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CLERK, SUPREME COURT
BY___________

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC90,540

Paul Alfred Brown,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary,
Florida Department of Corrections,

Respondent,

and

ROBERT BUTTERWORTH,
Attorney General,

Additional Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Article 1, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These claims demonstrate that Mr. Brown was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as "R. ___" followed by the appropriate volume and page numbers. The postconviction record on appeal will be referred to as "PC-R. " followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT . . . , ... , ... 1

TABLE OF CONTENTS . . . . , . . . ii

TABLE OF AUTHORITIES . . , . . , ... iii

INTRODUCTION . . . . , ... 1

JURISDICTION TO ENTERTAIN PETITION
AND GRANT HABEAS CORPUS RELIEF . . , ... 2

GROUNDS FOR HABEAS CORPUS RELIEF . . . . , 3

PROCEDURAL HISTORY . . . . , ... 3

CLAIM I

MR. BROWN'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS MR. BROWN MAY BE INCOMPETENT AT THE TIME OF EXECUTION. . , ... 5

CLAIM II

THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. . . 7

A. Apprendi is a fundamental change in law. 14

CONCLUSION AND RELIEF SOUGHT . . . . , , ... 16

CERTIFICATE OF SERVICE . . . . , ... 17

CERTIFICATE OF COMPLIANCE . . . . , , , ... 18

TABLE OF AUTHORITIES

Pase

Agostini v. Felton,
521 U.S. 203, 237 (1997) 13

Apprendi,
120 S.Ct. 2348, 2355 (2000) 7

Baggett v. Wainwright,
392 So.2d 1327 (Fla. 1981) 2

Barclay v. Wainwright,
444 So.2d 956, 959 (Fla. 1984) 1

Brown v. Florida,
111 S.Ct. 537 (1990) 4

Brown v. State,
565 So.2d 304 (Fla. 1990) 4

Brown v. State,
755 So.2d 616 (Fla. 2000) 4

Dallas v. Wainwright,
175 So.2d 785 (Fla. 1965) 2

Downs v. Dugger,
514 So.2d 1069 (Fla. 1987) 2

Fitzpatrick v. Wainwright,
490 So.2d 938, 940 (Fla. 1986) 1

Ford v. Wainwright,
477 U.S. 399, 106 S.Ct. 2595 (1986) 5

Gardner v. Florida,
430 U.S. 349, 357 (1976) 11

Herrera v. Collins,
506 U.S. 390,
113 S. Ct. 853,
122 L.Ed.2d 203 (1993) 6

Hitchcock v. Dugger,
481 U.S. 393 (1987) 15

In re: Provenzano,
No, 00-13193 (11th Cir. June 21, 2000) 6

James v. State,
615 So.2d 668 (Fla. 1993) 16

Jones v. United States,
526 U.S. 227, 243, n.6 (1999) 7, 11

Lockett v. Ohio,
438 U.S. 586 (1978) 15

Martin v. Wainwright,
497 So.2d 872 (1986) 5

Martinez-Villareal v. Stewart,
118 S. Ct. 1618,
523 U.S. 637,
140 L.Ed.2d 849 (1998) 6

Mills v. Michael W. Moore,
_____ So.2d _____ (Fla. April 12, 2001) 14

Palmes v. Wainwright,
460 So.2d 362 (Fla. 1984) 2

Poland v. Stewart,
41 F. Supp. 2d 1037 (D.Ariz 1999) 5

Riley v. Wainwright,
517 So.2d 656 (Fla. 1987) 2, 15

Rodriquez de Quijas v. Shearson/American Express, Inc.,
490 U.S. 477, 484 (1989) 13

Smith v. State,
400 So.2d 956, 960 (Fla. 1981) 2

Spaziano v. State,
433 So.2d 508, 511-12 (Fla. 1983) 15

State v. Dixon,
283 So.2d 1, 9 (Fla. 1973) 8

State v. Golphin,
533 S.E.2d 168, 193-94 (N.C. 2000) 13

State v. Hoskins,
14 P.3d 997, 1016 (Ariz. 2000) 13

Thompson v. Dugger,
515 So.2d 173, 175 (Fla. 1987) 15

Walton v. Arizona,
497 U.S. 639 (1990) 12

Way v. Dugger,
568 So.2d 1263 (Fla. 1990) 2

Weeks v. State,
761 A.2d 804, 806 (Del. 2000) 13

Wilson v. Wainwright,
474 So.2d 1162, 1164 (Fla. 1985) 1, 2

Witt v. State,
387 So.2d 922, 929-30 (Fla. 1980) 14

Woodson v. North Carolina,
428 U.S. 280, 305 (1975) 11

INTRODUCTION

Significant errors which occurred at Mr. Brown's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel.

