

IN THE COURT OF APPEALS OF THE STATE OF OREGON

ALFREDO SALDANA-RAMIREZ,  
Petitioner-Appellant,

v.

STATE OF OREGON,  
Defendant-Respondent.

Washington County Circuit Court  
C094946CV

A145980

Steven L. Price, Judge.

Argued and submitted on February 08, 2012.

Brian P. Conry argued the cause and filed the briefs for appellant.

Jeremy C. Rice, Assistant Attorney General, argued the cause for respondent. With him on the brief were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

Before Duncan, Presiding Judge, and Haselton, Chief Judge, and Rasmussen, Judge pro tempore.

HASELTON, C. J.

Affirmed.

1 HASELTON, C. J.

2 Petitioner appeals from a judgment denying post-conviction relief. ORS  
3 138.530. He asserts that he was denied effective assistance of counsel due to his criminal  
4 defense counsel's purported default in failing to inform him of specific immigration-  
5 related consequences that could result from pleading guilty to felony failure to appear.  
6 *Chaidez v. United States*, No 11-820, 2013 WL 610201 (US Feb 20, 2013), forecloses  
7 that claim.<sup>1</sup> Accordingly, we affirm.

8 In reviewing a claim of ineffective assistance of counsel, we are bound by  
9 the post-conviction court's factual findings that are supported by evidence in the record;  
10 we make our own determination regarding constitutional issues. *Carias v. State*, 148 Or  
11 App 540, 542, 941 P2d 571 (1997).

12 Consistently with that standard, the circumstances material to our review  
13 are as follows. Petitioner is not a United States citizen. On January 17, 2000, petitioner  
14 was charged with felony fourth-degree assault and misdemeanor fourth-degree assault in  
15 relation to an incident involving his girlfriend at that time. On April 25, 2000, he failed  
16 to appear on those charges; consequently, the court issued a bench warrant for his arrest.  
17 On June 22, 2000, petitioner was indicted for felony failure to appear, ORS 162.205, and  
18 on June 30, 2000, a nationwide arrest warrant issued for petitioner on that charge.

19 On November 25, 2007, police apprehended petitioner during a traffic stop  
20 and arrested him on the failure to appear charges. On January 22, 2008, relying on

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<sup>1</sup> We reject without published discussion petitioner's other arguments on appeal.

1 defense counsel's advice, petitioner pleaded guilty and was convicted of felony failure to  
2 appear.<sup>2</sup> The plea form stated:

3 "I understand that if I am not a citizen of the United States,  
4 conviction of a crime may result, under the laws of the United States, in my  
5 deportation, exclusion from admission to the United States or denial of  
6 naturalization."

7 On August 20, 2009, within two years of his conviction becoming final,  
8 petitioner filed his initial petition for post-conviction relief, asserting that he had been  
9 "denied effective and adequate assistance of trial counsel" under both the Oregon and  
10 federal constitutions. According to petitioner, "[a] reasonable attorney would have  
11 researched the immigration law so as to adequately advise Petitioner regarding the  
12 immigration consequences of his plea to Felony Failure to Appear." Petitioner asserted  
13 (and continues to assert) that his conviction for felony failure to appear "makes him  
14 inadmissible to the United States and as a matter of law unable to apply \* \* \* for  
15 Cancellation of Removal."<sup>3</sup>

16 In March 2010--while this matter was still pending before the post-  
17 conviction court--the United States Supreme Court decided *Padilla v. Kentucky*, 559 US  
18 356, 130 S Ct 1473, 176 L Ed 2d 284 (2010). In *Padilla*, the petitioner, who was not a  
19 United States citizen, faced deportation after pleading guilty to transporting a large

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<sup>2</sup> As part of the plea agreement, the state dismissed both the felony fourth-degree assault charge and the misdemeanor fourth-degree assault charge.

<sup>3</sup> The Attorney General of the United States "may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States" under certain conditions, which petitioner argues that he might otherwise meet but for his conviction. 8 USC § 1229b.

