IN THE SUPREME COURT OF THE
STATE OF OREGON

ESTEBAN CHAVEZ,
Petitioner on Review,

v.

STATE OF OREGON,
Respondent on Review.

(CC 111114537) (CA A151251) (SC S064968)

On review from the Court of Appeals.*

Argued and submitted March 8, 2018, at the University of Oregon School of Law, Eugene, Oregon.

Steven E. Benson, Portland, argued the cause and filed the brief for petitioner on review.

Benjamin Gutman, Solicitor General, Salem, argued the cause and filed the brief for respondent on review. Also on the brief was Ellen F. Rosenblum, Attorney General.

Before Walters, Chief Justice, and Balmer, Nakamoto, Flynn and Nelson, Justices, and Kistler and Brewer, Senior Justices pro tempore.**

KISTLER, S. J.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

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* On appeal from the Multnomah County Circuit Court, Cheryl Albrecht, Judge. 283 Or App 788, 391 P3d 801 (2017).

** Duncan and Garrett, JJ., did not participate in the consideration or decision of this case.

KISTLER, S. J.

In 1999, petitioner pled guilty to delivering cocaine. In 2011, he initiated this post-conviction proceeding. Relying on *Padilla v. Kentucky*, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284 (2010), he alleged that his trial attorney failed to advise him about the immigration consequences of his guilty plea in violation of the Sixth Amendment. The trial court dismissed the petition both because it was untimely and because *Padilla* does not apply retroactively. The Court of Appeals affirmed the post-conviction court's judgment on the latter ground. *Chavez v. State of Oregon*, 283 Or App 788, 391 P3d 801 (2017). On review, petitioner challenges both grounds that the trial court identified for dismissing his petition. We hold that, although the petition was timely, the only retroactivity argument that petitioner raises on review—that Oregon's post-conviction statutes require that all new constitutional rules be applied retroactively—is not well taken. Accordingly, we affirm the Court of Appeals decision and the trial court's judgment.

Because the trial court granted the state's motion to dismiss the petition for post-conviction relief, we assume that the allegations in the petition are true and state the facts consistently with those allegations. In 1999, petitioner was charged with possessing and delivering cocaine. Before trial, the district attorney offered petitioner a plea deal: If petitioner would plead guilty to delivering a controlled substance, the state would dismiss the possession charge and recommend a light sentence. In discussing the plea with petitioner, petitioner's lawyer did not advise him of the immigration consequences of pleading guilty to delivering a controlled substance. However, as part of the plea deal, petitioner did read and sign a plea petition, which recited:

> "I know that if I am not a United States citizen, my plea may result in my deportation from the USA, or denial of naturalization, or exclusion from future admission to the United States."

Petitioner's attorney discounted that warning; she advised him that she "did not think [he] would be deported as a result of his guilty plea." Finally, petitioner alleges that he "has no recollection" whether the trial judge discussed the

immigration consequences of his plea with him before he pled guilty to delivering a controlled substance. Petitioner did not appeal from the resulting judgment of conviction, which became final on September 2, 1999.

In 2011, petitioner applied to become a naturalized United States citizen. In processing his application, the Department of Homeland Security discovered that he had been convicted of delivering a controlled substance and, as a result, was subject to deportation. On November 4, 2011, petitioner filed his first petition for post-conviction relief. He alleged that the Court's 2010 decision in *Padilla* demonstrated that his trial attorney's advice fell below the standard that the Sixth Amendment requires. Specifically, petitioner alleged that his attorney was constitutionally deficient because she did not advise him that, if he pled guilty to delivering a controlled substance, he would almost certainly be deported.

The state moved to dismiss the petition, and the trial court granted the motion. The trial court reasoned that the petition was time-barred because petitioner reasonably could have anticipated *Padilla* and alternatively that *Padilla* did not apply retroactively to decisions that became final before it was decided. The Oregon Court of Appeals affirmed the trial court's judgment, reasoning that the argument that petitioner advanced for applying *Padilla* retroactively could not be reconciled with the Court of Appeals and this court's decisions. *Chavez*, 283 Or App at 796-99.

On review, the parties raise two issues. The first is whether the two-year statute of limitations in ORS 138.510(3)(a) bars petitioner's Sixth Amendment claim. The second is whether, if it does not, the Court's 2010 decision in *Padilla* applies retroactively to a conviction that became final in 1999. We begin with the first issue.

I. STATUTE OF LIMITATIONS

ORS 138.510(3) provides:

> "A petition pursuant to ORS 138.510 to 138.680 must be filed within two years of the [date that the challenged conviction became final], 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."

As this court has explained, that subsection contains both a limitations period within which a post-conviction petition must be filed (two years from the date that the conviction became final) and an escape clause (the limitation period does not apply if the grounds for relief asserted in the petition could not reasonably have been raised within the limitations period). *See Bartz v. State of Oregon*, 314 Or 353, 357-58, 839 P2d 217 (1992).

Because petitioner filed this petition for post-conviction relief approximately 12 years after his conviction became final, ORS 138.510(3) bars his petition unless the ground for relief asserted in the petition comes within the escape clause. Generally, cases invoking the escape clause fall into one of two categories. In one, the applicable law is established within the two-year limitation period, and the question is whether the petitioner reasonably could have asserted that available legal ground for relief. *Compare Gutale v. State of Oregon*, 364 Or 502, 519-20, 435 P3d 728 (2019) (holding that, even though *Padilla* had been decided when the petitioner pled guilty, a reasonable trier of fact could find that the petitioner was not on notice that he should investigate the possibility of adverse immigration consequences within the two-year limitations period), *with Bartz*, 314 Or at 359-60 (holding that the petitioner should have discovered within the limitations period a statutory defense to the charge to which he pled guilty). In the other category, a new constitutional rule is announced after the two-year limitation period expired, and the question is whether that "new rule" reasonably could have been raised within the limitations period. *See Verduzco v. State of Oregon*, 357 Or 553, 355 P3d 902 (2015).

