IN THE SUPREME COURT OF FLORIDA

PAUL ALFRED BROWN

Petitioner,

v. CASE NO. SC01-884

MICHAEL W. MOORE,

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, MICHAEL W. MOORE, by and through the undersigned Assistant Attorney General, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and states as grounds therefor:

FACTS AND PROCEDURAL HISTORY (PRIOR PROCEEDINGS)

The facts of the case are recited in this Court's initial opinion on Brown's direct appeal, Brown v. State, 565 So. 2d 304, 305 (Fla. 1990), cert. denied, 498 U.S. 992, 112 L.Ed.2d 547 (1990).

> Around 1:30 a.m., March 20, 1986 two gunshots woke Barry and Gail Barlow. Upon entering the Florida room of their home they found Gail's seventeen-year-old sister, Pauline Cowell, dead in her bed. Pauline's friend, Tammy Bird, had also been shot, but was still alive. The room's outside door stood open, missing the padlock with which it had been secured. Pursuant to information indicating Brown might be a suspect, sheriff's deputies

began searching for him in places he was known to frequent and found him hiding behind a shed in a trailer park where Brown's brother lived. They arrested Brown and seized a handgun, later linked to the shootings, (FN2) from his pants pocket.

Brown lived with the murder victim's mother, and the victim had only recently moved into her sister's home. Brown confessed after being arrested and, at the sheriff's office, stated that he had broken into the victim's room to talk with her about some "lies" she had been telling. Although he entered the room armed, Brown claimed that he had not intended to kill the girl, but that he planned to shoot her if **she** started "hollering."

The jury convicted Brown of armed burglary, first-degree murder, and attempted first-degree murder and recommended the death sentence. The trial court found that the mitigating evidence did not outweigh the aggravating circumstances and sentenced Brown to death.

> FN1. The jury also convicted Brown of armed burglary and attempted first-degree murder, for which the court sentenced him to consecutive terms of life imprisonment. Although Brown does not appeal those convictions and sentences, our review shows them to be supported by the record.
>
> FN2. Tests showed that bullets found at the murder scene had been fired from the handgun seized from Brown.

On direct appeal Brown raised the following issues:

ISSUE I

> BROWN'S CONFESSION SHOULD HAVE BEEN SUPPRESSED BECAUSE DETECTIVE DAVIS DID NOT ADEQUATELY ADVISE HIM OF HIS CONSTITUTIONAL RIGHTS AS REQUIRED BY MIRANDA V. ARIZONA.

ISSUE II

> THE TRIAL COURT ERRED BY DENYING APPELLANT'S CHALLENGE FOR CAUSE ON PROSPECTIVE JUROR SCALFARI WHO SHOWED A PREDISPOSITION IN FAVOR OF DEATH AS THE PROPER PENALTY.

ISSUE III

THE TRIAL COURT'S INSTRUCTION TO THE JURY ON "REASONABLE DOUBT" (STANDARD JURY INSTRUCTION) UNCONSTITUTIONALLY DILUTED THE DUE PROCESS REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT.

ISSUE IV

A SENTENCE OF DEATH IS DISPROPORTIONATE IN THIS CASE WHEN COMPARED TO OTHER CAPITAL CASES WHERE THIS COURT HAS REDUCED THE PENALTY TO LIFE IMPRISONMENT.

ISSUE V

THE TRIAL COURT ERRED BY DENYING APPELLANT'S SPECIALLY REQUESTED MODIFICATIONS TO THE STANDARD PENALTY PHASE JURY INSTRUCTIONS.

ISSUE VI

THE TRIAL COURT'S INSTRUCTION ON THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS UNCONSTITUTIONALLY VAGUE BECAUSE IT DID NOT INFORM THE PENALTY JURY OF THE LIMITING CONSTRUCTION GIVEN TO THIS AGGRAVATING CIRCUMSTANCE.

ISSUE VII

BROWN'S SENTENCE OF DEATH VIOLATES THE EIGHTH AMENDMENT, UNITED STATES CONSTITUTION BECAUSE A BARE MAJORITY JURY DEATH RECOMMENDATION IS NOT RELIABLY DIFFERENT FROM A TIE VOTE JURY LIFE RECOMMENDATION.

ISSUE VIII

THE FINDING BY THE SENTENCING JUDGE THAT THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTOR APPLIED WAS ERRONEOUS.

This Court affirmed the judgment and sentence and thereafter Brown filed a motion for post-conviction relief which was denied by the trial court after an evidentiary hearing. On appeal Brown raised the following fourteen (14) issues:

ISSUE I

WHETHER THE DEATH SENTENCE WAS THE PRODUCT OF AN UNCONSTITUTIONALLY VAGUE JURY INSTRUCTION ON THE CCP AGGRAVATOR AND IMPROPER APPLICATION OF THE AGGRAVATOR.

