

In the
Supreme Court of the United States

David Scott Franks,
Petitioner,

v.

Benjamin Ford, Warden,
Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined, on AEDPA review, that the state court did not unreasonably apply *Strickland v. Washington*, 466 U.S. 668 (1984), in concluding that trial counsel's strategy, after a thorough investigation, to present mitigation focusing on residual doubt and good character was not unconstitutionally deficient performance.
2. Whether the court of appeals correctly determined, on AEDPA review, that the state court did not unreasonably apply *Strickland* in concluding that trial counsel's strategy to not focus on petitioner's history of substance abuse was not unconstitutionally deficient performance.

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OPINIONS BELOW

The decision of the Georgia Supreme Court in the criminal direct appeal is published at 278 Ga. 246, 599 S.E.2d 134 (2004) and is included in Petitioner's Appendix 6.

The decision of the Butts County Superior Court denying state habeas relief is unpublished and is included in Petitioner's Appendix 4.

The decision of the Georgia Supreme Court affirming denial of state habeas relief is unpublished and is included in Petitioner's Appendix 5.

The decision of the district court denying federal habeas relief is unpublished and is included in Petitioner's Appendix 3.

The decision of the Eleventh Circuit Court of Appeals affirming the district court's denial of relief is published at 975 F.3d 1165 (11th Cir. 2020) and is included in Petitioner's Appendix 1.

The order of the Eleventh Circuit Court of Appeals denying rehearing and rehearing en banc is unpublished and is included in Petitioner's Appendix 2.

JURISDICTION

The Eleventh Circuit Court of Appeals entered its judgment in this case on September 16, 2020. Pet. App. at 1-43. A petition for writ of certiorari was timely filed in this Court on April 26, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a ... have the Assistance of Counsel for his defence.

28 U.S.C. § 2254(d) provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

Petitioner David Scott Franks presents two questions alleging that the court of appeals' holding conflicts with *Strickland v. Washington*, 466 U.S. 688 (1984). Certiorari review is not warranted because the facts do not provide a proper vehicle for the questions presented nor is the court of appeals' holding in conflict with this Court's precedent

Franks first asserts that the court of appeals held that counsel has no duty to investigate for mitigation if counsel chooses to present a residual doubt defense and that holding conflicts with the precedent of this Court. However, Franks's question misconstrues the holding of the court of appeals, which held only that, after conducting a reasonable investigation, counsel in this case reasonably chose to present residual doubt as a mitigation theory, even in light of overwhelming evidence of guilt.

Second, Franks argues that the court of appeals held that a reasonable attorney can choose not to investigate substance abuse because it is aggravating. Again, this question mischaracterizes the court's holding. Instead, the court held that introducing evidence of substance abuse is a double-edged sword and in very few circumstances will it be so powerful that "every objectively reasonable lawyer" would use it. *Franks v. Warden*, 975 F.3d 1165, 1180 (2020) (emphasis added).

In both instances, the court of appeals properly applied *Strickland* and the AEDPA and concluded that the state court's conclusion that counsel did not act unreasonably in making the strategic decision to present residual doubt and limit family history mitigation was not contrary to, or an unreasonable application of, *Strickland*, nor based on a unreasonable determination of the facts.

Franks has not shown that there is any conflict with this Court's precedent or that this case presents the proper vehicle to raise either of these arguments. Both issues thus reduce to a request for factbound error correction, which does not warrant further review. Certiorari should be denied.

STATEMENT

A. Factual Background

“In the early morning hours of August 5, 1994, David Martin and Clinton Wilson arrived at David Franks’s pawn shop in Bremen, Georgia.” (Pet. App. 1, pp. 2). During this meeting, “Franks shot Martin and Wilson execution-style...” *Id.*

Franks left the scene in Wilson’s white van and “drove nearly two hours away to Wilson’s home in Gainesville, Georgia, where Franks believed Wilson had hidden tens of thousands of dollars in cash.” *Id.* at 3. Franks “was friendly with Wilson” and knew Wilson’s wife and children. *Id.* When Franks arrived “at the Wilson home, Wilson’s nine-year-old daughter Jessica answered the door and allowed Franks to come in.” *Id.*

“Franks told Debbie he wanted to go fishing with Brian, the Wilsons’ thirteen-year-old son, who was at a neighbor’s home.” *Id.* “Debbie sent Jessica to tell Brian,” and with both children out of the house, Franks forced Debbie Wilson upstairs at gunpoint to where he knew the family kept a safe. *Id.* Franks took money from the safe and stabbed Debbie. *Id.* Debbie identified “David Franks” as her attacker on the 911 call and to the arriving paramedics and stated that “he attacked her for money.” *Id.* She died in route to the hospital. *Id.* at 4.

