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

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IN THE  
SUPREME COURT OF THE UNITED STATES

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LUIS ARMANDO MESTA,

Petitioner,

v.

JOHN MYRICK,

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

Kristina Hellman  
Assistant Federal Public Defender  
101 SW Main Street, Suite 1700  
Portland, Oregon 97204  
(503) 326-2123

Attorney for Petitioner

## QUESTION PRESENTED

1. Twelve days after Mr. Mesta's appellate brief was filed, the Oregon Supreme Court took review of a legal principle that was at issue in Mr. Mesta's case. His appellate attorney knew of the Oregon Supreme Court litigation, but inexplicably failed to take action to include all of the relevant arguments in Mr. Mesta's brief, despite not knowing which way the Oregon Supreme Court would rule. Had the argument been raised, Mr. Mesta would have won a new trial. The state court found that counsel was not ineffective under *Strickland* because the law was not settled in Mr. Mesta's favor at the time counsel filed his brief.

Did the Ninth Circuit's opinion, which deferred to the state court's finding that counsel was not ineffective, controvert this Court's well-established law which includes advocacy as a component of the Sixth Amendment?

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The petitioner, Luis Armando Mesta, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) entered on June 3, 2019. Appendix (App.) at 1-6.

## **OPINIONS BELOW**

On September 25, 2017, the United States District Court for the District of Oregon (district court) issued an opinion and order denying Mr. Mesta's petition for writ of habeas corpus under 28 U.S.C. § 2254. App. at 13-22. The district court also denied a certificate of appealability. App. at 22.

On January 30, 2018, the Ninth Circuit granted a certificate of appealability on the issue of "whether appellate counsel was constitutionally deficient for failing to raise the claim that the admission of" a doctor's medical diagnosis of sexual abuse violated Oregon law. App. at 10. On June 3, 2019, by a vote of 2-1, the Ninth Circuit affirmed the district court's denial of relief in a memorandum opinion. App. at 1-6. Judge Watford dissented. App. at 7-9.

## **JURISDICTIONAL STATEMENT**

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (2016).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

U.S. Const. Amend. VI. provides:

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

28 U.S.C. § 2254(d) (2016) 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.

## **STATEMENT OF THE CASE**

### **A. Jackson County Circuit Court Proceedings**

#### **1. Background**

In 2007, Mr. Mesta was indicted on five counts of sexual abuse for having sexual contact with minors S, C, A, H, and T. ER 178.<sup>1</sup> All five minors were girls who accused Mr. Mesta of touching their breasts while he was working as a medical receptionist at their school's onsite health clinic. ER 190–191. S, C, A, and H were all in the same fourth grade classroom. ER 42–43. T, an older girl, was friends with H and H's sister. ER 40–41. Each of the girls testified at trial that Mr. Mesta had touched their breasts. ER 191.

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<sup>1</sup> ER refers to the excerpts of record filed in the Ninth Circuit case of *Mesta v. Myrick*, Case No. 17-35801 at Docket No. 8.

2. Testimony of the five girls

S, the first girl to report the touching, had previously been sexually abused by her father, grandfather, and also someone in her foster home. ER 78–79. Subsequent to the allegations, but prior to trial, she was diagnosed with post-traumatic stress disorder and bipolar disorder with psychosis. ER 159, 170. At trial, S readily admitted to seeing things that other people could not see. ER 83–85. In addition, several adults in her life noted that S was not always truthful. ER 153, 160–161, 165–166.

S claimed that Mr. Mesta had touched her breasts while in an exam room on the pretense of showing her how to use a stethoscope to listen to her own heartbeat. ER 73–75.<sup>2</sup> S then told Nurse Denise Duren that Mr. Mesta had inappropriately touched her. ER 76. It remains unclear how Nurse Duren reacted at the time, but the nurse had some doubts regarding S's accusation after consulting S's file. *Compare* ER 76 with ER 145–153. S felt that Nurse Duren had not taken her seriously, which made S angry. ER 76-77, 82.

C had a medical exam around the same time as S, and claimed that Mr. Mesta had also touched her breasts that day in an exam room, again

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<sup>2</sup> Mr. Mesta's official duties did not include taking vitals or making any physical contact with the students. ER 144.

under the pretense of using a stethoscope. ER 44–48. A claimed that approximately a week before the incidents with S and C, Mr. Mesta had also touched her breasts while she was at the clinic. ER 57–63.

