IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1024

DAVID EUGENE JOHNSTON,

Petitioner,

v.

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

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

References to the record are the same as those in the Petition. In the Supplement Appendix allowed under Florida Rule of Appellate Procedure 9.100(k), Petitioner is providing the Court with copies of the records that are the central focus of this case. These records are taken from the record on appeal from the denial of Mr. Johnston's initial rule-3.850 motion. Supplemental Appendix Items 1,2, and 3 (records from Northeast Special Education Center, Leesville State Hospital, and Larned State Hospital, respectively) are from Volume IX of the initial post-conviction record on appeal. Item 4 (records from Central Louisiana State Hospital) is from Volume I of that record. These records were excerpted, quoted, referenced, and cited extensively in the Petition, and Respondent has had them since 1989. They represent nothing new. They are provided in order to give Members of the Court easy access to them.

TABLE OF CONTENTS

ARGUMENTS IN REPLY

I. THIS COURT HAS, AND SHOULD EXERCISE, THE AUTHORITY TO RECONSIDER AND CORRECT ITS PRIOR ERRONEOUS DECISION REJECTING PETITIONER'S INEFFECTIVE ASSISTANCE CLAIM

"This Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case." *Owens v. State*, 696 So.2d 715, 720 (Fla. 1997); *see also*, *Preston v. State*, 444 So.2d 939, 942 (Fla. 1984).[1] David Johnston has demonstrated six ways in which the decisions of the circuit court **and this Court** rejecting his ineffective assistance of counsel claim contravened this Court's capital sentencing jurisprudence, the Supreme Court's Eighth Amendment cases, the analysis required under *Strickland v. Washington*, 466 U.S. 668 (1984), and cases applying *Strickland*'s rule. To wit:

(1) the characterization of evidence which this Court and the Supreme Court have consistently considered mitigating as "derogatory" and "negative" for purposes of its weight and effect in sentencing was contrary to *Barclay v. Florida*, 463 U.S. 939, 956 (1983); *Zant v. Stephens*, 462 U.S. 862 (1983); *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Mikenas v. State*, 367 So.2d 606 (Fla. 1978);

(2) the failure to consider "*as a mitigating factor*," *Lockett*, 438

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[1] That this Court decided to "deny the petition" filed in *Sims v. State*, 754 So.2d 657, 670 (Fla. 2000), and "denied" the relief sought in *Bryan v. State*, 753 So.2d 1244, 1256 (Fla. 2000), does not support Respondent's argument that Mr. Johnston's "petition should be dismissed." Resp. at 7. The claims in those cases were not "identical to the one raised by Johnston." *Ibid.* (Sims's claim did not even relate to the penalty phase of his trial.) More importantly, *Williams v. Taylor*, 120 S.Ct. 1495 (2000), had not been decided when this Court decided *Sims* and *Bryan*, and therefore those petitioners could not have done what Mr. Johnston has done, demonstrated his entitlement to relief under the Supreme Court's application of *Strickland v. Washington*, 466 U.S. 668 (1984), to a case less meritorious than his own, and shown that this Court's prior decision rejecting his claim was contrary to and involved an unreasonable application of clearly established Supreme Court precedent.

U.S. at 604 (emphasis in original), in this Court's *Strickland* analysis, unrefuted evidence of Petitioner's problems with his homosexuality, his mental illness, retardation, and organic brain damage was contrary to *Lockett*, *Zant*, and *State v. Miller*, 313 So. 2d 656 (Fla. 1975), involved an unreasonable misapplication of those cases, and was contrary to *Strickland*;

(3) the failure to consider **any** of the mitigating evidence in Petitioner's medical records other than the evidence wrongly characterized as "negative aspects" of those records was contrary to *Lockett*, *Strickland*, and *Williams*;

(4) the failure to consider **in any way** the detailed evidence of Petitioner's mental retardation, and the formative childhood deprivations, neglect, and abuse he suffered violated *Lockett* and its progeny, and *Strickland*;

(5) the consideration of post hoc inventions as explanations for trial counsel's undisputed omissions rather than trial counsel's testimony, the circumstances of the case, and the applicable law violated *Strickland*, *Williams*, and *Kimmelman v. Morrison*, 477 U.S. 365 (1986);

(6) the failure to consider the totality of the undisputed mitigating evidence presented at trial and in post-conviction in violation of *Strickland*, *Williams*, *State v. Dixon*, 283 So. 2d 1 (Fla. 1973); and *Clemons v. Mississippi*, 494 U.S. 738 (1990).

