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* O'CONNOR WEBER LLP 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.

Cover sheet continues on next page.

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Table of Contents

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TABLE OF AUTHORITIES

Cases

O'Connor Weber LLP
522 SW Fifth Avenue, Suite 1125
Portland, OR 97204

O'Connor Weber LLP
522 SW Fifth Avenue, Suite 1125
Portland, OR 97204

Constitutional Provisions and Statutes

O'Connor Weber LLP
522 SW Fifth Avenue, Suite 1125
Portland, OR 97204

Other Authorities

O'Connor Weber LLP
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AMICUS CURIAE BRIEF ON THE MERITS

STATEMENT OF THE CASE

This case raises several questions related to Oregon's Post-Conviction Hearing Act (PCHA), ORS 138.510 to 138.660, including the proper construction of the "escape clauses" in ORS 138.510(3) and 138.550(3) that allow for untimely and successive petitions. In 1959, the legislature enacted Oregon's PCHA, which included the four escape clauses now contained in ORS 138.550. Specifically, the PCHA prohibits a petitioner from raising a ground for relief if the petitioner could have "reasonably" raised the ground earlier, such as during trial, ORS 138.550(1); direct appeal, ORS 138.550(2); a prior post-conviction proceeding, ORS 138.550(3); or any prior post-conviction proceeding that precedes the enactment of the PCHA, ORS 138.550(4). In 1989, the legislature amended the PCHA by adding a statute of limitations and the corresponding escape clause now contained in ORS 138.510(3). This court has previously construed the escape clause in ORS 138.510(3) in *Bartz v. State*, 314 Or 353, 839 P2d 217 (1992). *Amicus curiae* respectfully asks this court to revisit and clarify that interpretation for the reasons explained below.

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QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

For purposes of the PCHA escape clauses, ORS 138.510(3) and 138.550(3), how does a petitioner establish that a ground for relief "could not reasonably have been raised" at an earlier time?

Proposed Rule of Law

A petitioner can establish that he could not reasonably have raised a ground for relief earlier if the ground is based on newly discovered evidence or a new constitutional principle that did not exist and could not reasonably have been anticipated at an earlier time.

Summary of Argument

The legislature intended the procedural bars and escape clauses in the PCHA to codify the common-law concept of *res judicata*, which precludes a petitioner from raising a claim that could reasonably have been raised earlier. Applied to post-conviction cases, a petitioner must establish that he could not have reasonably raised a ground for relief at an earlier time, whether at trial, during direct appeal, or in an earlier post-conviction proceeding. The plain text of the PCHA indicates that a reviewing court should simply ask whether it was reasonable for the petitioner to have not raised the ground for relief earlier.

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In *State v. Bartz*, this court addressed one of the escape clauses in the PCHA, ORS 138.510(3). However, in *dicta*, this court construed the statute to impose a more exacting standard on petitioners, such that a petitioner must establish why his case presents an "extraordinary circumstance" under the "narrowly" construed escape clause, instead of having to show only that the failure to raise a claim earlier was reasonable.

This court should revisit and clarify the rule from *Bartz*, for several reasons. First, the court's statement about construing the escape clause narrowly was *dicta*, yet the Court of Appeals has subsequently treated that as the holding of *Bartz*. Indeed, *amicus curiae* is aware of only one Court of Appeals case since *Bartz* that has found that a petitioner satisfied the escape clause in ORS 138.510(3).[1] Second, the statutory construction in *Bartz* did not follow the statutory interpretation methodology that this court applies. Instead, in *Bartz*, this court grafted solitary comments in the legislative history onto the statute itself, despite no textual basis for doing so. Third, the legislature subsequently amended the statute at issue in *Bartz* in a way that warrants this court applying a new interpretation to the statute.

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[1] *See Keerins v. Schiedler*, 132 Or App 560, 563-64, 889 P2d 385 (1995) (holding that a petitioner met the escape clause because he alleged that his attorney failed to "inform him that an appeal had not been initiated" and that such information is not "readily available to the public" during the then-applicable 120-day statue of limitations).

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This court in *Bartz* arguably relied on the extant 120-day statute of limitations to suggest that the escape clause be narrowly construed, but the legislature subsequently amended the statute of limitations to be two years. That changed context suggests that the escape clause was not intended to be narrowly construed.

Under a correct statutory construction, this court should hold that the PCHA escape clauses require a petitioner to show only what the plain text requires – that he could not have reasonably raised a ground for relief at an earlier time.

Statement of Procedural Facts

Petitioner adopts the statement of procedural facts from the brief of *amicus curiae* Office of Public Defense Services (OPDS). *See Amicus Curiae* BOM (OPDS) at 5-7.

Argument

This case involves the interpretation of Oregon's post-conviction relief statutory scheme. This court has previously described the purpose of the PCHA as providing a "unitary" scheme to litigate post-conviction claims:

> "The Oregon Post-Conviction Hearing Act (PCHA) was enacted in 1959. Before that time, persons convicted of criminal offenses were confronted with 'a complex and confusing array of post-conviction remedies,' including writs of habeas corpus, writs of coram nobis, motions to correct the record, and motions to vacate the judgment. The 1959 PCHA was adopted to provide a 'detailed, unitary procedure to persons seeking post-conviction relief.'"