1 quantity of marijuana--charges for which deportation is "virtually mandatory." *Id.* at \_\_\_\_,  
2 130 S Ct at 1478. Prior to pleading, Padilla's defense counsel not only failed to advise  
3 him of the immigration consequences of conviction, but told him that he "did not have to  
4 worry about immigration status." *Id.* at \_\_\_\_, 130 S Ct at 1478 (internal quotation marks  
5 omitted). Padilla contended that his attorney's default in that regard gave rise to an  
6 entitlement to collateral relief under the two-prong standard prescribed in *Strickland v.*  
7 *Washington*, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984). That is, that (1)  
8 "counsel's representation fell below an objective standard of reasonableness," *id.* at 688,  
9 and (2) "there [was] a reasonable probability that, but for counsel's unprofessional errors,  
10 the result of the proceeding would have been different," *id.* at 694.

11           The Court determined that the *Strickland* test applies to advice regarding  
12 deportation and, applying *Strickland*, the court observed that, "under prevailing  
13 professional norms," a criminal defense attorney "must advise her client regarding the  
14 risk of deportation." *Padilla*, 559 US at \_\_\_\_, 130 S Ct at 1482. Specifically, the Court  
15 explained:

16           "In the instant case, the terms of the relevant immigration statute are  
17 succinct, clear, and explicit in defining the removal consequence for  
18 Padilla's conviction. See 8 U.S.C. § 1227(a)(2)(B)(i) ('Any alien who at  
19 any time after admission has been convicted of a violation of (or a  
20 conspiracy or attempt to violate) any law or regulation of a State, the  
21 United States or a foreign country relating to a controlled substance \* \* \*,  
22 other than a single offense involving possession for one's own use of 30  
23 grams or less of marijuana, is deportable'). Padilla's counsel could have  
24 easily determined that his plea would make him eligible for deportation  
25 simply from reading the text of the statute, which addresses not some broad  
26 classification of crimes but specifically commands removal for all  
27 controlled substances convictions except for the most trivial of marijuana

1 possession offenses. Instead, Padilla's counsel provided him false  
2 assurance that his conviction would not result in his removal from this  
3 country. This is not a hard case in which to find deficiency: The  
4 consequences of Padilla's plea could easily be determined from reading the  
5 removal statute, his deportation was presumptively mandatory, and his  
6 counsel's advice was incorrect.

7 "Immigration law can be complex, and it is a legal specialty of its  
8 own. Some members of the bar who represent clients facing criminal  
9 charges, in either state or federal court or both, may not be well versed in it.  
10 There will, therefore, undoubtedly be numerous situations in which the  
11 deportation consequences of a particular plea are unclear or uncertain. The  
12 duty of the private practitioner in such cases is more limited. When the law  
13 is not succinct and straightforward \* \* \*, a criminal defense attorney need  
14 do no more than advise a noncitizen client that pending criminal charges  
15 may carry a risk of adverse immigration consequences. But when the  
16 deportation consequence is truly clear, as it was in this case, the duty to  
17 give correct advice is equally clear."

18 *Id.* at \_\_\_, 130 S Ct at 1483 (footnote omitted). The Court concluded that Padilla had  
19 satisfied the first prong of *Strickland* and, accordingly, reversed and remanded for the  
20 post-conviction court to determine whether he had been prejudiced. *Id.* at \_\_\_, 130 S Ct  
21 at 1483-84.

22 Following *Padilla*, petitioner here supplemented his submissions in support  
23 of post-conviction relief in an effort to demonstrate that his defense counsel had offered  
24 him constitutionally inadequate advice under *Padilla*. In a supporting affidavit, criminal  
25 defense counsel stated that "I do not remember what I stated directly to [petitioner]" but  
26 that "[w]hen going through a plea petition I explain to my clients that I am not an  
27 immigration attorney and that all convictions may lead to deportation." She also  
28 explained that

29 "I probably told [petitioner] that for his criminal history that a  
30 [failure to appear] is better than a Felony Person crime such as Assault IV,

1 which was the underlying crime for the [failure to appear]. \* \* \* However, I  
2 am clear with my clients that any conviction can result in deportation."

3 Defendant, in response, remonstrated that criminal defense counsel's advice  
4 satisfied Oregon state constitutional requirements because defense counsel had informed  
5 petitioner that a conviction for failure to appear may result in deportation. *See Gonzalez*  
6 *v. State of Oregon*, 340 Or 452, 458, 134 P3d 955 (2006) (explaining that Oregon law  
7 requires that "defense counsel advise clients who are not United States citizens that a  
8 criminal conviction 'may result' in deportation" (citing *Lyons v. Pearce*, 298 Or 554, 557,  
9 567, 694 P2d 969 (1985))). Defendant further asserted that criminal defense counsel's  
10 advice satisfied *Padilla* because the immigration consequences of petitioner's plea were  
11 not "truly clear."

