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IN THE SUPREME COURT OF THE STATE OF OREGON

JOSE ANTONIO GONZALEZ VERDUZCO, Petitioner-Appellant, Petitioner on Review, v. STATE OF OREGON, Defendant-Respondent, Respondent on Review.	Yamhill County Circuit Court Case No. CV110467 CA A153165 S062339

BRIEF OF *AMICUS CURIAE* OFFICE OF PUBLIC DEFENSE SERVICES IN SUPPORT OF BRIEF ON THE MERITS OF PETITIONER ON REVIEW

Petition to review the decision of the Court of Appeals
on an appeal from a judgment of the
Circuit Court for Yamhill County
Honorable RONALD W. STONE, Judge

Order of Summary Affirmance Filed: May 6, 2014
Before: Wollheim, P.J. and Haselton, C.J.

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STATEMENT OF THE CASE

Petitioner filed an untimely and successive petition for post-conviction relief following the United States Supreme Court's decision in *Padilla v. Kentucky*, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284 (2010). At issue before this court is whether the Post-Conviction Hearings Act's "escape clauses" exempt the petition from procedural bars. The Court decided *Padilla* after petitioner's conviction became final. Accordingly, this court must also decide whether petitioner may rely on *Padilla* as a basis for his petition.

This court invited the Office of Public Defense Services to brief the issues as *amicus curiae*.

Questions Presented and Proposed Rules of Law

First Question Presented

When do the "escape clauses" in ORS 138.510(3) and ORS 138.550(3) exempt a petition for post-conviction relief from procedural bars?

First Proposed Rule of Law

ORS 138.510(3) requires a petitioner to file a petition for post-conviction relief within two years of the date that his conviction becomes final unless the petition includes "grounds for relief asserted which could not reasonably have been raised" in a timely petition. ORS 138.550(3) prohibits successive petitions

for post-conviction relief unless the successive petition includes "grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition."

"Grounds for relief" are the legal and factual elements of a post-conviction pleading entitling a petitioner for relief. A ground for relief "could not reasonably have been raised" if it is based on new facts or law that did not provide a remedy during the two-year period or upon the filing of the original petition. The newly available ground for relief may be asserted in a single petition within two years from the date it becomes available.

Second Question Presented

May a post-conviction petitioner rely on rules of law announced after his conviction becomes final?

Second Proposed Rule of Law

Yes. The federal "retroactivity" doctrine limiting the use of certain rules of constitutional law in federal habeas corpus cases is inapplicable in Oregon post-conviction cases governed by the Post-Conviction Hearings Act.

Summary of Argument

In 1959, the Oregon legislature enacted the Post-Conviction Hearing Act (PCHA). The PCHA is the exclusive means by which a person convicted of an Oregon crime may collaterally attack his conviction or sentence in state court.

Its purpose is to grant eligible petitioners a state remedy irrespective of whether they would be entitled to a remedy in federal court.

The legislature enacted the successive petitions rule and, later, the limitations period to save judicial resources by limiting repetitive and non-meritorious petitions. Neither rule imposes an absolute bar; the legislature created escape clauses to ensure that eligible petitioners have access to a state remedy. The escape clauses do not exempt every meritorious petition from procedural bars. But the legislature intended to provide an *opportunity* for a petitioner to raise each meritorious ground for relief. The escape clauses effectuate that purpose.

The legislature contemplated that newly discovered evidence or newly announced law could create new grounds for relief. The escape clauses thus excuse compliance with procedural bars in circumstances in which the ground for relief is newly available. A ground for relief "could not reasonably have been raised" if it is founded on new facts or law that did not provide a remedy during the two-year period or upon the filing of the original petition. The newly available ground for relief may be asserted in a single petition within two years from the date it becomes available. When a new rule of law provides a ground for relief, the limitations period begins to run upon the announcement of the new rule. The statutes' text, context, and legislative history so dictate.

In federal habeas corpus cases, a petitioner may not rely on certain rules announced after the date that the petitioner's conviction became final. The United States Supreme Court announced the federal "retroactivity" doctrine in *Teague v. Lane*, 489 US 288, 109 S Ct 1060, 103 L Ed 2d 334 (1989).

The *Teague* analysis is inapplicable to Oregon's post-conviction scheme. The federal courts' authority to engage in the analysis derives from the federal habeas corpus statute. There are two primary rationales underlying *Teague*: comity towards state courts and finality of state convictions. Concerns regarding comity and federalism are unique to federal courts. And finality is a policy question upon which the Oregon legislature has conclusively spoken. That is, the Oregon legislature expressed its view on retroactivity by creating escape clauses that provide post-conviction petitioners the benefit of a change in the law.

In this case, petitioner filed his petition for post-conviction relief following the United States Supreme Court's decision in *Padilla*. As grounds for relief, he raises, *inter alia*, his trial counsel's ineffectiveness under the Sixth Amendment due to her failure to advise him of the immigration consequences of his plea of guilty.

The petition is both untimely and successive, but it is not procedurally barred. The grounds for relief that petitioner raises were not available until the Court decided *Padilla*. And petitioner filed his petition within two years from

the date that the new grounds for relief became available. Accordingly, the escape clauses apply. This court should remand the case to permit the trial court to consider the merits of the petition.

Statement of Procedural Facts

Petitioner pleaded guilty to one count of delivery of marijuana on January 12, 2004. Judgment,[1] Trial Court File. His petition to enter a guilty plea provided, "I understand that a criminal conviction of a person who is not a United States citizen may result in deportation, exclusion from admission to the United States or denial of naturalization." Plea Petition, Trial Court File. The trial court imposed a sentence of probation. Judgment, Trial Court File.

On January 24, 2006, petitioner filed a timely petition for post-conviction relief. Petition for Post-Conviction Relief (2006), Trial Court File. In the petition, he raised ineffective assistance of counsel under Article I, section 11, of the Oregon Constitution and the Sixth Amendment to the United States Constitution based on counsel's failure to advise him that he would be subject to mandatory deportation if convicted of the crime to which he pleaded guilty. *Id.* The petition also alleged that petitioner's plea of guilty was "involuntary and unknowing because [he] was misadvised of the required immigration consequences of his conviction." *Id.*

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[1] The judgment was entered on January 27, 2004.

The post-conviction court denied relief in a letter opinion. Opinion Denying Relief (2006), Trial Court File. The court concluded that counsel's performance was not deficient under either the state or federal constitutions, relying on this court's then-recent opinion in *Gonzalez v. State*, 340 Or 452, 134 P3d 955 (2006), to resolve the state law claim. *Id.* Petitioner was deported on approximately July 7, 2006. Petition for Post-Conviction Relief (2011), Trial Court File.

On October 12, 2011, petitioner filed a second post-conviction petition for relief. *Id*. Petitioner moved for relief from the two-year-limitations period and rule against successive petitions on the ground that his petition relied on the then-recent United States Supreme Court opinion in *Padilla v. Kentucky*, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284 (2010). *Id.* The petition again raised counsel's ineffectiveness under the state and federal constitutions and the constitutional validity of the guilty plea as grounds for relief. *Id.*

The post-conviction court denied relief in a letter opinion, concluding that the petition was untimely and unreviewable as a successive petition. Opinion Denying Relief (2011), Trial Court File.

Petitioner appealed, and the Court of Appeals summarily affirmed the denial of relief. Order of Summary Affirmance, A153165 (May 6, 2014). The order provides,

> "Respondent moved pursuant to ORS 138.660 for summary affirmance on the ground that the appeal does not present a substantial question of law. The court determines, for the reasons articulated in respondent's motion, appellant's brief does not present a substantial question of law. *Chaidez v. United States*, 568 US ___, 133 S Ct 1103 (2013); *Saldana-Ramirez v. State of Oregon*, 255 Or App 602, 298 P3d 259 (2013). The motion is granted."

