IN THE SUPREME COURT OF THE STATE OF OREGON

JOSE ANTONIO GONZALEZ VERDUCZO

Petitioner-Appellant,

v.

STATE OF OREGON

Defendant-Respondent

Supreme Court Case No. 062339
Court of Appeals No. A153165
Yamhill County Circuit Court No. CV110467

BRIEF OF *AMICUS CURIAE* THE OREGON CHAPTER OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT FOR MULTNOMAH COUNTY: HONORABLE STEPHEN K. BUSHONG

DECISION OF COURT OF APPEALS FILED MAY 6, 2014. WOLHEIM, PRESIDING JUDGE, AND HASELTON, CHIEF JUDGE. ORDER OF SUMMARY AFFIRMANCE

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TABLE OF CONTENTS

TABLES OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*

The Oregon Chapter of the American Immigration Lawyers Association (AILA Oregon) is a professional group of Oregon lawyers who practice and teach in the field of immigration and nationality law. AILA is a national association of more than 12,000 members, with over 200 members in the AILA Oregon Chapter.

Members include lawyers and law professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization, to cultivate immigration-law jurisprudence, and to elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters.

AILA Oregon has a strong ongoing interest in the question of what constitutes a knowing and voluntary guilty plea in the Oregon state courts, when such pleas subject lawful permanent residents to mandatory deportation under the federal immigration statutes. AILA Oregon attorneys frequently provide representation in immigration matters to individuals—many of whom are long-time lawful permanent residents of the United States who entered the country as children—who are subject to mandatory deportation as a result of guilty pleas entered without their knowing that the plea would compel their removal from the United States, bar re-entry, and forever preclude the possibility of naturalization.

STATEMENT OF THE CASE

AILA Oregon adopts the Statement of the Case of Petitioner-Appellant Jose Antonio Gonzalez Verduzco (Petitioner).

QUESTION PRESENTED

AILA Oregon submits this brief to separately address an important issue of Oregon law that, although not specifically identified as an issue presented on review, was raised by Petitioner with both the post-conviction relief (PCR) court and the Court of Appeals. That question is the following:

> When the federal immigration statutes plainly *mandate deportation* for the offense with which a non-citizen defendant is charged, does the "may result * * * in deportation" advisal of ORS 135.385(2)(d), standing alone, provide the defendant with adequate knowledge of the immigration consequences of his guilty plea to qualify the plea as "understandingly made" under Article I, section 12 of the Oregon Constitution?

For the reasons articulated herein, it does not.[1]

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[1] AILA Oregon does not take a position regarding whether adequate pre-plea advice from counsel—of the sort required by *Padilla* to comply with the Sixth Amendment—could cure inadequacies in the "may result" advisal mandated by ORS 135.385(2)(d). On this point, AILA Oregon would simply note that, traditionally, both adequate legal advice *and* adequate plea advisals have been considered essential components of a constitutionally valid plea. However, whether pre-plea advice can cure any shortcomings in court advisals is a question for another day. The important point for present purposes is that, for the reasons articulated herein, the "may result" advisal is insufficiently specific to accomplish the converse task: curing inadequate advice from counsel.

SUMMARY OF THE ARGUMENT

Until the Supreme Court decided *Padilla v. Kentucky* in 2010, just about every state and federal jurisdiction to have considered the issue had determined that immigration consequences were only "collateral" consequences of a criminal conviction.[2] Thus, they reasoned, non-citizen defendants did not need to be advised of immigration consequences to enter a knowing and voluntary plea of guilt.

Not so in Oregon. Over three decades ago, our legislature added a provision to ORS 135.385 that requires courts to advise non-citizen defendants that their guilty pleas "may result" in deportation. *See* ORS 135.385(2)(d). Then, just under three decades ago, in *Lyons v. Pearce*, the Oregon Supreme Court ruled that immigration consequence advisals are not just a statutory mandate, but also a *constitutional requirement.* Specifically, *Lyons* ruled that immigration advisals are necessary to ensure that a plea is "understandingly made," a requirement for a valid plea under Article I, section 12 of the Oregon Constitution.[3]

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[2] *See Chaidez v. United States*, 568 US ___, 133 S Ct 1103, 1109 (2013) (observing that state and federal courts had, prior to *Padilla*, "almost unanimously concluded" that the immigration consequences of a plea were only "collateral").