When the Wilson children returned to the home, Franks told “Jessica to go outside to the van to get a briefcase ... and told Brian to get his fishing gear.” *Id.* While Jessica was outside, Franks attacked Brian from behind, stabbing him “in the chest and stomach” and slashing his throat “at least twice.” *Id.* Franks then found Jessica and stabbed her “in the chest as she came back into the house. Both children survived,” identified Franks as their attacker, and stated his was driving their father’s white van when he left. *Id.*

Law enforcement found the van not far from the house and a canine unit tracked Franks from the van to a nearby home where he stole the home owner's car and drove to "Biloxi, Mississippi, where he gambled for three days using the pseudonym 'Ty Dare.'" *Id.* at 5.

Franks then drove to Mobile, Alabama, and checked into a motel." *Id.* A local police officer spotted the stolen car, but before police could respond, Franks fled the scene. *Id.*

"After evading police at the motel," Franks then "invaded the home of" 76-year-old Carrie and 82-year-old Willie Cooper and locked the elderly couple in a "sweltering garage from mid-morning until late in the afternoon" without water. *Id.* at 5. When the Coopers's daughter "became concerned when she couldn't reach her parents by telephone," she went to their home, where she and her son were taken hostage by Franks at gunpoint. *Id.* Franks then stripped the phone line from the wall, and stole the family's car. *Id.*

Nine days after the murders, Franks was arrested at a relative's house in Alabama after "his brother-in-law turned him in." *Id.* "Before his arrest, [Franks] told his brother-in-law that the pawn-shop victims had promised to come up with \$100,000 to buy drugs. When they didn't have the money, [he] made them lie down on the floor and shot them." *Id.* at 5-6. "Franks also told his brother-in-law that Martin and Wilson 'got what they deserved.'" *Id.* at 6.

Three of Franks's family members also told law enforcement that Franks had told them that a man named "Bubba" was present when the murders in Haralson County occurred. (D.29-7:89-90, 119; D.29-8:20-21).¹ As for the Hall County crimes, Franks told his brother that "Bubba" and another man, also named David, were at the crime scene and that "the other David

¹ Record citation refers to the district court record, *Franks v. Warden*, No. 2:11-cv-0325 (N.D. Ga.), in the following order: district court docket number; attachment number; page number. For example, D.29-7:80-90 refers to docket number 29, Respondent's exhibit 7, pages 89-90.

stabbed Mrs. Wilson and also cut the children.” *Id.* Similarly, Franks told his brother-in-law that he was at the Wilson home, but “Bubba” was the attacker. *Id.*

B. Trial Proceedings

Franks was represented at trial by “experienced trial counsel” Stanley Robbins and Joseph Homans. (Pet. App. 1, pp. 23-24, n.1). Robbins had handled over a hundred felony criminal trials and was involved in a number of capital cases—one of which went to trial and another of which was resolved by plea before trial. *Id.* at 24. Homans had handled approximately six murder cases, including a death-penalty case that resulted in an acquittal, although he had “fully participated” in the mitigation investigation and preparation. *Id.* at 24.

During an initial meeting, Franks told the defense team a version of the events similar to what he had told his family members: that he had shot Wilson and Martin, but another “David”—“Little David”—had murdered Debbie Wilson and attacked the children. (D.29-5:11, 17-22; D.29-5:21; D.29-4:76-95). Franks changed his story several times but ultimately reverted back to the original version that others had committed the crimes in Hall County and he was afraid for his life and the lives of his family. (D.37-24:3; D.37-23:86).

Trial counsel decided to present a guilt phase theory “that other men had murdered Debbie, and that the attacks on the children, if [Franks] did them, were the result of coercion.” (Pet. App. 1, p. 13). Dovetailing with this defense theory, counsel chose to present a multi-faceted sentencing-phase strategy that focused on residual doubt carrying over from the guilt phase and good character to bolster that theory. *Id.* at 17.

In support, Franks testified in the guilt phase of trial. He told the jury that he had arranged for a drug deal at his pawn shop on the morning of August 5, 1994 between Wilson and members of the Dixie Mafia. *Id.* at 13. He testified that, when the men from the Dixie Mafia arrived, it was discovered that Wilson had not brought the money. *Id.* The four men threatened to harm Wilson's and Franks's families if they did not produce the money. *Id.* The men then shot Martin and Wilson, tied Franks with flex cuffs, placed him in the white van, and drove him to the Wilson home in Gainesville. *Id.* at 13-14.