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Johnson v. Premo, 355 Or 866, 873, __ P3d __ (2014) (citations omitted).

The petitioner in this case raised his ground of ineffective assistance of counsel in a late and successive petition for post-conviction relief, after his first, timely petition was denied on the merits. An issue in the appeal is whether his petition satisfies the escape clauses of the PCHA, specifically ORS 138.510(3) and 138.530(3).

I. The PCHA's procedural bars to reaching the merits of a post-conviction claim are nearly identically worded and reduce to a common question – whether the ground for relief "reasonably" could have been raised at an earlier time.

The question in this case is one of statutory interpretation, specifically the meaning of the phrase "could not reasonably have been" raised or asserted for purposes of the PCHA escape clauses. The "paramount goal" of statutory interpretation is "discerning the legislature's intent." *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009). To resolve a question of statutory interpretation, this court examines the text and context of a statute, as well as any helpful legislative history offered by the parties. *Id.* at 171-72. The context of a statute "includes other provisions of the same statute and other related statutes." *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993). "If the legislature's intent remains unclear after examining text, context, and legislative history, the

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court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Id.* at 172.

A. The text and context of the PCHA indicate that the legislature intended the analysis for all of the procedural bars to a post-conviction claim to codify the concept of *res judicata*.

The four procedural bars contained in ORS 138.550 were part of the original 1959 PCHA. Or Laws 1959, ch 636, §15. The text of section 15 of the law, which has not been amended by the legislature since its enactment in 1959, is codified in ORS 138.550:

> "The *effect of prior judicial proceedings* concerning the conviction of petitioner which is challenged in the petition shall be as specified in this section and not otherwise:
>
> "(1) The failure of petitioner to have sought appellate review of the conviction, or to have raised matters alleged in the petition at the trial of the petitioner, shall not affect the availability of relief under ORS 138.510 to 138.680. But no proceeding under ORS 138.510 to 138.680 shall be pursued while direct appellate review of the conviction of the petitioner, a motion for new trial, or a motion in arrest of judgment remains available.
>
> "(2) When the petitioner sought and obtained direct appellate review of the conviction and sentence of the petitioner, no ground for relief may be asserted by petitioner in a petition for relief under ORS 138.510 to 138.680 unless such ground was not asserted and *could not reasonably have been* asserted in the direct appellate review proceeding. If petitioner was not represented by counsel in the direct appellate review proceeding, due to lack of funds to retain such counsel and the failure of the court to appoint counsel for that proceeding, any ground for relief under ORS 138.510 to 138.680 which was not specifically decided by the appellate court may be

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asserted in the first petition for relief under ORS 138.510 to 138.680, unless otherwise provided in this section.

"(3) 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 a subsequent petition finds grounds for relief asserted therein which *could not reasonably have been* raised in the original or amended petition. However, any prior petition or amended petition which was withdrawn prior to the entry of judgment by leave of the court, as provided in ORS 138.610, shall have no effect on petitioner's right to bring a subsequent petition.

"(4) Except as otherwise provided in this subsection, no ground for relief under ORS 138.510 to 138.680 claimed by petitioner may be asserted when such ground has been asserted in any post-conviction proceeding prior to May 26, 1959, and relief was denied by the court, or when such ground *could reasonably have been* asserted in the prior proceeding. However, if petitioner was not represented by counsel in such prior proceeding, any ground for relief under ORS 138.510 to 138.680 which was not specifically decided in the prior proceedings may be raised in the first petition for relief pursuant to ORS 138.510 to 138.680. Petitioner's assertion, in a post-conviction proceeding prior to May 26, 1959, of a ground for relief under ORS 138.510 to 138.680, and the decision of the court in such proceeding adverse to the petitioner, shall not prevent the assertion of the same ground in the first petition pursuant to ORS 138.510 to 138.680 if the prior adverse decision was on the ground that no remedy heretofore existing allowed relief upon the grounds alleged, or if the decision rested upon the inability of the petitioner to allege and prove matters contradicting the record of the trial which resulted in the conviction and sentence of the petitioner."

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Or Laws 1959, ch 636, § 15 (emphasis added).[2]

The legislature intended for all four of the procedural bars in section 15 of the law to codify the common law concept of "*res judicata*" that applied in "civil cases to successive habeas corpus attacks on criminal convictions" at the time the PCHA was enacted. Jack G. Collins and Carl R. Neil, *The Oregon Postconviction-Hearing Act*, 39 Or L Rev 337, 356 (1960) (hereinafter "Collins and Neil") (citing the holding of *Barber v. Gladden*, 215 Or 129, 332 P2d 641 (1958)). The legislature intended for all four of the procedural bars to "provide a clear and workable basis for reducing the tide of post-conviction litigation to manageable proportions, while maintaining standards of fairness." Collins and Neil, 39 Or L Rev at 356 (emphasis added). By codifying the *res judicata* rule from *Barber*, the legislature intended to prevent "prison-lawyers" from raising issues or "grounds" for relief that "reasonably could have been raised" earlier. *Id*.; *see also Johnson*, 355 Or at 874-76 (describing how the PCHA codified the common-law *res judicata* rule); *Church v. Gladden*, 244 Or 308, 417 P2d 993 (1966) (holding that the "petitioner has not alleged sufficient reasons to escape the application of the *res*

[2] Subsections (1) and (3) of ORS 138.550 use the word "raised" in reference to how a petitioner presents a claim to the court, while subsections (2) and (4) use the word "asserted." *Amicus curiae* assume the legislature intended the words to be synonymous, and *amicus curiae* is unaware of any legislative history that suggests the terms had different connotations.