The issues, which appellate counsel neglected, demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Brown. "[E]xtant legal principles . . . provided a clear basis for . . . compelling appellate argument[s]." Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986). Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So.2d **1162,** 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165 (emphasis in original).

Additionally, this petition presents questions that were ruled on in direct appeal, but should now **be** revisited in light of subsequent case law **or** in order to correct error in the appeal process that denied fundamental constitutional rights. **As** this petition will demonstrate, Mr. Brown is entitled to habeas relief

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla.R.App.P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030(a) (3) and Art. V, Sec. 3(b) (9), Fla. Const. The Petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Brown's sentence of death.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Brown's direct appeal. See Wilson, 474 So.2d at 1163 (Fla. 1985); Baggett v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Brown to raise the claims presented herein, See, e.g., Way v. Dugger, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Wilson, 474 So.2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. See **Dallas** v. Wainwright, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct

constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Brown's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Brown asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

PROCEDURAL HISTORY

The Circuit Court of the Thirteenth Judicial Circuit, in and for Hillsborough County, entered the Judgment and Sentence on March 3, 1987. (R. 735). Mr. Brown was charged by indictment with murder in the first degree, armed burglary, attempted first degree murder, violations of §782.04 (1)(a), §810.02, and §777.04 and §782.04 Fla. Stat. (R. 814-816).

Trial commenced on February 16, 1987, and the jury returned a verdict of guilty on February 19, 1987. (R. 509-510, 895). On the same day, the penalty phase before the jury was held. The jury returned a death sentence recommendation by a 7-5 vote. (R. 663, 896).

On March 2, 1987, sentencing before the Judge was held. The Court, accepting the jury recommendation, imposed a sentence of

death. (R. 734). Mr. Brown unsuccessfully took a direct appeal from the judgment of conviction and imposition of the death sentence. Brown v. State, 565 So.2d 304 (Fla. 1990). Rehearing was denied on June 11, 1990, On November 26, 1990, a petition for writ of certiorari was denied by the United States Supreme Court. See, Brown v. Florida, 111 S.Ct. 537 (1990).

Mr. Brown's pleadings pursuant to Fla.R.Crim.P. 3.850 were due to be filed November 26, 1992. However, to avoid the signing of a warrant, Mr. Brown agreed to initiate his **post** conviction motion six months early to comply with schedules established by the Governor. (R. ___). Mr. Brown timely filed his initial 3.850 motion in the circuit court on May 8, 1992 (PC-R. 17-29). At a status hearing on June 5, 1992, the court dismissed Mr. Brown's initial 3.850 motion without prejudice. An amended 3.850 motion was filed on September **16,** 1992, with special request for leave to amend when and if 119 compliance did occur (PC-R. 30-81).

A second amended 3.850 was filed on November 24, 1992, (the two-year date) with special request for leave to amend. An evidentiary hearing was held on March 3, 1998. (PC-R. Vol. **IV** 15, 19, 35, 41).

Timely notice of appeal was filed on May 5, 1997. (PC-R. 454-455).

The Florida Supreme Court affirmed the denial of post conviction relief on March 9, 2000, Brown v. State, 755 So.2d 616

(Fla. 2000), and denied Mr. Brown's motion for rehearing on April 26, 2000. This petition follows.

CLAIM I

MR. BROWN'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS MR. BROWN MAY BE INCOMPETENT AT THE TIME OF EXECUTION.

In accordance with Florida Rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." This rule was enacted in response to Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986).

Paul Brown acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, Mr. Brown acknowledges that before a judicial review may be held in Florida, the defendant must first submit his claim in accordance with Florida Statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed, the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida Statutes (1985) and Martin v. Wainwright, 497 So.2d 872 (1986) (If Martin's counsel wish to pursue this claim, we direct them to initiate the sanity proceedings set out in section 922.07, Florida Statutes (1985)).