12 The post-conviction court denied relief. In doing so, the court found, *inter*  
13 *alia*, that "[i]t is more likely than not that trial counsel told petitioner that the failure to  
14 appear conviction would almost certainly result in removal." The court continued and  
15 concluded that

16 "[t]his is adequate advice under *Padilla* and *Gonzalez* \* \* \*. Regarding  
17 *Padilla*, trial counsel may have given the right advice on incomplete  
18 information but she nevertheless did tell petitioner that he could count on  
19 being deported, which was correct. *Padilla* requires trial counsel to advise  
20 a client in petitioner's situation that a conviction 'may carry a risk of  
21 adverse immigration consequences' where immigration consequences are  
22 not clear cut and clearly advise of adverse consequences when the  
23 consequences are clear. [559 US at \_\_\_, 130 S Ct at 1483.] Trial counsel  
24 for petitioner was sufficiently clear in her advice."

25 On appeal, petitioner reiterates his arguments before the post-conviction  
26 court, including his fundamental contention that his criminal defense counsel's failure to

1 inform him of certain potential immigration-related consequences of his plea breached  
2 the standard of constitutionally adequate representation as prescribed in *Padilla*. That  
3 contention is foreclosed by *Chaidez*.

4           In *Chaidez*, the petitioner was a lawful permanent resident of the United  
5 States whose guilty plea subjected her to mandatory deportation. *Chaidez*, 2013 WL  
6 610201 at \*3. After her convictions became final and before the Supreme Court issued  
7 *Padilla*, the petitioner filed a petition for a writ of *coram nobis* in federal court, arguing  
8 that her criminal defense counsel had provided constitutionally ineffective assistance by  
9 failing to advise her of the immigration consequences of a guilty plea. *Id.* While  
10 *Chaidez's* petition was pending, the Supreme Court decided *Padilla*. The district court  
11 determined that the rule in *Padilla* applied, that the petitioner's counsel had performed  
12 deficiently under *Padilla*, and that the petitioner had been prejudiced as a result.  
13 Accordingly, the court vacated the petitioner's convictions.

14           The United States Court of Appeals for the Seventh Circuit reversed,  
15 holding that, under federal retroactivity analysis, as described in *Teague v. Lane*, 489 US  
16 288, 109 S Ct 1060, 103 L Ed 2d 334 (1989), *Padilla* had declared a new constitutional  
17 rule of criminal procedure and, thus, did not apply retroactively to the petitioner's  
18 collateral challenge. *Chaidez v. United States*, 655 F3d 684 (7th Cir 2011). The  
19 Supreme Court granted certiorari "to resolve a split among federal and state courts on  
20 whether *Padilla* applies retroactively." *Chaidez*, 2013 WL 610201 at \*4.

21           Applying *Teague*, the Court concluded that it had announced a new rule of

1 criminal procedure in *Padilla*. *Id.* at \*10. Accordingly, the Court held that *Padilla* does  
2 not apply retroactively to convictions already final on direct review. That is, "defendants  
3 whose convictions became final prior to *Padilla* \* \* \* cannot benefit from its holding."  
4 *Id.*

5           Here, petitioner's *Padilla*-based post-conviction claim arises in a procedural  
6 posture functionally indistinguishable from that in *Chaidez*. Petitioner's conviction  
7 became final before *Padilla* issued. Thus, under federal retroactivity principles as  
8 elucidated in *Chaidez*, *Padilla* does not apply to petitioner's collateral challenge.  
9 "[F]ederal retroactivity principles govern whether a new federal rule applies retroactively  
10 in [Oregon] court." *Miller v. Lampert*, 340 Or 1, 7, 125 P3d 1260 (2006) (citing *Page v.*  
11 *Palmateer*, 336 Or 379, 385-86, 84 P3d 133, *cert den*, 543 US 866 (2004)).<sup>4</sup>  
12 Accordingly, we affirm.

13           Affirmed.

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<sup>4</sup> Petitioner asserts that "*Padilla* has *sub silentio* reversed *Gonzalez*," but does not otherwise make a separate argument under the state constitution. Contrary to petitioner's assertion, the Oregon Supreme Court's holding in *Gonzalez* remains valid, and petitioner failed to demonstrate that defense counsel's advice was constitutionally inadequate under that standard.