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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

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

BRIEF ON THE MERITS OF PETITIONER ON REVIEW

Review of the Decision of the Court of Appeals
on Petitioner's Appeal from a Judgment of the Circuit Court for Yamhill County
Honorable Ronald W. Stone, Judge.

Decision of Court of Appeals filed: May 6, 2014. Wollheim, Presiding Judge, and Haselton, Chief Judge. Order of Summary Affirmance.

BRIAN PATRICK CONRY # 822245
Attorney at Law
534 SW Third Avenue, Suite #711
Portland, Oregon, 97204
Telephone: (503) 274-4430
Attorney for Petitioner-Appellant

PETER GARTLAN
Chief Defender
LINDSEY BURROWS #113431
Deputy Public Defender
Office of Public Defense Services
Attorneys for *Amicus Curiae*

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA M. JOYCE #013112
Solicitor General
PAUL L. SMITH #001870
Attorney in Charge, Post-Conviction
KATHLEEN CEGLA #892090
Assistant Attorney General
400 Justice Building
1162 Court Street NE
Kathleen.cegla@doj.state.or.us
Telephone: (503) 378-4402
Attorneys for Defendant-Respondent

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Pursuant to ORAP 5.80, appellant submits the following, as indexed below.

BRIEF ON THE MERITS OF PETITIONER ON REVIEW
GONZALEZ-VERDUZCO

(I) NATURE OF THE PROCEEDING

Petitioner was convicted of Delivery of a Controlled Substance, Marijuana in Schedule I for consideration (hereafter DCS), in violation of ORS 475.992. Petitioner filed his first Post-Conviction Relief (hereafter PCR) petition, Yamhill County PCR Case No. CV060029 on January 24, 2006. His PCR petition was denied on June 6, 2006. Petitioner appealed and the denial of PCR was affirmed without opinion by the Court of Appeals. A petition for review was denied by the Oregon Supreme Court. Petitioner was placed into deportation proceedings on January 9, 2006 and ordered deported on July 7, 2006.

Petitioner filed his second PCR petition, Yamhill County PCR Case No. CV110467 on October 20, 2011. This PCR petition was denied on or about November 26, 2012. Petitioner appealed and the Court of Appeals issued an Order of Summary Affirmance No. A153165, on May 6, 2014. App-1.[1]

[1] App refers to the Appendix filed with Petitioner's Petition for Review, dated June 9, 2014

(II) LEGAL QUESTIONS PRESENTED ON REVIEW

(I) What is the effect of the Danforth v. Minnesota, 552 US 264, 128 S Ct 1029, 169 L Ed 2d 859 (2008) ruling that State courts need not follow the Teague v. Lane, 489 US 288, 109 S Ct 1060, 103 L Ed2d 334 (1989) anti-retroactivity rulings on new rules of federal constitutional procedure, that is:

(A) Should Oregon reject the Teague v. Lane anti-retroactivity doctrine and apply Padilla v. Kentucky, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284 (2010) retroactively because Teague has been broadened beyond recognition and fairness by later Supreme Court decisions applying the Teague rule, including Lambrix v. Singletary, 520 US 518, 117 S Ct 1517, 137 L Ed 2d 771 (1997) (The Teague rule is hereafter referred to as Teague/Lambrix rule).

(B) In the alternative, should this court find that Padilla is not a new rule but a surprising application of Strickland v. Washington, 466 US 688, 104 S Ct 2052, (1984) that was announced in the Padilla and Chaidez v. United States, 133 S Ct 1103, 185 L Ed 149, 569 US ____ (2013) decisions and apply Padilla to Petitioner's PCR claims?

(C) Should this court find Petitioner's successive PCR petition timely filed under ORS 138.550(3)[2] and within the safety valve rule for PCR petitions under ORS 138.510(3)[3]? In other words, should Petitioner's successive PCR petition have been filed at an earlier time even though there were no legal grounds to support it until after Padilla was decided?

(II) If this court chooses to follow the Teague v. Lane anti-retroactivity rule by deciding that in following the Danforth rule that States need not follow the U.S. Supreme Court's retroactivity rulings for new rules of criminal constitutional procedure and by continuing to apply Teague's anti-retroactivity rule, as broadened by Lambrix, to State PCR proceedings, is the Padilla/Chaidez rule within:

(A) The Teague watershed rule exception which is applicable to circumstances similar to the circumstances in the Gideon v. Wainwright, 372 US 335, 83 S Ct 792, 9 L Ed 2d 799 (1963) right to counsel case where it was recognized that there is little

[2] ORS 138.550(3) prohibits successive petitions for post-conviction relief unless the successive petition includes "grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition."

[3] A petition pursuant to ORS 138.510 (Persons who may file petition for relief) to 138.680 (Short title) must be filed within two years of the following…138.510(3) 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.

opportunity for fairness and due process in the courtroom without the assistance of counsel. The Teague exception is intended to apply to new rules of criminal constitutional procedure that are "implicit within the concept of ordered liberty." Should this exception apply where the Sixth Amendment right to counsel requires counsel to advise a criminal defendant of the clearly required immigration consequences of a criminal conviction because otherwise a knowing and voluntary plea cannot be entered?

(B) Alternatively, should this court choose to construe the Teague watershed rule exception independently under the Oregon Post-Conviction Hearing Act (hereafter OPCHA) and find Petitioner's PCR filing to be within the Teague exception for new rules of criminal constitutional procedure because a knowing and voluntary plea cannot be entered under the Oregon Constitution unless the Defendant knows of the clearly, legally required immigration consequences of his plea?

(III) Was there a "substantial denial in the proceedings" under ORS 138.530(1)(a)[4] because Petitioner entered an unknowing and involuntary plea?

[4] ORS 138.530(1)(a) provides: "Post-conviction relief pursuant to ORS 138.510 to 138.680 shall be granted by the court when one or more of the following grounds is established by the petitioner: (a) A substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void."

(IV) Should this court revisit Gonzalez v. State of Oregon, 340 Or 452, 134 P3d 955 (2006), which held that immigration consequences are collateral and that a "may be deported" pre-plea warning by counsel is appropriate, even where the immigrant is clearly required to be deported by the immigration laws? Should this court adopt the holding and rationale of Padilla as persuasive and find that counsel is required to advise an immigrant client of the clearly required immigration consequences of a plea, pre-plea; as this advice is within the ambit of the Oregon Constitution, Article I, Section 11, right to counsel?

(V) If this court decides Petitioner received ineffective assistance of counsel or that there was a substantial denial in the proceedings such as an unknowing and involuntary plea, should this court find prejudice and vacate Petitioner's conviction based upon the undisputed record in this case?

(III) PROPOSED RULES OF LAW

(I) As the Danforth decision makes clear, the federal anti-retroactivity Teague doctrine does not bar a grant of a state PCR petition based on a new federal constitutional rule in state (Oregon) PCR proceedings. The OPCHA protects petitioners whose convictions were caused by the denial of federal constitutional rights. Accordingly, we

will apply the Sixth Amendment right to counsel Padilla rule retroactively to cases on post-conviction review that are within "the safety valve", ORS 138.510(3) and successive petition ORS 138.550(3) escape clauses as construed by the texts of the statutes, legislative history and prior precedents including Long v. Armenakis, 166 Or App 94, 999 P2d 461 (2000).

Applying Danforth, counsel will be found ineffective due to a violation of Padilla, where the defendant was incompletely advised and/or misadvised by counsel pre-plea that he may be deported but was legally required to be deported by the plea, under the clear immigration laws.

In the alternative, under an Oregon constitutional analysis we find that Padilla is not a new rule but is an application of Strickland v. Washington as Petitioner's PCR filings are within the safety valve and successive petition OPCHA rules, this court will apply Padilla to defendant's PCR claim and find the defense counsel was ineffective for failing to advise her client of the clearly required immigration consequences of a DCS aggravated felony conviction.

(II) Alternatively, although this court has decided that Padilla is a new constitutional rule of criminal procedure agreeing with Chaidez on this point, this ruling does not bar Petitioner's PCR claims because Padilla is also a watershed rule of federal

criminal constitutional procedure "implicit within the concept of ordered liberty" and within the Teague exception permitting retroactive claims because:

(II)(A) An immigrant cannot enter into a knowing and voluntary plea to an "aggravated felony" charge, as that term is defined by the Immigration and Nationality Act (hereafter INA) Section 101 (a)(43) et seq. (see App-39), under the due process clause of the Fifth and Fourteenth Amendment to the U.S. Constitution, without knowing the legally required immigration consequences of his plea. Accordingly, where an immigrant has not been advised by counsel pre-plea that the penalty for his conviction is legally required deportation, inadmissibility and/or bar to his/her naturalization, where these immigration penalties are clearly required by the immigration laws, his conviction will be vacated as unknowingly and involuntarily entered.

(II)(B) Or, in the alternative, applying the Danforth rule, Oregon will apply the Teague watershed rule exception independently of the manner that the federal courts apply this exception to new rules of criminal constitutional procedure. Under the OPCHA, a knowing and voluntary plea under the Oregon Constitution, Article I, Section 10 and/or under Article I, Section 12 right to not incriminate oneself, is "implicit within the concept of ordered liberty" as independently determined by this court as a matter of state law. Accordingly, where a defendant does not know pre-plea that the immigration

penalty for his conviction is legally required deportation, inadmissibility and/or bar to his/her naturalization, his plea will be set aside as unknowingly and involuntarily made.

