

**In the Supreme Court of the United States**

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AARON E. CHOAT,

Petitioner,

v.

RICK COURSEY, Superintendent, Eastern Oregon 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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**RESPONDENT'S BRIEF IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Did the district court correctly (1) defer to the state post-conviction court’s ruling that trial counsel acted reasonably when cross-examining a state’s witness and (2) determine that petitioner had failed to demonstrate actual innocence to excuse the procedural default of his remaining claims?
2. Should this Court hold this petition in abeyance pending a decision in *Edwards v. Vannoy*, No. 19-5807, in which this Court will decide whether the rule from *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020)—that a nonunanimous jury verdict violates the United States Constitution—applies retroactively to cases on collateral review?

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## RESPONDENT'S BRIEF IN OPPOSITION

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### INTRODUCTION

The superintendent agrees with petitioner that this Court should hold this case in abeyance pending a decision in *Edwards v. Vannoy*, No. 19-5807. In *Edwards*, this Court will determine whether the rule of *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020)—prohibiting conviction by a nonunanimous jury verdict—applies retroactively to cases on collateral review. In this case, the Ninth Circuit stated that petitioner had not raised or exhausted a nonunanimous jury claim and therefore denied petitioner a certificate of appealability. But the record reflects that petitioner did raise a nonunanimous jury claim in his federal habeas petition and exhausted that claim in the state courts.

The superintendent therefore agrees that, if this Court holds that the *Ramos* rule is retroactive, petitioner will be entitled to a remand to the Ninth Circuit to resolve his nonunanimous jury claim. If this Court holds that the *Ramos* rule is not retroactive, however, petitioner cannot obtain relief on his nonunanimous jury claim. And, because the district court's denial of petitioner's other claims—and the Ninth Circuit's denial of a certificate of appealability on those claims—involves an ordinary, fact-driven application of well-settled legal principles, it does not warrant this Court's review. Thus, if this Court holds that the *Ramos* rule is not retroactive, it should deny the petition.

## STATEMENT OF THE CASE

### A. **Petitioner was convicted of several crimes after driving while intoxicated and crashing a vehicle, killing two of the passengers.**

Petitioner was charged with several crimes, including manslaughter and assault, after he drove while intoxicated and crashed a Jeep with three other passengers—Grant, Blocker, and Sells. (Pet. App. C 2). Grant and Blocker died from their injuries. (*Id.*). All four occupants were intoxicated, and the dispute at trial centered around who was driving during the crash. (Pet. App. C 3–4).

The state developed its case around a variety of evidence, including the occupants' injuries, the condition of the vehicle after the crash, and other circumstantial evidence. (Pet. App. C 4–13). Trooper DeHaven, a certified crash reconstructionist, opined—based on “a comprehensive analysis of all physical and testimonial evidence, scene diagrams, police reports, and medical records associated with the crash”—that, at the time of the crash, petitioner was driving, Grant was seated in the front passenger seat, and Sells and Blocker were seated in the back, with Blocker on the right and Sells on the left. (Pet. App. C 18, 20–21).

In addition, the state offered testimony from two eyewitnesses that petitioner had been driving in the hours leading up to the crash. In particular, an eyewitness who had seen the Jeep hours before the crash described the driver as a male matching petitioner's description. (Pet. App. C 14). In addition, the other survivor of the crash, Sells, gave a detailed account of the events leading up to the crash; although he did not remember the crash itself, he testified that

petitioner was the only driver the entire night. (Pet. App. C 15–18). Sells testified, consistently with DeHaven’s opinion, that Sells and Blocker had been in the back seat, with Blocker behind Grant, who was in the front passenger seat, and Sells behind petitioner, who was driving. (Pet. App. C 16).

The defense offered the testimony of two experts, who challenged DeHaven’s analysis in various ways. (Pet. App. C 22–26). Neither witness could determine that petitioner was *not* the driver. (*Id.*). In rebuttal, the state called another reconstructionist, who rebutted several key points made by the defense experts and testified that he was “very certain” that petitioner was the driver. (Pet. App. C 26).

The jury acquitted petitioner of first-degree manslaughter and third-degree assault but found him guilty on all remaining charges, including two counts of second-degree manslaughter and one count of fourth-degree assault. (Pet. App. C 27). The jury was not unanimous as to those counts. (*Id.*).

**B. Petitioner unsuccessfully challenged the nonunanimous verdicts on appeal and sought state post-conviction relief based on ineffective assistance of counsel.**

Petitioner appealed, arguing, among other claims, that the trial court had erred when it failed to instruct the jury that its verdict must be unanimous. The Oregon Court of Appeals affirmed in a written opinion. *State v. Choat*, 284 P.3d 578 (Or. App. 2012). The court rejected petitioner’s challenge to the nonunanimous verdicts in a footnote citing *State v. Cobb*, 198 P.3d 978 (Or. App. 2008), *rev. den.*, 213 P.3d 578 (Or. 2009), in which the court had held that *Apodaca v. Oregon*, 406 U.S. 404 (1972), foreclosed the argument. Petitioner

then petitioned for review in the Oregon Supreme Court, raising the same arguments. (Ex. 106). The court denied review. *State v. Choat*, 293 P.3d 1045 (Or. 2012).