Franks testified that the men told him to make entry into the house and be sure it was unlocked. *Id.* at 14. Once he did, the men entered the home, took Debbie Wilson upstairs to get the money they were owed, and stabbed her in the back. *Id.* Franks alleged that he was trying to "distract the children" so they would not be in the house. *Id.* Franks alleged he did not remember attacking the children. *Id.* He claimed he was afraid of the Dixie Mafia and did not go to the police because the men from that organization had threatened his family. *Id.*

Counsel presented evidence to support their theory. They noted that, on the 911 tape, Debbie Wilson stated that "[t]hey're hurting my kids." *Id.* at 16 (emphasis in original). Counsel also presented Annie Carlisle, a witness, who testified that, "on the morning of the murders, [she] saw four men drive into the pawn shop parking lot, exit their car, and push three men through the door of the pawn shop." *Id.* at 15-16. Trial counsel also argued that the police did not thoroughly investigate the crime because they did not conduct fingerprint analysis on the beer cans at the pawn shop crime scene and did

not investigate tire tracks at the Wilson home that were left on the day of the murder. *Id.* at 16.

During the sentencing phase, in addition to their residual-doubt theory, trial counsel also submitted “significant mitigation testimony” from nine lay witnesses that Franks was kind and a nonviolent person. *Id.* at 17.

Additionally, family members testified that Franks’s father was “a severe alcoholic” who was violent. *Id.* at 17-18. Franks’ brother testified he was afraid of his father when he was young and described an incident when his father had fired a gun at Franks. *Id.* at 18. He also described sleeping with a knife under his bed because he was afraid his father would come into his room and kill him. *Id.* at 17.

During the course of trial, Franks claimed he had memory lapses and trial counsel had him evaluated immediately by a psychiatrist, Dr. John Connell. *Id.* at 27-28. Dr. Connell testified Franks’s had features of post-traumatic stress disorder (“PTSD”),” which explained his memory lapses. *Id.* at 28.

In closing arguments, trial counsel acknowledged that the State’s evidence showed that Franks attacked Brian and Jessica. (Pet. App. 6, *Franks*, 278 Ga. at 255). However, counsel argued that Franks lacked the criminal intent required for a conviction because he suffered from PTSD as the result of the Dixie Mafia killing Wilson and Martin. (D.37-24:16). Trial counsel argued residual doubt based on evidence that supported this version of events and argued the State did not fully investigate other suspects or the crime scene. (Pet. App. 1, p. 18). They concluded by asking the jury for mercy and not to sentence Franks to death. *Id.* at 19.

On January 11, 1995, the Hall County jury convicted Franks of the malice murder, armed robbery, aggravated battery, two counts of aggravated assault, two counts of cruelty to a child, and theft by taking. *Id.* at 6. Following the sentencing phase of trial, “the jury unanimously recommended” a sentence of death. *Id.* “Because he was convicted and sentenced to death in Hall County, Franks was never tried for the murders of Clinton Wilson and David Martin in Haralson County.” *Id.*

C. Direct Appeal Proceedings

Franks was represented by new counsel on direct appeal. *Id.* He raised claims that trial counsel were ineffective in the investigation and presentation of mitigation evidence. *Id.* at 7. In affirming Franks’s convictions and sentences, the court concluded that he failed to establish any prejudice “because Franks’s new counsel ‘presented no competent evidence of what a more thorough mitigation investigation would have uncovered,’ offering only a summary of Franks’s life that was neither offered into evidence nor supported by competent testimony.” *Id.* (quoting Pet. App. 6, *Franks*, 278 Ga. at 263).

The court addressed Franks’s claim, which he repeats in his petition, that his trial counsel had conceded guilt during the guilt-phase closing arguments. Rejecting this claim, the Georgia Supreme Court found that although “trial counsel’s use of the word ‘guilty’ was unfortunate,” “trial counsel did not intentionally concede Franks’ guilt on any of the charged offenses, including the attacks on the children.” (Pet. App. 6, *Franks*, 278 Ga. at 256). The court reasoned that when the closing argument was viewed as a whole, “it [was] clear that trial counsel only conceded that Franks had

committed the physical act of attacking the children and that Franks lacked the criminal intent to be convicted of those charges” since he was forced to do so by men from the Dixie Mafia. *See id.* at 255. The court noted that trial counsel’s “argument was not inconsistent with Franks own testimony,” in which “he did not deny attacking the children, but had only said he did not remember attacking them.” *Id.*

D. State Habeas Proceedings

Franks then filed his state habeas corpus petition arguing that trial counsel were “ineffective for failing to investigate and present additional mitigating evidence about Franks’s difficult childhood and abusive father, his substance abuse, his cognitive deficits and mental illness, and for relying instead on a theory of residual doubt.” (Pet. App. 1, p. 7). He also claimed that his appellate counsel were ineffective in raising the ineffective assistance of trial claim on direct appeal. *Id.* “After a three-day evidentiary hearing, the state habeas court denied relief.” *Id.* at 19.

The state court found that counsel’s “strategic decision [to focus on residual doubt] was supported by a reasonable investigation that included extensive interviews with Franks’s family and friends, and the examination of ‘possible mental health history, dependency issues and other extenuating factors.’” *Id.* at 19-20. The court also found that trial counsel’s decision to focus on residual doubt was strategic and reasonable “after a thorough investigation of ‘law and facts.’” *Id.* at 20.