This case falls in the latter category. Petitioner argues that, when he pled guilty in 1999, the accepted understanding was that failing to warn a defendant about the collateral consequences of a guilty plea, such as the possibility of deportation, did not constitute inadequate assistance for the purposes of the Sixth Amendment. Rather, a lawyer would fall below the standard that the

Sixth Amendment required only if he or she failed to warn a defendant about the direct consequences of a plea, such as the maximum sentence that could be imposed as a result of the plea. The state responds that, as a matter of state constitutional law, this court required lawyers to advise their clients about the immigration consequences of a guilty plea as early as 1985 and that, before the Court decided *Padilla* in 2010, petitioners seeking post-conviction and habeas relief had argued that their lawyers violated the Sixth Amendment by failing to advise them of the immigration consequences of their pleas. In considering the parties' arguments, we first describe briefly the state of the law before *Padilla* and then turn to the question whether petitioner's Sixth Amendment claim reasonably could have been raised within two years of September 2, 1999, the date his conviction became final.

In 2006, this court explained that the Sixth Amendment required defense counsel to advise their clients of the direct but not the collateral consequences of a guilty plea. *Gonzalez v. State of Oregon*, 340 Or 452, 457-58, 134 P3d 955 (2006). As petitioner notes, the direct consequences of a plea include the maximum and mandatory minimum sentences that can be imposed as a result of the plea while the collateral consequences include deportation, the loss of a license to practice a profession, the termination of parental rights, and the like. *Id.* (citing Gabriel J. Chin and Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L Rev 697, 699-701 (2002)). As a result, before *Padilla*, the "almost unanimou[s]" rule was that a defense counsel's failure to advise a client about the immigration consequences of a guilty plea did not provide a basis for seeking state post-conviction or federal habeas relief. *Chaidez v. United States*, 568 US 342, 350, 133 S Ct 1103, 185 L Ed 2d 149 (2013).

Oregon was an exception to that rule. In 1985, this court held that lawyers will fall below the standard that the Oregon Constitution requires if they fail to warn clients who are not United States citizens that a guilty plea "may result" in deportation and other adverse immigration consequences. *Lyons v. Pearce*, 298 Or 554, 567, 694 P2d 969 (1985). In

2006, this court reaffirmed *Lyons*. *Gonzalez*, 340 Or at 459.[1] Specifically, it considered and rejected a claim that, in light of changes to federal immigration law in 1996, the Oregon Constitution now required lawyers to warn their clients that deportation was a virtual certainty if they pled guilty to certain enumerated crimes. *Id.* This court instead reaffirmed that it was sufficient under the Oregon Constitution to advise a client of the maximum collateral consequence (deportation) that "may result" from a guilty plea. *Id.* In reaffirming *Lyons*, this court recognized that, outside of Oregon, the general rule was that failing to advise a client of the immigration consequences of a plea was simply not a cognizable basis for an inadequate assistance claim. *See id.* at 458.

Four years after *Gonzalez*, the United States Supreme Court took a different course. After noting that, as a result of changes to immigration law in 1996, deportation was "virtually inevitable" for persons convicted of a specified class of crimes, the Court turned to the issue whether failing to advise a defendant of the immigration consequences of a guilty plea could be asserted as a basis for a Sixth Amendment inadequate assistance claim. In considering that issue, the Court noted that it had never adopted a distinction between "direct" and "collateral" consequences of a plea for the purposes of the Sixth Amendment. *Padilla*, 559 US at 365. The Court, however, found it unnecessary to decide the validity of that distinction in other contexts because it concluded that deportation, as a consequence of a criminal conviction, was sufficiently intertwined with the criminal process and sufficiently significant to a defendant considering a guilty plea to hold that the failure to advise a client of the immigration consequences of pleading guilty can violate the Sixth Amendment. *Id.* at 366.

Having reached that conclusion, the Court recognized that the federal immigration laws are not always clear

[1] The petitioner in *Gonzalez* raised only a state constitutional claim on review. 340 Or at 455 n 2. This court accordingly did not decide the Sixth Amendment claim that the Court later decided in *Padilla*, although it noted that the general rule outside of Oregon was that petitioners could not seek to set aside a guilty plea based on their counsels' failure to advise them of the collateral consequences of their pleas.

regarding the immigration consequences for persons convicted of some crimes. *Id.* at 369. It also recognized, however, that, for persons convicted of other, specified crimes, the immigration consequences are "succinct, clear, and explicit." *Id.* at 368. The Court reasoned that, "when the deportation consequence [of a criminal conviction] is truly clear, as it was in this case, the duty to give correct advice is equally clear." *Id.* at 369. That is, when a citizen of another country is considering pleading guilty to one of the specified offenses for which removal is "virtually inevitable," constitutionally adequate defense counsel should advise their clients of that likelihood.

Padilla altered the legal landscape in two respects. First, it departed from what had been the "almost unanimou[s]" rule that the failure to advise a client of the immigration consequences of a guilty plea will never be a cognizable basis for asserting an inadequate assistance claim under the Sixth Amendment. *See Chaidez*, 568 US at 350. Second, *Padilla* imposed a higher requirement on counsel than this court had done in *Lyons* in 1985 and in *Gonzalez* in 2006. After *Padilla*, if the immigration consequences of pleading guilty to certain crimes are "truly clear," as they were in this case, then the Sixth Amendment requires defense counsel to advise their clients not merely that a conviction "may result" in adverse immigration consequences but that deportation and other adverse immigration consequences will be "virtually inevitable" as a result of the plea.

