No. ____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2020

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DAVID SCOTT FRANKS,
Petitioner

-v-

BENJAMIN FORD, Warden,
Georgia Diagnostic Prison,
Respondent.

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On Petition for a Writ of *Certiorari*
to the United States Court of Appeals
for the Eleventh Circuit

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**PETITION FOR A WRIT OF *CERTIORARI***
Capital Case

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-Capital Case-

## QUESTIONS PRESENTED

*Question One*

In Mr. Franks's case, the district court found that "the evidence …was so overwhelming that *no competent lawyer* could be expected to have secured an acquittal." Pet. App. 3 at 14 (emphasis added). Indeed, Mr. Franks's own trial counsel conceded his guilt at trial, opening his closing arguments by informing the jury, "David Franks is guilty, there's no question from the evidence." D.17-14:3549-50. Yet counsel purportedly relied on a residual doubt/coercion theory at sentencing, sacrificing the thorough investigation into mitigating evidence that this Court requires.

The Eleventh Circuit Court of Appeals has credited counsel's approach, finding that residual doubt is "perhaps the best" sentencing strategy that counsel can employ during the penalty phase of a capital case, and counsel "cannot be held to be ineffective when he has taken a line of defense which is objectively reasonable." *Chandler v. United States*, 218 F.3d 1305, 1320 n. 28 (11th Cir. 2000). In other words, the Eleventh Circuit insulates an attorney from a finding of ineffectiveness if they have chosen to pursue a residual doubt defense, no matter how ill-conceived it was to do so.

Is counsel relieved of the duty to investigate and present "*all* reasonably available mitigating evidence," *Wiggins v. Smith*, 539 U.S. 510, 524 (2003), in a capital case if he chooses to present a residual doubt defense?

*Question Two*

The Eleventh Circuit has also said that substance abuse evidence is "*invariably* a two-edged sword" that will "[r]arely, if ever" be so mitigating that all reasonable counsel would present it during the penalty phase of a capital case, so trial counsel can never be ineffective for failing to do so. *See, e.g., Stewart v. Sec'y, Dep't of Corr.*, 476 F.3d 1193, 1217 (11th Cir. 2007). Yet this Court has repeatedly found that substance abuse evidence is highly mitigating, particularly when it is linked to cognitive impairments and childhood trauma. *See, e.g., Rompilla v. Beard,* 545 U.S. 374 (2005).

Is substance abuse evidence in the penalty phase of a capital case "invariably" a double-edged sword, such that counsel has no duty to investigate or present it as mitigating evidence, regardless of the circumstances of the case?

## LIST OF PARTIES TO THE PROCEEDINGS BELOW

This petition arises from a habeas corpus proceeding in which the petitioner, David Scott Franks, was the petitioner before the United States District Court for the Northern District of Georgia, as well as the petitioner-appellant before the United States Court of Appeals for the Eleventh Circuit. Mr. Franks is a prisoner sentenced to death and in the custody of Benjamin Ford, Warden of the Georgia Diagnostic and Classification Prison ("Warden"). The Warden and his predecessors were the respondents before the United States District Court for the Northern District of Georgia, and the respondent-appellee before the United States Court of Appeals for the Eleventh Circuit.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner David Scott Franks respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit affirming his conviction and death sentence.

## INTRODUCTION

Throughout the history of this case, the courts, the state, and even Mr. Franks's own trial counsel have agreed on one thing: the evidence against him at trial was simply overwhelming. *See, e.g.*, Pet. App. 1 at 12, 16. It "was so overwhelming," in fact, that the district court found that "**no competent lawyer** could be expected to have secured an acquittal." Pet. App. 3 at 14 (emphasis supplied). Owing to the strength of the state's evidence, trial counsel believed that the case was "unwinnable," D.26-26:61, and Mr. Franks "would be found guilty…regardless of what we could do," D.21-9:90. [1] Yet counsel devoted three and a half years to pursuing a residual doubt strategy that they knew they could not substantiate: "Our strategy at trial was to show that David was not acting alone. There were other people involved in this." D.21-9:87. But "[w]e were never able to establish proof of that." D.21-9:87.

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[1] Record citations in this petition refer to the district court record in *Franks v. Warden*, No. 2:11-cv-0325-WBH (N.D. Ga.), and are in the following form: district court docket number–attachment number: page number range according to the pagination as assigned by the court's ECF system. For example, "D.27-6:2" refers to Respondent's notice of filing at docket entry 27, attachment 6, page 2. All documents are available on the PACER system.

Counsel focused on this theory to the near-total exclusion of an investigation into mitigating evidence. By their own admission, they ignored Mr. Franks's significant history of substance abuse disorder, believing that it "certainly wouldn't go to mitigation." D.23-15:8-9. They failed to investigate developmental-phase head and brain injuries, believing that they wouldn't be "relevant to these events." D.23-15:436. They failed to obtain any medical records; and they threw away the relevant school record that they *did* find. D.21-11:232; D.23-15:33-35. Ultimately, Petitioner's jury heard nothing of the cognitive impairments spawned, in part, by his childhood trauma, or of the genetic predisposition to addiction that eventually consumed him.

In the lower courts, Mr. Franks raised a claim under *Strickland v. Washington*, 466 U.S. 668 (1984), that his counsel had rendered ineffective assistance of counsel by sacrificing the thorough mitigation investigation and presentation that this Court requires, and opting instead to pursue a baseless, "unwinnable" residual doubt defense. The state courts denied Mr. Franks's claim, and the federal habeas courts affirmed.

In affirming the state courts' denial of relief, the Eleventh Circuit held that trial counsel had not performed unreasonably because "residual doubt is perhaps the most effective strategy" counsel can employ at sentencing, and counsel can never be ineffective when he has pursued an "objectively reasonable" defense. Pet. App. 1 at 24-25 (citing *Chandler v. United States*, 218 F.3d 1305, 1320 n. 28 (11th Cir. 2000)). In other words, the panel concluded that counsel's

decision to pursue a residual doubt defense divests them of the responsibility to conduct a "thorough investigation of law and facts relevant to plausible options," *Strickland*, 466 U.S. at 690.

Further, the Eleventh Circuit found that counsel's failure to investigate Mr. Franks's substance abuse disorder was reasonable because such evidence is "invariably a two-edged sword" that will "[r]arely, if ever" be so powerful that any reasonable attorney would present it. Pet. App. 1 at 30-31. Put differently, the court has concluded that substance abuse is so potentially damaging that counsel *never* has a duty to investigate or present it as mitigating evidence in *any* capital case. In doing so, the court has clearly run afoul of this Court's precedent. *See, e.g., Rompilla v. Beard*, 545 U.S. 374 (2005). There is no *Strickland* exception for substance abuse evidence, and the Eleventh Circuit was not free to create one.

This Court should grant *certiorari*, reverse, and remand.