Id.

Argument

The petition for post-conviction relief in this case is founded on the newly announced rule in *Padilla*. It presents grounds for relief that were not available until that decision, and it is thus not procedurally barred. *Padilla* is not retroactive in federal habeas corpus cases. But this is not a federal habeas case, and the retroactivity analysis does not apply. This court should remand petitioner's case to the post-conviction trial court to permit it to consider the merits of the petition, including whether petitioner satisfies the prejudice prong of the ineffective assistance of counsel test.

The argument has three parts. In Part I, *amicus* interprets the statutory escape clauses to determine the legislature's intent. In Part II, *amicus* examines the federal retroactivity doctrine, concluding that it is inconsistent with the PCHA as the legislature intended it to operate. Finally, in Part III, *amicus* applies the preceding rules of law to the present case.

I. The legislature intended to create a forum for post-conviction litigants to raise adequate grounds for relief.

The Post-Convictions Hearings Act (PCHA) was the 1959 Legislative Assembly's comprehensive answer to the questions of who is entitled to post-conviction relief and how he or she must proceed in procuring it. *Ware v. Hall*, 342 Or 444, 449, 154 P3d 118 (2007) (The PCHA "both created a right to post-conviction relief and established a comprehensive set of procedures for resolving post-conviction claims."). Oregon case law and developments in federal law had exposed "[a]pparent constitutional defects in Oregon post-conviction procedure." Jack G. Collins and Carl R. Neil, *The Oregon Post-Conviction Hearing Act*, 39 Or L Rev 337, 339 (1960). State remedies had included (at least): (1) habeas corpus under the Oregon Constitution and statutes, (2) the writ of coram nobis, (3) motions to correct the record, and (4) motions to vacate the judgment. *Id.* at 337.

As it exists today, the PCHA defines the substantive grounds upon which relief may be sought and when a court must grant relief, ORS 138.530, the scope of remedies for a successful petition for post-conviction relief, ORS 138.510, and the procedures for litigants and courts when filing and processing petitions for relief. ORS 138.510-138.680; *see generally Ogle v. Nooth*, 355 Or 570, 577-78, 330 P3d 572 (2014) (outlining procedures for pleading and resolving post-conviction claims). This case involves two of the rules

governing claims for relief under the PCHA: that claims must appear in a single petition and that claims must be filed within a specified limitations period. ORS 138.550(3) (rule against successive petitions); ORS 138.510(3) (two-year statute of limitations).

The successive petitions rule, which appeared in the original PCHA, provides,

> "All grounds for relief claimed by petitioner in a petition pursuant to ORS 138.510 to 138.680 must be asserted in the original or amended petition, and any grounds not so asserted are deemed waived unless the court on hearing the subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition."

ORS 138.550(3).

The original Act did not include a limitations period. In 1989, the legislature added a 120-day deadline by which a petitioner must file a petition for relief. Or Laws 1989, ch 1053, § 18. In 1993, the legislature expanded the limitations period to two years. Or Laws 1993, ch 517, § 1. The statute currently provides,

> "A petition pursuant to ORS 138.510 to 138.680 must be filed within two years of the following, unless the court on hearing a subsequent petition finds grounds for relief asserted which could not reasonably have been raised in the original or amended petition:
>
> "(a) If no appeal is taken, the date the judgment or order on the conviction was entered in the register.
>
> "(b) If an appeal is taken, the date the appeal is final in the Oregon appellate courts.

> "(c) If a petition for certiorari to the United States Supreme Court is filed, the later of:
>
> "(A) The date of denial of certiorari, if the petition is denied; or
>
> "(B) The date of entry of a final state court judgment following remand from the United States Supreme Court."

ORS 138.510(3).

Both rules include nearly identical "escape clause" provisions, providing an exception to the procedural bars when the petitioner presents "grounds for relief which could not reasonably have been raised." Which "extraordinary circumstances" exempt post-conviction petitions is a question of legislative intent. *Bartz v. State*, 314 Or 353, 358, 839 P2d 217 (1992) (indicating that the escape clauses apply in "extraordinary circumstances"). To determine legislative intent, this court considers statutory text, *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993), statutory context, *State v. Toevs*, 327 Or 525, 532, 964 P2d 1007 (1998), and legislative history, *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009). If the legislature's intent remains ambiguous after that analysis, the court may consider canons of statutory construction. *Gaines*, 346 Or at 172.

A. The plain text and context of the escape clauses indicate that the legislature intended to allow a petitioner to raise newly available grounds for relief.

Statutory text and context provide the best evidence of the legislature's intent. *Gaines*, 346 Or at 171. This court gives words of common usage their

plain and ordinary meanings. *Ogle*, 355 Or at 578. When the words of a statute "are used in the context of a legal proceeding such as a post-conviction proceeding, they may be used as legal terms of art and, if so, [the court] give[s] precedence to their legal meanings." *Id.*

The function of the text in the escape clauses is to provide an exception to the respective rule. And the text of the rule informs the meaning of the exception. Again, the successive petitions rule provides,

> "All grounds for relief claimed by petitioner in a petition pursuant to ORS 138.510 to 138.680 must be asserted in the original or amended petition, and any grounds not so asserted are deemed waived unless the court on hearing the subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition."

ORS 138.550(3). The components of the rule and exception are uncomplicated: a petitioner raises "grounds for relief" in a petition. Any unraised "grounds for relief" are waived. But a "subsequent petition" is permissible if it raises "grounds for relief" that "could not reasonably have been raised" in the first petition.

The escape clause to the limitations period includes similar components. The statute provides,

> "A petition pursuant to ORS 138.510 to 138.680 must be filed within two years of [the date the conviction becomes final], unless the court on hearing a subsequent petition finds grounds for relief asserted which could not reasonably have been raised in the original or amended petition."

ORS 138.510(3). By the statute's plain text, a petitioner has two years within which to file a petition. "[T]he exception * * * does not require the filing of a timely 'original or amended' petition as a prerequisite to the filing of an untimely petition." *Bartz*, 314 Or at 558. Accordingly, an untimely petition is permissible if it presents "grounds for relief" that "could not reasonably have been raised" in a timely petition.

Each escape clause contains similar components. To trigger either escape clause, the petitioner must present (1) "grounds for relief." Those "grounds for relief" are qualified; they (2) "could not reasonably have been raised." *Where* the "ground for relief" "could not reasonably have been raised" depends on the source of the escape clause. For successive petitions, the "ground for relief" "could not reasonably have been raised" (3a) in the first petition. For untimely petitions, the "ground for relief" "could not reasonably have been raised" (3b) in a timely petition.

1. "Grounds for relief" are the legal and factual elements of a post-conviction claim entitling a petitioner to relief.

The statutory term "grounds for relief" is a term of art with a specified legal meaning. "Ground" was defined as "[a] foundation or basis; points relied on" at the time that the legislature enacted the PCHA. *Black's Law Dictionary* 832 (4th ed 1957). A "ground of action" was "[t]he basis of a suit; the foundation or fundamental state of facts on which an action rests; the real object

of the plaintiff in bringing his suit." *Id*. Those definitions indicate that the legislature intended "grounds for relief" in the escape clauses to refer to the basis for the petitioner's assertion that the PCHA permits him a remedy of law.

The PCHA defines the "grounds for relief" that entitle a petitioner to a post-conviction remedy. ORS 138.530(1) provides,

> "Post-conviction relief pursuant to ORS 138.510 to 138.680 shall be granted by the court when *one or more of the following grounds* is established by the petitioner:
>
> "(a) A substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void.
>
> "(b) Lack of jurisdiction of the court to impose the judgment rendered upon petitioner's conviction.
>
> "(c) Sentence in excess of, or otherwise not in accordance with, the sentence authorized by law for the crime of which petitioner was convicted; or unconstitutionality of such sentence.
>
> "(d) Unconstitutionality of the statute making criminal the acts for which petitioner was convicted."

