IN THE SUPREME COURT OF THE
STATE OF OREGON

ABDALLA DAHIR GUTALE,
Petitioner on Review,

v.

STATE OF OREGON,
Respondent on Review.

(CC C131617CV) (CA A155474) (SC S065136)

On review from the Court of Appeals.*

Argued and submitted March 7, 2018.

Jason Weber, O'Connor Weber LLC, Portland, filed the briefs and argued the cause for petitioner on review.

Jonathan N. Schildt, Assistant Attorney General, Salem, argued the cause and filed the brief for respondent on review. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Walters, Chief Justice, and Balmer, Nakamoto, and Nelson, Justices, and Kistler, Senior Justice pro tempore, and Roger DeHoog, Judge of the Court of Appeals, Justice pro tempore.**

NELSON, J.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings.

Balmer, J., dissented and filed an opinion, in which Kistler, S.J., joined.

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* On appeal from Washington County Circuit Court, Charles Bailey, Jr., Judge. 285 Or App 39, 395 P3d 942 (2017).

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

NELSON, J.

A petition for post-conviction relief "must be filed within two years" of the conviction becoming final, unless the petition falls within the escape clause. ORS 138.510(3). A petition falls within the escape clause if the "grounds for relief asserted *** could not reasonably have been raised" within the limitation period. *Id.* This case concerns the meaning of the escape clause.

Here, petitioner alleged in a petition for post-conviction relief that his trial counsel had failed to inform him of the immigration consequences of his guilty plea to a class A misdemeanor and, through that omission, led petitioner to believe that there would be no immigration consequences. Based on that alleged failure, petitioner asserted that his trial counsel was constitutionally inadequate and ineffective under the state and federal constitutions. *See Padilla v. Kentucky*, 559 US 356, 369, 130 S Ct 1473, 176 L Ed 2d 284 (2010) (requiring counsel to inform a criminal defendant of clear immigration consequences of a plea and, where consequences are not clear, to advise that plea may carry a risk of adverse immigration consequences).

The petition was filed outside the two-year limitations period. But petitioner alleged that his petition fell within the escape clause because he could not reasonably have known of his grounds for post-conviction relief within the limitations period. He based that allegation on the fact that neither trial counsel nor the sentencing court gave him any indication that his plea could carry immigration consequences, even when petitioner stated, on the record, that he was pleading guilty in part because he wished to travel and become a United States citizen. Petitioner alleged that he learned of counsel's inadequacy only when he was placed in deportation proceedings, after the statute of limitations had run.

The post-conviction court dismissed the petition as time-barred under ORS 138.510(3). The Court of Appeals affirmed, based on the principle that "persons are assumed to know laws that are publicly available and relevant to them," including relevant immigration law. *Gutale v. State of Oregon*, 285 Or App 39, 42, 395 P3d 942 (2017) (citing *Bartz*

v. State of Oregon, 314 Or 353, 839 P2d 217 (1992); *Benitez-Chacon v. State of Oregon*, 178 Or App 352, 37 P3d 1035 (2001)). We allowed review to determine the proper meaning and scope of the escape clause. For the reasons set out below, we reverse the decisions of the post-conviction court and the Court of Appeals.

I. BACKGROUND

We take the historical facts from the allegations in petitioner's pleadings and attachments, including petitioner's response to the state's motion to dismiss. *See Verduzco v. State of Oregon*, 357 Or 553, 555 n 1, 355 P3d 902 (2015) (taking undisputed facts from petitioner's pleadings and attachments). Petitioner is a refugee from Somalia who arrived in the United States in 2003, when he was in his early teens. In April 2010, at the age of 20, petitioner was charged with various crimes after he was discovered in a car having sex with a 16-year-old girl. Petitioner pleaded guilty to one count of sex abuse in the third degree, a class A misdemeanor, and the remaining charges were dismissed.

At the sentencing hearing that followed, petitioner stated that he was pleading guilty in part because he "really wan[ted to] travel" and to obtain his United States citizenship. The court sentenced petitioner to two years of probation and seven days in custody with credit for time served. The court ordered petitioner to register as a sex offender, but told him that if he successfully completed probation, it would "remove that requirement."

Petitioner's trial counsel was required under *Padilla* to provide petitioner with information regarding the potential immigration consequences of his plea. *Padilla* was decided by the United States Supreme Court a couple of months before petitioner's sentencing. And, under ORS 135.385(2)(d), trial courts are required to inform noncitizen defendants who plead guilty that "conviction of a crime may result *** in deportation, exclusion from admission to the United States or denial of naturalization." Despite petitioner's statement at sentencing that he was pleading guilty so that he could travel and become a United States citizen, neither trial counsel nor the court gave petitioner any indication that his plea subjected him to immigration

consequences. Petitioner's judgment of conviction was entered on June 3, 2010.

Just over two years later, on June 4, 2012, Immigration and Customs Enforcement (ICE) agents detained petitioner. In March 2013, petitioner filed for post-conviction relief, alleging that his trial counsel had been ineffective for failing to advise him of the immigration consequences of his plea. In an affidavit attached to his petition for post-conviction relief, he stated that his trial counsel had never discussed with him the immigration consequences of his guilty plea. At the time of his plea, petitioner was "unaware that [he] could be deported as a result of [his] sex abuse conviction." He remained "unaware that [he] could be deported until [he] was taken into ICE custody on June 4, 2012." He added, "I certainly would have filed within the two-year statute of limitations had I been informed that I could be deported as a result of my sex abuse conviction."

The state moved to dismiss, arguing that the petition was barred by the two-year statute of limitations. Petitioner responded that he did not know that counsel had been ineffective until he was placed in deportation proceedings and learned, at that time, that he had pleaded to an offense that made him deportable. He further argued that, based on the actions of his counsel and the trial court, he had no reason to suspect either that he would suffer immigration consequences or that his counsel had failed to provide him with legally-required advice.

At a hearing on the state's motion to dismiss, the post-conviction court made clear its view that, if petitioner's allegations were true, then he would have a strong claim for ineffective assistance of counsel under *Padilla*. The court nevertheless granted the state's motion, concluding that the information underlying petitioner's claim "would have been available" to petitioner because *Padilla* "already had been decided."[1]

[1] The post-conviction court also "assume[d] there was certain information" about the immigration consequences of criminal convictions that would have been available to petitioner when he received his green card. Regardless of whether that assumption was correct, there was nothing in the pleadings and record before the post-conviction court on that issue. And, on review in this court, the state does not argue the post-conviction court's judgment should be affirmed on that ground.

Petitioner appealed. In considering petitioner's argument that he could not reasonably have known about his trial counsel's failings before being taken into ICE custody, the Court of Appeals relied on this court's decision in *Bartz* and the Court of Appeals' application of *Bartz* in *Benitez-Chacon*. In *Bartz*, the petitioner filed an untimely petition alleging that his trial counsel had been ineffective for "fail[ing] to advise him of an available statutory defense." 314 Or at 357. The petitioner further alleged that, based on his trial counsel's failure, he could not reasonably have known of that defense within the limitations period. This court rejected that argument. The court held that, because "it is a basic assumption of the legal system that the ordinary means by which the legislature publishes and makes available its enactments are sufficient to inform persons of statutes that are relevant to them," the statutes pertaining to the petitioner's crime of conviction "were reasonably available to [the petitioner] when his conviction became final." *Id*. at 359-60 (citing *Dungey v. Fairview Farms, Inc.*, 205 Or 615, 621, 290 P2d 181 (1955) for proposition that "every person is presumed to know the law").