According to S, during recess later that day the three girls discussed what had happened.<sup>3</sup> ER 77, 80–81. S testified that the girls then decided they would report the sexual contact to their teacher, Rachel Frison, and to the school's principal. ER 77. S and C approached Ms. Frison after recess, and S reported the sexual contact. ER 50–51, 133–136. A also reported that same day, although the record is not clear regarding who she first reported to. ER 64–66, 68–70, 136–137. H overheard the girls talking to Ms. Frison and subsequently reported that, during the previous school year, Mr. Mesta had also used a stethoscope as an excuse to touch her breasts.<sup>4</sup> ER 86–90, 135.

T had gone to the clinic around the beginning of the school year to pick up a pedometer. ER 94–95. T had followed Mr. Mesta while he was looking for a pedometer in the nurse's office. ER 96. T claimed that Mr. Mesta had then touched her breasts while pulling out her necklace from inside her shirt.

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<sup>3</sup> The girls' disagreed during their testimonies on whether they discussed the issue together first or reported first. ER 49, 52–56, 66–72, 77, 91–92.

<sup>4</sup> The jury acquitted Mr. Mesta on the count of sexual abuse of H. ER 178.

ER 97–100. T testified that right after Mr. Mesta touched her breasts, Nurse Phyllis Wetzel had walked in and asked Mr. Mesta what he was doing alone in her office with a student. ER 100, 103–105. Nurse Wetzel could not recall any of these events at trial. ER 138–139, 140–141. T reported the incident after hearing about the other girls' accusations from H's sister. ER 101–102.

### 3. Dr. Oddo's testimony

To support its case against Mr. Mesta, the prosecutor called Dr. Curtis Oddo, a pediatrician and medical director of Jackson County Children's Advocacy Center. ER 255. Dr. Oddo had examined the girls, and had diagnosed S, C, and T with sexual abuse. ER 121-26. Prior to Dr. Oddo's testimony, trial counsel objected to Dr. Oddo's diagnoses of sex abuse being admitted into evidence. ER 106. Counsel's objections were made on grounds including lack of foundation, relevancy, cumulative testimony, impermissible vouching, impermissible testimony on the ultimate issue, and undue prejudice. ER 106–110. The court denied counsel's objection. ER 111.

Trial counsel continued to object, stating,

I'm really concerned, Your Honor, that if he gets up there and is able to say, 'In my opinion she was sexually abused,' that's gonna carry so much weight with the jury when he's not, again, qualified at least to render that ultimate opinion on that question. . . . I don't see how he is in the position, given his training – and I don't think anybody would be in a position, because ultimately it is a comment on whether the children are telling the truth. It's a comment on credibility and that's really all it is.

ER 112–113. The State made an offer of proof and the judge again overruled trial counsel’s objection. ER 115–116.

Before the jury, Dr. Oddo detailed his extensive experience with diagnosing sexual abuse in children, how he made his diagnoses, how most sexual abuse cases have no physical findings, and how he determines whether a child is being truthful about a sexual abuse accusation. ER 117–120, 126–130. Dr. Oddo then discussed his interviews and examinations of the girls who had accused Mr. Mesta. Dr. Oddo testified that he had diagnosed S, C, and T with sexual abuse. ER 121–124. Dr. Oddo also testified that he examined H and A, but he was not asked by the prosecutor about their diagnoses. ER 124–126.

After Dr. Oddo’s testimony, several other witnesses testified. None of them had personally observed any inappropriate behavior by Mr. Mesta.

#### 4. The verdict and sentence.

By a verdict of 11-1 (ER 206a), the jury convicted Mr. Mesta of sexual abuse of S, C, A, and T, but acquitted him of sexual abuse of H. ER 178. Mr. Mesta was sentenced to 150 months imprisonment and ten years of post-prison supervision. ER 178.

## B. Direct Appeal Proceedings

1. Mr. Mesta's appeal and the granting of review in *State v. Southard*.

Mr. Mesta's appellate brief was filed on April 4, 2008. ER 223. In that brief, appellate counsel argued that Dr. Oddo's testimony about his diagnoses of sexual abuse was an impermissible comment on the victims' credibility. ER 194, 201. The brief made no argument that the admission of the sexual abuse diagnoses was unfairly prejudicial, and therefore excludable, under Or. R. Evid. 403 (Rule 403).

