SUPREME COURT OF FLORIDA

JUAN ROBERTO MELENDEZ,

Petitioner,

v. CASE NO. 82,570

HARRY K. SINGLETARY, JR.,

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the Respondent, Harry K. Singletary, Jr., by and through the undersigned counsel and hereby files its response in opposition to the Petition for Writ of Habeas Corpus. Respondent would show unto the Court as follows:

I.

Statement of the Case

Melendez was named as a codefendant with John Arthur Berrien in an indictment in Polk County, Florida, charged with one count each of first degree murder and robbery. Melendez entered pleas of not guilty.

Trial commenced on September 17, 1984. On September 20, 1984, the jury found Melendez guilty of first degree murder and robbery. The penalty phase was conducted on September 21, 1984. The sentencing jury returned an advisory sentence of death by a vote of 9 - 3. Immediately thereafter, the Court imposed a sentence of death. Written findings supporting the death

sentence were entered on October 3, 1984. The Court found the following aggravating circumstances:

> 1. The defendant has previously been convicted of a felony involving the use or threat of violence to some person.
>
> 2. The crime for which the defendant is to be sentenced was committed while he was engaged or an accomplice in the commission of the crime of robbery.
>
> 3. The crime for which the defendant is to be sentenced is especially wicked, evil, atrocious or cruel.
>
> 4. The crime for which the defendant is to be sentenced was committed in a cold, calculated, premeditated manner without any pretense of moral or legal justification.

The court did not find any mitigating circumstances.

Melendez appealed his conviction to this Court. On appeal, appointed counsel, Marshall G. Slaughter, Esq., raised the following issues:

> POINT I: IF A LAW ENFORCEMENT AGENCY IS GROSSLY NEGLIGENT IN THE PRESERVATION OF, AND COLLECTION OF EVIDENCE WHICH COULD BE EXCULPATORY TO A DEFENDANT, HAS HE BEEN DENIED DUE PROCESS OF LAW?
>
> POINT II: IF THE STATE FAILS TO PROVE AGGRAVATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT, SHOULD A DEATH SENTENCE BE SET ASIDE?
>
> POINT III: IF A DEFENDANT HAS A POTENTIAL WITNESS WHO COULD GIVE VERY DAMAGING TESTIMONY AGAINST THE PROSECUTION'S MAIN WITNESS, AND POSSIBLY COULD INDICATE THAT THE STATE'S WITNESS WAS A PARTICIPANT IN THE SUBJECT CRIME, IS IT A DENIAL OF DUE PROCESS NOT TO DECLARE A MISTRIAL WHEN THE WITNESSES REFUSES TO APPEAR?
>
> POINT V: IF A DEFENDANT IS FOUND GUILTY OF FIRST DEGREE MURDER AND ARMED ROBBERY, ALL OF

WHICH WAS ONE TRANSACTION, IS IT IMPROPER TO SENTENCE HIM FOR BOTH OFFENSES?

Melendez's conviction and sentence were affirmed by this Court on direct appeal on December 11, 1986. Melendez v. State, 498 So. 2d 1258 (Fla. 1986). Petitioner did not take a petition for writ of certiorari to the United States Supreme Court.

On January 16, 1989, Melendez filed a Rule 3.850 motion for post conviction relief in the circuit court of the Tenth Judicial Circuit in and for Polk County, Florida. The motion raised the following issues:

CLAIM I: JUAN MELENDEZ'S CONVICTION AND DEATH SENTENCE ARE UNCONSTITUTIONALLY DISPROPORTIONATE AND IN DISPARITY WITH THE TREATMENT OF HIS ACCOMPLICE, IN CONTRAVENTION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM II: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ADVISE MR. MELENDEZ OF THE CONSEQUENCES OF NOT PRESENTING EVIDENCE DURING THE PENALTY PHASE OF HIS CAPITAL TRIAL.

