No. 20-7895

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

DAVID SCOTT FRANKS,
Petitioner

-v-

BENJAMIN FORD, Warden,
Georgia Diagnostic Prison,
Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Capital Case

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-Capital Case-
QUESTION 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.17-14:63-64. 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?

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I. RESPONDENT DENIES THE PLAIN LANGUAGE OF THE ELEVENTH CIRCUIT'S HOLDINGS.

Respondent argues that this Court cannot grant certiorari because Mr. Franks's case "do[es] not provide a proper vehicle for the questions presented." *See, e.g.,* Respondent's brief in opposition (hereinafter "Resp. Br.") at 4, 17, 27, 29. According to Respondent, Mr. Franks "misconstrues" and "mischaracterizes" the Eleventh Circuit's specific holdings. Respondent can make this argument only by denying the plain language of the Eleventh Circuit's cases. The Court should disregard his arguments, grant certiorari review, and reverse.

A. THE ELEVENTH CIRCUIT HAS INSULATED COUNSEL FROM A FINDING OF INEFFECTIVENESS IF THEY PURSUE A RESIDUAL DOUBT DEFENSE.

To briefly recap the facts underlying this claim, Mr. Franks's trial counsel called his case "unwinnable." D.26-26:60-61. They testified that "there was no question going into this case that there would be a guilty verdict," D.26-26:61, and Mr. Franks "would be found guilty…regardless of what we could do," D.21-9:90. Indeed, the federal habeas court found that "the evidence [against Mr. Franks]…was so overwhelming that *no competent lawyer*" could have succeeded during the guilt phase. Pet. App. 3 at 14 (emphasis supplied).

Even so, Mr. Franks's counsel spent 3.5 years pursuing an "unwinnable" residual doubt/coercion theory that they knew they could not substantiate. Counsel also knew that their coercion defense would not actually be available to them

because they could not meet the legal standard for coercion.[1] Even under counsel's own theory, Mr. Franks would still have been liable for the crimes under Georgia law as a party to a crime. Their defense was no defense at all.

Counsel pursued this theory at the expense of conducting a meaningful investigation into mitigating evidence. Yet the state habeas court credited counsel's approach, and the Eleventh Circuit affirmed, citing its decision in *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000), to find that residual doubt was a reasonable trial strategy.

1. Counsel's theory lacked a factual or legal basis.

Respondent disputes the Eleventh Circuit's essential holding that pursuing a residual doubt sentencing theory is a universally reasonable strategy:

> 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.

Resp. Br. at 4.

The circuit's holding that residual doubt was a reasonable theory in Mr. Franks's case does not hold water. Counsel postulated that the events had resulted

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[1] In order to make out the defense of coercion, counsel knew that they had to prove that "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 counsel "had time problems and [] couldn't place anybody [else at the scene of the crime]. …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.

from a drug deal gone awry. They theorized[2] that other individuals had been involved in the crimes, and those people had coerced Mr. Franks into the attacks. After 3.5 years of investigation, they were unable to identify a *single* other person who may have been involved. They found none. 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**."[3] *Id.* (emphasis supplied).

The circuit found that a few pieces of evidence buttressed counsel's absurd theory: (1) the language Debbie Wilson used in her 911 calls; (2) a phone record showing that a call was made from the pawn shop to the Wilson home while Mr. Franks was indisputably already at the Wilson home; (3) the testimony of Annie Carlisle, a witness who said she saw four men outside of the pawn shop on the morning of the murders; and (4) untested fingerprints found at the pawn shop.

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[2] They held onto this theory even after Mr. Franks *confessed to committing the crimes alone*:

> AP [defense investigator Andy Pennington]: Well, my personal opinion, David…Your story about Gainesville, I think somebody was with you.
>
> DF: Uh uh. There wadn't [sic]. There really wadn't [sic]. Uh, I mean I've told you …

D.27-28:32.

[3] Respondent has previously conceded that counsel was unable to substantiate this theory. *See* Eleventh Circuit Court of Appeals Case No. 16-17478, Response Brief at 10 ("trial counsel conducted an exhaustive investigation into other potential suspects…But they could locate none."); *ibid.* (counsel "was not able to substantiate the claim[.]").

The prosecution could rebut the second piece of evidence: during trial, Mr. Franks's girlfriend testified that she made the call. As for the fourth piece, it should not be surprising that other people had left prints at the pawn shop: it was a place of business, after all – and a busy one, according to witness accounts. *See*, *e.g.*, D.23-12:106.