(III) There is a "substantial denial in the proceedings" under ORS 138.530(1)(a) where the criminal defendant is not advised by the court or counsel pre-plea and/or at the plea hearing that he will be required to be deported, found inadmissible and barred from naturalization as the clearly required immigration penalty for his crime. The criminal judge in effect sentences the immigrant to deportation/banishment when a criminal defendant is sentenced for an "aggravated felony" as that term is defined by INA § 101(a)(43), et seq. in the criminal court. The immigration judge who orders the deportation is a mere scrivener of the punishment that has already been required by the criminal court judge's sentencing of the defendant.

(IV) Article I, Section 11 of the Oregon Constitution, the right to adequate counsel, includes within its ambit (Oregon now adopts the Padilla rule that legal advice about the clear immigration consequences of a conviction is within the ambit of the Sixth Amendment right to counsel; this required equal advice is also within the ambit of the Oregon constitution right to counsel) the obligation that counsel advise a client pre-plea of the required, clear immigration consequences of a plea to an aggravated felony or other criminal charge.

(V) When this court or a court of appeals finds ineffective assistance of counsel and/or a substantial denial in the proceedings due to entry of an unknowing and involuntary plea and prejudice is clear on the record provided by Petitioner; this court or the appellate court shall vacate Petitioner's conviction based upon the undisputed record of prejudice presented therein.

(VI) NATURE OF THE JUDGMENT TO BE REVIEWED

This is an appeal from the denial of PCR on Petitioner's conviction in Yamhill County Case No. CV110467, DCS in Schedule I. The judgment was entered on November 28, 2012.

(V) STATEMENT OF THE CASE: Pertinent Facts

Petitioner became a legal permanent resident[5] (hereafter, LPR) of the United States in 2001. He had first entered the United States at the age of 10. App-20 – 26 (affidavit of Jose Verduzco). He was not advised by counsel pre-plea of the clearly required deportation consequence of his guilty plea to DCS on 11/20/2003, App-6 (Plea Petition),

[5] INA § 101 (a)(20) provides that "'lawfully admitted for permanent residence'" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed."

App-39, definition of "aggravated felony" which includes illicit trafficking in a controlled substance, INA § 101(a)(43)(B).

Petitioner traveled to Mexico and on his return on January 9, 2006, was placed into immigration proceedings. App-17. The notice to appear immigration court for Petitioner, alleges that Petitioner is inadmissible into the United States under INA § 212(a)(2)(A)(i)(II) because he has been convicted of an act which constitutes the essential elements of a controlled substance offense as defined in Section 102 of the Controlled Substance Act, 21 U.S.C. 802. Petitioner was returning to the United States through Phoenix as a returning resident on January 9, 2006.

The 2011 PCR petition alleges for the first time Oregon and U.S. constitutional claims that Petitioner's due process rights were violated because his plea was entered into unknowingly and involuntarily. These new allegations are found in the 2011 PCR Petition at ER 46 line 1-8 to ER 48, line 8. The most pertinent part is as follows:

> The conviction is flawed because the plea violated the due process protections required by the Fifth Amendment...
>
> The Fourteenth Amendment due process and equal protection clauses require that Petitioner know the nature of the charges and consequences (including directly required mandatory minimum immigration penalties) of a guilty plea. Padilla v. Kentucky, 130 S. Ct. 1473 (2010); Boykin v. Alabama, 395 U.S. 238 (1969).
>
> Oregon Constitution Article 1, Section 105 requires the Court advise the Petitioner of the possible minimum and maximum penalties of his plea, also see Hartzog v. Keeney, 304 Or. 57, 64, 742 P.2d 600 (1987). The Court's failure to do so renders Petitioner's conviction void….

> The guilty plea was involuntary and unknowing because the Petitioner was misadvised of the required immigration penalty of his criminal conviction.

The 2011 PCR Petition continues at pages 11, 12 (ER 48, 49) with additional prejudice allegations at ER 48 line 21 to ER 49 line 14. The 2011 PCR Petition conclusion section includes some language not found in the 2006 PCR Petition as follows:

> …by the failure of the trial court to advise Petitioner at the time of his plea of the mandatory minimum immigration penalty required by his plea. ER 49, lines 23-26.

The 2006 PCR petition has 1,846 words and the 2011 PCR Petition has 2,961 words. The PCR petitions were dissimilar in the following additional ways:

In section 2, page 1 of the first 2006 PCR petition, the petitioner alleges that he is suffering the "collateral consequences of said conviction." In section 2, page 1 of the 2011 PCR petition, the allegation is Petitioner is suffering the "direct consequence and immigration penalty required by said conviction."

At section 6, page 2 of the 2011 PCR petition, the new language is as follows: "Petitioner had become a LPR (Legal Permanent Resident) on December 6, 2001. He no longer enjoys that status." And on page 3 that:

> Petitioner was charged with deportability by the immigration authorities (Immigration and Customs Enforcement, ICE) based on an "aggravated felony" conviction for drug trafficking. The deportation proceedings against Petitioner for this conviction resulted in Petitioner's deportation from the United States on approximately July 7, 2006.

Another section of the 2011 PCR petition that is not found in the 2006 PCR petition is at ER-40, line 22, to ER-43, line 7. Please see ER 40 at page 3, line 22 to page 6, line 5 for why a successive PCR petition is appropriate.

Please see ER 40 page 6, line 8-line 16 the successive 2011 PCR Petition allegations explaining why. Additional allegations not in the 2006 PCR petition but in the 2011 PCR petition include:

> Counsel failed to explain the plain language of INA 101(a)(43)(b)[6] to Petitioner when advising her client of the immigration consequence of Petitioner's plea to DCS. Footnote added. ER 45, lines 11-14.

The following from the 2011 PCR petition at Paragraph 2 of section 3, page 8 is not found in the 2006 PCR Petition:

> A reasonable immigrant would have elected to have the motion to suppress proceed if the immigrant had been advised that DCS will legally require the immigrant's deportation, and that the only potential defense to deportation is to have a motion to suppress granted. ER 45, lines 17-21.

Allegations 4 and 5, pages 8-9, of the 2011 PCR petition, ER 45, line 22 to ER 46, line 9, are not found in the 2006 PCR petition. The most pertinent part is stated here as follows:

> 4.) Counsel failed to advise Petitioner… his only opportunity for potentially remaining in the United States in legal status would be to file a motion to suppress and succeed thereon…

---

[6] INA § 101 (a)(43)(B) provides: (43) The term "aggravated felony" means-(B) Illicit trafficking in a controlled substance (as defined in section 102 of the Act), including a drug trafficking crime (as defined in section 924(C) of title 18 of the United States Code)

> 5.) Counsel further erred in her representation of Petitioner by telling him, as she was telling her other clients at this time who were not U.S. citizens that:
>
> "[T]he Federal Government can do whatever the Federal Government wants to do that, and so they need to understand that they could be deported."
>
> Counsel has admitted this was her advice to her noncitizen clients in her deposition of March 26, 2006, (attached at Exhibit 1, page 1).

The plea petition form that had been circulated, apparently throughout all the circuit courts in the state of Oregon, incompletely warned criminal defendants, i.e., like Petitioner here, who must be deported, be found inadmissible and whose naturalization is barred as a consequence of their plea, that they "may" be deported, found inadmissible, or barred from naturalization. Errors of omission, the lack of complete, accurate advice about the clear and legally required immigration consequences of a conviction, was found to be ineffective assistance of counsel violative of the Sixth and Fourteenth Amendment right to counsel in Padilla (Immigration consequences are not collateral; Counsel must advise client pre-plea of the clearly legally required consequences of a plea, errors of omission are actionable ineffective assistance)**.**

Petitioner was mistakenly misadvised by counsel that he could attend school and work if he entered into the plea "bargain." Petitioner's counsel, in her deposition, had stated that if her client is not a citizen she "tell(s) them that the Federal Government can do whatever the Federal government wants to do and so they need to understand that they could be deported." She said her client's main issue was "he didn't want to go to prison."

App-49. When asked if she told Mr. Verduzco what the immigration consequences were for DCS, she stated "…I wouldn't have told them that for sure you're going to be deported over something like that because that wouldn't be, in my opinion." App-50. Counsel also admitted everything in her representation of her client if she had known he would be required to be deported as a result of signing of the plea petition would have been different. She admitted this is because he would not have been able to keep his job and go to school in the United States, which were the stated goals of her representation of the client, if he was to be deported. See TR 34, 35.[7]

The circuit court's decision denying PCR following his first PCR hearing stated as follows in pertinent part:

> According to depositions, the emphasis in representation was Mr. Verduzco's desire to avoid jail or prison. That goal would appear to have been abundantly achieved. The issue of deportation was discussed. Mr. Verduzco was advised that he may be deported…

App-32. Footnote omitted.

The circuit court's decision further states in pertinent part:

> Material submitted by counsel appear to establish issues of fact regarding the searches that are central to this case. However, the issue, again, is not whether a motion to suppress might have been granted, therefore it is inadequate assistance of counsel not to pursue suppression. Rather, it is whether counsel adequately considered the issue and made, with client, an informed decision not to pursue it. Here, the client's primary and

[7] The PCR proceedings arguments were heard before the Honorable Ronald W. Stone of the Circuit Court of Yamhill County on February 15, 2012, March 9, 2012 and August 8, 2012.