CLAIM III: THE COURT AND PERSECUTOR MISINFORMED THE JURY THAT THEIR SENTENCING VERDICT CARRIED NO INDEPENDENT WEIGHT, DIMINISHING THE JURY'S SENSE OF RESPONSIBILITY FOR ITS SENTENCING DECISION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM IV: THE STATE'S INTENTIONAL WITHHOLDING OF MATERIAL AND EXCULPATORY EVIDENCE VIOLATED THE CONSTITUTIONAL RIGHTS OF JUAN ROBERTO MELENDEZ UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM V: FAILURE TO INSTRUCT THE JURY ON THE NONSTATUTORY MITIGATING CIRCUMSTANCES OF DISPARATE TREATMENT VIOLATED MR. MELENDEZ'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM VI: THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING DEPRIVED MR. MELENDEZ OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS, AND THE TRIAL COURT'S APPLICATION OF THIS UNCONSTITUTIONAL STANDARD TO ITS OWN SENTENCING DETERMINATION ALSO VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM VII: THE JURY WAS MISLED AND INCORRECTLY INFORMED ABOUT ITS FUNCTION AT CAPITAL SENTENCING, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM VIII: MR. MELENDEZ'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE.

CLAIM IX: JUAN MELENDEZ WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT BOTH THE GUILT-INNOCENCE AND SENTENCES PHASES OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM X: THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. MELENDEZ'S CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XI: THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCES WAS APPLIED TO MR. MELENDEZ'S CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XII: MR. MELENDEZ'S DEATH SENTENCE MUST BE VACATED BECAUSE THE COURT FAILED TO PROVIDE A FACTUAL BASIS IN SUPPORT OF THE PENALTY.

CLAIM XIII: BECAUSE THE FAILURE ON THE PART OF DEFENSE COUNSEL, MR. MELENDEZ WAS DENIED AN INDIVIDUALIZED AND RELIABLE SENTENCING DETERMINATION BECAUSE THERE WERE NO EXPERTS TO EVALUATE COMPETENCY OR MITIGATION, IN CONTRAVENTION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM XIV: DURING THE COURSE OF VOIR DIRE EXAMINATION THE PROSECUTION AND THE COURT

IMPROPERLY ASSERTED THAT SYMPATHY TOWARDS MR. MELENDEZ WAS AN IMPROPER CONSIDERATION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XV: MR. MELENDEZ WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO PRESENT KNOWN EXCULPATORY EVIDENCE TO THE JURY IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

CLAIM XVI: THE PROSECUTOR'S CLOSING ARGUMENT IMPROPERLY DIMINISHED THE JURY'S SENSE OF RESPONSIBILITY IN DETERMINING PENALTY AND THEREBY DEPRIVED MR. MELENDEZ OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO AN INDIVIDUALIZED SENTENCING.

CLAIM XVII: JUAN MELENDEZ WAS DENIED HIS RIGHT TO FUNDAMENTAL DUE PROCESS AND A FAIR TRIAL BY A COMBINATION OF FACTORS, IN CONTRAVENTION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Melendez filed a supplement to the Rule 3.850 motion on April 21, 1989, which did not raise any new issues. On July 17, 1989, the circuit court summarily denied relief.

An appeal from the denial of the motion for post conviction relief was then taken to this Court where Melendez raised the following allegations:

ARGUMENT I: THE RULE 3.850 COURT'S SUMMARY DENIAL OF MR. MELENDEZ'S MOTION TO VACATE WITHOUT AN EVIDENTIARY HEARING WAS ERRONEOUS AS A MATTER OF LAW AND FACT.

ARGUMENT II: THE STATE'S INTENTIONAL WITHHOLDING OF MATERIAL AND EXCULPATORY EVIDENCE AND ITS RELIANCE UPON FALSE EVIDENCE DEPRIVED MR. MELENDEZ OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

ARGUMENT III: JUAN MELENDEZ WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

ARGUMENT IV: JUAN MELENDEZ WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

A. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ADVISE MR. MELENDEZ OF HIS CONSEQUENCES OF NOT PRESENTING EVIDENCE DURING THE PENALTY PHASE OF HIS CAPITAL TRIAL.