Petitioner then filed for state post-conviction relief. He alleged that trial counsel had been ineffective in various ways, including by failing to effectively cross-examine Sells. (Pet. App. C 28). The post-conviction trial court denied relief, ruling that counsel's cross-examination was not ineffective. (*Id.*). Petitioner appealed, challenging that ruling and also arguing that the post-conviction court judgment did not comply with Oregon law. (*Id.*). The Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied review. (*Id.*).

**C. The district court denied the petition for federal habeas relief, and the Ninth Circuit denied a certificate of appealability.**

Petitioner then filed a petition for a writ of habeas corpus in federal district court. In the operative petition, he raised seven claims for relief, including a claim that he "was denied his rights under the Sixth and Fourteenth Amendments to the United States Constitution when he was convicted by a non-unanimous jury" and a claim that he received ineffective assistance of counsel at trial in various ways. (Dist. Ct. Docket No. 20, at 4–6 (Amended Petition for Writ of Habeas Corpus)<sup>1</sup>).

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<sup>1</sup> Dist. Ct. Docket No. refers to the docket entries in *Choat v. Coursey*, 2:16-cv-01459-JR (D. Or.).

In response to the petition, the superintendent argued that all but two of petitioner’s claims were procedurally defaulted. (Dist. Ct. Docket No. 28 at 4–6). As to the two claims that were not procedurally defaulted—the nonunanimous verdict claim and the claim that trial counsel had been ineffective for not effectively cross-examining Sells—the superintendent argued that the state court decisions were reasonable under the law in effect at the time of those decisions and therefore were entitled to deference under the Antiterrorism and Effective Death Penalty Act. (*Id.* at 7–15).

In petitioner’s subsequent briefing, he focused on his claims of ineffective assistance for failing to cross-examine Sells and for failing to offer the statements of a witness named Skaggs, who had told police and a defense investigator that he saw a Jeep being driven by a female around the time of the accident.<sup>2</sup> (Dist. Ct. Docket No. 44 at 32–38; Dist. Ct. Docket No. 72; Dist. Ct. Docket No. 82). He also argued that any procedural default should be excused under *Schlup v. Delo*, 513 U.S. 298 (1995), in light of evidence that he was actually innocent. (Dist. Ct. Docket No. 44 at 27–31).

The magistrate judge ruled that petitioner’s claim concerning the failure to offer additional evidence was procedurally defaulted and that petitioner had not met his burden of demonstrating “actual innocence” under *Schlup*. (Pet.

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<sup>2</sup> Petitioner initially contended that counsel should have called Skaggs as a witness. (Dist. Ct. Docket No. 44 at 35). In a reply brief, petitioner noted that Skaggs had died before trial. He nonetheless argued that counsel was ineffective for not offering Skaggs’s hearsay statements under the residual exception to the hearsay rule. (Dist. Ct. Docket No. 72 at 13).

App. C 3, 38). The court declined to “disregard evidence found credible by a jury in favor of uncorroborated speculation and self-serving conjecture.” (Pet. App. C 38). In particular, the court explained that the new evidence that petitioner presented—his own declaration and Skaggs’s hearsay statements—was not reliable. (Pet. App. C 34–38). As to petitioner’s declaration, the court noted that the statements were made nearly 10 years after trial with no explanation for why petitioner did not share the information earlier; the declaration contradicted the testimony of trial witnesses and petitioner’s own statements after the crash; and the declaration conflicted with itself. (Pet. App. C 35–37). As to Skaggs, the court noted that Skaggs’s description was inconsistent over time and that Skaggs never positively identified the Jeep he saw as Grant’s Jeep or Grant as the Jeep’s driver. (Pet. App. C 37–38).

The court also rejected petitioner’s claim of ineffective assistance for not adequately cross-examining Sells. The court reasoned that counsel had thoroughly cross-examined Sells by attempting to undercut his credibility and create inconsistencies with the state’s evidence. (Pet. App. C 42). And although petitioner argued that counsel had failed to “expose a significant time period that was unaccounted for,” counsel did, in fact, elicit admissions that “revealed lapses in Sells’[s] memory regarding the specific timing of the night’s events.” (Pet. App. C 45). The court reasoned that the record contained no evidence to impeach Sells’s testimony that petitioner had been the driver, because Sells was the only survivor with any memory of what occurred immediately before the

crash. (Pet. App. C 45–46). Thus, the court ruled that petitioner had failed to establish that the state post-conviction court’s decision was unreasonable. (Pet. App. C 46).

Because petitioner did not brief or argue the remaining grounds for relief alleged in the petition, the court determined that petitioner had not “sustained his burden to demonstrate why he [was] entitled to relief on those claims.” (Pet. App. C 47). The court nonetheless stated that it had reviewed those claims and determined that petitioner was not entitled to relief on them. (*Id.*).

