DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

CHRISTIAN CRUZ,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

MOTION TO PROCEED IN FORMA PAUPERIS

Petitioner, **CHRISTIAN CRUZ,** files this Motion to Proceed In Forma Pauperis, pursuant to Rule 39, Supreme Court Rules, and in support thereof asserts:

1. The undersigned counsel was appointed to represent **CHRISTIAN CRUZ**, on February 2, 2022, by the Circuit Court of the Seventh Judicial Circuit of Florida, in and for Volusia County, Florida, in his capital murder appeal. Attached hereto is a copy of the order of appointment.

2. Petitioner Christian Cruz is incarcerated and remains indigent.

WHEREFORE, based on the foregoing, Petitioner CHRISTIAN CRUZ, by and through undersigned counsel, moves this Honorable Court to grant his Motion to Proceed In Forma Pauperis.

Respectfully submitted,

LAW OFFICES OF
J. RAFAEL RODRÍGUEZ
Attorneys for Petitioner
6367 Bird Road
Miami, FL 33155
(305) 667-4445
(305) 667-4118 (FAX)
jrafrod@bellsouth.net

By: _____
JOSE RAFAEL RODRÍGUEZ
FLA. BAR NO. 302007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion was furnished by U.S. Mail, first class postage prepaid, to Patrick A. Bobek, Esq., Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, on this 27th day of December, 2023.

_____
JOSE RAFAEL RODRÍGUEZ

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

CHRISTIAN CRUZ,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.
_____/

CASE NO. 2013 102943 CFDL
SC CASE NO. SC21-1767

ORDER APPOINTING CONFLICT FREE COUNSEL

THIS CAUSE having come before this Court upon the Order of the Supreme Court dated February 01, 2022, and the Supreme Court having granted the Motion to Withdraw filed by the Office of Criminal Conflict and Civil Regional Counsel, it is therefore **ORDERED** that

Jose Rafael Rodriguez, ESQUIRE is appointed as attorney of record for the Appellant in the above-styled cause.

It is further **ORDERED** that

Any discovery materials received by the previous appointed attorney in the above-styled cause shall be made available within three (3) business days from the date of this Order for pickup in the county of venue.

DONE AND ORDERED in Chambers, Daytona Beach, Volusia County, Florida this _____day of February, 2022.

2/2/2022 1:20 PM 2013 102943 CFDL

e-Signed 2/2/2022 1:20 PM 2013 102943 CFDL

RAUL A. ZAMBRANO
CIRCUIT JUDGE

Copies to:
Office of the Attorney General, CrimAppDAB@MyFloridaLegal.com
Clerk of Circuit Court/Appeals, via interoffice mail
Office of Criminal Conflict and Civil Regional Counsel, via Maressa Ortiz mortiz@rc5state.com

Supreme Court
Defendant: Christian Cruz, DOC#D51268, Union Correctional Institution, P. O. Box 1000, Raiford, FL 32083
Appointed Attorney: Jose Rafael Rodriguez, Esq., jrafrod@bellsouth.net

CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTIAN CRUZ,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO REVIEW A JUDGMENT OF THE SUPREME COURT OF THE STATE OF FLORIDA

October, 2023 Term

PETITION FOR WRIT OF CERTIORARI

Of Counsel:

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QUESTIONS PRESENTED FOR REVIEW

CAPITAL CASE

I.

WHETHER THE AFFIRMANCE BY THE SUPREME COURT OF THE STATE OF FLORIDA OF DEFENDANT'S CONVICTION FOR FIRST DEGREE MURDER AND SENTENCE OF DEATH WAS CLEARLY ERRONEOUS AS THE FLORIDA SUPREME COURT IMPROPERLY INTERPRETED AND APPLIED THIS COURT'S DECISION IN *PULLEY v. HARRIS* TO DISALLOW A RELATIVE CULPABILITY ANALYSIS

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CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTIAN CRUZ,

Petitioner,

v.

THE STATE OF FLORIDA,

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ON PETITION FOR A WRIT OF CERTIORARI TO REVIEW A JUDGMENT OF THE SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

Petitioner, CHRISTIAN CRUZ, respectfully prays this Court issue a Writ of Certiorari to review the Judgment of the Supreme Court of the State of Florida entered in this case on July 6, 2023, rehearing denied, October 6, 2023.

OPINIONS RENDERED IN THE COURTS BELOW

THE SUPREME COURT OF THE STATE OF FLORIDA

Christian Cruz v. The State of Florida, Case No. SC21-1767 (Fla., July 6, 2023), rehearing denied, October 6, 2023.

STATEMENT OF JURISDICTION

On July 6, 2023, the Supreme Court of the State of Florida issued its decision in *Christian Cruz v. The State of Florida*, Case No. SC21-1767 (Fla., July 6, 2023).[1] Rehearing was denied on October 6, 2023. The mandate was issued in the case on October 23, 2023. (**Appendix A**). The statutory provision which confers on this Court jurisdiction to review the above-described decision of the Supreme Court of the State of Florida by writ of certiorari is 28 U.S.C. §1257.

