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 No. CV110467 CA A153165 SC S062339

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on 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.

Continued…

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BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

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Questions Presented

1. By statute, grounds for post-conviction relief must be alleged in an original or amended petition and within two years of when the criminal conviction (or direct appeal therefrom) becomes final, unless those grounds could not reasonably have been raised in a timely manner in the original or amended petition. Does an otherwise untimely and successive petition for post-conviction relief, alleging claims related to the failure to advise the petitioner that he would be deported following his guilty plea (and resulting conviction), qualify for the statutory escape clauses to the prohibitions on untimely and successive petitions; in other words, does it assert grounds that could not have been reasonably been raised in a timely manner in the original or amended petition?

2. In *Padilla v. Kentucky*, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284 (2010), the United States Supreme Court held that a criminal defense attorney performs deficiently by failing to advise his client of a "truly clear" "deportation consequence" that would result from a criminal conviction. Does the rule from *Padilla* apply retroactively to convictions that became final before *Padilla* was decided?

Proposed Rules of Law

1. Grounds for post-conviction relief alleging trial court error and ineffective and inadequate assistance of counsel based on the failure to advise the petitioner of the immigration consequences of a conviction (following a guilty plea) are grounds that could reasonably have been raised in a timely manner and in an original post-conviction relief petition. Consequently, such grounds do not qualify for the escape clauses to the two-year statute of limitations and the bar on successive post-conviction relief petitions.

2. Although this court is free to fashion its own rules for determining when new federal constitutional rules apply retroactively to final convictions, for prudential reasons, this court should follow the United States Supreme Court's lead and hold that new federal constitutional rules apply to cases no longer on direct review only when they are "watershed" rules of constitutional procedure. *Padilla* was not such a rule; therefore, this court should not apply it retroactively.

SUMMARY OF ARGUMENT

The Post-Conviction Hearing Act (PCHA), ORS 138.510-.680, provides a statutory mechanism for persons convicted in Oregon to collaterally challenge their convictions after those convictions become final. The PCHA allows courts to grant relief if a petitioner proves, among other possibilities, that his conviction resulted from a substantial denial of his state or federal constitutional

rights. Generally, that involves establishing that the petitioner received constitutionally ineffective or inadequate assistance of counsel during his criminal trial or direct appeal.

The PCHA contains several procedural restrictions including, as relevant here, a statute of limitations requiring petitions to be filed within two years of the conviction becoming final and a prohibition on filing successive petitions. Both the statute of limitations and the successive-petition prohibition contain an exception—or escape clause—for petitioners to raise grounds for relief that could not reasonably have been raised in a timely original or amended petition.

In this case, petitioner filed an untimely and successive petition raising two grounds for post-conviction relief to challenge his 2004 conviction, following a guilty plea, for Distribution of a Controlled Substance (DCS)—Marijuana. He alleged that (1) his trial counsel was deficient for not advising him about the deportation consequences that would follow from his guilty plea and conviction, and (2) the trial court violated his due process rights by allowing him to plead guilty without advising him of the same deportation consequences. Petitioner had filed an original petition for post-conviction relief in 2006 raising virtually identical grounds for relief, but that petition was denied on the merits. The post-conviction trial court denied petitioner's present petition because it was untimely and successive, and because it did not qualify for the escape clauses to those procedural limitations.

The post-conviction court correctly denied petitioner's untimely and successive petition. The two grounds for relief raised in the current petition reasonably could have been raised in a timely original petition. The escape clauses were meant to provide a very narrow exception to the procedural limitations in the PCHA; they apply only if the ground alleged was based on information that did not exist or was not reasonably available during the time for filing a timely original petition or if it would have been ridiculous, absurd, or extreme to bring the current grounds for relief to the court's attention in an earlier petition. The escape clauses necessarily do not apply here, where petitioner *did raise* these same grounds for relief in his timely original petition. Moreover, even if petitioner had not actually raised these grounds in an earlier petition, he reasonably could have done so. Although *Padilla* was not decided until after petitioner's original petition had been denied, it would not have been extreme or absurd for petitioner to raise *Padilla*-type grounds in a timely original petition.

Even if petitioner did qualify for the escape clauses to the procedural limitations of the PCHA, though, the post-conviction court still was correct to deny petitioner's petition, because the *Padilla* rule on which petitioner relies does not apply retroactively. Under the United States Supreme Court's retroactivity analysis from *Teague v. Lane*, 489 US 288, 109 S Ct 1060, 103 L Ed 2d 334 (1989), the *Padilla* rule does not apply retroactively to invalidate

convictions that were already final (like petitioner's) when *Padilla* was decided. Although this court is free to adopt retroactivity rules that afford greater relief than *Teague v. Lane*, it should decline to do so for prudential reasons. Specifically, more lenient retroactivity rules would undermine the public's and the parties' need for finality in criminal cases, and they would require Oregon courts to afford less respect to their own state-court judgments than federal courts are required to provide.

FACTUAL AND PROCEDURAL BACKGROUND

Following a guilty plea, petitioner was convicted in 2004 of DCS. Other charges were dismissed, and petitioner avoided incarceration as a result of the plea agreement. Petitioner did not file a direct appeal from that conviction. In 2006, petitioner filed a timely petition for post-conviction relief alleging, in part, that his 2004 defense attorney was inadequate and ineffective for "fail[ing] to inform Petitioner fully and adequately of the immigration consequences that a guilty plea to [DCS] would have on Petitioner's permanent resident status in the United States[.]" (App Br ER 11). He also alleged that the trial court erred by failing to correct the "false and misleading" immigration information that trial counsel gave to petitioner. (App Br ER 14). Relying on this court's decision in *Gonzalez v. State of Oregon*, 340 Or 452, 134 P3d 955 (2006), the post-conviction court denied petitioner relief. (App Br ER 23-28). Petitioner appealed from that denial of post-conviction relief; the Court of Appeals

affirmed without opinion, and this court denied petitioner's petition for review. *Verduzco v. State*, 218 Or App 736, 180 P3d 764, *rev den*, 345 Or 418 (2008). Petitioner did not petition for *certiorari* to the United States Supreme Court.

In March 2010, the United States Supreme Court decided *Padilla v. Kentucky*. In that case, which was on *certiorari* from the Kentucky Supreme Court reviewing the denial of the petitioner's request for state post-conviction relief, 559 US at 359-60, the Court held that the petitioner's counsel had performed deficiently under the Sixth Amendment to the United States Constitution when he failed to advise the petitioner of the clear deportation consequences of a conviction for transporting a large amount of marijuana before the petitioner pleaded guilty to that offense. *Id.* at 374. The Court remanded the case back to the Kentucky courts to determine whether the petitioner could prove that he was prejudiced by his counsel's deficient performance. *Id.* at 374-75.

