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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC22-322
L.T. No. 102009CF000671000AMX

HECTOR SANCHEZ-TORRES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR CLAY COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

ISSUE I: The Circuit Court Erred In Ruling Appellant's Successive 3.851 Motion Untimely

Appellant argued in his initial brief that the circuit court erred in not finding the successive 3.851 motion timely under the 3.851(d)(2)(C) gateway for attorney negligence in light of Appellant's representation by unqualified counsel. Appellee asserts that this Court should disregard the plain language of rule 3.851 and hold that the gateway does not apply to successive postconviction motions, and that counsel was not negligent. The Court should reject Appellee's arguments and reverse the circuit court's decision.

I. Appellant is entitled to file a successive 3.851 motion through the 3.851(d)(2)(C) attorney-negligence gateway based on the plain language of the governing rules of criminal procedure.

Appellee does not dispute—or even address—the plain language of Florida Rule of Criminal Procedure 3.851. In fact, Appellee fails to even mention subsection 3.851(e)(2), which mandates that successive postconviction motions be analyzed for timeliness under the 3.851(d)(2)(C) attorney-negligence gateway. Instead, Appellee asks this Court to disregard the plain language of rule 3.851 to hold that the attorney-negligence gateway be limited to "initial"

postconviction motions. *See* Answer Brief, at 20. In doing so, Appellee implicitly acknowledges that the plain language contains no such limitation. But both rule 3.851(d)(2) and subsection (d)(2)(C) refer to the timeliness of a postconviction "motion" without restricting the gateway to "initial" motions or excluding "successive" motions. These are terms of art that would have been used if they were meant to limit the gateway as Appellee asks this Court to do.

Rather than confronting the plain language of the rule, Appellee makes a host of policy-based arguments about why, in the State's view, it would be bad policy to follow the plain text of the rule. As this Court has previously held, "when the language [of a rule of criminal procedure] to be construed is unambiguous, it must be accorded its plain and ordinary meaning." *Brown v. State*, 715 So. 2d 241, 243 (Fla. 1998). Appellee's policy preferences do not trump the rule's plain meaning. *See Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1792 (2022) ("[W]e are not 'free to pave over [plain text] in the name of more expeditiously advancing a policy goal.'") (internal citation omitted); *Brotherhood of R. R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 529 (1947) (noting that courts can resort to interpretive tools "only when they shed light on some ambiguous word or phrase

. . . [b]ut they cannot undo or limit that which the text makes plain."). Because the language of rule 3.851 is unambiguous, Appellee's policy arguments, which are not strong in any event, necessarily fail.[1]

Next, Appellee argues that this Court should ignore United States Supreme Court precedent regarding protections against attorney misconduct based on traditional equitable principles because, under federal habeas law, the precedent only applies during initial federal habeas proceedings. While that much is true, Appellee's argument again ignores the plain text of the Florida Rules of Criminal Procedure, which, unlike the federal habeas statute, extends protections against attorney negligence to successive proceedings. This Court has historically looked to relevant federal habeas precedent for guidance in interpreting state postconviction rules

[1] Appellee also asks this Court to hold that the restrictions on the noncapital attorney-negligence gateway found in rule 3.850 also apply under rule 3.851. *See* Answer Brief, at 19-20, 24. But this argument aids Appellant's point about the plain text: these restrictions could have been, but were not, made part of rule 3.851, which says that a postconviction "motion"—without specifying whether initial or successive—should be considered for timeliness under 3.851(d)(2)(C) without any of the restrictions found in rule 3.850. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (the explicit inclusion of a restriction in one provision necessarily implies that the restriction does not apply in a related provision) (citing A. Scalia & B. Garner, Reading Law 107 (2012)).

while recognizing the differences between these schemes. *See State v. Bolyea*, 520 So. 2d 562, 563 (Fla. 1988). This Court should do so again in this case.