The Florida Supreme Court interpreted and applied this Court's decision in *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), when passing on the issue of disparate treatment of equally culpable co-defendants in a capital case.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions are quoted in **Appendix B**:

Section 1257 of Title 28, United States Code, 28 U.S.C. §1257.

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[1] *Cruz v. State*, ___ So.3d ___, 2023 WL 4359497 (Fla. 2023).

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

I.

FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

COURSE OF PROCEEDINGS AND DISPOSITION IN THE DISTRICT COURT AND THE COURT OF APPEALS

Petitioner, CHRISTIAN CRUZ, was a defendant in the trial court and respondent, the State of Florida, was the prosecution. Record references will be made by referring to the page number as reflected in the record on appeal and the page number as reflected in the transcripts. The symbol "R" will designate the record on appeal in SC20-60, "R1" will designate the record on appeal in SC21-1767, "T" will designate the trial transcripts, and "App" will designate the appendix. The parties will be referred to as they appeared below. All emphasis is supplied unless otherwise indicated.

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).[2] The State filed a notice of intent to seek the death penalty and a List of Aggravating Factors in Defendant's case. (R. 2672-2673).[3]

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 State presented an opening statement. (T. 19-31). Defendant's counsel thereafter presented opening statement. (T. 31-35). 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

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[2] 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).

[3] 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.

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 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).

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 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, the Florida Supreme 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, the 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).

The 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, 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 had improperly

determined that no *Enmund-Tison* analysis was necessary by finding that Cruz had killed the victim. The defense maintained 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 the Florida Supreme 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 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 re-imposing the death penalty. (R1. 119-250). Defendant appealed.

The Second Appeal

On Defendant's second direct appeal, the Florida Supreme Court in *Cruz v. State*, ___ So.3d ___, 2023 WL 4359497 (Fla. 2023), considered the following argument:

> 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

The Florida Supreme Court abandoned its long-established precedent that equally culpable defendants should be sentenced alike, concluding that its decision in *Lawrence v. State*, 308 So.3d 544 (Fla. 2020), which receded from the mandatory comparative proportionality review of death sentences, encompassed the relative culpability analysis. The decision in *Lawrence* ruled that comparative proportionality review was contrary to Florida's conformity clause [Art. I, §17, Florida Constitution], which requires Florida's cruel and unusual clause to be read in conformity with decisions of the U.S. Supreme Court.[4] The Court in *Lawrence* found that comparative proportionality review was precluded by this Court's decision in *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). The Florida Supreme Court concluded that application of the relative culpability analysis was not constitutionally required and was likewise precluded under *Pulley*

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[4] Article I, §17, Florida Constitution, provides, in pertinent part:

"...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..."

v. Harris, supra. Cruz v. State, ___ So.3d ___, 2023 WL 4359497 (Fla. 2023) [App. 15-16]. Justice Sasso did not participate in the opinion. Justice Labarga dissented.

STATEMENT OF THE FACTS

The facts of the case are reported in the Florida Supreme Court's initial 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 forcefully 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.

ARGUMENT

I.

WHETHER THE AFFIRMANCE BY THE SUPREME COURT OF THE STATE OF FLORIDA OF DEFENDANT'S CONVICTION FOR FIRST DEGREE MURDER AND SENTENCE OF DEATH WAS CLEARLY ERRONEOUS AS THE FLORIDA SUPREME COURT IMPROPERLY INTERPRETED AND APPLIED THIS COURT'S DECISION IN *PULLEY v. HARRIS* TO DISALLOW A RELATIVE CULPABILITY ANALYSIS

The Supreme Court of the State of Florida clearly erred in affirming the trial court's judgment of conviction of first-degree murder and sentence of death. The Florida Supreme Court clearly erred in finding that the equal culpability analysis is not viable based on this Court's decision in *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984).

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). 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 Woodson v. North Carolina, supra*, 428 U.S. at 305.

Relative Culpability Analysis

For nearly half a century, the Florida Supreme Court has considered relative culpability in its analysis of death penalty cases. In *Slater v. State*, 316 So.2d 539 (Fla. 1975), shortly after the *Furman*[5] decision, the Court had occasion to review a

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

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. The 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, the Court continued to apply the principle of relative culpability on a regular and systematic basis.

Equal Culpability Clearly Established

In the present case, there is no question that Defendant and Mr. Charles were equally culpable. On remand following the first appeal 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, re-imposed the death penalty in contrast to Mr. Charles's sentence of life imprisonment, without offering or suggesting any explanation whatsoever. In its opinion, the Florida Supreme Court did not challenge or question in any manner the circuit court's finding that Defendant and Charles were equally culpable.