The year after the Supreme Court decided *Padilla*, petitioner filed the successive, untimely petition for post-conviction relief at issue here. (App Br ER 29). In that petition, petitioner raised essentially the same claims of inadequate and ineffective assistance of counsel that had been rejected in 2006, and he raised a similar—but more refined—claim of trial court error. Petitioner argued that his new petition qualified for the exceptions—or escape clauses—to the two-year statute of limitations and the proscription on successive petitions,

because the grounds alleged could not reasonably have been raised in the timely original petition. He argued that, until *Padilla* was decided, "there was an inadequate basis as a matter of law * * * to pursue a PCR case based upon the Sixth Amendment right to counsel due to the failure of counsel to accurately advise Petitioner of the immigration consequences of his convictions[.]" (App Br ER 32, footnote omitted). The post-conviction trial court denied the petition as successive and untimely in violation of ORS 138.550(3) and 138.510(3), (App Br ER 43-44), and the Court of Appeals summarily affirmed, relying on *Chaidez v. United States*, 568 US ___, 133 S Ct 1103, 185 L Ed 2d 149 (2013), and *Saldana-Ramirez v. State of Oregon*, 255 Or App 602, 298 P3d 59, *rev den*, 354 Or 148 (2013). This court allowed review.

ARGUMENT

A post-conviction petitioner who files an untimely and successive petition for post-conviction relief and who seeks relief based upon a new federal constitutional principle announced after his underlying conviction became final, faces independent—yet interrelated—hurdles. *See Teague v. Palmateer*, 184 Or App 577, 584, 57 P3d 176 (2002), *rev den*, 335 Or 181 (2003) ("[W]hether a new constitutional rule provides an exception to issue preclusion and also is retroactive are complementary inquiries; a petitioner must

satisfy both to be entitled to post-conviction relief[.]").[1] First, he must establish that his untimely and successive petition qualifies for the escape clauses to the prohibitions on untimely and successive petitions. Those escape clauses require the petitioner to establish that his current claims for relief could not "reasonably have been raised" timely and in the original or amended petition. Second, if the petitioner clears those statutory hurdles, he also must establish that the newly announced constitutional principle should apply retroactively to invalidate his otherwise final conviction. Although whether, and how, to apply a newly announced federal constitutional principle in a state post-conviction proceeding is a question reserved to state courts, prudential reasons dictate that this court should follow the United States Supreme Court's retroactivity analysis. Under that approach, a new principle of constitutional law should invalidate otherwise final convictions only when the new principle places "certain kinds of primary,

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[1] The state is unaware of any cases in which this court has addressed the relationship between the procedural limitations in the PCHA and retroactive application of newly announced constitutional rules. However, other states with similar post-conviction procedures to Oregon's treat the inquiries—as did the Court of Appeals in *Teague v. Palmateer*—as separate but complementary. *See, e.g., Owens v. State of Mississippi* ___ So3d ___, 2014 WL 5437380 at *5 (Miss App Oct. 28, 2014) (considering whether untimely and successive state post-conviction petition seeking to apply *Padilla* retroactively qualified for statutory escape clause); *Gutierrez-Medina v. State of Idaho*, 333 P3d 849, 853 (Idaho App 2014) (declining to consider whether equitable tolling of state statute of limitations was required, but concluding that *Padilla* did not apply retroactively).

private individual conduct beyond the power of the criminal law-making authority to proscribe," or if the new rule is a so-called "watershed" rule of criminal procedure. *Teague v. Lane*, 489 US at 307, 311 (internal quotations and citations omitted).

As explained below, petitioner is unable to clear either of those hurdles. First, petitioner's claims for post-conviction relief, based on his trial counsel's purported failure to advise him before he pleaded guilty that he would be deported as a result of his conviction, is a ground that reasonably could have been—and in fact was—raised in a timely manner in petitioner's original or amended petition.[2] Second, for prudential reasons, this court should apply the United States Supreme Court's retroactivity principles and conclude that *Padilla* does not apply to invalidate petitioner's conviction.

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[2] As noted, petitioner also alleges trial court error on the same legal theory. The allegation of trial court error, even if not otherwise procedurally barred as untimely and successive, is barred under *Palmer v. State of Oregon*, 318 Or 352, 867 P2d 1368 (1994). Therefore, for ease of reading, the remainder of this brief will refer to only the inadequate and ineffective assistance of counsel claim. The legal analyses regarding the applicability of the escape clauses and *Padilla*'s retroactivity, however, apply equally to both grounds for relief asserted by petitioner.

A. Petitioner's petition for post-conviction relief was both untimely and successive; because the grounds for relief alleged could have been—and were—raised in a timely original petition, the post-conviction court correctly denied the current petition.

1. Post-conviction petitions must generally be filed within two years after the conviction becomes final; successive petitions are generally not allowed.

By statute, persons convicted of crimes in Oregon may collaterally challenge their convictions by filing a petition for post-conviction relief. ORS 138.510. Post-conviction petitioners are entitled to relief if they can establish that the criminal proceedings leading to their convictions amounted to a "substantial denial" of their state or federal constitutional rights.[3] ORS 138.530(1). Because post-conviction relief is limited to grounds that could not reasonably have been raised during the criminal trial or appeal, the most common types of post-conviction relief petitions allege inadequate or ineffective assistance of counsel in violation of Article I, section 12, of the Oregon Constitution or the Sixth Amendment to the United States Constitution. *See Palmer*, 318 Or at 360 (holding that all ORS 138.530(1) grounds for post-conviction relief that reasonably could have been raised at trial, but were not, cannot be the basis for relief under the PCHA).

[3] All of the potential grounds for relief under the PCHA are set forth in more detail below.

Petitions for post-conviction relief must be filed within two years of the date that the underlying criminal case became final. ORS 138.510(3).[4] An exception to that two-year statute of limitations is when the "grounds for relief asserted * * * could not reasonably have been raised in the original or amended petition." ORS 138.510(3).