In analyzing the additional potentially mitigating evidence introduced in the state habeas proceedings, the state court “concluded both that counsel made a reasonable strategic choice not to present it and that the evidence

was weak and would have had little mitigating value. Thus, Franks was not prejudiced by the choice to omit it.” *Id.* at 20. The court concluded that, “because trial counsel were not ineffective, appellate counsel were not deficient, nor was Franks prejudiced by their failure to challenge trial counsel’s mitigation investigation and presentation.” *Id.* at 8.

Franks appealed and, on November 30, 2011, the Georgia Supreme Court summarily denied Franks’ application for certificate of probable cause to appeal the state habeas court’s decision. (Pet. App. 5).

E. Federal Habeas Proceedings

1. District Court

Franks filed a 28 U.S.C. § 2254 habeas petition challenging appellate counsel’s effectiveness in raising the ineffectiveness of trial counsel on appeal. The district court, like the state court, “examined whether Franks’s trial counsel were constitutionally ineffective on the theory that if trial counsel were not ineffective, appellate counsel could not have been ineffective either for failing to raise a claim about trial counsel’s performance.” (Pet. App. 1, p. 8). The district court properly gave deference as required by the AEDPA and “concluded that none of the state habeas court’s factual findings were unreasonable in light of the evidence presented, and none of its conclusions of law were contrary to or involved an unreasonable application of clearly established federal law.” *Id.* at 8-9.

2. Court of Appeals

The court of appeals granted Franks a certificate of appealability on the sole issue of whether appellate counsel was ineffective in raising the claim of the effectiveness of trial counsel’s investigation and presentation of

mitigation evidence. *Id.* at 9. In analyzing this claim, like the Georgia Supreme Court and the district court, the court of appeals also reviewed the effectiveness of trial counsel to determine the effectiveness of appellate counsel. *Id.* at 9-10. The court concluded that “since Franks’s claim that his trial counsel were constitutionally ineffective is without merit ... [h]is appellate counsel could not have been constitutionally ineffective by failing to present a meritless claim.” *Id.* at 10.

a. Finding of No Deficiency

(1) *Not Deficient for Presenting Residual Doubt*

In first addressing whether the state court had reasonably assessed whether trial counsel were deficient in relying on residual doubt for sentencing, the court of appeals found that “a reasonable jurist could conclude that a reasonable lawyer could have performed the way Franks’s trial counsel performed.” *Id.* at 25. The court based this finding on trial counsel’s testimony that they believed residual doubt was imperative to attempt to avoid the death penalty based on the brutality of the crimes and because trial counsel presented evidence to support this theory. *Id.*

(2) *Not Deficient for Limiting Additional Potentially Mitigating Evidence*

The court also reviewed the state court’s holding that trial counsel’s decision to focus on residual doubt was based on a reasonable mitigation investigation. The court of appeals held, “[a]pplying the second layer of AEDPA deference owed to the state court, we conclude that [the state court’s] determination was not an unreasonable determination of the facts in light of

the evidence presented, nor was it contrary to or an unreasonable application of clearly established federal law.” *Id.* at 31.

The court’s holding was based on its review of the state court findings that trial counsel investigated Franks’s background, his childhood, and his home life. *Id.* at 25-31. Trial counsel were aware of Franks’s substance abuse and were given no indications of any cognitive deficits or mental health issues. *Id.* at 26. The court found that trial counsel introduced some of this evidence at trial, but made a reasonable strategic decision, based on *the jurors in this particular case* and their own experience, not to focus on those areas as they believed the evidence could be more harmful than mitigating. *Id.* at 30-31.

b. Finding of No Prejudice

The court of appeals also found that, “[p]erhaps even more clearly,” the state habeas court’s finding that Franks was not prejudiced by any alleged deficiency of trial counsel was not contrary to, or unreasonable application of, Supreme Court precedent nor based on an unreasonable determination of the facts. *Id.* at 31. The court reviewed the state court’s finding that the additional life-history mitigation evidence Franks claims should have been submitted at trial was cumulative, weak, and equivocal, and Franks was not prejudiced by counsel not submitting it. *Id.* at 31-43. The court of appeals concluded that this holding was not an unreasonable application of *Strickland* or based on an unreasonable determination of the facts. *Id.* at 43.

REASONS TO DENY THE WRIT

Franks asks this Court to grant certiorari review to engage in factbound error correction for a run-of-the-mill *Strickland* claim. Nothing in the court of appeals' decision conflicts with this Court's precedent or that of any other court of appeals. Franks merely disagrees with the court's determination on AEDPA review that the state court's application of *Strickland* was not unreasonable.

To establish his ineffectiveness claim under *Strickland*, Franks had to establish that counsel's performance was deficient and "that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. To establish prejudice, Franks had to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 694.