Florida Supreme Court's Faulty Reasoning

Rather than addressing the clear record establishing equal culpability, the Florida Supreme Court simply found that under Florida's conformity clause [Art. I, §17, Florida Constitution] it was compelled to conclude that the equal culpability analysis was no longer viable. The Florida Supreme Court premised its conclusion on this Court's decision in *Pulley v. Harris,* 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). The Florida Supreme Court's reasoning was faulty.

A. Ignoring Its Own Precedents

The Florida Supreme Court failed to address its own precedents in

reaching its decision. The Court ruled that its decision in *Lawrence* encompassed the abandonment of the relative culpability analysis even though *Lawrence* did not mention relative culpability. The Court did not address the long line of precedents recognizing that decisions of the Florida Supreme Court should not be considered reversed *sub silentio* as the 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).

Moreover, the Court did not engage in a thorough interpretation of the Florida Constitution's conformity clauses. The Florida Supreme Court has determined that when analyzing Florida's conformity clauses the Court is bound by decisions of this Court, and in the absence of any such decision, Florida courts are free to provide a higher standard of protection. *See Soca v. State*, 673 So.2d 24, 26 (Fla. 1996)(interpreting conformity clause found in Art. I, §12, Florida Constitution). The Court in *Soca* recognized that a U.S. Supreme Court decision must be on point in order to effectuate the conformity clause. *Id.* at 27. The Florida Supreme Court further refined its conformity clause analysis in *Smallwood v. State*, 113 So.3d 724 (Fla. 2013), noting that a decision of this Court must be factually and legally on point. *Id.*, at 730. *See also McGraw v. State*, 289 So.3d

836, 837 (Fla. 2019)(using terms "materially indistinguishable" and "squarely within the rule" when considering issues under Art. I, §12, conformity clause cases).

Brushing past these well-settled precedents, the Florida Supreme Court simply concluded that because relative culpability was an "aspect" of the comparative proportionality analysis (App. 8), the Court's decision in *Lawrence* necessarily overturned the Court's long line of precedents recognizing a separate relative culpability analysis. (App. 15). In further support of its decision to do away with the relative culpability analysis, the Court found that it had almost exclusively declined to consider any fact in its relative culpability analysis aside from a defendant's degree of participation in the murder. (App. 18). However, there have been cases where Florida courts have compared the relative mitigation as to each defendant. Nothing in the relative culpability analysis prohibits a court from engaging in such a comparison. *See, e.g., Bradley v. State*, 787 So.2d 732, 746-747 (Fla. 2001)(consideration of mitigation presented at co-defendant's trial distinguished her case from defendant who received death penalty). *See also Scott v. Dugger*, 604 So.2d 465 (Fla. 1992)(record of both defendants showed similar records, similar ages, comparable low IQs and equal culpability). Furthermore, in this case, while two different juries reached different verdicts, Cruz's jury reached a conclusion that Cruz was the shooter, thereby foreclosing any feasible mitigation

argument that he merited life imprisonment. However, the Florida Supreme 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). 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). There was no mention by the trial court of different mitigation presentations as a basis for the disparity in sentencing. The trial court judge in this case had the unfettered opportunity to list any mitigation submitted in the co-defendant's case which provided a rational basis to give disparate treatment of the defendants. The circuit court judge chose not to do so, but rather, found that both defendants were equally culpable and had the same aggravating factors. In fact, the trial judge found that the only possible reason the co-defendant was spared the death penalty was because the State stipulated he was not the shooter. The record, therefore, is bereft of any finding by the circuit court regarding mitigation justifying the disparate treatment of the two defendants. The circuit court here was not prevented from alluding to mitigation in making its decision imposing death on Defendant. Consequently, relative

culpability review does not violate the principle that capital punishment requires an individualized consideration of mitigation.

Additionally, this Court has not been impeded in disallowing the death penalty in multi-defendant cases *without* consideration of mitigation. In *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), this 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), this 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.

B. Mis-interpreting and Mis-applying *Pulley v. Harris*

The Florida Supreme Court mis-interpreted *Pulley v. Harris, supra*. 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 this 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). This Court concluded that its prior precedents did not establish this type of proportionality review as a constitutional requirement. *Id.*, at 45. In *Pulley*, therefore, this 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 the Florida Supreme Court since at least 1975. *See, e.g., Slater v. State*, 316 So.2d 539 (Fla. 1975). Rather, the Court in *Pulley* solely discussed *cross-case* comparisons. Thus, the Florida Supreme Court's reliance on *Pulley* to find that the relative culpability analysis, *addressing defendants in the same case,* was no longer viable was clearly erroneous. 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 required an analysis of other capital cases in order to ascertain the propriety of the death penalty. 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.

Application of Relative Culpability is Proper and Constitutional

The relative culpability analysis comports with federal constitutional law. Even those who passionately support the death penalty recognize there is something fundamentally wrong and unfair about sentencing one defendant to life imprisonment and another to death when both are indisputably equally culpable. The Florida Supreme Court did not, and could not, point to anything in *Pulley* which directly held that a relative culpability analysis is illegal, improper, unworkable or otherwise unconstitutional. Rather, as stated previously, *Pulley* exclusively dealt with comparative proportionality analysis, which addresses sentences in *other cases*. The Court in *Pulley* did not hold that a relative culpability analysis is not constitutionally mandated.