Additionally, all available grounds for relief must be asserted "in the original or amended petition." ORS 138.550(3). Any grounds not asserted in the original or amended petition are deemed waived, "unless the court on

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[4] ORS 138.510(3) 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.

hearing a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition." *Id.*

2. The escape clauses of ORS 138.510(3) and ORS 138.550(3) allow untimely or successive petitions only when they are based on information that did not exist or was not reasonably available—or if it would have been ridiculous, extreme, or absurd to assert the grounds for relief—when a timely original or amended petition was filed or due; the escape clauses apply only in extraordinary circumstances.

Whether a ground for relief could not "reasonably have been raised in the original or amended petition"—and thus satisfies the exceptions to the statute of limitations and the ban on successive petitions—is a question of statutory construction that this court addresses under its ordinary rules of statutory construction. *See State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009) (describing statutory construction methodology); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993) (same). Under that methodology, the court's goal is to discern the legislature's intent. *PGE*, 317 Or at 610; ORS 174.020(1). It does so by examining the text, context, and legislative history of the statutory wording. *Gaines*, 346 Or at 171-72. If the legislature's intent remains elusive, the court then applies relevant maxims of construction to finally construe the statute. *Id.* at 172.

a. This court's prior construction of the escape clauses is consistent with their plain meaning.

This court previously has construed the meaning of the escape clauses in *Bartz v. State of Oregon*, 314 Or 353, 839 P2d 217 (1992), and that prior construction is an important starting point for this court's analysis. *See Halperin v. Pitts*, 352 Or 482, 492, 287 P3d 1069 (2012) (recognizing that this court no longer adheres to a "rigid rule of prior construction," but that it "may consider itself bound to follow a prior construction as a matter of *stare decisis*"); *Liberty Northwest Ins. Corp., Inc. v. Watkins*, 347 Or 687, 692, 227 P3d 1134 (2010) ("As part of that first level of analysis, this court considers its prior interpretations of the statute."). In *Bartz*, this court was construing the statute of limitations escape clause, but it noted that *former* ORS 138.510(2) (1989) "was borrowed verbatim from ORS 138.550(3)[.]"[5] *Bartz*, 314 Or at 357-58. After examining the statutory text and legislative history of that escape clause, this court held that the legislature intended the escape clause to apply only in extraordinary circumstances and only when the petitioner discovers "information that did not exist or was not reasonably available to a defendant" within the statute of limitations. *Id.* at 359.

[5] *Former* ORS 138.510(2) (1989) has subsequently been renumbered as ORS 138.510(3). Or Laws 1999, ch 1055, § 7.

In *Bartz*, the petitioner had pleaded guilty to third-degree rape and was convicted. 314 Or at 356. Thereafter he filed a petition for post-conviction relief outside of the then-existing 120-day statute of limitations. *Id.* He alleged that his trial counsel was constitutionally ineffective for failing to advise him of an available statutory defense. *Id.* at 356-57. He argued that he should be excused from not filing his petition within the statute of limitations because "he could not reasonably have known of that defense within the 120-day period." *Id.* at 357. This court rejected that argument, and it affirmed the trial court's dismissal of the petition. After interpreting *former* ORS 138.510(2) to mean that the escape clause applied only in extraordinary circumstances, this court held that the petitioner had failed to prove that his untimeliness should be excused:

> Accordingly, we hold that the relevant statutes were reasonably available to [the petitioner] when his conviction became final. The failure of [the petitioner's] counsel to advise him of all available statutory defenses thus is not a 'ground[] for relief * * * which could not reasonably have been raised' timely. [*Former*] ORS 138.510(2). The exception to the 120-day limitation period is not available to [the petitioner] in the circumstances here.

Id. at 360 (omitted material in original).

Amicus Curiae O'Connor Weber LLP argues that this court "should revisit and clarify *Bartz*." (O'Connor Weber 16). It argues that *Bartz* did not follow a *PGE/Gaines* statutory construction methodology, that the narrow construction of the escape clauses was *dicta*, and that subsequent changes to the

statute of limitations require this court to revisit its decision. This court need not revisit *Bartz*'s sound statutory interpretation of the PCHA escape clauses.

To be sure, because *Bartz* was decided before *PGE* and *Gaines*, the now-familiar methodology from those cases was not *articulated* in *Bartz* in the way this court now articulates it. However, it is clear that this court was *applying* the *PGE/Gaines* methodology. This court correctly looked first to the wording of the statute, before turning to the legislative history. *See Bartz*, 314 Or at 358 ("[*Former*] 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."). Moreover, the fact that a prior decision predates *PGE* "provides no basis, in and of itself, to disregard its interpretation." *Mastriano v. Board of Parole*, 342 Or 684, 692, 159 P3d 1151 (2007). And, as explained below, even a more rigorous application of the *PGE*/*Gaines* methodology would not result in a different construction of the escape clauses.

Furthermore, this court's discussion in *Bartz* of what the statute of limitations escape clause meant was not *dicta*. The primary question before this court was whether the petitioner's untimely petition qualified for the protections of the escape clause. Necessarily, then, this court had to properly construe that statutory language. *See Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997)

(requiring courts to properly construe statutes even when the proper construction is not advanced by the parties in the case).

Finally, the only relevant change to the statute of limitations since *Bartz* was to enlarge the limitations time period. Or Laws 1993, ch 517, § 1. The legislature made no changes to the escape clause language in ORS 138.510(3) (or, for that matter, has it *ever* made any changes to the identical escape clause language in ORS 138.550(3)). Consequently, there is no reason for this court not to continue to follow *Bartz*'s construction of the escape clause.

Regardless, that construction of the escape clause is borne out even by a more rigorous application of the *PGE*/*Gaines* framework. "Reasonably" is an adverb meaning "in a reasonable manner." *Webster's Third New Int'l Dictionary* 1892 (unabridged ed 2002). "Reasonable," in turn, has several relevant meanings:

> 1 a: being in agreement with right thinking or right judgment: not conflicting with reason : not absurd : not ridiculous <a *reasonable* conviction> <a *reasonable* theory> b: being or remaining within the bounds of reason : not extreme : not excessive <a *reasonable* request> <a *reasonable* hope of succeeding> <spent a *reasonable* amount of time in relaxation> <is of a *reasonable* size> * * * 2 a : having the faculty of reason : RATIONAL <a *reasonable* being> b : possessing good sound judgment : well balanced : SENSIBLE <can rely on the judgment of a *reasonable* man>

Id. The verb "raise" has many meanings. The most relevant is "to bring up for consideration : to introduce into discussion : offer as an objection, a problem, or

a significant point <all these new views of the world *raised* problems for scholars as well as statesmen – R.W. Southern> <*raises* the moral question – E.M. Woolf> < *raises* the issue of the failure to distinguish between normal and abnormal – Abram Kardiner>." *Id.* at 1877. A ground for relief could not "reasonably have been raised" at an earlier time, then, if bringing up or introducing the ground at the earlier time would have been absurd, ridiculous, or extreme.

b. Statutory context confirms that the escape clauses were meant to be very narrow exceptions to the procedural restrictions on untimely and successive petitions.