(Emphasis added). Similarly, ORS 138.580, defining what a petitioner must allege in a petition for post-conviction relief, provides in pertinent part, "The petition shall set forth specifically the *grounds upon which relief is claimed*, and shall state clearly the relief desired." (Emphasis added).

"When the legislature uses the identical phrase in related statutory provisions that were enacted as part of the same law, [this court] interpret[s] the

phrase to have the same meaning in both sections." *Tharp v. PSRB*, 338 Or 413, 422, 110 P3d 103 (2005). And the legislature did not simply invoke the same language in the escape clauses as in ORS 138.530(1). Rather, the term "grounds" in the latter defines the allegations that a post-conviction petitioner may plead in order to obtain relief. In context, those same "grounds" – the "grounds for relief" – are the substance of the pleadings in an untimely or successive petition (and, for that matter, in a first timely petition).

This court so indicated in *Datt v. Hill*, 347 Or 672, 678-69, 227 P3d 714 (2010). There, the court interpreted the provision of the PCHA requiring a post-conviction trial court to "clearly state the grounds on which the cause was determined, and whether a state or federal question was presented and decided," ORS 138.640(1), in a post-conviction judgment. 347 Or at 674. The court concluded that the provision requires a post-conviction judgment to, "at minimum," identify the claims for relief considered and make separate rulings on each claim, declare whether the denial of a claim is based on a procedural failing or the merits, and "make the legal bases for denial of relief apparent." *Id.* at 685. In reaching that conclusion, the court contrasted the term "grounds" as it appears in the judgment statute with "grounds" as it appears in ORS 138.530(1), the statute defining the permissible "grounds" upon which a petitioner may found his petition for relief:

> "Indeed, in that provision of the act [(ORS 138.530(1))], the legislature appears to have used the word 'grounds' to mean the 'types of claims' that a petitioner may bring. The 'grounds' or 'types of claims' that give rise to post-conviction relief are those in which a petitioner asserts a denial of constitutional rights, lack of jurisdiction, excessive sentence, or the unconstitutionality of a statute."

Id. at 678.

That definition is consistent with this court's prior interpretations of the escape clause. In *Bartz*,[2] this court considered whether an untimely petition for relief satisfied the escape clause. 314 Or at 357-60. This court described the petitioner's "grounds for relief" as follows: "The next question is whether the ground for relief asserted by [the petitioner] – the failure of his trial counsel to advise him of a possible statutory defense – is one that could not reasonably have been raised within 120 days after [his] conviction became final." *Id.* at 358. *See also Church v. Gladden*, 244 Or 308, 417 P2d 993 (1966) (considering whether the following "grounds for relief" could be raised in a successive petition: that the "trial court was without jurisdiction to receive [the] petitioner's plea of guilty to second-degree murder because second-degree murder is not a lesser included crime of first-degree felony murder" and that "[t]he indictment * * * was based solely on testimony which was legally inadmissible"). Thus, a "ground for relief" is the legal and factual elements of a

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[2] *Bartz* involved two petitioners. *Amicus* limits its discussion to petitioner Bartz's case.

post-conviction claim entitling a petitioner to relief. Whether a particular "ground for relief" may be asserted in an untimely or successive petition depends on whether it "could not reasonably have been raised" in a timely first petition.

2. The standard "could not reasonably have been raised" focuses on when in time a particular "ground" entitles a petitioner to relief.

The meaning of "could not reasonably have been raised" is less definite than "grounds for relief." Necessarily so; the standard is a flexible one intended to capture various "extraordinary circumstances" justifying an untimely petition. This court's decisions illustrate those circumstances.

In *Bartz*, the petitioner filed a petition for post-conviction relief after the then-120-day filing deadline. 314 Or at 358. The untimely petition raised ineffective assistance of trial counsel based on counsel's failure to advise the petitioner of possible statutory defenses. *Id.* This court rejected the petitioner's argument that the escape clause applied, holding that his claim for relief could have been raised in a timely petition. *Id.*

The court identified three examples from legislative history of "extraordinary circumstances" that permit an untimely petition: (1) evidence "newly discovered after the expiration of the limitations period;" (2) "collusion between a prosecutor and a defense lawyer" discovered after the limitations period; and (3) "situations in which the statute under which the conviction was

obtained is later declared facially unconstitutional." *Id.* 359. The court summarized the legislative history as follows:

> "In general, those examples involve information that did not exist or was not reasonably available to a defendant within the 120-day period following conviction. The legislative history thus suggests that the exception in ORS 138.510(2) is meant to be construed narrowly."

Id. In petitioner Bartz's case, there was no indication that his untimely claim for relief derived from a change in the law or newly discovered factual circumstances. To the contrary, as this court noted, the statutory defenses that his trial attorney failed to advise him of "constitute[d] information that [was] reasonably available to a defendant convicted of that offense." *Id.* That is, the ground for relief was just as available to the petitioner on the 121st day after his conviction as it was on the first day after his conviction.

In *Church*, the petitioner filed a successive petition for relief raising various grounds for relief, including two that he had not previously raised and one that he raised but upon which he "was not given a fair and complete hearing[.]"[3] 244 Or at 310-11. With regard to the unraised claims, the petitioner argued that the escape clause applied because his court-appointed

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[3] The petitioner brought an additional ground for relief that the court refused to reach because the federal case upon which the petitioner relied, *Escobedo v. Illinois*, 378 US 478, 84 S Ct 1758, 12 L Ed 2d 977 (1964), had not been applied retroactively by federal courts. *Church*, 244 Or at 313. The federal retroactivity analysis in no way binds Oregon courts. *Danforth v. Minnesota*, 552 US 264, 128 S Ct 1029, 169 L Ed 2d 859 (2008). *See* Part II, *infra*.

post-conviction attorney refused to raise them in the first petition for relief. *Id.* And with regard to the previously raised claim, the petitioner argued that three witnesses had not been present to testify, even though counsel had promised that they would do so. *Id.*

Neither argument satisfied the escape clause; "If [the] petitioner's attorney in the first post-conviction proceeding failed to follow any legitimate request, [the] petitioner could not sit idly by and later complain." *Id.* at 311. Accordingly, under *Church*, post-conviction counsel's failure to raise an issue in a first petition does not itself mean that that issue "could not reasonably have been raised"[4] for purposes of the escape clause. *See also Barber v. Gladden*, 215 Or 129, 132-33, 332 P2d 641 (1958) (rejecting successive pre-PCHA habeas petition on the ground that "[t]here is nothing in the record to show that the issues presented on this appeal could not have been presented in the first habeas corpus proceeding brought by the plaintiff in December 1955.").

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[4] Although not at issue here, *amicus* submits that ineffective assistance of post-conviction counsel should provide an exception to the procedural bars in the PCHA in certain circumstances. *Cf. Martinez v. Ryan*, ___ US ___, ___, 132 S Ct 1309, 1315, 182 L Ed 272 (2012) (holding that ineffective assistance of post-conviction counsel during an initial post-conviction challenge may excuse procedural default in federal habeas corpus case alleging ineffective assistance of trial counsel). *See also McClure v. Maass*, 307 Or 606, ___ P3d ___ (1989) (Linde, J., dissenting from order denying review) (court should consider whether ineffective assistance of post-conviction counsel provides an exemption from procedural bars in the PCHA).