With that background in mind, we turn to the state's argument that petitioner reasonably could have raised his Sixth Amendment claim within two years of the date that his conviction became final in 1999. As we explained in *Verduzco*, the fact that a constitutional rule has not been definitively established does not necessarily mean that that ground for relief could not reasonably have been raised:

> "'The touchstone is not whether a particular question is *settled*, but whether it reasonably is to be *anticipated* so that it can be raised and settled accordingly. The more settled and familiar a constitutional or other principle on which a claim is based, the more likely the claim reasonably should have been anticipated and raised. Conversely,

> if the constitutional principle is a new one, or if its extension to a particular statute, circumstance, or setting is novel, unprecedented, or surprising, then the more likely the conclusion that the claim reasonably could not have been raised.'"

Verduzco, 357 Or at 571 (quoting *Long v. Armenakis*, 166 Or App 94, 101, 999 P2d 461 (2000); emphases in original).

In *Verduzco*, the petitioner filed a second post-conviction petition after the Court decided *Padilla* in 2010, and the state argued that a related procedural statute barred his Sixth Amendment *Padilla* claim because he reasonably could have raised that claim in the first post-conviction petition he filed in 2006. *Id.* at 573; *see* ORS 138.550(3) (barring a successive post-conviction petition when the ground for relief asserted in the petition reasonably could have been raised in an earlier petition). In considering that issue, we began by noting that it might be a close question whether the petitioner in *Verduzco* reasonably could have asserted an inadequate assistance claim based on *Padilla* in his first post-conviction petition, were it not for one fact: The petitioner had asserted such a claim in his first post-conviction petition. 357 Or at 572-73. As we explained, "[h]aving raised those grounds for relief in his first post-conviction petition, he cannot claim that he could not reasonably have raised them" until his second petition. *Id.* at 573.

We also noted that the proceedings in *Verduzco* were contemporaneous with the proceedings in *Padilla*. *Id.* at 557-59. Not only had Verduzco litigated a virtually identical Sixth Amendment claim at roughly the same time that Padilla was pursuing his claim, but the United States Supreme Court had granted Padilla's petition for *certiorari* before the time expired for Verduzco to file a petition for *certiorari*. *Id.* at 558 n 3. As a matter of timing, if Verduzco had petitioned for *certiorari*, the Court could have held his case until it decided *Padilla* and then granted, vacated, and remanded Verduzco's case for reconsideration in light of the Court's decision in *Padilla*. See *id.* at 573 n 20. We accordingly concluded that Verduzco reasonably could have raised his Sixth Amendment inadequate assistance claim when he filed his first post-conviction petition. *Id.* at 573.

This case arises in a different posture. In this case, petitioner never asserted a claim that was virtually identical to the claim that the Court later decided in *Padilla*, as the petitioner in *Verduzco* did. Accordingly, we cannot say, as we did in *Verduzco*, that petitioner reasonably could have anticipated *Padilla* in 2001 because he had, in fact, anticipated it. Moreover, the timing in this case is problematic for the state. *Verduzco* was contemporaneous with *Padilla*. For the state to prevail here, it has to persuade us that a *Padilla* claim reasonably could have been raised five years before the petitioners in *Verduzco* and *Padilla* raised that claim—*i.e.*, within two years of September 2, 1999, the date that petitioner's conviction became final. On this record, we cannot say that petitioner reasonably could have done so.

As the Court explained in *Chaidez*, the "almost unanimou[s]" rule before *Padilla* was that a Sixth Amendment inadequate assistance claim based on the failure to advise a defendant of the immigration consequences of a guilty plea was simply not cognizable. 568 US at 350. It is certainly true, as the state notes, that some litigants were raising similar claims before *Padilla*. However, those claims did not meet with success in the federal courts, and the question is not whether such a claim conceivably could have been raised. *Verduzco*, 357 Or at 566. Rather, it is whether it reasonably could have been raised. *Id.* As this court recognized in *Verduzco*, when the underlying principle is "novel, unprecedented, or surprising," and not merely an extension of settled or familiar rules, the more likely it becomes that the ground for relief could not reasonably have been asserted. Indeed, if this court did not anticipate *Padilla*'s holding when we decided *Gonzalez* in 2006, we can hardly say that petitioner should have anticipated it five years earlier in 2001. We accordingly hold that his petition comes within the escape clause in ORS 138.510(3).[2]

[2] Because petitioner filed his petition for post-conviction relief within two years of the date that *Padilla* was decided, this case does not require us to decide whether laches or a comparable doctrine might apply if petitioner had waited more than two years after *Padilla* was decided to file his petition. We express no opinion on that issue.

II. RETROACTIVITY

Having concluded that petitioner's Sixth Amendment claim is not time-barred, we turn to his argument that *Padilla* applies retroactively in state post-conviction proceedings. On that issue, petitioner recognizes that *Padilla* announced a new federal constitutional rule that does not apply retroactively in federal court. He argues, however, that federal law permits states to apply new federal rules, such as the one announced in *Padilla*, retroactively even though those rules do not apply retroactively in the federal courts. Additionally, he contends that, as a matter of state law, Oregon's 1959 post-conviction statute requires that all new state and federal constitutional rules apply retroactively in state post-conviction proceedings.

Before turning to petitioner's argument that the text, context, and history of Oregon's 1959 post-conviction statute require that all new federal constitutional rules apply retroactively in state post-conviction proceedings, we first discuss federal retroactivity analysis. Oregon adopted its 1959 post-conviction statute as federal retroactivity analysis was being developed, and an understanding of the federal analysis provides important context for understanding the Oregon statute. With the federal cases in mind, we then turn to petitioner's state statutory arguments.