Both the circuit and Respondent rely heavily on the transcripts of Debbie Wilson's two 911 calls, in which she informs the dispatcher, "*they're* hurting my kids." D.27-15:92-93 (emphasis added). But they elide the most important exchanges, which make it abundantly clear that Debbie Wilson was using "they" in the singular. She repeatedly refers to David Franks, and *only* David Franks, by name:

> DISPATCH: What's the problem?
> CALLER: I've been shot and they're hurting my kids.
> DISPATCH: What happened?
> CALLER: I've been shot and they're hurting my kids, please hurry.
> DISPATCH: You've been shot?
> CALLER: Yes, they're hurting my kids
> DISPATCH: O.K.
> CALLER: Please hurry
> DISPATCH: Who, who's hurting your kids
> CALLER: David Franks
> DISPATCH: David who?
> CALLER: Franks, please hurry

D.27-15:92-93 (first 911 call).

> DISPATCH: Who shot you ma'am?
> CALLER: David Franks
> DISPATCH: David Franks
> CALLER: Yeah. Please tell 'em to come get me
> DISPATCH: Ok. Who is David Franks?
> CALLER: I don't know
> DISPATCH: You don't know, know who he is?

CALLER: No
DISPATCH: Is he a friend of your husband?
CALLER: He was…
….
ON THE SCENE MALE [EMT]: Who did this
CALLER: David Franks

D.27-16:8-12 (second 911 call).

Indeed, the circuit concedes that Mrs. Wilson repeatedly identified Mr. Franks alone:

> She called 911 and identified her attacker repeatedly as "David Franks," telling the 911 operator that he attacked her for money. Paramedics eventually arrived to treat Debbie, and she told them the same thing: David Franks attacked her for money. …Both children survived and escaped to a neighbor's house. They told the neighbor that their father's friend "David Franks" -- whom they physically described -- had attacked them[.]

Pet. App. 1 at 4.

The truth is that counsel had only a single piece of evidence, after 3.5 years of investigation, that supported their theory. This does not residual doubt make.[4] As

[4] Trial counsel was well aware that Mr. Franks had been present at the scene of the crimes and that they could not substantiate their theory. With respect to the attacks on the Wilson children, counsel admitted, "David is guilty, no question about it" during the guilt-phase closing arguments. D.17-14:63-64. Respondent takes issue with this too, arguing that counsel did not concede Mr. Franks's guilt, but Respondent cannot argue with the transcript. *See, e.g., id.* ("The evidence is clear, it's compelling, it's horrible regarding the children, there's no question. **We can't come before you and tell you he didn't do those things. We have Brian's statement, we have Jessica's statement and those children were telling the truth.** It's clear when you heard them on the stand, it's clear when you heard the descriptions they gave to everyone else. **It was a horrible, horrible situation that they went through, and he did that, he did do that."**); *ibid.* at 92 ("There's no doubt about what he did to the children…We can put him in the house, **we can prove that he did what he did to the kids**") (emphasis supplied); *ibid.* at 96 ("…after David snapped and he went back downstairs with the kids. The evidence is convincing, **he did that act**. I can't tell you he didn't do that act, **he can't tell you that**").

noted *supra*, even under counsel's own theory, Mr. Franks would still have been liable for the crimes under Georgia law as a party to a crime. To borrow a phrase from the Eleventh Circuit, there was no residual doubt here; it was merely "whimsical doubt." *Smith v. Wainwright*, 741 F.2d 1248, 1255 (11th Cir. 1984).

2. Counsel's choice of a residual doubt strategy does not insulate them from a finding of ineffectiveness.

Respondent's argument conflicts with the plain language of the Eleventh Circuit's holdings. It is simply not the case, as Respondent argues, that the Eleventh Circuit "held **only** that, after conducting a reasonable investigation, counsel in [Mr. Franks's] case reasonably chose to present residual doubt as a mitigation theory[.]" *Id.* (emphasis mine). In *Chandler*, the Eleventh Circuit was clear: "residual doubt is perhaps the most effective strategy to employ at sentencing." *Chandler*, 218 F.3d at 1320 n. 28. Indeed, *Chandler* went so far as to hold that pursuing a residual doubt defense is "the best thing a capital defendant can do[.]" *Id.* A habeas petitioner alleging that his counsel was ineffective within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984), "can rarely (if ever) prove a lawyer to be ineffective for relying on" that strategy because "[c]ounsel cannot be held to be ineffective when he has taken a line of defense which is objectively reasonable." *Id.*