Bartz and *Church* establish that a ground for relief "could not reasonably have been raised" if it is based on information that was not available during the limitations period. But new information is not itself sufficient. A petitioner must prove that the new information creates a ground for relief. *See* Collins and Neil, 39 Or L Rev at 346 ("Newly discovered evidence is not a ground for relief under the act."). Put another way, it is the newfound availability of a "ground for relief," not new evidence, that triggers the escape clauses.

When in time a "ground for relief" becomes available is a familiar inquiry. Indeed, the same analysis applies when determining when statutes of limitations begin to run in other legal contexts. *See, e.g., Stevens v. Bisphem*, 316 Or 211, 851 P2d 556 (1993) (analyzing commencement of statute of limitations for a legal malpractice claim against a criminal defense attorney by a prisoner). A statute of limitations commences when the claim accrues, and a claim accrues when "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment" occurs. *U.S. Nat'l Bank v. Davies*, 274 Or 663, 666-67, 548 P2d 966 (1976) (quoting Michael Franks, *Limitations of Actions* 11 (1959)).

The "could not reasonably have been raised" standard operates similarly to the common law discovery accrual rule. The rule is pragmatic:

> "To say that a cause of action accrues to a person when she may maintain an action thereon and, at the same time, that it accrues before she has or can reasonably be expected to have knowledge of any wrong inflicted upon her is patently inconsistent and unrealistic. She cannot maintain an action before she knows she has one. To say to one who has been wronged, 'You had a remedy, but before the wrong was ascertainable to you, the law stripped you of your remedy,' makes a mockery of the law."

T.R. v. Boy Scouts of America, 344 Or 282, 291, 181 P3d 758 (2008) (quoting *Berry v. Branner*, 245 Or 307, 312, 421 P2d 996 (1966)). Under the discovery accrual rule, the limitations period begins to run "from the earlier of two possible events": (1) the date the claimant actually discovers the injury creating the cause of action, or (2) the date a person exercising reasonable care should have discovered the injury. *Rice v. Rabb*, 354 Or 721, 725, 320 P3d 554 (2014).

The legal elements of a post-conviction claim are, unremarkably, set by law. Newly announced law may create a ground for relief that did not previously exist. In that circumstance, the escape clause is triggered by the pronouncement of the new law (*e.g.*, the announcement of a rule of constitutional law establishing that a constitutional violation upon which the petitioner's conviction was obtained "rendered the conviction void," ORS 138.530(a)). If the new law is announced after the filing of the first petition, the successive petitions escape clause applies. The claim accrues upon the announcement of the new law. Accordingly, the announcement of the law

creating the "elements of the [new] cause of action" commences the two-year post-conviction limitations period.

Alternatively, the discovery of a new ground for relief may be founded on new facts. Again, those new facts must support a new ground for relief to trigger the escape clauses. Whether the new claim has accrued may be analyzed with reference to the familiar discovery accrual formula. *See, e.g.*, *Stevens*, 316 Or at 227 (in legal malpractice suit "the claim accrues and the statute of limitations begins to run when the client both suffers damage and knows or, in the exercise of reasonable care, should know that the substantial damage actually suffered was caused by the lawyer's acts or omissions." (quotation marks and emphasis omitted)). If the new facts supporting the new ground for relief were discovered or reasonably should have been discovered when the petitioner filed his first petition, the successive petitions escape clause does not apply. And the limitations period runs from the date that the claim accrues; the two years begins to run on the date that the petitioner discovered or reasonably should have discovered the facts underlying his ground for relief.

The examples provided in *Bartz* offer illustrations. The first example, newly discovered evidence, might not alone constitute grounds for relief. But say, for instance, it was discovered that the prosecutor withheld material and prejudicial exculpatory facts. In that circumstance, the *Brady* violation would constitute both the new information *and* grounds for relief. *Cf. Banks v. Dretke*,

540 US 668, 698, 124 S Ct 1256, 157 L Ed 2d 1166 (2004) (*Brady* violation excused procedural default in federal habeas corpus case). The limitations period would run from the discovery of the violation, and a successive petition would be justified if the violation were discovered after the first filing.

Similarly, the second example – collusion between a prosecutor and a defense lawyer – could provide both new information and a ground for relief. Among other possible remedies, the petitioner could raise counsel's ineffectiveness under Article I, section 11, and the Sixth Amendment as grounds for relief. The limitations period would commence upon the discovery of the collusion. *See* ORS 12.110 ("[I]n an action at law based upon fraud or deceit, the limitat[ions period] shall be deemed to commence only from the discovery of the fraud or deceit."). Whether the petitioner was prejudiced would be resolved at a merits hearing.

The third example illustrates a scenario where both the ground for relief and the new information are patent. The example posits "situations in which the statute under which the conviction was obtained is later declared facially unconstitutional." If the ground for relief – the unconstitutionality of the statute – did not provide a remedy during the limitations period or upon the original filing, the escape clauses are triggered. The claim accrues from the date the

statute is declared unconstitutional, and, accordingly, the limitations period begins to run on that date.[5]

As explained below, the escape clauses further a basic objective of the PCHA: to provide a forum for those entitled to a post-conviction remedy to obtain relief. The class of petitioners entitled to relief is narrow. *See, e.g.,* ORS 138.530(a) (a "substantial denial" of a constitutional right that "rendered a conviction void" entitles a petitioner to relief). The PCHA affords each member of that class an opportunity to raise errors of statutorily-defined magnitude. If a remedy was available *before* the conviction became final, trial (or appellate) counsel was constitutionally ineffective for failing to raise it. In that circumstance, the petitioner must raise counsel's ineffectiveness in a timely petition to obtain post-conviction relief. But if the remedy was available only *after* the limitations period, the escape clauses permit an untimely petition.

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[5] The successive petitions rule and the limitations period are not preservation rules. In contrast, ORS 138.550(1) generally requires a petitioner to have raised substantive post-conviction issues at trial and on direct appeal. *Palmer v. State*, 318 Or 352, 356, 867 P2d 1368 (1994); *North v. Cupp*, 254 Or 451,455, 461 P2d 271 (1969). The exceptions to that rule are similar to the exceptions discussed here. *Id.* But the rules serve different functions. That is, the *North* exceptions apply where a petitioner raises a ground that "could not reasonably have been raised" at trial or on direct appeal, but the *North* exceptions do not otherwise define or limit the scope of the escape clauses for the successive petition rule and the limitations period.

B. The legislature intended to create an independent post-conviction system that grants eligible petitioners a state remedy.

The 1959 Legislative Assembly took up the issue of state collateral review in response to national and local calls for reform. Collins and Neil, 39 Or L Rev at 337-40. The PCHA fit within a criminal justice system subject to close legislative control. The result was a comprehensive system; "[t]he legislature has seen fit to control very fully the criminal justice process from pre-trial proceedings through post-conviction relief proceedings, and to provide for nearly all conceivable contingencies that might arise as a case makes its way through that system." *Stevens*, 316 Or at 230. The comprehensiveness of that landscape "demonstrates the legislature's intention that only those persons deserving of a conviction will be, or will remain, convicted." *Id.* *See also State v. Cloran*, 233 Or 400, 412, 377 P2d 911 (1963) (the PCHA "was designed * * * to provide a remedy for any denial of constitutional rights or to correct an excessive sentence.").

House Bill 590, which became the PCHA, was founded in part on the 1955 Uniform Post-Conviction Procedure Act (UPCPA). *Id.* at 340. The UPCPA derived from a report prepared for the Conference of Chief Justices concluding that "many of the abuses which had arisen in connection with federal habeas corpus and other post-conviction remedies might be eliminated through constructive action at the state level." UPCPA Prefatory Statement, 3

(1955). Those abuses included "long delays and years of illegal imprisonment which result because of inadequate reviewing procedures and the maze of remedies that exist." *Id.* at 7. In the words of the drafters,

> "The difficulties arising out of the present system are clearly traceable to the multiplicity and indefiniteness of existing post-conviction remedies. The aim of the proposed Uniform Post-Conviction Procedure Act is to clarify and simplify present procedures through consolidating them into a single action and so to eliminate the confusion of cases that now burden the courts, and at the same time provide for the petitioner a more complete protection than he now has in his assertion of valid claims."