ISSUE II

WHETHER MR. BROWN WAS DENIED A FULL AND FAIR HEARING REGARDING HIS PROSECUTORIAL MISCONDUCT CLAIM.

ISSUE III

WHETHER MR. BROWN WAS DENIED A FULL AND FAIR HEARING REGARDING THE EFFECTIVE ASSISTANCE OF COUNSEL AT GUILT PHASE OF HIS TRIAL.

ISSUE IV

WHETHER TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE AT PENALTY PHASE.

ISSUE V

MR. BROWN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING VOIR DIRE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S ACTION WHEN IT REFUSED TO GRANT ADDITIONAL PEREMPTORY CHALLENGES.

ISSUE VI

MR. BROWN'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF STRINGER V.

BLACK, MAYNARD V. CARTWRIGHT, LOWENFIELD V. PHELPS, AND THE EIGHTH AMENDMENT. COUNSEL'S FAILURE TO OBJECT WAS INEFFECTIVE ASSISTANCE OF COUNSEL. THUS, MR. BROWN, WAS DENIED HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

ISSUE VII

MR. BROWN WAS DENIED A RELIABLE SENTENCING IN HIS CAPITAL TRIAL BECAUSE THE SENTENCING JUDGE REFUSED AND FAILED TO FIND THE EXISTENCE OF MITIGATION ESTABLISHED BY THE EVIDENCE IN THE RECORD, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

ISSUE VIII

MR. BROWN'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS WERE INCORRECT UNDER FLORIDA LAW AND SHIFTED THE BURDEN TO MR. BROWN TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE TRIAL COURT EMPLOYED A PRESUMPTION OF DEATH IN SENTENCING MR. BROWN TO DEATH. FAILURE TO OBJECT OR ARGUE EFFECTIVELY RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE.

ISSUE IX

MR. BROWN'S SENTENCING JURY WAS MISLED BY ARGUMENT WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED ITS SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

ISSUE X

MR. BROWN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DURING TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S ACTION. TRIAL COUNSEL FAILED TO OBJECT OR MOVE FOR MISTRIAL WHEN JURY MISCONDUCT WAS EVIDENT. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

ISSUE XI

WHETHER BROWN'S TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS.

ISSUE XII

WHETHER RULES PROHIBITING JURORS FROM BEING INTERVIEWED BY LAWYERS VIOLATES THE CONSTITUTION.

ISSUE XIII

WHETHER THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY ON THE STANDARD TO EVALUATE EXPERT TESTIMONY.

ISSUE XIV

WHETHER EXECUTION OF A MENTALLY RETARDED, BRAIN DAMAGED INDIVIDUAL CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

This Court affirmed the trial court's denial of post-conviction relief in a thorough opinion on March 9, 2000, reported at Brown v. State, 755 So. 2d 616 (Fla. 2000). The Court denied a rehearing petition on April 26, 2000. Brown did not seek certiorari review.[1]

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[1]In his introduction at Page 1 of the petition Brown claims that significant errors were not presented on direct appeal due to the ineffective assistance of appellate counsel. He also states that this petition presents questions that were ruled on in direct appeal but should now be **revisited** in light of subsequent case law or to correct error that constituted fundamental constitutional error. He does not identify which issues fall in either of the two categories. Respondent submits that appellate counsel was not ineffective. See Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000).

CLAIM I: COMPETENCY TO BE EXECUTED

Petitioner recognizes that this issue is not ripe. This Court has recently disposed of the identical claim in Hall v. Moore, ___ So. 2d __, 26 Fla. L. Weekly S316 (Fla. 2001). This Court concluded:

> Hall next argues that it would violate the Eighth Amendment's prohibition against cruel and unusual punishment to execute Hall, who may be incompetent at the time of execution. Hall concedes that this issue is premature and that he cannot legally raise the issue of his competency to be executed until after a death warrant is issued. We agree and find this claim to be without merit. [footnote omitted]

Id.

Hall is controlling. Petitioner is not entitled to relief.

CLAIM II: THE APPRENDI CLAIM

Petitioner mailed the instant pleading on April **23**, 2001, eleven days after this Court decided Mills v. Moore, So. 2d ___, 26 Fla. L. Weekly S242 (Fla. 2001), cert. denied, ___ U.S. ___, 69 Cr. L. Rptr. 2043 (Case No. 00-9601, May 1, 2001) and while petitioner alludes to Mills at page 14 of his petition, inexplicably he fails to recite its holding. Respondent would submit that Mills is dispositive of his claim that his sentence is invalid under Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In Mills, supra, this Court specifically rejected the contention that the death penalty scheme violates the principle espoused in Apprendi:

In *Apprendi* v. *New* ***Jersey,*** 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), [FN2] the Supreme Court announced the general rule that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2362-63. The Court specifically stated in the majority opinion that *Apprendi* does not apply to already challenged capital sentencing schemes that have been deemed constitutional. The Court stated:

> Finally, this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. For reasons we have explained, the capital cases are not controlling:
>
> > "Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to **be** imposed.... The person who is charged with actions that expose him or her to the death penalty has an absolute entitlement to jury trial on all the elements of the charge."
>
> *Id.* at 2366 (citations omitted). And one justice, in a separate concurring opinion, indicated that issue was left to be decided in the future. ***Id.*** at 2380 (Thomas, J. concurring).