The *Chandler* court found that this rule is "[e]specially [true] when – as in [Chandler's] case – the evidence of guilt [i]s not overwhelming[.]" *Id.* at 1320. In Mr. Franks's case, however, the court did an about-face, citing *Chandler* to find that it is reasonable to pursue a residual doubt strategy even in an "unwinnable" case where

the "nature of th[e] crime" is "brutal and aggravated." Pet. App. 1 at 24-25. In other words, the Eleventh Circuit has now concluded that a residual doubt theory is "objectively reasonable" *both* when there is little to no evidence of guilt *and* when the evidence is so overwhelming that "no competent attorney" could hope to undermine the state's case. And according to the Eleventh Circuit, counsel "cannot be held to be ineffective when he has taken a line of defense which is objectively reasonable." *Chandler*, 218 F.3d at 1320 n. 28; *see also Butts v. Warden, GDCP*, 850 F.3d 1201 (11th Cir. 2017) ("We cannot and will not second guess trial counsel's strategic decision to focus on residual doubt instead of mitigation evidence").

The circuit has relied on this rule to refuse to find counsel ineffective when they pursued a residual doubt strategy in many cases prior to Mr. Franks's case.[5] So the law has developed in the Eleventh Circuit such that counsel is insulated from a finding of ineffectiveness if they have chosen to pursue a residual doubt defense because that defense is reasonable regardless of the circumstances of the individual case. *See id.* at 1320.

This cannot be squared with the law of this Court. Counsel's duty to investigate is not discharged because they select a superficially reasonable theory. There *is* no facially reasonable trial theory. Investigation is a necessary precursor to developing any theory:

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[5] *See also Terrell v. Warden*, 744 F.3d 1255, 1269 (11th Cir. 2014); *Johnson v. Upton*, 615 F.3d 1318, 1338 (11th Cir. 2010); *Ward v. Hall*, 592 F.3d 1144, 1170 (11th Cir. 2010); *Hammond v. Hall*, 586 F.3d 1289, 1333–34 & n. 18 (11th Cir. 2009); *Hannon v. Sec'y, Dep't of Corr.*, 562 F.3d 1146, 1154–55 (11th Cir. 2009).

> [T]hat a theory might be reasonable, in the abstract, does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced [the petitioner]. The reasonableness of counsel's theory was, at this stage in the inquiry, beside the point[.] …
>
> This point is plain in *Williams:* We rejected any suggestion that a decision to focus on one potentially reasonable trial strategy—in that case, petitioner's voluntary confession—was "justified by a tactical decision" when "counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background."

Sears v. Upton, 561 U.S. 945, 953-54 (2010) (citing *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). Accordingly, this Court "ha[s] found deficiency and prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase." *Id.* at 954.

It cannot possibly be the case that residual doubt was a reasonable theory in Mr. Franks's case – let alone "the best thing [Mr. Franks] [could] do," *Chandler*, 218 F.3d at 1320 n. 28. It cannot be true that, as the Eleventh Circuit has held, residual doubt is always a constitutionally reasonable strategy, and a habeas petitioner "can rarely (if ever) prove a lawyer to be ineffective for relying on" that strategy. *Id.*

Mr. Franks neither "misconstrued" nor "mischaracterized" the Eleventh Circuit's holding in his petition, and he has not done so here. Direct quotes from the circuit's own opinions reveal that those opinions directly conflict with the decisions of this Court. The Court should reject Respondent's argument and grant certiorari.

B. THE ELEVENTH CIRCUIT HAS HELD THAT SUBSTANCE ABUSE EVIDENCE IS NOT MITIGATING.

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 and extreme substance abuse, his severe adult substance abuse disorder, and his inability to conform his conduct to the requirements of the law at the time of the crime. *See generally Franks v. Warden*, Eleventh Circuit Court of Appeals Case No. 16-17478, Initial Brief of Appellant at 41-67. Evidence regarding the role that developmental 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."[6] D.23-15:8-9. The state habeas court upheld their decision, and the Eleventh Circuit affirmed, finding:

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[6] Respondent makes the strange assertion that Mr. Franks's "[c]ounsel did not 'ignore' evidence of substance abuse. Instead, trial counsel testified in the state habeas proceedings that they specifically **chose 'not to focus on** Franks's [] drug abuse[.]" Resp. Br. at 21 (emphasis mine). "Ignoring" and "choosing not to focus on" are completely synonymous.