Twelve days after appellate counsel filed the brief, the Oregon Supreme Court granted review in *State v. Southard*, 218 P.3d 104 (Or. 2009), a case with issues nearly identical to those raised in Mr. Mesta's appeal. ER 261. A press release stated that the issues on review in *Southard* were:

- (1) Whether a medical diagnosis of child sexual abuse based on the child's claim of abuse and his behavior, without confirming physical evidence, is scientifically valid under the requirements of *State v. Brown*, 297 Or 404, 687 P2d 751 (1984), and *State v. O'Key*, 321 Or 285, 899 P2d 663 (1995).
- (2) Whether a medical diagnosis of child sexual abuse in the absence of corroborating physical evidence is unfairly prejudicial.
- (3) Whether a diagnosis of child sexual abuse that is based on the evaluator's detailed explanation as to why the child's statement is truthful is an impermissible comment on the credibility of the alleged victim.

*Mesta v. Franke*, 322 P.3d 1136, 1147 (Or. Ct. App. 2014).<sup>5</sup>

Although the press release stated that lawyers should not rely on the statement of issues to be decided, appellate counsel was already familiar with the *Southard* case because it was being litigated by another attorney in his state public defender's office. *Id.* at 1147 n.4.

After review was granted in *Southard*, Mr. Mesta's appellate counsel made no motion to amend the appellate brief to include the preserved Rule 403 claim. The State's response brief was filed six months later, on October 28, 2008. *Id.* at 1154. In that brief, the State argued that Mr. Mesta's argument was foreclosed by controlling precedent. ER 207–208. A footnote in the State's brief noted:

It appears the same question is currently pending before the Oregon Supreme Court in *State v. Southard* (S05546) scheduled to be argued September 17, 2008. Unlike the defendant in *Southard*, however, defendant here concedes the foundation laid for the medical diagnosis was adequate under *State v. Brown*, 297 Or 404, 687 P2d 751 (1984). The sole question in the instant case is the comment-on-credibility claim.

ER 207–208.

The Oregon Court of Appeals affirmed Mr. Mesta's case without opinion on March 25, 2009. ER 221. Appellate counsel filed a petition for

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<sup>5</sup> Citations to the opinion in this brief will be to the published opinion; however, the opinion was submitted as an exhibit in the district court and is also found at ER 12-36.

review in the Oregon Supreme Court and on July 29, 2009, the Court ordered Mr. Mesta's appeal to be held in abeyance pending the *Southard* decision. ER 261.

2. The decision in *State v. Southard*.

In *State v. Southard*, 218 P.3d 104 (Or. 2009), the Oregon Supreme Court held that in the absence of physical evidence of abuse, a medical diagnosis of sexual abuse which “does not tell the jury anything it could not have determined on its own” is inadmissible under Rule 403 since its “probative value is substantially outweighed by the danger of unfair prejudice.” *Id.* at 111–13. The Court noted that a jury might be “overly impressed” by a credentialed expert, or be “prejudiced by a perhaps misplaced aura of reliability or validity of the evidence.” *Id.* at 112 (citations omitted). The decision did not reach the issue of impermissible commenting on witness credibility. *Id.* at 104.

3. The motion to recall the appellate judgment.

On January 21, 2010, the Oregon Supreme Court denied review of Mr. Mesta's case, and the Oregon Court of Appeals judgment became effective on March 25, 2010. ER 262. Six days later, the Oregon Court of Appeals issued decisions in two similar cases holding that the admission of a diagnosis of sexual abuse absent physical findings constituted plain error.

ER 262; *see State v. Lovern*, 228 P.3d 688 (Or. Ct. App. 2010); *State v. Merrimon*, 228 P.3d 666 (Or. Ct. App. 2010).

On April 9, 2010, Mr. Mesta’s appellate counsel moved to recall the appellate judgment and for leave to file a petition for plain error review. ER 222–229. The Oregon Court of Appeals denied the motion. ER 230.

In the petition for review to the Oregon Supreme Court from that decision, appellate counsel admitted that he had been familiar with the claims in *Southard* and called his failure to request a plain error review immediately following the *Southard* decision a “misstep.” ER 236–237. The Oregon Supreme Court denied the petition for review. ER 238.

#### **C. Post-Conviction Trial Proceedings**

As relevant to this appeal, Mr. Mesta’s post-conviction petition asserted that appellate counsel had been ineffective for failing to raise the Rule 403 claim by amending or supplementing the appellate brief after review was granted in *Southard*. ER 239–245. The post-conviction court denied relief. ER 245–50

#### **D. Post-Conviction Appellate Proceedings**

Mr. Mesta appealed the denial of post-conviction relief, and the Oregon Court of Appeals published an opinion in his case: *Mesta v. Franke*, 322 P.3d 1136 (Or. Ct. App. 2014). The majority opinion affirmed the post-conviction

court’s denial of relief; however, Judge Lynn Nakamoto wrote a dissenting opinion. *Id.* at 1136.