Petition at 9-10; 10-46.

These exceptional circumstances of manifest injustice warrant correction of this Court's prior decision. Previously, in this case, this Court "opened a case" at Respondent's request because this Court's prior decision could not serve as a bar to the federal courts' consideration of Petitioner's meritorious claim that his sentencers considered an unconstitutionally vague aggravating circumstance. *Johnston v. Singletary*, 640 So.2d 1102 (Fla. 1994). Thus, the record in this very case shows that Respondent is wrong to assert there is "no basis for re-opening a case," Response at 7, and "no authority for such a procedure." Resp. at 8. If that were true, the federal court "would have then vacated [Mr. Johnston's death] sentence." *Johnston v. Singletary*, 708 So.2d 590, 592 (Fla.

1998).

In *Johnston v. Singletary*, 640 So.2d 1102 (Fla. 1994), this Court asserted its jurisdiction under Article V, sections 3(b)(1) and 3(b)(7) of the Florida Constitution. *Johnston*, 640 So.2d at 1103. To the extent Petitioner erred by not invoking this Court's jurisdiction under Article V, sections 3(b)(3) and 3(b)(7) of the Florida Constitution, the provisions under which this Court took jurisdiction in *Johnston v. Singletary*, Petitioner does so now.

Respondent's position is remarkable because he does not dispute that any of the errors described in the Petition were made, or that they tainted the analysis of Petitioner's ineffective assistance claim.[2] Respondent also does not dispute the facts set forth in the Petition, for example that there was no basis in the record for concluding that trial counsel "decided" not to present the documentary evidence showing that Mr. Johnston is schizophrenic and brain damaged. "The law is well settled that failure to raise an available issue constitutes an admission that . . . error occurred." *Johnson v. State*, 660 So.2d 637, 645 (Fla. 1995); *Cannady v. State*, 620 So.2d 165, 170 (Fla. 1993); *State v. Wells*, 539 So.2d 464, 468 n.4 (Fla. 1989).

Unable to contest Petitioner's claims, Respondent shrugs them off noting that a co-equal federal court also denied relief. Resp. at 8. In essence, Respondent's argument against correcting this Court's erroneous decision is that "the law is easy to beat," *Deal v. United States*, 508 U.S. 129, 136 (1993); Respondent may "obtain a second bite at the apple," Response at 8, but Petitioner must

[2] Respondent argues that Petitioner's complaints about the circuit court's contrary-to-law reasoning were cured by this Court's decision. As described *infra*, this Court's 1991 decision was merely a recapitulation of the circuit court's order.

settle for a death sentence imposed in violation of his Sixth, Eighth, and Fourteenth Amendment rights.

This Court, "out of a sense of fairness," has retroactively applied new Supreme Court decisions to a claim which this Court previously rejected where the new decision "reneder[ed] this Court's resolution of the matter erroneous." *Johnson v. Singletary*, 618 So.2d 731, 732 n.* (Fla. 1993) (Kogan, J., concurring) (explaining retroactive application of *Espinosa v. Florida*, 505 U.S. 1079 (1992), in *James v. State*, 615 So.2d 668 (Fla. 1993)). Consideration of Petitioner's penalty phase ineffective assistance claim in light of *Williams* and *Stephens* makes it clear this Court's prior rejection of that claim was erroneous. Fairness, due process, and this Court's respect for the important role the constitutional right to habeas corpus serves in Florida's death penalty scheme warrants reconsideration of Petitioner's claim.