The petitioner in *Benitez-Chacon* filed an untimely petition alleging that her trial counsel had "failed to inform her fully and adequately of the immigration consequences of a no contest plea." 178 Or App at 354. She alleged as well that, because her counsel had not fully informed her, she could not reasonably have known of the immigration consequences within the limitations period. The Court of Appeals relied on *Bartz* and rejected that argument. According to the Court of Appeals, "If the petitioner in *Bartz* was presumed to know the law based on the public nature of legislative enactments, so must petitioner in this case be presumed to have had knowledge of the relevant immigration statutes and rules." *Id.* at 357.

In this case, petitioner is in essentially the same position as the petitioner in *Benitez-Chacon*, and he argued to the Court of Appeals that it should overrule its decision in that case. The court declined to so, concluding that the result in *Benitez-Chacon* was dictated by this court's decision *Bartz*. *Gutale*, 285 Or App at 44. The court held that

petitioner could not obtain relief from the statute of limitations because he was presumed to know the immigration law and United States Supreme Court case law that was relevant to his claim. *Id.* at 42-43. As a result, the Court of Appeals affirmed the post-conviction court's dismissal. *Id.* at 44 ("[W]e adhere to *Benitez-Chacon* and affirm the post-conviction court's ruling that the grounds for relief asserted in the petition do not fall within the escape clause."). Petitioner then sought review in this court, which we allowed.

II. ANALYSIS

Under Oregon's Post-Conviction Hearing Act (PCHA), a petitioner who has been convicted of a crime may obtain collateral relief by establishing "[a] substantial denial in proceedings resulting in petitioner's conviction *** 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." ORS 138.530(1)(a). Post-conviction relief provides the primary mechanism by which a person who has been convicted of a crime may allege constitutional errors that were not, and could not have been, raised during the underlying criminal proceeding or on direct appeal. Those errors frequently involve allegations that counsel was unconstitutionally ineffective and inadequate in his or her handling of the criminal case.

The PCHA generally requires that a post-conviction petitioner file a petition within two years of the date that the conviction becomes final. ORS 138.510(3). That statute of limitations, however, is subject to an escape clause. Under the escape clause, a petitioner may file an untimely petition by asserting "grounds for relief *** which could not reasonably have been raised" within the two-year limitations period. *Id.*

The parties dispute the meaning of that text and how that text was applied in *Bartz*. Petitioner reads *Bartz* as establishing a factual presumption that people know the law. According to petitioner, even if such a presumption applies, it is a presumption that may be overcome by a petitioner who establishes facts demonstrating that, within the limitations period, he or she could not reasonably have known

the law that provided the basis for the claim. And petitioner maintains that whether a petitioner reasonably should have known the law that provides the basis for a claim turns on a fact-intensive consideration of the totality of circumstances, such as whether the petitioner had access to legal sources or whether the legal basis for the claim was complicated.

The state argues that petitioner's position is precluded by *Bartz*. According to the state, the standard is whether the bases for the claim—both the facts and the law—were reasonably available to the petitioner. And the state reads *Bartz* as holding that settled law is always reasonably available to a petitioner. Thus, under the state's reading, when the law that provides the basis for claim is settled, it is never a fact question whether that legal basis was reasonably available to a petitioner.

Neither party gets it exactly right. As we explain below, the state is correct that the appropriate standard focuses on whether the grounds for relief were known or reasonably available to a petitioner. However, we do not read *Bartz* as narrowing the escape clause as much as the state maintains. We instead conclude that, when a petitioner's claim is premised on a trial counsel's failure to advise on the immigration consequences of a conviction, fact questions may still be relevant to determining whether the petitioner should have known about those immigration consequences.

As an initial matter, we have made clear that a ground for relief reasonably could have been raised under one of two circumstances: (1) when the ground for relief was known or (2) when the ground for relief was reasonably available, despite not being known. *See Verduzco*, 357 Or at 566 (providing textual analysis of the phrase "could not reasonably have raised"); *id.* at 573 (concluding that a ground for relief was reasonably available to the petitioner because he had previously asserted that same ground for relief). Thus, a ground for relief could not reasonably have been raised earlier if the ground for relief was not known and was not reasonably available. That is true for both the factual and legal basis for a ground of relief. *See Eklof v. Steward*, 360 Or 717, 734, 385 P3d 1074 (2016) (considering whether the factual predicate of a petitioner's claim "reasonably should

have [been] discovered"); *Verduzco*, 357 Or at 571 (considering whether a legal claim could have been reasonably anticipated even before the legal basis for that claim was settled by the courts).

Within that framework—which turns on whether the ground for relief was known or reasonably available—petitioner understands *Bartz* as addressing whether the ground for relief was known. Petitioner reads *Bartz* as holding that the petitioner was presumed to *know* the legal basis for his claim because people are presumed to know the law. To be sure, in a parenthetical citation, the court in *Bartz* cited *Dungey* for the proposition that "every person is presumed to know the law." *Bartz*, 314 Or at 360. And, in *Benitez-Chacon*, the Court of Appeals applied *Bartz* as presuming that people know the law: "If the petitioner in *Bartz* was presumed to know the law based on the public nature of legislative enactments, so must petitioner in this case be presumed to have had knowledge of the relevant immigration statutes and rules." *Benitez-Chacon*, 178 Or App at 357.

But, notwithstanding the citation to *Dungey*, this court's analysis in *Bartz* did not turn on a presumption that people know the law. Instead of presuming that the petitioner *knew* the law, the court in *Bartz* concluded that the legal basis for the petitioner's claim was *reasonably available* to the petitioner. The court reached that conclusion because, if the petitioner had looked, the law could have been found in publicly available sources. As noted above, the court held that, because "it is a basic assumption of the legal system that the ordinary means by which the legislature publishes and makes available its enactments are sufficient to inform persons of statutes that are relevant to them," the statutes pertaining to the petitioner's crime of conviction "were *reasonably available* to [the petitioner] when his conviction became final." 314 Or at 359-60 (emphasis added). Thus, consistent with our other decisions interpreting the escape clause, the court's analysis in *Bartz* turned on whether the legal basis for the petitioner's claim was reasonably available to him. And the court concluded that it was.

Nevertheless, *Bartz* does not control the outcome of this case in the manner that the state maintains. Being

reasonably available means more than just that a petitioner could have found the law if he or she had looked. Instead, a ground for relief is reasonably available only if there was a reason for the petitioner to look for it.

For example, in cases where petitioners have asserted grounds for relief based on newly discovered facts, this court has considered whether "the facts on which their new grounds for relief depended could not reasonably have been discovered sooner." *Verduzco*, 357 Or at 566. In one such case, *Eklof*, the petitioner brought an untimely and successive petition for post-conviction relief, alleging that the prosecutor had withheld favorable evidence during the underlying criminal proceedings and that the fact of that withholding came to light only after the petitioner's first petition. 360 Or at 719. Specifically, after the first petition, the petitioner obtained the case file from her accomplice's trial counsel containing evidence that could have been used to impeach a witness that the state presented against the petitioner in her criminal trial. The petitioner alleged that the state violated her constitutional rights when it failed to turn over that impeachment evidence before the criminal trial. *Id.* at 722.