Lastly, Appellee's argument that Appellant is asking for a constitutional right to postconviction counsel is a red herring. As noted above, Appellant's argument that he is entitled to file a successive 3.851 motion through the 3.851(d)(2)(C) attorney-negligence gateway is based on the plain language of the governing rules of criminal procedure. If this Court were to disregard that plain language, it would be a violation of Appellant's constitutional rights to meaningfully access the courts, due process, and equal protection. *See* Initial Brief, at 35-37. Appellee has seemingly misconstrued this argument, but nowhere has Appellant asked this Court to create a new constitutional right to postconviction counsel.

I. The failure to apply the 3.851(d)(2)(C) attorney-negligence gateway would violate Appellant's constitutional rights and not remedy errors made by unqualified counsel.

Turning to the application of rule 3.851(d)(2)(C), Appellee does not defend Shea's conduct. As laid out more fully in the successive 3.851 motion below, (PCR-2 7-32), and Appellant's Initial Brief, at 6-

14, 22-30, Shea's conduct included misrepresenting his qualifications in his contract with the Judicial Administrative Commission and defending his misrepresentation by arguing that he had participated in capital collateral proceedings previously by testifying as a trial attorney facing an ineffective assistance of counsel claim and by receiving calls from other attorneys asking for advice.[2] It is also clear from his conduct that he did not understand basic legal principles regarding capital collateral proceedings: he did not file a notice of appearance; he filed a notice of appeal to the wrong court (twice); he did not put on a single lay mitigation witness despite the circuit court granting an evidentiary hearing on an ineffective assistance of counsel in the penalty phase claim during the initial 3.851 proceeding; and, ultimately, he failed to file the successive 3.851 motion based on the claims raised in this proceeding.

Instead of defending Shea's conduct, Appellee simply asserts that lack of experience does not render counsel *per se* ineffective. *See* Answer Brief, at 25. In doing so, Appellee ignores two key pieces of

[2] It is unclear which case Shea was referencing regarding being challenged as ineffective, but this Court did find his performance deficient in *Martin v. State*, 311 So. 3d 778, 795 (Fla. 2020).

Appellant's argument. First, Appellee disregards the fact that Shea actively misrepresented his qualifications in order to be listed on the capital collateral registry and to execute a contract to represent Appellant. These qualifications that Shea failed to meet were specifically instated to ensure death row inmates were represented by "competent" counsel. Second, even if this Court agrees with Appellee's argument that the fact that Shea was not Appellant's agent does not itself render the attorney-negligence gateway satisfied, Appellant also argued that this Court can remand for an evidentiary hearing for factual development on the question. *See Davis v. State,* 26 So. 3d 519, 528-29 (Fla. 2009) (noting that whether a postconviction motion has met the standards of rule 3.851 is subject to factual testing at a hearing).

Appellee likewise does not defend the failure of the circuit court, this Court, or JAC to enforce constitutional and statutory safeguards against unqualified counsel in this case. As Appellant noted in the initial brief, the appointment of Shea as his counsel was entirely outside of his control. Under Florida law, courts—including the circuit court and this Court—are tasked with "monitor[ing] the performance of assigned counsel to ensure that the capital defendant

is receiving quality representation" and "evaluat[ing] allegations that are made regarding the performance of assigned counsel." § 27.711(12), Fla. Stat. (2021). JAC is tasked with compiling and maintaining a registry of qualified capital collateral attorneys. § 27.710, Fla. Stat. (2021).

The circuit court appointed Shea despite having similarly appointed unqualified counsel just two weeks prior using the same generic appointment order. The circuit court never required Shea to file a notice of appearance until the State raised the issue of Shea's qualifications over two years later. Appellant, through two collateral counsels appointed after Shea was removed from the case, filed multiple motions in the circuit court and this Court regarding Shea's representation. No action was taken by either court on these motions despite both courts finding Shea unqualified. JAC likewise bears fault given that Shea was allowed to place his name on the registry of "qualified" attorneys and execute a contract misrepresenting his qualifications.[3]

[3] JAC has taken the position that JAC is under no statutory duty to independently verify an attorney's qualifications. Instead, JAC relies on the attorney's certification as both a member of the Florida Bar and as an officer of the court that they satisfy the qualifications. Mr.