The Court was referring to its earlier decision in *Walton* ***v. Arizona,*** 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), wherein it addressed a capital sentencing scheme and held that the presence of an aggravating circumstance in a capital case may constitutionally be determined by

a judge rather than a jury. *Id.* at 647-48. [FN3] Because *Apprendi* did not overrule *Walton,* the basic scheme in Florida is not overruled either.

Mills argues that *Apprendi* overruled *Walton* and relies upon the five-to- four split in the Court. Four justices stated 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, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 471, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (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.

[1] 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,* 199 Ariz. 127, 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 (De1.2000) (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,* --- U.S. ____, 121 S.Ct. 476, 148 L.Ed.2d 478 (2000); *State v. Golphin,* 352 N.C. 364, 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*, --- U.S. ---, 121 S.Ct. 476, 148 L.Ed.2d 478. 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.

[2] Mills makes two additional arguments that are fact-specific to his case. First, he argues that the statute in effect at the time of the initial trial made the maximum penalty for his crime life imprisonment. Only after the jury verdict and further sentencing proceedings, Mills argues, could death be a possible sentence. This particular scheme, Mills argues, puts the sentence *of* death outside of the maximum penalty available and triggers ***Apprendi*** protection.

With regard to the statute in effect at the time of trial, Mills cites section 775.082(1), Florida Statutes (1979), which 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 finding 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(1) Fla. Stat. (1979). Mills argues that this statute makes life imprisonment the maximum penalty available. Mills argues that the statute allowing the judge to override the jury's recommendation makes it clear that the maximum possible penalty is life imprisonment unless and until the judge holds a separate hearing and finds that the defendant is death eligible.

[3] The plain language of section 775.082(1) is clear that the maximum penalty available for a person convicted of a capital felony is death. When section 775.082(1) is

> read in pari materia with section 921.141, Florida Statutes, there can be no doubt that a person convicted of a capital felony faces a maximum possible penalty of death. [FN4] Both sections 775.082 and 921.141 clearly refer to a "capital felony." *Black's Law Dictionary* defines "capital" as "punishable by execution; involving the death penalty." *Black's Law Dictionary* 200 (7th ed.1999). *Merriam Webster's Collegiate Dictionary* defines "capital" as "punishable by death ... involving execution." *Merriam Webster's Collegiate Dictionary* 169 (10th ed.1998). Therefore, a "capital felony" is by definition a felony that may be punishable by death. The maximum possible penalty described in the capital sentencing scheme is clearly death.
>
> Mills is actually attacking the validity of the bifurcated guilt and sentencing phases of a capital trial. That issue was litigated and decided in *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), and *Walton v. Arizona,* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). The *Apprendi* majority clearly did not revisit these rulings.

26 Fla. L. Weekly at 243-244.

Despite petitioner's reluctance to acknowledge the fact, this Court's decision in Mills, supra, is controlling and Brown is not entitled to relief under Apprendi v. New Jersey.

Additionally, respondent would submit that this Court should deny relief in the instant claim for procedural reasons. First of all, it is well-settled that the writ of habeas corpus is not intended to serve as a second appeal. See Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987); Rutherford v. Moore, 774 So. 2d 637, 645 (Fla. 2000). Petitioner should have made his "Apprendi" argument previously on direct appeal or in his prior motion for post-conviction relief and appeal rather than in this belated

habeas corpus petition. To the extent that petitioner may urge that Apprendi was not decided until June 26, 2000, respondent answers that the Apprendi decision acknowledges that it was foreshadowed by the earlier decision in Jones v. United States, 526 U.S. 227, 143 L.Ed.2d 311 (1999). See Apprendi, 147 L. Ed.2d at 446. Jones was decided on March 24, 1999 and indeed is cited in Brown's current habeas petition at page 7. Consequently, the tools were available for at **least** the last two years for Brown and his counsel to construct the argument now being advanced. See Engle v. Isaac, 456 U.S. 107, 133, 71 L.Ed.2d 783, 804 (1982) ("In light of this activity, we cannot say that respondents lacked the tools to construct their constitutional claim").