## OPINIONS BELOW

The Eleventh Circuit entered an opinion in Mr. Franks's case on September 16, 2020. The opinion, reported as *Franks v. Warden*, 975 F.3d 1165 (11th Cir. 2020), is reproduced in the appendix as Pet. App 1. The order denying rehearing is included in the appendix as Pet. App. 2.

The United States District Court for the Northern District of Georgia's order denying relief is reproduced in the appendix as Pet. App. 3.

The Superior Court of Butts County's order denying habeas corpus relief is attached as Pet. App. 4. The Supreme Court of Georgia's opinion affirming that denial is reproduced in the appendix as Pet. App. 5.

The Supreme Court of Georgia's denial of Mr. Franks's direct appeal is reproduced in the appendix as Pet. App. 6.

## JURISDICTION

The Eleventh Circuit entered judgment on September 16, 2020, Pet. App. 1, and denied a timely petition for rehearing and rehearing *en banc* on November 27, 2020, Pet. App. 2.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions:

The Sixth Amendment to the United States Constitution, which provides: "In all criminal proceedings, the accused shall enjoy the right…to have the Assistance of Counsel for his defence."

The Eighth Amendment to the United States Constitution, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution, which provides: "No state shall…deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF RELEVANT FACTS

### A. Mr. Franks Suffered From Profound Drug and Alcohol Dependence.

David Scott Franks was born into a long line of addicts. D.27-6:2, 27. His father – a sadistic tyrant who terrorized his wife and children by, *inter alia*, periodically shooting a gun at them in their home, D.27-6:5-20 – was addicted to alcohol and methamphetamine. Predictably, Mr. Franks himself began abusing drugs and alcohol when he was only 12 or 13 years old. D.28-13:51-52.

As Mr. Franks grew into adulthood, he tried to overcome his background. He married and opened a pawn shop with his father-in-law, and he seemed to achieve some stability. But when his marriage dissolved, he self-medicated with alcohol and developed a serious drinking problem. D.27-6:33; D.27-6:23. When a friend introduced him to cocaine in 1993, a year before the crime, it quickly consumed his life.

Mr. Franks was wired to "become dependent on [alcohol and drugs] upon initial exposure." D.28-13:3. As a result of his genetic predispositions and preexisting brain damage, he was a prime candidate for the escalating, consuming addiction that occurred during the year preceding the crimes. He quickly progressed to using seven grams of cocaine a day and spending thousands of dollars a week to feed his habit. D.27-6:40-41.

Before his addiction took hold, Mr. Franks was "easy-going, generous and friendly." D.28-13:5829. After, he became paranoid and unkempt, particularly

after consuming cocaine or methamphetamine. He "exhibit[ed] paranoid behavior such as pacing and constantly looking out of the window." D.27-6:3043. He "talked about people being out to get him," although he couldn't say "who these people were or why." *Id.* He became "jittery," and let his hygiene deteriorate, D.23-12:106-08.

Eventually, Mr. Franks owed so much money to drug dealers that his business collapsed. He was forced to close it in summer 1994. He was drinking heavily, and he was stuck in a quagmire of financial difficulties. Just before his arrest for the capital offense, he told a friend that "he'd done got in some trouble that he couldn't get out of and he didn't know how to handle it." D.23-12:117.

An expert in psychopharmacology retained during state habeas proceedings, Dr. Todd Antin, explained that Mr. Franks's acute intoxication fueled the crimes, testifying that "[t]he combination of intoxicants, intertwined with David's already desperate state of mind, undermined his ability to exercise rational judgment, foresight, planning, and impulse control." D.28-13:3. Mr. Franks's drug use exacerbated his pre-existing cognitive impairments and impaired his ability to make decisions. D.23-14:320.

Mr. Franks was at "enormously high risk" of developing chemical dependence because of the age of first exposure: his father had begun abusing alcohol and methamphetamines during David's infancy. D.23-13:1. "Research has long shown that the earlier one's exposure to intoxicants and illicit substances, the more likely one is to abuse intoxicants and become dependent

upon them." D.28-13:95. And a person who begins abusing substances in adolescence is "much more likely [to] develop a more severe form of alcoholism or drug use or abuse." D.23-13:8.

Mr. Franks's father's domestic abuse also played a significant role in Mr. Franks's addiction. As Dr. Daniel Grant, a neuropsychologist retained by appellate and state habeas counsel, explained:

> The kinds of horrors experienced by Mr. Franks as a child and young adult put him at an extremely high risk of developing a serious substance abuse problem, chemical dependency, and emotional disorders as he grew into adulthood[]. It is clear to me that the origin of his chemical addictions lay in the easy availability of alcohol from a young age, the pervasive modeling of abusive consumption of alcohol by his father, and his need to blunt what must have been intense feelings of stress and anxiety stemming from life in such a chaotic household.

D.28-12:26-27.

Both trauma and early substance abuse alter and arrest brain development. Trauma "invariably and profoundly scar[s] one's central nervous system." D.28-14:1. The trauma and "high intensity" of life with an erratic abuser causes a person to secrete cortisol, one of the stress hormones of the body and brain; if secreted at a young age, cortisol "forever alters" the brain. D.23-13:4. Further, alcohol consumption in adolescence damages the developing central nervous system. D.28-12:26. It affects the development of vital brain functions – memory, intelligence, and behavior control – and a person's ability to react to stress. D.23-13:13. Mr. Franks's neuropsychological testing results bore this out: his scores were consistent with chronic substance abuse. D.23-14:54-55.

All of this evidence would have been mitigating if his jury had known it. But they did not, because his counsel did not.

**B. Mr. Franks's Trial: An "Unwinnable" Case.**

Mr. Franks's involvement in drugs directly led to the crimes at the heart of this case. He allowed a local drug dealer named Clint Wilson – known as "Cuz" – to install gambling machines in his pawn shops. Cuz used the machines to facilitate hands-off drug sales. D.27-6:3056; *see also* D.27-6:3049. At first, Mr. Franks and Cuz were friends who worked and got high together. But their relationship soured as Mr. Franks's life spiraled out of control, leading to a series of crimes that occurred in August 1994.

At his January 1998 trial in Hall County, Georgia, Mr. Franks faced a mountain of evidence that he killed Cuz's wife, Debbie Wilson, and critically injured the Wilsons' children. Mrs. Wilson identified Petitioner repeatedly during her 911 calls. Both children identified him as the person who attacked them. DNA evidence linked him to the scene. Witnesses described him fleeing the scene.

Petitioner was also charged with murdering Cuz and David Martin (Cuz's bodyguard) in Haralson County, evidence of which would be admitted during the Hall County trial. There, too, the evidence was impossible to overcome. Wilson and Martin were killed with Mr. Franks's gun in Mr. Franks's pawn shop.