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judicata provision of ORS 138.550(3)). At the same time, the legislature intended for the escape clauses in ORS 138.550 to allow a petitioner, in some cases, to raise a "ground" for relief if the ground was not reasonably available at an earlier time because it was based on a new interpretation of the United States Constitution. Collins and Neil, 39 Or L Rev at 358-59.

In *Barber v. Gladden*, the Oregon Supreme Court construed the habeas corpus statute, ORS 34.710, to incorporate a *res judicata* rule, meaning that "a denial of the writ of habeas corpus is *res judicata* on subsequent application for the writ, not only upon grounds which were alleged, but also on grounds which *could have been alleged* in the prior habeas corpus proceeding." 215 Or at 134 (emphasis in original). On the other hand, "[i]f a petitioner establishes that the grounds asserted in his petition could not reasonably have been presented in the prior proceeding he will not be precluded from asserting them." *Id.* at 136. Notably, the *Barber* opinion does not indicate that "reasonably" should mean anything other than its normal, common meaning.

In summary, the legislature used the identical words in subsections (2), (3), and (4) of section 15 (ORS 138.550) to prohibit a petitioner from raising an issue or "ground" for relief, unless it could not "reasonably have been" asserted or raised at an earlier time. Although the legislature did not use the identical words in

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subsection (1) of ORS 138.550, this court has previously interpreted that subsection consistently with the legislature's intent to codify *res judicata*. *North v. Cupp,* 254 Or 451, 454-63, 461 P2d 271 (1969) (applying the concept of *res judicata* to ORS 138.550(1) and concluding that the legislature did not "intend" to allow a petitioner to raise an issue in a post-conviction petition if the issue reasonably could have been raised at trial); *see also* Collins and Neil, 39 Or L Rev at 356 (explaining that the legislature intended all of section 15 to codify the common-law concept of *res judicata*).

B. In 1989, the legislature amended the PCHA to extend the *res judicata* concept to apply to an untimely petition.

The original PCHA did not contain any statute of limitations period. Collins and Neil, 39 Or L Rev at 361. In 1959, the legislature believed that a statute of limitations would be "unconstitutional" because the PCHA was, in part, codifying the right to habeas corpus under Article I, section 23, of the Oregon Constitution and "[t]he right of habeas corpus under the Oregon constitution is subject to no time limit." *Id.*

In 1989, the legislature amended the PCHA by adding a 120-day statute of limitations and the escape clause that is now contained in ORS 138.510(3). Or

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Laws 1989, ch 1053, § 18.[3] The text of that escape clause was taken verbatim from the original act, and it requires a petitioner to raise a ground for relief within the statute of limitations period, 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) (emphasis added); *see also Bartz*, 314 Or at 357-58 (noting that the amended wording "was borrowed verbatim from ORS 138.550(3), which limits the substantive grounds for relief claimed in a subsequent petition to those raised in an original or amended petition").

Thus, the legislature intended all of the escape clauses contained in the PCHA to implement the common-law concept of *res judicata*. *See PGE*, 317 Or at 611 ("use of the same term throughout a statute indicates that the term has the same meaning throughout the statute"). Therefore, all of the escape-clause statutes reduce to the same inquiry – whether a ground for relief could "reasonably" have been raised or asserted at an earlier time. However, whether the failure to raise a ground earlier was "reasonable" will depend on the context; for example, different

[3] The legislative history of the 1989 amendment is described by *amicus curiae* OPDS. *See Amicus Curiae* BOM (OPDS) at 27-30.

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factors will be relevant to whether a ground could have been raised at trial or on appeal.

C. A petitioner could have reasonably raised a claim earlier if it would not have been sensible or rational or if to do so would be absurd.

The term "reasonably" is not defined in the statute, but is a word of common usage. *See PGE*, 317 Or at 611 (noting "the rule that words of common usage typically should be given their plain, natural, and ordinary meaning"). "Reasonably" can be defined as "in a reasonable manner" or "to a fairly sufficient extent." *Webster's Third New Int'l Dictionary* 1892 (unabridged ed 1966). In turn, "reasonable" can be defined as follows:

> "**1 a :** being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous <a ~ conviction> <a ~ theory> **b :** being or remaining within the bounds of reason : not extreme : not excessive <a ~ request> <a ~ hope of succeeding> <spent a ~ amount of time in relaxation> <is of a ~ size> **c :** MODERATE: as (1) : not demanding too much <a ~ boss> (2) : not expensive <fresh vegetables are now ~> (3) : that allows a fair profit <sold the material at a ~ rate> **2 a :** having the faculty of reason : RATIONAL <a ~ being> **b :** possessing good sound judgment : well balanced : SENSIBLE <can rely on the judgment of a ~ man>"

Id. See also Black's Law Dictionary 1431 (4th ed 1968) (defining "reasonable" as, *inter alia*, "rational" and "suitable" and "not immoderate or excessive").