The state argued in *Eklof* that, as a matter of law, the petitioner could not take advantage of the escape clause for either untimely or successive petitions because the petitioner's first post-conviction counsel had failed to request and review the case file at issue.[2] This court rejected that argument and held that whether the petitioner's first post-conviction counsel should have requested and reviewed the case file turned on whether there was information providing a reason to request and review the case file. *See* 360 Or at 734 ("Did petitioner's first post-conviction counsel have any information that would have revealed that the state had the evidence at issue during petitioner's criminal prosecution?"); *id.* at 733 (stating that the question of "[w]hether a petitioner 'reasonably could have been expected' to raise her claim in a timely initial post-conviction action often will depend on

[2] Like untimely petitions, successive petitions are barred unless they assert grounds for relief that "could not reasonably have been raised" in the original petition. ORS 138.550(3).

who knew what, and when"). Thus, the petitioner's ground for relief was not barred because, although the evidence may have been available to her counsel on request, her counsel may have had no reason to suspect that the state had possession of evidence that it failed to produce.

The resulting standard, therefore, requires assessing both whether the petitioner reasonably could have accessed the ground for relief and whether a reasonable person in the petitioner's situation would have thought to investigate the existence of that ground for relief. That standard is very similar to the standard for a discovery rule, which is used in other contexts. In negligence cases, for example, the statute of limitations does not begin until at least "the earlier of two possible events: (1) the date of the plaintiff's *actual discovery* of injury; or (2) the date when a person exercising reasonable care *should have discovered* the injury, including learning facts that an inquiry would have disclosed." *Greene v. Legacy Emanuel Hospital*, 335 Or 115, 123, 60 P3d 535 (2002) (emphasis in original); *see also Johnson v. Mult. Co. Dept. Justice*, 344 Or 111, 119, 178 P3d 210 (2008) ("[T]he discovery rule does not protect plaintiffs who fail to make a further inquiry when a reasonable person would do so.").

What distinguishes the petitioner in *Bartz* and petitioner in this case is whether they had a reason to look for the existence of legal grounds for relief. For the petitioner in *Bartz*, the conviction itself put him on notice of the need to investigate the existence of a ground for relief. He was, of course, aware of that conviction at the time it occurred. It was, therefore, incumbent on the petitioner to look for legal challenges to his conviction. And the court concluded in *Bartz* that, given the public nature of legislative enactments, the legal grounds for the petitioner's challenge would have been accessible to a reasonable person looking for such a legal challenge.

For petitioner in this case, however, his conviction may not have put him on notice of the need to investigate. Instead, petitioner alleges that it was the consequences of that conviction that caused him to conduct such an investigation. And those consequences are not always obvious, even to lawyers. *See Padilla*, 559 US at 369 ("There will, therefore,

undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain."). Petitioner alleges that, until he was detained by ICE after the limitations period had run, he was unaware that his counsel had caused him harm that might arise in the future. In support, petitioner alleges that, at his sentencing hearing, neither his trial counsel nor the trial court raised the possibility of immigration consequences even when petitioner stated that he was pleading guilty so that he could travel and become a citizen of the United States. Based on those allegations, petitioner's claim is akin to a latent physical injury in a negligence case. He might have found the ineffective assistance of his counsel if he had looked for it, but he had no reason to look for it before being detained by ICE.

Our prior decisions interpret the escape clause in ORS 138.510(3) in a manner consistent with that understanding. As noted, the text at issue is the phrase "could not reasonably have raised." ORS 138.510(3). We observed in *Verduzco* that the legislature's use of the adverb "reasonably" to modify the phrase "could not have raised" requires an inquiry beyond what is merely possible, calling instead "for a judgment about what is 'reasonable' under the circumstances." 357 Or at 566.

When it was enacted in 1989, ORS 138.510(3) originally required a post-conviction petitioner to file within 120 days of the conviction becoming final.[3] The legislature's primary purpose for the statute of limitations was to reduce the costs of indigent defense by limiting frivolous post-conviction claims. *See Bartz*, 314 Or at 358 (1989 amendments to PCHA were intended to reduce indigent defense costs); Tape Recording, House Judiciary Crime and Corrections Subcommittee, HB 2796, Mar 9, 1989, Tape 44, Side A (statement of Representative Baum). The escape clause creates an exception to the bar imposed by that statute of limitations. According to the court in *Bartz*, the purpose of the escape clause was "to give persons extra time to file petitions for post-conviction relief in extraordinary circumstances." 314 Or at 358. And, as a result, the court

[3] In 1993, the legislature expanded the time for filing a post-conviction petition from 120 days to two years. Or Laws 1993, ch 517, § 1.

said that the escape clause should be "construed narrowly." *Id.* at 359. The court did not, however, attempt to identify the boundaries of what counts as extraordinary or to define just how narrowly to construe the escape clause.

We understand the court in *Bartz* to have been appropriately concerned with reading the escape clause in a manner that would not allow the exception to swallow the rule. The facts presented by the petitioner in *Bartz* were unexceptional. It is not unusual for a petitioner to be unaware of the law pertaining to the crime of conviction. If that fact, without further qualification, were sufficient to bring a claim within the escape clause, then it is likely that most claims—and certainly most claims for ineffective assistance of counsel—would fall within the escape clause. That result would defeat the goal that the legislature was attempting to advance by passing the statute of limitations in the first place.

This case does not present those same concerns. Whereas the petitioner in *Bartz* was aware of his conviction and could have either researched whether his trial counsel was ineffective, or sought help from an attorney to make that determination, petitioner in this case did not know about the immigration consequences that form the basis for his claim until he was later detained by ICE. Further, petitioners who were unaware of the immigration consequences of their convictions are a narrow class of petitioners. Allowing petitioner's claim in this case to fall within the escape clause does not run the risk of having the escape clause swallow the statute of limitations.

The court in *Bartz* additionally reviewed specific types of claims discussed during the legislative hearings that led to the statute of limitations and escape clause of ORS 138.510(3). The court understood those discussions as identifying representative examples of claims that might fall within the escape clause. The state points out that claims based on a trial counsel's failure to advise on the immigration consequences of conviction is not among those claims identified during those hearings:

> "Discussion of the scope of the 'escape clause' took place in two subcommittees of the House Committee on the

> Judiciary. In the Subcommittee on Crime and Corrections, a representative of the Justice Department noted the importance of such a provision in cases where evidence is newly discovered after the expiration of the limitation period. A representative of the Oregon Criminal Defense Lawyers Association testified to the Subcommittee on Civil and Judicial Administration that he would support the 120-day time limitation if an exception were made where 'extraordinary circumstances' were shown. As examples, he mentioned convictions procured by collusion between a prosecutor and a defense lawyer, but coming to light after the limitation period, and situations in which the statute under which the conviction was obtained is later declared facially unconstitutional."

