No. 18-9297

IN THE SUPREME COURT OF THE UNITED STATES

JEREMY SHANE HALL

Petitioner,

v.

JOHN MYRICK, Superintendent,
Two Rivers Correctional Institution

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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

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QUESTIONS PRESENTED

1. Petitioner's trial counsel did not object to testimony that, under then-binding caselaw from the state's intermediate appellate court, was admissible. Years after petitioner's trial, the Oregon Supreme Court issued decisions that might have made that testimony inadmissible. The state post-conviction court held that counsel was not ineffective for failing to anticipate that change in the law. Was that ruling contrary to or an unreasonable application of this Court's Sixth Amendment case law?

2. Should this Court hold this petition in abeyance pending a decision on the constitutionality of nonunanimous juries in *Ramos v. Louisiana*, No. 18-5924, 139 S. Ct. 1318 (2019), even though petitioner raised no claim on that issue in his federal habeas corpus petition?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

In this habeas corpus case, petitioner challenges his 2007 convictions for sexual abuse of a 13-year-old girl. (*See* Pet. App. B 2–6). In the operative petition, he raised three claims for relief: a single claim of trial-court error in the imposition of consecutive sentences, which petitioner contended relied on impermissible judicial fact-finding; a claim that he received ineffective assistance of counsel at trial in various ways; and a claim that he received ineffective assistance of appellate counsel. (*See* Amended Petition for Writ of Habeas Corpus 3–5).[1]

In the relevant portion of the decision on review, the court of appeals affirmed the district court's denial of petitioner's claims that his trial counsel was ineffective in failing to object to certain expert testimony introduced by the state at his trial. (Pet. App. A 2–3). As the district court had explained, the state post-conviction court rejected that claim because, among other reasons, "'[a]ny objection to that testimony would have been overruled so it was not an error by the attorney not to make a useless objection.'" (Pet. App. B 10 (quoting state post-conviction court's judgment)).

[1] Although petitioner's operative habeas petition alleges only three claims, it numbers them "Ground One," "Ground Two," and "Ground Four."

The court of appeals deferred to that conclusion under the Antiterrorism and Effective Death Penalty Act (AEDPA), explaining that—although an objection to that testimony might prevail under state-court decisions announced years after petitioner's trial—decisions of the intermediate state court of appeals allowed admission of the testimony at issue at the time of trial. (Pet. App. A 2–3). The expert testimony at issue involved a diagnosis of sexual abuse based on non-physical evidence, as well as a summary of how the victim's allegations of abuse bore indicia of truthfulness. (Pet. App. A 2–3). As the court of appeals explained (Pet. App. A 2), the diagnosis testimony was admissible at the time of trial under cases such as *State v. Wilson*, 855 P.2d 657 (Or. Ct. App. 1993), and *State v. Sanchez-Cruz*, 33 P.3d 1037 (Or. Ct. App. 2001), but the Oregon Supreme Court held to the contrary years after trial in *State v. Southard*, 218 P.3d 104 (Or. 2009). The court of appeals similarly explained that the testimony regarding indicia of truthfulness was admissible at the time of trial under cases such as *State v. Middleton*, 657 P.2d 1215 (Or. 1983), and *State v. Remme*, 23 P.3d 374 (Or. Ct. App. 2001), but the Oregon Supreme Court held to the contrary years after trial in *State v. Lupoli*, 234 P.3d 117 (Or. 2010). (Pet. App. A 3).

After reviewing the foregoing cases, the court of appeals rejected petitioner's claims on grounds that the standard for constitutionally effective

counsel, as explained in *Strickland v. Washington*, 466 U.S. 668 (1984), does not require "prescience" about changes in the law. (Pet. App. A 2–3).

REASONS FOR DENYING THE PETITION

Before this Court, petitioner makes two requests. First, he asks the Court to grant the petition and hear the case on the merits, contending that the court of appeals' decision contravened *Strickland* by failing to evaluate trial counsel's performance in light of "prevailing professional norms" at the time of trial, which in petitioner's view required counsel to object to the expert testimony in his case. (Pet. 9). Second, petitioner asks this Court to "hold this case in abeyance until it decides the constitutionality of non-unanimous jury verdicts like Petitioner's verdict in *Ramos v. Louisiana*, No. 18-5924," although he does explain how that issue is presented in the procedural posture of this case. (Pet. 9). For reasons explained below, this Court should deny both of those requests.

This Court should deny the petition because the court of appeals was correct to defer, under AEDPA, to the state post-conviction court's ruling—which was entirely consistent with the principles in *Strickland*. At a minimum, the state court's application of those principles was a reasonable enough application of *Strickland* that the court of appeals was correct to accord it deference under AEDPA. That ruling involves an ordinary, fact-driven application of well-settled legal principles that does not conflict with any other

appellate decisions or otherwise warrant this Court's review. And this Court should deny petitioner's request to hold this case in abeyance pending *Ramos* because this case does not present a *Ramos* issue in the current procedural posture.

A. This Court should deny the petition because the court of appeals' ruling was a routine and correct application of well-settled caselaw.

The court of appeals deferred to the state post-conviction court's ruling that trial counsel was not required to object to testimony that was admissible under controlling precedent at the time of petitioner's trial, even if later decisions undercut that precedent. (Pet. App. A 2–3). That routine application of AEDPA's standard of review to the facts of this case involves settled principles of law that do not warrant further review by this Court. The court of appeals' ruling does not conflict with any decisions of the federal courts of appeals or state supreme courts.