Further, Respondent argues that this decision was reasonable because "counsel explained that, **during** voir [sic], some jurors had 'made a point of…I don't want to hear a sob story about [a criminal defendant's] childhood.'" Resp. Br. at 21 (emphasis mine). *Voir dire*, of course, occurs *during* a trial; it cannot provide a justification for counsel's failure to conduct the *pretrial* investigation that the Constitution requires. *See Wiggins v. Smith,* 539 U.S. 510, 521 (2003); *Strickland*, 466 U.S. at 690-91.

After conceding that counsel "specifically chose not to focus on" Mr. Franks's substance abuse disorder, Respondent concludes that counsel's investigation was **"thorough**," and that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" Resp. Br. at 21-22 (citing *Strickland*, 466 U.S. at 690-91) (emphasis mine). This conclusion is obviously erroneous. An investigation that did not, by Respondent's own admission, even exist cannot simultaneously be "thorough."

> 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 (emphases added).

Respondent asserts again that Mr. Franks's petition "mischaracterized" the panel's holding:

> 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).

Resp. Br. at 4.

Mr. Franks's exact argument was as follows: "The Eleventh Circuit has also said that substance abuse is '*invariably* a two-edged sword' that will 'rarely*, if ever*' be so mitigating that all reasonable counsel would present it during the penalty phase of a capital case[.]" Pet. Br. at ii (citation omitted). The only difference between this argument and Respondent's "corrected" argument above is that *Respondent* has excised the Eleventh Circuit's most relevant language in order to soften the impact of its holdings. Respondent, not Petitioner, has mischaracterized the Eleventh Circuit.

In order to prevail on a *Strickland* claim of ineffective assistance of counsel in the Eleventh Circuit, "a petitioner must establish that no competent counsel would

have taken the action that his counsel did take." *Chandler*, 218 U.S. at 1315. If the law in the Eleventh Circuit is such that substance abuse evidence is *always* a double-edged sword that may "[n]ever…be so powerful that every objectively reasonable lawyer who had the evidence would have used it," Pet. App. 1 at 30-31, then counsel can never meet the *Strickland* standard for deficient performance if they fail to investigate and present that evidence – no matter how compelling or vital it is in a particular case. In other words, the Eleventh Circuit has absolved counsel of their responsibility to investigate and/or present substance abuse evidence.

But just as it is not reasonable to select a strategy without conducting a constitutionally sufficient investigation, it is also unreasonable to *reject* a theory without first investigating. This Court has repeatedly held that failure to follow mitigation leads falls below objective standards of reasonableness. *See Strickland*, 466 U.S. at 690-91 ("choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation"); *Wiggins v. Smith*, 539 U.S. 510, 527 (2003) ("In assessing the reasonableness of an attorney's investigation…a court must consider…whether the known evidence would lead a reasonable attorney to investigate further."); *Rompilla v. Beard*, 545 U.S. 374, 382 (2005) (finding counsel ineffective where "counsel knew from police reports provided in pretrial discovery that Rompilla had been drinking heavily at the time of his offense, and although one of the mental health experts reported that Rompilla's troubles with alcohol

merited further investigation, counsel did not look for evidence of a history of dependence on alcohol that might have extenuating significance."); *Sears*, 561 U.S. at 948 (finding counsel ineffective for failing to investigate Sears's substantial cognitive deficits that resulted from, *inter alia*, "drug and alcohol abuse.").

Yet the Eleventh Circuit has sanctioned counsel's deliberate failure to investigate such evidence. In the Eleventh Circuit, all that counsel is required to do is decide prior to trial that substance abuse is not likely to be mitigating (a conclusion that would not be difficult to reach, given that the Eleventh Circuit has said so); or testify *post hoc* that they did not think that it would be useful to investigate substance abuse evidence. The circuit will then excuse counsel's failure to investigate the evidence even though that clearly runs afoul of this Court's precedent.[7]

Respondent cannot dispute the explicit holdings of the Eleventh Circuit; nor can he dispute that the circuit relied on those holdings in denying Mr. Franks's claim. Mr. Franks's counsel clearly admitted that they (to use Respondent's own language) "chose not to" investigate substance abuse because they believed it could not possibly "serve a mitigation purpose," D.23-15:8-9. Counsel was plainly deficient