Nor does Appellee defend the State's conduct in this case. As noted in Appellant's Initial Brief, the State was on notice for over two years that Shea was not qualified to appear in a Rule 3.851 proceeding. Indeed, the State objected to a similarly unqualified attorney's appearance two weeks before Shea was appointed to the case. (PCR 681). Despite this, Appellee once again declined to explain why the State waited until after the circuit court denied relief in this case or why the conclusion of proceedings in the trial court was "the most appropriate juncture" for the State to move to have qualified counsel appointed. (PCR 2524). Appellee does note that initial Rule 3.851 proceedings are the postconviction proceeding in which defendants are both most likely to get an evidentiary hearing on their claims and thus most likely to get relief. *See* Answer Brief, at 21.

Instead, Appellee shifts the blame to CCRC-N counsel Robert Berry. Appellee argues that because Berry was assigned to this case less than two weeks before the deadline to file a successive 3.851 motion, he should have filed the successive 3.581 motion. *See*

Shea certified he met the required capital collateral registry counsel qualifications when he signed the contract with JAC.
Answer Brief, at 13 n.6, *Sanchez-Torres v. JAC*, SC20-406 (filed 6/17/2020).

Answer Brief, at 19 n.3. This argument is premised on the notion that it would even be possible for a collateral counsel to file a notice of appearance, receive all relevant files and records, digest those records and the record of the case, discover the meritorious claims, investigate the factual and legal bases for those claims, and file a postconviction motion based on those claims in less than fourteen days. This argument should be dismissed out of hand.[4]

For the reasons stated herein and in the Initial Brief, this Court should find the successive 3.851 motion timely.

ISSUE 2: The Circuit Court Erred in Denying Appellant's Claim Of Newly Discovered Evidence Regarding Markeil Thomas's New Sentence And Related New Evidence Of Thomas's Culpability.

A defendant can obtain a new trial based on newly discovered evidence if he satisfies the newly discovered evidence test. First, the new evidence must not have been known or discoverable at the time

[4] Appellee ignores the diligence with which Berry sought to remedy the damage done by the appointment of unqualified counsel. Appellant, through Berry, filed two motions to relinquish this case back to the circuit court based on Shea's illegal appointment. *See Sanchez-Torres v. State*, No. SC19-211 (filed 4/29/2019 and 12/3/2019). The first was based on Berry's preliminary review of the case upon being appointed and the second was based on the finding by the circuit court (later upheld by this Court) that Shea was unqualified. Both were denied by this Court.

of trial. Second, the new evidence must create a reasonable doubt as to the culpability of the defendant such that it would probably yield a lesser sentence at retrial. Because resentencing proceedings are held *de novo*, the *Jones* inquiry must necessarily be a forward-looking one. *See State v. Fleming*, 61 So. 3d 399, 406-08 (Fla. 2011). Appellant meets the two-step *Jones* test, and the circuit court erred in denying his claim.

I. The law-of-the-case doctrine is not applicable because this Court has not previously adjudicated either of the claims raised below.

As a threshold matter, Appellee argues that any claims raised regarding Appellant's relative culpability are "barred by the law-of-the-case doctrine because it was addressed by this Court in the direct appeal." Answer Brief, at 36. Appellee is mistaken.

The law-of-the-case doctrine is not applicable because this Court has not previously adjudicated either of the claims raised below. This Court previously declined to conduct relative culpability review given that both Appellant and Markeil Thomas were facing the maximum sentences they could receive at the time of trial and thus there was no disparity in their sentences. *Sanchez-Torres v. State*, 130 So. 3d 661, 675 n.5 (Fla. 2013). The law-of-the-case doctrine

only applies to issues that have *actually* been decided. *See Mut. Life Ins. Co. of New York v. Hill*, 193 U.S. 551, 554 (1904) ("An actual decision of any question settles the law in respect thereto for future action in the case. . . . [A]ll questions which appear upon the record and have not already been decided are open for consideration.").