[3] Article I, Section 12 of the Oregon Constitution provides: "No person shall be put in jeopardy twice for the same offence, **nor be compelled in any criminal prosecution to testify against himself**." (Emphasis added.)

At the time, the *Lyons* court determined that Oregon's statutorily mandated "may result" advisal was adequate to fully apprise a non-citizen defendant of the consequences of a guilty plea. In 1985, when *Lyons* was decided, that was the correct conclusion, because there was no such thing then as an "automatically deportable defense"; relief from deportation was always a possibility. However, as *Padilla* explains, the immigration-law landscape has changed dramatically in the intervening years, converting deportation into a *mandatory consequence* of pleading guilty to many crimes.

Citing these developments, *Padilla* broke with established precedent and ruled—albeit in the context of a Sixth Amendment claim—that immigration consequences are *not* "collateral," but a core consideration in a non-citizen defendant's decision whether to plead guilty. *Padilla* further ruled that, under the Sixth Amendment, advising a non-citizen defendant that he "may" be deported is not sufficiently specific to give him an accurate understanding of the consequences of his plea in cases where, in reality, the immigration statutes plainly *mandate deportation* for the charged offense.

Padilla compels a reexamination of *Lyons*' conclusion that Oregon's statutory "may result" advisal is sufficient to ensure that a plea is "understandingly made" under the Oregon Constitution. For the reasons articulated herein, in the modern immigration-law context, preserving the state constitutional right identified

in *Lyons* requires the following rule:

> Where the federal immigration statutes plainly *mandate deportation* for the offense with which a non-citizen defendant is charged, the defendant's plea is not "understandingly made" if: (a) neither defendant's counsel nor the court informs him that he will be subject to mandatory deportation; (b) the court does not inquire whether the defendant has had, or wants, the opportunity to consult with an attorney regarding whether pleading guilty will subject him to mandatory deportation; an d (c) as a result, the defendant actually lacks knowledge that entry of a guilty plea will compel his deportation.[4]

Under *Padilla*, a plea does comport with the requirements of the federal constitution in such circumstances. In keeping with Oregon's tradition of providing state constitutional protections at least as strong as (and often stronger

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[4] In AILA Oregon's view, an adequate plea colloquy in the current legal landscape would have to include questions along the following lines: (1) "Do you understand that the federal immigration laws require deportation when a person pleads [guilty/no contest] to certain types of crimes?"; and (2) "Have you had the opportunity to consult with [your attorney (if represented)/an attorney (if unrepresented)] regarding whether the federal immigration laws require that you be deported if you plead [guilty/no contest] here today?" If the defendant answers "no" to the second question, then the court should inquire whether she would like the opportunity to consult with counsel on this critical issue. Among other things, the above colloquy would allow the court to ensure that counsel had enough knowledge, or had done enough minimal research, to effectively do his job of adequately counseling his client. As *Padilla* makes clear, criminal-defense attorneys are constitutionally obligated to learn the legal fundamentals with respect to how the federal immigration statutes impact their non-citizen clients.

than) the protections individuals enjoy under the federal constitution,[5] the Court should revisit *Lyons* and announce that the "understandingly made" requirement of the Oregon Constitution is no longer satisfied in such circumstances, either.

If the Court rules thusly, then, inasmuch as Court would be articulating a new standard of law under the *state* constitution, Petitioner would be entitled to the relief requested in his PCR petition even if the Court rejects Petitioner's principal argument on review and concludes that the rule announced in *Padilla* does not apply retroactively to Petitioner's claims asserting violations of the federal constitution. The question whether a newly announced *Oregon* constitutional standard should have retroactive application would be a question for another day. It would also be a pure question of state law, since it would involve not the Fifth Amendment, the Sixth Amendment, or the Fourteenth Amendment, but the application of a new standard under Article I, section 12, enhancing a right already enjoyed under the Oregon constitution.