Other sections of the PCHA provide additional useful context for determining how narrowly the escape clauses of ORS 138.550(3) and ORS 138.510(3) should be interpreted. ORS 138.550(2), for instance, provides that "[w]hen a petitioner sought and obtained direct appellate review * * *, no ground for relief may be asserted by petitioner * * * unless such ground was not asserted and could not reasonably have been asserted in the direct appellate review proceeding." The history of that provision establishes that it was intended to allow post-conviction claims "only when a claim could not reasonably have been raised on the [direct] 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."[6] Jack G. Collins and Carl R. Neil, *The Oregon Postconviction-Hearing Act*, 39 Or L Rev 337, 357 (1960) (emphasis added). In other words, the focus was on whether the issue—or "question"—could have been presented in a direct appeal, not whether the petitioner would likely have been successful on direct appeal.

The same focus applies to the escape clauses at issue here. Whether a ground for relief "could not reasonably have been raised" in a timely or previous petition does not turn on whether that ground likely would have resulted in relief. Rather, it turns on whether the ground for relief could have been put before the post-conviction court earlier. If it could have—even if the petitioner would not have been successful earlier—the untimely or successive petition does not qualify for the escape clauses.

The Oregon Court of Appeals reached the same conclusion in *Long v. Armenakis*, 166 Or App 94, 999 P2d 461, *rev den*, 330 Or 361 (2000). There, the post-conviction petitioner was charged—and later convicted—under a newly enacted extended statute of limitations for certain sex crimes. *Id.* at 96. After the petitioner's convictions became final, and after his time for filing a

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[6] At the time the PCHA was enacted in 1959, Oregon's only appellate court was the Oregon Supreme Court, and direct appeals from all criminal convictions were reviewed by this court. References to "the highest court of the state," therefore, should be understood to refer to any state appellate court.

petition for post-conviction relief had lapsed, this court declared the newly enacted statute of limitations to be unconstitutional as applied to people in the petitioner's situation. *State v. Cookman*, 324 Or 19, 27, 920 P2d 1086 (1996). Thereafter, the petitioner filed an untimely petition for post-conviction relief arguing that the subsequent "change in the law" announced by *Cookman* qualified his petition for the statute of limitations' escape clause. *Long*, 166 Or App at 97. The Court of Appeals disagreed:

> We agree with the state that whether an issue reasonably could be anticipated and raised does not depend—at least not in a *per se* way—on whether the issue has been definitely resolved by the courts. * * *
>
> * * * * *
>
> * * * 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.

Id. at 97-101.[7] *See also Benitez-Chacon v. State of Oregon*, 178 Or App 352, 357-59, 37 P3d 1035 (2001), *rev den*, 334 Or 76 (2002) (holding that a post-

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[7] As discussed below, the United States Supreme Court has held that *Padilla* announced a "new rule" for purposes of the federal retroactivity analysis. *Chaidez*, 133 S Ct at 1111. That holding, however, has limited bearing on the question of whether a *Padilla*-type ground could not reasonably have been raised in an earlier petition—thus qualifying for the escape clauses. First, the escape-clause interpretation question is purely a question of state law

Footnote continued…

conviction petitioner learning that she would be deported as a result of her conviction did not satisfy escape clause to allow her to bring an untimely claim based on counsel's allegedly deficient advice about the immigration consequences of the conviction). Although this court is, of course, not bound by prior Court of Appeals decisions, that court's opinions in *Long* and *Benitez-Chacon* persuasively explain why the statutory escape clauses should not apply in a case like this one.

One final piece of important statutory context is ORS 138.530(1). That statute identifies all of the available "grounds" for post-conviction relief:

> 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:

(…continued)
resolved under *PGE* and *Gaines*. Second, the "new rule" holding in *Chaidez* was fairly narrow. The "new rule" announced in *Padilla* was merely the holding that the *Strickland v. Washington*, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984), test for determining ineffective assistance of counsel applies to mis-advice about "collateral consequences" of a conviction. *Chaidez*, 133 S Ct at 1108. Of course, in Oregon, advice about "collateral" immigration consequences had been required long before *Padilla*. *See Gonzalez*, 340 Or at 458 (noting that Oregon "has joined a minority of states" that require counsel to advise non-citizen defendants that a criminal conviction may result in deportation); *Lyons v. Pearce*, 298 Or 554, 694 P2d 969 (1985) (recognizing state constitutional right to same advice); ORS 135.385(2)(d) (requiring trial courts to tell non-citizen defendants who plead guilty that "conviction of a crime may result, under the laws of the United States, in deportation, exclusion from admission to the United States or denial of naturalization"). Therefore, the requirement that counsel advise a criminal defendant that a conviction may result in deportation was not a new requirement in Oregon.

> (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.
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> (b) Lack of jurisdiction of the court to impose the judgment rendered upon petitioner's conviction.
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> (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.

ORS 138.530(1) (emphasis added). Importantly, the statute identifies the available grounds for relief in very broad terms—denial of constitutional rights, lack of jurisdiction, unlawful or unconstitutional sentence, or unconstitutional substantive statute.

So, when considering whether a "ground[] for relief * * * could not reasonably have been raised in the original or amended petition" to satisfy the escape clauses, the question is whether the petitioner could have alleged one of those very broad grounds identified in ORS 138.530(1). The question is not whether the petitioner could have raised a specific claim or whether the petitioner would have been successful if he had raised the ground for relief earlier.