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Contemporaneous scholars of the 1959 PCHA described the use of the term "reasonably" in ORS 138.530, and their analysis suggests that the legislature intended the term to carry its normal meaning:

> "Subsection (2) * * * allow[s] postconviction attack only when a claim could not reasonably have been raised on the appeal. If a petitioner had a reasonable opportunity to present a question before the highest court of the state, there is no substantial reason why further judicial time should be spent in litigating the question in other state courts.
>
> "* * * * *
>
> "Subsection (3) codifies the holding of *Barber v. Gladden*[, 215 Or 129, 332 P2d 641 (1958),] and follows section 8 of the Uniform Post-Conviction Procedure Act. It allows any prisoner only one postconviction hearing unless he subsequently asserts questions which could not reasonably have been raised in the earlier proceeding."

Collins and Neil, 39 Or L Rev at 357-58 (footnotes omitted).

The word "reasonably" is used as a standard for whether "grounds for relief" could have been "raised" or "asserted." The term "grounds" is used in part of the PCHA that describes what a petitioner must establish to be granted relief. Specifically, ORS 138.530 provides, in relevant part:

> "(1) 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

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> 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."

Or Laws 1959, ch 636, § 3 (emphasis added). *See also* Collins and Neil, 39 Or L Rev at 345 ("Section 3 sets forth the substantive grounds upon which a conviction may be challenged under the act. In general, it is a codification of the grounds for relief under one or more of the postconviction remedies heretofore available.").

As argued by *amicus curiae* OPDS, "'[g]rounds for relief' are the legal and factual elements of a post-conviction claim entitling a petitioner to relief." *Amicus Curiae* BOM (OPDS) at 12. When a ground is based on newly discovered evidence, the question is whether, under the circumstances of that case, the evidence was reasonably available to the petitioner at trial, on direct appeal, in an original or amended petition, or during the applicable statute of limitations. ORS 133.550(1)-(3); ORS 138.510(3). Similarly, if a newly raised ground is based on a change in appellate case law, the test for whether the ground reasonably could have been raised earlier is one of reasonableness, depending on the circumstances of the

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particular case. *See, e.g., Long v. Armenakis*, 166 Or App 94, 101, 999 P2d 461, *rev den*, 330 Or 361 (2000) ("The more settled and familiar a constitutional or other principle on which a claim is based, the more likely the claim reasonably should have been articulated and raised. Conversely, if the constitutional principle is a new one, or if its extension to a particular statute, circumstance, or setting is novel, unprecedented, or surprising, the more likely the conclusion that the claim reasonably could not have been raised.").

Thus, based solely on the text and context of the PCHA, the phrase at issue – whether the grounds for relief "could not reasonably have been raised" – appears to mean that a petitioner satisfies the escape clause of the post-conviction statutes if it would not have been "sensible" or "rational" to have asserted the grounds earlier. Stated differently, if it would have been "absurd" or "ridiculous" to have asserted the ground earlier, the petitioner can satisfy the escape clause and raise a valid post-conviction claim. It will require a case-by-case approach to determine whether it would have been reasonable to assert the grounds earlier.

II. The legislature did not intend for the escape clauses contained Oregon's PCHA to be "construed narrowly" or to only apply in "extraordinary circumstances."

This court has previously construed the "escape clause" now contained in ORS 138.510(3), in *Bartz*. This court has not interpreted ORS 138.510(3) since

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Bartz. In *Bartz*, this court stated in *dicta* that the escape clause in ORS 138.510(3) was to be "construed narrowly" and apply only in "extraordinary circumstances." However, the Court of Appeals has consistently applied that *dicta* to frame the issue on appeal of whether a petitioner has satisfied the escape clause. *See, e.g.*, *Long*, 166 Or App at 99-100 (citing the two phrases as part of the holding of *Bartz*); *Benitez-Chacon v. State*, 178 Or App 352, 356, 37 P3d 1035 (2001) (same); *Stahlman v. Mills*, 238 Or App 606, 610, 243 P3d 786 (2010) (citing "construed narrowly" as the holding of *Bartz*); *Fisher v. Belleque*, 237 Or App 405, 409-10, 240 P3d 745 (2010) (citing "construed narrowly" as the holding of *Bartz*). *Amicus curiae* is aware of only one Court of Appeals case after *Bartz* that has found that a petitioner satisfied the escape clause of ORS 138.510(3). *E.g.*, *Keerins v. Schiedler*, 132 Or App 560, 563-64, 889 P2d 385 (1995).

This court should revisit and clarify *Bartz* for several reasons. First, this court should state that ORS 138.510(3) was not intended to be construed narrowly, nor was it intended to apply only in extraordinary circumstances. Second, this court's analysis in *Bartz* conflicts with the *PGE* framework and led to an erroneously limited interpretation. Third, in any event, the legislature substantively amended the statute in 1993, subsequent to *Bartz*, which also warrants revisiting the analysis.