1. The majority opinion.

Although a Rule 403 claim had been properly preserved in the trial court, the majority rejected Mr. Mesta’s claim “both because of the state of the law regarding the issue that appellate counsel did raise—inadmissible vouching—and the state of the law regarding the issue that counsel did not raise—[Rule] 403.” *Id.* at 1147–48.

On the vouching claim that counsel raised, Mr. Mesta argued that it was “almost certain to fail under *State v. Wilson*,” controlling Oregon Court of Appeals precedent. *Id.* at 1148. The majority wrote that although “an inadmissible vouching argument would have looked unpromising in light of [Wilson], the law was not so contrary to appellate counsel’s argument as petitioner suggests.” *Id.* The majority determined that appellate counsel had made a reasonable argument because, in *State v. Keller*, 844 P.2d 195 (Or. 1993), the court had held that under certain circumstances doctor testimony regarding sexual abuse could constitute inadmissible vouching.<sup>6</sup> *Mesta*, 322 P.3d at 1148-49. The majority provided a detailed explanation of an

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<sup>6</sup> In *Keller*, the doctor had made statements such as “there was no evidence of leading or coaching or fantasizing” and that during the interview the child was “obviously telling you about what happened to her body.” 844 P.2d at 195.

argument that counsel could have made,<sup>7</sup> and then concluded that, even after review had been granted in *Southard*, appellate counsel was not unreasonable in “declin[ing] to raise a speculative [Rule] 403 argument when he had already presented this court with a viable, albeit not particularly compelling, argument under the law as it then stood.” *Id.* at 1149.

On the Rule 403 issue, the majority noted that *State v. Sanchez-Cruz*, 33 P.3d 1037 (Or. Ct. App. 2001), *rev. den.*, 42 P.3d 1245 (Or. 2001) – the controlling precedent at the time the appellate brief was filed – had rejected the argument that a sexual abuse diagnosis was inherently prejudicial under Rule 403. *Mesta*, 322 P.3d at 1142–43. In contrast to its detailed analysis distinguishing *Wilson*, the majority wrote “there was nothing, in light of *Sanchez-Cruz*, to reasonably indicate to counsel that the outcome of the appeal in this court would be any different than what it eventually was.” *Id.* at 1150. The majority concluded that “*Southard* represented a substantial departure from previous law” and the benefits of raising the Rule 403 claim were now obvious only due to “hindsight” and would have required appellate counsel to be “clairvoyant.” *Id.* at 1149–50. The majority reasoned that “although the [Oregon] Supreme Court had indicated that the [Rule] 403 issue *might* be considered in *Southard*, there was nothing to particularly

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<sup>7</sup> As explained below on pages 32-33, counsel did not make this argument in his brief.

indicate that the court was going to decide the case on that issue, let alone decide it in a manner favorable to [Mr. Mesta].” *Id.* at 1149.

The majority rejected the

[p]roposition that in order to be constitutionally adequate appellate counsel must, after filing an opening brief, not only keep apprised of which issues become pending in the Supreme Court, but assert each of those issues that might conceivably, one day, be resolved in a manner that holds out some prospect for the client’s success.

*Id.* at 1151. The majority held that, “[t]he Oregon Constitution does not require appellate counsel to advance every conceivable argument in a given appeal on the off-chance that one of them will eventually prove effective.” *Id.* at 1151. Thus, the majority concluded, “appellate counsel may have reasonably decided . . . that raising Rule 403 after the Supreme Court granted review in *Southard* was not worth the candle.” *Id.* at 1151.

## 2. The dissenting opinion

The dissent concluded that Mr. Mesta’s appellate attorney had failed to assert a claim, preserved at trial, “that was the subject of Supreme Court review in a significant case during the briefing in petitioner’s direct appeal in this court” and which would have granted Mr. Mesta a “new trial pursuant to the Supreme Court’s holding in *State v. Southard*.” *Mesta*, 322 P.3d at 1152. Consequently, Mr. Mesta had proven his “appellate lawyer could and should have preserved his argument and that [Mr. Mesta] suffered prejudice.” *Id.*

The dissent noted that any motion for leave to file an amended or supplemental brief would have been granted, writing:

I do not doubt the [majority's] assumption that we would have allowed a motion by petitioner for leave to file a supplemental brief in light of the issues on review in *Southard*. The evidentiary error was a key aspect of petitioner's appeal, and the state's briefing period was hardly underway. In fact, the state filed its answering brief in the appeal more than six months later, in late October 2008.