Id. at 359 (internal footnotes and citations omitted).

We do not interpret that legislative history as defining the scope of the escape clause. As an initial matter, the Justice Department representative that the court referred to was not discussing how the text of the escape clause would be applied. Instead, she was discussing the original version of the proposed statute of limitations, which contained no escape clause at all. She acknowledged that, under that original version, a petitioner who discovered evidence of a claim after the limitations period would be unable to bring a state claim for post-conviction relief. She proposed addressing that issue, not by adding an escape clause, but by extending the statute of limitations from the 120 days being proposed to 180 days or one year. Minutes, Subcommittee on Crime and Corrections, Mar 9, 1989, Ex D (statement of Assistant Attorney General Brenda Peterson). As a result, testimony by that witness says little about the scope of the escape clause that the legislature later enacted.

And, similarly, the testimony from the representative of the Oregon Criminal Defense Lawyers Association makes no attempt to define the scope of the escape clause that the legislature enacted. That witness was discussing a proposed escape clause that would have required a petitioner to establish "manifest injustice." Tape Recording, Senate Judiciary Committee, SB 284, Apr 12, 1989, Tape 123, Side A (statement of Ross Shepard). That is, however, not the standard that the legislature ultimately passed. Instead of

requiring a petitioner to establish "manifest injustice," the escape clause passed by the legislature applies if the petitioner establishes that his or her claim "could not reasonably have been raised" within the limitation period. Because the legislature did not adopt the standard discussed by that witness, we do not understand that witness as discussing representative cases that would fall under separate standard that the legislature did adopt.

Additional analysis of the legislative history tells us little about the intended scope of the escape clause. During the 1989 legislative session, the legislature heard testimony that most petitions, and in particular "most stronger cases," would be filed within the statute of limitations, and that the effect of the statute of limitations would be to "take[] away the opportunity for defendants with a little time on their hands to file in periods of time that are quite extended from when they were convicted." Tape Recording, Senate Judiciary Committee, SB 284, June 12, 1989, Tape 121, Side B (statement of Bill Linden).

By adding the escape clause to the statute of limitations, the legislature expressed an intent that some untimely claims for post-conviction relief would be permitted, notwithstanding the statute of limitations. The escape clause in ORS 138.510(3) is closely related to a parallel provision in ORS 138.550(3), which prohibits a petitioner who already has filed a post-conviction petition from later filing a successive petition. Under ORS 138.550(3),

> "all grounds [for relief] must be asserted in [the] original or amended petition, and any grounds not so asserted are deemed waived unless the court on hearing a subsequent petition *finds grounds for relief asserted therein which could not reasonably have been raised* in the original or amended petition."

(Emphasis added.) That provision codifies claim preclusion principles: It addresses the question of whether a petitioner who already has litigated a petition for post-conviction relief may return to court and litigate a second time, and it provides that a petitioner may not do so where counsel raised, or reasonably could have raised, the grounds at issue in that prior litigation. *See Verduzco*, 357 Or at 565 (citing

Johnson v. Premo, 355 Or 866, 874-75, 399 P3d 431 (2014) for proposition that ORS 138.550(3) codifies claim preclusion principles).

The 1989 legislative history makes clear, and our case law also has recognized, that the text of the escape clause contained in ORS 138.510(3) is derived from its ORS 138.550(3) counterpart. State Court Administrator Bill Linden recommended the addition of the escape clause to the proposed 120-day statute of limitations to clarify "how [the statute barring successive petitions] might come into play both when a [petition for post-conviction relief] is timely filed within 120 days and when it is not." He wrote: "Our suggestion is that an amendment may be necessary to the current bill to allow the issues brought up on [post-conviction relief] past 120 days if they could not reasonably have been raised before that time." Linden warned that, "without such an amendment, there is a greater chance of litigation[.]" Exhibit G, House Judiciary Crime and Corrections Subcommittee, HB 2796, Mar 9, 1989 (accompanying statement of Bill Linden).[4]

We take Linden's concern to be that a 120-day statute of limitations without exception could give rise to litigation concerning the relationship between ORS 138.510(3) and ORS 138.550(3), where a successive petition alleging a ground that could not reasonably have been raised would be permitted under ORS 138.550(3), but barred under the statute of limitations. The 1989 Legislative Assembly adopted the text proposed by Linden and enacted it into law without

[4] Linden's full statement concerning the escape clause language is as follows:

"ORS 138.550, which is not amended by this bill, allows that PCR grounds for relief that were not raised in the original or amended petition 'are deemed waived *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*.' (Emphasis added). The question we have is how this statute might come into play both when a PCR is timely filed within 120 days and when it is not. Our suggestion is that an amendment may be necessary to the current bill to allow the issues brought up on a PCR past 120 days if they could not reasonably have been raised before that time. On the other hand, everyone who misses the 120 days SOL may raise the issue that their issues could not have reasonably been raised earlier and the court would have to review that issue. Without such an amendment, however, there is a greater chance of litigation as long as postconviction relief is available in some form."

Id. (emphasis in original).

modification. It thus appears that the 1989 Legislative Assembly intended the escape clause to provide consistency in the treatment of successive petitions that are timely and untimely: If a successive petition is permitted under ORS 138.550(3) because it raises a ground for relief that could not reasonably have been raised, then generally it also is permitted under ORS 138.510(3), even if it is filed outside the 120-day limitations period.

Although that legislative history suggests that timely and untimely successive petitions will frequently be treated the same, it does not directly address what to do with petitions that are untimely but not successive. The escape clause to the statute of limitations differs from the escape clause to the bar on successive petitions in one important respect. In *Verduzco*, *Eklof*, and our other cases applying the escape clause to the bar on successive petitions, we have considered whether a ground for relief reasonably could have been raised from the point of view of counsel. *See Eklof*, 360 Or at 733 ("[A] common issue in successive post-conviction actions is whether *counsel* in an earlier post-conviction action reasonably could have been expected to raise a claim that later appellate case law demonstrated would have been viable." (Emphasis added.)). As noted, ORS 138.550(3) codifies claim preclusion principles: It addresses the question of whether a petitioner who already has litigated a petition for post-conviction relief may return to court and litigate a second time, and it provides that a petitioner may not do so where counsel reasonably could have raised the grounds at issue in that prior litigation.[5] By contrast, when the bar

[5] In *Bogle v. State*, 363 Or 455, 423 P3d 455 (2018), we noted that, when the legislature enacted the Post-Conviction Hearing Act in 1959, it intended that claim preclusion provisions would apply when a post-conviction petitioner was represented by counsel. The legislature did that by providing indigent petitioners with counsel. ORS 138.590(4); *see Bogle*, 363 Or at 466-67 (noting that one intended purpose of court-appointed counsel was to "ensure that [a] petitioner did not inadvertently waive any grounds for relief" in view of strict *res judicata* provisions; those provisions "apply 'only to the effect of prior post-convictions proceedings under the act, when appointed counsel will always have been available in the first proceeding'") (quoting Jack G. Collins and Carl R. Neil, *The Oregon Postconviction Hearing Act*, 39 Or L Rev 337, 358 (1960) (emphasis omitted)).