Appellee concedes that Thomas's resentencing did not become final, and thus discoverable, until 2018. Answer Brief, at 15 ("Thomas' new sentence was discoverable on February 26, 2018, when it became final on appeal and any claim based on the new sentence had to be filed by February of 2019"). Likewise, any evidence that came to light during that proceeding only became discoverable after Appellant's trial. Appellee wisely does not contest the circuit court's finding that all of the newly discovered evidence met the first step of the *Jones* test because it was not discoverable at the time of trial or direct appeal. (PCR-2 462). Therefore, the law-of-the-case doctrine does not apply here.[5]

II. The newly discovered evidence

[5] Appellee also argues that Issue 3 is likewise barred by the law-of-the-case doctrine. But for the same reasons, this Court should also reject that argument.

a. Thomas's new sentence

Appellee argues that because Thomas was not eligible for the death penalty due to his juvenile status, a newly discovered evidence claim based on the new sentence of a codefendant is not cognizable. *See* Answer brief, at 46. Appellee cites to multiple cases in which a claim was rejected by this Court where a codefendant was resentenced for purely legal reasons and where such resentencings had no connection to the circumstances of the crime. *See* Answer Brief, at 45-46. The distinction to be made between those cases and Appellant's is that, although Thomas's original life sentence was vacated for purely legal reasons, the new sentence that he actually received was based upon the nature and circumstances of the crime.

At Thomas's resentencing the court was required to make a holistic assessment of Thomas, which necessarily included his relative culpability. The court had wide discretion in imposing a sentence and could have sentenced Thomas to life if it made the relevant findings. Thomas's new sentence is thus different in both degree and kind than those previously rejected by this Court as irrelevant. Thomas's sentence has now been drastically reduced based on the same findings that this Court pointed to as relevant in

Scott and *Farina*. *Farina v. State*, 937 So. 2d 612 (Fla. 2006); *Scott v. Dugger*, 604 So. 2d 465 (Fla. 1992); *see also* Initial Brief, at 40-42.

Further, Appellee argues that "[m]itigation looks at the defendant himself and the crime, not at the sentence of a co-perpetrator." Answer brief, at 63.[6] Appellee cites to *Hitchcock and Owens* in support of this position. *Hitchcock v. Sec'y Fla. Dep't. Corr.*, 745 F.3d 476, 483 (11th Cir. 2014); *Owens v. Guida*, 549 F.3d 399, 419-20 (6th Cir. 2008). *Hitchcock* and *Owens* are distinguishable as they both relate to rejected pretrial plea offers. Here, the manner in which "the murder was committed" was considered by the court in determining Thomas's sentence. *Owens*, 549 F.3d at 420; *see also Farina*, 937 So. 2d at 620 (noting that a codefendant's new sentence is constitutionally relevant under *Lockett*, and thus cognizable as newly discovered evidence, when it is based on a consideration of the "the nature or circumstances of the crime or to the [co]defendant's character or record").

[6] Appellee responds in Issue 3 to arguments raised in Appellant's Issue 2, and vice versa. For the sake of consistency with his initial brief, Appellant will address Appellee's arguments within the issue the relevant component was raised in Appellant's initial brief.

As a general matter, Appellee fails to understand that mitigation is not hyper-limited to the specific characteristics of the defendant being sentenced. In *Lockett*, the Supreme Court "conclude[d] that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion). Relevant circumstances of the offense include a codefendant's sentence allowing for early release, particularly here where Appellant was not found to be more culpable than his codefendant.

Moreover, this Court has already rejected Appellee's argument that this Court should not consider Thomas's new sentence because he was ineligible for the death penalty. This Court has held that a newly discovered evidence claim based on the new sentence of a codefendant is cognizable where one codefendant has been sentenced to death and another has been convicted of a crime less than first-degree murder—a crime that is not death eligible. *See McCloud v. Sate*, 208 So. 3d 668, 687-89 (Fla. 2016). This Court's reasoning in

McCloud is analogous to the circumstance here and should govern in light of Thomas's resentencing. Thomas's new sentence is not relevant because he has received a sentence less than death or because he has received a new sentence, but rather because the actual new sentence Thomas received bears a direct "connection to the nature or circumstances of the crime." *Farina*, 937 So. 2d at 620.