A. *Federal Retroactivity Analysis*

Before 1915, the grounds for petitioning for a writ of federal habeas corpus were limited; the only basis that a petitioner could assert was that the court that had rendered the judgment lacked jurisdiction. *See Danforth v. Minnesota*, 552 US 264, 271, 128 S Ct 1029, 169 L Ed 2d 859 (2008) (discussing the development of federal habeas corpus law). In 1915, the grounds for petitioning for habeas were expanded to include the "depriv[ation] *** of [a person's] life or liberty without due process of law," but only if the constitutional violation was so serious that it rendered the conviction void for lack of jurisdiction. *Id.* at 272 (citing cases that had granted habeas relief when, for example, mob violence had dominated the petitioner's criminal trial). Perhaps because those cases turned primarily on the application of settled

principles to new factual situations, the question whether a "new" federal constitutional rule applied retroactively never arose. *Cf. Desist v. United States*, 394 US 244, 263, 89 S Ct 1030, 22 L Ed 2d 248 (1969) (Harlan, J., dissenting) (noting that only new rules would raise a question of retroactive application).[3]

In 1953, the Court expanded the grounds on which federal habeas relief could be granted to violations of all applicable constitutional rights. *Brown v. Allen*, 344 US 443, 73 S Ct 397, 97 L Ed 469 (1953). However, even after *Brown*, procedural restrictions on asserting federal habeas claims meant that "[i]t was the rare case in which the habeas petitioner had raised a 'new' constitutional argument both at his original trial and on appeal" so as to allow a habeas court to consider whether to apply a "new" constitutional rule to convictions which had become final. *Desist*, 394 US at 261 (Harlan, J., dissenting). As Justice Harlan explained in *Desist*, "[t]he conflict between retroactivity and finality only became of major importance [in 1963] with the Court's decision in *Fay v. Noia*, [372 US 391, 83 S Ct 822, 9 L Ed 2d 837 (1963)]." *Id.* Only after *Fay* removed the procedural restrictions that limited the instances in which the retroactivity of new rules was at issue did the conflict between retroactivity and finality become acute. Indeed, before 1959, when Oregon enacted its post-conviction statute, the Court had applied a new constitutional rule retroactively only once. *See Eskridge v. Washington Prison Board*, 357 US 214, 78 S Ct 1061, 2 L Ed 2d 1269 (1958) (applying equal protection holding retroactively); *cf. Linkletter v. Walker*, 381 US 618, 628 n 13, 85 S Ct 1731, 14 L Ed 2d 601 (1965) (listing cases in which the Court had applied new constitutional rules retroactively).

From 1961 to 1964, the Court expanded the list of federal constitutional rights that apply directly to the states and applied those rights for the first time (and thus retroactively) to two and perhaps three cases arising on federal habeas corpus. *See Linkletter*, 381 US at 628 n 13

[3] We look to Justice Harlan's dissent in *Desist* both because his reasoning is persuasive and because his reasoning was later adopted in *Teague v. Lane*, 489 US 288, 109 S Ct 1060, 103 L Ed 2d 334 (1989) (plurality).

(listing cases).[4] In 1965, the Court held that a new constitutional rule—that the Fourth Amendment exclusionary rule applies to the states—should be given only prospective effect. *Linkletter*, 381 US at 639. The rationale in *Linkletter* prompted significant criticism and led to what some perceived as inconsistent results. *See Mackey v. United States*, 401 US 667, 676-77, 91 S Ct 1160, 28 L Ed 2d 404 (1971) (Harlan, J., concurring in part and dissenting in part); *Desist*, 394 US at 258-59 (Harlan, J., dissenting); Paul J. Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 Harv L Rev 56, 77 (1964).

In 1989, a plurality of the Court sought to bring some order to the field. It announced a set of principles to govern the retroactive application of new federal constitutional rules, which it drew in large part from Justice Harlan's separate opinions in *Desist* and *Mackey*. *See Teague v. Lane*, 489 US 288, 303-08, 109 S Ct 1060, 103 L Ed 2d 334 (1989) (plurality). *Teague* defined what constitutes a "new" constitutional rule and explained that new federal constitutional rules should apply to all cases pending on direct appeal when the rule is announced. *Id.* at 301, 304-05. However, *Teague* recognized that

> "'[t]he interest in leaving concluded litigation in a state of repose *** may quite legitimately be found by those responsible for defining the scope of the [federal] writ [of habeas corpus] to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed.'"

Id. at 306 (quoting *Mackey*, 401 US at 682-83 (Harlan, J., concurring in part and dissenting in part)). After noting the different considerations at issue in cases arising on direct appeal and in cases arising on collateral review, *Teague* concluded that, as a general rule, new federal constitutional rules will not apply retroactively to cases that had become

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[4] The Court recognized the Sixth Amendment right to appointed counsel for indigent criminal defendants in *Gideon v. Wainwright*, 372 US 335, 83 S Ct 792, 9 L Ed 2d 799 (1963), and the prohibition against coerced confessions in *Jackson v. Denno*, 378 US 368, 84 S Ct 1774, 12 L Ed 2d 908 (1964). It also reversed two other decisions arising in habeas with a cite respectively to *Gideon* and *Jackson*. *See Linkletter*, 381 US at 628 n 13.

final before the new constitutional rule was announced. *Id.* at 307-08. *Teague* also recognized two exceptions to that "general rule of nonretroactivity": (1) "if [the rule] places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" and (2) if the rule is a "watershed rul[e] of criminal procedure" that "alter[s] our understanding of the bedrock procedural elements" essential to a fair proceeding. 489 US at 307, 311 (internal quotation marks omitted; emphasis omitted). *See Penry v. Lynaugh*, 492 US 302, 330, 109 S Ct 2934, 106 L Ed 2d 256 (1989) (adopting the plurality's reasoning in *Teague*).