Additionally, the legislature determined that the ban on successive claims should apply differently depending on whether the petitioner was represented by counsel on direct appeal. *See* ORS 138.550(2) ("If petitioner was not represented

on successive petitions does not apply, the inquiry under the escape clause to the statute of limitations is whether a petitioner reasonably could have raised a ground for relief *before any litigation has occurred*. The focus of the reasonableness inquiry is therefore the petitioner, rather than an attorney representing the petitioner.[6] *See Bartz*, 314 Or at 360 (inquiry was whether the petitioner himself reasonably could have known of the statutes pertaining to his offense of conviction).

Our conclusion that the subject of the reasonableness inquiry in ORS 138.510(3) is an unrepresented petitioner, rather than counsel, is significant. Although counsel may be responsible for knowing that there may be immigration consequences to a criminal conviction, we do not presume that to be the case for an individual petitioner, unless there is a factual basis for concluding that the petitioner knew that there may be immigration consequences to his or her conviction.

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by counsel in the direct appellate review proceeding, due to lack of funds to retain such counsel and the failure of the court to appoint counsel for that proceeding, any ground for relief under ORS 138.510 to 138.680 which was not specifically decided by the appellate court may be asserted in the first petition for relief under ORS 138.510 to 138.680, unless otherwise provided in this section."). The reason for that distinction was because "a layman cannot fairly be held responsible for failure to proceed and raise legal issues when he is without legal assistance." Collins and Neil, *The Oregon Postconviction Hearing Act*, 39 Or L Rev at 357.

[6] The state argues that, because the escape clause asks whether the "grounds for relief" in an untimely petition "could *** reasonably have been raised," it intended the reasonableness inquiry to focus exclusively on the grounds, rather than on whether it would have been reasonable for a petitioner to raise those grounds. As we explained in *Alfieri v. Solomon*, 358 Or 383, 399, 365 P3d 99 (2015), although the legislature often uses the passive voice, "its significance for statutory interpretation varies." In some instances, it may convey intent that a statute applies broadly; at other times it "adds nothing to the meaning of a provision and instead generates ambiguity as to how the law should be applied." *Id.* at 399-400. The passive voice does not, as the state suggests, necessarily render the actor inconsequential to our analysis. Here, the plain text of ORS 138.510(3) asks whether the "grounds for relief asserted *** could *** reasonably have been raised." The question is not whether the grounds are reasonable, but rather, whether an unspecified actor reasonably could have raised them. Although the legislature used the passive voice, it is difficult to consider the reasonableness inquiry in ORS 138.510(3) from the point of view of the "grounds" alone; "reasonably" modifies the verb "raised," and grounds do not raise themselves. Turning to the context of ORS 138.510(3), we conclude that it is the petitioner who reasonably must have raised the grounds. The statutes governing post-conviction relief refer to the person who files a petition as the "petitioner." *See* ORS 138.530(1) (stating grounds for relief that the *petitioner* must establish).

There was no such factual basis alleged in this case. Here, petitioner alleged that, at sentencing, he stated that he was pleading guilty so that he could still travel and become an United States citizen. Neither his trial counsel nor the sentencing court informed him that his conviction might affect his ability to travel or become a citizen. He alleged that, as a result, he did not know that his conviction could affect his immigration status and that he remained unaware of that fact until he was detained by ICE after the limitations period expired. It may be that the factual record will ultimately reveal that petitioner had information about the immigration consequences of his conviction sooner. But, because we credit petitioner's allegations in reviewing the post-conviction court's ruling on a motion to dismiss, we conclude that the post-conviction erred in granting the state's motion to dismiss.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings.

BALMER, J., dissenting.

Statutes of limitations, by their nature, can block good claims. In criminal law, they may protect the guilty. In the tort system, they may deprive the injured of a remedy. And in post-conviction proceedings, they can deny relief from constitutionally unsound convictions.

Why accept that? Because statutes of limitations also play an important, and sometimes essential, role in our legal system. They press parties to bring their claims in a timely matter, they prevent disputes from being adjudicated long after the most probative evidence has gone stale, and they provide certainty to potential defendants who once the statute of limitations has run can live their lives without the fear that they will be subject to a lawsuit or to criminal charges. In the post-conviction context, a statute of limitations may provide crime victims with assurance that the criminal justice system has finally reached a definitive conclusion. A statute of limitations may also make it more likely that post-conviction claims are brought in a timeframe

where, if a conviction is set aside, it still may be practicable for the state to retry the petitioner, should doing so be in the interests of justice. Yet those advantages come at an unavoidable cost: Any statute of limitations will necessarily, but hopefully rarely, block some good claims.

The legislature recognized this essential fact about statutes of limitations when drafting Oregon's system of post-conviction review, and for that reason initially declined to include one. Jack G. Collins & Carl R. Neil, *The Oregon Postconviction Hearing Act*, 39 Or L Rev 337, 361 (1960) ("A layman convicted of a crime may be unaware of legal remedies for procedural defects in his conviction until the limited time has expired."). In 1989, however, the legislature reevaluated the costs and benefits of statutes of limitations and added a statute of limitations to post-conviction proceedings. Or Laws 1989, ch 1053, § 18. Although the legislature limited the time within which a post-conviction claim must be brought, it also included an "escape clause," defining circumstances where the statute of limitations would not apply. In *Bartz v. State of Oregon*, 314 Or 353, 839 P2d 217 (1992), this court held that the escape clause contained in ORS 138.510(3) was narrow, and that it did not include claims that were untimely filed because of a petitioner's ignorance of the law relevant to the claim. Now, the majority interprets ORS 138.510(3) to, in effect, carve out a new exception to *Bartz*—a petitioner's ignorance of immigration consequences of his or her conviction can be a basis for invoking the escape clause. I sympathize with the majority's effort to provide a path to relief for petitioner, who faces harsh immigration consequences that he did not anticipate when he made the decision to plead guilty. But the distinction that the majority draws between petitioner's claim and that of any other post-conviction petitioner who was unaware of the law pertaining to his or her challenge has no basis in the text, context, or legislative history of the escape clause. The best reading of the escape clause, considering both its text and the legislature's intent, is that it does not provide relief in this case, where petitioner's only reason for his late filing was ignorance of the law. Therefore, I respectfully dissent.

Petitioner is an immigrant who pleaded guilty to the crime of sex abuse in the third degree, ORS 163.315. In his petition, he alleged that this conviction makes him deportable and that his attorney failed to inform him of this fact before he pleaded guilty to the offense. That allegation, if true, would likely entitle petitioner to relief under *Padilla v. Kentucky*, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284 (2010), which held that criminal defense attorneys must inform immigrant clients of the immigration consequences of a conviction.