Amicus Curiae Oregon Public Defense Services (OPDS) argues for a much more limited understanding of what are "grounds for relief," and that

understanding drives its conclusion that petitioner could not have reasonably raised his grounds for relief in this case. (OPDS 12-16). OPDS asserts that "a 'ground for relief' is the legal and factual elements of a post-conviction claim entitling a petitioner to relief." (*Id.* at 15-16). OPDS's definition, however, is not grounded in the statutory text. OPDS argues that the term "is a term of art," and it then turns to *Black's Law Dictionary* for a definition. But where a statute defines a term, this court need not look outside of the statute to determine what the term means. Here, the PCHA defines what a "ground" for relief is in ORS 138.530(1). And the "grounds" identified in ORS 138.530(1) as potential bases for post-conviction relief are necessarily the same "grounds for relief" contemplated by the ORS 138.510(3) and ORS 138.550(3) escape clauses. *See Datt v. Hill*, 347 Or 672, 678-80, 227 P3d 714 (2010) (assuming term "grounds" in ORS 138.530(1) has same meaning as "grounds" in ORS 138.510(3) and ORS 138.550(3), but holding that "grounds" in ORS 138.640(1) had a different meaning). Contrary to OPDS's argument, the specific facts supporting the claims do not constitute the "grounds" for relief. *See Ogle v. Nooth*, 355 Or 570, 579, 330 P3d 572 (2014) (distinguishing between "grounds" for relief and "facts relating to those claims").

c. Legislative history confirms that the escape clauses apply in only extraordinary circumstances.

Because this same escape clause is found in two different statutes within the PCHA, relevant legislative history comes from both the enactment of the original PCHA in 1959 and the enactment of the statute of limitations in 1989. The escape clause in ORS 138.550(3) was part of the original PCHA. ORS 138.550(3) was a codification of this court's then-recent holding in *Barber v. Gladden*, 215 Or 129, 332 P2d 641 (1958), to apply *res judicata* principles to *habeas corpus* actions. Collins and Neil, 39 Or L Rev at 357-58. In *Barber*, the petitioner filed a second habeas corpus petition challenging the lawfulness of his conviction, alleging five grounds for relief. *Barber*, 215 Or at 131-32. There was "nothing in the record to show that the issues presented * * * could not have been presented in the first habeas corpus proceeding brought by the plaintiff[.]" *Id.* at 132. "In fact," some of the grounds urged in the successive petition were "essentially the same as those presented in the first petition." *Id.* at 132-33. The circuit court dismissed the petition, and this court affirmed:

> We believe that the principle of *res judicata* should be fully applicable to habeas corpus proceedings[.]
>
> If 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 (italics added).

When it added a statute of limitations to the PCHA in 1989, the legislature included an identical escape clause. A representative of the Oregon Department of Justice testified that an escape clause was important for cases where evidence was newly discovered after the expiration of the statute of limitations. Minutes, House Committee on the Judiciary, Subcommittee on Crime and Corrections, March 9, 1989, p 4. Before another subcommittee, a representative of the Oregon Criminal Defense Lawyers Association testified that he could support a 120-day statute of limitations if exceptions to that limitations period were made for "extraordinary circumstances." Minutes, House Committee on the Judiciary, Subcommittee on Civil and Judicial Administration, June 12, 1989, pp 13-14. "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." *Bartz*, 315 Or at 359 (extensively discussing legislative history of *former* ORS 138.510(2) escape clause). "The witness suggested that the exception apply 'only upon a showing of a manifest injustice' and that it be applied so as to 'severely limit' the number of late petitions permitted to be filed." *Id.* at 359 n 7 (quoting legislative history). Nothing in the legislative history of ORS 138.510 indicates that the legislature intended that escape clause to have any different meaning than the ORS 138.550 escape clause.

Taken together, the text, context, and legislative history of the escape clauses in ORS 138.550(3) and ORS 138.510(3), show that the legislature intended them to be very narrow exceptions to the limitations period for filing a post-conviction petition and to the proscription on filing a successive petition. Raising a ground for relief in a successive petition, or more than two years after the challenged conviction became final, is permissible only when advancing that claim in the original petition or within the limitations period would have been extreme, ridiculous, or absurd or when information supporting a specific claim for relief did not yet exist or was not reasonably available to the petitioner. Such untimely and successive claims should be entertained only in extraordinary circumstances. As explained below, this case does not present such an extraordinary circumstance.

3. Petitioner's claims could reasonably have been raised—and, in fact, were raised—in his original or amended petition; therefore, the post-conviction court properly denied his petition.

With that understanding of whether grounds for relief "could not reasonably have been raised in the original or amended petition," the trial court correctly concluded that petitioner did not qualify for the escape clauses to ORS 138.550(3) or ORS 138.510(3). The asserted "grounds for relief" in petitioner's current petition are that "[p]etitioner was denied effective and adequate assistance of trial counsel under Article I, Section 11, of the

Constitution of the State of Oregon and under the Sixth and Fourteenth Amendments to the Constitution of the United States" in several particulars and that the trial court erred by accepting petitioner's guilty plea without "advis[ing] Petitioner of the * * * required minimum immigration penalties he is subjected to as a result of his entry of a plea to DCS[.]" (App Br ER 34-35, 37). The particular allegations of ineffective and inadequate assistance of counsel were that counsel: failed to adequately inform petitioner of "the immigration consequences that a guilty plea to [DCS] would have on Petitioner's permanent resident status"; falsely advised petitioner that he "may" be deported "when in truth his deportation from the United States and denial of naturalization are required legal consequences of his * * * conviction for DCS"; failed to litigate a motion to suppress; failed to advise petitioner that "his only opportunity for potentially remaining in the United States" would be to file a successful motion to suppress; failed to "even attempt to obtain a nondeportable result"; and erroneously advised petitioner that "[t]he Federal Government can do whatever the Federal Government wants to do" with respect to deportation. (App Br ER 35-37).

Whether this court views petitioner's "grounds for relief" as simply the generic allegation that counsel was ineffective and inadequate, or as the more particular factual allegations detailing the alleged inadequacies, those grounds could have been raised in the timely original or amended petition. In fact, those

grounds for relief *were raised* in petitioner's original timely petition. Because the bar on successive petitions was intended to incorporate *res judicata* principles into the PCHA, the fact that petitioner's current petition "was virtually the same as his first petition," (App Br ER 43), means that it necessarily could not enjoy the protections of the escape clause. If a petitioner could file the same petition—alleging the same grounds for relief—after each new decision from this court or the United States Supreme Court, the ban on successive petitions would have no meaning.

Regardless, even if petitioner had not filed his earlier petition, it would have been neither ridiculous nor absurd to raise these grounds in a timely original petition. Nor were the grounds in this petition based on information that did not exist or was not reasonably available when the timely original petition was filed. The grounds for relief alleged in this petition are run-of-the-mill inadequate and ineffective assistance of counsel claims based upon facts that were readily knowable (and known) at the time of the filing of the timely original petition.