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A. In *Bartz*, this court stated that the PCHA escape clause should be construed narrowly and apply only in extraordinary circumstances.

In *Bartz*, this court construed *former* ORS 138.510(2) (1989)[4], which imposed a 120-day time limit to file a petition for post-conviction relief. The petitioners in *Bartz* – Bartz and Britain – argued that their post-conviction cases satisfied the escape clause of ORS 138.510 and, in the alternative, that the statute was unconstitutional for various reasons. *Id.* Specifically, petitioner Bartz argued that his case fit within the escape clause because he had alleged that "his trial counsel had failed to advise him of a possible statutory defense to the charge and that he did not learn of the defense within 120 days after his conviction became final." *Id.* at 356-57.

To resolve the petitioner's argument, this court construed the phrase at issue here, "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[.]" *Id.* at 357. First, this court analyzed the text, context, and legislative history of the statute and held that the statutory exception "does not require the filing of a timely 'original or amended' petition as a prerequisite to the filing of an untimely petition." *Id.* at 358.

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[4] In 1999, the statutory provision was renumbered as ORS 138.510(3). Or Laws 1999, ch 1055, § 7.

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Second, and as relevant here, the court addressed the issue of whether the specific ground for relief that the petitioner alleged could not have reasonably been raised within 120 days after his conviction became final. *Id.* However, instead of engaging in a "*PGE* analysis" of the text and context of the statute, this court simply noted:

> "ORS 138.510(2) does not explain precisely what kinds of circumstances fulfill the statutory requirement that an untimely petition assert a ground for relief that 'could not reasonably have been raised' in a timely petition. We therefore examine the legislative history of that requirement."

Id. at 358. In other words, instead of construing the term "reasonably" and applying that standard to the circumstances of the case, as *PGE* and *Gaines* require, this court passed over the most important step in statutory analysis to search the legislative history.

In examining the legislative history, this court noted that "[l]imiting the time within which convicted persons may file petitions for post-conviction relief was one of several cost-cutting methods proposed" in order "to reduce the costs of the state's indigent defense programs." *Id.* at 358. However, "it was suggested" during hearings in the House Judiciary Subcommittee on Crime and Corrections "that, if a time limitation were adopted, it contain an exception or 'escape clause.'" *Id.* at 358-59. This court noted that the scope of the "escape clause" was discussed

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in "two subcommittees of the House Committee on the Judiciary" when it was enacted in 1989. *Id.* at 359. This court then cited specific testimony:

> "A representative of the Oregon Criminal Defense Lawyers Association testified to the Subcommittee on Civil and Judicial Administration that he would support the 120-day time limitation if an exception were made where 'extraordinary circumstances' were shown. As examples, he mentioned convictions procured by collusion between a prosecutor and a defense lawyer, but coming to light after the limitation period, and situations in which the statute under which the conviction was obtained is later declared facially unconstitutional.
> * * *
>
> "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. at 359 (emphasis added).

With that understanding, this court turned to the specific question before it, "whether the extant statutes pertaining to a particular criminal offense constitute information that is reasonably available to a defendant convicted of that offense," and concluded that the exception did not apply because the statues were reasonably available to the petitioner, and that people are presumed to know the law. *Id.* at 359-60.

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B. The statement in *Bartz* that the escape clause should be "construed narrowly" and only applies in "extraordinary circumstances" was *dicta*.

In *Bartz*, this court correctly held that a petitioner does not meet the escape clauses by alleging that he was personally ignorant of the criminal laws. *Bartz*, 314 Or at 359-60 ("[T]he issue becomes whether the extant statutes pertaining to a particular criminal offense constitute information that is reasonably available to a defendant convicted of that offense."). *Amicus curiae* agrees that was the correct way to resolve the case at hand. But that conclusion does not rely on the statement that the escape clause is to be construed narrowly or that it only applies in "extraordinary circumstances." Rather, that result can be reached by applying the plain terms of the statute, *i.e.*, that the petitioner could have reasonably raised the ground for relief earlier.

When a court's prior statutory construction is mere *dictum*, it has no precedential effect. *See, e.g., Mastriano v. Board of Parole*, 342 Or 684, 692 n 8, 159 P3d 1151 (2007) ("This court has declined to treat a prior interpretation of a statute as authoritative when it is *dictum.*"); *SAIF v. Allen*, 320 Or 192, 204, 881 P2d 773 (1994) (same). A statement is *dictum* if it is not necessary to reach the result in the case:

> "'*Dictum*" is short for '*obiter dictum*,' Latin for 'something said in passing.' *Black's Law Dictionary* 1102 (8th ed 2004). In

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> judicial opinions, it commonly refers to a statement that is not necessary to the decision. *See State ex rel. Huddleston v. Sawyer*, 324 Or 597, 621 n 19, 932 P2d 1145 (1997) ('[T]hat statement was *dictum*, because it was not necessary to the outcome of the case.'); *State v. Smith*, 301 Or 681, 696 n 10, 725 P.2d 894 (1986) ('[T]he statement is not necessary to the decision in the case and is *dictum.*')."

Halperin v. Pitts, 352 Or 482, 492, 287 P3d 1069 (2012). The statements in *Bartz* that the escape clauses should be "construed narrowly" and were only intended to apply in "extraordinary circumstances" were *dicta* because they were not necessary for the court to reach its ultimate conclusion. *Bartz*, 414 Or at 358-59.