> strong focus was not on avoiding conviction, but rather on avoiding prison. Adequacy of counsel is not to be measured solely by the outcome, but, clearly, here, counsel not only accomplished the result sought by the client, but managed to obtain 80 hours of community service as the only sanction for apparent involvement in what, by Yamhill County standards, is distribution of a fairly significant quantity of marijuana by a person who admitted regular sales.
>
> Counsel and client clearly chose to focus on this outcome which proved successful. The court should not second guess counsel's judgment in not pursuing a motion to suppress and cannot find that failure to do so constitutes such breach of reasonable standards of representation as to amount to a constitutional denial of adequate assistance of counsel.

App-35.

Further, this court rejected the federal constitutional claim at that time by stating:

> In *United States v. Frye,* 322 F.3d 1198 (9th Cir. 2003), the Ninth Circuit Court of Appeals held that an attorney's failure to advise a client of the immigration consequences of a conviction, without more, does not constitute ineffective assistance of counsel.

App-34. Footnote omitted.

This court relied on the Gonzalez v. State of Oregon decision as follows in disposing of Petitioner's PCR claim in pertinent part as follows:

> Neither *Lyons* nor ORS 135.385(2)(d) requires counsel or the court to specify the likelihood that a particular defendant will be deported…
>
> As noted, in determining what counsel must tell their clients about the direct consequences of a guilty plea, the courts have held that a defense counsel must advise his or her client of the maximum penalty that the trial court can impose as well as the possibility of a minimum sentence. The court has not held that the Oregon Constitution requires counsel to attempt to specify the likelihood that the trial court might impose either the maximum sentence or a minimum sentence. If the constitution does not require that level of specificity concerning the

> *direct* consequences of a criminal conviction, we see no constitutional warrant for requiring that level of specificity concerning a *collateral* consequence of a conviction. Petitioner's counsel did not 'fai[l] to exercise reasonable skill and judgment' when he advised petitioner of the maximum collateral sanction available – deportation – if he pleaded guilty.

App-33.

Petitioner's appeal from the denial of PCR was affirmed without opinion by the Oregon Court of Appeals on March 19, 2008. The Oregon Supreme Court denied his Petition for Review on November 26, 2008.

His successive PCR claim was denied on November 26, 2012. On October 22, 2012 in its Letter of Opinion, the Circuit Court states in pertinent part as follows:

> The first (and in this case dispositive) issue regarding the availability of relief under Oregon's post-conviction statutes (ORS 138.510 to 138.686) is whether the petitioner has followed the proper procedures for obtaining post conviction relief. Teague v. Palmateer, 184 Ore. App. 577, 583 (2002). In this case, petitioner violated the procedural restriction of ORS 138.550(3) for the reasons argued by the Respondent in "Respondent's Response to Petitioner's Post-Hearing Memorandum" entered June 19, 2012 which is hereby adopted and incorporated herein.
>
> In addition, Petitioner's petition for post conviction relief is time barred by ORS 135.510(3) which requires a petition to be filed within two years of "(a) If no appeal is taken, the date the judgment or order on the conviction was entered in the register". Petitioner did not directly appeal. His conviction was entered on Jan 27, 2004. Petitioner filed his second post-conviction petition on October 20, 2011. Therefore, it should be dismissed as untimely unless the one exception applies: '…unless the court on hearing a subsequent petition finds grounds for relief asserted which could not reasonably have been raised in the original or amended petition.' ORS 138.510(3).

> The standards to determine the "extraordinary" and" narrow" exceptions to ORS 138.510(3) is contained in Long v. Armenakis, 166 Ore. App. 94 (2000). The primary issue in that case (and in this case) was: "whether and under what circumstances a "change in the law" or a new legal pronouncement permits a petition for post-conviction relief to be filed late on the grounds that the issue could not reasonably have been raised earlier". Id at 97. The crucial consideration according to Long, supra, is: when a new constitutional principle has been articulated after a post-conviction proceeding has been decided (and before the second post-conviction petition) it will be considered timely and excused from the two year statute of limitations. But, "...where the constitutional principle is an acknowledged one, and the uncertainty is in its scope or application to a particular circumstance..." the exception in ORS 138.510 (3) will not apply. Id at 101.
>
> Here, Padilla was not a new constitutional right; it was only an extension of the right identified in Strickland. It was only another example of the principle held to be a 6th amendment constitutional right, i.e., the right to effective assistance of counsel. There may be many other examples of this 6th amendment constitutional right applied to new particular facts in the future. But the constitutional right will not be new, only the new application of that constitutional right: "...the test is not whether the law is settled; it is only whether the issue was reasonable to anticipate and raise. Here it was". Id at 102. And, as I have legally concluded, so was it in this case.
>
> In short, Jose Antonio Verduzco-Gonzalez v. State of Oregon should have been appealed to the Federal Courts. If he had, he might have been the beneficiary of the new application of Strickland to the facts of this particular case, rather than Padilla.
>
> Therefore, petitioner's petition is denied.

App-36, 37.

The Respondent's Response to Petitioner's Post-Hearing Memorandum stated in pertinent part that "[b]ecause this subsequent petition presents the same claims for relief

that were presented in the initial petition; the subsequent petition should be denied pursuant to ORS 138.550(3)."

He timely appealed to the Oregon Court of Appeals which summarily affirmed the denial of his PCR claim.

SUMMARY OF ARGUMENT

(I) Statute of Limitation Issue: *Padilla/Chaidez* Applies Under the OPCHA Safety Valve Rule

(A) Danforth held States need not follow Teague v. Lane, the federal retroactivity rule that applies to federal habeas claims, when deciding on the scope of the application of new federal constitutional rules in state court PCR hearings. Teague held a decision announced a new rule if the result was not dictated by precedent. Lambrix v. Singletary held that the definition of a new rule had been expanded to include results "not apparent to all reasonable jurists." Teague has been broadened beyond recognition by subsequent precedents. Applying the original Teague v. Lane retroactivity test, this court should find that Padilla is not a new rule even though it applies retroactively in Oregon.

If this court agrees with the U.S. Supreme Court that Padilla is a new rule of criminal constitutional procedure, this court should apply Padilla retroactively in OPCHA cases to cure violations of the federal constitutional right to counsel by exercising its independent judgment and not follow Chaidez's decision that Padilla does not apply

retroactively in federal habeas corpus cases. Padilla should be applied retroactively because the successive PCR petition satisfies the OPCHA test for successive petitions under ORS 138.550(3) and/or safety valve petitions under and ORS 138.510(3).

(B) Padilla is a surprising application of the broad Strickland ineffectiveness formula. This court can exercise its independent judgment and apply Padilla to Petitioner's case under the OPCHA and reject the U.S. Supreme Court ruling that Padilla is a new rule of criminal constitutional procedure that does not apply retroactively. Padilla should be found to be an application of the Strickland rule because it merely holds that counsel must abide by well-established professional responsibility rules when advising immigrants about the consequence of a criminal conviction. These ethical rules were in place, admonishing counsel to provide his immigrant client with accurate immigration advice, for at least 15 years, prior to the Padilla decision.

Although it is conceivable his successive petition could have been brought at an earlier time, it is not reasonable to require that Petitioner had done so.[8] There were no "grounds for relief" available until after Padilla was decided on March 31, 2010. The successive petition is not the same petition as the earlier PCR petition because it invokes

[8] Petitioner welcomes and joins in Amicus Briefs filed by Oregon Public Defense Services (OPDS), Jason Weber with O'Connor Weber, LLP, Dan Howard with the American Immigration Lawyers Association's (AILA), and Christopher Lasch with Oregon Justice Resource Center (OJRC) and Oregon Academics.

the Sixth and Fourteenth Amendment to the U.S. Constitution as the earlier petition had. The new legal principles on which the successive petition rely are:

1.) Immigration consequences of a conviction are not collateral;

2.) Errors of omission in the immigration consequences area of law is ineffectiveness;

3.) Counsel has a duty to advise his client pre-plea of the required immigration consequences of a criminal conviction.

These principles are surprising and reasonably could not have been anticipated by Petitioner before these principles became published law. The first time these principles saw the light of day was when Padilla was decided. Up until that time, all precedent was to the contrary and the grounds for relief Petitioner relies on did not exist.

Padilla was dictated by Strickland and is not a new rule, even though it was a surprising application of the general ineffectiveness standard found in Strickland. In Commonwealth v. Sylvain, 466 Mass 422, 995 NE2d. 760 (2013) the Massachusetts Supreme Court applying Teague v. Lane, held that in Massachusetts collateral proceedings, Padilla is not a new rule, and vacated Sylvain's conviction.

(II) The Teague Watershed Rule Exception: (A) Federal and (B) State Analysis

II (A) The Teague watershed rule exception should be found applicable under federal law. The ruling in Chaidez that Padilla is not retroactive does not bar Petitioner's PCR

claim. Padilla is a watershed rule of criminal constitutional procedure "implicit within the concept of ordered liberty" and within the Teague exception permitting retroactive claims as a matter of federal law. An immigrant cannot enter a knowing and voluntary plea to a charge requiring his deportation without knowing he agrees to that deportation/penalty by entering into that plea. There is a material difference, "implicit within the concept of ordered liberty," between possible deportation and legally required deportation/banishment.