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 is an altogether legal and proper review which does not violate the U.S. Constitution. Indeed, such an analysis appears to be constitutionally mandated. *Edmund v. Florida*, *supra*; *Tison v. Arizona*, *supra*.

While this Court's decisions in *Enmund* and *Tison* do not exhaustively describe the interactions among actors in a particular crime, the Florida Supreme Court's decision is radically closed to such a possibility based on its interpretation of *Pulley*. The decisions in *Enmund* and *Tison* cannot be read to delimit the extent of a proper relative culpability analysis. Rather, a clear lesson to be gleaned from the *Enmund-Tison* analysis is that it establishes a constitutional directive to assess 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 in *Enmund* the Court determined that the petitioner's conduct was not as serious as his accomplices' conduct.").

Due Process and Equal Protection

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. The unequal treatment of equally culpable defendants in a capital case violates equal protection and due process under the U.S. Constitution. Protection from a demonstrably disparate sentence of death is afforded under the 5th and 14th Amendments, United States Constitution, and deprivation of such protection is unconstitutional because it violates a defendant's life and liberty interests without due process and violates the principle that equally culpable defendants should have the equal protection of the law and not be subject to arbitrary and capricious treatment. In *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), this 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). Moreover, 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 Florida Supreme Court noted that a rational basis for imposing different sentences on co-defendants who share equal

culpability is mitigation, or the lack thereof, applicable to each codefendant. (App. 16). However, this statement disregards the record in this case. Here, the trial court considered the entirety of both Defendant's case and Charles's case and concluded that *the only possible reason* Charles was spared the death penalty was because the State stipulated he [Charles] was not the shooter. (R. 3828). Yet, there was no competent, substantial evidence to support the jury's finding that Defendant was the shooter. *Cruz v. State, supra* 320 So.3d at 716-717. Additionally, the Florida Supreme Court noted that aggravating factors may form a rational basis for treating equally culpable defendants differently. (App. 17). This statement likewise disregards the record in this case. Both defendants were found to have the same aggravating factors. 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 and equal protection of the law.

CONCLUSION

This petition presents an ideal opportunity for this Court to consider whether the U.S. Constitution precludes consideration of equally culpable co-defendants at sentencing in capital cases.

WHEREFORE, CHRISTIAN CRUZ, respectfully prays that this Court issue its Writ of Certiorari to the Supreme Court of the State of Florida.

Respectfully submitted on this ___ day of December, 2023.

J. RAFAEL RODRÍGUEZ
FLA. BAR NO. 302007

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing petition was mailed to Patrick A. Bobek, Esq., Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, on this 27th day of December, 2023.

J. RAFAEL RODRÍGUEZ

APPENDIX

Supreme Court of Florida

No. SC2021-1767

CHRISTIAN CRUZ,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

July 6, 2023

PER CURIAM.

Christian Cruz appeals his sentence of death, which was imposed by the trial court for the second time following this Court's reversal of his original death sentence "and remand for the limited purpose of requiring the trial court to perform a new sentencing evaluation and provide a new sentencing order." *See Cruz v. State*, 320 So. 3d 695, 731-32 (Fla. 2021). We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons we explain, we affirm Cruz's sentence of death.

I. BACKGROUND

In 2019, Cruz was convicted of first-degree murder, burglary, robbery, and kidnapping and was sentenced to death for the murder. *Cruz*, 320 So. 3d at 710, 716. This Court summarized the relevant facts as follows:

> 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, 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.
>
> The evidence showed that both Cruz and Charles forcefully 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.
>
> 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 of John Doe. John Doe was later identified as Christopher Jemery.

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.

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 705-06.

> During the guilt phase of Cruz's trial, the State presented the testimony of 17 witnesses. The State did not, however, present at Cruz's trial 2 items of evidence that it did introduce at the trial of Charles: first, the testimony of Charles' girlfriend that she had seen Cruz with a .22 caliber firearm, and second, a stipulation between the State and Charles' trial counsel that Cruz was the shooter.

Id. at 708.

To establish the prior violent felony aggravator, the State presented evidence of a robbery of a Hungry Howie's committed by Cruz and Charles days after the murder in this case. At the conclusion of the penalty phase, the jury unanimously recommended that Cruz be sentenced to death. *Id.* at 710.

> [T]he 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 financial gain (great weight); (3) the first-degree murder was committed for the purpose of avoiding arrest (great weight); (4) the first-degree murder was especially heinous, atrocious, or cruel (great weight); and (5) the first-degree murder was committed in a cold, calculated, and premeditated 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.

