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No. \_\_\_\_\_

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**IN THE SUPREME COURT  
OF THE UNITED STATES**

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**JEREMY SHANE HALL,**

**Petitioner,**

**v.**

**JOHN MYRICK, Superintendent,  
Two Rivers Correctional Institution,**

**Respondent.**

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

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Whether a court can disregard record evidence of the prevailing professional norms in assessing the reasonableness of counsel's action or inaction under the Sixth Amendment.

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The petitioner, Jeremy Hall, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on January 16, 2019.

## **OPINIONS BELOW**

On October 25, 2018, the United States Court of Appeals for the Ninth Circuit denied habeas corpus relief in a memorandum opinion affirming the District Court decision without addressing record evidence of the prevailing professional norms. Appendices A, B. On January 16, 2019, the Ninth Circuit panel denied Petitioner's motion for rehearing and rehearing *en banc*. Appendix C.

## **JURISDICTIONAL STATEMENT**

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

## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must [first] show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

This Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead [has] emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland*, 466 U.S. at 688).

## **STATEMENT OF THE CASE**

### **A. State Trial Court Proceedings.**

In 2007, Petitioner was tried on charges of inappropriate sexual contact. The alleged victim testified that Petitioner had touched her inappropriately with his hands. There was no physical evidence to corroborate her allegation. Petitioner also testified, denying any improper conduct. The only other person in the room during the alleged conduct, Petitioner's daughter, testified she witnessed nothing improper. The central question at trial was whether the alleged victim was credible.

To bolster its case for the alleged victim's credibility, the State called, as experts, two evaluators, a physician and an interviewer, who had physically examined and interviewed the alleged victim in response to her allegations. Although the physical examination was normal, the physician diagnosed the alleged victim as having been "sexually abused" based solely on the interview. In other words, the physician believed the alleged victim. Without objection from defense counsel, the physician testified at trial that she determined "to a reasonable degree of medical certainty" that the alleged victim had been "sexually abused." ER 223. The physician and interviewer also testified, without objection, to the characteristics of the alleged victim's statement that caused them to believe her. ER 143-50, 227-29.

Although the jury could not reach a unanimous verdict, it nevertheless convicted Petitioner under Oregon’s non-unanimous jury system, and Petitioner was sentenced to nearly nineteen years in prison. ER 358-59, 361-77. Petitioner’s appeal did not include the unpreserved challenge the expert testimony. ER 381.

**B. At The Time of Petitioner’s Trial, Oregon Criminal Defense Attorneys Regularly Challenged Expert Sexual Abuse “Diagnosis” Testimony Because The Law Provided Reason To Believe Such Challenges Were Promising.**

At the time of Petitioner’s trial, there was “tension” between Oregon Supreme Court precedent and the decisions of Oregon’s lower courts that had admitted expert diagnosis testimony, and the question presented in this case had been left open.<sup>1</sup> As a result, Oregon criminal defense attorneys were regularly challenging so-called “diagnosis” testimony by sexual abuse evaluators in cases, like Petitioner’s, where the physical examination did not show signs of abuse. Attorneys were challenging diagnosis testimony on the grounds that it was improper expert testimony; that it vouched for the victim’s credibility; and that it was unduly prejudicial. These challenges were based in longstanding principles from decisions of Oregon’s highest

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<sup>1</sup> *Jackson v. Francke*, 364 Or. 312, 329 (2018) (explaining that, prior to *Southard* and *Lupoli*, there was an “ongoing tension” between the decisions of the Oregon Court of Appeals and “several decisions of the Oregon Supreme Court holding that medical experts were not permitted to vouch for a person who asserted that the defendant had sexually abused them.”).



court that made it clear that one witness—expert or otherwise—could not testify about the credibility of another witness. In these situations, the expert’s “diagnosis” was nothing more than the expert testifying that he or she believed the alleged victim’s report.

Attorneys routinely made such challenges, despite contrary lower court decisions, because the Oregon criminal defense bar expected the Oregon Supreme Court would eventually take up a case and address the issue. This was so because the intermediate appellate court decisions in this area appeared to deviate from the principles spelled out in earlier Oregon Supreme Court precedent. If preserved below, attorneys routinely pursued these challenges on appeal. ER 50-51.

As predicted by the criminal defense bar, while Petitioner’s case was pending on appeal, the Oregon Supreme Court did, in fact, take up a case in this area. In *State v. Southard*, Oregon’s highest court ruled that experts cannot testify to their diagnosis of sexual abuse in cases where there is no corroborative physical evidence of abuse. 218 P.3d 104 (2009). *Southard* held that this type of expert “diagnosis” did not tell the jury anything it could not determine itself. *Id.* at 111-12. On the other hand, the expert testimony posed a “great” risk of prejudicing the jury because the jury might substitute the expert’s credibility assessment for its own. *Id.* at 112. The following year, the Oregon Supreme Court ruled that testimony about the

characteristics of the alleged victim's report that led evaluators to diagnose abuse was also inadmissible. *State v. Lupoli*, 234 P.3d 117 (Or. 2010).