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[5] *See Criminal Law* § 17.1-1 (OSB CLE 2013 rev.) (detailing the multiple ways in which the right to counsel under Article I, section 11 of the Oregon Constitution is more expansive than the right to counsel under the Sixth Amendment).

ARGUMENT

A. Petitioner's "Unknowing Plea" Argument Was Timely Asserted under the "Escape Clause" of ORS 138.510(3), Inasmuch as: (a) It Is Premised on *Padilla*'s Articulation of a New Constitutional Principle; and (b) the "Layman Knows the Law" Presumption Has No Application in the Plea Advisals Context.

Petitioner asserted multiple times before the PCR court, and the Court of Appeals, that his plea was invalid under the Oregon Constitution because it did not qualify as "knowing and voluntary" under state constitutional standards. [6] Accepting this argument would result in a new constitutional standard in Oregon, namely, that a guilty plea cannot be "knowingly made" under Article I of the Oregon Constitution if the federal immigration statutes plainly mandate deportation for the charged offense, but a non-citizen defendant remains ignorant of this fact because neither counsel nor the court informs him of this consequence before entry of his plea.

Admittedly, that is contrary to current Oregon law, inasmuch as the court in *Lyons v. Pearce* found—albeit in a very different legal landscape—that Oregon's statutory "may result * * * in deportation" advisal (ORS 135.385(2)(d)) *was*

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[6] *See, e.g.*, Petition for Post-Conviction Relief (October 10, 2011), pp. 9-11 (ER 37-39); Petitioner's Post-Hearing Memorandum (Post Conviction Case No. CV110467, Yamhill County Case No. CR030790), pp. 6-8; Appellant's Opening Brief (January 16, 2014, Appellate Court No. A153165), pp. 28-30 (citing, *inter alia*, *Lyons*, where the Oregon Supreme Court first announced that advisals on deportation are constitutionally required under Article I, section 12 of the Oregon Constitution).

constitutionally adequate. *See* 298 Or 554, 557, 562, 694 P2d 969 (1985). However, the court there went on to hold that the petitioner was entitled to post-conviction relief in any event because his counsel failed to seek a judicial recommendation against deportation (JRAD), a remedy then available to non-citizen defendants. *See id.* at 568 ("failure of counsel to request from the court a recommendation against deportation where the defendant ... was subject to deportation as a result of his conviction rendered counsel's assistance constitutionally inadequate").

As the court noted, a JRAD, when granted, was "absolutely binding upon the Attorney General," leaving "no discretionary authority to deport." *Id.* at 568. The very existence of such broad discretionary power vested in the court to prevent deportation made the statutory "may result" advisal inherently accurate (and, therefore, adequate), because post-conviction immigration relief always remained a possibility, as long as counsel requested it. However, as set out in detail below, Congress's subsequent abolishment of the JRAD procedure, along with its elimination of the Attorney General's authority to grant discretionary relief from deportation, have since converted many crimes that previously exposed defendants to *possible* deportation into offenses that *mandate* that consequence. *See Padilla v. Kentucky*, 559 US 356, 130 S Ct 1473, 1480 (2010).

Petitioner's assertion that his plea fails to satisfy the "understandingly made"

standard of the Oregon Constitution is premised on his argument that the new federal constitutional rule announced in *Padilla* compels a reexamination of whether the "may result" advisal of ORS 135.385(2)(d) is still adequate under the Oregon Constitution, given the dramatically different immigration consequences of guilty pleas today, compared with their consequences when *Lyons* was decided. Thus, although Petitioner filed his second PCR petition more than two years after his direct appeal became final—*i.e.*, outside the usual statute of limitations for PCR petitions (*see* ORS 138.510(3)(b))—his "unknowing plea" argument falls within the so-called "escape clause" of ORS 138.510(3).