*Id.* at 1154.

The dissent then reasoned that the impermissible vouching claim raised by appellate counsel "was almost certain to fail in this court," and that "paying attention to the issues on review . . . in *Southard* and pursuing [Mr. Mesta's] preserved arguments like those to be heard in *Southard* . . . was a promising avenue, if not *the* avenue, for petitioner to gain a new trial."

*Id.*

The dissent further found that there was no evidence appellate counsel had made a tactical decision in not including a Rule 403 claim, there was no strategic downside preventing counsel from including the claim, and, once the issues on review in *Southard* were announced, "omission of the [Rule] 403 argument posed a significant risk for petitioner." *Id.* at 1154, 1155–56.

Additionally, the dissent noted the existing Oregon Supreme Court precedents in support of such an argument even prior to *Southard*. *Id.* at 1154, 1155–56. The dissent rejected the majority's reasoning that appellate

counsel would have had to have been “clairvoyant” to anticipate a favorable outcome in *Southard*, finding instead that appellate counsel “was not going to gain a new trial for [Mr. Mesta] in this court under our precedents and so had to be looking to a favorable Supreme Court decision in *Southard* for relief for his client.” *Id.* at 1155. However, the dissent noted, “if petitioner was to have any chance to take advantage of a favorable ruling in *Southard*, his appellate lawyer had to raise those arguments in this court. . . . [Appellate counsel] had the opportunity to preserve two of the three issues on review in *Southard* but, instead, preserved only one.” *Id.* at 1155.

The dissent concluded,

Going into his appeal, [Mr. Mesta] held two of the three keys that the defendant in *Southard* contended should unlock the door to a new trial based on the erroneous admission of a child sexual abuse diagnosis. Because the outcome in *Southard* was unknown, it was possible that petitioner could unlock that door with either key he held, yet he lost one of those keys on appeal when his appellate lawyer failed to preserve it. The benefit of pursuing the [Rule] 403 issue was not, as the majority concludes, speculative; rather, by doing so, [Mr. Mesta] would maximize his chance to gain a new trial.

*Id.* at 1156. Thus, appellate counsel had failed to meet the standard of reasonable care. *Id.* The dissent further concluded that there was “no doubt” Mr. Mesta suffered prejudice as a result because he “never received a new trial,” the reasonable inference for which was because the Rule 403 claim had

never been raised before the court. *Id.* (citing *Merrimon*, 228 P.3d 666; *Lovern*, 228 P.3d 688).

#### **E. Previous Federal Court Proceedings**

Mr. Mesta timely filed a *pro se* petition for writ of habeas corpus. ER 278–300. As relevant here, he claimed that his rights under the Fourteenth Amendment to the United States Constitution were violated because he received ineffective assistance of appellate counsel when counsel failed to move to amend or supplement the brief to raise the Rule 403 after review was granted in *Southard*. ER 283.

The district court held that Mr. Mesta was not entitled to relief because “the Oregon Court of Appeals’ decision was not contrary to or an unreasonable application of *Strickland*” and was therefore entitled to deference. ER 6, 10. The district court issued a judgment dismissing the case and denied a certificate of appealability. ER 1, 10. Thereafter, the Ninth Circuit granted a certificate of appealability on the issue of “whether appellate counsel was constitutionally deficient for failing to raise the claim that the admission of Dr. Oddo’s diagnosis of sexual abuse violated [Rule] 403.” App. at 10.

By a vote of 2-1, the Ninth Circuit ultimately affirmed the district court’s decision. App. at 1-6. The panel majority opinion held that deference was owed to the Oregon Court of Appeals’s opinion because it was not

unreasonable to find that counsel's choice of issues was proper winnowing. App. at 4-6.

Judge Watford dissented. App. at 7-9. In his opinion, Judge Watford reasoned that it was "precisely because Mesta's lawyer could not predict in advance on which ground the Supreme Court might rely that his failure to preserve both grounds constituted deficient performance." App. at 8. He further found "that conclusion is sufficiently obvious to render the contrary decision of the Oregon Court of Appeals unreasonable under 28 U.S.C. § 2254(d)(1)." App. at 8-9.