In a § 2254 proceeding, the "pivotal question" "is whether the state court's application of the *Strickland* standard was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). Federal habeas courts thus must take "a 'highly deferential' look at counsel's performance [under *Strickland*] ... through the 'deferential lens' of § 2254(d)..." *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011). Accordingly, the question "is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Richter*, 562 U.S. at 105. Properly applying this standard, the court of appeals correctly concluded that the state court's finding that Franks failed to establish deficiency or prejudice from counsel strategically determining, after a thorough investigation, to present a multifaceted mitigation theory that focused on residual doubt, was not an unreasonable application of *Strickland*.

I. The court of appeals' holding concerning the reasonableness of counsel's decision to focus on residual doubt as mitigation was correct and does not conflict with this Court's precedent.

Franks argues that the court of appeals held that residual doubt is always the best mitigation strategy, and that such a holding is contrary to *Strickland* because it unconstitutionally relieves trial counsel of having to conduct a mitigation investigation. This case does not present the proper vehicle to address this issue because the court of appeals did not hold that counsel's duty to investigate for mitigation was erased once they chose a residual doubt strategy. Nor does the court's holding conflict with this Court's precedent. Instead, the court of appeals correctly applied *Strickland* and the AEDPA and properly assessed the reasonableness of the state court's holding that trial counsel were not deficient for deciding, after conducting a reasonable mitigation investigation, to present a multi-faceted mitigation theory that focused on residual doubt but included additional life-history mitigation.

A. Counsel's mitigation strategy to focus on residual doubt was reasonable and based on a reasonable investigation.

In assessing the reasonableness of counsel's decision to focus on residual doubt, the court of appeals held that there is no question that residual doubt can be a reasonable strategic theory if evidence of guilt is weak. (Pet. App. 1, pp. 24-26). The court further held, however, that in a case where the crimes are of such "brutal and aggravated nature," a reasonable attorney could conclude that "without residual doubt, a life sentence would be difficult to sustain." *Id.* at 25. In so holding, the court noted trial counsel's testimony in the state proceedings that they made a strategic decision to present residual doubt because, based on their experience, "you can put in whatever you

want, strong about [Franks] or weak about [Franks] personally,' but '[g]iven these sets of facts and given what happened to the children, if you're unable to point out residual doubt, you're going to lose the penalty phase.'" *Id.* at 24. The court of appeals also noted that the residual doubt theory was supported by some evidence, including: Annie Carlisle's testimony of seeing other men present at the pawn shop around the time of the murders there; Debbie Wilson's statements that "*they're* hurting my kids"; "unidentified fingerprints at the crimes scenes"; and the disparity between the two murder scenes"—the pawn shop being calculated and the Hall County home being "frenzied." *Id.* at 25 (emphasis added). Additionally, trial counsel presented numerous lay witnesses to testify to Franks's good character, further supporting their residual doubt theory. *Id.* at 17. The court concluded "[g]iven the horrific facts surrounding these crimes and the availability of some extrinsic evidence supporting Frank's account, a reasonable jurist could conclude that a reasonable lawyer could have performed the way Franks's trial counsel performed." *Id.* at 25. This analysis was a proper application of *Strickland* and the AEDPA.

B. Counsel's decision to limit life-history mitigation was reasonable.

The court of appeals at no time held that the decision to present a residual doubt theory can be determined in a vacuum or that such a decision relieves trial counsel of investigating other mitigation or mutually excludes the presentation of other mitigating evidence. *See* petition, pp. 22. In fact, the court's analysis specifically addresses the reasonableness of trial counsel's mitigation investigation and their strategic decision to present limited life history mitigation in direct accordance with *Strickland* and the AEDPA.

1. Counsel conducted a reasonable investigation into Franks's mental health.

Counsel did not fail to investigate mental health based on a belief that it “wouldn’t be relevant to the events,” as Franks argues. (Petition, p. 2 (citing D.23-15:36)). Instead, as the court found, trial counsel had the assistance of a well-known and experienced mitigation investigator who interviewed “Franks and his family extensively” and was “never given any indication that Franks’s mental health required further investigation.” (Pet. App. 1, p. 26). The court of appeals noted that the state court made the factual finding that “the defense team went ‘very in depth’ with Franks’s mother concerning his childhood and spoke ‘very frequently’ with his aunt, Jane Mashburn.” *Id.* Trial counsel were not given any information concerning any “treating doctors or hospitals” and “did not come across any relevant medical records during [their] investigation.” *Id.* To the contrary, “neither Franks’s family nor Franks himself ever gave any indication that there were any mental health issues.” *Id.* The state habeas court found that trial counsel “made the determination not to hire a mental health expert to evaluate [Franks] prior to trial as they concluded, after a thorough investigation, that they did not have a good faith basis to request such an evaluation.” *Id.*