Obviously Brown and his counsel could have sought relief in this Court after Jones was decided in March of 1999, but instead chose to wait not only *for* a year until this Court issued its opinion denying post-conviction relief but also for another year until April of 2001 prior to initiating consideration of this argument. See **Glock** v. Moore, 776 So. 2d 243, 251 (Fla. 2001) ("As to the first prong of Jones, any claim of newly-discovered evidence in a death penalty case must be brought within one year of the date such evidence could have been discovered through the exercise of due diligence."). Petitioner's delay of two years is unconscionable and his claim should be deemed barred.

Second, to the extent that Brown is attempting to obtain relief on the basis that he received ineffective assistance of appellate counsel, this Court should deny relief for the failure to comply with Florida Rule of Appellate Procedure 9.140(j)(3)(B) which provides:

> "A petition alleging ineffective assistance of appellate counsel shall not be filed more than two years after the conviction becomes final on direct review unless it alleges under oath with a specific factual basis that the petitioner was affirmatively misled about the results of the appeal **by** counsel."

The rule became effective on January 1, 1997. See Amendment to Florida Rules of Appellate Procedure, 685 So. 2d *773* (Fla. 1996). See also Russell v. State, 740 *So.* 2d 567 (Fla. 1st DCA 1999). Brown has failed to satisfy the under oath provision with specific factual basis that he was affirmatively misled. Moreover in McCray v. State, 699 So. 2d 1366, 1369 (Fla. 1997) this Court through Justice Overton, without dissent, opined:

> This case represents a perfect example of why the doctrine of laches should be applied to bar some collateral claims for relief. McCray has waited fifteen years to bring this proceeding and has made no representation as to the reason for the delay. Moreover, his claim is based on a brief reference to a collateral crime in his trial, which occurred seventeen years ago. This claim could and should have been raised many years ago. The unwarranted filings of such delayed claims unnecessarily clog the court dockets and represent an abuse of the judicial process.
>
> To remedy this abuse, we conclude, as a matter of law, that any **P**etition for a writ *of* habeas corpus claiming ineffective assistance of appellate counsel is **presumed** to **be the** result of unreasonable delav and to

> prejudice the state if the petition has been filed more than five years from the date the petitioner's conviction became final. We further conclude that this initial presumption may be overcome only if the petitioner alleges under oath, with a specific factual basis that the petitioner was affirmatively misled about the results of the appeal by counsel.
>
> Accordingly, we find this petition is barred by laches and we deny the petition. (emphasis supplied)

See also Strange v. State, 732 So. **2d** 1117 (Fla. 5th DCA 1999); Hill v. State, 724 So. 2d 610 (Fla. 5th DCA 1998). In McCray this Court held the claim time-barred by laches even though not time-barred by the rule.

In the instant case petitioner's direct appeal became final on November 26, 1990 - over a decade ago - with the denial of certiorari following this Court's affirmance of the judgment and sentence. Brown v. State, 565 So. 2d 304 (Fla. 1990), cert. denied, 498 U.S. 992, 112 L.Ed.2d 547 (1990). There can be no justification for his waiting this long to initiate a habeas corpus petition in this Court. Respondent is cognizant that in Robinson v. Moore, 773 So. 2d 1, 2 n. 1 (Fla. 2000) this Court refused to apply a procedural bar pursuant to Florida Rule of Criminal Procedure 3.851(b)(6) where the conviction and sentence became final before January 1, 1994. But the Robinson court did not discuss there the applicability of Florida Rule of Appellate Procedure 9.140(j)(3)(B) or of the McCray decision and those

matters should be considered now. Brown's claim should be deemed barred as well as meritless.[2]

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[2]Respondent notes a recent trend whereby capital defendants delay the filing of a habeas corpus petition in this Court until the conclusion of the post conviction appeal. See Robinson v. Moore, *773* So. 2d 1 (Fla. 2000); Hall v. Moore, ___ So. 2d , 26 Fla. L. Weekly S316 (Fla. May 10, 2001); Mann v. Moore, Florida **Supreme** Court Case No. *SCOO-2602;* Downs v. Moore, Florida Supreme Court Case No. SCOO-2186.

Petitioner could have filed his habeas petition simultaneously with his prior initial brief on the **Rule** 3.850 appeal in May of 1998 and **he** did not have to wait for more than a year after this Court's affirmance on March 9, 2000 of the trial court's denial of the motion for post-conviction relief to file the instant pleading. It would appear that unreasonable delay may have been a predominant reason. The failure to comply with present Florida Rule of Appellate Procedure 9.140(6)(E) (2001) along with this Court's decision in McCray, supra, should disentitle Brown to any relief.

WHEREFORE, Respondent respectfully requests that this Honorable Court DENY the Petition for Writ of Habeas Corpus filed in this case.

Respectfully submitted,

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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 Dwight M. Wells, Assistant CCRC, Office of the Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136, this 14 day of June, 2001.

COUNSEL FOR RESPONDENT

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

COUNSEL FOR RESPONDENT