The same holding exists under federal law. Poland v. Stewart,

41 F. Supp. 2d 1037 (D.Ariz 1999) (such claims truly are not ripe unless a death warrant has been issued and an execution date is pending); Martinez-Villareal v. Stewart, 118 S. Ct. 1618, 523 U.S. 637, 140 L.Ed.2d 849 (1998)(respondent's Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time); Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L.Ed.2d 203 (1993)(the issue of sanity [for Ford claim] is properly considered in proximity to the execution).

However, most recently, in In re: Provenzano, No. 00-13193 (11th Cir. June 21, 2000), the 11th Circuit Court of Appeals stated:

> Realizing that our decision in In Re: Medina, 109 F.3d 1556 (11th Cir. 1997), forecloses us from granting him authorization to file such a claim in a second or successive petition, Provenzano asks us to revisit that decision in light of the Supreme Court's subsequent decision in Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998). Under our prior panel precedent rule, See United States v. Steele, 147 F.3d 1316, 1317-18 (11th Cir. 1998)(en banc), we are bound to follow the Medina decision. We would, of course, not only be authorized but also required to depart from Medina if an intervening Supreme Court decision actually overruled or conflicted with it. [citations omitted]
> Stewart v. Martinez-Villareal does not conflict with Medina's holding that a competency to be executed claim not raised in the initial habeas petition is subject to the strictures of 28 U.S.C. Sec 2244(b)(2), and that such a claim cannot meet either of the exceptions set out in that provision.

Id. at pages 2-3 of opinion.

This claim is necessary at this stage because federal law requires that, in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus, and federal law requires all issues raised in a federal habeas petition to be exhausted in state court. Hence, Paul Brown raises this claim now.

CLAIM II

THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH, *AND* FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

In Jones v. United States, the United States Supreme Court held, "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones v. United States, 526 U.S. 227, 243, n.6 (1999). Subsequently, in Apprendi v. New Jersey, the Court held that the Fourteenth Amendment affords citizens the same protections under state law. Apprendi, 120 S.Ct. 2348, 2355 (2000).

In Apprendi, the issue was whether a New Jersey hate crime sentencing enhancement, which increased the punishment beyond the statutory maximum, operated as an element of an offense so as to

require a jury determination beyond a reasonable doubt. Apprendi, **120** S.Ct. at 2365. "[T]he relevant inquiry here is not one of form, but of effect-does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Apprendi, **120** S.Ct. at 2365. Applying this test, it is clear that aggravators under the Florida death penalty sentencing scheme are elements of the offense which must be charged in an indictment, submitted to a jury during guilt phase, and proven beyond a reasonable doubt by a unanimous verdict.

At the time of Paul Brown's penalty phase, Florida statute 775.082 provided:

> A person who has been convicted of a capital felony **shall be punished by life imprisonment** and shall be required to serve no less than 25 years before becoming eligible **for** parole **unless the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.**

§775.082 Fla. Stat. **(1983)** (emphasis added). Under this statute, the state must prove at least **one** aggravating factor in the separate penalty phase proceeding **before** a person convicted of first degree murder is eligible for the death penalty. State v. Dixon, 283 So.2d 1, 9 (Fla. **1973)**; Fla. Stat., §775.082 (1994); §921.141(2)(a), (3)(a) Fla. Stat. (1994). Thus, Florida capital defendants are not eligible for the death sentence simply upon

conviction of first degree murder. If a court sentenced a defendant immediately after conviction, the court could only impose a life sentence. §775.082 Fla. Stat. **(1994).** Therefore, under Florida law, the death sentence is not within the statutory maximum sentence, as analyzed in Apprendi, because it increased the penalty for first degree murder beyond the life sentence a defendant is eligible for based solely upon the jury's guilty verdict.

Under the Florida death penalty scheme there are essentially two levels of murder. The first, conviction for first degree premeditated murder or felony murder permits **a** life sentence. The second, if aggravating circumstances are proved beyond a reasonable doubt, the person so convicted can be sentenced to death. Thus, the Florida death penalty system divides murders into two categories, analogous to felony battery and aggravated battery. Felony battery, which is punished as a third degree felony, becomes aggravated battery, punished as a second degree battery, upon proof of certain aggravating circumstances. §§784.041, 784.045 Fla. Stat. (1999). These circumstances which increase felony battery from a third degree felony to **a** second degree felony of aggravated battery are elements of the crime which must be charged in the indictment, submitted to the jury, and must be proved beyond a reasonable doubt **by** a unanimous verdict. Likewise the Florida death penalty aggravating circumstances, which elevate a murder punishable by a life sentence to a murder punishable by death, must

be charged in the indictment, submitted to the jury, and must be proved beyond a reasonable doubt. No other crimes in Florida allow increased punishments based on additional findings (other than prior conviction) made by a judge; Apprendi disallows this practice.