Relying on *Strickland*, the court of appeals decided that “[t]he reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions ... In particular, what investigation decisions are reasonable depends critically on such information.” *Id.* at 27 (quoting *Strickland*, 466 U.S. at 691). Applying this precedent, the court of appeals found that Franks’s was not a case where counsel had failed to investigate mental-health issues that “were ‘overt and fairly apparent to anyone who cared to look closely.’” *Id.* at 29. Instead, trial

counsel had “extensive interviews” with Franks and his family and no one ever gave the defense team any indications of mental-health issues. *Id.*

Franks argued that his school records showing poor grades, his repeat of second grade, and dropping out of school in sixth grade, along with his inconsistent statements to trial counsel about the facts of the crimes, were red flags that a mental-health evaluation was necessary. In assessing the reasonableness of the state court’s findings, the court of appeals noted the fact finding of the state court that, regardless of Franks’s school records, “by the time of [Franks’s] trial, [he] had owned two separate businesses and had never been diagnosed or even treated for any mental health issues.” *Id.* at 29. Further, during trial, once Franks claimed he had memory lapses, trial counsel had him evaluated. *Id.* at 28, 29. As a result, they presented the testimony of psychiatrist Dr. Connell who testified Franks had “some features of” PTSD resulting from the Dixie Mafia murdering the men in the pawn shop, which explained why he was unable to recall certain events. *Id.* at 28. When asked if “somebody who is in a [traumatic situation] could be made to do something they knew was wrong,” Dr. Connell agreed they could. *Id.* The court of appeals found that Connell’s “testimony supported the defense theory that Franks had not committed any of the murders and that, even if he had harmed the children, which he did not recall, he did so under duress or coercion.” *Id.*

The court of appeals concluded that the state court’s holding that trial counsel were not deficient in their investigation and decision to limit the presentation of mental health evidence “was neither contrary to nor an unreasonable application of clearly established Supreme Court law, nor was it based on an unreasonable determination of the facts in light of the evidence

presented.” *Id.* at 27. This holding was a proper application of this Court’s precedent.

2. Substance Abuse and Childhood Investigation

Franks also argued that his trial counsel were deficient in not presenting evidence of his dysfunctional home life and substance abuse. *Id.* But trial counsel presented some evidence of both Franks’s father’s abuse and Franks’s substance abuse. They simply made the strategic decision, based on their investigation, experience, and the particular jurors in this case, to limit this testimony.

Trial counsel were aware of Franks’s father’s abuse and Franks’s own history of substance abuse and presented “some of both themes at trial.” *Id.* The court of appeals found that Franks testified to his own substance abuse and Franks’s brother testified “in some detail that their father terrorized the family.” *Id.*

Counsel did not “ignore” evidence of substance abuse, (Pet. 2.) Instead, trial counsel testified in the state habeas proceedings that they specifically chose “not to focus on Franks’s childhood and drug abuse because of [their] familiarity with Hall County juries and [their] belief that such a mitigation strategy ‘was not going to be a winning hand.’” (Pet. App. 1, p. 30). Trial counsel explained that, during voir, some jurors had “made a point of [if] somebody commits murder I don’t want to hear a sob story about their childhood. ... so we told [the family] we’ve got to be careful about trying to blame something for the conduct, we just need to show this is out of character.” *Id.* As this Court has held, “strategic choices made after thorough

investigation of law and facts relevant to plausible options are virtually unchallengeable....” *Strickland*, 466 U.S. at 690-91.

The court of appeals concluded, after reviewing the state court’s decision under the AEDPA, that trial counsel did not perform unreasonably in making the strategic decision to limit this type of evidence. *Id.* at 31. This holding does not conflict with any precedent of this Court.

C. The mitigation presentation did not prejudice Franks.

Further establishing that the court of appeals’ analysis was correct and does not warrant certiorari review, the court also conducted a proper *Strickland* prejudice analysis under the AEDPA. The court concluded that it was “even more clear[]” that the state court’s determination that Franks suffered no prejudice “was neither contrary to nor an unreasonable application of clearly established law, nor was it based on an unreasonable determination of the facts in light of the evidence presented.” *Id.*

In conducting its prejudice analysis, the court “reweigh[ed] the evidence in aggravation against the totality of available mitigating evidence.” *Id.* at 32 (quoting *Wiggins*, 539 U.S. at 534 (emphasis in original)). “The question is whether, ‘viewed as a whole and cumulative of mitigation evidence presented originally,’ ‘a reasonable probability that the result of the sentencing proceeding would have been different’ if competent counsel had presented and explained the significance of all the available evidence.” *Id.* at 32 (quoting *Williams*, 529 U.S. at 399). The court concluded, after conducting this analysis, that the reweighing of the evidence did not undermine confidence in the outcome of the sentence, “let alone lead us to conclude that

the state court’s determination about prejudice was contrary to or amounted to an unreasonable application of clearly established law.” *Id.* at 41.