Petitioner has long had a clearly established constitutional right to meaningful post-conviction review, including a right to appeal in this Court. *See Allen v. Butterworth*, 756 So.2d 52, 61-62 (Fla. 2000). The Court's failure to properly apply the law governing his claim denied Petitioner meaningful post-conviction appellate review to which he was constitutionally entitled. *Cf. Parker v. Dugger*, 498 U.S. 308 (1992). These errors needlessly impeded and unfairly prejudiced Petitioner's post-conviction review in violation of the Due Process Clause of the Fourteenth Amendment and Article I, section 13 of the Florida Constitution. *Allen*, 756 So.2d at 61, citing *Haag v. State*, 591 So.2d 614, 616 (Fla. 1992) (access to habeas corpus relief must not needlessly be impeded or unfairly administered). "It is only in the case of error that prejudicially denied fundamental constitutional rights that this

Court will revisit a matter previously settled by the affirmance of a conviction or sentence." *Kennedy v. Wainwright*, 483 So.2d 424, 426 (Fla. 1986). Comparing the Mr. Johnston's ineffective assistance claim with the Supreme Court's decision in *Williams* shows that this is such a case.

II. RECENT DECISIONS BY THE SUPREME COURT AND THIS COURT SHOW THAT DAVID JOHNSTON'S INEFFECTIVE ASSISTANCE CLAIM SHOULD NOT HAVE BEEN DENIED, AND SHOULD NOW BE GRANTED

A. Applicability of *Williams v. Taylor*

The Supreme Court's recent decision in *Williams v. Taylor*, 120 S.Ct. 1495 (2000), shows that Mr. Johnston was and is entitled to relief because he was denied effective assistance of counsel, **and** shows that this Court's prior decision rejecting that claim was contrary to and involved unreasonable applications of clearly established Supreme Court precedent.[3] *Williams* is a straightforward application of *Strickland v. Washington*, 466 U.S. 668 (1984), to a claim that is distinguishable from Petitioner's only in that Williams' claim was weaker than Petitioner's.

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[3] Respondent wrongly accuses Petitioner of making "misleading" reference to *Williams*. Reply at 7 n.4. *Williams* was **not** solely "concerned with the interpretation of a provision of the Anti-terrorism and Effective Death Penalty Act," as Respondent contends. *Ibid.* Reading the very first sentence of the Supreme Court's opinion shows that Respondent's accusation is false:

> The question**s** presented are **whether Terry Williams' constitutional right to the effective assistance of counsel as defined in *Strickland v. Washington*, 466 U.S. 668 (1984), was violated, and** whether the judgment of the Virginia Supreme Court refusing to set aside his death sentence "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," withing the meaning of 28 U.S.C. § 2254(d)(1) (1994 ed., Supp. III).

Williams, 120 S.Ct. at 1499 (emphasis added).

FACTS OF *WILLIAMS V. TAYLOR*	FACTS OF *JOHNSTON V. STATE*
"The evidence offered by Williams' trial counsel at the sentencing hearing consisted of the testimony of Williams' mother, two neighbors, and a taped excerpt from a statement by a psychiatrist." *Williams*, 120 S.Ct. at 1500.	"It should be noted that trial counsel did call two witnesses [at the penalty phase], Ken Cotter, defendant's former attorney, and Corrine Johns[t]on, his foster mother, to testify as to defendant's mental problems." PCR at 1683.
"'Counsel did not introduce evidence that Petitioner was abused by his father.'" *Williams*, 120 S.Ct. at 1502 n.4 (quoting district court).	Counsel did not introduce evidence that Petitioner suffered "some definite physical neglect and abuse . . . by [both] his parents," including that "daddy had 'beat me hard and put me outside in the dark at night,'" and that his mother knocked out his teeth and tried to drown him.
"'[C]ounsel did not introduce evidence that Petitioner was borderline mentally retarded, though he was found competent to stand trial.'" *Williams*, 120 S.Ct. at 1502 n.4 (quoting district court).	Counsel did not investigate for or introduce readily available evidence that Petitioner had been "functioning within the Retarded Educable Range," with an I.Q. of 57 at age 7 and an I.Q. of 65 at age 12. Suppl. App. Item 1.
"Judge Ingram found that Williams' . . . trial attorneys had been ineffective [for failing to introduce evidence that Williams] . . . **might have mental impairments organic in origin**." *Williams*, 120 S.Ct. at 1501 (emphasis added).	Johnston's trial counsel failed to introduce documents stating that he suffered from "moderate to severe levels of perceptual problems and/or organic brain damage" and that "this youngster is **definitely experiencing some level of brain damage**."
Trial counsel "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood." *Williams*, 120 S.Ct. at 1514.	Trial counsel failed to conduct an investigation that would have uncovered extensive records stating that Mr. Johnston's "early familial environment was one of extreme detrimental conditions that would certainly affect adequate emotional growth and development."
Trial counsel failed to present evidence that state's future-dangerousness expert said Williams was among those least likely to pose a future danger if kept in a structured environment. *Williams*, 120 S.Ct. at 1501; 1514.	Trial counsel failed to present evidence that Johnston, although schizophrenic and brain damaged, was "cooperative and very polite" when medicated and treated.