Id. at 9.

The 1959 Act did not include a limitations period. Or Laws 1959, ch 636, §15. The original PCHA provided, "A petition pursuant to this Act may be filed without limit in time." *Former* ORS 138.510(2) (1959). Legislators feared that a time limitation would create "harsh results" because "[a] layman convicted of a crime may be unaware of legal remedies for procedural defects in his conviction until the limited time has expired." Collins and Neil, 39 Or L Rev at 361. That is, the drafters did not intend to prevent the filing of a valid post-conviction claim. *Id.* The drafters of the Uniform Act also decided against the inclusion of a statute of limitations; "[t]he decision was that this would be unwise and that any limitation of this sort might raise a question as to the constitutionality of the act." UPCPA, § 1 Comment, 11 (1955). That policy – the provision of a forum for litigants to raise valid claims without regard to time

– continued beyond the legislature's eventual incorporation of a limitations period.

The original PCHA included the same successive petitions rule that appears today. That rule, including the escape clause, was imported from the UPCPA. UPCPA § 8, 15 (1955). A comment appended to the Uniform Act explained,

> "Many petitions for habeas corpus or other post-conviction relief are repetitious; others are specious. This places an unnecessary burden upon the courts. It is highly desirable that a petitioner be required to assert all of his claims in one petition. His failure to assert them constitutes a waiver. The way is left open, however, for a subsequent petition if the court finds grounds for relief that could not reasonably have been raised in the original petition."

Id. The escape clause ensured that valid claims could be raised at least once, consistently with the policy underlying the decision to omit a time bar.

The successive petitions provision was intended to "codif[y] the holding" in *Barber*, a pre-PCHA state habeas case. Collins and Neil, 39 Or L Rev at 357. As the court noted in *Barber*, common law *res judicata* had not previously applied in state habeas proceedings. *Johnson v. Premo*, 355 Or 866, 874, ___ P3d ___ (2014). But ORS 34.710, providing that "[n]o question once finally determined upon a proceeding by habeas corpus shall be reexamined upon another proceeding of the same kind[,]" was "a legislative declaration that the principle of res judicata is applicable to habeas corpus proceedings[.]" *Barber*,

215 Or at 133. That meant that, under *Barber*, a trial court presented with a successive habeas corpus application was required to dismiss grounds "which *could have been alleged*" in a prior application for the writ. *Id.* at 134 (emphasis in original).

The legislature added the 120-day limitations period in 1989. Or Laws 1989, ch 1053, § 18. That provision was adopted in Senate Bill 284, a fiscal savings measure that initially proposed the elimination of the PCHA. Due to widespread concerns from the defense and prosecution bars, the legislature rejected the proposal to eliminate the PCHA entirely and replaced it with House Bill 2796, which included the 120-day limitations period and escape clause. Tape Recording, House Judiciary Civil and Judicial Administration Subcommittee Minutes, SB 284, June 12, 1989, Tape 120, Side B (statement of State Court Administrator Bill Linden).

House Bill 2796 was sponsored by Representative Ray Baum and supported by the Department of Justice as an effort to reduce the number of non-meritorious post-conviction filings. Tape Recording, House Judiciary Crime and Corrections Subcommittee Minutes, HB 2796, March 9, 1989, Tape 45, Side A. Assistant Attorney General Nancy Womack testified in support of the bill, stating that the older post-conviction cases became, the more difficult and expensive it became to litigate them. *Id.* at Tape 44, Side A. As proposed, the bill did not include an escape clause; the 120-day limit was an absolute bar.

That troubled American Civil Liberties Union Executive Director Stevie Remington, who opposed the bill as written. *Id.* at Tape 45, Side A. Remington testified that the strict 120-day deadline would prevent persons convicted of crimes under a statute that is declared unconstitutional after the deadline from filing a petition. *Id.* Remington was particularly concerned that persons who were not eligible for federal habeas corpus relief because they had been released from prison would not have a chance to "clear" their "names":

> "Not all people who call for post-conviction relief are * * * in prison. Some people are out of prison and trying to clear their name of an unjustified sentence. * * * Secretly people really want their record clear and they want the court to say that they were unjustly charged. It is my understanding that [federal] habeas corpus cannot be used after serving the sentence."

Minutes, House Judiciary Crime and Corrections Subcommittee, HB 2796, March 9, 1989, 5.

To address those and other concerns, including consistency with the successive petitions rule, State Court Administrator Bill Linden proposed the escape clause, which mirrored the language of the existing successive petitions rule escape clause. Testimony, House Judiciary Crime and Corrections Subcommittee, HB 2796, March 9, 1989, Ex G. The subcommittee unanimously adopted the escape clause amendment on April 4, 1989. Minutes, House Judiciary Crime and Corrections Subcommittee, HB 2796, April 4, 1989, 8. Representative Kevin Mannix explained the amendment to the

subcommittee, noting that it responded to concerns regarding the later-discovered unconstitutionality of a statute and indicating that the amendment creates "an escape valve." Tape Recording, House Judiciary Crime and Corrections Subcommittee, HB 2796, April 4, 1989, Tape 60, Side B. Legislative Counsel Jo Ellen Zucker explained the amended bill to the full committee:

> "As amended, the bill provides an exception to the strict requirement for cases in which a petitioner discovers information after the time limit and that information could not reasonably have been raised earlier."

Tape Recording, House Judiciary Committee, HB 2796, April 18, 1989, Tape 30, Side A.

When HB 2796 was incorporated into SB 284, State Court Administrator Linden explained that the limitations period would reduce the cost of administering the PCHA by reducing the number of expensive non-meritorious filings; in his words, the limitations period "takes away the opportunity for defendants with perhaps a little bit of time on their hands to * * * file post-conviction petitions at periods of time that are quite extended from when they were actually convicted." *Id.* The Chair of the Oregon State Bar's Indigent Defense Committee explained that the limitations period addressed situations where an inmate "dream[s] up" an "issue of the adequacy of counsel" four or five years after he is convicted. *Id.* at Tape 122, Side A. In those

circumstances, it was expensive and time-intensive to revive the record for an ultimately frivolous issue. *Id.* Oregon Criminal Defense Lawyers Association representative Ross Shepard supported the limitations period with the inclusion of an escape clause "if extraordinary circumstances could be shown." *Id.* "As examples, he mentioned convictions procured by collusion between a prosecutor and a defense lawyer, but coming to light after the limitations period, and situations in which the statute under which the conviction was obtained is later declared facially unconstitutional." *Bartz*, 314 Or at 359 (citing Minutes, House Committee on the Judiciary, Subcommittee on Civil and Judicial Administration, June 12, 1989, 12-13).

Ultimately, the 1959 Legislative Assembly intended to create a scheme that did more than provide a checkpoint on the road to federal habeas corpus relief; the legislature intended to grant eligible petitioners – including those without grounds for federal relief – a state remedy. The legislature enacted the successive petitions rule and, later, the limitations period to save judicial resources by limiting repetitive and non-meritorious petitions. Neither rule imposes an absolute bar; the legislature created escape clauses to ensure that eligible petitioners have access to a state remedy. The escape clauses do not exempt every meritorious petition from procedural bars. But the legislature

intended to provide an *opportunity* for a petitioner to raise each meritorious ground for relief. The escape clauses effectuate that purpose.