II (B) This court in its independent discretion, as a matter of OPCHA, should not permit a draconic punishment, here deportation/banishment, to be imposed following an unknowing, involuntary plea by an immigrant who did not agree to his clearly legally required deportation when entering into his plea.

(III) Unknowing and Involuntary Plea

There was a "substantial denial" in the criminal court proceedings because Petitioner entered an unknowing and involuntary plea in violation of ORS 138.530(1)(a). A substantial denial in proceedings extends to any denial of petitioner's rights under the U.S. and Oregon Constitution. This is an independent claim from Petitioner's ineffective assistance of counsel claim. The due process clause of the Fifth and Fourteenth Amendment of the U.S. Constitution and the remedy by due course of law clause, Article

I, Section 10 of the Oregon Constitution and Petitioner's right to not incriminate himself under Article I, Section 12 of the Oregon Constitution were violated by Petitioner's unknowing and involuntary plea. Petitioner was not advised of the legally required consequences of his plea by the court or counsel, to wit, deportation and inadmissibility prior to entry of his plea. The PCR petition must be granted due to the entry of an unknowing and involuntary plea regardless of whether or not counsel provided "ineffective" assistance of counsel. The PCR court mistakenly did not reach this issue.

(IV) Oregon Should Reverse *Gonzalez* and Adopt *Padilla* as the Oregon Constitutional Standard under Right to Counsel

Petitioner respectfully submits this court should rule that under the Oregon Constitution Article I, Section 11, the right to effective counsel includes within its ambit the legal rule that an immigrant defendant must be advised by counsel the clear immigration consequence of a plea to a criminal charge pre-plea.

Padilla is persuasive. Oregon always provides its citizens at least the minimum constitutional protections recognized under the federal constitution as an Oregon constitutional right. Oregon, pre-Gonzalez, had been as protective as almost all other states of immigrant rights. In Lyons v. Pearce, 298 Or 554, 694 P2d 969 (1985), the court held that counsel, to be minimally competent, must attempt to secure a judicial recommendation against deportation (hereafter, JRAD) for an immigrant defendant at the

time of sentencing. JRADs, at the time, precluded the deportation of an immigrant from the United States. Sentencing courts (criminal judges) were allowed to bar (immigration judges) deportation by granting a JRAD at the time of sentencing. Failure of counsel to request a JRAD was ineffective. Similarly here, failure of counsel to advise his client of the clearly required immigration consequences of a plea to an aggravated felony is ineffective assistance of counsel under Article I, Section 11 and also resulted in an unknowing and involuntary plea.

(V) Prejudice

The petitioner, on the merits of this case, was not accurately advised by counsel of the legally required clear immigration consequences of his plea and his conviction. Counsel is on the record in her deposition stating she was unaware Petitioner's deportation was required by his plea and that she would have handled his defense differently had she known Petitioner's deportation was the legally required result of his plea.

The record is clear and irrefutable that Petitioner would have insisted on a motion to suppress, and if that failed, on a jury trial if he had known the required clear immigration consequences of his plea to an aggravated felony, DCS. See ER 19, Petitioner's Exhibit (hereafter, PE) 14. As counsel was clearly ineffective, this court should vacate the conviction and avoid unneeded further delay in vacating the conviction.

ARGUMENT

(I) Statute of Limitation Issue: *Padilla/Chaidez* applies Under the OPCHA Safety Valve Rule

I (A) *Danforth* Potentially Changes Everything

Miller v. Lampert, 340 Or 1, 125 P3d 1260 (2006) could not have taken into account the holding of Danforth v. Minnesota. Danforth was decided after Miller. Since Danforth, this court has not revisited the Miller decision. Danforth disapproved of the authorities upon which Miller relied. Saldana-Ramirez v. State of Oregon, 255 Or App 602, 298 P3d 59, *rev den*, 354 Or 148 (2013), which held that Padilla does not apply retroactively, relied on Miller v. Lampert. Neither ORS 138.510(3) nor the U.S. or Oregon Constitutions require Oregon to defer to federal habeas corpus anti-retroactivity decisions such as Teague v. Lane in Oregon PCR proceedings. This is especially unjust where, as here, the PCR safety valve statute and PCR successive petition statute would otherwise permit a PCR filing two years post judgment.

Because in Oregon, retroactivity analysis is not controlled by U.S. Supreme court retroactivity analysis, this court should find Padilla retroactive and apply this decision to Petitioner's circumstances.

Oregon's anti-retroactivity precedents, in OPCHA cases, are clearly in error under Danforth. One of the last Oregon Supreme Court cases to discuss retroactivity is Page v. Palmateer, 336 Or 379, 84 P3d 133 (2004), which held that the federal

constitutional right announced in Apprendi v. New Jersey, 530 US 466, 120 S Ct 2348, 147 L Ed2d 435 (2000), does not apply retroactively. Page mistakenly stated State v. Fair, 263 Or 383, 502 P2d 1150 (1972) was incorrect. The Miller v. Lampert (concerned the issue of whether the reasonable doubt aspect of Apprendi constituted a watershed rule within the meaning of Teague) decision which followed Page relied, in part on Page's articulation of the anti-retroactivity rule and did not revisit the foundations of that rule. The Oregon Supreme Court did not have the benefit of the Danforth decision at that time.

In Page v. Palmateer, the Oregon Supreme Court relied upon American Trucking Ass'ns. Inc. v. Smith, 496 US 167, 110 S Ct 2323, 110 L Ed2d 148 (1990), and mistakenly held as follows at 138:

> In *Fair,* this court thus correctly stated that it was free to determine the degree to which a new rule of Oregon constitutional law should be applied retroactively. However, the court's statement that it also was free to determine the degree to which a new rule of federal constitutional law should be applied retroactively was incorrect. Although that latter conclusion was not necessary to the holding in *Fair,* we nevertheless disavow it.

Fair stated Oregon is free to determine the degree to which a new rule of federal constitutional law should be applied retroactively. Fair was correct. Page was wrongly decided as clearly stated by the Danforth opinion.

Page was decided before Danforth. This court is respectfully requested to follow Danforth which clearly rules the authorities upon which Page relied were not dispositive. Justice Stevens in Danforth stated at 1042:

> [T]he *Teague* decision limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed "nonretroactive" under *Teague.*
>
> The State contends that two of our prior decisions—*Michigan v. Payne* and *American Trucking Assns., Inc. v. Smith*—cast doubt on state courts' authority to provide broader remedies for federal constitutional violations than mandated by *Teague.* We disagree.

In Danforth, Justice Stevens at 1032 states:

> New constitutional rules announced by this Court… "watershed" rules of criminal procedure, must be applied in all future trials, all cases pending on direct review, and all federal habeas corpus proceedings. All other new rules of criminal procedure must be applied in future trials and in cases pending on direct review, but may not provide the basis for a federal collateral attack on a state-court conviction. This is the substance of the "*Teague* rule" … (*citations omitted*). The question in this case is whether *Teague* constrains the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion. We have never suggested that it does, and now hold that it does not.

The Teague/Lambix anti-retroactivity doctrine has become so broad that it is extremely unlikely that new rules of federal constitutional procedures will ever be applied in federal habeas corpus proceedings. Unless Oregon rejects for state PCR proceedings the federal anti-retroactivity doctrine; the new federal rules will in all likelihood never be applied in Oregon PCR cases. The Teague v. Lane retroactivity rule provided a case announced a “new rule” if its result was not dictated by precedent. Lambrix v. Singletary,

significantly broadened Teague where it held that what is "new," include results not "apparent to all reasonable jurists at the time."

The U.S. Supreme Court has never applied new rules of criminal constitutional procedure retroactively in a federal collateral attack on a state conviction. The broad Lambrix/Teague anti-retroactivity doctrine, when applied by a state court, unnecessarily takes away from the state its own power to independently decide whether or not to apply a new federal constitutional claim in state PCR proceedings. The federal anti-retroactivity rule establishes an apparently ironclad, albeit unjust defense to any Oregon PCR claim based on a new federal constitutional rule.

It is irrational to apply the federal anti-retroactivity principle in state court PCR proceedings. This state is not upsetting the sovereignty of any other state in discerning in its own wisdom, whether or not a new constitutional rule should be applied retroactively in Oregon PCR proceedings. State sovereignty is enhanced by the state independently deciding whether or not to apply a new constitutional rule retroactively. Oregon has clearly, in other contexts, embraced its prerogative to interpret the Oregon constitution independent of a federal constitutional analysis and should do so in OPCHA cases when the interests of justice so require.

Since Teague v. Lane was announced in 1989, the Supreme Court has not identified any new constitutional rule that should be applied retroactively under the so-called "watershed" exception. *See, e.g.*, United States v. Mandanici, 205 F3d 519, 529

(2nd Cir. 2000), *cert den* 122 S Ct 2666 (2002) summarizes at least eleven new rules, or proposed new rules, of criminal procedure that the Supreme Court held would not apply retroactively.

This court should, in the interests of justice and in an independent state court, and due to the deterioration of the original Teague v. Lane holding in U.S. Supreme Court jurisprudence, hold that the federal anti-retroactivity Teague/Lambrix doctrine does not apply in Oregon PCR proceedings. Danforth instructs that it is within the discretion of a state court to require a Petitioner's conviction be set aside on federal constitutional grounds in State PCR proceedings without regard to or not the federal court is applying the new rule in federal habeas corpus proceedings.