Under that clause, a PCR petition may be filed after the usual two-year statute of limitations has expired if it asserts grounds for relief that "could not reasonably have been raised in the original or amended petition." ORS 138.510(3). *Padilla* was decided on March 31, 2010, so Petitioner could not have raised an "unknowing plea" argument based on *Padilla* until after that date.[7]

The standards that govern whether Petitioner timely asserted his argument were articulated in *Long v. Armenakis*, where the court stated:

> "[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

[7] Petitioner filed his second PCR petition less than a year after *Padilla* was decided, well within the statute of limitations if it was effectively tolled by the escape clause until the Supreme Court decided that case.

> the post-conviction proceeding even though it was not raised at trial or on appeal. * * * 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 * * *, the more likely the conclusion that the claim reasonably could not have been raised." 166 Or App 94, 101, 999 P2d 461 (2000).

The court went on to observe that Oregon courts "adhere to those general guidelines" in determining whether a claim raised in a late PCR petition falls within the statutory "escape clause," or, conversely "reasonably could have been raised timely" (precluding relief). *Id.* at 101-02.

There is simply no doubt that *Padilla*, the decision upon which Petitioner's "unknowing plea" argument in his second PCR petition is premised, announced a new constitutional principle. Specifically, *Padilla* announced not only that advice regarding the immigration consequences of a plea is required by the Sixth Amendment—*i.e.*, that deportation is not simply a "collateral" consequence of a guilty plea—but also that a vague advisal that deportation "may" result is constitutionally deficient where the immigration statutes actually compel deportation for the crime in issue. *See Padilla*, 130 S Ct at 1483 ("when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear").

In *Chaidez v. United States*, decided last year, the Court stated plainly that

Padilla "announced a new rule." 568 US ___, 133 S Ct 1103, 1113 (2013). In other words, it articulated just the sort of "new constitutional principle" (*Long*, 166 Or App at 101) that brings an argument raised in a PCR petition squarely within the "escape clause" of ORS 138.510(3).

Petitioner has consistently argued (as AILA Oregon now argues) that *Padilla*'s new constitutional standard—particularly that part of its ruling indicating that a "may be deported"-type advisal is constitutionally deficient under the United States Constitution where the immigration statutes "presumptively mandat[e]" deportation (*Padilla*, 130 S Ct at 1483)—compels a reexamination of whether Oregon's statutory "may result" advisal still passes muster under the Oregon Constitution. That argument falls within the "escape clause" of ORS 138.510(3) because Petitioner could not possibly have asserted it prior to *Padilla*'s announcement of the "new rule" upon which it is premised.

Moreover, insofar as Petitioner's second PCR petition is based on the argument that his plea was unknowingly made, the earlier availability of the actual immigration statutes that mandated his deportation—as opposed to the later availability of *Padilla*—is inapposite. Thus, the case of *Benitez-Chacon v. State*, 178 Or App 352, 37 P3d 1035 (2001), which admittedly involved analogous facts, is readily distinguishable on legal grounds.

In *Benitez-Chacon*, petitioner's attorney told her that a conviction on a

delivery-of-controlled-substances charge "might" subject her to deportation. *Id.* at 354. She alleged that she would not have pleaded "no contest" if she had been accurately advised that that plea would actually *compel* her removal from the United States. *Id.*

The state asserted that the "escape clause" of ORS 138.510 did not apply to petitioner's late-filed PCR petition because her claim that she was not adequately advised of the immigration consequences of her conviction did not qualify as a ground that "could not have reasonably been raised timely." *Id.* at 355. The court accepted the state's argument, stating that the escape-clause exception "depends on whether the information existed or was reasonably available to petitioner to discover her attorney's alleged inadequate advice, not on whether petitioner reasonably was unaware of it." *Id.* at 357. The court found petitioner's arguments foreclosed under that standard because "the immigration laws and rules were available, even if petitioner chose not to determine what they actually were." *Id.*

The court's ruling was premised on *Bartz v. State of Oregon*, where the court, in finding that the petitioner's late-filed PCR petition asserting ineffective assistance of counsel did not fall within the escape clause, observed that it is "a basic assumption of the legal system that the ordinary means by which the legislature publishes and makes available its enactments are sufficient to inform persons of statutes that are relevant to them." 314 Or 353, 359-60, 839 P2d 217

(1992). Applying that principle, the *Benitez-Chacon* court observed that the petitioner could have obtained the information that her counsel failed to provide simply by consulting the relevant immigration statutes herself. 178 Or App at 356.