**C. State Post-Conviction Court Proceedings.**

In his state post-conviction case, Petitioner claimed, as he does in this habeas corpus proceeding, that his trial attorney was ineffective for failing to challenge the expert testimony. He alleged that, but for his attorney's failure, he would have prevailed on appeal either because his could have been the case the Oregon Supreme Court took up, or he could have benefitted from the *Southard* ruling as did his contemporaries who raised the issue on appeal at that time.

The claim was supported by two affidavits of Oregon attorney practitioners. ER 476-87, 447-55. The first attorney affidavit recited the relevant prevailing professional norm, stating that, based on the development of the relevant Oregon law, "all reasonably competent criminal defense lawyers" should have raised an *in limine* challenge where "the state was attempting to offer evidence of a medical diagnosis of sexual abuse where there were no physical findings" at the time of Petitioner's criminal trial. ER 447.

The same affidavit also attached a motion *in limine* filed in another case that was tried contemporaneously to Petitioner's (and also two years before the *Southard* decision). ER 449-54. The *in limine* motion challenged expert sexual abuse

diagnosis testimony based on Oregon Supreme Court precedent dating back to the 1980s that repeatedly excluded testimony by one witness about the credibility of another. ER 451-54. The motion also distinguished the two Oregon Court of Appeals cases that had admitted diagnosis testimony, arguing these decisions were “not controlling.” *Id.* Ultimately, because the attorneys in that case preserved and pursued a challenge to the expert testimony, the Oregon Court of Appeals summarily reversed based on *Southard*. ER 31; *see* ER 30.

Petitioner submitted a second attorney affidavit that detailed the development of Oregon law in this area, citing the same body of Oregon Supreme Court precedent. ER 478-79, 481-82. The attorney averred: “The evidentiary rules forming the basis for the Oregon Supreme Court’s recent decisions in [*Southard* and *Lupoli*] were available *before* those opinions were rendered. Those rules preclude improper vouching for the credibility of a witness by characterizing that testimony or endorsing it in pseudo-scientific language.” ER 482. She explained that, although the ultimate conclusion reached in those cases did not become law until 2009 and 2010, “the principles upon which those decisions relied were widely understood and pursued by effective defense counsel across this state for many years.” *Id.*

The post-conviction evidence also showed that Petitioner’s trial attorney had no strategic reason not to challenge the expert evidence, and, to the contrary, that

challenging the expert's testimony was the "number one" goal of his defense. ER 535. Counsel simply did not recognize the challenges available because he was unaware of the relevant law, including that there was tension between decisions of the Oregon Court of Appeals and precedent from Oregon's highest court and that the law had left an open question on the issue presented by Petitioner's case. *Id.*

**D. Federal Habeas Corpus Proceedings.**

In his petition for a writ of federal habeas corpus, Petitioner claimed that his trial attorney was ineffective for failing to challenge the expert's testimony about her diagnosis of the alleged victim as having been sexually abused. The District Court denied relief. Appendix B. On October 25, 2018, in a memorandum opinion, the Ninth Circuit affirmed. Appendix A. The Ninth Circuit did not address the evidence of the prevailing professional norms in assessing the reasonableness of counsel's failure to object to the expert testimony. Specifically, the Ninth Circuit ignored evidence that attorneys were routinely raising these objections because, with good reason, they viewed the issue as a promising issue for appellate relief. Instead, the Ninth Circuit found that no attorney could have been expected to raise an objection until after *Southard* and *Lupoli* were decided. *Id.*

## REASONS FOR GRANTING THE WRIT

This Court should grant the writ of certiorari because the Ninth Circuit's decision conflicts with decisions of this Court that state that the reasonableness of counsel's performance be evaluated in light of the relevant standard of care, as evidenced by the prevailing professional norms at the time of counsel's conduct. *Strickland* dictates: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." 466 U.S. at 688. Yet, the Ninth Circuit utterly disregarded record evidence demonstrating that the prevailing professional norm at the relevant time was to challenge expert "diagnosis" testimony in cases like Petitioner's on the grounds that unfavorable lower court decisions were in tension with earlier, binding precedent from the state's highest court.

In the alternative, this Court should 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.