In Apprendi, the hate crime sentencing enhancement was applied after the defendant was found guilty and increased the statutory maximum penalty by up to ten years. Apprendi, 120 S.Ct. at 2351. The Apprendi **court** clearly dispensed with the fiction that such an enhancement was not an element which received Sixth Amendment protections. The Court wrote, "[b]ut it can hardly be said that the potential doubling of one's sentence **from** 10 years to 20-has no more that a nominal effect. Both in terms of absolute years behind bars, and because of the severe stigma attached, the differential here is unquestionably of constitutional significance." Apprendi, **120** S.Ct. at 2365. As in Apprendi, in Paul Brown's case, the aggravators were applied only after he was found guilty. The aggravators increased the statutory maximum penalty based on the guilty verdict from life imprisonment to death. Certainly, the difference between life and death has more than nominal effect and is of constitutional significance. "[T]he **penalty** of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or

two." Woodson v. North Carolina, 428 U.S. 280, 305 (1975). See Gardner v. Florida, 430 U.S. 349, 357 (1976).

Though Apprendi involved two separate statutes and the Florida death penalty involves only one, the issue is substance over form. Apprendi 120 S.Ct. at 2350, 2365; §921.141 Fla. Stat. (1999). The effect of the Florida death penalty statute is similar to the effect of the federal car jacking statute the United States Supreme Court addressed in Jones v. United States, 526 U.S. 227, 243, n.6 (1999). Three subsections of the Jones statute appeared, superficially, to be sentencing factors. However, the superficial impression lost clarity when the Court examined the effects **of** the sentencing factors.

> But the superficial impression loses clarity when one **looks** at the penalty subsections (2) and (3). These not only provide for steeply higher penalties, but they condition them on further acts (injury, death) that seem quite as important as the elements in the principle paragraph (e.g. force and violence, intimidation). It is at best questionable whether the specification of facts sufficient to increase a penalty range from 15 years to life, **was** meant to carry none of the process safeguards that elements of the offense bring with them for a defendant's benefit.

Jones, 526 U.S. at 233. Because the car jacking sentencing factors increased the maximum penalty for the crime from **15** years to 25 years or life imprisonment, the Court interpreted them as elements of the crime which receive Sixth Amendment protection. Jones, 526 U.S. at 230, 242-43.

Although the majority of the Court stated in dicta that Apprendi did not overrule Walton v. Arizona, 497 **U.S.** 639 (1990), the Apprendi court was not addressing a death case in which constitutional protections are more rigorously applied, and Apprendi did not specifically address the Florida sentencing scheme. Apprendi, 120 S.Ct. at 2366. Moreover, the majority dicta did not carry the force of an opinion of the full court. See Apprendi, 120 S.Ct. at 2380 (Thomas J., concurring) ("Whether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated is a question for another day."); Apprendi, 120 S.Ct. at 2387-88 (O'Connor, J., dissenting) ("If the Court does not intend to overrule Walton, one would be hard pressed to tell from the opinion it issues today.") Apprendi, 120 S.Ct. 2388.

Because the effect of finding an aggravator exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict, the aggravator must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. Apprendi, at 2365. This did not occur in Paul Brown's case. Thus, the Florida death penalty scheme is unconstitutional as applied.

Brown argues that Apprendi overruled Walton and relies upon the five-to-four split in the Court. Four justices states in dissent that Apprendi effectively overruled Walton, and another

justice in his concurring opinion stated that reconsideration of Walton was left for another day. With the majority of the justices refusing to disturb the rule of law announced in Walton, it is still the law and it is not within this Court's authority to overrule Walton in anticipation of any future Supreme Court action. The Supreme Court has specifically directed lower courts to "leav[e] to this Court the prerogative of overruling its own decisions." Agostini v. Felton, 521 U.S. 203, 237 (1997) (quoting Rodriquez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)). The majority opinion in Apprendi forecloses Mills' claim because Apprendi preserves the constitutionality of capital sentencing schemes like Florida's. Therefore, on its face, Apprendi is inapplicable to this case.