B. TRIAL COUNSEL FAILED TO INVESTIGATE AND PREPARE FOR THE PENALTY PHASE.

C. TRIAL COUNSEL PRESENTED AN UTTERLY INADEQUATE CLOSING ARGUMENT AT THE PENALTY PHASE REGARDING THE NONSTATUTORY MITIGATING CIRCUMSTANCE OF DISPARATE TREATMENT OF CODEFENDANT.

D. AS A RESULT OF DEFENSE COUNSEL'S FAILURES, MR. MELENDEZ WAS DENIED AN INDIVIDUALIZED AND RELIABLE SENTENCING DETERMINATION BECAUSE THERE WERE MENTAL HEALTH EXPERTS TO EVALUATE COMPETENCY OR MITIGATION.

E. CONCLUSION.

ARGUMENT V: JUAN MELENDEZ'S CONVICTION AND DEATH SENTENCE ARE CONSTITUTIONALLY DISPROPORTIONATE AND IN DISPARITY WITH THE TREATMENT OF HIS ACCOMPLICE, IN CONTRAVENTION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

ARGUMENT VI: MR. MELENDEZ'S SENTENCE, OF DEATH, RESTING ON THE "HEINOUS, ATROCIOUS, AND CRUEL" AGGRAVATING FACTOR, VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS, AND THE JURY INSTRUCTIONS REGARDING HIS AGGRAVATING CIRCUMSTANCE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

ARGUMENT VII: MR. MELENDEZ'S SENTENCE OF DEATH, RESTING ON THE "HEINOUS, ATROCIOUS, AND CRUEL" AGGRAVATING FACTOR VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS, AND THE JURY INSTRUCTIONS REGARDING THIS AGGRAVATING CIRCUMSTANCE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

ARGUMENT VIII: THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. MELENDEZ'S CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

ARGUMENT IX: MR. MELENDEZ'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AN INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, CONTRARY TO CALDWELL V. MISSISSIPPI, 105 S.CT. 2633 (1895) AND MANN V. DUGGER, 844 F.2D 1446 (11TH CIR. 1988), AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. MR. MELENDEZ RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ZEALOUSLY ADVOCATE AND LITIGATING THIS ISSUE.

ARGUMENT X: THE SHIFTING OF BURDEN OF PROOF IN THE JURY INSTRUCTIONS AT SENTENCING DEPRIVED MR. MELENDEZ OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

ARGUMENT XI: MR. MELENDEZ'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE IN VIOLATION OF MAYNARD V. CARTWRIGHT, LOWENFIELD V. PHELPS, HITCHCOCK V. DUGGER, AND THE EIGHTH AMENDMENT.

On November 12, 1992, this Court issued its opinion affirming the denial of the motion for post conviction relief. Melendez v. State, 612 So. 2d 1366 (Fla. 1992). A petition for writ of certiorari was taken to the United States Supreme Court and denied on October 18, 1993. A petition for writ of habeas corpus was filed in the United States District Court, Middle District on October 18, 1993. It is still pending. Melendez then sought relief in this Honorable Court by way of petition for writ of habeas corpus filed in April, 1993.

III.