#### **REASONS FOR GRANTING THE PETITION**

In the context of an ineffective assistance of counsel claim, this Court has made it clear that counsel's duty involves advocacy on the part of her client. Here, the Ninth Circuit effectively wrote out that component of the analysis, when it affirmed the Oregon Court of Appeals's decision that counsel reasonably winnowed an argument, even though the law was unsettled and actively being litigated in the Oregon Supreme Court. This Court should grant a writ of certiorari to review the Ninth Circuit's opinion that controverts well-established law, and, in effect, limits advocacy to situations in which the law is already settled in the defendant's favor.

## ARGUMENT

In establishing the parameters of the Sixth Amendment right to effective assistance of counsel, this Court has determined a defendant is entitled to counsel who “function[s] in the active role of an advocate.” *Entsminger v. Iowa*, 386 U.S. 748, 751 (1967); *see also Florida v. Nixon*, 543 U.S. 175, 189 (2004) (recognizing that prejudice is presumed when “counsel has entirely failed to function as the client’s advocate.”); *Strickland*, 466 U.S. at 688 (recognizing counsel’s “overarching duty to advocate defendant’s cause”). Although this Court has also recognized that counsel can make strategic decisions within the context advocacy, the Ninth Circuit effectively wrote out the advocacy requirement when it held that the state court was not unreasonable to find that Mr. Mesta’s counsel could reasonably have abandoned an argument that was pending in the state supreme court.

Advocacy requires more than mechanistically raising issues with a guaranteed positive outcome for a client. Indeed, few, if any cases, are so clear-cut. Instead, at a minimum, appellate advocacy requires counsel to advance preserved arguments that have support in controlling precedent, are open questions of law, and are being considered by the state supreme court at the time of the appeal.

Mr. Mesta’s case presents precisely a failure of advocacy on the part of counsel. First, his litigation was contemporaneous both in time and court

systems – the Oregon Supreme Court granted review while Mr. Mesta’s case was pending in the Oregon Court of Appeals, only twelve days after counsel filed his opening brief.

Next, counsel was not asked to provide independent advice for a future decision based on a complex and unsettled area of law. The briefs from counsel’s own office provided the issues that the Oregon Supreme Court would consider, the issue had been preserved in the trial court, and it was directly related to the issue that appellate counsel did raise.

Third, and critically, appellate counsel made the decision to challenge the introduction of the doctor’s testimony, so the issue was before the courts. Having raised the issue, counsel had a duty to litigate it effectively. When the Oregon Supreme Court accepted review in *Southard*, it effectively told counsel that the way in which he understood and briefed the issue was too narrow, because *Southard* had presented the overall issue in three separate parts. At that time – only twelve days after counsel filed his opening brief – counsel was on notice that a brief like his which did not cite Rule 403 or make any argument about its application to the introduction of the doctor’s testimony was insufficient to fully present the issue. In sum, this is not a case about reasonable winnowing. *E.g., Jones v. Barnes*, 463 U.S. 745, 752-63 (1983). This is about counsel’s failure to ensure that he correctly presented the claim in a complete way.

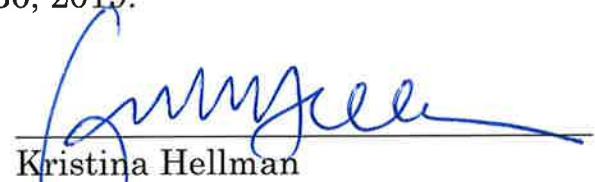
Counsel admitted as much. When he sought review of Mr. Mesta’s case in the Oregon Supreme Court, he explained that he had attempted to obtain relief for Mr. Mesta on the same basis as was decided in *Southard*. ER 236. He further explained that he had just “framed the issue as an impermissible comment on the credibility of a witness,” but that once *Southard* issued, he “asked for plain error review.” ER 235. Counsel also urged the Oregon Supreme Court to rule in Mr. Mesta’s favor to avoid the need for him to obtain relief through a post-conviction proceeding. ER 237. Counsel did not take the position that he had winnowed the claims prior to *Southard* and was now seeking to undo that decision. In effect, counsel admitted that his intention was to raise the issues as they were presented in *Southard*, but that he failed to do so.

Counsel did not strategically winnow claims in this case. Instead he ineffectively failed in his duty as an advocate for Mr. Mesta. The Oregon Court of Appeals was objectively unreasonable to conclude otherwise, and the Ninth Circuit’s opinion ratifying that decision contradicted this Court’s well-established precedent on the requirement of advocacy.

## CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari.

Respectfully submitted on August 30, 2019.



Kristina Hellman  
Assistant Federal Public Defender  
Attorney for Petitioner