In its sentencing order, the trial court conducted an *Enmund*[n.4]-*Tison*[n.5] analysis, finding as follows:

> The jury found Mr. Cruz to be the individual who shot and killed Mr. Jemery. In Mr. Charles's 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, premeditated murder AND felony murder.
>
> Therefore, this court finds that Mr. Cruz in fact killed Mr. Jemery and no further analysis is needed.
>
> [N.4] *Enmund v. Florida*, 458 U.S. 782 (1982).
>
> [N.5] *Tison v. Arizona*, 481 U.S. 137 (1987).

In the sentencing order, the trial court explained that he heard and considered evidence of the case in Cruz's and codefendant Charles' trials.

Id. at 710-11 (footnote omitted).

On appeal, we agreed with Cruz's argument that he was improperly sentenced to death based on extrarecord facts:

> 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 judge 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. We thus overturned the death sentence "and remand[ed] for the limited purpose of resentencing by the trial court and a new sentencing order." *Id.* at 723. At that time, we declined to address Cruz's argument that his sentence was "disproportionate in comparison to other death sentences and Charles' life sentence." *Id.* We explained that there was no need to address comparative proportionality in light of our decision in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020), in which we receded from the judge-made requirement to review the comparative proportionality of death sentences as contrary to the conformity clause of article I, section 17 of the Florida Constitution. Because of the need for resentencing caused by the error of reliance on facts not in evidence, we also did not reach the issue of relative culpability in light of Charles's life sentence. *Id.*

On remand in 2020, aside from a slight change in weight to one aggravator and one mitigator—both of which were favorable to

Cruz—the trial court found and assigned the same weight to each aggravator and mitigator and again sentenced Cruz to death. The trial court decreased the weight it assigned to the cold, calculated, and premeditated aggravator from great to moderate and increased the weight it assigned to the "minor participation" mitigator from slight to moderate. This appeal follows.

II. ANALYSIS

Cruz's sole challenge to his death sentence is that this Court's relative culpability review requires that the sentence be reduced to life imprisonment because his equally culpable codefendant, Charles, who was convicted of the same offenses and to whom the same aggravating factors were proven applicable, was sentenced to life imprisonment by the same judge. The State takes the position that when this Court in *Lawrence* receded from its obligation to conduct a comparative proportionality review, it also receded from its obligation to conduct a relative culpability analysis, and therefore Charles's sentence is irrelevant to Cruz's sentence. This dispute thus presents the threshold question, Does relative culpability review survive *Lawrence*?

This Court's formerly mandatory comparative proportionality

review that was eliminated in *Lawrence* involved consideration of circumstances present in a capital case and a qualitative comparison to other similar capital cases in order to determine whether the case being reviewed fell under the category of most aggravated and least mitigated of first-degree murders, *see, e.g.*, *Lebron v. State*, 982 So. 2d 649, 668 (Fla. 2008); *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990), "thereby assuring uniformity in the application of the sentence," *Anderson v. State*, 841 So. 2d 390, 408 (Fla. 2003). And in capital cases involving multiple defendants, this Court has performed an additional analysis—which has been described as an "aspect" of its comparative proportionality review—of a defendant's culpability relative to his codefendant(s). *See, e.g.*, *Shere v. Moore*, 830 So. 2d 56, 60-62 (Fla. 2002). Underlying this relative culpability review has been "the principle that equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment." *Id.* at 60.

In *Lawrence*, we held "that the conformity clause of article I, section 17 of the Florida Constitution[1] forbids this Court from

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1. The conformity clause of article I, section 17 provides that "[t]he prohibition against cruel or unusual punishment, and the

analyzing death sentences for comparative proportionality in the absence of a statute establishing that review." *Lawrence*, 308 So. 3d at 545. *Lawrence* thus receded from precedent that required death sentences to be reviewed "for comparative proportionality." *Id.* at 552. And *Lawrence* "eliminate[d] comparative proportionality review from the scope of [this Court's] appellate review set forth in [Florida Rule of Appellate Procedure] 9.142(a)(5)." *Id.*

Cruz presents several points of argument in favor of his position. He asserts that our relative culpability review survived *Lawrence* because *Lawrence* dealt exclusively with the imposition of comparative proportionality review and did not address relative culpability review. But nearly every time this Court has addressed relative culpability review, it has either described it as a part of its formerly mandatory comparative proportionality review or addressed it as such. *E.g.*, *Truehill v. State*, 358 So. 3d 1167, 1186 (Fla. 2022) (describing, post-*Lawrence*, a relative culpability claim

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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." Art. I, § 17, Fla. Const.