Both *Bartz* and *Benitez-Chacon* are distinguishable, for the simple fact that each case involved ineffective assistance of counsel claims, rather than arguments asserting that a plea was "unknowingly made." As a matter of simple logic, the "layman is presumed to know the law" presumption upon which both *Bartz* and *Benitez-Chacon* relied *cannot be applied to claims asserting an unknowing plea*, given that the entire premise of ORS 135.385 is that the typical defendant will ***not*** walk into court with knowledge of true consequences of his plea (immigration or otherwise).

Indeed, the statute specifically requires the court to advise the defendant regarding any number of penalties that are readily determinable by referencing publicly available criminal statutes or immigration statutes. Nonetheless, *Lyons* states that advising the defendant of these consequences is not only a statutory requirement under ORS 135.385, but also required *under the Oregon Constitution*, which requires that a guilty or no contest plea be "understandingly made" to be valid. *Lyons*, 298 Or at 562.

Thus, simply put, the "laymen are presumed to know the law" presumption has no application in the context of determining what is an "understanding" plea,

for purposes of the Oregon Constitution. Therefore, it has no place in determining whether a PCR petition asserting an unknowing plea falls within the escape clause of ORS 138.510(3). If the Court were to apply the presumption in this context, this would eviscerate the constitutional right to receive plea advisals identified in *Lyons*. It would also effectively proclaim ORS 135.385 a nugatory piece of legislation and a waste of the trial courts' time.

For the foregoing reasons, Petitioner's argument that his plea was not valid under the Oregon Constitution, in light of the new federal constitutional standard announced in *Padilla*—which Petitioner asserts should be adopted for determining when a plea is "understandingly made" under the state constitution, as well—falls within the "escape clause" of ORS 135.510(3). The "unknowing plea" argument that Petitioner raised below is thus timely.

B. To Have an "Understandingly Made" Plea, the Oregon Constitution Requires More than a "May Result in Deportation" Advisal When the Federal Statutes *Mandate Deportation* for the Charged Offense.

In *Lyons v. Pearce*, *supra*, the court announced that Article I, section 12 of the Oregon Constitution, which articulates Oregon's right against self-incrimination, requires that any plea of guilty be "understandingly made," with "knowledge of the legal consequences of such a plea." 298 Or at 562. Critically, *Lyons* also recognized that "[d]eportation is one such legal consequence." *Id.*

Thus, for almost thirty years, the Oregon Supreme Court has recognized that

advisals regarding deportation are essential for the guilty plea of a non-citizen defendant to be considered knowing, voluntary, and valid under the Oregon Constitution. Admittedly, the *Lyons* court also determined that the advisal prescribed by ORS 135.385(2)(d)—which requires the court to advise the defendant that conviction of a crime "**may result**, under the laws of the United States, in deportation" (emphasis added)—gave the non-citizen defendant before it constitutionally adequate "knowledge of the consequences" of his plea. *Id.*

When *Lyons* was decided, in 1985, the court's conclusion regarding the sufficiency of this advisal was entirely reasonable. As the Supreme Court noted in *Padilla*, there was "no such creature as an automatically deportable offense" until more than a decade later (until 1996, to be precise). 130 S Ct at 1479. However, striking changes in the immigration laws since 1985, detailed in *Padilla*, compel a reexamination of the sufficiency of the advisal required by ORS 135.385(2)(a).

For example, as described in *Padilla*, Congress has made two absolutely transformative changes to the immigration laws since 1985. First, in 1990, Congress abolished the JRAD procedure entirely. *See id.* at 1480. Then, in 1996, Congress "eliminated the Attorney General's authority to grant discretionary relief from deportation …, an authority that had been exercised to prevent deportation of over 10,000 citizens during the 5-year period to 1996[.]" *Id.* These changes to the immigration laws, among others, have "dramatically raised the stakes of a

noncitizen's criminal conviction," converting deportation into "nearly an automatic result for a broad class of noncitizen offenders" (*id.* at 1481), and "presumptively mandatory" for offenses like the one to which Petitioner pled guilty (*id.* at 1483).