Additionally, this Court's opinion rejecting Petitioner's ineffective assistance claim contains some of the same errors which the *Williams* Court held were contrary to, and involved an unreasonable application of, *Strickland.* These errors occurred because this Court incorrectly deferred to the trial court's analysis of Petitioner's claim. In *Stephens v. State*, 748 So.2d 1028 (Fla. 2000), this Court acknowledged that such deference occurred, was wrong, and was also contrary to *Strickland*. *Stephens*, 748 So.2d at 1032. These errors constitute grounds for re-examining Petitioner's claim.[4]

B. Application of *Williams v. Taylor*

1. Petitioner's retardation: the Records from the Northeast Special Education Center & Leesville State School

Respondent does not dispute that trial counsel unreasonably failed to meet their "obligation to conduct a thorough investigation of the defendant's background." *Williams*, 120 S.Ct. at 1515. In this case, as in *Williams*, trial "counsel's failure to conduct the *requisite, diligent investigation* into his client's troubling background and unique personal circumstances," *Id.*, 120

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[4] After quoting the 285 words in which this Court reviewed Petitioner's penalty phase ineffective assistance claim, Respondent argues that "[t]hose findings of fact and conclusions of law by this Court are inconsistent with Johnston's claim that this Court 'improperly reviewed' his ineffective assistance of counsel claims." Reply at 6. On the contrary, the language of this Court's opinion was taken almost verbatim from the circuit court's order. *Compare*, *Johnston*, 583 So.2d at 662; *with* PCR at 1684. This Court's adoption of the circuit court's reasoning–which *Williams* shows was both contrary to and involved an unreasonable application of *Strickland*–is precisely the sort of error this Court repudiated in *Stephens*. Even if the quoted passage constitutes an independent, de novo review of Petitioner's *Strickland* claim, and it does not, the Court's reasoning is no less a contrary to, and no less an unreasonable application of *Strickland*, *Kimmelman v. Morrison*, *Lockett v. Ohio*, *Zant v. Stevens*, and *Clemons v. Mississippi*.

S.Ct. at 1524 (O'Connor, J., concurring) (emphasis added), denied Petitioner his "constitutionally protected right [] to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer," *Williams*, 120 S.Ct. at 1513: **unrefuted evidence that David Johnston had been repeatedly diagnosed as mentally retarded and brain-damaged, and that his personal development was a product of extreme abuse and neglect.** *See* Suppl. App. Items 1 & 2.

As in *Williams*, Petitioner's trial counsel failed to seek social service and school records containing "the graphic description of [Mr. Johnston's] childhood, filled with abuse and privation, [and] the reality that he was ['functioning within the Retarded Educable range']." *Williams*, 120 S.Ct. at 1515. There is no excuse for this omission, and trial counsel offered no explanation for it at the evidentiary hearing. **Mr. Johnston never asked his attorneys not to investigate or present the records of his retardation, or his abusive, deprived, and neglected development**, although trial counsel testified that he did not want himself presented as mentally ill. **These records contain none of the supposedly "negative" information** referred to in this Court's previous decision and the trial court's order. Comparing this case with *Williams* inexorably leads to the conclusion, based on the school and social services records alone, that Mr. Johnston received prejudicially deficient representation.[5]

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[5] Respondent is wrong to claim that a deficient performance turns on whether "some reasonable lawyer" would have behaved like Petitioner's counsel. Hypothesizing some reasonable actor agreeing with the conduct challenged by Petitioner would wrongly "transform [an objective] inquiry into a subjective one." *Williams*, 120 S.Ct. at 1521-22. The test is whether "counsel's representation fell below an **objective** standard of reasonableness." *Strickland*, 466 U.S. at 688 (emphasis added).