The district court adopted the foregoing findings and recommendations of the magistrate judge. The court also declined to issue a Certificate of Appealability on the basis that petitioner had not made a substantial showing of the denial of a constitutional right. (Pet. App. B).

Petitioner then moved the Ninth Circuit for an order issuing a certificate of appealability on the claims briefed in the district court and, alternatively, moved to stay the proceedings pending *Edwards v. Vannoy*. (9th Cir. Docket No. 2<sup>3</sup>). In that motion, petitioner stated that he did not previously raise the nonunanimous jury issue “in the Oregon courts or in his petition for writ of habeas corpus in the District Court.” (*Id.* at 1–2). The court denied petitioner’s motion, noting that his “new claim” based on the nonunanimous jury verdicts

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<sup>3</sup> 9th Cir. Docket No. refers to the docket entries in *Choat v. Coursey*, 19-36044 (9th Cir.).

could be pursued in an application to file a successive petition under 28 U.S.C. § 2244. (Pet. App. A).

## DISCUSSION

Before this Court, petitioner makes two requests. First, he asks the Court to grant the petition and hear the case on the merits or summarily reverse, contending that the Ninth Circuit should have granted him a certificate of appealability on his ineffective-assistance claims. (Pet. 9–11). But as explained below, 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. Second, petitioner asks this Court to hold this case in abeyance pending *Edwards v. Vannoy*, No. 19-5807, which will determine whether the rule of *Ramos v. Louisiana*—that conviction by a nonunanimous jury violates the Constitution—applies retroactively. (Pet. 9). The superintendent agrees. If this Court holds that the *Ramos* rule is retroactive, then it should remand to the Ninth Circuit for further proceedings. If this Court hold that the *Ramos* rule is not retroactive, it should deny the petition.

**A. This Court should decline petitioner’s first request because the district court’s ruling was a routine and correct application of well-settled caselaw.**

Petitioner first asks this Court to grant certiorari or summary reversal on the ground that the Ninth Circuit erred by denying a certificate of appealability as to the ineffective assistance claims. But the district court’s routine application of AEDPA’s standard of review to the facts of this case—and the

Ninth Circuit’s denial of a certificate of appealability—Involves settled principles of law that do not warrant further review by this Court.

Petitioner contends that “it was unreasonable for counsel not to use all available impeachment and exculpatory evidence to challenge the State’s theory that Petitioner was the driver of the vehicle at the time of the accident.” (Pet. 11). But the district court’s reasoning, described above, was a routine and correct application of the law. As to the claim that counsel should have cross-examined Sells about the timeline of events, the court correctly deferred to the state post-conviction court’s ruling that counsel performed adequately because counsel *did* cross-examine Sells about the timeline and because petitioner failed to identify any evidence that could have impeached Sells’s testimony on the key issue—that petitioner was the driver. As to the defaulted claims, the district court correctly concluded that petitioner failed to meet *Schlup*’s high burden of demonstrating actual innocence.

Thus, the district court’s decision—and the Ninth Circuit’s denial of a certificate of appealability—is correct and presents a routine, fact-driven application of AEDPA. Further review on that issue is therefore neither necessary nor prudent.

**B. The superintendent agrees that this Court should hold this case pending *Edwards*.**

In *Edwards* this Court will determine whether the rule from *Ramos*—that convictions based on nonunanimous jury verdicts are unconstitutional—is

retroactive. As explained below, this court should hold this petition in abeyance pending its decision in that case.

In his federal habeas petition, petitioner alleged that his nonunanimous jury verdicts violated the Sixth and Fourteenth Amendments to the United States Constitution. The superintendent conceded in the district court that petitioner had exhausted that claim in state court, and the Oregon Court of Appeals decided it on the merits in a written opinion. But based on petitioner's concession in his motion to the Ninth Circuit, that court erroneously reasoned that petitioner had never raised that claim in the district court and that it was not exhausted in the state courts. As a result, the superintendent agrees that, if this Court were to hold that the *Ramos* rule is retroactive, it would be appropriate to remand to the Ninth Circuit to resolve petitioner's claim.<sup>4</sup> However, if this Court holds that the *Ramos* rule is not retroactive, then petitioner is not entitled to relief and this Court should deny the petition.

## CONCLUSION

This Court should hold the petition pending *Edwards v. Vannoy*. If the Court determines that the rule from *Ramos* is not retroactive, it should deny the

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<sup>4</sup> Petitioner would not necessarily be entitled to relief, however. The Ninth Circuit might need to resolve whether the district court permissibly determined that petitioner failed to meet his burden on the claims that he did not brief (Pet. App. C 47), and whether petitioner's claim fails under AEDPA because the state court's decision is not inconsistent with then-existing federal law. *See Greene v. Fisher*, 565 U.S. 34, 40 (2011) ("clearly established Federal law" for purposes of AEDPA means law in effect at the time of the state court decision).

petition. If the Court determines that the rule from *Ramos* is retroactive, it should grant the petition, vacate the Ninth Circuit decision, and remand to the Ninth Circuit to resolve the remaining issues in the case.

Respectfully submitted,

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