As noted earlier, the Court of Appeals has consistently used that *dicta* to frame the issue on appeal. *See, e.g.*, *Long*, 166 Or App at 99-100; *Benitez-Chacon*, 178 Or App at 356; *Stahlman*, 238 Or App at 610; *Fisher*, 237 Or App at 409-10. The difference is significant. A petitioner may have an easier time of establishing that raising a claim would not have been reasonable if he does not at the same time have to establish that his case is an extraordinary circumstance. Some petitions are dismissed as "meritless" by post-conviction trial courts, not based on the actual claims being meritless, but instead because they are untimely. And, with petitions dismissed as meritless not being appealable, *see* ORS 138.525, it is even harder for these claims – and the interpretation of the phrases in *Bartz* – to make it to appellate courts. Therefore, *amicus curiae* suggest that the analysis simply be

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tethered to the plain and unambiguous text of the statute, *i.e.*, whether a ground for relief reasonably could have been raised at an earlier time.

C. This court's analysis in *Bartz* is problematic because it did not adhere to the paradigm described in *PGE* and *Gaines*.

The analysis in *Bartz* does not appear to follow the *Gaines* and *PGE* analysis that it should if it is purporting to construe a statute. The opinion has no analysis of the text or context of the statute, which is paramount when interpreting what a statute means. Instead, this court merely noted that the text and context do not answer the question and moved on to legislative history. A *PGE* or *Gaines* analysis requires more than a conclusory statement that the text and context do not answer the question, especially when, as argued above, the text and context do provide an answer for what standard to apply when the escape clauses are at issue.

Further, this court relied on the testimony from one witness in a subcommittee meeting to conclude that the escape clause applies in "extraordinary circumstances" and should be "construed narrowly." *See Davis v. O'Brien*, 320 Or 729, 745, 891 P2d 1307 (1995) (noting that "isolated statements made in committee are not necessarily indicative of the intent of the entire legislature"). Yet, this court did not identify what terms in the text of the statute express a legislative intent that the escape clause contained those "narrow" limits. If those phrases were intended to be a construction of the term "reasonably," the analysis in

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Bartz falls short of explaining why or how the term "reasonably" can carry that interpretive weight as opposed to merely meaning what its common usage would suggest.

For either of those reasons, the opinion in *Bartz* is worth revisiting in order to clarify the intent of the legislature in enacting the PCHA escape clause.

D. In any event, this court should revisit *Bartz* in light of subsequent amendments to the statute.

As originally enacted, ORS 138.510(2) provided, "A petition pursuant to this Act may be filed without limit in time." Or Laws 1959, ch 636, § 17.

The legislature amended ORS 138.510(2) in 1989, to provide as follows:

> "A petition pursuant to ORS 138.510 to 138.660 [may] *must* be filed [without limit in time.] *within 120 days 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.*"

Or Laws 1989, ch 1053, § 18 (deletions in brackets, additions in italics). That version of the statute was at issue in *Bartz*.

The legislature subsequently amended ORS 138.510 in 1993, to provide in part as follows:

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> "(2) A petition pursuant to ORS 138.510 to 138.680 must be filed within [120 days] *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 of 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.
>
> "*(3) A one-year filing period shall apply retroactively to petitions filed by persons whose convictions and appeals became final before August 5, 1989, and any such petitions must be filed within one year after the effective date of this 1993 act. A person whose post-conviction petition was dismissed prior to the effective date of this 1993 act cannot file another post-conviction petition involving the same case.*"

Or Laws 1993, ch 517, § 1 (deletions in brackets, additions in italics).[5] *See State v. Swanson*, 351 Or 286, 290, 266 P3d 45 (2011) (noting that in interpreting a statute, "we look to the intent of the legislature that enacted the statute, and we also consider any later amendments or statutory changes that were intended by the

[5] The 1993 amendments are the only subsequent amendments that affect the analysis in this case. In 1999, the statutory provision was renumbered as ORS 138.510(3). Or Laws 1999, ch 1055, § 7. In 2007, the legislature added subsection (3)(c), which addressed the timing of filing a petition for post-conviction relief when a petition for certiorari had been filed with the United States Supreme Court, but did not amend any of the text at issue here. Or Laws 2007, ch 292, § 1.

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legislature to modify or otherwise alter the meaning of the original terms of the statute").

As originally introduced, House Bill (HB) 2352 was intended to address a recent Supreme Court decision, *Boone v. Wright*, 314 Or 135, 836 P2d 727 (1992). Tape Recording, House Judiciary Subcommittee on Civil Law and Judicial Administration, HB 2352, Jan 21, 1993, Tape 5, Side A (statement of Rep. Kevin Mannix). In *Boone*, this court addressed the 1989 amendment to ORS 138.510 that provided for a 120-day limitation, and concluded that it did not apply retroactively. *Id.* at 142 (holding that "the 120-day limitation in ORS 138.510(2) does not apply to petitions filed by persons whose convictions and appeals became final before August 5, 1989, because the legislature did not manifest an intent to apply the shortened limitation period to such petitions").