Statement of Facts

In its opinion affirming Melendez's conviction and sentence, this Court set forth the salient facts as follows:

> Police responded to a call from the victim's sister on the evening of September 13, 1983, and found the body of Delbert Baker on the floor in the back room of his beauty school in Auburndale. His throat had been slashed, and he had been shot in the head and shoulders. No jewelry was found on his body.
>
> John Berrien testified at trial that there was an occasion around the time of September 12, 1983, on a rainy day that he, his cousin George Berrien, and appellant were together and appellant asked him to drive him to Auburndale so he could get his hair done an pick up some money. The three of them left at about 4 p.m. Appellant had a bulge in the back of his pants that Johns suspected was a gun. George and appellant said to pick them up from Mr. Del's beauty school, in about one and one-half to two hours, and he did so. The next day George asked John to drive him to the train station so that he could go to Delaware to see his children. Appellant went with them to the station and gave George two rings, a watch an a gun to sell in Wilmington. John had seen appellant with watches and rings before, but could not say if they were the same ones. The watch looked like one appellant previously had tried to sell him. Amtrak records reflecting that a Mr. G. Berrien made a reservation on September 14, 1983, to go from Lakeland to Wilmington, Delaware, and a ticket lift indicating that the train was actually boarded were introduced into evidence. There was testimony that the victim had worn his missing wrist watch, gold bracelet and four diamond rings for years and that he had been wearing them on the day of the murder. A bank bag containing $50 in petty cash was missing from the victim's desk drawer.

David Falcon, a convicted felon, testified that several months after the murder appellant told him of having participated in the crimes. According to Falcon's rendition, appellant and another had made an appointment with the victim because he was supposed to have money and jewelry. The driver, John, stayed in the car. Appellant and his accomplice went inside, and the latter cut the victim's throat. The victim begged them to take him to a hospital, but appellant said that that could not be done because the victim would tell the police. Appellant then shot him in the head. The perpetrators cleaned up any fingerprints and took jewelry and money.

George Berrien testified for the defense and denied riding with appellant in the car to Auburndale and said he had seen him only once before at his cousin John's house. Appellant testified and denied culpability. A prisoner named Roger Mims testified that his cellmate, Vernon James, told him that he, his partner and a homosexual killer Baker. There was police testimony that Harold Landrum was a close friend of James' and that James and Landrum were initially suspects in the case, but that Landrum was eliminated as a suspect based on an interview with Landrum's employer.

Appellant's lover testified that Falcon had told her he was going to testify falsely against appellant. She also stated that she had been with appellant the evening of the murder, and this was corroborated by her sister's testimony. There was additional testimony that Falcon did not like appellant and said he was going to have him killed.

The jury convicted appellant of first-degree murder and armed robbery and recommended the death penalty for the murder. The trial court sentenced him to death in accordance with the jury's recommendation, finding four aggravating and no mitigating factors.

IV.

Argument

Petitioner raises six claims in the instant petition under the umbrella of an ineffective assistance of appellate counsel claim. The issues as stated by Petitioner are:

> CLAIM I: MR. MELENDEZ WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT AS REQUIRED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATED CONSTITUTION AND ARTICLE I §§9, 16(a) AND 17 OF THE CONSTITUTION OTHER STATE OF FLORIDA.
>
> A. THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN MR. MELENDEZ WAS PREVENTED FROM CROSS-EXAMINING WITNESSES AND FROM INTRODUCING EVIDENCE NECESSARY TO PROVE HIS INNOCENCE OF THIS CRIME.
>
> B. THERE IS INSUFFICIENT EVIDENCE TO CONVICT MR. MELENDEZ OF THIS CRIME.
>
> C. JUAN MELENDEZ'S DEATH SENTENCE WAS ARBITRARILY AND CAPRICIOUSLY IMPOSED IN LIGHT OF THE FACT THAT AN ALLEGED CO-PERPETRATOR WHOM THE STATE ADMITTED TO BE EQUALLY GUILTY WAS NEVER CHARGED WITH THE CRIME, IN VIOLATION OF THE EIGHT AND FOURTEENTH TO THE UNITED STATES CONSTITUTION.
>
> D. MR. MELENDEZ DID NOT MAKE A KNOWING AND INTELLIGENT WAIVER OF HIS RIGHTS TO PRESENT EVIDENCE IN MITIGATION IN THE SENTENCING STAGE OF HIS CAPITAL TRIAL.
>
> E. THE SHIFTING OF THE BURDEN OF PROOF IN JURY INSTRUCTIONS AT SENTENCING DEPRIVED MR. MELENDEZ OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.
>
> F. MR. MELENDEZ'S SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF STRINGER V. BLACK, MAYNARD CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A review of the foregoing claims makes it clear that the instant petition for writ of habeas corpus is, as was the petition filed in **Blanco v. Wainwright**, 507 So.2d 1377 (Fla. 1987), "almost entirely a repetition of the issues raised in the Rule 3.850 proceeding." By including these types of claims within his petition for writ of habeas corpus, "collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material." **Blanco v. Wainwright**, 507 So.2d at 1384. As these identical claims were considered and rejected upon review of the denial of the 3.850, this Honorable Court need not and should not "replough this ground once again." Ibid.