I(B) & I(C) *Padilla* is Not a New Rule of Criminal Constitutional Procedure but a Surprising Application of *Strickland* to Novel Circumstances: This Court Should Apply Padilla to Petitioner's Filing under the OPCHA Safety Valve and Escape Clause Rules

Petitioner's PCR petition is timely. In Oregon, where a conviction is dependent upon the violation of a new retroactively applied federal constitutional rule, or a surprising application of Strickland, the PCR filing is found to be within the safety valve of ORS 138.510(3), the conviction should be vacated as unconstitutionally obtained.

A Sixth Amendment violation of the right to counsel claim is cognizable, following the Chaidez v. United States decision, in an Oregon post-conviction matter that is filed

within the safety valve for OPCHA cases. Petitioner's PCR petition was filed within the safety valve of the OPCHA statute of limitations, ORS 138.510(3), as the statute is construed by Long v. Armenakis, 166 Or App 94, 999 P2d 461 (2000). Long holds that new constitutional rules or surprising extensions of precedent decisions (i.e., like Strickland's application to the immigration consequences of a conviction) to novel circumstances apply in PCR proceedings if the PCR Petitioner reasonably could not have filed the petition at an earlier time.

Petitioner's PCR filing should be recognized to be within the statute of limitations because it was only when Padilla was decided that the U.S. Supreme Court determined that immigration consequences of a criminal conviction are not collateral and that errors of omission about the immigration consequences of a conviction by criminal defense counsel are negligent, ineffective assistance.

This court has not yet adopted this persuasive rule as within the rubric of the Oregon constitutional right to counsel. The published Oregon law on this matter at this point is non-existent and Verduzco is the first time that this court may address this issue.

Padilla rejected the Solicitor General's suggestion that the Padilla decision should limit itself to remedying affirmative misadvise from counsel in advising his client about the immigration consequences of a criminal conviction. Padilla chose to extend the scope of its decision to require counsel to give accurate advice about the clearly required immigration consequences of a conviction. Padilla v. Kentucky, 569 US 356, 130 S Ct at 1483-1484.

Also see Strickland v. Washington, 466 US 668, 690, 104 S Ct 2052, 80 L Ed2d 674 (1984) which made clear its standard of attorney performance applied to both "acts" and "omissions." Silence or ambiguous warnings from counsel to his client pre-plea are not enough; i.e., but is ineffectiveness as a matter of law when deportation is required by a plea to a criminal charge.

Petitioner respectfully requests this court adopt the persuasive reasoning of the Sylvain decision from Massachusetts and find that Padilla applies to Oregon PCR claims under Article I, Section 11 of the Oregon Constitution..

In Sylvain, the court independently interpreted the Massachusetts constitutional right to counsel (Mass Const, Art 12) and held that Padilla retroactively applies to convictions that are final after April 1, 1997. Sylvain applied the Teague v. Lane anti-retroactivity formula by rejecting the broadened Teague/Lambrix retroactivity test. Sylvain held that because under the original Teague formula, Padilla is clearly not a new rule but an application of the Strickland ineffectiveness of counsel standard for evaluation of whether or not criminal defense counsel is effective, that Padilla applies to Massachusetts PCR proceedings. Sylvain relied in part on the dissent in Chaidez by Justice Sotomayor which states at pages 1120-1121 in pertinent part as follows:

> In *Padilla*, we did nothing more than apply *Strickland.* By holding to the contrary, today's decision deprives defendants of the fundamental protection of *Strickland,* which requires that lawyers comply with professional norms with respect to any advice they provide to clients.

Justice Sotomayor noted that "the fact that a decision was perceived as momentous or consequential, particularly by those who disagreed with it, does not control in the *Teague* analysis." Petitioner here requests that this court follow Sylvain and apply Padilla to Petitioner's case by finding that Padilla applies Strickland in a surprising way although it is not a new rule. Long v. Armenakis, 999 P.2d 461, 166 Or. App. 94 (2000). Armenakis, at 999 P.2d 465, stated as follows:

> Consequently, when a new constitutional principle has been articulated between the time of a petitioner's direct appeal and the post-conviction proceeding, a claim based on the new constitutional principle will be considered in the post-conviction proceeding even though it was not raised at trial or on appeal. See, e.g., Twitty v. Maas, 96 Or., App. 631, 773 P.2d 1336 (1989); Pettibone v. Cupp, 43 Or.App. 955, 959, 607 P.2d 742 (1979), rev. den. 289 Or. 45 (1980). The same result does not necessarily follow where the constitutional principle is an acknowledged one, and the uncertainty is in its scope or application to a particular circumstance. The touchstone is not whether a particular question is settled, but whether it reasonably is to be anticipated so that it can be raised and settled accordingly. See, e.g., Kniss v. Cupp, 27 Or.App. 815, 818, 558 P.2d 364 (1976), rev. den. 277 Or. 491 (1977) (where, at time of trial, case law had established right to counsel at post-indictment lineup, and courts only later extended same right to preindictment lineup, issue reasonably could have been anticipated and raised). The more settled and familiar a constitutional or other principle on which a claim is based, the more likely the claim reasonably should have been anticipated and raised. Conversely, if the constitutional principle is a new one, or if its extension to a particular statute, circumstance, or setting is novel, unprecedented, or surprising, the more likely the conclusion that the claim reasonably could not have been raised.

Long strongly suggests that when a particular question cannot be reasonably anticipated, such as Petitioner's claim based on the surprising, novel, and unprecedented broader application of Strickland to the particular circumstances of the immigration

consequences of convictions, that this unprecedented application of Strickland will be considered in post-conviction proceedings even though it was not raised at trial or on appeal.

Sylvain quoted Danforth at 282, "*Teague* does not 'limit the authority of a [S]tate court, when reviewing its own [S]tate criminal convictions, to provide a remedy for a violation that is deemed `nonretroactive' under *Teague*.'" Sylvain also noted that there is an important distinction between existence of a federal substantive right and that procedural availability of such a right, the scope of which may be set by State law. Danforth at 280 indicated that "considerations of comity militate in favor of allowing [S]tate courts to grant [collateral] relief to a broader class of individuals than is required by *Teague*." *Id*. at 279-280.

During 2012 PCR proceedings, Petitioner, the PCR court and the DDA agreed that Padilla was not a new rule but an application of Strickland. Since the PCR hearing, Chaidez has held that Padilla is a new federal rule of a criminal constitutional procedure because it had to first decide whether the right to counsel applies to what had heretofore been considered a collateral matter, the immigration consequences of a conviction. Chaidez held Padilla could not go directly to a Strickland PCR analysis because the first issue was whether the immigration consequences of conviction area was within the ambit of the Sixth Amendment right to counsel. Chaidez held that Padilla does not apply retroactively to federal habeas claims alleging ineffective assistance of counsel

because it is a new rule of criminal constitutional procedure breaking new ground because heretofore, immigration consequences had universally been considered a collateral matter.

Prior to Padilla, each time the government had argued Strickland did not apply to an arguably new rule of criminal constitutional procedure, the U.S. Supreme Court had found that Strickland applied to the proposed new application of the Strickland test and that this application of Strickland to new factual circumstances was not a new rule under Teague. Cf. Bousley v. United States, 523 U.S. 614 (1998) (plea was not voluntary because Bousely was misinformed what the elements of the crime were that he pled to), Roe v. Flores-Ortega, 528 U.S. 470 (2000) (discusses when counsel must file a notice of appeal or assure that such is filed on behalf of his client).

Discussing the Williams v. Taylor case, *infra*, New York v. Bennett, 28 Misc.3d 575, 579 (2010) stated:

> "However, the *Williams* Court held that merely applying *Strickland* to a new scenario does not create a new rule, as "it can hardly be said that recognizing the right to effective counsel breaks new ground or imposes a new obligation on the States" (529 US at 391). The rationale behind this aspect of the holding in *Williams* is illustrated by Justice Kennedy's explanation that:
>
> "[i]f the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule.... Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent" (*Wright v West*, 505 US 277, 308-309 [1992, concurring op]).

> The rule in *Strickland* necessarily requires a fact-specific analysis, and *Padilla* held that *Strickland* should be applied in the context of advice concerning deportation. *Padilla* is the type of case that merely extends an existing rule rather than creating a new one."

Oregon is under no duty under Danforth to follow Chaidez's retroactivity ruling. This court has the discretion to make the independent judgment that Padilla is not a new rule but a surprising application of the Strickland rule and accordingly apply Padilla. This court should choose to independently decide that Padilla is a surprising extension of the broad Strickland ineffectiveness of counsel standard.

Today, Oregon precedents mistakenly require, as a practical matter under the nation's current legal landscape, an immigrant to know the immigration consequences of a plea to any criminal charge under the applicable immigration law while not requiring his counsel to know the immigration law at all. Counsel, under Gonzalez, is only required to give an ambiguous warning at the time of the plea, although often the warning is inaccurate because it is incomplete and misleading. The antiquated warning often in practical effect advises that the client may be deported, when in fact the client is required to be deported by the immigration laws. This warning is required to be given to the defendant under ORS 135.385 (1979) which provides:

> (1) The court shall not accept a plea of guilty or no contest to a felony or other charge on which the defendant appears in person without first addressing the defendant personally and determining that the defendant understands the nature of the charge.
>
> (2) The court shall inform the defendant:

> (d) That if the defendant is not a citizen of the United States 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.