II. A petitioner who satisfies the PCHA is entitled to relief regardless of whether federal courts apply federal precedent retroactively.

The PCHA creates trial and appellate court jurisdiction over post-conviction cases. ORS 138.530 (describing when a trial court must grant post-conviction relief); ORS 138.650 (creating appellate jurisdiction). And it defines when a court *must* grant post-conviction relief. ORS 138.530. This court has nonetheless imposed an additional hurdle upon post-conviction petitioners: "retroactivity."

In *Miller v. Lampert*, 340 Or 1, 5-13, 125 P3d 1260 (2006), this court considered whether a post-conviction petitioner was entitled to relief based on the United States Supreme Court's then-recent decision in *Apprendi v. New Jersey*, 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435 (2000). This court affirmed the trial court's denial of relief, concluding that *Apprendi* did not apply "retroactively" to the petitioner's case. *Miller*, 340 Or at 13. That is, because the Court decided *Apprendi after* the petitioner's conviction was final (but before he filed a petition for post-conviction relief), he was not entitled to the benefit of the *Apprendi* rule. *Id.* To reach that conclusion, the court employed the federal analysis announced in *Teague v. Lane*, 489 US 288, 109 S Ct 1060,

103 L Ed 2d 334 (1989), pursuant to its holding in *Page v. Palmateer*, 336 Or 379, 84 P3d 133 (2004). *Id.* at 7.

As in *Miller*, the post-conviction petitioner in *Page* relied on *Apprendi* as his ground for relief. 336 Or at 382. This court rejected the claim, holding that a state post-conviction court must follow the federal retroactivity analysis when determining whether to apply a federal precedent to a state post-conviction petitioner whose conviction became final before the announcement of the federal precedent:

> "In [*State v. Fair*, 263 Or 383, 387-88, 502, P2d 1150 (1972)[6]], this court * * * correctly stated that it was free to determine the degree to which a new rule of Oregon constitutional law should be applied retroactively. However, the court's

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[6] In *Fair*, this court wrote,

> "We may draw two conclusions from our recent decisions on retroactivity. First, we are free to choose the degree of retroactivity or prospectivity which we believe appropriate to the particular rule under consideration, so long as we give federal constitutional rights at least as broad a scope as the United States Supreme Court requires. Secondly, we have tended to restrict the retroactive application of newly-announced rights, giving them only the application which the Supreme Court has adopted as a minimum. In the present case since we are dealing with a new principle of law which rests entirely on our own Constitution the determination of retroactivity is for us alone. The decisions of the United States Supreme Court are not binding on us, but we may look to those cases for guidance."

263 Or at 387-88. As discussed *infra*, that formulation was incorrect. The *Teague* analysis applies in federal habeas corpus cases not because the Constitution requires it but because the litigant seeks a remedy in federal habeas.

> statement that it also was free to determine the degree to which a new rule of federal constitutional law should be applied retroactively was incorrect. Although that latter conclusion was not necessary to the holding in *Fair*, we nevertheless disavow it."

Page, 336 Or at 387. The court went on to apply the federal *Teague* retroactivity test. *Id.* at 387-90. That was incorrect. The retroactivity analysis does not derive from the source of the right asserted (*i.e.*, the federal versus the state constitution). *See Linkletter v. Walker*, 381 US 618, 629, 85 S Ct 1731, 14 L Ed 2d 601(1965) ("[T]he Constitution neither prohibits nor requires retrospective effect. As Justice Cardozo said, 'We think the Federal Constitution has no voice upon the subject.' (Quoting *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 US 358, 364, 53 S Ct 145, 77 L Ed 360 (1932)). Rather, the retroactivity analysis outlined in *Teague* was a jurisprudential decision unique to the *type of action before the Court* – an appeal from the denial of a petition for a writ of habeas corpus.

The Court so explained in *Danforth v. Minnesota*, 552 US 264, 266, 128 S Ct 1029, 169 L Ed 2d 859 (2008), which it decided after this court's decisions in *Miller* and *Page*.[7] *Danforth* concludes,

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[7] The Court specifically referenced *Page*, noting that "its decision to change course" and follow the *Teague* analysis was "misguided." *Danforth*, 552 US at n 277 n 14.

> "It is thus abundantly clear that the *Teague* rule of nonretroactivity was fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings. It was intended to limit the authority of federal courts to overturn state convictions—not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions."

552 US at 280-81.

Thus, as explained more fully below, the *Teague* nonretroactivity analysis serves a particular purpose (the protection of independent state review) in a particular forum (federal habeas corpus actions). Oregon post-conviction proceedings are governed by statute. The legislature, not the federal courts, determines which Oregon convictions are subject to review and which Oregon petitioners are entitled to relief. It would disrupt that legislative scheme to impose an additional hurdle, particularly one derived from concerns unique to federalism, on state petitioners seeking a state post-conviction remedy.[8]

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[8] This court has on rare occasion held that a newly announced rule in a civil case should apply only prospectively, but its analysis is inapplicable in post-conviction cases. *See, e.g., Peterson v. Temple*, 323 Or 322, 332-33, 918 P2d 413 (1996) (prospectively applying newly announced rule that common law rule against splitting a claim prohibits a plaintiff from maintaining separate actions for injury to person and injury to property arising from the same accident). Factors that guide the determination include whether an "inequitable result" would occur if the rule applied retroactively and whether a litigant "justifiably relied" on the old rule. *Id.*; *Falk v. Amsberry*, 290 Or 839, 847, 626 P2d 362 (1981) (indicating the court's "reluctance to prejudice litigants by applying new pleading or trial practice requirements to cases tried before the announcement of these requirements."). Unlike civil cases involving property interests between private parties, the validity of state-imposed deprivation of liberty is at issue in a proceeding under the PCHA.

A. The federal retroactivity analysis derives from federalism.

The United States Supreme Court took its first step toward modern federal retroactivity jurisprudence in *Linkletter*. At issue in *Linkletter* was whether the rule announced in *Mapp v. Ohio*, 367 US 643, 81 S Ct 1684, 6 L Ed 2d 1081 (1965), applying the Fourth Amendment to the states, governed state court convictions that had become final before the rule was announced. 381 US at 620-22. The Court held that it did not, articulating a three-factor test to determine whether a decision would apply only prospectively: the purpose of the new rule, the reliance placed upon the old rule, and the effect on the administration of justice of retrospective application. *Id.* at 636.

The *Linkletter* test initiated a departure from traditional "Blackstonian" declaratory theory. Paul Mishkin, *The High Court, The Great Writ, and the Due Process of Time and Law*, 79 Harv L Rev 56, 58-60 (1965). Put simply, the declaratory theory posits that courts "'find' or declare a preexisting law and do not exercise any creative function." *Id.* at 59. Or stated in terms of constitutional interpretation: "a newly announced rule necessarily must be applied retroactively as well as prospectively, for it reflects the court's current (and clearest) understanding of what the constitution requires and has always required." Randy Hertz and James Liebman, 2 *Federal Habeas Corpus Practice and Procedure* § 25.2, 1309 (6th ed 2011) (citing *James Beam Distilling Co. v. Georgia*, 501 US 529, 548-49 (1991) (Scalia, J., concurring)).

See also Kermit Roosevelt III, *A Retroactivity Retrospective, With Thoughts for the Future: What the Supreme Court Learned From Paul Mishkin, and What It Might*, 95 Cal L Rev 1677, 1681 (2007) ("By asserting that the authority behind many rules of law is nothing more than the Court, *Linkletter* sapped 'the moral force that gives substance not only to the felt obligation to obey, but to other persuasive attitudes toward the Court that are essential to the Court's effective operation.'" (quoting Mishkin, 79 Harv L Rev at 67)).