Such claims were so reasonable in the timely original petition, in fact, that petitioner actually alleged them. Unless petitioner is acknowledging that his timely original petition was making irrational or absurd claims, it is hard to reconcile petitioner's insistence that his current claims could not reasonably

have been raised in his timely original petition with the fact that they, in fact, were raised.

To be sure, petitioner's argument has some superficial appeal: he tried to raise this claim in a timely original petition, and it was denied; but, he contends, if he raised it in a timely original petition today—after *Padilla*—it would be allowed.[8] Even if petitioner is right that a timely original *Padilla*-based petition would be allowed today, though, that is not a basis to excuse his procedural default in this case. This court's case law is replete with examples of litigants being unable to vindicate constitutional rights based upon a procedural impediment to doing so. *See, e.g.*, *Williams v. Philip Morris Inc.*, 344 Or 45, 61, 176 P3d 1255 (2008) (affirming as right for the wrong reason a trial court's refusal to give civil defendant's punitive damages jury instruction even though the trial court's basis for refusing to give the instruction was erroneous as a matter of federal constitutional law); *State v. Gornick*, 340 Or 160, 170, 130 P3d 780 (2006) (holding that it was improper for appellate court to consider a

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[8] Whether petitioner's claim—if not procedurally barred—would be successful, is not a question facing this court. Suffice it to say, the record here demonstrates that counsel did advise petitioner of the immigration consequences of being convicted of DCS—namely, that he could be deported. Moreover, the record also contains evidence that petitioner's primary goal in pleading guilty was to avoid prison time, so petitioner likely would not be able to prove prejudice even if the post-conviction court had considered the merits of the untimely and successive petition. (App Br ER 27).

criminal defendant's Sixth Amendment jury trial claim when the claim was unpreserved and did not qualify as error apparent on the face of the record). The purpose behind any statute of limitations is to promote finality without regard to the underlying merits of the litigants' claims. *See Johnson v. Star Machinery Co.*, 270 Or 694, 700-01, 530 P2d 53 (1974) (describing dual purposes of statute of ultimate repose: to protect the ability of parties to mount a defense to the claims; and to promote "the public policy of allowing people, after the lapse of a reasonable time, to plan their affairs with a degree of certainty"). This same purpose applies to procedural limitations on bringing post-conviction relief actions.

The state—a party to the underlying criminal proceeding as well as this post-conviction proceeding—has an interest in knowing that its criminal convictions (some, as in this case, that are over a decade old) are not lightly reversed based upon subsequent changes in the law. Almost any criminal case would be extremely difficult to prosecute more than ten years after the crime occurred. A criminal case involving the identification and quantification of a controlled substance, like the prosecution underlying this action, would be virtually impossible to re-prosecute now. That is because most of the investigative reports, laboratory reports, warrants, and evidence from the original prosecution would have been destroyed under state public records retention policies. *See, e.g.*, OAR 166-150-0095(2)(b) (district attorney records

retention for "felonies, with a judgment of guilty": "3 years after sentence expires"); OAR 166-150-0095(2)(c) (district attorney records retention for "misdemeanor cases": "3 years after termination"); OAR 166-150-0135(39)(c) (law enforcement records retention for incident case files, including laboratory reports, officer notes, warrants: "until statute of limitations expires"); OAR 166-150-0135(63) (law enforcement records retention for officer notes: 2 years); OAR 166-150-0135(71)(b) (law enforcement records retention for "property and evidence control": "1 year after statute of limitations expires"). Moreover, even obtaining evidence to defend the post-conviction claim (like testimony from counsel or counsel's files) would be exceedingly difficult to get—especially after the time for all collateral challenges had lapsed.

If petitioner's argument were correct, then any new decision by an appellate court providing a benefit to persons convicted of a crime would be a basis for filing an untimely or successive petition for post-conviction relief—no matter how old the convictions being challenged were. The escape clauses in the PCHA simply were not drafted with that purpose in mind. Rather, as this court held in *Bartz*, their availability to excuse procedural default was intended to be much more limited.[9]

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[9] As discussed below, some constitutional rights are so fundamental that when they are newly announced by the United States Supreme Court they are deemed to be "watershed" rights. Because *Padilla* did not announce a

Footnote continued…

B. *Padilla* is not retroactive.

If this court concludes that petitioner's claim qualifies for the statutory escape clauses, petitioner must also establish that *Padilla* applies retroactively in assessing the constitutional adequacy of his counsel's performance six years before *Padilla* was decided. The United States Supreme Court has held that *Padilla* announced a "new" rule of criminal procedure.[10] *Chaidez,* 133 S Ct at 1111. Generally, "new constitutional rules of criminal procedure" are not "applicable to those cases which have become final before the new rules are

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(…continued)
"watershed" rule, this court need not address whether the escape clauses would be triggered by the announcement of such a right. Even if a post-conviction petitioner could not bring an untimely claim to vindicate a newly announced "watershed" right in state court, however, he likely could have that right vindicated in a federal habeas corpus proceeding. *See* 28 USC §2244(d)(1)(C) (allowing state prisoners to file federal habeas corpus petitions within one year of "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review").

[10] In arguing that this court is not bound by federal retroactivity rules, petitioner argues that this court should conclude, contrary to *Chaidez,* that "*Padilla* is not a new rule but a surprising application of the *Strickland* rule." (Pet Br 34). As discussed below, the state agrees that this court is not obligated to follow federal retroactivity rules. But that does not mean that this court is free to ignore the United States Supreme Court's holding that *Padilla* is a "new" constitutional rule. The freedom that this court retains is the freedom to decide what significance—if any—to ascribe to the Supreme Court's conclusion that *Padilla* announced a "new" rule. *But see Commonwealth of Massachusetts v. Sylvain,* 995 NE2d 760 (Mass 2013) (concluding, as a matter of state law, that *Padilla* was not a "new" rule, and applying it to defendants whose convictions were final after April 1, 1997).

announced." *Teague v. Lane*, 489 US at 310; *accord Schriro v. Summerlin*, 542 US 348, 352, 124 S Ct 2519, 159 L Ed 2d 442, (2004) ("New rules of procedure * * * generally do not apply retroactively."). However, two exceptions to that general non-retroactivity rule exist: "Substantive" rules that place "conduct beyond the power of the criminal law-making authority to proscribe," and so-called "watershed rules of criminal procedure," both of which apply retroactively despite the general prohibition on retroactive application of "new" rules. *Teague v. Lane*, 489 US at 307, 311 (internal quotations omitted). Here, petitioner's convictions were final years before the "new" rule from *Padilla* was announced.[11] Therefore, petitioner would be entitled to have that rule applied on collateral review only if it met one of the *Teague v. Lane* exceptions.