Contrary to petitioner's argument, the court of appeals' ruling also does not conflict with any decisions of this Court. The state post-conviction court reasoned that trial counsel could not be expected to anticipate a change in the law that would make valid an evidentiary objection that failed under precedent binding at the time of trial. That reasoning was consistent with *Strickland*'s rule that counsel's performance must "be assessed in light of the information known at the time of the decisions, not in hindsight." 466 U.S. at 680; *cf.*

Premo v. Moore, 562 U.S. 115, 124, 131 S. Ct. 733 (2011) (explaining that, where seeking suppression "would have been futile," counsel's decision not to do so reflected representation that "was adequate under *Strickland*, or at least * * * it would have been reasonable for the state court to reach that conclusion").

Even if some counsel had adopted a practice of raising objections that were foreclosed by binding caselaw, that does not mean trial counsel was unreasonable for omitting such an objection. To conclude otherwise would require ignoring *Strickland*'s admonition that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." 466 U.S. at 688–89.

And although petitioner is correct that *Strickland* contemplated that the standard of reasonable representation might include consideration of "[p]revailing norms of practice" as "guides to determining what is reasonable," *Strickland* also warned that such norms "are only guides." 466 U.S. at 688. Any other approach "would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Id.* at 689. Importantly, trial counsel could have a tactical reason for not raising an objection that is foreclosed by binding

precedent, notwithstanding a general hope among the defense bar that a higher court will change the law. Trial counsel might view the likely benefit—reversal in the event of a change in the law—too speculative to warrant incurring the certain detriment of squandering finite resources during trial, including both the lawyer's time and credibility with the judge. As this Court has explained, *Strickland* requires presuming "that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect." *Harrington v. Richter*, 562 U.S. 86, 109, 131 S. Ct. 770 (2011) (internal quotation marks omitted); *see also id.* at 106 ("Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies.").[2]

In short, notwithstanding the value of professional norms as a guideline, counsel frequently will have tactical reasons to depart from those norms. *Strickland* permits counsel that latitude, to which courts should defer.

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[2] *See also Cullen v. Pinholster*, 563 U.S. 170, 196, 131 S. Ct. 1388 (2011) ("*Strickland* specifically commands that a court 'must indulge [the] strong presumption' that counsel 'made all significant decisions in the exercise of reasonable professional judgment.'" (quoting *Strickland*, 466 US at 689–90, revision in original)); *id.* (holding that *Strickland*'s standard requires courts "not simply to give the attorneys the benefit of the doubt, but to affirmatively entertain the range of possible reasons * * * counsel may have had for proceeding as they did" (internal quotation marks, citations, and brackets omitted)).

And even if—contrary to the foregoing discussion—*Strickland* left some tension between the competing interests of, on the one hand, standardizing professional norms and, on the other hand, allowing counsel room for case-specific tactical judgment, this Court's subsequent cases have yet to resolve that tension. That is, petitioner can point to no case from *this* Court holding that the *Strickland* standard requires counsel to mechanically conform to prevailing professional norms or to anticipate changes in the law, and certainly no case requiring that approach even when it would require raising objections that a trial court is obligated to reject. In that circumstance, the court of appeals was correct to conclude that the state post-conviction court's ruling here was reasonable enough to warrant deference under AEDPA. *See* 28 U.S.C. § 2254(d)(1) (prohibiting the grant of habeas relief on "any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim * * * 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"); *see also, e.g.*, *Harrington*, 562 U.S. at 102–03 (explaining that "§ 2254(d) * * * preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents," but it "goes no

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further" when it "stop[s] short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings").

In sum, the court of appeals' decision in this case reflects no conflict with the decisions of this Court, and further review is therefore neither necessary nor prudent.

B. This Court should not hold this case pending *Ramos* because this case does not present a *Ramos* issue.

In *Ramos*, this Court is reviewing the constitutionality of a state law that allowed nonunanimous juries. But although defendant was convicted by a nonunanimous jury, that issue is not presented in this habeas proceeding. The operative habeas corpus petition in this case alleges no claim that the state trial court violated the federal constitution by accepting a nonunanimous verdict; indeed, the petition alleges only one claim of trial court error, but that claim pertains to sentencing rather than to the verdict. (*See* Amended Petition for Writ of Habeas Corpus 3–5). Thus, neither the district court nor the court of appeals resolved any question as to whether the nonunanimous verdict in petitioner's case violated his federal rights, leaving this Court with nothing to review on that issue even if it decides *Ramos* in a way that is favorable to criminal defendants.

Given that procedural posture, *Ramos* cannot have any effect on this case, and this Court has no reason to hold this case pending its decision in

Ramos. In that respect this case is unlike cases like *Dick v. Oregon*, No. 18-9130, where the constitutionality of a nonunanimous jury was squarely raised and litigated in the lower courts. Petitions like *Dick* should be held pending the decision in *Ramos*, but petitions like this one where the issue was never litigated below should be denied rather than held. Petitioner's request to hold his case is therefore not well-taken.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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PROOF OF MAILING: RESPONDENT'S BRIEF IN OPPOSITION

I, Benjamin Gutman, a member of the Bar of the Court, hereby certify that on July 11, 2019, in compliance with Rule 29, I mailed the brief of John Myrick, Superintendent, Two Rivers Correctional Institution, as respondent in the above-entitled case, by depositing 10 copies thereof in the United States Postal Service mailbox, express mail, postage prepaid, addressed to the Office of the Clerk, Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543.

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PROOF OF SERVICE: RESPONDENT'S BRIEF IN OPPOSITION

I, Benjamin Gutman, a member of the Bar of the Court, hereby certify that on July 11, 2019, three copies of the brief of John Myrick, Superintendent, Two Rivers Correctional Institution, as respondent in the above-entitled case were served upon Nell I. Brown, Attorney for Petitioner, by mail delivery to the Federal Public Defender for the District of Oregon, 101 SW Main Street Suite 1700, Portland, OR 97204. I further certify that all parties required to be served have been served.

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