The warning was a forward looking warning in 1979 when it was first effective. It is now an antiquated misadvise of the immigration consequences of a conviction. Many criminal convictions that had not triggered inadmissibility or deportability or barred naturalization suddenly required mandatory deportation, inadmissibility and barred naturalization. Pre- 1996-1997, the Oregon statutorily required "may be deported" warning was accurate because, if an alien was found deportable or inadmissible, he would often be permitted a hearing before an immigration judge (hereafter IJ) who in the court's discretion would be permitted to allow the "alien" to remain in the United States. Post-1996-1997, the mandatory penalties prescribed by the 1996-1997 laws have left the IJ with no discretion to allow the "alien" to remain in the United States once convicted for example, of any aggravated felony under INA § 101(a)(43) et seq. App-39.

In 1996-1997, the immigration laws became extremely more punitive. This change in the immigration laws rendered the "may be deported" warning flawed immigration advice. *Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)* – [PL 104-132, title IV; 110 Stat. 1214, 1258-81 (Apr. 24, 1996)], *Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)* – [PL 104-193, 208, div. C; 110 Stat. 3009-46 to 724 (Sept. 30, 1996)]. Padilla rendered a "may be deported" advisal affirmative misadvice of the immigration consequences of a conviction. In light of the new or surprising legal

principles Padilla/Chaidez have announced; a "may be deported" advisal is affirmative misadvice under Oregon law when the alien must be deported. Long v. State of Oregon, 130 Or App 198, 880 P2d 509 (1994) held at 202-203:

> [The petition] alleges, and his trial counsel admits, affirmative, albeit negligent, misrepresentation.
> There is a qualitative distinction between passive nondisclosure and active misrepresentation. Defense counsel was under no obligation to tell [the] petitioner that his conviction could not be expunged. However, having undertaken to provide advice on expungeability in response to client's expressed concerns, counsel was obliged to do so accurately and completely.

Gonzalez v. State of Oregon, 340 Or 452, 134 P.3d 955, (2006), held that immigration consequences are collateral consequences of criminal convictions and its decision is premised on what is proven to be flawed assumption. In Padilla v. Kentucky, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010), 130 S.Ct at 1484 , the majority opinion states:

> "We do not share this view, but we agree that there is no relevant difference 'between an act of commission and an act of omission' in this context. *Id., at 30; Strickland,* 466 U.S., at 690 … the critical obligation of counsel to advise the client of 'the advantages and disadvantages of a plea agreement.' *Libretti v. United States*, 516 U.S. 29, 50-51 (1995). When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all. Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so 'clearly satisfies the first prong of the *Strickland* analysis.' *Hill v. Lockhart*, 474 U.S. 52, 62 (1985) (White, J. concurring in judgment)."

As importantly in Padilla, 130 S.Ct at 1481, the Supreme Court further noted that:

> "We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable, professional assistance' required under *Strickland*, 466 U.S., at 689. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation … Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to Padilla's claim."

The specific area of the Padilla decision, upon which Petitioner relies, in part to prove prejudice, states at 1476, 1477:

> "The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect. [. . .] But when the deportation consequence is truly clear, as it was here, the duty to give correct advice is equally clear."

Petitioner is entitled to Post-Conviction Relief from a defective judgment if his counsel's ineffectiveness had "a tendency to affect the result" of the trial. Krummacher v. Gierloff, 290 Or. 867, 883, 628 P.2d 458 (1981); *see also* Stevens v. State of Oregon, 322 Or. 101, 110 n 5, 902 P.2d 1137 (1995) (reaffirming Krummacher's prejudice standard) *and* Horn v. Hill, 180 Or. App. 139, 147, 41 P.3d 1127 (2002) ("Tendency to affect the outcome" means something less than a probability.)

Under Strickland Id. at 694, defendant ordinarily must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of proceedings would have been different" to obtain relief. A reasonable probability is a probability sufficient to

undermine confidence in the outcome. In the plea context, prejudice is established if the defendant can show that he would not have plead guilty, but would have insisted on going to trial. Hill v. Lockhart 474 US 54, 57 (1985).

Professional Responsibility Rules and Required Advice from Counsel about the Immigration Consequences of a Conviction

Padilla at 1483 states:

> We too have previously recognized that "'[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" St. Cyr, 533 U.S., at 323, 121 S.Ct. 2271 (quoting 3 Criminal Defense Techniques §§ 60A.01, 60A.02[2] (1999)). Likewise, we have recognized that "preserving the possibility of" discretionary relief from deportation under § 212(c) of the 1952 INA, 66 Stat. 187, repealed by Congress in 1996, "would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." St. Cyr, 533 U.S., at 323, 121 S.Ct. 2271. We expected that counsel who were unaware of the discretionary relief measures would "follo[w] the advice of numerous practice guides" to advise themselves of the importance of this particular form of discretionary relief. Ibid., n. 50.

Professional norms that existed prior to Mr. Verduzco's conviction admonished counsel to provide his client with clear advice about the immigration consequences. Strickland imposes on defense counsel a duty to investigate the laws, and ABA practice standards are consistent with the Strickland rule.

Padilla quoted Strickland, stating that the evaluation of whether counsel's representation was constitutionally deficient "is necessarily linked to the practice and

reasonable expectations of the legal community … under prevailing professional norms." Padilla v. Kentucky, 130 S. Ct. at 1482.

The Supreme Court discussed the professional responsibility standards in INS v. St. Cyr, 533 US 289 (2001): "[T]he American Bar Association's Standards for Criminal Justice provide that, if a defendant will face deportation as a result of a conviction, defense counsel 'should fully advise the defendant of these consequences.'" *Id.* at 323 n48 (quoting 3 ABA Standards for Criminal Justice 14-3.2 Comment, 75 (2d ed. 1982)).

Counsel has also breached this 1982 ABA standard and failed to follow the ABA 1999 Standards for Criminal Justice Pleas of Guilty Third Edition, standard 14-3.2 Responsibilities of defense counsel sub (b) which states:

> To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and address considerations deemed important by defense counsel or the defendant in reaching a decision. Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed.

In the ABA commentary to this standard, the importance of knowing basic immigration consequences of convictions law is emphasized:

> [I]t may well be that many clients' greatest potential difficulty and greatest priority, will be the immigration consequences of a conviction. To reflect this reality, counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client. Knowing the likely consequences of certain types of offense conduct will also be important.

ORS 135.425, which was intended to embody established professional ethics regarding the role of defense counsel in negotiated pleas, provides:

> (1) Defense counsel shall conclude a plea agreement only with the consent of the defendant, and shall ensure that the decision whether to enter a plea of guilty or no contest is ultimately made by the defendant.
> (2) To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, shall advise the defendant of the alternatives available and of factors considered important by him or the defendant in reaching a decision.

In Gonzalez, 340 Or at 959 this court, discussing the professional responsibility rules, stated as follows:

> We recognize that it may be better practice for defense counsel to provide, to the extent possible, more specific advice about the likelihood of deportation than petitioner's counsel provided. The question, however, is not whether petitioner's defense counsel could have provided better advice. Rather, the question is whether counsel's advice fell below the minimum that the state constitution requires. We cannot say that it did.

In Padilla, it was the settled nature of the professional responsibility rules that led the Supreme Court to state at 1485:

> It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea. See, supra, at 1483-1484. We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty. Strickland, 466 U.S., at 689, 104 S.Ct. 2052.

Padilla held that these ethical rules were not merely aspirational but required minimal constitutional conduct for counsel to abide by:

One argument the state will probably assert is that granting Petitioner's PCR petition will open the "floodgates" and upset the finality of convictions long since settled. The U.S. Supreme Court in Padilla addressed the floodgates argument as follows at 1485:

> [W]e must be especially careful about recognizing new grounds for attacking the validity of guilty pleas, in the 25 years since we first applied Strickland to claims of ineffective assistance at the plea stage, practice has shown that pleas are less frequently the subject of collateral challenges than convictions obtained after a trial. Pleas account for nearly 95% of all criminal convictions.[13] But they account for only approximately 30% of the habeas petitions filed.[14] The nature of relief secured by a successful collateral challenge to a guilty plea—an opportunity to withdraw the plea and proceed to trial—imposes its own significant limiting principle: Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea. Thus, a different calculus informs *1486 whether it is wise to challenge a guilty plea in a habeas proceeding because, ultimately, the challenge may result in a less favorable outcome for the defendant, whereas a collateral challenge to a conviction obtained after a jury trial has no similar downside potential.

Criminal defense counsel's duty to advise his client accurately, not by a misleading warning of possible consequences, of the clearly required immigration consequences of a conviction; and that this right lays within the ambit of the Sixth Amendment right to counsel, was a surprising and/or new, federal constitutional rule Chaidez decided.

