing equal culpability, the court reached a conclusion that Defendant's sentence was not disproportionate with Mr. Charles' sentence *without offering or suggesting any explanation whatsoever*. 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); *Morgan v. State*, 453 So.2d 394, 397 (Fla. 1984); *Fennie v. State*, 855 So.2d 597, 608 (Fla. 2003). The resentencing order does not provide this Court with an adequate basis justifying the unequal treatment of equally culpable defendants.

[9] The practice of assessing the respective roles of co-defendants is well established in the application of the sentencing guidelines as a non-statutory mitigating circumstance. *See, e.g., Sanders v. State*, 510 So.2d 296 (Fla. 1987); *Marchetta v. State*, 766 So.2d 1126 (Fla. 2d DCA 2000).

The State argues that Defendant is incorrect to suggest that because this Court continues to review the sufficiency of the evidence whether a defendant requests it,[10] relative culpability survives *Lawrence*. The State claims that this Court reviews the sufficiency of the evidence to sustain a conviction on first-degree murder, and whether competent, substantial evidence of the aggravators is supported by the record, not to address what sentence is imposed. According to the State, this process is to safeguard a defendant's right to a fair trial and that he was in fact death-eligible and is unrelated to the sentence or the Eighth Amendment prohibition on cruel and unusual punishment. (AB, pp. 66-67). Although 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, it also entails a review of the record to assess whether the death penalty was proper. This Court's review encompasses a review of the propriety of the sentence. *See, e.g., Robertson v. State*, 143 So.3d 907, 908 (Fla. 2014)(mandatory review of both the validity of the judgment and the propriety of the death sentence); *Combs v. State*, 403 So.2d 418, 422 (Fla. 1981)(automatic review requires a full review of the record for trial

[10] The contemporary objection rule is done away with to review sufficiency in capital cases by court rule and not by statute or constitutional provision.

error and a determination of the sufficiency of the evidence, as well as the appropriateness of the imposition of the death sentence). *See also Spaziano v. Florida,* 468 U.S. 447, 466, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984)("The Florida Supreme Court must review every capital sentence to ensure that the penalty has not been imposed arbitrarily or capriciously. §921.141(4).").[11] Mandatory review is, therefore, not just a jurisdictional device, but a substantive avenue to review the appropriateness of a defendant's death sentence and constitutes a bulwark against constitutional error.[12] Under this Court's precedents, relative culpability review is an integral part of this Court's mandatory death sentence review. This provision remains unchanged after *Lawrence*. 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.

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[11] The State cites to *Kirkman v. State*, 233 So.3d 456 (Fla. 2018) for the proposition that automatic review is limited to review of the sufficiency of the evidence as to a defendant's conviction. (AB, p. 67). However, in *Kirkman*, this Court never reached penalty phase issues because the case was remanded on *Hurst. Id*., at 465.

[12] The U.S. Supreme Court has noted this Court's system of independent review of death sentences "minimizes the risk of constitutional error…" *Parker v. Dugger*, 498 U.S. 308, 321, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991).

The U.S. Supreme Court has determined that 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. *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). The State insists the defense agrees that relative culpability complements the constitutional requirement of assessing an individual's culpability. This argument was made in the regard to the *Enmund/Tison* analysis, under which an individual's culpability can be measured by his participation in a particular homicide in the context of the actions of his codefendants. Florida's continued use of relative culpability in no way violates the conformity clause because, as stated earlier, there is no direct U.S. Supreme Court opinion factually and legally on point regarding relative culpability. Contrary to the State's argument, this Court did not lose its ability to conduct a relative culpability analysis in 2002 when the voters approved the constitutional amendment in Art. I, §17, Florida Constitution.

The State maintains that proportionality review and relative culpability were designed to further the goals of *Furman*[13] and therefore implicate the

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

Eighth Amendment, not equal protection. In support of this argument, the State cites to *Peters v. State*, 128 So.3d 832 (Fla. 4th DCA 2013). *Peters* was a noncapital case which rejected a defendant's claim that his 99-year sentence violated the Equal Protection Clause in comparison to the sentence imposed on the co-defendant. The appellate court ruled that any such argument was limited to capital cases. *Id*., at 849-850. The *Peters* court did not discuss equal protection in the capital context. Other than this single case, the State cites no other authority. The *Furman* Court touched on equal protection, noting that there is an "increasing recognition of the fact the basic theme of equal protection is implicit in `cruel and unusual' punishments." *Id.*, 408 U.S. at 249 (Douglas, J., concurring). In *Asay v. State*, 210 So.3d 1, 28 (Fla. 2016), this Court noted that disparate treatment of similarly situated defendants may violate equal protection. In *Slater v. State*, 316 So.2d 539 (Fla. 1975), 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 (emphasis supplied).

The State makes no specific argument regarding the due process clause argument raised by Defendant.

Finally, the State argues that *stare decisis* is not a bar for this Court to overturn decades of opinions employing the relative culpability analysis. The State points out that once this Court has determined that a precedent was clearly erroneous, the proper question becomes whether there is a valid reason why not to recede from that precedent, and that the critical consideration is typically reliance on that precedent, and reliance interests are lowest in cases that involve procedural or evidentiary issues. (AB, p. 69)(citing *Lawrence*, 308 So.3d at 551). The State extensively quotes from *Lawrence*, which overturned *Yacob v. State*, 136 So.3d 539 (Fla. 2014). Specifically, this Court stated that "[I]n light of the Supreme Court's decision in *Pulley*, the conformity clause expressly forecloses this Court's imposition of a comparative proportionality review requirement that is predicated on the Eighth Amendment." *Lawrence*, 308 So.3d at 551. The Court concluded that the reliance interests of death-sentenced defendants on the comparative proportionality review are low to nonexistent. Moreover, there was no reason to continue to apply erroneous precedent that relies on perceived deficiencies in section 921.141 that do not exist. *Id*. The State concludes that the same logic applies in this case. (AB, p. 70).

The State asks this Court to jettison decades of long-standing precedent on the incorrect assumption that *Pulley* addressed relative culpability. In *Lawrence*, 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 550-551 (quoting *State v. Poole*, 297 So.3d 487, 507 (Fla. 2020)). *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. *Pulley* does not clearly conflict with the relative culpability analysis this Court has applied since at least 1975. Contrary to the State's conclusion (AB, p. 71), the Court in *Lawrence* did not do away with relative culpability. Relative culpability was not even mentioned in *Lawrence*. As such, there is no basis to recede from this Court's long line of precedents applying relative culpability review.

## CONCLUSION

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. If this Court accepts the State's proposition seeking abandonment of relative culpability it will not just overturn decades-long precedent regarding relative culpability but will undermine this Court's precedents disfavoring *sub silentio* reversals and precedents applying a strict conformity clause analysis.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing reply 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 10th day of September, 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 6,558 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