Teague arose in the context of a federal habeas corpus proceeding, and it was unclear initially whether the general rule of nonretroactivity and the two exceptions that *Teague* announced reflected an interpretation of the federal habeas corpus statutes or the scope of the underlying federal constitutional right. The Court gave partial answers to that question first in *Danforth* and later in *Montgomery v. Louisiana*, ___ US ___, 136 S Ct 718, 193 L Ed 2d 599 (2016).

The Court held in *Danforth* that *Teague*'s general rule of nonretroactivity reflects the relief available under the federal habeas corpus statutes. 552 US at 282. In reaching that conclusion, the Court started from the proposition that "the source of a 'new rule' is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule." *Id.* at 271. The Court explained:

> "What we are actually determining when we assess the 'retroactivity' of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought."

Id.

Building on that proposition, the Court explained in *Danforth* that, while the federal habeas statute gives federal courts the authority to grant writs of habeas corpus, it "leaves unresolved many important questions about the scope of available relief." *Id.* at 278. The Court observed that

it "has interpreted that congressional silence—along with the statute's command to dispose of habeas petitions 'as law and justice require'—as an authorization to adjust the scope of the writ in accordance with equitable and prudential considerations." *Id.* (internal citations omitted). The Court concluded in *Danforth* that *Teague*'s general rule of nonretroactivity was "plainly grounded" in that authority, as were the Court's decisions requiring exhaustion of state court remedies and a showing of cause and prejudice before raising an issue in federal habeas that had not been preserved in the state courts. *Id.*

The Court later held in *Montgomery* that "*Teague*'s conclusion establishing the retroactivity of new substantive rules [that come within the first *Teague* exception] is best understood as resting upon constitutional premises." 136 S Ct at 729. The Court reasoned that the concerns that led to *Teague*'s first exception required, as a matter of federal constitutional law, that new rules that come within that exception be applied retroactively. *Id.* It followed, the Court held in *Montgomery*, "that when a new substantive rule of constitutional law [that comes within the first *Teague* exception] controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *Id.*

Danforth and *Montgomery* thus identify two classes of new federal constitutional rules. For new constitutional rules that come within the first *Teague* exception, retroactivity is an inherent part of the right; state courts must give retroactive effect to the right. *Montgomery*, 136 S Ct at 729. Conversely, new constitutional rules that come within *Teague*'s "general rule of nonretroactivity" permit but do not require retroactive application of the newly recognized right. *Danforth*, 552 US at 278-79. The retroactive application of those rules (rules that come within the general rule of nonretroactivity) on state and federal collateral review can be offset by "equitable and prudential considerations," such as finality. *Id.*

B. *State Collateral Challenges*

The history of state post-conviction proceedings mirrors in many respects their federal counterpart. The

Oregon legislature enacted the post-conviction statute in 1959. Before then, a person convicted of a crime could bring a state writ of habeas corpus to challenge the validity of his or her criminal conviction, although the grounds for doing so were limited initially to jurisdictional challenges. *Huffman v. Alexander*, 197 Or 283, 297, 251 P2d 87 (1952), *on recons*, 253 P2d 289 (1953) (explaining that state habeas initially was limited to jurisdictional challenges). Other common law writs, such as a motion in the nature of *coram nobis* and a motion to correct the record, were also available in state court before 1959 to challenge the validity of a conviction. *See* Jack G. Collins and Carl R. Neil, *The Oregon Postconviction-Hearing Act*, 39 Or L Rev 337, 338 (1960) (listing collateral relief available before the enactment of the 1959 post-conviction act). As Collins and Neil note, the multiplicity of state collateral remedies sometimes proved a trap for the unwary, and the Oregon legislature enacted the 1959 post-conviction act to simplify the procedure for bringing a state collateral challenge to a criminal conviction. *Id.* at 337-40; *see also Bartz*, 314 Or at 362.

The 1959 state post-conviction act made a petition under the act the exclusive remedy for challenging the lawfulness of a state criminal conviction,[5] and it abolished all common law post-conviction remedies except for the writ of habeas corpus. ORS 138.540(1); *cf. Penrod/Brown v. Cupp*, 283 Or 21, 24-25, 581 P2d 934 (1978) (describing the scope of relief available pursuant to a writ of habeas after the enactment of the 1959 post-conviction act).[6] The 1959 act identified four categories of claims for which "[p]ost-conviction relief pursuant to [this act] shall be granted": (a) "[a] substantial denial" of the petitioner's federal and state constitutional rights "which denial rendered the conviction void"; (b) lack of jurisdiction; (c) an unconstitutional or statutorily unauthorized sentence; and (d) a conviction under a statute

[5] The act recognized limited exceptions to the general rule that post-conviction proceedings are the exclusive means for challenging the lawfulness of a conviction. ORS 138.540(1).

[6] In discussing the 1959 act, we cite the statutes codifying the act. The relevant provisions of ORS 138.520, ORS 138.530, and ORS 138.540(1) have remained unchanged since their enactment. *Compare* Or Laws 1959, ch 636, §§ 2-4, *with* ORS 138.520, ORS 138.530, and 138.540(1).

that is substantively unconstitutional. ORS 138.530(1). The act also supplied a rule for construing its terms. It provided:

> "Whenever a person petitions for relief under ORS 138.510 to 138.680, ORS 138.510 to 138.680 shall not be construed to deny relief where such relief would have been available prior to May 26, 1959, under the writ of habeas corpus, nor shall it be construed to affect any powers of executive clemency or pardon provided by law."

ORS 138.530(2). Finally, the act gave trial courts discretion to grant "release, new trial, modification of sentence, and such other relief as may be proper and just." ORS 138.520.