In the words of trial counsel:

The case in chief [] was an unwinnable case. There was an audiotape of

> the victim, as she was dying, identifying David. They had his fingerprints, his blood. They had two eyewitnesses that lived…I mean it was totally – the guilt was just – there was no question going into this case that there would be a guilty verdict.

D.26-26:61. Counsel believed that Mr. Franks "would be found guilty…regardless of what we could do," D.21-9:90. Yet they allocated virtually all of their resources towards the guilt-innocence investigation, neglecting to prepare a mitigation case that supported a life sentence.

Counsel theorized that other individuals had been involved in the crimes, and those people had coerced Mr. Franks into the attacks. They pursued this line of investigation for 3.5 years, but were unable to identify a *single* other person who may have been involved. Counsel testified: "Our strategy at trial was to show that David was not acting alone. There were other people involved in this." D.21-9:87. But "[w]e were never able to establish proof of that." *Id*.

Counsel's fruitless investigation wasn't the only problem with their theory. They admitted that in order for a coercion defense to apply, "your life has to be in danger to the extent that if you don't act, you'll be killed or done serious bodily injury." D.21-9:108-09. But they

> had time problems and we couldn't place anybody [else at the scene]. And by David's own version, as I recall, he was left alone in this house, especially, you know, with what was going on with the kids. There wasn't somebody there holding a gun to his head.

D.21-9:108-09. Further, their theory did not, even under counsel's best-case scenario, exonerate Mr. Franks: even if other individuals had been involved, he would have been liable for the murders as a party to a crime. D.17-15:3621.

Counsel "were hoping…[they]'d get a better result on the penalty phase," D.21-9:87, but they did very little to achieve that. They neglected to gather any life history records, except one educational record, which they disposed of without recognizing its significance. D.21-11:232; *see also* D.23-15:33; D.23-15:35 ("We didn't have any medical records"). They did not engage a mental health expert prior to trial. D.23-15:19 ("he said he felt fine, and those sorts of things."). They did not investigate the violent environment in which Mr. Franks grew up. They neglected to develop evidence of his severe early childhood illnesses, which had rendered him unable to walk and resulted in partial blindness, because they believed that such evidence would not be "relevant to these events." D.23-15:436. And they ignored his history of genetically-founded substance abuse. D.23-15:8-9 ("Well, I think that certainly wouldn't go to mitigation.").

Instead, counsel proceeded to trial with their baseless residual doubt/coercion theory. They put Mr. Franks on the stand during the guilt phase. He testified that drug dealers brought him to the Wilsons' home against his will, burst into the house and dragged Debbie upstairs, forced her to open a safe in the bedroom, and stabbed her. After that, everything "went red," and he could not remember the attacks on the children.

During closing arguments, counsel destroyed their own theory by repeatedly asserting that Mr. Franks was "guilty":

> …David Franks is guilty, there's no question from the evidence, we've been here for four weeks listening to detailed evidence…David is guilty, no question about it.

D.17-14:3549-50; *see also* D.17-14:3549-50 ("those children were telling the truth.…It was a horrible, horrible situation that they went through, and he did that, he did do that."); D.17-14:3578 ("We can put him in the house, we can prove that he did what he did to the kids.").

Counsel also addressed Mr. Franks's drug use. He informed the jury that Mr. Franks "was not the greatest guy":

> [H]e was a small time drug user who occasionally engaged in drug deals, we know that. We know that he and Cuz were up to shady business. Who knows what kinds of things. … We're talking about a couple of losers here, actually, a couple of small time losers, Cuz and David.

D.17-4:78. Counsel provided no further information regarding Mr. Franks's substance abuse history.

Ultimately, the evidence supporting counsel's coercion theory was so flimsy that the court refused to instruct the jury on coercion. D.17-14:3543. On February 2, 1998, Mr. Franks was convicted of malice murder.

During opening arguments in the penalty phase, the *defense* implored the jury to give Mr. Franks the sentence that would be "appropriate and necessary to assure that this type of hell on earth never occurs again as a result of any forces placed in motion by David Scott Franks." D.17-16:3665-66.

Counsel's purported sentencing strategy was to present testimony from family members regarding his good character. They presented a handful of family and friends and instructed them "to talk about good things about David." D.27-6:3024. They put forth no witnesses or evidence regarding the

coercion/residual doubt argument. Mr. Franks took the stand again and apologized to the victims' families. D.17-16:3772-73.

Counsel's "hell on earth" statement proved useful to the prosecution. In closing, the state asked the jury to "do what [counsel] said in his opening…impose the appropriate sentence that will be necessary to assure that this type of hell on earth never happens again[.]" D.17-18:3802. They also pointed out that the attacks on the children, for which counsel had repeatedly conceded Mr. Franks's guilt, established the aggravating circumstances necessary to secure a death sentence. D.17-18:3801. The jury so found, and on February 3, 1998, Mr. Franks was sentenced to death.

### C. Motion for New Trial and Direct Appeal Counsel "Doom[ed] the Ineffectiveness Claims."

Following the trial, the court replaced trial counsel with Michael Mears of the Multi-County Public Defender (MPD) and Susan Brown. MPD was a capital trial office without expertise in appellate or post-conviction representation, but they accepted the appointment anyway.

Under Georgia law, new counsel was required to raise a claim of ineffective assistance of counsel during the motion for new trial proceedings, and they did. *See Glover v. State*, 465 S.E.2d 659 (Ga. 1996). They undertook some of the investigation that trial counsel ignored. They unearthed evidence regarding Mr. Franks's childhood trauma, cognitive impairments, and substance abuse disorder; amassed background records; and interviewed a handful of relatives.

They quickly recognized the need to retain a mental health expert. Pamela Leonard, the lead investigator, testified:

> As I looked at the record, it became clear to me that Mr. Franks had a serious substance abuse problem and had suffered some kind of psychotic-like break, probably caused by the drugs he was on at the time of the crime and related stress….
>
> I could see that Mr. Franks had some family history of mental health problems, most obviously seen in his father's alcohol addiction and bizarre, violent behavior. Also, Mr. Franks had clearly been raised in a deeply chaotic and abusive home for many years before he managed to leave. These factors all cried out for mental health assistance[.]

D.28-13:5751.

Nevertheless, the defense made no effort to develop mental health evidence until the eleventh hour. They consulted with a neuropsychologist, Dr. Daniel Grant, and asked him to conduct neuropsychological testing on Mr. Franks within weeks of the motion for new trial hearing. Following the testing, Leonard and Dr. Grant had a "brief, one-way" telephone conversation in which Dr. Grant told Leonard in basic terms about the impairments he had observed. D.28-12:5655. Dr. Grant reported that Mr. Franks's test results revealed deficits in executive functioning, including "abstract thinking, problem solving, conceptualization, planning, organization, evaluating consequences" and "impulse control." D.23-14:273-75; D.28-12:5653. Counsel never called Dr. Grant again.