No court has extended Apprendi to capital sentencing schemes, and the plain language of Apprendi indicates that the case is not intended to apply to capital schemes. See State v. Hoskins, 14 P.3d 997, 1016 (Ariz. 2000) (noting Apprendi did not apply to capital sentencing schemes and did not overrule Walton); Weeks v. State, 761 A.2d 804, 806 (Del. 2000) (en banc) ("[W]e are not persuaded that Apprendi's reach extends to 'state capital sentencing schemes' in which judges are required to find 'specific aggravating factors before imposing a sentence of death.'"), cert. denied, 121 S.Ct. 476 (2000); State v. Golphin, 533 S.E.2d 168, 193-94 (N.C. 2000) ("The United States Supreme Court's recent

opinion in Apprendi . . , does not affect our prior holdings regarding the inclusion of aggravating circumstances in an indictment. . . . [A]n indictment need not contain the aggravating circumstances the State will use to seek the death penalty . . .), cert. denied, 69 U.S.L.W. 3618 (U.S.Mar. 19, 2001). Importantly, in Weeks v. State, a capital defendant brought his second habeas petition on October 27, 2000, alleging an Apprendi violation and seeking a stay of his execution which was set for November 17, 2000. The trial court ruled that Apprendi did not apply to Weeks' case. Weeks appealed and the trial court's ruling was affirmed. On November 16, 2000, just one day before the scheduled execution, the United States Supreme Court denied certiorari. Weeks v. Delaware, 121 S.Ct. 476.

The Supreme Court's denial of certiorari indicates that the Court meant what it said when it held that Apprendi was not intended to affect capital sentencing schemes. Mills v. Michael W. Moore, _____ So.2d _____ (Fla. April 12, 2001) (SC01-338).

A. Apprendi is a fundamental change in law.

Mr. Brown submits that he should be entitled to the benefit of Apprendi at this time. In Witt v. State, 387 So.2d 922, 929-30 (Fla. 1980), this Court held that "major constitutional changes of law" as determined by either this Court or the United States Supreme Court are cognizable in post conviction proceedings. Under Witt, for a new rule of law to apply retroactively, a three-part

test is applied. First, the new rule must originate in either the United States Supreme court or the Florida Supreme Court. Second, the new rule must be constitutional in nature. Third, the new rule must have fundamental significance.

Apprendi clearly qualifies under all of the Witt criteria, and the Court is "required by this [Apprendi] decision to re-examine this matter as a new issue of law." Thompson v. Dugger, 515 So.2d 173, 175 (Fla. 1987). Mr. Brown submits that Apprendi qualifies under Witt to be a change in law and also is of such significance as to defeat any procedural defaults. In Thompson, this Court held Hitchcock v. Dugger, 481 U.S. 393 (1987), to be a change in Florida law because it "represent[ed] a sufficient change in the law that potentially affect[ed] a class of petitioners, including Thompson, to defeat the claim of a procedural default." Id. at 175. See also Riley v. Wainwright, 517 So.2d 656 (Fla. 1987) (holding that Lockett v. Ohio, 438 U.S. 586 (1978), is a new law requiring retroactive application). The same can be said for Apprendi, which can be no clearer in its rejection of this Court's prior precedent that Florida's death penalty scheme did not violate due process or the Sixth Amendment right to jury trial. See Spaziano v. State, 433 So.2d 508, 511-12 (Fla. 1983). Apprendi represents such a watershed change in law that Florida defendants should not be

required to have preserved the issue.[1]

Even if prior presentation of the issue is required in order to receive the benefit of Apprendi, see James v. State, 615 So.2d 668 (Fla. 1993), Mr. Brown is still entitled to the benefit of Apprendi.

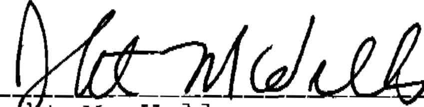
CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Brown respectfully urges this Honorable Court to grant habeas relief.

[1]The dissenting opinion in Apprendi, authored by Justice O'Connor and joined by Chief Justice Rehnquist and Justices Breyer and Kennedy, wrote that the majority decision cast "serious doubt . . . on sentencing systems employed by the Federal Government and States alike," and concluded that the decision was "a watershed change in constitutional law." Apprendi, 120 S.Ct. at 2380 (O'Connor, J., dissenting).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the following has been has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this 23 day of APRIL, 2001.



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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply Petition for Writ of Habeas Corpus, was generated in a Courier non-proportional, 12 point font, pursuant to Fla. R. App. P. 9.210.

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