as a "proportionality claim" and "claim of relative proportionality"); *Bargo v. State*, 331 So. 3d 653, 665 (Fla. 2021) (discussing proportionality and relative culpability under the joint heading "Proportionality – Relative Culpability"), *cert. denied*, 143 S. Ct. 193 (2022); *Hannon v. State*, 228 So. 3d 505, 509-11 (Fla. 2017) (discussing the relative culpability analysis as related to a "proportionality claim" and under the heading "Proportionality"); *Truehill v. State*, 211 So. 3d 930, 959 (Fla. 2017) (addressing relative culpability as part of this Court's then-mandatory comparative proportionality review despite the fact that defendant did not raise a relative culpability or comparative proportionality claim); *Jeffries v. State*, 222 So. 3d 538, 547 (Fla. 2017) (conducting a relative culpability analysis under the heading "Proportionality" and stating that this Court "may also consider relative culpability as part of our mandatory proportionality review"); *McCloud v. State*, 208 So. 3d 668, 688 (Fla. 2016) (describing "a full proportionality review" as "including a relative culpability analysis"); *Cannon v. State*, 180 So. 3d 1023, 1041 (Fla. 2015) (analyzing a relative culpability claim under the heading "Proportionality," addressing it as a claim that defendant's sentence is "disproportionate," and

referring to it in terms of "comparing the case to other capital cases with similar mitigating and aggravating circumstances"); *Fletcher v. State*, 168 So. 3d 186, 221 (Fla. 2015) (conducting a relative culpability analysis under the heading of "Proportionality" and in conjunction with a traditional comparative proportionality analysis); *Brooks v. State*, 175 So. 3d 204, 235 (Fla. 2015) (addressing a relative culpability claim under the heading "Proportionality"); *Carr v. State*, 156 So. 3d 1052, 1070 n.13 (Fla. 2015) (noting under the heading "Proportionality" that defendant also raised a relative culpability claim); *Martin v. State*, 151 So. 3d 1184, 1198 (Fla. 2014) (addressing relative culpability as part of traditional comparative proportionality review); *Wright v. State*, 19 So. 3d 277, 305 (Fla. 2009) ("[P]roportionality review requires us to consider the codefendant's sentence."); *Hernandez v. State*, 4 So. 3d 642, 671 (Fla. 2009) (addressing relative culpability claim under the "Proportionality" heading); *Brooks v. State*, 918 So. 2d 181, 210 (Fla. 2005) (same); *Kormondy v. State*, 845 So. 2d 41, 47 (Fla. 2003) (stating that an analysis of comparative proportionality, "of necessity, includes the relative culpability of each codefendant"); *Lugo v. State*, 845 So. 2d 74, 117-19 (Fla. 2003) (addressing relative

culpability claim under the "Proportionality" heading and as part of traditional comparative proportionality review); *Shere*, 830 So. 2d at 62 (noting that "relative culpability" is an "aspect of proportionality"); *Hertz v. State*, 803 So. 2d 629, 652 (Fla. 2001) (addressing relative culpability under the "Proportionality" heading); *Brown v. State*, 721 So. 2d 274, 282 (Fla. 1998) (same); *Henyard v. State*, 689 So. 2d 239, 254 (Fla. 1996) ("[T]hus, an equally or more culpable codefendant's sentence is relevant to a proportionality analysis." (citing *Cardona v. State*, 641 So. 2d 361 (Fla. 1994))); *see also McCloud*, 208 So. 3d at 693 n.6 (Canady J., concurring in part and dissenting in part) (describing relative culpability as "an aspect of [this Court's] comparative proportionality review"); *Shere*, 830 So. 2d at 64 (Anstead, C.J., concurring in part and dissenting in part) ("As a corollary to this analysis of comparing the circumstances of a case in which death had been imposed to others with a similar sentence, the Court also performs an additional analysis of relative culpability in cases where more than one defendant was involved in the commission of the killing."). *But see Wade v. State*, 41 So. 3d 857, 867, 879 (Fla. 2010) (considering defendant's relative culpability claim prior to and separate from traditional, comparative

proportionality); *Cole v. State*, 36 So. 3d 597, 610 (Fla. 2010) (same); *Caballero v. State*, 851 So. 2d 655, 662-63 (Fla. 2003) (same).

Cruz cites *Palmes v. Wainwright*, 460 So. 2d 362, 364 (Fla. 1984), for the proposition that this Court views comparative proportionality review and relative culpability review as entirely separate matters, relying on the following statement in the opinion: "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 of mitigation is an entirely separate matter." But when read in context, it is clear that this statement cannot be interpreted literally to mean that relative culpability review does not fall under the umbrella of proportionality review.

In his habeas petition, Palmes asserted that this Court failed to conduct a proportionality review in his direct appeal affirming his death sentence. 460 So. 2d at 364. Palmes "argue[d] that the state's chief witness against him was equally as guilty of the murder as he was and that her immunization from prosecution constituted such a disparity of treatment of equally guilty accomplices as to

violate the principle of proportionality." *Id.* This Court rejected Palmes's argument on the ground that it was procedurally barred, having been raised in his direct appeal and previous postconviction motion, and noted that "the original affirmance of the sentence of death implicitly found the sentence appropriate to the crime under proportionality principles." *Id.* Only then did the Court make the statement that "[d]isparate treatment of accomplices which may be a ground of mitigation is an entirely separate matter." When taken in context, this statement cannot support Cruz's position, because before the statement was made, the Court had already confirmed that Palmes's claim of disparate sentencing based on relative culpability was previously resolved, implicitly and "under proportionality principles." It would be illogical to conclude that relative culpability is an entirely separate matter from proportionality yet able to be implicitly resolved by a determination that a death sentence is proportional.