In order to prove the prejudice prong of their claim under *Strickland v. Washington*, 466 U.S. 668 (1984), counsel was required to present the evidence

that trial counsel could and should have presented. *See Roe v. Flores-Ortega*, 528 U.S. 470 (2000). But counsel had a misguided concern about revealing the fruits of their investigation to the state, leading them to the erroneous conclusion that they could prove the claims without presenting any of the mitigating evidence they had developed. Counsel believed that withholding the evidence "was necessary because ineffective assistance of counsel claims are litigated on habeas corpus, and allowing the state to learn about this information would give it an advantage at a possible retrial." *Franks v. State*, 599 S.E.2d 134, 148 (Ga. 2004) (Pet. App. 6). And because they lacked experience litigating ineffectiveness claims, they believed that they "would not have to make a full-blown, trial-style evidentiary presentation in support of the IAC claims." D.28-13:5750.

The hearing transcript reveals counsel's myopic focus on trial counsel's performance, and their total failure to engage with the prejudicial effects of counsel's deficiencies. Their direct questioning of Mr. Franks's mother spans a mere 7.5 transcript pages. Only *one* page consists of questions regarding mitigating information. In contrast, their questioning of trial counsel spans approximately 300 pages.

The motion for new trial was denied. On direct appeal, the Supreme Court of Georgia found, *inter alia*, that counsel's mistake of law – that is, their belief that they did not need to present evidence in order to establish *Strickland* prejudice – "**doom[ed] the ineffectiveness claims**…because [it] prevent[ed] the trial court and appellate court from evaluating whether prejudice resulted

from trial counsel's alleged failure to uncover and present mitigating evidence." Pet. App. 6 at 148 (emphasis supplied).

### D. State Habeas Proceedings

During the state habeas proceedings, new counsel's investigation revealed that Mr. Franks's traumatic upbringing, severe childhood illnesses, and early substance abuse damaged his brain and primed him for the significant addiction issues that led to the crimes.

#### 1. The "Significant" Cognitive Impairments That Trial and Appellate Counsel Neglected.

Habeas counsel contacted Dr. Grant regarding his previous neurospsychological testing, and armed him with significantly more information regarding Mr. Franks's background and development. This time, Dr. Grant testified. He explained that Mr. Franks performed in the impaired or borderline range on several neuropsychological tests, indicating deficits "in areas associated with executive functioning[:] abstract thinking, problem solving, judgment, memory, planning and organizing." D.28-12:5653; *see also* D.23-14:10. These deficits "impair his ability to plan, organize and to envision related consequences." D.28-12:3. Mr. Franks's cognitive deficits are "significant" and highly relevant to daily functioning. D.23-14:314.

The etiology of these impairments is likely complex, and includes his mother's difficult pregnancy, D.28-12:6; his early childhood bouts of severe illnesses, D.28-12:6, D.23-12:138-40, D.23-14:51-52; and various head injuries. A

high fever he developed at 9 months old, from which he sustained permanent vision damage and nearly died, D.28-12:6, likely had a "profound" effect on cognitive development because his brain was still immature, D.23-12:139. A bout of rheumatic fever he experienced in childhood also likely affected his brain development because experiencing such high fevers in infancy can prematurely kill brain cells or arrest their development. D.23-12:140. Such fevers can also lead to seizures that inhibit normal brain development. D.23-12:140.

In addition, Mr. Franks sustained multiple head injuries that caused or contributed to cognitive impairments. When he was four, he fell off the porch, hit his head on a large rock, and experienced uncontrollable bleeding. D.27-6:3005. At age 18, he sustained a "significant head injury" in a car accident and was rushed to the hospital, D.23-17:7-59, where he experienced a seizure, D.23-14:302-03.

In addition, Dr. Grant testified that the circumstances that David "endured in the first 15 or 16 years of his life were exceptional and highly unusual in their extreme chaos and violence." D.28-13:96. He was exposed to his father's "explosive and even psychotic outbursts," as well as his alcoholism. D.28-13:96. Mr. Franks's father's "unpredictable, chaotic, and violent behavior engendered an atmosphere of chronic life threat, fear and hypervigilance among his family." D.28-14:2.

Mr. Franks's school records "confirm long-standing and significant academic difficulties," and are consistent with brain damage. D.28-12:26. He had

to repeat second and third grade, and he never progressed past sixth grade. D.23-17:60-64; D.23-18:1-5; D.23-13:145.

### 2. Mr. Franks Was at "Enormously" High Risk of Developing Substance Abuse Disorder.

Both Mr. Franks's genetics and his upbringing placed him at extreme risk for addiction. D.28-13:95. According to Dr. Grant, "it is clear [] that the origin of Petitioner's chemical addictions lay in the easy availability of alcohol from a young age, the pervasive modeling of abusive consumption of alcohol by his father, and his need to blunt what must have been intense feelings of stress and anxiety stemming from life in such a chaotic household." D.28-12:6-7. He explained:

> The kinds of horrors experienced by Mr. Franks as a child and young adult put him at an extremely high risk of developing a serious substance abuse problem, chemical dependency, and emotional disorders as he grew into adulthood, and which is what I see in my review of his life history leading up to the crime in this case.

D.28-12:6-7. But Petitioner's jury was robbed of the opportunity to learn any of this.

### 3. Resolution by the State Habeas Court and the Supreme Court of Georgia.

Despite this record, the state habeas court found that "trial counsel thoroughly investigated Petitioner's background and family before formulating their mitigation theory and thereafter, reasonably supported that theory at

trial."[2] Pet. App. 4 at 38. Counsel's theory, according to the state court, was residual doubt. The court found that, "based on [counsel's] investigation and their opinion of the evidence," they "determined that the mitigation strategy would focus on residual doubt and Petitioner's good character." *Id.* at 44. Although counsel had clearly testified that they had chosen not to investigate Mr. Franks's substance abuse history, *see* D.23-15:8-9, the state habeas court unreasonably found that counsel "were aware of and thoroughly investigated Petitioner's drug usage," Pet. App. 4 at 49. The court credited counsel's approach, finding that the "evidence that Petitioner is a violent, unpredictable drunk" would have been "likely to prove harmful" before the jury. *Id.* at 50, 26-27. The habeas court adopted Respondent's proposed order verbatim, and denied Mr. Franks's petition.

The Supreme Court of Georgia summarily denied his application for a certificate of probable cause to appeal. Pet. App. 5.