In this case, petitioner relies on ORS 138.530(2) and ORS 138.530(1)(a) to argue that the 1959 legislature intended that every new constitutional rule announced by this court and the United States Supreme Court will apply retroactively in all post-conviction proceedings brought pursuant to the 1959 act. Petitioner focuses initially on ORS 138.530(2), and we begin with that subsection.

1. *ORS 138.530(2)*

ORS 138.530(2) provides that post-conviction petitions filed pursuant to the 1959 act "shall not be construed to deny relief where such relief would have been available prior to May 26, 1959, under the writ of habeas corpus." In arguing that ORS 138.530(2) requires the retroactive application of all new constitutional rules, petitioner starts from the premise that, before May 26, 1959, federal courts applied new federal constitutional rules retroactively in federal habeas corpus proceedings. Because ORS 138.530(2) provides that the post-conviction act shall not be construed to deny relief "where such relief would have been available prior to May 26, 1959, under the writ of habeas corpus," he concludes that the legislature intended that all new constitutional rules will be applied retroactively in Oregon post-conviction proceedings.

As petitioner recognizes, the rule of construction that ORS 138.530(2) provides turns on the scope of the "relief [that] would have been available prior to May 26, 1959, under the writ of habeas corpus." The relief under the 1959 act should be as broad as the relief that previously

was available "under the writ of habeas corpus." However, contrary to the assumption that underlies petitioner's argument, the statutory phrase "writ of habeas corpus" in ORS 138.530(2) refers to the state writ of habeas corpus, not the federal writ. Moreover, before 1959, the Oregon courts had not applied new constitutional rules retroactively. Rather, the issue had not arisen in state habeas. For that reason, no clear pattern of state habeas decisions existed that would permit us to infer that the 1959 legislature intended to codify a requirement that all new constitutional rules be applied retroactively. With that preface, we turn to a more complete discussion of the textual and contextual issues that petitioner's argument raises.

Textually, the phrase "writ of habeas corpus" in ORS 138.530(2) could refer to either the federal writ or the state writ. The legislature did not specify which writ it had in mind. Other sections of the 1959 act, however, refer to either the state statutory writ or the state constitutional writ. ORS 138.540(1) abolished a number of state "common law post-conviction remedies" "[w]ith the exception of habeas corpus." Given the juxtaposition of "habeas corpus" with other state "common law post-conviction remedies," we assume that the phrase, as used in that subsection of the statute, refers to the state writ. Similarly, ORS 138.530(3) provides that the act shall not be construed to limit this court's constitutionally based original jurisdiction in habeas corpus, again using the phrase to refer to a state writ. Finally, section 22 of the 1959 act amended the state habeas statutes to except post-conviction petitions under the 1959 act from the scope of those statutes. *See* Or Laws 1959, ch 636, § 22.

Ordinarily, we assume that the legislature used the phrase "writ of habeas corpus" in ORS 138.530(2) the same way that it used that phrase (or a variation of that phrase) throughout the act—namely, to refer to a state writ of habeas corpus. *See Figueroa v. BNSF Railway Co.*, 361 Or 142, 159, 390 P3d 1019 (2017) (identifying that principle of statutory construction). Moreover, because a statutory post-conviction petition is the exclusive means for challenging the validity of a conviction under the 1959 act, this court has recognized that ORS 138.530(2) reflects the legislature's

intent to ensure that the relief available under the new post-conviction act was as broad as that available under the state writ of habeas corpus, which has state constitutional underpinnings. *Benson v. Gladden*, 242 Or 132, 136-37, 407 P2d 634 (1965). We accordingly look to the practice under the state writ of habeas corpus to determine whether, as petitioner argues, ORS 138.530(2) requires that all new constitutional rules be applied retroactively in state post-conviction proceedings.

On that issue, no Oregon Supreme Court decision had held before 1959 that a new constitutional ruling would apply retroactively. Indeed, no Oregon Supreme Court decision had expressly identified that issue before 1959, nor does there appear to have been a practice of *sub silentio* applying new constitutional rulings retroactively in state habeas. In large part, the absence of any discussion of retroactivity before 1959 derived from the limited grounds on which habeas had been available before the enactment of the post-conviction act. As noted above, state habeas relief traditionally had been available only if the court imposing the conviction had lacked jurisdiction over the person or the subject. *Huffman*, 197 Or at 297. Because those constitutional principles were well-established, they presumably did not raise questions regarding the retroactive application of "new" constitutional rules. At most, the only question that they raised was the application of established principles to analogous circumstances.

To be sure, this court recognized in *Huffman* in 1952 that state habeas also would lie for "other matter[s] rendering the proceeding void." 197 Or at 298 (internal quotation marks omitted; emphasis omitted). However, the court had no occasion in *Huffman* to address whether the other matters that the petitioner raised in that case, if proved on remand, would announce "new rules" and whether, if they did so, they would apply retroactively.[7] The same is true for the other cases arising before 1959. For all that appears from the cases, this court applied settled rules to the facts of

[7] After the court issued its decision in *Huffman*, the state notified this court that the case was moot and that the petitioner's claims should have been raised by way of a motion in *coram nobis* rather than habeas. The court disagreed with the latter claim but did not vacate its decision. 197 Or at 331-33, 350.

the cases in habeas. *See, e.g.*, *Barber v. Gladden*, 210 Or 46, 57-58, 298 P2d 986, 309 P2d 192 (1957).[8] Those cases do not yield an instance in which this court clearly applied a new constitutional rule retroactively in state habeas.

Although petitioner does not identify any case in which the state writ of habeas was applied retroactively, even *sub silentio*, we note that two cases—*Cannon v. Gladden*, 203 Or 629, 281 P2d 233 (1955), and *Smallman v. Gladden*, 206 Or 262, 291 P2d 749 (1956), *overruled in part on other grounds*, *State v. Collis*, 243 Or 222, 413 P2d 53 (1966)—arguably could be viewed that way. We discuss each case briefly and then explain why we view them differently.