One critic of *Linkletter* retroactivity, Justice Harlan, ultimately persuaded the Court that it had taken a wrong turn. *Id.* at 1685. In Harlan's words,

> "We announce new constitutional rules, then, only as a correlative of our dual duty to decide those cases over which we have jurisdiction and to apply the Federal Constitution as one source of the matrix of governing legal rules. We cannot release criminals from jail merely because we think one case is a particularly appropriate one in which to apply what reads like a general rule of law or in order to avoid making new legal norms through promulgation of dicta. This serious interference with the corrective process is justified only by necessity, as part of our task of applying the Constitution to cases before us. Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from this model of judicial review."

Mackey v. United States, 401 US 667, 679, 91 S Ct 1171, 28 L Ed 2d 404 (1971) (Harlan, J., dissenting). But Harlan did not propose the abandonment of nonretroactivity altogether; "[d]rawing heavily on Mishkin's analysis, Justice Harlan argued that the purposes of federal habeas corpus review made it

generally appropriate to judge state-court convictions by the legal standards in effect at the time those convictions became final." Roosevelt, 95 Cal L Rev at 1685 (citing *Desist v. United States*, 394 US 244, 262-63, 394 US 244, 89 S Ct 1030 (1969) (Harlan, J., dissenting)).

A plurality of the Court adopted Harlan's approach in *Teague*. 489 US at 303-06. By its own terms, the *Teague* analysis applies in federal habeas cases, and it treats retroactivity as a threshold question. *Id.* at 300. Under the analysis, if a rule is "new," a presumption of nonretroactivity applies. *Id.* at 301.[9] "New" rules may be applied retroactively only if one of two exceptions are satisfied: (1) the rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to provide," or (2) the rule "requires observance of those procedures that are implicit in the concept of ordered liberty." *Id.* at 311 (quotation marks omitted).[10] The Court identified two bases for the presumption against retroactive application in habeas corpus cases: (1) comity towards states when exercising federal habeas

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[9] For a discussion of the problems that the Court has encountered in applying *Teague*, including in formulating a consistent principle guiding the identification of a "new" rule, see Hertz and Liebman, 2 *Federal Habeas Corpus Practice and Procedure* § 25.5 at 1329-75.

[10] The Court has yet to find a "watershed" rule under the second exception. *Beard v. Banks*, 542 US 406, 417, 124 S Ct 2504, 159 L Ed 2d 494 (2004). *But see* Jennifer H. Berman, *Padilla v. Kentucky: Overcoming Teague's "Watershed" Exception to Non-Retroactivity*, 15 U Pa J Const L 667 (2012) (arguing that *Padilla* is a watershed rule).

review and (2) respect for the finality of state convictions. *Danforth*, 552 US at 279. Neither of those justifications pertains to state post-conviction review.

B. This court should give Oregon post-conviction petitioners the benefit of current state and federal constitutional law to best effectuate the legislature's intent.

The Court's authority to engage in the retroactivity analysis derived from statute. *Danforth*, 552 US at 278. More specifically, the legal basis for the *Teague* test was the statute granting federal courts the authority to grant writs of habeas corpus "as law and justice require." *Id.* at 278 (citing 28 U.S.C. § 2243). The Court had previously interpreted that grant of authority "as an authorization to adjust the scope of the writ in accordance with equitable and prudential considerations." *Id.* (Citing cases so holding). As evidenced by *Teague*, that statutory authority permitted the creation of the nonretroactivity presumption for federal habeas corpus cases. *Id.* ("Since *Teague* is based on statutory authority that extends only to federal courts applying a federal statute, it cannot be read as imposing a binding obligation on state courts."). No parallel authority exists in Oregon.

The PCHA is the sole state post-conviction remedy available to individuals convicted of Oregon crimes. ORS 138.540. The Act is the source of jurisdiction in post-conviction cases. ORS 138.650. And although the legislature provided a post-conviction court discretion to determine *which* remedy to grant, ORS 138.520, *whether* a court may grant relief is non-

discretionary. ORS 138.530 ("Post-conviction relief pursuant to ORS 138.510 to 138.680 *shall* be granted by the court when one or more of the following grounds is established by the petitioner: [listing grounds]." (Emphasis added)). This court has never before held that the PCHA grants it the authority to limit the scope of law that a post-conviction petitioner may rely on in a post-conviction proceeding. Nor should it; the legislature intended to require Oregon courts to grant a post-conviction remedy to all petitioners who qualify for relief under the PCHA.[11]

As explained, the *Teague* retroactivity analysis is a product of federal habeas review designed specifically for courts engaged in federal habeas review. *Danforth*, 552 US at 277 ("A close reading of the *Teague* opinion makes clear that the rule it established was tailored to the unique context of

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[11] Chief Judge Haselton articulated a similar approach in his dissent from the opinion in *Teague v. Palmateer*, 184 Or App 577, 594-603, 57 P3d 176 (2002):

> "[T]he state legislature, in enacting post-conviction statutes, defines the level of burden imposed on the state in terms of relitigating issues in criminal cases after convictions are final. The legislature has, in fact, placed some limitations on when claims will not be considered despite asserted errors of constitutional magnitude. *See, e.g.*, ORS 138.510(3); ORS 139.550(3) (establishing timelines on post-conviction claims and limiting successive petitions * * *). Those limitations are – and are properly – the product of a *state legislative choice*, and not a *federal constitutional command*."

(Emphasis in original).

federal habeas and therefore had no bearing on whether States could provide broader relief in their own postconviction proceedings than required by that opinion."). One of the two central justifications for the *Teague* analysis was the protection of independent state review over state convictions. But concerns arising from federalism and comity do not apply to state collateral review of state convictions. *See, e.g., Cowell v. Leapley*, 458 NW 2d 514 (SD 1990) ("Each sovereign has the right to decide how it will allow access to this extraordinary remedy [state habeas corpus]."). "If anything, considerations of comity militate in favor of allowing state courts to grant habeas relief to a broader class of individuals than is required by *Teague*." *Danforth*, 522 US at 279-80.

The other justification for the rule – the finality of state convictions – is a question reserved to the states. That is, finality "is a matter that States should be free to evaluate and weigh the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal rights by their lower courts." *Id.* at 280. That principle necessarily applies (perhaps even more forcefully) when this court evaluates a violation of state rights by lower state courts. But finality is policy matter, and the PCHA defines the Oregon Legislative Assembly's policy choice regarding the finality of Oregon convictions for purposes of Oregon collateral review.

The Oregon legislature expressed its views on retroactivity by creating escape clauses that provide post-conviction petitioners the benefit of a change in the law. It expressly relied on examples involving a change in the law when it amended the PCHA to include a limitations period and escape clause. *Bartz*, 314 Or at 359. More specifically, it noted that the escape clause should apply "in situations in which the statute under which the conviction was obtained is later declared facially unconstitutional." *Id.* The purpose of the escape clauses was to exempt certain petitioners from procedural bars in order to provide relief. *See supra*, Part I. The legislature did not indicate that the state of the law would "freeze" upon the finality of a criminal conviction. Instead, it created a system that *relies on* the availability of new rules in order to define the class of petitioners able to file a petition and obtain relief.

Oregon courts deliberately decide questions of Oregon law before reaching questions of federal law. *State v. Kennedy*, 295 Or 260, 262-68, 666 P2d 1316 (1983) ("[A]n Oregon court should not readily let parties, simply by their choice of issues, force the court into a position to decide that the state's government has fallen below a nationwide constitutional standard, when in fact the state's law, when properly invoked, meets or exceeds that standard."). The PCHA grants state post-conviction petitioners an independent state remedy.