**A. The Ninth Circuit Disregarded This Court’s Requirement That The Reasonableness Of Counsel’s Conduct Is Judged According To The Then-Prevailing Professional Norm.**

In the context of Sixth Amendment ineffective-assistance claims, this Court has “declined to articulate specific guidelines for appropriate attorney conduct and instead [has] emphasized that ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” *Wiggins*, 539 U.S. at 521 (citing *Strickland*, 466 U.S. at 688).

The record before the state and federal courts contained evidence of the prevailing standards, practices and expectations—the professional norms—with regard to the type of expert testimony at issue here. At the time of Petitioner’s trial, attorneys regularly challenged expert diagnosis testimony based on Oregon Supreme Court precedent. ER 448, 449-55, 476-82.

The Ninth Circuit disregarded this material evidence. Instead, with regard to counsel’s failure to challenge the expert’s diagnosis, the Ninth Circuit concluded:

The claim rests on *State v. Southard*, 218 P.3d 104 (Or. 2009), decided by the Oregon Supreme Court two years after Hall’s trial. Before *Southard*, decisions by the Oregon Court of Appeals allowed admission of the testimony at issue. *See, e.g., State v. Wilson*, 855 P.2d 657 (Or. Ct. App. 1993); *State v. Sanchez-Cruz*, 33 P.3d 1037 (Or. Ct. App. 2001).

Appendix A. Citing only Oregon’s lower court decisions, the Ninth Circuit failed to address the primary Oregon Supreme Court decisions that provided the basis for the challenges foregone by Petitioner’s counsel. Instead, citing cases that stand for

the propositions that “*Strickland* does not mandate prescience” and counsel “cannot be required to anticipate [a] decision in a later case,” the Ninth Circuit concluded the state court reasonably concluded that trial counsel was not ineffective. *Id.*

But Petitioner’s evidence demonstrated that no Oregon attorney needed to be prescient to know that challenges to diagnosis testimony were “promising” appellate issues at the time of Petitioner’s trial. ER 33. Contrary to the Ninth Circuit’s finding, the claim does not “rest” on the Oregon Supreme Court’s later decision in *Southard*. Nor was *Southard* the basis for the challenge. Rather, *Southard* was the *result* of attorneys raising available challenges in cases contemporaneous to Petitioner’s.

The record evidence—which the Ninth Circuit neglected to address—demonstrates that the basis for the challenge that eventually resulted in the *Southard* decision were principles that “were widely understood and pursued by effective defense counsel across this state” in the decade prior to *Southard*. ER 482. Only by ignoring the record evidence that the prevailing professional norm at the time of Petitioner’s trial was to challenge expert diagnosis testimony could the Ninth Circuit find that counsel had to be “prescient” to challenge the expert testimony in this case.

To be prescient is to be prophetic or to have knowledge of future events before they take place. Counsel did not need to be clairvoyant—or even innovative—to identify meritorious challenges to the expert testimony at issue. There were sample

motions available. ER 449-55. The issue was discussed at CLEs and on the primary listserv for the Oregon criminal defense bar. ER 33, 34. Attorneys were being encouraged to continue to pursue challenges to expert diagnosis testimony until the Oregon Supreme Court took up the issue. *Id.* As one attorney explained: “The fact of the matter is that we all knew that this was a promising issue, despite the fact that the Court of Appeals had rejected the issue . . . .” ER 33. Indeed, the Oregon Supreme Court has recently assumed without deciding “that an attorney exercising reasonable professional skill and judgment would have objected to the medical diagnosis despite” contrary court of appeals decisions. *Jackson*, 364 Or. at 321.

To act reasonably under this prevailing standard of care, counsel simply needed to conduct basic research of the law applicable to his client’s case. Attorneys have a basic duty to be familiar with the relevant law and to maintain competence by keeping abreast of changes in the law and of issues that are percolating in the courts. *Hinton v. Alabama*, 571 U.S. 263, 274 (2014). This is the central failure of counsel in this case. Counsel failed to research the relevant Oregon cases that provided fodder for a challenge. The Oregon Supreme Court’s decisions, none of which are mentioned in the Ninth Circuit decision and all of which are discussed in detail in the briefing of this case, collectively foreshadowed that an expert’s opinion on the believability of the alleged victim would be held inadmissible if the issue



were to be decided by the Oregon Supreme Court. *See* Appellant’s Opening Brief, at 35-40.

As the criminal defense bar knew, the law in this area would not be settled until the Oregon Supreme Court ruled. ER 34. That court is the final arbiter of Oregon law. *Montana v. Wyoming*, 563 U.S. 368, 377 (2011). Oregon’s intermediate appellate court had deviated from the clear principles set out in these Oregon Supreme Court decisions in admitting diagnosis testimony in the cases cited by the Ninth Circuit. *See* Appellant’s Opening Brief, at 40-48. Consequently, attorneys not only saw reasons to, but also had a basis to, challenge these intermediate appellate court decisions.