Only the second of these exceptions could possibly apply. *Padilla* was a not a substantive rule placing conduct outside of the power of the state to proscribe. Rather, it was a rule of procedure. Therefore, the question here is whether it was a "watershed" rule of criminal procedure.

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[11] "State convictions are final 'for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.'" *Beard v. Banks*, 542 US 406, 411, 124 S Ct 2504, 159 L Ed 2d 494 (2004) (*quoting Caspari v. Bohlen*, 510 US 383, 114 S Ct 948, 127 L Ed 2d 236 (1994)). It is the conclusion of the "direct appeal"—not the conclusion of a subsequent, collateral post-conviction proceeding—that marks the finality of a conviction. *Clay v. United States*, 537 US 522, 527, 123 S Ct 1072, 155 L Ed 2d 88 (2003).

Padilla did not announce a "watershed" rule of criminal procedure.[12] As noted, "new" rules of criminal procedure do not apply retroactively unless they qualify as "watershed" rules. But "to qualify as watershed a new rule must meet two requirements. First, the rule must be necessary to prevent 'an impermissibly large risk' of an inaccurate conviction. * * * Second, the rule must 'alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'" *Whorton v. Bockting*, 549 US 406, 418, 127 S Ct 1173, 167 L Ed 2d 1 (2007) (citations omitted). The exception for "watershed" rules was "clearly meant to apply only to a small core of rules requiring observance of those procedures that ... are implicit in the concept of ordered liberty." *Beard*, 542 US at 417 (internal citations and quotation marks omitted; ellipses in original).

The *Padilla* Court did two things. First, the Court held that the Sixth Amendment requires a criminal defense attorney to properly advise her non-citizen clients about the immigration consequences of a guilty plea. 559 US at

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[12] In *Chaidez*, the petitioner did not argue that either of the *Teague v. Lane* exceptions applied; therefore the Court did not explicitly consider them in its analysis. 133 S Ct at 1107 n 3. However, because the Court ultimately held that *Padilla* would not be given retroactive effect, it necessarily assumed that neither exception applied. *See Chaidez*, 133 S Ct at 1113 ("The Court announced a new rule in *Padilla*. Under *Teague* [*v. Lane*], defendants whose convictions became final prior to *Padilla* therefore cannot benefit from its holding.").

367-68. Second, the Court set standards for what advice is required in those circumstances. Specifically, the Court explained that when the immigration consequences of a guilty plea are "truly clear," a criminal defense attorney must give her client "correct" advice regarding those consequences. *Id.* at 369. Otherwise, the attorney must "advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.*

That extension of the Sixth Amendment right to effective counsel was not "necessary to prevent an impermissibly large risk of an inaccurate conviction." *Whorton*, 549 US at 418 (internal quotations omitted). In fact, *Padilla* is not concerned with the *reliability* of convictions at all. The fact that a non-citizen defendant may have pleaded guilty unaware of the immigration consequences of his decision says little, if anything, about whether the defendant was *guilty of the offense*. Although receiving accurate advice about immigration consequences very well may affect a person's decision whether to plead guilty, that advice is not essential—if even related—to ensuring the *accuracy* of the conviction itself.

For the same reasons, the Court's decision in *Padilla* did not "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Id.* (internal quotations omitted). To be sure, *Padilla* did announce a "new" rule. But the fact that the *Padilla* rule was "new" does not mean that it changed the "bedrock procedural elements essential for the fairness

of a proceeding." Since *Teague*, the only new rule that the Court has ever even suggested might qualify as such a "bedrock" rule was the announcement in *Gideon v. Wainwright*, 372 US 335, 83 S Ct 792, 9 L Ed 2d 799 (1963), that states must provide counsel to indigent defendants. *Beard*, 542 US at 417-20; *see also Whorton*, 549 US at 409 (holding that *Crawford v. Washington*, 541 US 36, 124 S Ct 1354, 158 L Ed 2d 177 (2004) is not retroactive to convictions already final); *Miller v. Lampert*, 340 Or 1, 12, 125 P3d 1260 (2006) (holding that *Apprendi v. New Jersey*, 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435 (2000), is not a "watershed" rule of criminal procedure and does not apply retroactively to cases on collateral review). Although *Padilla* does relate to the assistance of counsel in criminal prosecutions, its narrow scope makes it plainly distinguishable from *Gideon*—the total denial of counsel is not the same as the ineffective assistance of counsel in one narrow area of representation.

Although few courts have addressed the issue, the courts that have considered *Padilla*'s status as a "watershed" rule have reached the same conclusion. The Fourth Circuit explained that *Padilla* is not a watershed rule because the fact that a criminal defendant received ineffective advice "does not cast doubt on the verity of the defendant's admission of guilt." *United States v. Mathur*, 685 F3d 396, 399-400 (4th Cir 2012), *cert den*, 133 S Ct 1457 (2013). Similarly, the Tenth Circuit held that *Padilla* is not a watershed rule because it "is simply not germane to concerns about risks of inaccurate convictions or

fundamental procedural fairness." *United States v. Chang Hong*, 671 F3d 1147, 1158 (10th Cir 2011). Finally, the Eleventh Circuit reasoned that "ineffective assistance of counsel [is not] on par with deprivation of counsel under *Gideon* in terms of its presumed effect on the accuracy of the proceedings." *Figuereo-Sanchez v. United States*, 678 F3d 1203, 1209 (11th Cir 2012), *cert den*, 133 S Ct 1455 (2013). In short, the rule announced in *Padilla* is not a "watershed" rule because it is not the type of "bedrock" procedural rule that is essential to the fairness of a proceeding, and its absence does not create an "impermissibly large risk" of an inaccurate conviction.[13]

As petitioner and various *amici* correctly argue, this court is not required to follow the *Teague v. Lane* framework for determining whether to apply a "new" federal constitutional rule retroactively. (Oregon Legal Academics and

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[13] Other state courts considering the issue have also concluded that *Padilla* was not a "watershed" rule, and the state is not aware of any other state court that has concluded otherwise. *See, e.g.*, *Gutierrez-Medina*, 333 P3d at 853 ("We are aware of no court that has found that *Padilla* applies retroactively under *Teague*'s watershed exception."); *People v. Baret*, 23 NY3d 777, 797, 16 NE3d 1216 (NY 2014) (holding that *Padilla* is not a watershed rule; "immigration advice is not critical to an accurate determination of guilt or innocence"); *Campos v. State of Minnesota*, 816 NW2d 480, 499 (Minn 2012), *cert den*, 133 S Ct 938 (2013) (holding that *Padilla* is not germane to concerns about risks of inaccurate convictions, and it affects only a small subset of defendants, therefore it is not a watershed rule); *Perez v. State of Iowa*, 816 NW2d 354, 359 (Iowa 2012) (recognizing that no court so far has held the *Padilla* rule qualifies for the watershed exception).