In *Cannon*, the legislature provided (and Cannon received) a greater sentence for attempted rape than he could have received for the completed crime. 203 Or at 630-31. In considering whether Cannon's sentence was constitutionally disproportionate, this court began by noting that the case was "unusual" and that it could not find "any authorities to guide [it] in [its] task." *Id.* at 631. However, it decided the question by applying the constitutional rule established 34 years earlier in *Sustar v. County Court for Marion Co.*, 101 Or 657, 201 P 445 (1921)—whether Cannon's sentence was so disproportionate to the offense that it shocked the moral sense of all reasonable people. 203 Or at 632. After phrasing the question that way, the court explained that "[t]he question answers itself." *Id.*

On the one hand, it is possible to read *Cannon* as announcing a new rule that it applied retroactively (albeit without saying so) to a conviction that had become final. After all, the court noted that it could find no authorities to guide it in its task. On the other hand, it is possible to read *Cannon* as applying the well-settled rule set out in *Sustar* to a new factual situation in which the correct application of the rule to the petitioner's sentence could only be described as self-evident. In considering whether *Cannon* announced

[8] In *Barber*, for example, the court considered whether a criminal statute was vague in violation of due process, whether a statute that authorized omitting a description of the crime violated due process, whether a punishment was cruel and unusual, and whether lesser sentences for codefendants convicted under a different statute violated equal protection. *See id.* at 57-58. The court found that none of petitioner's various claims had any merit.

a "new" constitutional rule that it applied retroactively, it is helpful to remember that the current federal definition of a "new" constitutional rule set out in *Teague* in 1989 did not exist either in 1955 when the court decided *Cannon* or in 1959 when the legislature enacted the post-conviction act. *See Desist*, 394 US at 263 (Harlan, J., dissenting) (explaining in 1969 that, before asking whether a rule applies retroactively, "it is necessary to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law"). In our view, *Cannon*'s holding is better understood as applying the constitutional principles established in *Sustar* to a new factual situation. As such, its application of *Sustar* to the sentence before it raised no question of retroactive application of a new rule.

The other decision that could be said to raise an issue of retroactivity is *Smallman*. Tucked away in the middle of that decision is a discussion of the petitioner's third assignment of error; in that assignment of error, he argued that the statute under which he had been convicted violated the Equal Protection Clause. *See* 206 Or at 278-81. This court noted that "[t]he fact that the ruling contended for might cause a mass hegira from the penitentiary does not foreclose consideration of the issue, but it does argue that the contention should be viewed with profound skepticism." *Id.* at 279. This court went on to reject the petitioner's argument on the merits. *Id.* at 281.

It is possible to read the court's statement that a ruling in the petitioner's favor "might cause a mass hegira from the penitentiary" as a recognition that a favorable ruling "might" apply retroactively. The court, however, never resolved (and had no need to resolve) whether such a ruling would apply retroactively since it ruled against the petitioner on the merits. It is true that, long after *Smallman* was decided, the plurality in *Teague* explained that the question whether a new federal ruling applies retroactively should be resolved as a preliminary matter. *See Teague*, 489 US at 300-01. But we cannot conclude from a federal practice announced more than 30 years after *Smallman* was decided

that this court *sub silentio* concluded that any ruling in the petitioner's favor would apply retroactively.

As we read the state habeas decisions before 1959, they do not expressly address the retroactive application of new constitutional rules, nor do they reveal a clear pattern of retroactive application in state habeas decisions. It follows that we cannot read ORS 138.530(2), as petitioner urges us to do, as codifying a well-accepted practice of requiring that all new constitutional rules will be applied retroactively. Moreover, even if we were to conclude that, before 1959, the Oregon courts had applied *some* new constitutional rules retroactively in state habeas corpus, it does not follow that the 1959 legislature understood or intended that *all* new rules would be applied retroactively. After all, some new constitutional rules call for retroactive application in ways that others do not. *See generally* Mishkin, 79 Harv L Rev at 77-86 (noting that point).

Contrary to petitioner's argument, ORS 138.530(2) does not reflect a legislative choice to require that all new constitutional rules be applied retroactively in state post-conviction proceedings. We also note that, even if we looked to the practice in federal habeas cases, as petitioner argues we should, to interpret the meaning of ORS 138.530(2), the retroactive application of new federal rulings in federal habeas cases before 1963 was "rare." *Desist*, 394 US at 261 (Harlan, J., dissenting). More importantly, as noted above, the Court had applied only one new federal constitutional rule retroactively before the Oregon legislature enacted our post-conviction statute in 1959. It follows that we cannot find in either the text of ORS 138.530(2) or the context of that statute a mandate that we apply every new constitutional rule retroactively. Because ORS 138.530(2) does not support the conclusion that petitioner urges us to draw from it, we turn to ORS 138.530(1)(a), the other subsection on which petitioner relies.

2. *ORS 138.530(1)(a)*

ORS 138.530(1) provides that "[p]ost-conviction relief pursuant to [the 1959 act] 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" of the petitioner's state or federal constitutional rights which "rendered the conviction void"; (b) a lack of jurisdiction over the subject matter or the person; (c) an unconstitutional or an unauthorized sentence; and (d) a conviction based on a statute that is substantively unconstitutional.

Focusing on ORS 138.530(1)(a), petitioner interprets that subsection as requiring that all new constitutional rules be applied retroactively. Petitioner does not explain why he interprets ORS 138.530(1)(a) that way, and we note two textual problems with his interpretation. Petitioner appears to read the word "when" in the phrase "when one or more of the following grounds is established by the petitioner" as "whenever." To be sure, "when" is broad enough to permit his reading. But his conclusion that ORS 138.530(1)(a) mandates retroactive application of all new constitutional rules would follow more naturally from the text if the legislature had used a different word.