### E. Federal Habeas Proceedings

Mr. Franks filed a petition for federal habeas corpus relief pursuant to 28 U.S.C. § 2254(d) in the United States District Court for the Northern District of Georgia. The district court and a three-judge panel of the Eleventh Circuit

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[2] The claim that Mr. Franks presented to the habeas court was that appellate counsel rendered constitutionally ineffective assistance of counsel by failing to fully litigate trial counsel's ineffectiveness. Therefore, trial counsel's conduct was the focus of the state and federal habeas courts' inquiries.

affirmed the state court's order, finding that the state courts had neither unreasonably determined the facts in light of the record, § 2254(d)(2), nor unreasonably applied clearly-established federal law, § 2254(d)(1), in adjudicating Mr. Franks's case. Specifically, the panel found, *inter alia*, that it was reasonable for Mr. Franks's counsel to pursue a residual doubt defense, Pet. App. 1 at 24-25, and that Mr. Franks was not prejudiced by counsel's failure to present mitigating evidence regarding his life history, substance abuse disorder, and cognitive impairments. *Id.* at 30-31.

## REASONS FOR GRANTING THE WRIT

The Eleventh Circuit maintains the position that "residual doubt is perhaps the most effective strategy to employ at sentencing. Counsel cannot be held to be ineffective when he has taken a line of defense which is objectively reasonable." *Chandler v. United States*, 218 F.3d 1305, 1320 n. 28 (11th Cir. 2000). In Mr. Franks's case, the court elaborated on that position, finding:

> It is true that we have also said this is especially so when the evidence of guilt is not overwhelming. But the brutal and aggravated nature of this crime … could lead a reasonable attorney to conclude that without residual doubt, a life sentence would be difficult to sustain.

Pet. App. 1 at 24-25.

In other words, in the Eleventh Circuit, counsel can *never* be unreasonable when they have pursued a residual doubt strategy, regardless of how ill-conceived that strategy, and regardless of the extent to which that decision was supported by a reasonable investigation. Under the court's jurisprudence,

counsel's decision to pursue a residual doubt strategy is as reasonable when there is *no* evidence against their client as when the evidence is "so overwhelming that **no competent lawyer** could" raise a meaningful challenge to it. Pet. App. 3 at 14 (emphasis supplied). The Eleventh Circuit's decisions in *Chandler* and this case raise an important question: does counsel's pursuit of a residual doubt strategy relieve them of the obligation to conduct a "thorough investigation of law and facts relevant to plausible options," *Strickland*, 466 U.S. at 690?

## I. MR. FRANKS'S TRIAL COUNSEL PERFORMED DEFICIENTLY DURING THE PENALTY PHASE OF HIS TRIAL.

### A. The Eleventh Circuit Has Repeatedly Flouted This Court's Precedent Holding That Residual Doubt and Life History Mitigation Are Not Mutually Exclusive Sentencing Theories.

Throughout the course of the proceedings in this case, the courts and the parties have agreed on one thing: the evidence against Mr. Franks was simply overwhelming. *See, e.g.,* Pet. App. 1 at 12, 16 ("It is undeniable that Franks's trial counsel faced overwhelming evidence of their client's guilt[,]" and "[a]t the penalty phase, the state's aggravation case grew still stronger."); *ibid*. at 32 ("We start with what is indisputable: the aggravating factors were very powerful."). In fact, according to the federal habeas court, "the evidence…was so overwhelming that **no competent lawyer** could be expected to have secured an acquittal. Thus, no matter how incompetently Petitioner's trial counsel presented Petitioner's defense during the guilt/innocence phase of the trial, Petitioner

could not have been prejudiced." Pet. App. 3 at 14 (emphasis supplied).

In trial counsel's own words:

> The case in chief [] was an unwinnable case.…I mean it was totally – the guilt was just – there was no question going into this case that there would be a guilty verdict.

D.26-26:61.

Despite their belief that Petitioner's case was "unwinnable," however, counsel allocated virtually all of their resources towards the guilt-innocence investigation. By the time the trial began – 3.5 years after the crime – counsel had conducted almost *no* investigation into any mitigating circumstances that might explain Petitioner's involvement in the crime. They made these omissions in the mistaken belief that a jury would not be interested in evidence of trauma, brain injury, and substance abuse. *See, e.g.,* D.23-15:403; D.23-15:8-9 ("I'm just saying that was not going to serve a mitigation purpose.").

In the lower courts, Mr. Franks claimed that his counsel had rendered ineffective assistance of counsel by sacrificing a constitutionally reasonable mitigation investigation and presentation in favor of a baseless, "unwinnable" defense.[3] The Eleventh Circuit upheld the lower courts' denial of this claim,

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[3] To prevail on a claim of ineffective assistance of counsel, Petitioner must demonstrate (1) that counsel's performance fell below objective standards of reasonableness, *Strickland*, 466 U.S. at 688; and (2) that "there is a reasonable probability that…the result of the proceeding would have been different" absent counsel's deficiency, *ibid.* at 694. The issue before the courts is whether Mr. Franks's appellate counsel rendered ineffective assistance of counsel by failing to properly litigate trial counsel's

citing its decision in *Chandler* for the proposition that "residual doubt is perhaps the most effective strategy" counsel can employ at sentencing, and counsel cannot be ineffective when he has pursued an "objectively reasonable" defense. Pet. App. 1 at 24-25.

### 1. Counsel's duty to investigate does not evaporate when he chooses to pursue a residual doubt theory.

At the heart of the Eleventh Circuit's flawed conclusion is a flawed premise: that residual doubt and mitigation are mutually exclusive sentencing strategies. But this Court refuted that premise nearly two decades ago in *Wiggins*. There, counsel "decided to focus their [sentencing-phase preparation] efforts on retry[ing] the factual case and disputing Wiggins' direct responsibility for the murder" instead of presenting mitigating evidence regarding Wiggins's background. *Wiggins v. Smith*, 539 U.S. 510, 517 (2003) (internal quotations

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ineffectiveness. In order to determine whether appellate counsel was ineffective, this Court must examine the trial counsel's actions. If trial counsel provided constitutionally deficient assistance, so too did appellate counsel. *See, e.g., Ferrell v. Hall*, 640 F.3d 1199 (11th Cir. 2011). Accordingly, this petition focuses on trial counsel's conduct.

It is beyond dispute that appellate counsel's mistake of law regarding the burden they carried during motion for new trial proceedings – and subsequent failure to present a prejudice case – constituted deficient performance. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274-75 (2014). But for counsel's error, there is a reasonable probability that a more favorable outcome would have resulted during motion for new trial or direct appeal.

omitted). Like Mr. Franks's counsel, they "intended [] to prove that Wiggins did not act as a 'principal in the first degree,'" *id.* at 510, meaning "that someone other than Wiggins actually killed [the victim]," *ibid.* at 515.

This Court found that counsel's decision to focus on residual doubt at the expense of mitigating evidence was unreasonable. *Id.* at 519. And the Court specifically rejected the notion that residual doubt and mitigation cannot comfortably coexist:

> While it may well have been strategically defensible upon a reasonably thorough investigation to focus on Wiggins' direct responsibility for the murder, the two sentencing strategies *are not necessarily mutually exclusive*. Moreover, given the strength of the available evidence, a reasonable attorney might well have chosen to prioritize the mitigation case over the direct responsibility challenge[.]