Further, the federal retroactivity analysis is inconsistent with this court's interpretive method. Even the term "retroactivity" is misleading; "the source of

a 'new rule' is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists [the court's] articulation of the new rule." *Danforth*, 552 US at 271. In Oregon, the "goal" of constitutional interpretation "is to determine the meaning of the constitutional wording, informed by general principles that the framers would have understood were being advanced by the adoption of the constitution." *State v. Mills*, 354 Or 350, 354, 312 P3d 515 (2013). Consistent with that interpretive framework, Oregon post-conviction litigants should have the benefit of this court's most recent announcement of what the state and federal constitutions have always required.

III. The petition for post-conviction relief is not procedurally barred because it includes grounds for relief that did not provide a remedy when petitioner filed his timely petition.

The petition for post-conviction relief in this case was both successive and untimely. In that petition, petitioner asserted, *inter alia*, that his trial counsel was ineffective under the state[12] and federal constitutions for failing to advise him of the immigration consequences of pleading guilty to delivery of

[12] Ineffective assistance of counsel claims under the Oregon Constitution are similar to, but ultimately distinct from, ineffective assistance claims under the Sixth Amendment. *Lichau v. Baldwin*, 333 Or 350, 359, 39 P3d 851 (2002) (articulating standard for ineffective assistance of counsel under Article I, section 11). The scope of the substantive right to counsel under Article I, section 11, may differ from that under the Sixth Amendment. Accordingly, independent grounds for relief are available. *Amicus* limits its analysis to the Sixth Amendment claim in light of this court's decision in *Gonzalez v. State*, 340 Or 452, 134 P3d 955 (2006).

marijuana. The trial court dismissed the petition, finding that the escape clauses did not apply. For the reasons explained below, the petition presented "grounds for relief" that were not available when petitioner filed his timely first petition. This court should reverse the judgment of the Court of Appeals and remand to the trial court to permit it to consider the merits of the grounds for relief asserted in the petition, including whether the claim satisfies the *Strickland v. Washington*, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984), prejudice standard.

As a preliminary matter, the fact that defendant previously asserted similar grounds for relief does not preclude the application of the escape clauses. As discussed, a "ground for relief" is the legal and factual elements of a claim entitling a petitioner to a post-conviction remedy. Petitioner did not have grounds for relief until the Court decided *Padilla*.

The PCHA encourages timely and complete filings, as evidenced by the limitations period and successive petition rule. But the legislature did not intend to require a petitioner to, at the time of his initial finding, gamble away a potential ground for relief on the chance that the ground was not yet available. And state post-conviction relief is but one step in a larger criminal justice system that *requires* petitioners to raise and re-raise issues in multiple fora. Some substantive post-conviction issues must have been raised at trial and then again on direct appeal to garner post-conviction review. *Palmer v. State*, 318

Or 352, 356, 867 P2d 1368 (1994); *North v. Cupp*, 254 Or 451,455, 461 P2d 271 (1969). More to the point, a "ground for relief" for purposes of the escape clauses does not exist until there is a remedy for the post-conviction claim. If an earlier-raised claim does not entitle a petitioner to relief, it is not a "ground for relief," even if it employs the exact language of the later meritorious ground for relief.

Padilla announced a new rule of law that created a new ground for relief. The petitioner in that case filed a petition for state post-conviction relief, alleging that his trial counsel was constitutionally ineffective under the Sixth Amendment. *Padilla*, 559 US at 359. The petitioner's conviction for drug distribution made him subject to automatic deportation. *Id.* at 360. In his petition, the petitioner alleged that counsel "not only failed to advise him of this consequence prior to his entering the plea, but also told him that he did not have to worry about immigration status since he had been in the country so long." *Id.* at 359 (Citation and quotation marks omitted). The Supreme Court of Kentucky reinstated the post-conviction trial court's order denying relief, holding that "collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel." *Commonwealth v. Padilla*, 253 SW 3d 482, 485 (Ky 2008).

The United States Supreme Court reversed, holding that "constitutionally competent counsel would have advised [the petitioner] that his conviction for

drug distribution made him subject to automatic deportation." *Padilla*, 559 US at 360. The Court remanded the case to permit the Kentucky courts to consider whether the petitioner satisfied the *Strickland* prejudice standard. *Id.* ("Whether [the petitioner] is entitled to relief depends on whether he has been prejudiced, a matter that we do not address."). In reaching that holding, the Court explicitly rejected an argument that *Strickland* applied to the petitioner's claim "only to the extent that he ha[d] alleged affirmative misadvice." *Id.* at 370. Instead, the court held that to provide conditionally adequate representation, counsel was required to advise his client that his plea of guilty would result in automatic deportation:

> "Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the [immigration] statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. * * *. When the law is not succinct and straightforward * * * a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear."

559 US at 368-69 (footnote omitted).

In *Chaidez v. United States*, ___ US ___, 133 S Ct 1103, 185 L Ed 2d 149 (2013), the Court concluded that *Padilla* announced a "new rule" for purposes of federal retroactivity. As discussed in Part II, *supra*, the federal retroactivity analysis is inapplicable to Oregon post-conviction cases. But the

Court's analysis offers insights relevant to the question of whether *Padilla* created a new ground for relief according to the PCHA's escape clauses.

Ultimately, the Court in *Chaidez* concluded that *Padilla* announced a new rule because it required the Court to decide the preliminary question of whether the Sixth Amendment's guarantee of the effective assistance of counsel applied to advice regarding the collateral consequences of a criminal conviction. 133 S Ct at 1108. The Court had never before resolved that question. *Id.* at 1109. And critically, the Court clarified that *Padilla* created an affirmative obligation to advise clients regarding deportation consequences; *Padilla* held that the Sixth Amendment *requires* "a reasonably competent lawyer [to] tell a non-citizen client about a guilty plea's deportation consequences because 'preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" *Chaidez*, 133 S Ct at 1112 (quoting *Padilla*, 559 US at 367).

The question of whether a ground for relief is newly available is far simpler than the "new rule" inquiry for purposes of retroactivity. The same law requiring removal applies in this case as it did in *Padilla*. Petition for Post-Conviction Relief (2011), Trial Court File ("The conviction is an 'aggravated felony' under immigration law and subjected [petitioner] to mandatory

deportation.").[13] Accordingly, as in *Padilla*, petitioner's trial attorney was ineffective under the Sixth Amendment. That ground for relief was not available until *Padilla*. *See, e.g.*, *United States v. Kwan*, 407 F3d 1005 (9th Cir 2005), *abrogated by Padilla*, 559 US at 370 (limiting ineffective assistance claims to affirmative misadvice regarding immigration consequences). Because *Padilla* created a ground for relief that had not previously existed, the escape clauses permit petitioner's untimely and successive petition. Whether petitioner is entitled to relief will require the post-conviction trial court to consider whether he suffered prejudice under *Strickland*. This court should remand the case to permit the trial court to make that determination.

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[13] *See also Padilla*, 559 US at 363-64 ("Under contemporary law, if a noncitizen has committed a removable offense after [1996], his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses. See 8 U.S.C. § 1229b. Subject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance. See 8 U.S.C. § 1101(a)(43)(B); § 1228." (footnote omitted)).

CONCLUSION

Amicus curiae respectfully requests that this court reverse the decision of the Court of Appeals and remand to the trial court to permit it to make a decision on the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Petition length

I certify that (1) this petition complies with the word-count limitation in ORAP 9.05(3)(a) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 11,589 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original *Amicus* Brief on the Merits in support of Petitioner on Review to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on October 1, 2014.

I further certify that I directed the *Amicus* Brief on the Merits for Respondent Review to be served upon Anna Joyce attorney for Plaintiff-Respondent, on October 1, 2014, by having the document delivered to the following:

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