This Court Should Find That *Benitez-Chacon* is Inapposite

Respondent may claim Benitez-Chacon v. State of Oregon, 178 Or App 352, 37 P3d 1035 (2001) is dispositive authority barring the Petitioner's PCR claim. Benitez-Chacon held that Benitez-Chacon could have learned the immigration laws by reading the published law, and that her failure to file a PCR claim earlier was due to her own negligence and could not be attributed to her criminal defense counsel. Benitez-Chacon, however, is inapposite because it was decided before the U.S. Supreme Court held that the immigration consequences of a conviction are within the ambit of the Sixth Amendment right to counsel in Padilla v. Kentucky.

Benitez-Chacon v. State, 178 Or App at 354-355 held:

> [T]he immigration laws and rules were available, even if petitioner chose not to determine what they actually were. Petitioner's claim here does not differ meaningfully from the petitioner's claim in *Bartz*. As in *Bartz*, the petition is time barred.

Today, the lay person is presumed to know the law legal fiction application to the immigration consequences of conviction area purports to trump the criminal defendant's right to counsel and his right to enter a knowing, intelligent and voluntary plea. The lay person is "presumed to know the law" legal "fiction," if it still purports to deprive a criminal defendant of his right to counsel's advice about the clear immigration consequences of a criminal conviction, which Padilla found to be within the ambit of the

Sixth Amendment of the U.S. Constitution right to counsel, must be found inapplicable at least in these circumstances. The "Padilla" right, announced as a new rule of criminal constitutional procedure in Chaidez, is the criminal defendant has a right to hear directly from his criminal defense counsel pre-plea the clearly required immigration consequences of a conviction before deciding whether or not to enter into a plea agreement.

The legal landscape has dramatically changed due to the rejection by the U.S. Supreme Court of the mistaken, but up until Padilla was decided, universally followed axiom that immigration consequences are collateral. The Gonzalez and the Benitez-Chacon decisions, and the lay person is presumed to know the law presumption, only pass constitutional muster when immigration consequences of a conviction are "collateral" consequences of a criminal charge. Immigration consequences of a criminal conviction are not collateral. Criminal convictions often define the immigration punishment that follows due to the plea to a criminal charge. The immigration judge is a mere scrivener of what has already been decided in the criminal court; having no discretion but to deport an "alien" due to his criminal conviction.

II. Application of *Teague* Exception under Federal and/or State Law

Petitioner respectfully submits that if this court finds that Padilla is a new rule that does not apply retroactively, then this court should find his conviction to be within

the Teague exception either (a) as that application would be construed by the U.S. Supreme Court, or (b) In the alternative, as this court may choose to independently construe the Teague watershed rule exception in the interests of justice.

(A) Federal Constitutional Analysis: Applying the Teague Exception to Verduzco

The Teague exception provides:

> The plurality in *Teague* explained, however, that the second exception includes only those watershed rules of criminal procedure that " 'alter our understanding of the *bedrock procedural elements*' " essential to the fairness of a processing. *Id*. at 311 (quoting *Mackey v. United States*, 401 US 667, 693-94, 91 S Ct 1160, 28 L Ed 2d 404 (1971)) (emphasis in original). The plurality observed that, for a new rule of procedure to fall within this exception, it must be a rule that is both an "absolute prerequisite to fundamental fairness" and one "without which the likelihood of an accurate conviction is seriously diminished." *Id*. at 313-14…
> The rule in *Gideon* would qualify as a watershed rule, the Court explained, because that decision "alter[ed] our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Id*. at 418 (emphasis in original; internal quotation marks omitted). To date, no other rule has had "the primacy and centrality of the rule adopted in *Gideon*." *Id*. at 420.

Miller v. Lampert, 340 Or at 9.

An immigrant cannot enter into a knowing and voluntary plea to an "aggravated felony" charge, as that term is defined by INA § 101 (a)(43), et seq., under the Oregon Constitution, Article I, Section 10 or under the due process clause of the Fifth and Fourteenth Amendment to the U.S. Constitution, without knowing the required legal consequences of his plea, i.e., the mandatory minimum legal penalty of deportation if

pleading to an aggravated felony like DCS. Accordingly, where an immigrant has not been advised by counsel pre-plea of the legal requirement of deportation, where the deportation penalty is required by the immigration laws, his conviction will be vacated as unknowingly and involuntarily entered.

Although Gonzalez discussed the need for counsel to advise the client of the possibility of a minimum sentence, counsel is also reasonably required to advise the client of any required mandatory minimum penalty. Here the mandatory minimum immigration penalty facing Mr. Verduzco was deportation, inadmissibility, i.e. a bar from ever being allowed back in the United States once deported and his naturalization is barred forever. These are penalties required by the criminal punishment.

The right to choose to fight against deportation and to preserve "all that makes life worth living," Ng Fung Ho v. White, 259 U.S. 276, 42 S Ct 492, 66 L Ed 938 (1922), for the alien from a violent land of birth, such as Mexico, it is a matter of his life or death. *See also* Barder v. Gonzalez 347 US 637, 642 (1954) ("Although not penal in character, deportation statutes as a practical matter may inflict the equivalent of "banishment or exile" and should be strictly construed.").

Legal representation to assist in protecting against deportation, if protection against deportation is possible, is a fight that without counsel's accurate advice about the immigration consequence of a conviction at the time of the plea entry to a criminal charge will often be impossible.

A client, like Petitioner here, cannot make an informed decision about whether or not to proceed on a motion to suppress and not enter into a plea "bargain" unless the client knows the penalty if he accepts the plea bargain. A 2254 federal habeas corpus petition was granted in Moore v. Czerniak, 574 F3d 1092 (9th Cir. 2009), where counsel did not proceed with a motion to suppress due to an involuntary confession and counsel's ineffectiveness was prejudicial. Moore discusses the importance of motion to suppress litigation in ascertaining whether or not there is ineffective assistance of counsel. Similarly, Moore is persuasive authority for Petitioner's argument that the failure of counsel to identify that the only potential defense to the client's legally required deportation is a potentially meritorious motion to suppress and to so inform the client pre-plea. This is a suspension of judgment on the part of counsel. Mr. Verduzco, not being fully informed of the plea calculus in this situation because deprived of the knowledge that he will be required to be deported if he signs on to the plea petition, unwittingly agrees to his very likely unnecessary deportation. Under these circumstances, the client has unfairly been convicted of a crime based upon an unknowing and involuntary plea.

Teague's emphasis on whether or not the result of a decision might have caused an innocent person to be convicted should extend to include a conviction based upon inaccurate immigration consequence advice where it is clear the petitioner would rationally have elected a motion to suppress as a potential complete defense to the charges against him, rather than stipulate to his own banishment. Teague's focus on trial

outcome should extend to the need for a motion to suppress for those defendants who lacked knowledge of legally required deportation and rationally would have elected not to be convicted based upon arguably unlawfully seized evidence if these defendants had known a conviction would result in their banishment from the United States. These clients clearly would have elected to litigate a motion to suppress. For these reasons, the Teague exception should apply under federal constitutional analysis that recognizes where a motion to suppress is waived by a plea based upon a discussion with counsel that did not include the required deportation consequence, as part of the plea-choice calculus; that the defendant should not be found to have knowingly and voluntarily waived his right to challenge an illegal search and seizure and agreed to his unnecessary banishment from the United States.

(B) OPCHA Analysis: Applying the Teague Exception Under OPCHA

Or, in the alternative, under the Danforth rule, Petitioner respectfully requests that this court apply the Teague watershed rule exception independently of the federal courts in the immigration consequence area of the law. This Oregon watershed rule exception should apply to new rules of criminal constitutional procedure because a knowing and voluntary plea is implicitly within the concept of ordered liberty as a matter of law. The interests of justice are facilitated by preserving the right of a criminal defendant to elect a motion to suppress in those circumstances where such a motion might have been granted

and resulted in there being absolutely no prosecution against the defendant at all. This is especially the case where it' is clear that a fully informed client would have been reasonable to elect to proceed with a motion to suppress rather than sign off on his banishment from the United States. Here, Mr. Verduzco had a promising life in the United States and in Mexico, he has nothing.

Padilla should be found to be within the Teague watershed rule exception, as that exception is construed by this court. Much as the Teague/Lambrix rule need not be applied in the same manner that the U.S. Supreme Court applies it, the Teague exception for watershed rules can be applied by this court without being in lock step with how the rule would apply in federal habeas corpus proceedings. This court should independently apply the watershed rule exception to remedy the complete failure of due process that otherwise has occurred when immigrants enter unknowing and involuntary pleas and are subjected to required deportation as a consequence.

Under the common circumstances of a delayed immigration proceeding occurring years after the criminal conviction was final, where inadequate counsel failed to advise his client accurately about the clearly legally required deportation penalty required by his plea; there is no other avenue to combat this injustice under current Oregon law then to permit PCR petitions that are filed within the Oregon safety valve rule to have the protection afforded by the Padilla decision.

III. DUE PROCESS PREJUDICE – This Substantial Denial in the Proceedings Claim (Unknowing and Involuntary Plea) is Independent of the Ineffective Assistance of Counsel Claim

Petitioner seeks to vacate his conviction due in part to the fact that his plea was unknowingly and involuntarily made. This ground for relief is found under ORS 138.530(1)(a) which provides:

> Post-conviction relief pursuant to ORS 138.510 to 138.680 shall be granted by the court when one or more of the following grounds is established by the petitioner: (a) A substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void.