Finally, this Court should reject Appellee's argument that a newly discovered evidence claim of a codefendant's new sentence is no longer cognizable after *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020). There are two distinct components of relative culpability review. The first is a factual review of the impact of one codefendant's new sentence as evidence that mitigates against a death sentence for the other codefendant. *See Puccio v. State*, 701 So. 2d 858, 863 (Fla. 1997) ("A trial court's determination concerning the relative culpability of the co-perpetrators in a first-degree murder case is a finding of fact and will be sustained on review if supported by competent substantial evidence."). The second is a legal review traditionally performed by this Court. *See Shere v. Moore*, 830 So. 2d 56, 60 (Fla. 2002) ("[I]n cases where more than one defendant was involved in the commission of the crime, this Court performs an

additional analysis of relative culpability. Underlying our relative culpability analysis is the principle that equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment."). *Lawrence* is addressed more thoroughly below, but to the extent that *Lawrence* has any relevance to this case, it would only impact Appellant's legal claim, not Appellant's fact-based newly discovered evidence claim.

Therefore, Thomas's new sentence is cognizable as newly discovered evidence and should be considered in the cumulative prejudice analysis.

b. Thomas's recantation

Appellee dismisses the relevance of Thomas's recantation because it is a "recantation of a recantation" and therefore unreliable. Answer Brief, at 72. Appellant agrees that Thomas's recantation is unreliable. In fact, that is exactly Appellant's argument for the relevance of the statement.

Thomas's "self-serving" recantation is not credible because it was made to limit the potential sentence he faced. *See Archer v. State*, 934 So. 2d 1187, 1198 (Fla. 2006). The circumstances surrounding Thomas's recantation were highly dubious. The recantation was

made over a year after he confessed to being the triggerman and a mere two weeks prior to his resentencing. Thomas argued at the resentencing that he was less culpable than Appellant because he was not the triggerman.

At a new trial for Appellant, a jury could find evidence of Thomas's recantation—and inconsistencies over time as to his culpability in the crime—to have strong probative value. It is also of significance as the trial court rejected the statutory mitigating circumstance that Appellant was an accomplice or minor participant *because* he relied on the apparent credibility—and consistency—of Thomas. *See* Initial Brief, at 49-50. Contrary to Appellee's assertion, the recantation is relevant mitigating evidence that could result in at least one juror voting for life at a resentencing. The circuit court's determination otherwise should not be sustained.

c. The forensic report and prior conviction

The forensic report and prior violent criminal conviction would each be admissible at a new trial to show that it is more probable that Thomas was the triggerman, thus lessening Appellant's culpability. Appellee argues that the forensic report and Thomas's

prior violent criminal acts are not mitigating evidence in Appellant's case. *See* Answer Brief, at 71. Appellee is mistaken.

Appellee seeks to minimize Thomas's prior criminal history as "insignificant" and downplays his propensity for violence by characterizing his prior criminal conviction as a "school fight." Answer Brief, at 73. The criminal conviction was the result of an unprovoked attack bludgeoning the victim in the back of the head with brass knuckles on a dare. The conviction was based on acts that were certainly not insignificant. Further, Thomas's diagnosis of antisocial personality disorder—especially given that this diagnosis had been explicitly rejected for Appellant—would have particularly strong probative value to a jury at resentencing. The newly discovered evidence demonstrates that Thomas has a historical propensity for violence and makes it more likely that he was the shooter and therefore it mitigates against the imposition of a death sentence.

Appellee cites to *U.S. v. Tsarnaev* for its argument that the report and Thomas's prior violent criminal history would be inadmissible. *See* Answer Brief, at 71; 142 S. Ct. 1024 (2022). *Tsarnaev* does not make this new evidence inadmissible. The evidence that Tsarnaev sought to introduce as mitigation related to

an *unsolved* triple murder in which his older brother was a suspect. During the investigation of that triple murder, FBI agents interviewed a friend of the older brother who ultimately confessed to being involved and confirmed Tsarnaev's brother's involvement. That witness died before a written statement was obtained. The trial court excluded evidence related to the triple murder because there was no confirmation of Tsarnaev's brother's participation by way of a guilty verdict, a plea deal, or a memorialized confession. Thus, if Tsarnaev had been allowed to use that evidence, it would result in an extended trial-within-a-trial over whether his brother did in fact commit an entirely unrelated unsolved murder. Ultimately, the Supreme Court agreed with the district court, noting that there was no way to verify the allegations as the brother and the witness were both dead.