*Id.* at 535 (emphasis supplied); *see also ibid.* at 536 ("counsel were not in a position to make a reasonable strategic choice as to whether to focus on Wiggins' direct responsibility, the sordid details of his life history, **or both**, because the investigation supporting their choice was unreasonable" (emphasis supplied)).

Two years later, the Court again found counsel ineffective in *Rompilla*, where counsel's "sentencing strategy stress[ed] residual doubt," so they failed to present background evidence regarding Rompilla's organic brain damage, substance abuse history, and other mental health issues. *Rompilla v. Beard*, 545 U.S. 374, 380 (2005)

This Court reached those results because the analysis of whether or not counsel rendered constitutionally ineffective assistance is pegged not to whether

counsel's chosen strategy was superficially reasonable, but whether the investigation supporting the decision to pursue that strategy was reasonable. *Wiggins*, 539 U.S. at 527 ("Even assuming [Wiggins's counsel] limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy."). It simply cannot be the case that counsel's decision to present a residual doubt defense[4] renders their pretrial investigation *always* reasonable. This Court's jurisprudence is clear: counsel has a "duty to conduct [a] requisite, diligent investigation into his client's background." *Wiggins*, 539 U.S. at 522 (citation omitted). This obligation has been clear since this Court decided *Strickland* in 1984.

But the Eleventh Circuit has made a blanket finding that pursuing a residual doubt defense is a reasonable – even "the best," *Chandler*, 218 F.3d at 1320 n. 28 – strategy in *every* case, regardless of the circumstances. In doing so, the Eleventh Circuit has effectively eliminated this Court's requirement that

[4] Under the Eleventh Circuit's current jurisprudence, *any* lawyer could be insulated from a finding of ineffectiveness by testifying post-trial that they pursued a residual doubt defense. All they would need to do is cross-examine a single witness during the guilt phase, and then mention residual doubt in their sentencing-phase closing argument. Undoubtedly, more – far more – is required of counsel in a capital case.

counsel conduct a reasonable investigation into mitigating evidence and make a reasonable decision when settling on a strategy. *Strickland*, 466 U.S. at 690-91.

The Eleventh Circuit's apparent rationale for its position is that presenting a mitigation case may undermine residual doubt because there is an implied admission of guilt if a defendant seeks to mitigate his role in the crime. But not only are residual doubt and mitigation *not* always mutually exclusive sentencing theories, they may even be complementary. In Mr. Franks's case, for instance, evidence of his brain damage would have buttressed the story counsel presented. Evidence of his impairments in "problem solving, judgment," and "ability to…envision [] consequences, D.23-14:10, D.28-12:5653, would have showed that he was *more likely to* become entangled in a situation that spun out of his control, and ultimately fall prey to coercion. *See Sears v. Upton*, 561 U.S. 945, 950 (2010) ("the fact that Sears' brother is a convicted drug dealer and user, and introduced Sears to a life of crime, actually would have been consistent with a mitigation theory portraying Sears as an individual with diminished judgment and reasoning skills").

The simple truth is that "counsel were not in a position to make a reasonable strategic choice as to whether to focus on [Mr. Franks's] direct responsibility, the sordid details of his life history, or both, because the investigation supporting their choice was unreasonable." *Wiggins*, 539 U.S. at 536. Selecting residual doubt as a sentencing-phase strategy does not and cannot relieve counsel of their responsibility to conduct a thorough, sifting

investigation into mitigating evidence. This is especially true where, as here, counsel believes the case is "unwinnable," D.26-26:61; where, as here, counsel does not believe their case meets the legal standard for the defense, D.21-9:108-09; and where, as here, counsel concedes their client's guilt before the jury, D.17-14:3549-50. The Court should grant *certiorari*, reverse, and remand Mr. Franks's case.

### B. Substance Abuse Is Not "Invariably" a Double-Edged Sword.

Mr. Franks's trial counsel failed to investigate or present mitigating evidence regarding his genetic predisposition to substance abuse, the cognitive impairments he suffered as a result of juvenile substance abuse, and his resultant inability to conform his conduct to the requirements of the law at the time of the crime. Evidence regarding the role that childhood trauma and brain damage played in Mr. Franks's addiction was central to jurors' understanding of how he became involved in the crime. Yet counsel openly admitted that they neglected to marshal that evidence, mistakenly believing that it "certainly wouldn't go to mitigation." D.23-15:8-9. Although counsel's justification for their failure to present this evidence was admittedly not based on an investigation, the state habeas court upheld their decision, and a panel of the Eleventh Circuit affirmed it as a reasonable application of this Court's precedents. Specifically, the panel found:

> []…trial counsel made a reasonable, strategic decision not to focus on [Franks]'s drug use as a mitigating factor at trial.[] As we've repeatedly said, "reasonably competent counsel may not present such evidence

> because a detailed account of a defendant's alcohol and drug abuse is **invariably** a 'two-edged sword.'" *Stewart v. Sec'y, Dep't of Corr.*, 476 F.3d 1193, 1217 (11th Cir. 2007) (quoting *Housel v. Head*, 238 F.3d 1289, 1296 (11th Cir. 2001)). "Rarely, **if ever**, will evidence of a long history of alcohol and drug abuse be so powerful that every objectively reasonable lawyer who had the evidence would have used it." *Id*.

Pet. App. 1 at 30-31 (emphasis mine).

The panel's conclusion cannot be squared with the law of this Court, and it raises an exceptionally important question: Does a capital defendant's history of substance abuse – especially juvenile substance abuse, which profoundly alters brain development – constitute a mitigating circumstance, as this Court has repeatedly held, or is it "**invariably** a two-edged sword" that will "[r]arely, **if ever**" be so mitigating that all reasonable attorneys would present it during the sentencing phase of a capital trial, as the panel held? In other words, is substance abuse evidence so potentially damaging in *every* case that counsel has no duty to investigate or present it as mitigating evidence in a capital case, regardless of the circumstances?

### 1. Substance Abuse Is Mitigating.

#### a. There Is No *Strickland* Exception for Substance Abuse Evidence.

This Court has long held that "the Eighth and Fourteenth Amendments require that the sentencer… not be precluded from considering, 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 v. Ohio*, 438 U.S. 586, 604 (1978). The familiar list of

potential mitigating circumstances includes, *inter alia*, a history of abuse, neglect, and/or trauma; the defendant's age; mental illness; substance abuse; and cognitive impairments. *See generally Wiggins, supra*; *Sears, supra*; *Porter v. McCollum,* 558 U.S. 30 (2009); and *Rompilla*, *supra.*

But the Eleventh Circuit has unilaterally excised substance abuse and addiction from this list, *see* Pet. App. 1 at 30-31, even though this Court has explicitly found that "a history of dependence on alcohol" has "extenuating significance" in a capital case, *Rompilla*, 545 U.S. at 382. Substance abuse has featured prominently in many of this Court's cases finding counsel ineffective. *See Sears*, 561 U.S. at 949 (finding counsel ineffective where they failed to investigate and present evidence of the deficits Sears developed as a result of head injuries and drug and alcohol abuse at an early age); *Rompilla*, 545 U.S. at 382 (finding counsel ineffective where "counsel knew…that Rompilla had been drinking heavily at the time of his offense, and…one of the mental health experts reported that Rompilla's troubles with alcohol merited further investigation, [but] counsel did not look for evidence of a history of dependence on alcohol that might have extenuating significance."); *Porter*, 558 U.S. at 37 (criticizing the state habeas judge for discounting evidence of alcohol abuse).