OJRC 1; Pet Br 24). However, as explained below, this court *should* continue to do so.

In *Danforth v. Minnesota*, 552 US 264, 268, 128 S Ct 1029, 169 L Ed 2d 859 (2008), the Supreme Court explained that state courts are not required to apply *Teague v. Lane* to new rules announced by the Court. That is, even if *Teague v. Lane* would prohibit a *federal* court from retroactively applying a new rule, *state* courts are not so limited and are, instead, entitled to apply new rules retroactively if they wish to do so. Thus, under *Danforth*, this court is not required to apply the *Teague v. Lane* analysis.[14]

It is worth noting that, even before *Danforth* and before this court's contrary holding in *Page*, the Oregon Court of Appeals correctly held that it was not *required* to adopt the federal retroactivity analysis from *Teague v. Lane*; nevertheless, that court concluded that Oregon courts should *voluntarily* apply the *Teague v. Lane* framework when addressing those questions. *Teague v. Palmateer*, 184 Or App at 587. That court explained that, although it was free to adopt a different retroactivity rule, the "current standards governing retroactivity adopted by the United States Supreme Court appropriately apply"

[14] With that holding, the Court implicitly overruled this court's contrary conclusion in *Page v. Palmateer*, 336 Or 379, 385, 84 P3d 133 (2004).

to state-court claims based on new federal rules of criminal procedure. 184 Or App at 587.

The Court of Appeals based its decision, in part, on this court's statement in *State v. Fair*, 263 Or 383, 387-88, 502 P2d 1150 (1972), that "we have tended to restrict the retroactive application of newly-announced rights, giving them only the application which the [United States] Supreme Court has adopted as a minimum." *Teague v. Palmateer*, 183 Or App at 585-86.

> *Fair*, at a minimum, announces a preferred approach and stands for the proposition that Oregon courts generally should apply federal retroactivity rules to newly announced federal principles, unless we identify a sound reason to depart from them.

Teague v. Palmateer, 184 Or App at 586. *See also State v. Evans*, 258 Or 437, 442, 483 P2d 1300 (1971) ("There is nothing to prevent this court from adopting a more strict rule [of retroactivity] than that enunciated by the United States Supreme Court, but in this field of law it adds nothing to consistent and orderly judicial process."). The Court of Appeals concluded that, adopting broader rules of retroactivity than those adopted by federal courts "would be a perversion of the comity principles reflected in state post-conviction procedures, not a service to them, * * * therefore according *less* respect to the finality of state court judgments than the federal courts themselves require." *Teague v. Palmateer*, 184 Or App at 587 (emphasis in original).

The Court of Appeals in *Teague v. Palmateer* was following this court's "preferred approach" of applying federal retroactivity rules to new federal constitutional rules. To be sure, this court incorrectly believed that it was *required* to follow those federal rules in the years after *Teague v. Lane*. *Page*, 336 Or at 385. Yet, the fact that the United States Supreme Court has made clear that state courts are free to fashion their own retroactivity rules provides no basis for this court to now stray from its longstanding policy of following federal retroactivity rules absent a sound reason to depart from them.

Absent a principled reason to break from this court's policy of following federal retroactivity principles without a clear reason to do so—and absent petitioner or *amici* identifying such a reason with respect to this area of the law—this court should follow the United States Supreme Court's lead and declare that *Padilla* does not apply retroactively. *See State v. Bishop*, 7 NE3d 605, 610 (Ohio App 2014) (applying *Teague v. Lane* retroactivity principles where state retroactivity jurisprudence "contains no suggestion that the retroactive effect of *Padilla* should be determined under a standard other than that set forth in *Teague* [*v. Lane*]"). Under the Supreme Court's retroactivity principles, *Padilla* cannot benefit petitioner, whose conviction became final years before *Padilla* was decided.

C. Remedy

If this court concludes that petitioner's untimely and successive petition did not qualify for the escape clause protections, or if this court concludes that *Padilla* does not apply retroactively to criminal convictions that have become final, it should affirm the post-conviction court's judgment denying post-conviction relief. For the reasons explained above, that is the appropriate resolution of this case. If, however, this court concludes both that petitioner's petition was permissibly filed and that *Padilla* applies retroactively, it should remand this case to the post-conviction trial court for a hearing on the merits of the petition. *See Padilla*, 559 US at 374-75 ("Whether [the petitioner] is entitled to relief will depend on whether he can demonstrate prejudice[.]"; remanding for further proceedings).

CONCLUSION

This court should affirm the post-conviction court's judgment denying petitioner's petition for post-conviction relief and the Court of Appeals' summary affirmance of that judgment. As explained above, petitioner's petition was both untimely and successive, and the grounds for relief asserted in the petition could reasonably have been raised in a timely original petition. In fact, these grounds *were raised* in a timely original petition. Moreover, even if petitioner qualified for the escape clauses to the statute of limitations and to the proscription on successive petitions, the law petitioner seeks to invoke—

Padilla—does not apply retroactively to invalidate his conviction, which became final years earlier.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on November 20, 2014, I directed the original Brief on the Merits of Respondent on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Brian Patrick Conry, attorney for petitioner on review, Peter Gartlan and Lindsey J. Burrows, attorneys for amicus curiae Office of Public Defense Services, Ryan T. O'Connor, attorney for amicus curiae O'Connor Weber LLP, and Sara F. Werboff, attorney for amicus curiae Oregon Legal Academics and Oregon Justice Resource Center, by using the court's electronic filing system.

I further certify that on November 20, 2014, I directed the Brief on the Merits of Respondent on Review, State of Oregon to be served upon Dan Webb Howard, attorney for amicus curiae The Oregon Chapter of the American Immigration Lawyers Association, by mailing two copies with postage prepaid, in an envelope, addressed to:

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 9,904 words. I further 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(2)(b).

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