Here, the new evidence is readily verifiable as Thomas was convicted of the crime. The concerns that the Supreme Court had about the evidence in *Tsarnaev* are not an issue with respect to Thomas's criminal history. Likewise, the forensic report is a simple diagnostic report generated by a licensed psychologist who could be subjected to cross-examination. Thus, *Tsarnaev* is not relevant.

The threshold for the relevance of mitigation evidence is "low" and must be considered "in the most expansive terms." *Tennard v. Dretke*, 542 U.S. 274, 275 (2004). Because the new evidence tends to show that it was more probable that Thomas was the shooter, it meets this low threshold and would be admissible at resentencing.

III. Cumulative prejudice of all newly discovered evidence entitles appellant to a new penalty phase trial.

A proper *Jones* analysis must necessarily look forward to how the newly discovered evidence could potentially impact a jury at a new penalty phase trial. *See State v. Fleming*, 61 So. 3d 399, 406-08 (Fla. 2011). The evidence presented in Appellant's successive postconviction motion is relevant and probative mitigation evidence. A cumulative review of the total picture of evidence in this case demonstrates that the newly discovered evidence of Thomas's new sentence and related resentencing evidence gives rise to a reasonable doubt as to the culpability of Appellant and thus would probably produce a lesser sentence at a new trial.

Issue 3: The circuit court erred in denying appellant's claim that his death sentence violates the eighth amendment in light of Thomas's term-of-years sentence.

A mere one year and eight months separate Appellant and his co-defendant in age. Neither codefendant has been found more culpable than the other in this case where a single shot, which could have been an accidental discharge, was fired. Yet Appellant faces the death penalty and Thomas will serve, at most, 40 years with the possibility of release as soon as March 2024. This disparity in sentencing violates the Eighth Amendment.

Appellee argues that relative culpability analysis is now prohibited by *Lawrence*, in which this Court held that proportionality review was prohibited per the Florida Constitution's conformity clause, Fla. Const. art. I, § 17. *Lawrence* did not prohibit relative culpability review. 308 So. 3d at 548. Nor has this Court yet made such a determination. *Bargo v. State*, 331 So. 3d 653, 665 (Fla. 2021).

There is no on point Supreme Court decision holding that relative culpability is not constitutionally required. As this Court recognized in *Lawrence*, *Pulley v. Harris* 465 U.S. 37 (1984) dealt solely with comparative proportionality. *Lawrence*, 308 So.3d at 550. The Conformity Clause only applies when there is a "decision" of the United States Supreme Court directly on point. Fla. Const. Art. I § 17. When there is no decision directly on point, this Court is required

to follow its own precedent. *Smallwood v. State*, 113 So. 3d 724, 730 (Fla. 2013) (finding U.S. Supreme Court decision was not binding under Florida's analogous Fourth Amendment Conformity Clause because only a "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." (cleaned up) (emphasis in original); *Soca v. State*, 673 So.2d 24, 26-27 (Fla. 1996) (same).

Relative culpability is still the law of Florida. As discussed in detail in Appellant's Brief, at 64-72, the Supreme Court of the United States has distinguished between the proportionality review at issue in *Lawrence*—which looks to the universe of all death sentences imposed across different cases—and relative culpability review—which looks to the sentences imposed to codefendants within the same case. Importantly, in *Pulley* itself, the case upon which this Court based its holding in *Lawrence*, the Supreme Court recognized the distinction between these two types of reviews. 465 U.S. at 43.

In conformity with the Supreme Court's distinguishment between proportionality and relative culpability review, this Court has consistently analyzed these issues separately. *See*, *e.g.*, *Cruz v. State*, 320 So. 3d 695, 723 (Fla. 2021); *Gonzalez v. State*, 136 So. 3d

1125, 1165 (Fla. 2014); *Hernandez v. State*, 4 So. 3d 642, 671–72 (Fla. 2009); *Jennings v. State*, 718 So. 2d 144, 153 (Fla. 1998).