Although petitioner appears to have a meritorious claim, there is a roadblock, the statute of limitations. ORS 138.510(3) states that "[a] petition [for post-conviction relief] must be filed within two years of the following, unless the court on hearing a subsequent petition finds *grounds for relief asserted which could not reasonably have been raised* in the original or amended petition" (emphasis added), and then sets out the date on which the limitations period begins to run in several different circumstances. There is no dispute that petitioner did not file his petition within two years of the required date—in his case, the date that his conviction was entered in the record. Therefore, his petition must be dismissed, whatever its merits, unless his "grounds for relief asserted *** could not reasonably have been raised in the original or amended petition." *Id.*

Petitioner does not dispute that he knew most facts relevant to his claim. He knew that he had entered a plea to the crime of sex abuse in the third degree, and he knew the matters that his trial lawyer had informed him about before he entered that plea—and that they did not include possible immigration consequences of his plea. He knew, or at least he now alleges, that he would not have pleaded guilty to a crime that made him deportable. He alleges neither that he was unaware of *Padilla v. Kentucky*, the principal case that his claim for relief relies upon, nor that he was unaware that criminal convictions, as a general matter, might have immigration consequences. He states, however, that he did not learn that his specific conviction could make him deportable until after the statute of limitations had run. That piece of legal information is the only thing that petitioner states that he did not know during the statute of limitations

period.[1] Is ignorance of that point of law, and nothing else, sufficient to support a finding that his grounds for relief "could not reasonably have been raised" within two years of his conviction? ORS 138.510(3).

This court has addressed that question before. In *Bartz*, 314 Or 353, a post-conviction petitioner alleged that his trial counsel had been inadequate because he had failed to inform the petitioner of a possible defense before the petitioner entered a guilty plea.[2] The petitioner, Bartz, argued that because he was unaware of the existence of the defense until after the statute of limitations had run and was therefore unable to bring his inadequate assistance of counsel claim earlier, the escape clause should apply to his claim. *Id.* This court examined the legislative history of ORS 138.510(3) and concluded that the legislature intended the escape clause "to be construed narrowly." *Bartz*, 314 Or at 359. Consistent with that understanding, the court framed the question as "whether the extant statutes pertaining to a particular criminal offense constitute information that is reasonably available to a defendant convicted of that offense." *Id.* The court then answered that question in the affirmative:

> "It is a basic assumption of the legal system that the ordinary means by which the legislature publishes and makes available its enactments are sufficient to inform persons of statutes that are relevant to them. Accordingly, we hold that the relevant statutes were reasonably available to Bartz when his conviction became final."

Id. at 359-60 (internal citation removed).

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[1] Petitioner also states that he did not know that there was a two-year statute of limitations on postconviction relief in Oregon, but he does not argue that that ignorance is relevant to whether his claim falls within the escape clause.

[2] Bartz had been charged with two counts of third-degree and one count of first-degree rape. ORS 163.355; ORS 163.375. The defense in question was that:

> "In any prosecution under ORS 163.355, ORS 163.365, ORS 163.385 or ORS 163.395 in which the victim's lack of consent was due solely to incapacity to consent by reason of being less than a specified age, it is a defense that the actor was less than three years older than the victim at the time of the alleged offense."

Bartz v. State, 110 Or App 614, 617 n 2, 825 P2d 657, *aff'd*, 314 Or 353 (1992) (quoting ORS 163.345). Bartz did not claim that he was unaware of any fact relevant to this defense, only of its existence. *Id.*

In this case, petitioner had all the information needed to raise an ineffective assistance of counsel claim in a petition for post-conviction review, except for the legal effect of his conviction on his immigration status. If the relevant law was available to him, as *Bartz* held, this is an easy case: Petitioner either had or reasonably could have had all the information necessary to file a petition for post-conviction review within two years of his conviction, and thus reasonably could have done so.

The majority's resolution of this case, and its break from *Bartz*, rests on two new conclusions about the escape clause. The majority holds that "the subject of the reasonableness inquiry in ORS 138.510(3) is an unrepresented petitioner, rather than counsel ***." 364 Or at ___. Second, the majority draws a distinction between the availability of the law to a petitioner and that petitioner's motivation to consult the law, holding that "a ground for relief is reasonably available only if there was a reason for the petitioner to look for it." 364 Or at ___. The majority then holds that this case differs from *Bartz* in that the petitioner was unaware of any "need to investigate," 364 Or at ___, because "until he was detained by ICE after the limitations period had run, he was unaware that his counsel had caused him harm that might arise in the future," 364 Or at ___. Both conclusions are incorrect.

I begin with the question of whether the legal ignorance of a previously unrepresented petitioner is sufficient to allow invocation of the escape clause. The text of the escape clause refers to "grounds for relief asserted which could not reasonably have been raised in the original or amended petition." ORS 138.510(3). As we recognized in *Bartz*, that text, standing on its own, is ambiguous. *Bartz*, 314 Or at 357 ("ORS 138.510(2) does not explain precisely what kinds of circumstances fulfill the statutory requirement that an untimely petition assert a ground for relief that 'could not reasonably have been raised' in a timely petition."). The context, however, substantially clarifies its meaning.

When it was added, the text of the escape clause mirrored that found in two existing provisions of Oregon post-conviction law. ORS 138.550(2) bars petitioners who have

obtained "direct appellate review" of their conviction from raising any ground in their petition "unless such ground was not asserted and could not reasonably have been asserted in the direct appellate review proceeding." And petitioners who have already filed one petition for post-conviction review are barred from filing another by ORS 138.550(3), "unless the court finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition." Both of those provisions—the direct review escape clause and the successive petitions escape clause—have been present in Oregon law since 1959. Or Laws 1959, ch 636, § 15(3).[3]

As a general presumption, when the legislature uses the same text in multiple places within the same set of statutes, that text should be given the same meaning throughout. *State v. Shaw*, 338 Or 586, 603, 113 P3d 898 (2005). Here, the legislature used existing text to define a new exception. The most reasonable inference is that the legislature wanted that text to have the same meaning, not a wholly different application.

In the context of the original act, ORS 138.550(2) and (3) served an important purpose: codifying *res judicata*, or claim preclusion, principles. *See Bogle v. State of Oregon*, 363 Or 455, 467, __ P3d __ (2018) ("ORS 138.550(3) is one of the *res judicata* provisions of the PCHA."); *Freeman v. Gladden*, 236 Or 137, 139, 387 P2d 360 (1963) ("[ORS 138.550(2)] was intended to state the principle of *res judicata* in post-conviction appeals."). We have previously recognized that

> "The *res judicata* provisions were among 'the most important [provisions of] the act.' They were intended to 'provide a clear and workable basis for reducing the tide of post-conviction litigation to manageable proportions, while maintaining standards of fairness.'"

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[3] It is impossible to understand the statute of limitations escape clause without recognizing this fact, because the escape clause contains a puzzling reference to "the original or amended petition." ORS 138.510(3). We have previously recognized that that was a drafting error, and that the legislature did not mean for the statute of limitations to apply only to situations in which a previous petition had been filed. *Verduzco v. State*, 357 Or 553, 564, 355 P3d 902 (2015); *Bartz*, 314 Or at 358. The existence of that error further confirms the derivation of the escape clause text in ORS 138.510(3).

Bogle, 363 Or at 467 (quoting Collins & Neil, 39 Or L Rev at 356) (alteration in *Bogle*; citations omitted). Those provisions were a response to a significant problem:

> "It is well known that a few 'prisoner-lawyers' have taken advantage of inadequate *res judicata* doctrines applicable in postconviction cases to flood the courts with petition after petition, each raising a different ground of attack on their convictions."