Based on these changes in the law, the majority in *Padilla* concluded that, "when the deportation consequence [of a plea] is truly clear, as it was in this case, the duty to give correct advice"—*i.e.*, that deportation is "presumptively mandatory"—is "equally clear." *Id.* at 1483. Failure to provide such clear advice, the Court held, establishes a violation of the defendant's Sixth Amendment right to effective assistance of counsel.

In so holding, the Court rejected the characterization of deportation as a merely "collateral" consequence of a criminal conviction, observing that deportation is, "because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence." *Id.* at 1482. Furthermore, the Court noted that because deportation is "an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes" (*id.* at 1480), preserving the client's right to remain in the United States "may be *more important to the client than any potential jail sentence*." *Id.* at 1482 (internal quotation marks and brackets omitted; emphasis added).

The Supreme Court's refusal to accept the characterization of immigration

consequences as "collateral" is in keeping with Oregon's approach under Article I, section 12 of the state constitution. Indeed, the Oregon Supreme Court was well ahead of *Padilla* in reaching this conclusion. Almost three decades ago, *Lyons* implicitly rejected the notion that immigration consequences are "collateral"—at least for purposes of ensuring an "understandingly made" plea—by finding a right *under the state constitution* to be advised of such consequences. Relevant to that conclusion, the *Lyons* court observed:

> "In a country that was founded and settled by immigrants, where immigration has continued with each succeeding generation and where millions of aliens continue to respond to the invitation of the Statue of Liberty, it is important to recognize the significance associated with deportation. A deported alien may be required to sever family ties, become impoverished and return to a society in which he no longer can function and may, indeed, face life-threatening conditions. It portends drastic consequences in many cases. It is in all cases a life sentence of banishment." 298 Or at 565 (footnote and internal quotation marks omitted).

Lyons' observations about the significance of deportation are in harmony with the Court's observations in *Padilla*. Moreover, *Padilla*'s observations regarding the importance of the deportation penalty, and how changes in immigration law have converted this penalty from one that is "discretionary" to one that is "presumptively mandatory," are true beyond cavil.

Taking these last two points together, the inexorable conclusion is that the "may result" advisal required by 135.385(2)(a) no longer passes constitutional

muster. Simply put, it is insufficient, in today's immigration-law context, to satisfy the "understandingly made" standard articulated in *Lyons*.

Preliminarily, although *Padilla* involved the Sixth Amendment right to counsel, its conclusion that counsel has an obligation to "clear[ly]" advise her client that his guilty plea *will* subject him to deportation (130 S Ct at 1483)—not that it "may" cause this result—is certainly relevant in assessing the continued adequacy of Oregon's statutory advisal. Effectively, *Padilla* establishes that a "may result" advisal of the type specified on ORS 135.385(2)(d) *does not pass muster under the Sixth Amendment* when given by counsel to a client for whom deportation will be "presumptively mandatory" (*id.* at 1483) if he pleads guilty.

This is important, because—as a panel for the Fifth Circuit observed in *United States v. Urias-Marrufo*—the questions whether there was effective assistance and whether there was a knowing plea are "inextricably tied" when the defendant alleges that she did not receive accurate information on the immigration consequences of her plea from either counsel or the court. 744 F.3d 361, 365 (5th Cir. 2014). In *Urias-Marrufo*, the petitioner alleged that her plea was unknowing, in violation of the Fifth Amendment. As the court observed, "[t]o enter a knowing and voluntary guilty plea, the defendant must have a '*full understanding* of what the plea connotes and of its consequence.'" *Id.* at 366, quoting *Boykin v. Alabama*, 395 US 238, 244, 89 S Ct 1709 (1969) (emphasis

added).