This Court's lengthy history of overwhelmingly referring to and treating relative culpability as a part of, "a corollary of," or intertwined with its traditional comparative proportionality review as well as its explicit identification of a relative culpability analysis

as a necessary component of comparative proportionality in multi-defendant capital cases, *e.g.*, *McCloud*, 208 So. 3d at 688; *Kormondy*, 845 So. 2d at 47, makes it clear that relative culpability review was indeed a part of its comparative proportionality review. Consequently, this Court's elimination of comparative proportionality review in *Lawrence* also resulted in the elimination of its relative culpability review. Here, that means that Charles's life sentence is irrelevant to and has no bearing on Cruz's death sentence.

Cruz argues that the conformity clause in article I, section 17 does not prohibit this Court from conducting a relative culpability review because *Lawrence* was exclusively premised on *Pulley v. Harris*, 465 U.S. 37 (1984), which held that comparative proportionality review is not constitutionally required but did not address relative culpability, and there is no direct United States Supreme Court opinion prohibiting relative culpability review under the Eighth Amendment. This argument fails for the same reason as the previous argument: our relative culpability review is a corollary of our obsolete comparative proportionality review. Under *Pulley*, as

a component of comparative proportionality review, a relative culpability review is not constitutionally required.

Cruz also argues that his death sentence violates his right to equal protection under the United States and Florida Constitutions, in light of Charles's life sentence. But "co-defendants have no enforceable right to have sentences that are precisely congruent with one another." *United States v. Haehle*, 227 F.3d 857, 860 (7th Cir. 2000). And it has been recognized that "[a] criminal sentence violates the Equal Protection Clause only if it reflects disparate treatment of similarly situated defendants lacking any rational basis." *Peters v. State*, 128 So. 3d 832, 853 (Fla. 4th DCA 2013) (quoting *United States v. Pierce*, 409 F.3d 228, 234 (4th Cir. 2005)).

One potential "rational basis" for imposing different sentences on codefendants who appear to share equal culpability is the mitigation, or the lack thereof, applicable to each codefendant. Mitigation is "a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). "[T]he sentencer in capital cases must be permitted to consider any relevant mitigating factor," *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982), "may not refuse to consider

any mitigating evidence," *Butler v. State*, 842 So. 2d 817, 831 (Fla. 2003), and "must expressly evaluate each statutory and nonstatutory mitigating circumstance proposed by the defendant," *Ault v. State*, 53 So. 3d 175, 186 (Fla. 2010). Because a capital sentencing court is required to give due consideration to each mitigating circumstance that exists relative to each individual defendant, there can be no constitutional requirement that capital codefendants who appear equally culpable on the facts of a case receive the same sentence. This individualized consideration of mitigation has been described as "[t]he core substantive ingredient" of a capital defendant's right to individualized sentencing. *Puiatti v. McNeil*, 626 F.3d 1283, 1314 (11th Cir. 2010) ("The core substantive ingredient in the constitutional right to an 'individualized sentencing' is mitigation evidence relevant to the capital defendant as an individual or unique person . . . .").

Like mitigation, aggravation may provide a "rational basis" for imposing different sentences on codefendants who appear to be equally culpable on the facts of a murder. But this Court's relative culpability review never required consideration of the aggravating factors or mitigating circumstances applicable to each codefendant.

Even where codefendants had equal roles in a murder, it would be a farce to consider them equally culpable if, for example, only a single aggravator were applicable to one codefendant but numerous aggravators were proven as to the other. Yet this Court has almost exclusively declined to consider any fact in its relative culpability analyses aside from a defendant's degree of participation in the murder.

The fact that this Court's relative culpability review failed to require consideration of "constitutionally indispensable" mitigation or aggravation—also a "constitutionally indispensable" part of capital sentencing, *see, e.g.*, *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003)—further supports our conclusion that relative culpability review is neither constitutionally required nor consistent with ensuring that a constitutional capital sentence was rendered.

Cruz also attempts to invoke the Due Process Clause, arguing that "the unequal treatment of equally culpable defendants in a capital case violates due process," Initial Brief of Appellant at 69, "because the entire purpose of the Due Process Clause is to prevent arbitrary deprivations of liberty or property," *id.* at 70. But this argument makes no sense if disparate sentences are imposed based

on incongruent mitigation or aggravation or both. The imposition of a lesser sentence upon a defendant with more mitigation or less aggravation than his codefendant(s) certainly cannot be considered "arbitrary." And there is no merit to Cruz's assertion that the conformity clause in article I, section 17 does not prevent this Court from continuing to conduct its relative culpability review because there is no corresponding conformity clause for due process in the Florida Constitution.