Had Petitioner’s counsel read the relevant caselaw, counsel also would have seen that even the Court of Appeals decisions left open the question presented by Petitioner’s case: whether expert diagnosis testimony is permissible when the diagnosis is based solely on believing the victim because no physical evidence corroborated the allegation of abuse. *See* Appellant’s Opening Brief, at 44-45; *see also Jackson*, 364 Or. at 33 n.11 (explaining that in the Court of Appeals decision, “unlike *Southard* and unlike this case, the diagnosis of sex abuse was corroborated by physical evidence, which presents a distinct issue.”).

Further, counsel could have distinguished the lower court cases as “not controlling” just as was argued in the motion *in limine* contained in the record. ER 451. Had counsel actually reviewed those cases, that review would have revealed major deviations from Oregon Supreme Court precedent. First, the Court of Appeals did not apply the analysis long required by the Oregon Supreme Court cases for the admission of expert testimony. Appellant’s Opening Brief, at 41-42. Moreover, those decisions drew a distinction between “direct” and “indirect” comments on credibility, despite that Oregon Supreme Court precedent foreclosed drawing such a distinction. *See id.* at 41, 47.

This case is not about counsel’s failure to see the future or to be prescient or clairvoyant, or to anticipate an unforeseeable change in the law. This is not a case about counsel’s failure to anticipate a change in the law. Rather, this case is about an attorney’s basic duty to know the law relevant to his client’s cause and to act reasonably under the prevailing professional norms. Other attorneys did basic research and saw there were challenges to make. This research is exemplified by the motion *in limine* in the record.

Contrary to the Ninth Circuit’s effectiveness analysis, what happened after Petitioner’s trial in *Southard* and *Lupoli* is immaterial to *Strickland*’s effectiveness prong analysis. The effectiveness of counsel’s conduct is judged according to what

attorneys were doing at the time—in this case, in 2007. Here, there is actual evidence of what attorneys were doing at this relevant time. To be effective at that time, counsel did not need to see the future. He only needed to do what other attorneys all around him were doing: researching the relevant law or following the conversation on the professional association list serv. Attorneys who did this knew to raise challenges under Oregon’s procedure for the admission of scientific evidence and vouching challenges. Contrary to the finding of the Ninth Circuit, an objection here would not have been “useless” or plainly meritless, nor would it require counsel to foresee the decision in *Southard*. The challenges at issue here were “promising” under the law as it existed at the time of Petitioner’s trial. ER 33.

The fact that the challenges counsel neglected here were, in fact, meritorious and eventually prevailed in *Southard* and *Lupoli* is, however, relevant to *Strickland*’s prejudice prong. Unlike the performance determination, the prejudice analysis may be made with the benefit of hindsight. *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). Had counsel raised a challenge to the expert testimony here, there is practical certainty (although he need only show a “reasonable probability”) that Petitioner would have received appellate relief in the form of a new trial. Indeed, defendants whose attorneys did pursue the same challenge in their 2007 trials, received new trials on appeal. *E.g.*, ER 30-32. The fact that precisely the same

claim was successful on an appeal pursued by a similarly situated litigant is a strong indication that the failure of Petitioner's counsel to press that claim was prejudicial. *See McKee v. United States*, 167 F.3d 103, 106-07 (2d Cir. 1999).

**B. In The Alternative, This Court Should Hold This Case In Abeyance Until It Decides *Ramos v. Louisiana*.**

Petitioner's Oregon conviction was by a non-unanimous jury in violation of his rights to due process, to an unbiased jury, and to have the State prove the charges beyond a reasonable doubt. The verdict and, as a result, Petitioner's convictions reflect lingering doubt.


On March 18, 2019, in *Ramos v. Louisiana*, No. 18-5924, this Court granted certiorari on the question: "Whether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict?" The briefing in *Ramos v. Louisiana* is not yet complete. The decision in *Ramos* could render verdicts like the one in Petitioner's case unconstitutional.

Raising this issue in Oregon has been futile under existing precedent since the time of Petitioner's trial. However, should this Court answer the question presented in *Ramos* in the affirmative, the Court should also find that that ruling applies retroactively to cases such as Petitioner's. Therefore, in the alternative, Petitioner requests that this Court hold his case in abeyance until these important issues have been decided.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted. At a minimum, the case should be held in abeyance pending this Court's decision in *Ramos v. Louisiana*.

DATED this 16th day of April, 2019.

  
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Nell Brown, Assistant Federal Public Defender  
Attorney for Petitioner