Indeed, this Court has continued to do so after *Lawrence. See*, *e.g.*, *Cruz*, 320 So. 3d at 723 (refusing to address a proportionality claim due to *Lawrence* but declining to address a claim of relative culpability due to relief being granted for an unrelated penalty phase error). As a result, conducting a relative culpability review, as delineated in *McCloud*, remains binding precedent for Florida's lower courts. 208 So. 3d. Therefore, the circuit court's exclusive reliance on *Lawrence* to deny Appellant's claim was erroneous. (PCR-2 463).

As to the analysis of relative culpability, Appellee argues that Appellant was the more culpable party by incorrectly labelling Appellant as the "triggerman." No court has determined that Appellant was the "triggerman." In his sentencing order, Judge Skinner "noted [. . .] that the Court is not making a finding that [Appellant], in fact, was the person who shot Eric Joel Colon. Nor has the Court relied upon the inference that [Appellant] may have been the trigger man as an aggravating factor." (5 R 876). Likewise, on direct appeal, this Court made no such finding when it declined to conduct a relative culpability analysis.

In doing so, Appellee repeats the legal error committed by the circuit court in labeling Appellant as the shooter based on the verdict in Thomas's trial finding that Thomas did not possess a gun during the offense. *See* Answer Brief, at 47. As both the United States Supreme Court and Justices of this Court have recognized, an acquittal is not a rejection of a fact. *See United States v. Watts*, 519 U.S. 148 (1997); *Harris v. State*, 959 So. 2d 794, 799 (Fla. 2d DCA 2007) (Canady, J., dissenting).

To the extent that Appellee relies upon any judicial findings made by Judge Skinner during the resentencing of Thomas, they likewise cannot be considered. First, Appellee made no mention or argument regarding any of these findings below, rendering the arguments waived. *See Bryant v. State*, 901 So. 2d 810, 822 (Fla. 2005). Second, it is improper to make any inferences regarding Appellant based upon judicial findings made during a proceeding in which Appellant did not and could not participate, present evidence on his own behalf, or confront witnesses. Such a determination is not based on the adversarial testing required to make such a finding. For Appellee to argue otherwise, based entirely on inference and assumption, and with no fair opportunity for Appellant to adequately

defend himself, goes against the principals of our adversarial legal system. *Cf. Bravo-Fernandez v. United States*, 137 S. Ct. 352, 356 (2016) (issue preclusion only applies to a determination in litigation "between the same parties"). Moreover, any finding by Judge Skinner in that proceeding is almost certainly premised on the same legal error made in this case that a jury acquittal constitutes a finding of fact.

Appellee essentially asks this Court to commit the same error that led this Court to vacate the death sentence in *Cruz*. There, the trial court sentenced Cruz to death after finding that Cruz was the shooter based on the trial court's consideration of the jury's finding at the separate trial of Cruz's codefendant that the codefendant was not the shooter. 320 So. 3d at 723-25. This Court reversed because there was "no competent, substantial evidence presented in Cruz's trial to support the [co-defendant's] jury's finding that Cruz was the shooter." *Id.* at 725. This Court should not consider the jury verdict at Thomas's trial or any judicial findings made in Thomas's case.

As detailed in Appellant's brief, at 62-73, the great disparity in Appellant's and Thomas's sentences makes Appellant's death sentence unconstitutional. At the time of the offense, these now-

disparately sentenced co-defendants were both teenagers, separated in age only by twenty months. Now those twenty months make the sole difference between a death sentence and the potential to walk out of prison in 2024. This is irrationally arbitrary, and it is in violation of the Eighth Amendment.

CONCLUSION

This Court should reverse the lower court, and either vacate Appellant's death sentence or remand the cause for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading has been furnished by electronic service to all counsel of record on this 13th day of September, 2022.

/s/ Karin L. Moore

CERTIFICATION OF TYPE SIZE AND STYLE

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/s/ Karin L. Moore