1. The potential mental-health evidence was equivocal and weak.

In reviewing whether the state court properly found Franks failed to show *Strickland* prejudice resulting from counsel not presenting mental health evidence at trial, the court looked at all the evidence, including that presented in the state habeas proceedings—Franks’s mother, two mental health experts, and school and medical records. Reviewing the evidence as a whole, the court found that the state court’s holding that Franks suffered no prejudice based on its factual findings that the evidence of “cognitive deficits” was “equivocal” and “weak” was not unreasonable. *Id.* at 33-39.

Franks’s mother, Doris, testified that she was sick during her pregnancy with Franks, that she “lacked prenatal care,” and that he was born with hepatitis. *Id.* at 34. But the court of appeals noted the state court’s finding that, in contrast to any potential brain damage resulting from prenatal care or traumatic birth, Franks’s medical records showed that his mother’s pregnancy was “normal,” he weighed eight pounds at birth, and his condition was noted as “good.” *Id.* Doris Franks also testified that Franks was sickly as a child, almost died from a high fever, “which caused him to lose his sight in one eye,” and had a head injury at age four, where he did not lose consciousness. *Id.* She also testified she did not know that her son was doing so poorly in school in second and third grade. *Id.*

Franks presented two mental health experts—Dr. Grant and Dr. Antin—to support his allegation of brain damage resulting in cognitive deficits, but neither gave compelling testimony. For example, although Dr.

Grant conducted a full neuropsychological evaluation of Franks and found he had some cognitive deficits that “could be’ linked” to a brain injury, Franks scored in the average range of intelligence. *Id.* at 34. Moreover, Dr. Grant testified that “the cognitive deficits were not ‘glaring,’ ‘not the kind of thing that makes attorneys hearts palpitate’: ‘there’s nothing that really stands out glaring, huge, you know, it’s subtleties.’” *Id.* at 35.²

The court of appeals noted the state habeas court’s finding that “Grant’s testimony was weak and equivocal.” *Id.* at 35. Likewise, Antin’s testimony also lacked much mitigating value. The court of appeals noted that the state habeas court found that Antin had not conducted any independent testing, met with Franks once, and did not attempt to make any diagnosis; (*id.* at 35-36) the court of appeals further noted “the state habeas court found Dr. Antin’s testimony weak. *Id.* at 36.

The court of appeals determined that substantial evidence either undermined or outweighed the experts’ testimony. For example, the court pointed out that, in contrast to the claim that he could not plan or foresee consequences, he owned and operated two businesses. *Id.* at 38. The court also found that Franks’s crimes “reveal a person who acted with presence of mind and foresight” as he: drove across the state to obtain money from the Wilson’s home; tricked the family into letting him in the home; “had the foresight to bring flex ties with him with the intent of immobilizing Debbie Wilson”; isolated his victims by sending the children on errands; and used a

² Dr. Grant testified the cognitive deficits could be caused by a car accident Franks was in when he was 18 and suffered a seizure at the hospital. *Id.* However, that the tests conducted at the hospital after the wreck came back “normal.” *Id.* at 35.

false name and obtained several different cars to elude the police.” *Id.* at 38-39.

It was not unreasonable for the state habeas court to conclude that Franks suffered no prejudice on account of an alleged failure to introduce relatively weak evidence suggesting his inability to plan and impulsivity.” *Id.* at 39. This analysis is a proper application of *Strickland* and does not conflict with any precedent of this Court.

2. The evidence about Franks’s childhood and substance abuse would have been of limited value.

The court of appeals also determined that the state court’s prejudice finding regarding Franks’s dysfunctional childhood and substance abuse was reasonable under *Strickland* because the additional evidence was cumulative, contradicted, and potential aggravating. *Id.* at 39-43.

As to the cumulative nature of the evidence, the court found that Franks’s brother had testified about their father being an alcoholic and living in fear of him. *Id.* at 39. Franks’s brother also testified about their father firing a gun between Franks’s and their mother inside the home. *Id.* In the state habeas proceedings, Doris Franks added that Franks’s father carried a firearm around the house and would shoot it randomly outside the home. *Id.* She also testified that he was verbally abusive to Franks’s brother and her, once where he told the both “they ‘would make pretty corpses’” and another when grabbed Franks’s brother by the arm and “told him he would ‘blow [his] brains out.’” *Id.* at 39-40. Doris Franks also included two “isolated instances of physical abuse”—her husband once kicked Franks and another time “jumped on” Franks, but Franks “managed to get away.” *Id.* at 40.