*Strickland* did not carve out an exception for addiction or substance abuse evidence, and the Eleventh Circuit was not free to disregard this Court's precedent and decide that a vital category of mitigating evidence simply is not mitigating.

### b. Addiction Is a Mental Health Disorder that Creates and Exacerbates Cognitive Impairments.

Courts find that addiction is mitigating for a reason: it is a mental health disorder. While it may be true that some jurors would not be especially sympathetic if a defendant claimed that he committed a murder because he was too intoxicated, that is not the nature of the evidence or argument in this case. That is substance *use*, not substance *dependence.*

Addiction is often inextricable from cognitive impairments because addiction both creates and exacerbates a person's existing deficits. In *Sears*, for instance, this Court found counsel ineffective for failing to investigate and present evidence of the "deficits in mental cognition and reasoning" that Sears developed "as a result of several serious head injuries he suffered as a child, as well as drug and alcohol abuse." 561 U.S. at 949; *see also ibid.* ("Sears's history is replete with multiple head trauma, substance abuse and traumatic experiences of the type expected to lead to these significant impairments."). In *Rompilla*, Rompilla's parents were alcoholics, and he "over-indulge[d] in alcohol[]" throughout his adolescence and teens. 545 U.S. at 390. He showed early signs of cognitive impairment. *Id.* These impairments "relate[d] back to his childhood," *id.* at 392-93, just as Mr. Franks's did. At the time of the crime, Rompilla had "a history of dependence on alcohol." *Id.* at 382. Like Mr. Franks, his substance abuse exacerbated his pre-existing impairments; and like Mr. Franks, his substance abuse and impairments rendered his "capacity to

appreciate the criminality of his conduct or to conform his conduct to the law…substantially impaired at the time of the offense." *Id*. at 392-93.

### c. Substance Abuse Is Not "Invariably" a Double-Edged Sword

The panel also found that Mr. Franks's counsel's decision not to investigate or present evidence regarding his substance abuse was reasonable "because a detailed account of a defendant's alcohol and drug abuse is **invariably** a 'two-edged sword.'" Pet. App. 1 at 30-31 (emphasis added). But substance abuse is not "invariably" a double-edged sword. The case law of this Court is rife with cases in which the defendant's substance abuse played a role in the crime for which the defendant was on trial. In such circumstances, there is much to be gained – and nothing to be lost – by providing the sentencer with mitigating information that places the defendant's substance abuse in context. *See, e.g., Rompilla*, 545 U.S. at 382 (finding counsel ineffective where "counsel knew…that Rompilla had been drinking heavily at the time of his offense," but failed to investigate substance abuse evidence). Indeed, when substance abuse is at the heart of the crime, this Court imposes a clear duty to investigate it. *See Bobby v Van Hook,* 558 U.S. 4, 7-8 (2009) (counsel must investigate "mitigating circumstances surrounding the commission of the offense itself.").

That is the situation confronting the Court here. Mr. Franks's jury was fully aware that he used drugs: his *own counsel's defense theory* was that the crime was the result of a drug deal gone awry, and counsel himself informed the

jury that Mr. Franks was a drug user, D.17-4:78. What they lacked was an understanding of why he engaged in drug use at such a tender age, the effect that substance abuse had on his developing brain, and how his cognitive impairments affected him on the night of the crime. Presenting this evidence would only have inured to the defense's benefit. It "might not have made [Mr. Franks] any more likable to the jury, but it might well have helped the jury understand [him], and his horrendous acts." *Sears*, 561 U.S. at 951. It would have completely changed the evidentiary picture presented during sentencing.

Further, even if a certain type of evidence is, in general, a double-edged sword, counsel can still be ineffective for failing to investigate and present it. This Court has never carved out a *Strickland* exception for a certain type or piece of mitigating evidence simply because such evidence may sometimes have a potential downside. That is because the answer to the question of whether counsel was ineffective turns on *counsel's conduct* – specifically, the reasonableness of counsel's investigation. *Strickland*, 466 U.S. at 690-91.

### 2. *Strickland* Imposes a Clear Duty to Investigate "All Reasonably Available" Mitigating Evidence.

The question at the heart of the *Strickland* inquiry is whether counsel conducted a sufficient investigation before selecting a course of action. When evaluating whether counsel's performance was constitutionally adequate, the question is not, "Did counsel *have* a strategy?" The inquiry is instead, "Was

counsel's strategy the product of a reasonable – or reasonably truncated – investigation?" As Justice O'Connor explained in *Strickland*:

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

*Strickland*, 466 U.S. at 690-91.

Counsel cannot form strategy from ignorance. They must conduct a "thorough" and "diligent" investigation into the client's background *before* selecting a strategy. *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *see also Wiggins*, 539 U.S. at 524 (counsel has an affirmative obligation to present "all reasonably available mitigating evidence"). When analyzing counsel's effectiveness, courts focus not on whether counsel's ultimate tactical decisions were sound, but on whether the investigation underlying counsel's decisions "was itself reasonable." *Wiggins*, 539 U.S. at 523 (emphasis in original).

As described *supra*, in *Van Hook*, this Court found that counsel is obligated to investigate not just life history evidence, but also "mitigating circumstances surrounding the commission of the offense itself." 558 U.S. at 7-8. In other words, no reasonable counsel can ignore substance abuse evidence when substance abuse was part of the crime; it cannot ever be the case that it is reasonable to fail to investigate substance abuse under such circumstances. *Id.*

In Mr. Franks's case, the panel buttressed its conclusion that trial counsel's failure to investigate or present this evidence was reasonable by

pointing to the fact that trial counsel testified during the habeas proceedings that their failure to investigate was deliberate. D.23-15:8-9. But counsel's failure to investigate can, of course, be unreasonable even where counsel claims that omission was strategic; nowhere in *Strickland* does it say that *all* deliberate strategies, however ill-conceived, are insulated from judicial review. This is because courts "define[] the deference owed [to] strategic judgments in terms of the adequacy of the investigations supporting those judgments," not in terms of "post hoc rationalization[s]," *Wiggins*, 539 U.S. at 521, 526.