Applying this standard in light of the principles articulated in *Padilla*, the court concluded that the defendant lacked the requisite "full understanding" if she had not been advised of the "certain deportation consequences" of her plea. *Id.* at 368. Moreover, accepting as true the defendant's allegations that her attorney had failed to so advise her, the magistrate judge's advisal to her that there "might" be immigration consequences of pleading guilty was entirely inadequate to cure the deficiency in her counsel's advice. *Id.* at 369 (emphasis in original). Consequently, the district court erred in concluding that the defendant had not alleged a valid legal argument to support her motion to withdraw her guilty plea, and the court remanded with instructions that it entertain her motion and make appropriate factual findings. *Id.* at 369.

Applying the reasoning in *Urias-Marrufo*, but applying Oregon law, *Lyons* states that, under Article I, section 12 of the Oregon Constitution, a guilty plea must be "understandingly made," with "knowledge of the legal consequences," and that "[d]eportation is one such consequence." 298 Or at 562. Accepting these propositions as true, *Padilla* and *Urias-Marrufo* compellingly detail why the "may result" advisal of ORS 135.385(2)(d)—although constitutionally adequate when implemented in 1979 (indeed, it was far ahead of its time)—is no longer adequate in light of the dramatically different immigration-law landscape. As those two

cases establish, a "may result"-type advisal does *not* provide a defendant with anything approaching "full knowledge" of the immigration consequences of a guilty plea when that plea actually *compels deportation*.

For this reason, the court should rule that Petitioner's plea was not "understandingly made" under the Oregon Constitution.

C. Precedent from Oregon and Other Jurisdictions Relying on the "Direct" Versus "Collateral" Distinction Is Distinguishable.

No Oregon precedent compels the conclusion that the "may result" advisal Petitioner received resulted in knowing plea. Moreover, decisions from other jurisdictions that have found *Padilla* inapplicable in the plea advisals context are also distinguishable.

In *Gonzalez v. State of Oregon*, 340 Or 452, 134 P3d 955 (2006), the Oregon Supreme Court considered the obligation of counsel to advise a non-citizen client of the immigration consequences of a guilty plea. *Gonzalez* concluded—contrary to *Padilla*, which was decided subsequently—that a "may result" advisal qualifies as effective assistance of counsel even if the client's guilty plea will actually *mandate* his deportation. *See id.* at 459 (finding "no constitutional warrant" for requiring a greater level of specificity for "a *collateral* consequence of a conviction") (emphasis in original).

Inasmuch as *Gonzalez* is premised on the "direct" versus "collateral" distinction that *Padilla* rejected for Sixth Amendment purposes, it is ripe for

reexamination. Indeed, *Gonzalez* ultimately must be overruled if the Oregon Supreme Court believes that the Oregon Constitution provides a right to counsel equivalent to (or stronger than) that provided by the Sixth Amendment. *See Criminal Law* § 17.1-1 (OSB CLE 2013 rev.) (detailing the multiple ways in which the right to counsel under Article I, section 11 of the Oregon Constitution is more expansive than the right to counsel under the Sixth Amendment).

At the end of the day, however, it simply is not necessary to overrule *Gonzalez* to conclude that ORS 135.385(2)(d)'s "may result" advisal is constitutionally deficient, for the simple fact that *Gonzalez* did not consider the adequacy of that advisal *under Article I, section 12 of the Oregon Constitution.*[8]

With *Lyons*, the Oregon Supreme Court long ago rejected the proposition that immigration consequences are "collateral" for purposes of determining what plea advisals are required under section 12. Moreover, since some defendants represent themselves (their constitutional prerogative under section 12), it is only logical to require an accurate immigration consequences advisal for a "knowing and voluntary" plea, irrespective of any limitations on the obligations of defense counsel.

Indeed, the distinct requirements of section 12 compel a different result from

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[8] *Gonzalez* considered the adequacy of the advisal in question under ORS 135.385, but not under Oregon's right against self-incrimination. *See* 340 Or at 458.

that reached in cases where courts have concluded that the accurate immigration advisals required by *Padilla* are not necessary to satisfy the due process requirements of the Fifth Amendment. In these cases, the courts have concluded that the "direct" versus "collateral" distinction survived *Padilla* for purposes of determining whether a guilty plea is sufficiently "knowing and voluntary" to comply with due process. *See United States v. Delgado-Ramos*, 635 F.3d 1237, 1240-41 (9th Cir. 2011) (noting that *Padilla* had "no occasion" to consider "the continued viability of the distinction between direct and collateral consequences in the due process context").