Mr. Johnston is entitled to relief on the basis of this portion of his ineffective assistance claim alone. Without knowing that Mr. Johnston was retarded and developed (to the extent he did) under conditions of extreme deprivation and abuse, the jury could not have made a reasoned judgment about his death-worthiness. As in *Williams*, there is a reasonable probability that consideration of Mr. Johnston's background would have altered the sentencing calculous in his favor. Note that the Supreme Court found prejudice in *Williams* although Williams' sentencing jury knew that in addition to the crime for which he had just been convicted (Williams beat a man to death with a mattock and stole money from his wallet), *Williams*, 120 S.Ct. at 1499 n.1, the jury heard "particularly damaging" evidence that he had "brutally assaulted an elderly woman * * * [who] was in a 'vegetative state' and not expected to recover." *Id.*, 120 S.Ct. at 1500.

This Court and the circuit court failed to consider the mitigating evidence of Petitioner's developmental disadvantages and disabilities. As the Supreme Court held in *Williams*, such a "fail[ure] to evaluate the totality of the mitigation evidence–both that adduced at trial, and the evidence adduced in the habeas proceedings–in reweighing the evidence in aggravation," was not only an erroneous application of *Strickland* and *Clemmons*, it was unreasonable as well. *Williams*, 120 S.Ct. at 1515; *id.*, 120 S.Ct. at 1524-25 (O'Connor, J., concurring). At a minimum, the prior unreasonable application of *Strickland* justifies reconsideration of Petitioner's claim.

2. The mitigating record of a prior conviction introduced in aggravation: the Larned State Hospital Records

Trial counsel's second unexplained and unreasonable omission

was their failure to investigate Petitioner's conviction for making "terroristic threats" which counsel knew would be introduce in aggravation. Suppl. App. Item 3. Respondent's support of this Court's prior decision fails to explain how this Court could have "[kept] in mind that counsel's function . . . [wa]s to make the adversarial testing process work in the particular case," *Strickland*, 466 U.S. at 690, without considering that Mr. Johnston's trial counsel completely failed to investigate or challenge this aspect of the State's case for death-eligibility. "Such a complete lack of pretrial preparation puts at risk both the defendant's right to an ample opportunity to meet the case of the prosecution, and the reliability of the adversarial testing process." *Kimmelman*, 477 U.S. at 385 (internal quotation marks and citations omitted).

Williams' counsel were found to have provided constitutionally deficient performance in part because they failed to learn that the Commonwealth's future-dangerousness expert would have testified that Williams was among those least likely to be a future danger if he were kept in a structured environment. *Williams*, 120 S.Ct. at 1501, 1514. Likewise, in this case, Petitioner's trial counsel were aware that the State was planning to establish his death-eligibility in part through the introduction of the "terroristic threats" conviction. Had trial counsel investigated the circumstances of this conviction, they would have obtained records from Larned State Hospital, where Petitioner was sent after the prosecutor in that case told the trial court he believed Petitioner was incompetent.

Psychologists and social workers at Larned documented their observations of his background and neurological impairments. These documents are a treasure trove of information minimizing

Petitioner's moral culpability and undermining the weight of the conviction as an aggravating circumstance. After testing and evaluating Petitioner, a psychologist at Larned concluded that "many of his behavior problems may stem from neurological problems." Suppl. App. Item 3. In addition to finding Petitioner incompetent to stand trial because he lacked the "affective ability to behave adaptively in the role of defendant in a trial,"[6] the psychologist concluded that "his hostile, uncooperative, threatening, demanding behavior is likely to be a function of efforts to defend himself from a world that he cannot understand." *Id.*

Evidence that a defendant's bad behavior is a product of neurological impairments that leave him frightened and defensive in the face of a world he cannot comprehend diminishes his moral blameworthiness, and his death-worthiness. These are precisely the "frailties of humankind," *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976), that "might well have influenced the jury's appraisal of [Mr. Johnston's] moral culpability." *Williams*, 120 S.Ct. at 1515.

3. Petitioner's schizophrenia: the Central Louisiana State Hospital records

Although Petitioner's trial counsel never investigated his development or upbringing, they possessed records of his treatment in various psychiatric hospitals and his many diagnoses of schizophrenia. Suppl. App. Item 4. Viewed post-*Williams* and post-*Stephens*, three things can be said about trial counsel's failure to tell the jury about Mr. Johnstons's mental illness. First, trial

[6] Recall from the direct appeal Petitioner's absurd effort to fire his counsel and represent himself. *Johnston v. State*, 497 So.2d 863, 867-868 (Fla. 1986).

counsel testified that Petitioner–whom they believed to be incompetent–did not want to be seen as mentally ill. If trial counsel's omission was a deferral to this irrational desire of a client whom trial counsel believed was incompetent, that was unreasonable as a matter of law as explained in the Petition.