> It is no more tenable to skirt the conformity clause by proclaiming that comparative proportionality review is required by the due process clause rather than by the prohibition on cruel and unusual punishments. Under the federal Constitution, "the Eighth Amendment's Cruel and Unusual Punishments Clause [is] made applicable to the States by the Due Process Clause of the Fourteenth Amendment." *Graham* [*v. Florida*, 560 U.S. 48, 53 (2010)]. The prohibition on cruel and unusual punishments thus is a particular aspect of due process. And the conformity clause expressly limits the authority of this Court with respect to that aspect of due process. To conclude otherwise is to treat the conformity clause as meaningless for all practical purposes.

Yacob v. State, 136 So. 3d 539, 562 (Fla. 2014) (Canady, J., concurring in part and dissenting in part) (first alteration in original).

Cruz's other arguments—*e.g.*, that relative culpability review is part of this Court's obligatory sufficiency of the evidence review in capital cases, and that the State's argument that relative culpability had been abandoned was not properly preserved for review—are without merit and do not warrant further discussion.

III. CONCLUSION

This Court's relative culpability review was a corollary of its comparative proportionality review, which was determined in *Lawrence* to be violative of the Florida Constitution. As an integrated part of comparative proportionality review, relative culpability review was rendered obsolete by the *Lawrence* decision, and it cannot now provide a basis for vacating Cruz's death sentence, which we hereby affirm.

It is so ordered.

MUÑIZ, C.J., and CANADY, COURIEL, GROSSHANS, and FRANCIS, JJ., concur.
LABARGA, J., dissents with an opinion.
SASSO, J., did not participate.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

LABARGA, J., dissenting.

In 2020, during a series of significant changes by this Court to Florida's death penalty jurisprudence, I strenuously dissented to the elimination of comparative proportionality review—which I described as "the most consequential step yet in dismantling the reasonable safeguards contained within Florida's death penalty jurisprudence." *Lawrence v. State*, 308 So. 3d 544, 552-53 (Fla. 2020) (Labarga, J., dissenting).

Today, I reiterate my dissent as the majority expressly eliminates relative proportionality review as "a corollary of our obsolete comparative proportionality review." Majority op. at 15. I fundamentally disagree with the majority's view that the conformity clause prohibits this Court from conducting proportionality review as a part of its review of death penalty cases. Indeed, I view proportionality review as being consistent with the Eighth Amendment prohibition of arbitrary death sentences.

Surely, in a state that leads the nation with thirty exonerations of individuals from death row, every reasonable safeguard should be retained in this Court's toolkit when reviewing

death sentences to ensure that the death penalty is reserved for the most aggravated and least mitigated of murders.[2]

I respectfully dissent.

An Appeal from the Circuit Court in and for Volusia County,
Raul A. Zambrano, Judge – 642013CF102943XXXADL

J. Rafael Rodriguez of Law Offices of J. Rafael Rodriguez, Miami, Florida,

for Appellant

Ashley Moody, Attorney General, Tallahassee, Florida, and Patrick Bobek, Assistant Attorney General, Daytona Beach, Florida,

for Appellee

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2. *See* Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/florida (last visited June 14, 2023).

Supreme Court of Florida

THURSDAY, OCTOBER 5, 2023

Christian Cruz,
Appellant(s)

SC2021-1767
Lower Tribunal No(s).:
642013CF102943XXXADL

v.

State of Florida,
Appellee(s)

Appellant's "Motion for Rehearing" is hereby denied.

MUÑIZ, C.J., and CANADY, COURIEL, GROSSHANS, and FRANCIS, JJ., concur.
LABARGA, J., dissents with an opinion.
SASSO, J., did not participate.

LABARGA, J., dissenting.

Given my fundamental disagreement with the majority's view that the conformity clause prohibits proportionality review in death penalty cases, I dissented to the majority's decision to expressly disavow relative proportionality review in *Cruz v. State*, 48 Fla. L. Weekly S140 (Fla. July 6, 2023).

As such, I would vote to grant rehearing.

A True Copy
Test:

SC2021-1767 10/5/2023

John A. Tomasino
Clerk, Supreme Court
SC2021-1767 10/5/2023

SO

Served:

CapAppeals Attorney General TLH
Volusia Clerk
Patrick Albert Bobek
Jose Rafael Rodriguez

MANDATE

SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the:

Circuit Court for the Seventh Judicial Circuit, Volusia County

WHEREAS, in that certain cause filed in this Court styled:

Christian Cruz,
Appellant(s)
v.

State of Florida,
Appellee(s)

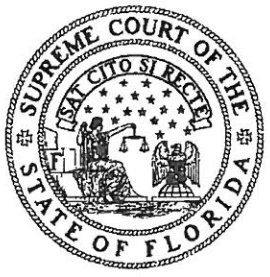
Case No.: **SC2021-1767**

Your Case No.: **642013CF102943XXXADL**

The attached opinion was rendered on: **July 06, 2023**

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS, The Honorable Chief Justice Carlos G. Muñiz, Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on October 23, 2023.



Clerk of the Supreme Court of Florida