This PCR claim does not depend upon any need to prove that counsel was ineffective. Proof of an unknowing and involuntary plea is proof that there was a substantial denial in the proceedings resulting in the Petitioner's conviction due to a violation of his due process rights under the U.S. and Oregon Constitution, rendering the conviction void. The PCR petition alleged this defect at ER 46, line 16-26, ER 47, lines 1-13, ER 47, lines 23-25 and ER 48, lines 1-8.

The right to enter a plea knowingly and voluntarily which Padilla protects is "implicit in the concept of ordered liberty." *See* Dixon v. Gladden, 250 Or 580, 444 P2d 11 (1968), Hartzog v. Keeney, 304 Or 57, 742 P2d 600 (1987), Moen v. Peterson, 312 Or 503, 824 P2d 404 (1991) (Counsel must advise client of the required consequences of a

plea pre-plea). The "mandatory minimum" under the immigration laws is the required immigration penalty of deportation for DCS. Petitioner was mistakenly not so advised by the court or counsel.

Moreover, the draconic immigration penalty is in fact required in the immigration court by the entry of plea in the criminal court. The immigration judge has no discretion to not deport an "aggravated felon," i.e. such as defendant who pled to DCS. The "mandatory" minimum, if you will, in immigration court for this petitioner's plea to DCS in criminal court is deportation.

IV. The Oregon Supreme Court Decision *Gonzalez v. Oregon* Should be Reversed: Immigration Consequences are Ill Suited to Being Defined as Either Direct or Collateral Consequence of a Criminal Conviction

It is reasonably anticipatable post-Chaidez that this court may adopt the Padilla decision and find under Article 1, Section 11 of the Oregon Constitution that counsel must advise his client pre-plea of the clearly required immigration consequences of a conviction pre-plea. If so, this court should allow Petitioner's PCR filings because his argument about the appropriateness of filing for a reversal of Gonzalez reasonably could only have been made after Padilla was decided. Petitioner would be the first beneficiary of this new Oregon constitutional rule.

Pre-Padilla precedent throughout the United States uniformly held that criminal defense counsel's advice regarding immigration consequences of a conviction prior to a

guilty plea was advice about a "collateral" issue. Cf. US v. Frye, 322 F3d 1198 (9th Cir. 2003). Well-established, but constitutionally erroneous legal principles, such as immigration consequences are collateral, prove why the Petitioner's PCR allegations reasonably depend upon the proclamation in Chaidez that Padilla is a new rule of criminal constitutional procedure. Gonzalez v. Oregon precluded as an Oregon constitutional claim any challenge to the "may be" deported advise given to Petitioner in this case. *Stare decisis* would require that under the Oregon Constitution, such an almost inconceivable claim, Pre-Padilla and Pre-Chaidez be quickly dismissed as frivolous by an Oregon court that heard the claim. Under the U.S. Constitution right to counsel**,** it was not until Padilla was decided that any federal court recognized that immigration consequences are not collateral and accurate advice about those consequences pre-plea are within the ambit of the Sixth Amendment right to counsel.

Padilla recognizes as a new principle of law that errors of omission (failure to advise of the eligibility for relief from deportation if not convicted of the charged crimes) are cognizable claims of ineffectiveness under the Sixth Amendment right to counsel of the U.S. Constitution. Errors of omission or incomplete advice about the immigration consequences of a conviction should also be recognized as ineffectiveness under Article I, Section 11 of the Oregon Constitution. Oregon should also recognize that the immigration consequences of a conviction are not a collateral matter under the Oregon Constitution right to counsel Article I, Section 11.

Surely, Oregon wishes to protect its citizens under the Oregon Constitution at least as much or more than the federal constitution protects them. In Montez v. Czerniak, 355 Or 1 270 P3d 230 (2011) at pages 6-7, this court stated:

> [T]he standards for determining the adequacy of legal counsel under the state constitution are functionally equivalent to those for determining the effectiveness of counsel under the federal constitution. *See State v. Davis*, 345 Or 551, 579, 201 P3d 185 (2008) (equating "effective" assistance with "adequate" assistance). Footnote omitted.

Because these constitutional provisions are "functionally equivalent," it appears clear when the Sixth Amendment right to counsel has been violated, Article I, Section 11 right to counsel has similarly been violated.

Petitioner's PCR petition was timely filed under the OPCHA. Petitioner's Oregon constitutional right to adequate counsel applies to Petitioner's case because Gonzalez, upon it being revisited by this court will, counsel respectfully submits, reasonably be found to have been wrongly decided. *Stare decisis* requires the balancing of the "undeniable importance of stability in legal rules and decisions" with the "important need to be able to correct past errors." Stranahan v. Fred Meyer, Inc., 331 Or 38, 53, 11 P3d 228 (2000).

Adopting the Padilla rule as the Oregon constitutional standard, this court should require the vacation of Petitioner's conviction due to the inadequacy of counsel in violation of Article I, Section 11. Counsel failed to advise the Petitioner clearly of the required immigration consequences (the draconic penalty of deportation) of his

plea. Lyons v. Pearce held that a defendant is not represented effectively if at sentencing his counsel does not request a judicial recommendation against deportation. At the time, if the defendant secured a judicial recommendation against deportation, an immigration judge was required not to deport the alien. Now, it's only the vacation of the criminal conviction as unconstitutionally obtained that will protect a defendant from the penalty of deportation that he was entitled to be advised of by his counsel prior to plea entry.

Lyons v. Pearce further held that a criminal defense counsel had an obligation to know about the nature of JRADs[9] and to request a JRAD at the time of a sentencing in order to protect an immigrant defendant from even the initiation of deportation proceedings. Lyons stated at page 567:

> 16. We turn next to the question whether the attorney's failure to ask the court for a recommendation against deportation, 8 USC 1251(b),(fn12) constitutes ineffective assistance of counsel. Commentators have observed that the recommendation against deportation is a significant tool available to forestall deportation of which defense attorneys should be aware (citations omitted). Once obtained from the sentencing court, a recommendation is absolutely binding upon the Attorney General and leaves no discretionary

[9] JRADS were Judicial Recommendations Against Deportation that prevented the deportation of the alien defendant. In fact, the conviction could not even be charged as a deportable offense in the immigration court if the criminal court judge signed a JRAD. JRAD "under former INA § 241(b) 8 U.S.C. §1251(b) was *abolished*. I.A. 90 § 602(b) repealed INA § 241(b) in *its entirety*. The INS has interpreted this provision to relate to cases prospectively and it does not apply to JRADs 'granted prior to date of enactment." ImmAct 90 Wire No. 5, McNary, Comm. (Nov. 28, 1990). Kurzban, Ira J., Immigration Law Sourcebook, 7th ed., American Immigration Law Foundation (2000).

> authority to deport. This important statutory protection cannot be overlooked by defense attorneys representing alien defendants.
>
> 17. Equating an attorney's failure to request a recommendation against deportation from the court with failure to perfect an appeal, as in *Shipman and Welch*[10], is not difficult when we consider the consequences of both. In one the defendant faces certain exile from his chosen country and in the other the defendant faces certain imprisonment or other imposed penalties. Indeed, the exile may carry with it more serious long range consequences. We hold that failure of counsel to request from the court a recommendation against deportation where the defendant, in fact, was subject to deportation as result of his conviction rendered counsel's assistance constitutionally inadequate. This requires setting the sentence aside. On remand for resentencing counsel will consider whether to make the request for a recommendation against deportation.

Oregon has an admirable history of protecting immigrant rights that this court should revive by holding Padilla is applicable to Petitioner's PCR petition.

(VIII) CONCLUSION

The Petitioner's conviction should be vacated – due to the ineffectiveness of counsel and due to a substantial denial in the circuit court proceedings (entry of an unknowing and involuntary plea) resulting in his unconstitutionally obtained conviction.

Dated this 2nd day of October, 2014.

Respectfully Submitted,

/s/ Brian Patrick Conry
Brian Conry, OSB No. 82224
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE
SIZE REQUIREMENTS

Brief length

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 13,927 words.

Type size

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

/s/ Brian Patrick Conry
Brian Conry, OSB No. 82224
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Kelsey Lynn Provo, certify that on October 2, 2014, I submitted an electronic form of the BRIEF ON THE MERITS OF PETITIONER ON REVIEW GONZALEZ VERDUZCO in Portable Document Format (PDF), to be filed with the Appellate Court Administrator, Appellate Court Records Section, 1163 State Street, Salem, Oregon 97301.

I further certify that I directed the BRIEF ON THE MERITS OF PETITIONER ON REVIEW GONZALEZ VERDUZCO to be served upon Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, Paul L. Smith, Attorney in Charge, Post-Conviction, and Kathleen Cegla, Assistant Attorney General on October 2, 2014, by having the document delivered to the following:

ELLEN F. ROSENBLUM #753239
Attorney General
ANNE M. JOYCE #013112
Solicitor General
PAUL L. SMITH #001870
Attorney in Charge, Post-Conviction
KATHLEEN CEGLA #892090
Assistant Attorney General
Department of Justice
1162 Court Street, Suite 400
Salem, OR 97301-4096

PETER GARTLAN
Chief Defender
LINDSEY BURROWS #113431
Deputy Public Defender
Office of Public Defense Services
Attorneys for *Amicus Curiae*

Respectfully Submitted,
/s/ Kelsey Lynn Provo
Kelsey Provo
Legal Assistant
BRIAN PATRICK CONRY, PC