With respect to each of the issues raised in this habeas petition, petitioner gratuitously asserts that appellate counsel was ineffective for failing to raise the issues on direct appeal. In **McCrae v. Wainwright**, 439 So.2d 868 (Fla. 1983), this Court held that "[h]abeas corpus should not be used as a vehicle for presenting issues which should have been raised at trial and on appeal", citing **Hargrave v. Wainwright**, 388 So.2d 1021 (Fla. 1980), and **State ex rel. Copeland v. Mayo**, 87 So.2d 501 (Fla. 1956). In **McCrae**, this Court specifically opined that:

> . . . Allegations of ineffective appellate counsel therefore should not be allowed to serve as a means as circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal. (text at 870)

This type of admonition has been consistently followed by this Honorable Court and this Court has specifically admonished the office of the capital collateral counsel "that habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been raised in Rule 3.850 proceedings." **White v. Dugger**, 511 So.2d 554 (Fla. 1987), citing **Blanco**, supra, and **Copeland v. Wainwright**, 505 So.2d 425 (Fla. 1987). Thus, to the extent that petitioner is again asking this Court to exercise its jurisdiction over issues not legally cognizable on habeas review, this Court should decline to do so.

As all of these claims could have been or should have been asserted on direct appeal, respondent declines to address the merits of substantive claims asserted in this habeas petition and urges this Court to continue to enforce its procedural default policy; otherwise, appeal will follow appeal and there will be no finality in capital litigation. cf. **Johnson v. State**, 536 So.2d 1009 (Fla. 1988) (the credibility of the criminal justice system depends upon both fairness and finality). In **Harris v. Reed**, 489 U.S. __, 109 S.Ct. 1083, 103 L.Ed.2d 308 (1989), the Supreme Court held that where a state court was ambiguous in its ruling denying relief on both procedural and substantive grounds, the federal habeas courts should reach the merits:

> Faced with a common problem, we adopt a common solution: a procedural default does not bar consideration of a federal claim on

> either direct or habeas review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar.

The court added in footnote 12:

> . . . Additionally, the dissent's fear, post, p.11-12 and n.6, that our holding will submerge courts in a flood of improper prisoner petitions is unrealistic: a state court that wishes to rely on a procedural bar rule in a one-line pro forma order can easily write that "relief is denied for reasons of procedural default."

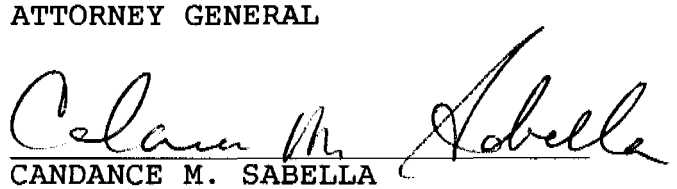
If, however, this Honorable Court should determine that a review of the merits of any of these claims is necessary, Respondent respectfully requests the opportunity to file a supplemental response.

CONCLUSION

Based on the foregoing reasons, this Honorable Court should deny the Petition for Writ of Habeas Corpus.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, November 1, 1993.

OF COUNSEL RESPONDENT.