Second, this Court "found" that trial counsel's purported "decision" not to introduce "Johnston's Louisiana hospital records in the penalty phase * * * [was] reasonable trial strategy given the negative aspects of the records." *Johnston*, 583 So.2d at 662. Specifically, this Court found it was reasonable not to introduce any part of Petitioner's psychiatric treatment records because they showed "his dangerousness." *Ibid.* As stated in the Petition, and undisputed by Respondent, there is no basis in the record for finding that this actually was trial counsel's reason for failing to present the evidence of schizophrenia and brain damage. *Strickland* forbids reviewing courts from ascribing reasons for counsel's conduct after the fact. *Strickland*, 466 U.S. at 689 ("every effort [must] be made to eliminate the distorting effects of hindsight"); *id.,* 466 U.S. at 690 ("**must judge the reasonableness** of counsel's challenged conduct on the facts of the particular case, **viewed as of the time of counsel's conduct**")(emphasis added).

Third, if this had been trial counsel's reasoning, *Williams* makes clear that trial counsel's performance was constitutionally deficient because it was based on a misunderstanding of Florida law. *See Williams*, 120 S.Ct. at 1514 (counsel deficient for failing to obtain social services records "because they incorrectly thought that state law barred access to such records"). *See also Kimmelman v. Morrison*, 477 U.S. at 385 (deficient performance where trial counsel failed to conduct discovery because of "counsel's

mistaken belief that the State was obliged to take the initiative and turn over all its inculpatory evidence to the defense").

Long before Petitioner's trial, this Court had held that a capital sentencer could not constitutionally consider "the defendant's mental illness, and his resulting propensity to commit violent acts, as an aggravating factor favoring the imposition of the death penalty."[7] *Miller v. State*, 373 So.2d 882, 886 (Fla. 1979). "Moreover, the State **may not attach aggravating labels** to factors that actually should militate in favor of a lesser penalty–like, as in this case, the defendant's mental impairments. *Zant v. Stephens*, 462 U.S. 862, 885 (1983)." *Walker v. State*, 707 So.2d 300, 313 (Fla. 1998). When this Court rejected Petitioner's ineffectiveness claim, it attached an aggravating label to Petitioner's suicidality and the behaviors resulting from the failure of Louisiana officials to treat his mental illness.

Prior to Petitioner's trial the Supreme Court also had held that the jury must understand the it is required to consider "*as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604(emphasis in original). Additionally, *Zant* specifically approved this Court's rejection of mental illness as an aggravating consideration. *Zant*, 462 U.S. at 885

Considering the psychopathological explanations of Petitioner's bad behavior as aggravating was contrary to

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[7] Additionally, the "large number of the statutory mitigating factors [related to mental impairment] reflect a legislative determination to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of mental illness, uncontrolled emotional state of mind, **or drug abuse**." *Miller*, 373 So.2d at 886 (emphasis added).

Strickland's requirement that the assessment of an ineffective assistance claim "should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision," whether or not to impose death. *Strickland*, 466 U.S. at 695. This Court had to consider mitigating trial court's finding that the evidence of his mental impairments "would explain why defendant was capable of committing such [a] heinous crime . . . ." PCR at 1684.

Viewing this Court's rejection of Petitioner's ineffectiveness claim from the perspective of *Williams* and *Stephens*, shows that Mr. Johnston was wrongly denied post-conviction relief. This Court has the authority to correct its erroneous decision and prevent the manifest injustice of executing a retarded, brain-damaged, schizophrenic man whose bad acts were a response to a world he could not comprehend.

CONCLUSION

For the foregoing reasons and those stated in the Petition, this Court should re-consider Petitioner's ineffective assistance of counsel claim and grant relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply to Response for Petition for Writ of Habeas Corpus is being furnished by United States Mail, first class postage prepaid, to all counsel of record this ____ day of October, 2000.

_____
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