Mr. Franks's counsel admitted to conducting **no investigation** into substance abuse and addiction. It cannot be constitutionally permissible for counsel to intentionally fail to investigate a fruitful category of mitigating evidence, especially when that evidence played a vital role in the crime for which the defendant is on trial. Mr. Franks's counsel "chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." *Id.* at 527. "As a result, the court's subsequent deference to counsel's strategic decision…despite the fact that counsel based this alleged choice on…an unreasonable investigation, was also objectively unreasonable." *Id.* at 527-28. Counsel's performance was plainly deficient.

The panel's contrary conclusion was divorced from counsel's conduct, counsel's constitutional obligations, and the facts of this case. The Court should reverse and remand.

## II. MR. FRANKS WAS PREJUDICED BY HIS COUNSEL'S OMISSIONS.

It is undeniable that Mr. Franks's counsel performed deficiently by focusing on an "unwinnable," D.26-26:61, residual doubt theory instead of developing a meaningful case for a life sentence. In order for Mr. Franks to prevail on a *Strickland* claim of ineffective assistance of counsel, however, it is not enough for him to show that counsel performed deficiently. He must also demonstrate "a reasonable probability that…the result of the proceeding would have been different" absent counsel's deficiency. *Strickland*, 466 U.S. at 694. In Georgia, a non-unanimous death verdict results in a life sentence. *See* O.C.G.A. § 17-10-31.1(c); *Miller v. State*, 229 S.E.2d 376, 377 (Ga. 1976). Accordingly, the prejudice test in Georgia is whether "a reasonable probability [exists] that at least one juror would have struck a different balance" if they had heard the omitted evidence. *Wiggins*, 539 U.S. at 537. And in Georgia, "[m]itigating evidence, '*anything* that might persuade the jury to impose a sentence less than death,' is critical because 'the jury may withhold imposition of the death penalty for any reason, or without any reason.'" *Thomason v. Head*, 578 S.E.2d 426, 429 (Ga. 2003) (emphasis in original).

During Petitioner's state habeas proceedings, counsel introduced copious evidence of Petitioner's trauma history, addiction, and cognitive impairments – evidence that had been almost entirely omitted at trial and on appeal. The state habeas court deemed the evidence "weak," and found that Petitioner was not

prejudiced by its omission. Pet. App. 4 at 44. The district court agreed, Pet. App. 3 at 22, and the Eleventh Circuit affirmed, Pet. App. 1. The lower courts were only able to issue those findings by unreasonably applying *Strickland, Wiggins, Rompilla, Porter, Williams*, and *Sears*. This Court's cases compel the conclusion that trial counsel's omission of vital mitigating evidence altered the outcome of Petitioner's trial.

### 1. Evidence of Brain Damage Was a Powerful Explanation for the Crime.

The state court discounted Petitioner's uncontroverted evidence of brain damage to irrelevance. *See* Pet. App 4 at 74. The district court completely misapprehended the evidence, conflating it with intellectual disability or mental illness, *see* Pet. App. 3 at 23, and the Eleventh Circuit affirmed. But the state court's conclusion cannot be squared with the law of this Court, which has repeatedly held that evidence of cognitive impairment is powerfully mitigating. *See Rompilla*, 545 U.S. at 392-93; *Porter*, 558 U.S. at 41; *Sears*, 561 U.S. at 949.

As Dr. Grant explained, Mr. Franks's brain damage "hindered his ability to think, judge and plan rationally and appreciate fully the consequences of his actions" at the time of the crimes. D.28-12:5658. His acute intoxication aggravated "the effects of his longstanding deficits." *Id.* This evidence would have had a profound effect on the jury, as it would have proved that Petitioner's acts were not volitional, and Petitioner was not the one-dimensional drug addict the state (and his own counsel) made him out to be.

The state court unreasonably concluded that the evidence would not have altered the jury's appraisal of Mr. Franks's culpability. This Court has found prejudice in significantly similar cases. In *Sears*, for instance, the evidence introduced during habeas proceedings revealed that Sears struggled in school, even – like Petitioner – repeating second grade. *Sears*, 561 U.S. at 948. Sears's academic difficulties were early red flags that "Sears suffered significant frontal lobe abnormalities. Two different psychological experts testified that Sears had "substantial [cognitive] deficits" that resulted from "head injuries he suffered as a child," "drug and alcohol abuse," and "traumatic [childhood] experiences." *Id.* Like Petitioner, Sears's deficits impaired his "ability to suppress competing impulses and conform behavior only to relevant stimuli" and "ability to organize his choices, assign them relative weight and select among them in a deliberate way." *Id.* Just as in *Sears*, the likelihood of a different result if Petitioner's counsel had introduced this evidence is "sufficient to undermine confidence in the outcome" of the sentencing proceeding. *Strickland,* 466 U.S. at 694.

**2. Addiction Evidence Would Have Been Highly Mitigating.**

Under the circumstances, the Eleventh Circuit's assessment of the mitigating force of substance abuse evidence was simply wrong. Petitioner's genetic predisposition to addiction would have explained how such a kind, personable man could have become involved with hard-core drugs to the extent that he became involved in this crime. This was not the story of someone who got too intoxicated one night and murdered someone in a bar brawl. This was the

story of a person with a genetically-founded addiction catalyzed by abuse and trauma, who began self-medicating with drugs and alcohol in early adolescence, whose existing brain damage was compounded by early substance exposure, and whose cognitive impairments rendered him substantially unable to conform his behavior to the law. D.28-13:3; D.28-12:7.

Time and again, this Court has found that this type of evidence is powerfully mitigating. *Rompilla*, 545 U.S. at 382; *see also Porter*, 558 U.S. at 37. Rompilla's history resembled Mr. Franks's. His "parents were both severe alcoholics," and "the children lived in terror." *Id.* at 392. Rompilla's adolescence and teenage years were marked by difficulties stemming from "over-indulgence in alcoholic beverages," *id.* at 390; he showed early signs of cognitive impairment, *ibid.*; and he left school after the ninth grade, *ibid.* at 382. Rompilla's cognitive impairments "relate[d] back to his childhood," *id.* at 392-93, just as Mr. Franks's did. And like Mr. Franks, Rompilla's substance abuse and cognitive impairments rendered his "capacity to appreciate the criminality of his conduct or to conform his conduct to the law…substantially impaired at the time of the offense." *Id.* at 392-93. The combination of addiction, brain damage, mental health, and trauma evidence "adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury." *Id.* at 393 (citations omitted).

If Mr. Franks's jury had been able to "place [his] excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least

one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537. That likelihood is "sufficient to undermine confidence in the outcome" of Petitioner's trial. *Strickland*, 466 U.S. at 694. The state courts could only reach a contrary conclusion by unreasonably applying this Court's precedent.

## CONCLUSION

This Court should grant the petition for writ of *certiorari*, reverse, and remand Mr. Franks's case for further proceedings.

Respectfully submitted, this the 26th day of April, 2021.

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