Collins & Neil, 39 Or L Rev at 356. In line with that restrictive purpose, the exception to the *res judicata* provisions for grounds that "could not reasonably have been raised" was not intended to be particularly broad, or to undermine the restrictions themselves.

The label of *res judicata*, the structure of those provisions, and the commentary to them indicate that the provisions operated to require that claims must be brought at the first available proceeding, regardless of whether the law was known to the petitioner and his or her attorney. But what if an unrepresented petitioner failed to bring the claim in an earlier proceeding because of legal ignorance? The structure of the *res judicata* provisions makes clear that that was not a basis for invoking their escape clauses. ORS 138.550(2) contains *res judicata* provisions applicable when there had already been a direct appeal as well as the direct appeal escape clause. However, the drafters understood that not all petitioners would have had access to counsel on direct appeal and felt "that a layman cannot fairly be held responsible for failure to proceed and raise legal issues when he is without legal assistance." Collins & Neil, 39 Or L Rev at 357. The legislature did not understand the direct appeal escape clause to solve that problem. To protect unrepresented petitioners, the legislature added a *second* exception: The direct appeal *res judicata* provisions do not apply "[i]f petitioner was not represented by counsel in the direct appellate review proceeding, due to his lack of funds to retain such counsel and the failure of the court to appoint counsel for that proceeding." ORS 138.550(2). Because the second exception was necessary to avoid barring claims that had not been raised because of legal ignorance, the legislature clearly did not understand the escape clause, standing alone, to forgive an unrepresented nonlawyer's ignorance of

the law. If the direct appeal escape clause allowed petitioners to bring claims that they would have raised on appeal but for their legal ignorance, the second exception would be redundant.

In addition, "[c]ourt decisions that existed at the time that the legislature enacted a statute—and that, as a result, it could have been aware of—may be consulted in determining what the legislature intended in enacting the law as part of the context for the legislature's decision." *OR-OSHA v. CBI Services, Inc.*, 356 Or 577, 593, 341 P3d 701 (2014). Shortly before the legislature enacted the post-conviction statute of limitations, the Court of Appeals held that the successive petitions escape clause, contained in ORS 138.550(3), operated on a presumption that post-conviction petitioners knew the law. The issue came up in the case of a petitioner who claimed that he had grounds that he "could not reasonably have been raised in the earlier [post-conviction] proceeding, because his counsel in that proceeding was ineffective." *Page v. Cupp*, 78 Or App 520, 524, 717 P2d 1183 (1986). When a post-conviction petitioner wished to raise a claim that counsel did not, this court had outlined procedures, in *Church v. Gladden*, 244 Or 308, 417 P2d 993 (1966), for raising the claim in the first post-conviction hearing and held that the petitioner could not save the claim for a subsequent post-conviction petition. But *Church* had concerned grounds that the petitioner *had* tried to raise, and therefore of which the petitioner was necessarily aware. In *Page*, the petitioner claimed that he could not have raised the grounds in the first hearing because his counsel was ineffective, although he conceded that "the factual basis underlying his * * * claims for relief was revealed during his first post-conviction proceeding." *Page*, 78 Or App at 525. There, as here, the question was whether petitioner's own legal ignorance and understandable reliance on counsel could excuse a failure to bring claims under the escape clause. The Court of Appeals held that ORS 138.550(3), in combination with *Church*, "presumes that the *petitioner* has knowledge of all grounds for relief that were, or should have been, discovered before the close of the original proceeding" and affirmed the dismissal of his petition. *Page*, 78 Or App at 525 (emphasis added).

As outlined above, the escape clauses in the *res judicata* provisions were understood to be narrow and could not be invoked based on legal ignorance. Because the legislature copied the escape clause from the existing *res judicata* provisions, it is appropriate to infer that the legislature wanted it to operate in the same way. If the legislature had wished to create a different or more generous exception, one that would forgive the legal ignorance of the typical petitioner, it surely would have used different words. And, as the majority describes, the legislative history supports the conclusion that the legislature wanted the statute of limitations escape clause to mirror the *res judicata* provision in ORS 138.510(3). 364 Or at ___.

Having reviewed that history, I have no difficulty in concluding that *Bartz* was correctly decided and that a ground could "reasonably have been raised" during the statute of limitations period if the petitioner was aware of all necessary facts, but unaware of a point of law relevant to his claim.[4] The legislature adopted the escape clause with full knowledge that it was a *res judicata* provision that had previously been interpreted not to excuse legal ignorance. That rule resolves this case against petitioner.

As the majority recognizes, allowing the escape clause to be invoked based on a claim of legal ignorance "would allow the exception to swallow the rule," 364 Or at ___. Yet the majority nevertheless holds that the escape clause "requires assessing both whether the petitioner reasonably could have accessed the ground for relief and whether a reasonable person in the petitioner's situation would have thought to investigate the existence of that ground for relief." 364 Or at ___.

That approach was raised and rejected in *Bartz*, where the petitioner argued that,

> "If an innocent criminal defendant takes his case to trial and is convicted, he knows something went wrong. He will be prompted to dig for the reasons of what went wrong and

[4] I would leave for another day the question of how the escape clause would apply in an extraordinary circumstance where the petitioner was denied access to the laws, or where the state's actions were responsible for petitioner's ignorance. No such circumstances are alleged here.

> how he can undo that wrong *immediately* following the conviction. A person, like the petitioner, who is convicted based upon a plea of guilty pursuant to plea negotiations upon the advice of trial counsel, would not similarly know something went wrong."

Petition for Review at 6-7, *Bartz*, 314 Or 353 (emphasis in original). This court clearly understood what it wrote in *Bartz* to be responsive to that argument, and it is not hard to see why. Because the grounds of relief were available to Bartz, they could reasonably have been raised during the statute of limitations period, even if he was not particularly motivated to overturn his conviction until later. The majority agrees that *Bartz* reached the correct result even under its new formulation of the test:

> "For the petitioner in *Bartz*, the conviction itself put him on notice of the need to investigate the existence of a ground for relief. He was, of course, aware of that conviction at the time it occurred. It was, therefore, incumbent on the petitioner to look for legal challenges to his conviction."

364 Or at ___. The majority also suggests that other, similarly "unexceptional" facts should be treated the same way. 364 Or at ___.

The majority thus faces the difficult task of distinguishing *Bartz* from this case. *Bartz*, like this case, involved as "grounds for relief," a claim of ineffective assistance of counsel.[5] That claim has two prongs. A petitioner "must show that counsel's representation 'fell below an objective standard of reasonableness' and that he was prejudiced as a result." *Lee v. United States*, __ US __, __, 137 S Ct 1958, 1964, 198 L Ed 2d 476 (2017) (quoting *Strickland v. Washington*, 466 US 668, 688, 104 S Ct 205, 280 L Ed 2d 674 (1984)). In many ineffective assistance of counsel cases, particularly those involving a decision to plead guilty, the deficient performance takes the form of counsel providing a defendant with erroneous advice, or of counsel failing to provide a defendant with the advice that a reasonable attorney would have provided. In cases where the petitioner entered a

[5] Ineffective or inadequate assistance of counsel is a claim under both state and federal constitutions, and in most respects is analyzed similarly under each. Petitioner's claim, however, is made only under the United States Constitution.

plea, a category that includes both *Bartz* and this case, prejudice may be shown by demonstrating a "'reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial.'" *Lee*, __ US at __, 137 S Ct at 1965 (quoting *Hill v. Lockhart*, 474 US 52, 59, 106 S Ct 366, 88 L Ed 2d 203 (1985)).