However, the legislature added two other substantive provisions to HB 2352 during the legislative process. First, the legislature added a provision that gave post-conviction courts the ability to dismiss meritless petitions in order to save money. Or Laws 1993, ch 517, § 3. Second, and as relevant here, the legislature changed the 120-day limitation to two years. Or Laws 1993, ch 517, § 1.

Supporters of the two-year amendment suggested the purpose was to bring post-conviction relief in line with other legal processes. Specifically, the statute of

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limitations for legal malpractice claims was two years from the discovery of the error or omission giving rise to the malpractice claim, so the post-conviction and legal malpractice statutes would have "some symmetry there." Tape Recording, Senate Judiciary Committee, HB 2352, June 11, 1993, Tapes 189-90, Side A (statement of Ross Shepard).

In *Bartz*, the court was interpreting ORS 138.510(2) in the context of the then-applicable 120-day statute of limitations. 314 Or at 359. The court in *Bartz* repeatedly cited the 120-day window and this court's opinion implies that the 120-day time period within which petitioners could file post-conviction petitions justified the "narrow" construction of the escape clause. *E.g.*, *Bartz*, 314 Or at 359 ("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."). By expanding that limit from 120 days to two years, the legislature changed one of the bases for this court's opinion in *Bartz*. For that reason, too, *Bartz* warrants revisiting.

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E. This court should clarify *Bartz* and hold that the escape clause requires a petitioner to show that it was not reasonable to have raised the issue earlier.

As argued above, the escape clause of the PCHA only requires a petitioner to show that he could not reasonably have raised the ground for relief earlier. In *Bartz*, this court cited testimony in a subcommittee regarding examples of when the escape clause would be satisfied. Those examples are consistent with the legislature's intent that the PCHA allow a hearing on the merits of a ground for relief when that ground is based on newly discovered evidence or a change in the law that provides a new ground for relief.

The analytical framework does not need to be phrased any differently than the statutes. That is, the focus should be whether it would have been *reasonable* to have raised or asserted the claim earlier. A reviewing court should not have to consider whether the case is an "extraordinary circumstance" or what it means that the escape clauses are to be "construed narrowly." Indeed, in *Bartz*, this court likely would have reached the same result under the "reasonableness" standard that *amicus curiae* proposes. That is, the petitioner in *Bartz* was not entitled to raise the issue in the post-conviction proceeding, because he could have reasonably raised the claim earlier based on the presumption that people know the statutory law.

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III. The petitioner in this case could not have reasonably raised the ground for relief earlier.[6]

In this case, petitioner filed a timely petition for post-conviction relief in 2006. Petitioner raised a ground of ineffective assistance of counsel based on inadequate advice regarding the immigration consequences of his conviction, specifically that deportation was mandatory. That petition was denied under the then-controlling case law. *See Gonzales v. State*, 340 Or 452, 458-59, 134 P3d 955 (2006) (holding that deportation is a "collateral" consequence of conviction, for which a defense attorney need only advise a client that a conviction "may result" in deportation, without advising as to its likelihood); *Lyons v. Pearce*, 298 Or 554, 567, 694 P2d 969 (1985) (applying the standard that a non-citizen defendant must be aware of "the possibility of deportation" for a post-conviction claim involving ineffective assistance of counsel).

After the United States Supreme Court decided *Padilla v. Kentucky*, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284 (2010), petitioner filed a successive petition for post-conviction relief. In *Padilla*, the United States Supreme Court rejected the distinction between a direct and collateral consequence of a crime of conviction

[6] This case also presents a question of whether the federal retroactivity analysis should apply under Oregon law. *Amicus curiae* agree with the proposed rule of law, analysis, and application of this question as presented in the *amicus* brief filed by the Office of Public Defense Services.

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and held that "when the deportation consequence is truly clear, * * * the duty to give correct advice is equally clear." 559 US at 366, 369.

Under the proposed rule of *amicus curiae*, petitioner's ground for relief satisfies the escape clause of ORS 138.510(3). As noted earlier, a ground for relief is "the legal and factual elements of his post-conviction claim." *Amicus Curiae* BOM (OPDS) at 12. Here, petitioner's ground for relief is that under *Padilla* his trial attorney rendered inadequate advice. Petitioner could not reasonably have raised that ground earlier because the Supreme Court had not yet decided *Padilla*. Because the "constitutional principle" announced by *Padilla* was "novel, unprecedented, [and] surprising," *Long*, 166 Or App at 101, petitioner could not have reasonably raised it earlier, and therefore ORS 138.510(3) should allow his successive petition.