In other words, these cases simply find *no obligation whatsoever* under the United States Constitution that a court advise a defendant of the immigration consequences of her plea. In *Lyons*, the Oregon Supreme Court long ago rejected the proposition that the *Oregon Constitution* imposes no such duty.

Thus, to reach the result most consistent with Oregon precedent, *Padilla*, and the requirements of Article I, section 12 of the Oregon Constitution, the court should reject those decisions from other jurisdictions that conclude that the "direct" versus "collateral" distinction still applies to plea advisals. When neither counsel nor the court has advised a non-citizen defendant that his guilty plea will mandate his deportation, the plea actually will mandate deportation, and the defendant actually is ignorant of this fact, his plea cannot be considered "understandingly

made" under the Oregon Constitution.

Finally, *Padilla*'s observation that accurate plea advisals are salutary not only for preserving constitutional rights, but also for the efficient administration of justice, deserves at least passing mention. As *Padilla* states:

> "[I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. * * * The threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for dismissal of a charge that does." *Id.* at 1486.

Of course, as this passage suggests, it would be far superior, in all respects, if all non-citizen defendants always had legal representation, that representation was always adequate, and all of them had therefore received accurate information regarding whether a guilty plea would mandate their deportation *long before* arriving in court for a plea colloquy. However, that said, this is certainly a case where the adage "better late than never" applies.

Even if a non-citizen defendant does not realize until the plea colloquy that he has been ignorant or misinformed regarding the true immigration consequences of a guilty plea, there is still time to correct this deficiency in his knowledge, by

providing him with the opportunity to confer with counsel regarding this critical issue.[9] Certainly, *that* is superior in all respects, and for all parties concerned (the state, the court, and the defendant), to entering an unknowing plea and later having it challenged via a PCR petition that effectively renews the proceedings after a final judgment.

CONCLUSION

For the foregoing reasons, the court should announce a rule that a non-citizen defendant's plea cannot be "understandingly made" under Article I, section 12 of the Oregon Constitution where: (a) it will presumptively mandate deportation under the federal criminal statues; (b) neither counsel nor the court has informed him of this fact; (c) the court has not inquired whether he understands

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[9] AILA Oregon does not take the position that adequate court advisals can cure inadequate advice from counsel. Certainly, many defendants will be ill-prepared to make a hugely consequential decision at a plea colloquy if their attorneys have failed to give them in advance the advice they need to make a well-considered decision. However, it also seems highly likely that some substantial portion of non-citizen defendants, learning for the first time at the colloquy that deportation could be a *mandatory consequence* of a guilty plea, and asked by the judge if they would like to find out from an attorney whether it truly is (in light of the crime with which they are charged), will answer "yes." That, in turn, will lead to a reasonable probability that they will finally receive the accurate information that they lacked previously. It will also serve to educate those criminal-defense attorneys who are unaware of their obligations under *Padilla* that *Padilla* obligates them to provide constitutionally adequate immigration-law advice to their non-citizen clients. However, all this notwithstanding, whether adequate advisals can cure inadequate advice from counsel is really a question for another day. Here, Petitioner did not receive accurate information from either counsel or the court. Under these circumstances, his plea cannot be described as "understandingly made," under the Oregon Constitution.

that some crimes mandate deportation and whether he has had (or wants) the opportunity to confer with counsel regarding whether the crime with which he is charged is such a crime; and (d) he therefore remains ignorant of the true immigration consequences of his plea.

DATED this 2nd day of October, 2014.

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CERTIFICATE OF FILING AND SERVICE

I, Kymbreynn Lynn Borden, do hereby certify that on October 2, 2014, I electronically filed the foregoing AMICUS CURIAE BRIEF with the State Court Administrator by using the e-filing system of the Oregon Appellate Courts.

I further certify that on October 2, 2014, I served copies of this AMICUS CURIAE BRIEF via the Oregon Appellate Court's e-filing system to the following:

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