With regard to the contradictory evidence, “as the state habeas court noted, Doris had previously denied that [Frank’s father] physically abused David, which was documented in [the defense investigator’s] contemporaneous notes.” *Id.* Likewise, Jane Mashburn, Franks’s aunt, informed trial counsel “she had never heard David say he was afraid of his father.” *Id.* at 40. The state habeas court also relied on Franks’s own statements that he “was not physically or emotionally abused as a child.” *Id.*

The court of appeals noted that the “primary evidence” as to Franks’s substance abuse was introduced through Dr. Antin on collateral review. *Id.* at 41. He testified Franks had a long history of substance abuse that was “likely linked to a genetic predisposition, and that chronic substance abuse affects neurological development in the areas of memory, intelligence, behavior, and cognition.” *Id.* He further testified that his use of drugs at the time of the crimes led Franks to being “in a very frenzied and maniacal and paranoid state; and was acting impulsively.” *Id.*

The court of appeals held that, although substance abuse evidence can be mitigating, “it is ‘invariably a two-edged sword’ and ‘may have the counterproductive effect of alienating the jury,’” particularly when pursuing a sentencing strategy of residual doubt. *Id.* As to the additional evidence of abuse by Franks’s father, the court found that the state court’s determination that Franks suffered no prejudice was not unreasonable, “particularly when weighed against the truly horrific nature of the crimes and the many aggravating circumstances.” *Id.* at 40.

* * *

The court of appeals’ decision properly applied *Strickland* and the AEDPA. Noting that trial counsel had conducted a mitigation investigation

and strategically chose to present some background mitigation evidence in addition to a residual doubt theory at sentencing, the court of appeals at no time held that trial counsel could “*never* be unreasonable” when pursuing a residual doubt strategy, regardless of the strength of the evidence or the reasonableness of the investigation. (Petition, p. 19) (emphasis in original). Instead, the court of appeals specifically reviewed the reasonableness of counsel’s investigation and the reasonableness of their mitigation presentation in denying relief. The facts of Franks’s case do not present the proper vehicle to raise the question presented. Franks’s questions presented are merely a plea for error correction as his analysis reduces to an argument that the court of appeals erred in the way it applied *Strickland* and its progeny to the facts of his case. This challenge does not warrant certiorari review.

II. The court of appeals’ decision that counsel were not deficient in not presenting more evidence of substance abuse was correct and does not conflict with this Court’s precedent.

Contrary to Franks’s argument, the court of appeals did not hold that substance abuse is so aggravating that it relieves counsel of a duty to investigate for mitigating evidence in violation of *Rompilla v. Beard*, 545 U.S. 374 (2005). Again, because the court of appeals did not make this blanket finding, but properly conducted a *Strickland* analysis under the AEDPA, this case does not present the proper vehicle to raise the question Franks presents.

In reviewing the state court’s determination that counsel did not perform deficiently in making the strategic decision not to focus on Franks’s substance abuse, the court of appeals noted its prior precedent in which it

held that a “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.’” *Id.* at 30 (quoting *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)) (emphasis added). The court held, “[r]arely, 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.* at 30-31 (emphasis added). The court of appeals held, “[a]pplying the second layer of AEDPA deference owed to the state court, we conclude that its determination was not an unreasonable determination of the facts in light of the evidence presented, nor was it contrary to or an unreasonable application of clearly established federal law. *Id.* at 31. The court did not hold, as Franks asserts, that counsel has no duty to *investigate* substance abuse. In fact, the court’s holding concerns the reasonableness of making a strategic decision on whether to *present* substance abuse.

Moreover, as set forth above, the court of appeals reviewed the state court’s conclusions that trial counsel were not deficient nor Franks prejudiced by trial counsel’s investigation and presentation substance abuse as mitigation. The court noted that Franks testified at trial to his own substance abuse at the time of the crime. *Id.* at 29. The court of appeals also noted trial counsel’s testimony that they made a strategic choice to limit this type of evidence and that the state habeas court had credited that testimony. *Id.* at 30. Trial counsel testified in the state habeas proceedings that they specifically chose “not to focus on Franks’s drug abuse because of his familiarity with Hall County juries and his belief that such a mitigation strategy ‘was not going to be a winning hand.’” *Id.* Trial counsel explained

that, during voir, some jurors had “made a point of [if] somebody commits murder I don’t want to hear a sob story about their childhood. ... so we told [the family] we’ve got to be careful about trying to blame something for the conduct, we just need to show this is out of character.” *Id.* In crediting trial counsel’s testimony, the state habeas court also noted that “at the time trial counsel was making these determinations, he had been practicing in Hall County for twelve years.” D.37-24:30.

In reviewing the state court’s decision under the AEDPA that trial counsel did not perform unreasonably in making the strategic decision not to present this type of evidence, the court of appeals did not hold that substance abuse is never mitigating. It also did not hold that, because substance abuse is always aggravating, counsel has no duty to even investigate it. Instead, the court held that Franks’s counsel had investigated his substance abuse and made a strategic decision to limit it as evidence based on their own experience and the specific jurors in this case. This holding does not implicate the question presented by Franks in his petition, nor does it conflict with any precedent of this Court. Certiorari review is unwarranted.

CONCLUSION

For the reasons set out above, this Court should deny the petition.

Respectfully submitted.

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