That conclusion is consistent with this court's prior case law. In *Palmer v. State*, 318 Or 352, 867 P2d 1368 (1994), this court held that a post-conviction petitioner may not assert as a ground for relief any issue "that was not raised at trial in the underlying criminal proceeding, when the petitioner reasonably could have been expected to raise that issue in the trial court and when the petitioner does not assert the failure to raise that issue constituted inadequate assistance of trial counsel." 318 Or at 354. In arriving at that holding, this court relied on a

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narrowing construction of the post-conviction statute ORS 138.550(1) that this court applied in *North v. Cupp*, 254 Or 451, 461 P2d 271 (1969). *See Palmer*, 318 Or at 356-60 (discussing *North*). In *North*, this court noted an exception to the procedural rule of ORS 138.550(1), which limits what claims can afford post-conviction relief:

> "[T]here are situations in which the law recognizes that it is inappropriate to require a contemporaneous objection at trial as a prerequisite to the subsequent raising of the constitutional issue. We believe that the provision in question was intended to prevent the assertion of the procedural rule in such situations. The most common illustration is where the objection could conceivably have been made but could not reasonably have been expected. Examples are where the right subsequently sought to be asserted was not generally recognized to be in existence at the time of trial; where counsel was excusably unaware of facts which would have disclosed a basis for the assertion of the right; and where duress or coercion prevented assertion of the right."

North, 254 Or at 456-57.

In *Palmer*, the court applied the *res judicata* rule that it had announced in *North*. The court noted that the reasoning in *North* was consistent with the reasoning in *Wells v. Peterson*, 315 Or 233, 844 P2d 192 (1992). *Palmer*, 318 Or at 361 n 7. In *Wells*, this court held that the petitioner's trial counsel was not inadequate for failing to raise a sentencing issue at trial "because at the time of trial [the issue] was not clearly settled." 315 Or at 236. Therefore, the *Palmer* court reasoned, trial counsel's failure to raise the issue was "reasonable due to the

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unsettled state of the law." *Palmer*, 318 Or at 361 n 7. The court in *Palmer* correctly concluded that the standard for reasonable counsel should be consistent with the *res judicata* rule contained in ORS 138.550(1), that is, whether a petitioner could have reasonably raised a ground earlier.

The discussion in *Palmer* of this court's case law demonstrates the circumstances in which it would be reasonable for a petitioner to have failed to assert or raise a claim earlier. The observation in *North* that a petitioner should not be reasonably expected to raise an objection when controlling case law is against it comports with *amicus curiae*'s proposed holding in this case – that a petitioner does not need to raise it claim when it is foreclosed by controlling case law, as it was in this case by *Gonzales* and *Lyons*.

The proposed rule of *amicus curiae* is also consistent with how the Court of Appeals has viewed the exception. For example, in *Long v. Armenakis*, the issue was whether the petitioner was excused from filing a timely petition because he could not reasonably have raised an argument earlier. The Court of Appeals, relying on *Palmer* and *North*, identified when a change in the law could lead to a new claim being raised during post-conviction relief:

> "[W]hen a new constitutional principle has been articulated between the time of a petitioner's direct appeal and the post-conviction proceeding, a claim based on the new constitutional principle will be considered in the post-conviction proceeding even

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> though it was not raised at trial or on appeal. The same result does not necessarily follow where the constitutional principle is an acknowledged one, and the uncertainty is in its scope or application to a particular circumstance. The touchstone is not whether a particular question is settled, but whether it reasonably is to be anticipated so that it can be raised and settled accordingly. The more settled and familiar a constitutional or other principle on which a claim is based, the more likely the claim reasonably should have been anticipated and raised. Conversely, if the constitutional principle is a new one, or if its extension to a particular statute, circumstance, or setting is novel, unprecedented, or surprising, the more likely the conclusion that the claim reasonably could not have been raised."

Long, 166 Or App at 101 (citations omitted). Consequently, as this court suggested in *North*, when a new constitutional principle is articulated after the two-year statute of limitations for a timely petition has expired, a claim based on the new constitutional principle will be considered even though it was not raised at an earlier time.

In this case, the petitioner has raised essentially the same argument at two different times. The first time, the petitioner's argument was controlled by contrary case law. *E.g.*, *Gonzales*, 340 Or at 458-59; *Lyons*, 298 Or at 567. The second time, however, the petitioner had a new ground for relief that was not reasonably available during the first proceeding, namely a new constitutional principle that was announced by the United States Supreme Court in *Padilla*. The petitioner could not reasonably have asserted that ground earlier, because it did not exist. There was no United States Supreme Court case suggesting his trial attorney

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was obligated to tell him of the immigration consequences of a crime of conviction, such as whether deportation would be mandatory.

Because the case and ground for relief did not exist earlier, the petitioner could not have reasonably asserted the claim during his first post-conviction proceeding. Therefore, *amicus curiae* suggest that this court hold that the petitioner's post-conviction claim satisfies the escape clauses of the PCHA.

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CONCLUSION

For the foregoing reasons, petitioner asks this court to hold that the petitioner could not have reasonably asserted his ground for relief earlier because it is based on a constitutional principle that did not exist during his prior post-conviction proceeding. In the alternative, petitioner requests that this court grant or order "such other relief as may be proper and just." ORS 138.520.

DATED October 2, 2014.

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

Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) that the word count of this brief (as described in ORAP 5.05(2)(a)) is 8,024 words.

Type Size

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

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original *Amicus* Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records section, 1163 State Street, Salem, OR 97301.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this *Amicus* Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Brian Patrick Conry, #822245, attorney for petitioner on review; and on Ellen F. Rosenblum, #753239, Anna M. Joyce, #013112, Paul L. Smith, #001870, and Kathleen Cegla, #892090, attorneys for respondent on review.

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