In *Bartz*, the petitioner alleged that his lawyer had performed deficiently by failing to inform him that he had a viable defense to third-degree rape, the charge to which he ultimately entered a guilty plea. In this case, petitioner alleges that counsel performed deficiently by failing to inform him that the crime to which he entered a guilty plea might have immigration consequences. In both cases, the petitioners claimed prejudice, in that they would not have entered the plea if they had received the required advice. The claims made in each case are structurally identical. They differ only in the type of advice that the attorney failed to provide. The basis for petitioner's claim is not the immigration consequences themselves, but his lawyer's *failure to advise him* concerning immigration consequences. Equally, his challenge is, like Bartz's, to his conviction, not to the immigration consequences that it may trigger under federal law.

The majority attempts to distinguish the two situations as follows:

> "Whereas the petitioner in *Bartz* was aware of his conviction and could have either researched whether his trial counsel was ineffective, or sought help from an attorney to make that determination, petitioner in this case did not know about the immigration consequences that form the basis for his claim until he was later detained by ICE."

364 Or at ___. Yet the majority reaches different answers only by asking different questions. Was Bartz aware of his conviction? Of course, but petitioner also was aware of *his* conviction. Did petitioner know of the immigration consequences that form the basis for his claim?[6] No, but neither

[6] It would be more accurate to say that the lack of advice concerning immigration consequences forms the basis of petitioner's claim. Petitioner's actual immigration status is only somewhat related to his post-conviction claim. Petitioner

was Bartz aware of the neglected defense that formed the basis of *his* claim. The real question, to which the majority does not supply an answer, is why the two cases should be analyzed differently. The result is an unexplained holding that Bartz's awareness of his conviction made it "incumbent on [him] to look for legal challenges to his conviction," 364 Or at ___, including ineffective assistance of counsel, yet that in this case petitioner had "no reason to look for [ineffective assistance of counsel] before being detained by ICE," 364 Or at ___.

As a result, the only fact that the majority points to that distinguishes this case from *Bartz*, and from most other untimely post-conviction claims, is that petitioner's claim was based on his lawyer's failure to advise him on *immigration consequences*. The majority suggests that its holding is limited to those facts:

> "[P]etitioners who were unaware of the immigration consequences of their convictions are a narrow class of petitioners. Allowing petitioner's claim in this case to fall within the escape clause does not run the risk of having the escape clause swallow the statute of limitations."

364 Or at ___. That focus may narrow a rule that the majority recognizes would otherwise be too broad, but the majority points to nothing in the text, context, or legislative history of the escape clause that suggests an intent to treat that class of petitioners differently from all the others.

Although it is not explained that way, the majority's distinction between this case and *Bartz* may be better understood as rooted in fundamentally practical concerns. As the Supreme Court has observed,

> "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

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may be deportable for reasons besides this conviction; conversely, he may have valid defenses against removal irrespective of this conviction. Moreover, the true immigration consequences of his conviction may turn on law that trial counsel was not constitutionally required to advise him on, or on changes in the law subsequent to his conviction, among several possible scenarios. *See Esquivel-Quintana v. Sessions*, __ US __, 137 S Ct 1562, 198 L Ed 2d 22 (2017) (limiting the immigration consequences of state statutory rape offenses that do not require the victim to be under 16).

> 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 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."

Padilla, 559 US at 372-73 (emphasis in original). As *Padilla* recognized, that difference between challenges to guilty pleas and challenges to convictions after trial would likely reduce the number of challenges under its new rule. In that sense, the majority is likely correct in observing that "[petitioner] had no reason to look for [his claim] before being detained by ICE." 364 Or at ___. But that is equally true in most ineffective assistance of counsel cases involving guilty pleas. A petitioner is likely to view her plea, and the underlying plea bargain, as something other than an injury—and perhaps to see it as a boon, given the alternatives—and thus will have no reason to seek to challenge it until she discovers that the advice that informed her decision to enter the plea was incorrect or incomplete. But there is no special connection between that fact and unforeseen immigration consequences. There are many reasons why an individual might come to regret a guilty plea and seek to undo it—an unknown defense, an overlooked motion to suppress, an obscure constitutional challenge to the law—so an exception to the statute of limitations crafted to accommodate this concern would have to either be very broad or very arbitrary.[7]

Another practical dimension to this case is the ease of locating and discerning the point of law of which the petitioner was unaware. For an individual looking to challenge a criminal conviction, the elements of the crime and the available defenses are an intuitive place to begin the search—and, in *Bartz*, such an investigation would have

[7] There is also no necessary connection between the reasons that an individual might wish to overturn a conviction and the legal basis for doing so. In this case, the two are apparently aligned, but that will not be so in all cases. For example, a petitioner might wish to undo her plea principally because of the deleterious effect that her conviction has upon her employment opportunities, but raise as grounds for relief that her trial counsel was ineffective for failing to uncover exculpatory evidence.

sufficed to uncover the attorney's error. The immigration consequences of petitioner's conviction might be less intuitive or more complex. But, again, there is nothing unique about immigration consequences in this regard. Many of the other topics on which a constitutionally deficient attorney could have failed to provide advice are no less obscure to the nonlawyer than immigration consequences—merger rules, search and seizure law, hearsay exceptions—and criminal cases with some frequency turn on aspects of the law that are removed from quotidian criminal practice, such as free speech rights or property law. There is no principled or workable basis on which to distinguish advice about immigration consequences from all other types of advice—and the majority does not offer one. The majority's exception will thus prove to be very broad or very arbitrary.

Of course, the legislature is entitled to carve out exceptions to the statute of limitations that are broad, seemingly arbitrary, or both. But the legislature intended to create neither a broad exception to the statute of limitations in ORS 138.510(3) for all types of legal ignorance nor a special exception for claims with some connection to immigration consequences. The majority agrees that the former exception would be contrary to the legislature's intentions and points to nothing to suggest that the legislature intended the latter exception. The majority's rule is, in essence, a judicial creation. In articulating the common law or constitutional requirements we may have a freer hand, but since 1959 the post-conviction process has been statutorily defined, and our role is to interpret what the legislature has written. *See Dillard v. Premo*, 362 Or 41, 48-49, 403 P3d 746 (2017) (Balmer, C. J., dissenting).

Strict statutes of limitations have their advantages, but their price is that they occasionally produce harsh results and unfairness. Even a claim that, as far as I can tell at this stage, is meritorious, and would likely have succeeded had it been filed a year earlier, must be dismissed. It may be the case that the escape clause, which has not been amended since *Padilla* was decided, should be modified to be more forgiving of immigration-related claims like petitioner's. The legislature is entitled to engage in the delicate balancing of competing policy objectives as is necessary in crafting any

statute of limitations. Here, they did so, and I cannot give their words any fair reading other than that outlined above. For those reasons, I would affirm the judgment below, and therefore I respectfully dissent.

Kistler, S. J., joins in this dissent.