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[7] *See, e.g., Brooks v. Comm'r, Dep't of Corr.*, 719 F.3d 1292 (11th Cir. 2013); *Pooler v. Sec'y, Dep't of Corr.*, 702 F.3d 1252 (11th Cir. 2012); *Petri v. Fla. Dep't of Corr.*, 641 F.3d 1276 (11th Cir. 2011); *Pace v. McNeil*, 556 F.3d 1211 (11th Cir. 2009); *McClain v. Hall* 552 F.3d 1245, 1253 (11th Cir. 2008); *Pittman v. Sec'y, Dep't of Corr.*, 871 F.3d 1231 (11th Cir. 2007); *Haliburton v. Sec'y, Dep't of Corr.,* 342 F.3d 1233, 1244 (11th Cir. 2003); *Crawford v. Head*, 311 F.3d 1288 (11th Cir. 2002); *Grayson v. Thompson*, 257 F.3d 1194 (11th Cir. 2001); *Tompkins v. Moore*, 193 F.3d 1327, 1338 (11th Cir. 1999).

for failing to investigate or present the vital mitigating evidence of his genetically-founded substance abuse disorder and his resulting brain damage. The circuit's decision to uphold the state habeas court's denial of this claim violated *Strickland*, *Sears*, and *Rompilla*, *inter alia*. This Court should reject Respondent's contrary argument, grant certiorari review, and reverse.

II. MR. FRANKS'S CASE IS THE PROPER VEHICLE FOR THE QUESTIONS PRESENTED.

Respondent suggests that Mr. Franks's case boils down to a simple error-correction issue, and is thus inappropriate for this Court's review.[8] Mr. Franks has amply demonstrated that this case is not merely about error correction. Certiorari review is a matter of "judicial discretion" that is granted "for compelling reasons." SUP. CT. R. 10; *see also Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917 (1950) (FRANKFURTER, J., respecting denial of certiorari) (the Court grants certiorari "as a matter of 'sound judicial discretion'"). The Court exercises its discretion to grant certiorari when, for instance, "a United States court of appeals…has decided an important federal question in a way that conflicts with relevant decisions of this Court." *Id.* Whether or not the Eleventh Circuit is flouting this Court's jurisprudence is an issue that is clearly within the Court's purview.

The Court may also grant certiorari when the questions raised by a petitioner are substantial, novel, or have "immediate importance far beyond the particular

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[8] As Justice Scalia pointed out in *Dobbs v. Zant*, 506 U.S. 357, 360 (1993) (SCALIA, J., dissenting), this Court examines capital cases with a wider lens than non-capital cases, and it *does* engage in error-correction in capital cases.

facts and parties involved." *Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (REHNQUIST, J., dissenting) (citing the address of Chief Justice Vinson before the American Bar Association, Sept. 7, 1949, as quoted in R. Stern & E. Gressman, *Supreme Court Practice 258* (5th ed. 1978)). This Court has wide latitude to decide which issues are "novel" or "substantial," and which fall under the umbrella of "significant national importance."

Those too apply here. The issues that Mr. Franks presented to this Court are gravely important and have implications far beyond his own case. The Eleventh Circuit has engaged in a pattern and practice of flouting this Court's jurisprudence by broadly sanctioning counsel's conduct when they pursue a residual doubt defense at the expense of mitigating evidence, and when they completely fail to investigate vital substance abuse evidence. *See Chandler*, 218 F.3d at 1320; 1320 n. 28; *Stewart*, 476 F.3d at 1217. These are important issues for both capital and non-capital habeas petitioners across the Eleventh Circuit – and beyond, if sister circuits use the Eleventh Circuit's case law as a tool in sculpting their own habeas jurisprudence. *See, e.g., Mitchell v. United States*, 2010 WL 3895691 (D. Ariz. September 30, 2010) (quoting *Housel*, 238 F.3d at 1296, for the proposition that "evidence of drug and alcohol abuse is a two-edged sword"); *United States v. Davis*, 132 F. Supp. 2d 455, 462 (E.D. La. February 2, 2001) (quoting *Tarver*, *Stewart*, and *Chandler* to analyze the reasonableness of a residual doubt strategy).

By now, it is axiomatic that death is different: it "cannot fairly be denied that death is a punishment different from all other sanctions in kind rather than

degree." *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976). There is a correspondingly heightened "need for reliability in the determination that death is the appropriate punishment in a specific case." *Id.* at 305. This Court does and must exercise utmost authority and care in cases where the state seeks to take the life of one of its citizens. *See, e.g., Dobbs,* 506 U.S. at 360 (SCALIA, J., dissenting). The Court clearly has the authority to grant certiorari in this case and on these facts, and it should.

CONCLUSION

This Court should grant the petition for writ of *certiorari*, reverse, and remand to the Eleventh Circuit.

Respectfully submitted on this, the 15th day of June, 2021.

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