Beyond that, petitioner never explains why the phrase "substantial denial" of his constitutional rights that "rendered the conviction void" is not a problem for his reading of the subsection. Textually, ORS 138.530(1)(a) does not require that post-conviction relief "shall be granted" when any denial of a constitutional right is established. Rather, it provides that relief shall be granted only when a "substantial denial" of a constitutional right rendered the conviction "void." At a minimum, the text of the statute is difficult to square with petitioner's argument that ORS 138.530(1)(a) requires that every new constitutional rule be applied retroactively. In our view, the interpretation of ORS 138.530 (1)(a) that petitioner urges us to adopt does not fit comfortably with the text of that subsection.

Another interpretation is textually permissible. ORS 138.530(1) might not be intended to address retroactivity at all. Rather, it could merely identify four grounds for relief for which post-conviction relief shall be granted. Moreover, the phrase "when one or more of the following grounds is established by the petitioner" could have a more modest meaning than the one petitioner attributes to it. It could simply make clear that the burden is on the petitioner to establish the

existence of one of the four grounds for which relief shall be granted. Providing that post-conviction relief shall be granted if and when one of those four grounds for relief is established does not necessarily say anything about whether some or all new constitutional rules that come within those four grounds will apply retroactively.

We also consider a statute's context in determining what the text means. Context includes "the preexisting common law and the statutory framework within which the law was enacted." *Klamath Irrigation District v. United States*, 348 Or 15, 23, 227 P3d 1145 (2010) (internal quotation marks omitted). As explained above, retroactive application of new constitutional rules in state habeas proceedings was not an issue when the legislature enacted the post-conviction act in 1959. Moreover, it was not a substantial issue in federal habeas either. Because of procedural limitations on federal habeas corpus, the retroactive application of new federal rulings in federal habeas cases before 1963 was "rare." *Desist*, 394 US at 261 (Harlan, J., dissenting).

To be sure, one pair of federal decisions had raised the issue before 1959. In 1956, a plurality of the United States Supreme Court ruled that, if states provided for appeals generally, they could not deny indigent defendants that right by requiring them to pay for a transcript as a condition of taking an appeal. *Griffin v. Illinois*, 351 US 12, 18-20, 76 S Ct 585, 100 L Ed 891 (1956). Justice Frankfurter concurred in the judgment. He agreed that, if a state "has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity." *Id.* at 24 (Frankfurter, J., concurring in the judgment). In agreeing with the plurality, however, he noted that the rule announced in *Griffin* did not necessarily apply retroactively. He observed that, in future cases, the Court should recognize "candidly the considerations that give prospective content to a new pronouncement of law." *Id.* 26. He then concluded that "[t]he rule of law announced this day should be delimited as indicated." *Id.*

Two years later, in 1958, the Court applied *Griffin* retroactively in a *per curiam* opinion, which did not mention the issue of retroactivity. *See Eskridge*, 357 US at 216. The

opinion focused instead on the state's argument that, even though the petitioner in *Eskridge* had lacked the funds to pay for a transcript, he could have based his direct appeal on "notes compiled by someone other than the official court reporter." *See id.* at 215-16. Petitioner has not identified any other United States Supreme Court decision before 1959 applying a new federal constitutional rule retroactively to a case arising on collateral review, and we hesitate to infer from a single decision that the 1959 Oregon Legislature would have intended that *all* new federal and state constitutional rules would apply retroactively in Oregon post-conviction proceedings.

One final source bears on petitioner's statutory interpretation argument. In *State v. Fair*, 263 Or 383, 502 P2d 1150 (1972), this court recognized that it was not bound to apply all new federal constitutional rules retroactively in post-conviction proceedings. As the court explained in *Fair*, "we are free to choose the degree of retroactivity or prospectivity which we believe appropriate to the particular rule under consideration, so long as we give federal constitutional rights at least as broad a scope as the United States Supreme Court requires." *Id.* at 387-88; *see Bouge v. Reed*, 254 Or 418, 459 P2d 869 (1969); *Haynes v. Cupp*, 253 Or 566, 456 P2d 490 (1969) *overruled on other grounds*, *State v. Evans*, 258 Or 437, 442, 483 P2d 1300 (1971).[9] We cannot reconcile the rule that petitioner urges us to draw from Oregon's post-conviction statute (that every new constitutional rule will apply retroactively in post-conviction proceedings) with the rule that *Fair* announced (that the court may but need not apply some new constitutional rules retroactively).

To be sure, the court in *Fair* did not state its retroactivity rule after analyzing the text and context of the 1959 statute. But if, as discussed above, the text and context of the 1959 statute do not require the absolute rule that petitioner urges us to find in those sources, then this court's retroactivity decisions, summarized in *Fair*, provide another

[9] The specific question in *Fair* was whether a new constitutional rule should be applied retroactively on direct appeal. However, in stating the rule quoted above, the court surveyed and cited its post-conviction decisions. *See Fair*, 263 Or at 387 nn 6 & 7. We accordingly conclude that the retroactivity rule that *Fair* stated applies equally to post-conviction proceedings.

contextual clue that ORS 138.530(1)(a) does not require that every new constitutional rule apply retroactively in state post-conviction proceedings.

Considering the text and context of Oregon's post-conviction statute, we hold that ORS 138.530 does not require that all new constitutional rules be applied retroactively. That holding is sufficient to answer the sole retroactivity argument that petitioner has made in his briefs to this court. It follows that we need not decide in this case whether we should clarify or further refine the factors that this court considered in *Fair* in deciding whether a new constitutional rule will apply retroactively.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.